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S.C. SUPREME COURT

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.

APPENDIX (VOL. 1)

Kevin B. Smith
Hoffman Law Firm
7087 Rivers Ave.
N. Charleston, SC 29406
(843) 769-7077
ksmith@hoffmanlaw.net

S. Randall Hood
Jordan C. Calloway
McGowan, Hood & Felder
1539 Health Care Drive
Rock Hill, SC 29732
(803) 327-7800
rhood@mcgowanhood.com
jcalloway@mcgowanhood.com

Shawn B. Deery
McGowan, Hood & Felder
1517 Hampton Street
Columbia, SC 29201
(803) 779-0100
sdeery@mcgowanhood.com
Attorneys for Appellants

Roy G. Maybank
Amanda R. Maybank
Maybank Law Firm
531 Savannah Highway
PO Box 12579
Charleston, SC 29422
(843) 766-8101
roy@maybanklaw.com
Amanda@maybanklaw.com

Attorneys for Respondent South Carolina Department of Transportation

J. Bennett Crites, III
Shumaker, Loop & Kendrick, LLP
176 Croghan Spur Road, Suite 400
Charleston, SC 29407
(843) 996-1900
bcrites@shumaker.com

Attorney for Respondent Speedway, LLC

Bruce A. Berlinsky
Bruce A. Berlinsky, P.A.
P.O. Box 206 (29402)
One Carriage Lane, Bldg. F
Charleston, SC 29407

Attorney for Respondent Ashley Land Surveying, Inc.

R. Davis Howser
Andrew LaRoche Hethington
Howser, Newman & Besley, LLC
1508 Washington Street
PO Box 12009
Columbia, SC 29211
(803) 758-6000
rdhowser@hnblaw.com
ahethington@hnblaw.com

Attorneys for Respondent Pilot Travel Centers, LLC

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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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 & Consulting, Inc., and Munlake Contractors, Inc., Defendants,

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

Appellate Case No. 2017-001563

Appeal From Berkeley County
Roger M. Young, Sr., Circuit Court Judge
Kristi Lea Harrington, Circuit Court Judge

Opinion No. 5921
Heard May 27, 2020 – Filed July 6, 2022

AFFIRMED

S. Randall Hood and Jordan Christopher Calloway, both of McGowan Hood & Felder, LLC, of Rock Hill, Shawn Boyd Deery, of McGowan Hood & Felder, LLC, of Columbia, and Kevin B. Smith, of Hoffman Law Firm, of North Charleston; all for Appellants.

R. Davis Howser and Jeffrey Ian Silverberg, both of Howser Newman & Besley, LLC, of Columbia, for Respondent Pilot Travel Centers, LLC; Roy Pearce Maybank and Amanda R. Maybank, both of Maybank Law Firm, LLC, of Charleston, for Respondent South Carolina Department of Transportation; Jerome Bennett Crites, III and Mary Barnwell Ramsey, both of Shumaker Loop & Kendrick, LLP, of Charleston, for Respondent Speedway, LLC; and Bruce Alan Berlinsky, of Charleston, for Respondent Ashley Land Surveying, Inc.

MCDONALD, J.: Cynthia and Richard Wright appeal the circuit court's orders granting summary judgment to the South Carolina Department of Transportation (SCDOT), Pilot Travel Centers, Speedway, LLC, and Ashley Land Surveying (Ashley), arguing the circuit court erred in finding (1) the private entities did not owe a duty of care to the Wrights with respect to the design and placement of a highway median and the driveways constructed pursuant to an encroachment permit, (2) no question of fact existed as to proximate cause, and (3) the South Carolina Tort Claims Act barred their action against SCDOT. We affirm the orders of the circuit court.

Facts and Procedural History

In September 2000, SCDOT contacted Speedway regarding the acquisition of a 9,102 square foot right-of-way for a project redesigning the I-26 interchange next to Speedway's property on Highway 17-Alternative in Summerville. SCDOT acquired the right of way in November 2000. In September 2001, Pilot purchased the Speedway property, which contained an existing gas station, and redeveloped the property as a Pilot travel center. In May 2002, Pilot submitted an application for an encroachment permit to SCDOT in order to construct three access driveways for the new travel center. Ashley is an engineering firm Pilot retained to assist with obtaining the encroachment permit. At the time of SCDOT's approval of Pilot's application for the encroachment permit, no raised highway median prevented left turns into the property from the southbound lane of Highway 17A.[1]

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[1] The original Speedway gas station on the property already had three driveways. These driveways were relocated as part of the Pilot rebuild. At no time prior to the Wrights' accident was there a non-traversable median at this location on Highway 17A.

Pilot began constructing the new travel center in August 2002. During this same time period, SCDOT was working on two projects in the area: the widening of Highway 17A in front of the travel center (Widening Project) and a separate project to redesign the I-26 interchange (Interchange Project) adjacent to it. SCDOT used its own engineers to design the plans for the Widening Project but hired an outside firm to design the Interchange Project. SCDOT completed the Widening Project on June 17, 2002, and the Interchange Project in November 2003.

On October 6, 2012, the Wrights were traveling on their motorcycle on Highway 17A near the I-26 overpass when a pickup truck driven by Daniel Sena turned left across their lane of travel directly into the Wrights' path. Sena was in the median attempting to turn left into the Pilot travel center when he collided with the Wrights' motorcycle and seriously injured them. Sena fled the scene of the accident and was later taken into custody, where he tested positive for cocaine and had a .12 blood alcohol level. Sena subsequently pled guilty to two counts of felony DUI, leaving the scene of an accident with great bodily injury, and possession of cocaine.

The Wrights filed an action for negligence and loss of consortium against SCDOT, Pilot, and C & A Unlimited, Inc., in Berkeley County, and an action against Marathon Petroleum Company, Ashley, and Munlake Contractors in Dorchester County.[2] They subsequently amended the Berkeley complaint to substitute Speedway as a party for Marathon Petroleum, and the two cases were consolidated in Berkeley County. Munlake Contractors failed to appear and was held in default.

The Honorable Roger Young granted Pilot's motion for summary judgment, finding the Wrights could not establish Pilot owed them a duty of care "as a landowner abutting the portion of the highway" where the Wrights were injured. The circuit court denied the Wrights' Rule 59(e), SCRCP, motion as well. The Honorable Kristi Harrington subsequently granted summary judgment to Speedway and Ashley by Form 4 order, finding no genuine issue of material fact existed as to the issues of duty and proximate cause for the Wrights' claims against these private defendants. The circuit court further found the claims against SCDOT were barred by Section 15-78-60 of the South Carolina Code, which sets forth the Tort Claims Act's exceptions to the waiver of governmental immunity.

Standard of Review

[2] Munlake was the general contractor for the Pilot travel center.

"In reviewing a grant of summary judgment, our appellate court applies the same standard as the trial court under Rule 56(c), SCRCP." *Woodson v. DLI Properties, LLC*, 406 S.C. 517, 528, 753 S.E.2d 428, 434 (2014). "In determining whether summary judgment is proper, the court must construe all ambiguities, conclusions, and inferences arising from the evidence against the moving party." *Weston v. Kim's Dollar Store*, 399 S.C. 303, 308, 731 S.E.2d 864, 866 (2012) (quoting *Byers v. Westinghouse Elec. Corp.*, 310 S.C. 5, 7, 425 S.E.2d 23, 24 (1992)).

Law and Analysis

I. Pilot, Speedway, and Ashley

A. Duty of Care

The Wrights contend the circuit court erred in finding Pilot, Speedway, and Ashley owed them no duty of care because these entities negotiated with SCDOT for the creation of a dangerous artificial condition—a non-raised, painted flush median in place of a safer raised concrete median—during the design of the Highway 17A Widening Project.[3] The Wrights allege Pilot breached its duty of care to travelers by seeking and obtaining the alteration of SCDOT's plan for a raised median, pursuing entrance driveways too close to an adjacent intersection, and failing to address problems with the nearby highway intersection despite notice of accidents there. We agree with the circuit court that under South Carolina law, the Wrights cannot establish the private entities owed them a duty of care for conditions on Highway 17A.

> In order to prove negligence, a plaintiff must show: (1) defendant owes a duty of care to the plaintiff; (2) defendant breached the duty by a negligent act or omission; (3) defendant's breach was the actual and proximate cause of the plaintiff's injury; and (4) plaintiff suffered an injury or damages.

Doe v. Marion, 373 S.C. 390, 400, 645 S.E.2d 245, 250 (2007). "In a negligence action, '[t]he court must determine, as a matter of law, whether the law recognizes a particular duty.'" *Repko v. Cnty. of Georgetown*, 424 S.C. 494, 500, 818 S.E.2d

[3] A flush median is an area in the middle of a roadway that can easily be traversed by a vehicle.

743, 747 (2018) (alteration in original) (quoting *Steinke v. S.C. Dep't of Lab., Licensing & Regul.*, 336 S.C. 373, 387, 520 S.E.2d 142, 149 (1999)). "Absent a legally recognized duty, the defendant in a negligence action is entitled to a judgment as matter of law." *Cole v. Boy Scouts of Am.*, 397 S.C. 247, 251, 725 S.E.2d 476, 478 (2011). "Whether a duty exists is a question of law for the Court." *Skinner v. S.C. Dep't of Transp.*, 383 S.C. 520, 523, 681 S.E.2d 871, 873 (2009). "South Carolina common law only imposes a duty for highway conditions where an individual or business has undertaken an activity that creates an artificial condition on the highway which is dangerous to travelers." *Id.* at 524, 681 S.E.2d at 873. Examples of artificial conditions created by an abutting property owner might include materials spilled on a highway or smoke emissions that obstruct visibility. *See, e.g., id.* at 525, 681 S.E.2d at 874.

SCDOT engineers designed the plans for the Widening Project in 1998, and the outside design firm completed the plans for the Interchange Project in 1999. Leland Colvin is currently the SCDOT Director of Engineering, but he was previously the program manager for both the Widening Project and the Interchange Project. Colvin testified in his deposition that the outside firm's plans for the Interchange Project originally showed a raised median as a placeholder at this location on Highway 17A, but the plans SCDOT engineers designed for the Widening Project never included a raised median. When Colvin combined the two plans, he made the decision to utilize a flush median instead of a raised median in order to comply the SCDOT Highway Design Manual, which he considers the authority for highway design in South Carolina. Colvin testified he combined the plans so the Interchange Project plan would accurately reflect SCDOT's design for the Widening Project, and "the widening project always had that painted flush median."

The Wrights contend handwritten notes on an August 28, 2000 SCDOT letter to Marathon Petroleum support their claim that the circuit court erred in finding the private entities owed them no duty of care with respect to the dangerous condition, which they claim Pilot's predecessor negotiated during SCDOT's design and construction of the Highway 17A Widening Project. In this letter, SCDOT District Right of Way Manager Tommy Smoak wrote to a Marathon Petroleum representative, Robert Greiwe, referencing curb cuts and enclosing a copy of driveway drawings for the project. Handwritten notes Greiwe later made at the bottom of this letter state, "Per Phone Verification w/ T. Smoak (negotiated median removal & drive cuts)" and "Approved to have painted median only from far western curb cut to stop bar (stop light). In other words, the unmountable median has been eliminated from the plan." For the reasons discussed below, we agree

with the circuit court that despite these notations on the letter, the evidence in the record establishes the decision to implement a flush median as opposed to a raised median remained an SCDOT engineering decision, not the responsibility of the private entities.

Colvin testified that any statement that Pilot or Speedway "negotiated" the raised median out of the plans was inaccurate because the removal of a placeholder median (from the Interchange Plan, not the Widening Plan) was not due to any negotiation with or action by a private entity. He confirmed the plans for the Widening Project never contemplated a raised, non-traversable median. Colvin made the decision to use a flush median in his capacity as program manager, and from his perspective, "it was purely an engineering decision based on the Highway Design Manual, based on the difference of the two projects, the purpose and need." *See* S.C. Code Ann. § 15-78-60 (15) (2005) (recognizing SCDOT's initial discretion regarding the placement of highway median barriers). The Wrights have theorized that Pilot or Speedway may have negotiated with SCDOT for the non-raised flush median as part of SCDOT's right-of-way acquisition process. But evidence produced in discovery regarding SCDOT's purchase of the right-of-way for over two times the property's appraised value belies this theory, and the record contains no evidence of any "quid pro quo." Colvin did not recall ever speaking with any representative of the private parties regarding the decision to use a flush median, and he testified there simply was no such negotiation.

In addition to Colvin's testimony that it was SCDOT's decision to use a painted flush median in the Widening Project to address the needs of the combined plan, our supreme court's decision in *Skinner* further supports the circuit court's granting of summary judgment to the private entities. 383 S.C. at 525, 681 S.E.2d at 874. The Skinners were injured in an accident when their car was struck head on by a vehicle that veered onto the shoulder of the road near a stable driveway, overcorrected, and crossed over the centerline of the roadway. *Id.* at 522, 681 S.E.2d at 872. The Skinners sued the owners of the driveway and stable; however, the circuit court granted summary judgment, finding the property owners owed the Skinners no duty of care. *Id.* at 522, 681 S.E.2d at 872–73. On appeal, the Skinners argued traffic from horse trailers approaching the driveway caused ruts in the highway's shoulder, creating a dangerous condition of which the property owners had a duty to warn travelers along the highway. *Id.* at 523, 681 S.E.2d at 873. Our supreme court disagreed, finding the owners of property abutting a highway, who neither possess nor control the highway, owe no duty of care to travelers on the highway. *Id.* at 524, 681 S.E.2d at 874. The court recognized the ruts along the shoulder were "the natural consequences of highway use," and thus,

not artificial conditions giving rise to liability. *Id.* The court rejected the Skinners' argument that the owners of the driveway owed a duty of care to travelers due to their creation of the highway defect (in that the use of their driveway led to the ruts on the road shoulder). *Id.* at 525, 681 S.E.2d at 874. In finding the Skinners' reliance on SCDOT's ARMS[4] manual misplaced, the court held the SCDOT regulations were "inapplicable to respondents [the property owners] and are not a source of any duty. Moreover, they specifically impose the responsibility for maintaining rights-of-way, such as highway shoulders, on the Department." *Id.*[5]

For these reasons, the circuit court properly found the Wrights failed to establish any private entity owed them a duty of care because neither Pilot nor Speedway possessed or controlled the highway; possession and control of highways lies with SCDOT. *See id.* at 524–25, 681 S.E.2d at 874 ("We agree with the trial court that a contractor performing highway alterations owes a duty to travelers, but we find no analogous duty on the part of an owner of property abutting a highway who neither possesses nor controls the highway."). There is no evidence here that Pilot, Speedway, or Ashley created an artificial condition on Highway 17A. *See id.* at 523, 681 S.E.2d at 873 ("South Carolina common law only imposes a duty for highway conditions where an individual or business has undertaken an activity that creates an artificial condition on the highway which is dangerous to travelers.").

Even if SCDOT's installation of a flush median in lieu of a raised median could be construed as an artificial condition in the light most favorable to the Wrights, by statute SCDOT is exclusively responsible for highway design. *See* S.C. Code Ann. § 57-3-110 (2018) ("The Department of Transportation shall have the following duties and powers: (1) lay out, build, and maintain public highways and bridges, including the exclusive authority to establish design criteria, construction specifications, and standards required to construct and maintain highways and bridges; . . . (3) cause the state highways to be marked with appropriate directions

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[4] SCDOT's Access and Roadside Management Standards (ARMS) manual provides guidelines to companies, developers, and private individuals seeking access to the state highway system. The South Carolina Highway Design Manual is a separate manual; both manuals provide mandatory rules, along with guidelines, as well as a process for seeking exceptions to these rules and guidelines.

[5] SCDOT's 30(b)(6) designee acknowledged in his deposition that SCDOT possesses and controls Highway 17A and is responsible for maintaining highways in a safe condition.

for travel and regulate the travel and traffic along such highways, subject to the laws of the State. . . ."); S.C. Code Ann. § 57-1-30 (2018) (stating SCDOT "shall have as its functions and purposes the systematic planning, construction, maintenance, and operation of the state highway system and the development of a statewide intermodal and freight system that is consistent with the needs and desires of the public"); S.C. Code Ann. § 15-78-60 (15) (2005) (recognizing SCDOT's initial discretion regarding the placement of highway median barriers).

As with the median selection, SCDOT was responsible for granting the encroachment permit and approving the design and placement of Pilot's driveways accessing Highway 17A. To the extent the Wrights argue Pilot or Ashley created a dangerous condition in failing to request the encroachment permit and construct the driveways in a manner that would prevent access by travelers making left turns into the travel center from the opposite side of Highway 17A, we agree with the circuit court that this argument must fail. Without more, the existence of permitted access driveways for ingress and egress to a business does not impose a duty upon a private property owner with respect to accidents that occur on the public highway.[6]

Colvin's deposition testimony supports this finding as well. He explained that when SCDOT reviews encroachment permit applications, safety and the operation and functionality of the state highway system are the two primary concerns SCDOT considers in evaluating requests for access. Safety considerations differ for interstate systems with no such access points, for urban arteries, minor arteries, and neighborhood streets. Colvin elaborated, "[n]o roadway is treated the same with regards to the reasonable expectation of those drivers."

With respect to the Wrights' claim that the private entities failed to take remedial action to keep this area of Highway 17A in a safe condition or to warn travelers of the alleged dangerous condition, we have been unable to locate any South Carolina authority establishing a private property or business owner owes such a duty to warn or make safe a public highway. Like the circuit court, we find the Pennsylvania case of *Allen v. Mellinger*, 625 A.2d 1326 (Pa. Commw. Ct. 1993),

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[6] We find the Wrights' reliance upon the Georgia case of *Keith v. Beard*, 219 Ga. App. 190, 464 S.E.2d 633 (1995), is misplaced because the question in that case involved the property owner's violation of a commercial driveway permit requirement and an accident occurring when a motorist exited an *unpermitted* driveway.

helpful to our analysis. There, the plaintiff attempted to make a left turn into the parking lot of a meat market when she collided with a truck travelling in the opposite direction. *Id.* at 1327. The crest of a hill limited visibility for both drivers, and motorists in the area often exceeded the fifty-mile per hour speed limit. *Id*. Allen and her passenger sustained serious injuries; she sued the owners of the market, "alleging that they had breached a duty of care by failing to warn her of a dangerous condition." *Id*.

Relying upon the Restatement (Second) of Torts, § 349, the trial court granted the business owners' motion for summary judgment. *Id.* at 1328.[7] The Pennsylvania Commonwealth Court affirmed, noting state highways are the property of the Commonwealth, which "has the exclusive duty for the maintenance and repair of state highways." *Id*. Thus, any duty to maintain the highway or warn of a dangerous condition fell to the Commonwealth and not the abutting landowners. *Id.* The court also rejected Allen's argument that the business owners' "failure to erect signs, paint lines, or place curbing or barricades in the store parking lot, indicating where it was safe to turn, created a dangerous condition which led to her accident." *Id*. at 1329 n. 6.

Similarly, the private entities here owed no duty to warn or take other remedial action to address the safety of Highway 17A. As noted above, SCDOT is statutorily responsible for design, maintenance, and repair of the state highway system and for placement of appropriate signage. *See* § 57-3-110 ("The Department of Transportation shall have the following duties and powers: (1) lay out, build, and maintain public highways and bridges, including the exclusive authority to establish design criteria, construction specifications, and standards

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[7] The Restatement (Second) of Torts, § 349, provides:

> A possessor of land over which there is a public highway or private right of way is not subject to liability for physical harm caused to travelers upon the highway or persons lawfully using the way by his failure to exercise reasonable care
> (a) to maintain the highway or way in safe condition for their use, or
> (b) to warn them of dangerous conditions in the way which, although not created by him, are known to him and which they neither know nor are likely to discover.

required to construct and maintain highways and bridges; . . . (3) cause the state highways to be marked with appropriate directions for travel and regulate the travel and traffic along such highways, subject to the laws of the State; . . .").

Accordingly, we find the circuit court properly declined to impose a duty of care upon a private "owner of property abutting a highway who neither possesses nor controls the highway." *See Skinner*, 383 S.C. at 524–25, 681 S.E.2d at 874; *see also Cole*, 397 S.C. at 251, 725 S.E.2d at 478 ("Absent a legally recognized duty, the defendant in a negligence action is entitled to a judgment as matter of law."). Thus, we affirm the orders granting summary judgment to the private entities.[8]

II. SCDOT

As to SCDOT, the Wrights assert the circuit court erred in finding the Tort Claims Act barred recovery because SCDOT had constructive notice that the flush median allowing left turns into the Pilot travel center posed a risk of harm to motorists. The Wrights further argue that because SCDOT approved Pilot's encroachment permit in violation of its own policies and procedures, SCDOT is not entitled to discretionary or design immunity. Finally, the Wrights contend SCDOT was grossly negligent in failing to investigate and improve the intersection given the high rate of accidents in this area. We find the circuit court properly granted SCDOT summary judgment pursuant to the Tort Claims Act.

"The Tort Claims Act waives immunity for torts committed by the State, its political subdivisions, and governmental employees acting within the scope of their official duties." *Pike v. S.C. Dep't of Transp.*, 343 S.C. 224, 230, 540 S.E.2d 87, 90 (2000). The General Assembly has recognized it is "the public policy of the State of South Carolina that the State, and its political subdivisions, are only liable for torts within the limitations of this chapter and in accordance with the principles established herein." S.C. Code Ann. § 15-78-20(a) (2005). "The provisions of this chapter establishing limitations on and exemptions to the liability of the State, its political subdivisions, and employees, while acting within the scope of official duty, must be liberally construed in favor of limiting the liability of the State."

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[8] Because the disposition of the duty issue is dispositive, we decline to address the Wrights' proximate cause argument. *See Futch v. McAllister Towing of Georgetown, Inc.*, 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (explaining an appellate court need not address remaining issues when disposition of prior issue is dispositive).

S.C. Code Ann. § 15-78-20(f) (2005). The Tort Claims Act subsection most applicable to the Wrights' claims regarding the choice of a flush median for the Highway 17A Widening Project states, in pertinent part:

> The governmental entity is not liable for a loss resulting from:
>
> (15) absence, condition, or malfunction of any sign, signal, warning device, illumination device, guardrail, or median barrier unless the absence, condition, or malfunction is not corrected by the governmental entity responsible for its maintenance within a reasonable time after actual or constructive notice. Nothing in this item gives rise to liability arising from a failure of any governmental entity to initially place any of the above signs, signals, warning devices, guardrails, or median barriers when the failure is the result of a discretionary act of the governmental entity. The signs, signals, warning devices, guardrails, or median barriers referred to in this item are those used in connection with hazards normally connected with the use of public ways and do not apply to the duty to warn of special conditions such as excavations, dredging, or public way construction. Governmental entities are not liable for the design of highways and other public ways . . . .

S.C. Code Ann. § 15-78-60(15) (2005).

The Wrights presented SCDOT's 2008 ARMS manual as an exhibit at Colvin's deposition in seeking to establish SCDOT erred in designing and implementing a two-way left turn lane instead of a raised, non-traversable median. The Wrights' counsel asked:

> Q: Is it true that nontraversable medians have the effect of a 35 percent reduction in traffic collisions?
>
> A: Yes. I mean, Page on—on—Table 1.1, a continuous two-way left turn lane, TWLTL is our engineering term, has 35 percent reduction in total crashes, as a well as a

nontraversable median. Both showed 35 percent reduction in total crashes.

Q: All right. So nontraversable medians, those would have the effect of a 35 percent reduction in traffic collisions?

A: Correct.

Q: Okay. And so the absence of a nontraversable would increase traffic collisions by 35 percent?

A: That is not what this table states. This table—this table states that continuous two-way left turn lane, which is what we have—

Q: Okay.

A: —has—the effects on that has a 35 percent reduction in total crashes, 30 percent decrease in delay, and a 30 percent increase in capacity. The same increases and decreases as a nontraversable median as noted in this table.

Following this discussion, the Wrights questioned Colvin about statistics for accidents involving left-turn collisions and the various options SCDOT might consider in restricting left turn access from a highway into driveways and businesses. These options could include medians, guardrails, signs, and road spikes. In concluding this line of questioning, the Wrights asked:

Q: Okay. And there was nothing that prohibited [SCDOT] from incorporating their raised median plans from the interchange improvement project. Nothing prohibited the DOT from going with the raised median plan, did it?

A: It would have been outside of the Highway Design Manual guidelines regarding this section of roadway and where it stood—excuse me.

> Q: Um-hum.
>
> A: —and how this urban section of roadway with a design speed less than 45 miles an hour, it would have been in conflict with our Highway Design Manual.

Based on the evidence in the record, we agree with the circuit court that SCDOT is entitled to design immunity under the Tort Claims Act with respect to its decision to keep a two-way left turn lane at this location on Highway 17A when completing the Widening Project.

"[A]lthough SCDOT has design immunity, such immunity does not extend to maintenance issues after the DOT has notice of a hazardous condition." *Giannini v. S.C. Dep't of Transp.*, 378 S.C. 573, 580, 664 S.E.2d 450, 454 (2008). However, no evidence in this case suggests SCDOT had constructive notice of a hazardous condition at the intersection *prior to* the Wrights' accident.[9] Tragically, SCDOT became aware of the high rate of collisions along this busy stretch of Highway 17A after the Wrights' 2012 accident. SCDOT annually collects collision data through its access to the South Carolina Public Safety database—which shows the GPS location of traffic accidents—and SCDOT conducts annual safety analyses at those intersections with the highest accident rates as reported by SCDOT's traffic safety office. Colvin emphasized that collision rate triggers SCDOT's investigation into a location—not merely the number of accidents. Determining the collision rate in an area is a function of the total number of accidents and the respective annual traffic volume for the location.

In 2013, SCDOT conducted an accident analysis for the area of Highway 17A where the Pilot travel center is located because this was an intersection with one of the highest accident rates that particular year. There is no evidence in the record to suggest SCDOT knew or should have known of a high collision rate or otherwise potentially hazardous condition at the intersection prior to 2013.[10] Thus, the Wrights are unable to prevail on their theory that SCDOT was negligent in failing to investigate and correct conditions at the intersection prior to their accident.

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[9] At oral argument, the Wrights agreed constructive, not actual, notice is the theory upon which they base their claims.

[10] SCDOT took corrective action on Highway 17A following its 2013 accident analysis in the area.

In *Giannini*, two plaintiffs were injured and one died after being struck by a hydroplaning Ford Expedition traveling north crossed a median into the southbound lanes of I-77. 378 S.C. at 578, 664 S.E.2d at 452. The plaintiffs alleged median barriers could have prevented the accident and SCDOT negligently failed to install the barriers in the area of the interstate where the accident occurred. *Id*. SCDOT claimed immunity under the Tort Claims Act and moved for a directed verdict, which the circuit court denied. *Id.* at 578, 664 S.E.2d at 452–53. Following a verdict for the plaintiffs, post-trial motions, and SCDOT's appeal, the supreme court found SCDOT had notice of the existing hazard on I-77 because there had been several crossover accidents within two miles of the *Giannini* accident, two people had died, and local media covered these accidents. *Id.* Thus, the circuit court properly denied SCDOT's directed verdict and JNOV motions on the issue of whether SCDOT breached a duty to the plaintiffs by failing to install median barriers on that stretch of I-77 after it received notice of crossover accidents in the area. *Id.* at 581, 664 S.E.2d at 454.

Prior to *Giannini*, the supreme court addressed section 15-78-60(15) in *Wooten ex rel. Wooten v. South Carolina Department of Transportation*, 333 S.C. 464, 468, 511 S.E.2d 355, 357 (1999). There, a twelve-year-old girl was injured when she was struck by a vehicle while crossing an intersection. *Id.* at 466, 511 S.E.2d at 356. The girl and her mother filed an action alleging SCDOT was negligent in failing to set traffic lights with sufficient time for a pedestrian to cross the intersection, failing to provide walk signals, and failing to warn pedestrians the intersection was hazardous. *Id.* at 466–67, 511 S.E.2d at 356–57. On appeal, this court held SCDOT was no longer immune from liability once it had notice that an intersection was hazardous. *Id.* The supreme court affirmed as modified, adopting the circuit court's reasoning that the immunity provision addressing signs and signals applied to the case, as opposed to the broader design immunity provision. *Id.* Thus, while the design immunity language of exception (15) was inapplicable in *Wooten*, the traffic signal portion of the exception providing discretionary immunity controlled.

The Tort Claims Acts further declares governmental entities are not liable for "the exercise of discretion or judgment by the governmental entity or employee or the performance or failure to perform any act or service which is in the discretion or judgment of the governmental entity or employee." S.C. Code Ann. § 15-78-60(5) (2005). "To establish discretionary immunity, the governmental entity must prove that the governmental employees, faced with alternatives, actually weighed competing considerations and made a conscious choice." *Pike*, 343 S.C. at 230, 540 S.E.2d at 90. "The governmental entity must show that in weighing the

competing considerations and alternatives, it utilized accepted professional standards appropriate to resolve the issue before them." *Id.* (quoting *Foster v. S.C. Dep't of Highways & Pub. Transp.*, 306 S.C. 519, 525, 413 S.E.2d 31, 35 (1992)).

Evidence in the record establishes SCDOT employees "weighed competing considerations and made a conscious choice" in granting the encroachment permit for the Pilot travel center. Colvin explained the ARMS manual provides a set of guidelines to be followed but also allows for exceptions to these guidelines. While he acknowledged one of Pilot's driveways was within the functional area of the intersection, which is generally "frowned upon" by the guidelines of the ARMS manual, he explained that in determining driveway locations, SCDOT considers a variety of factors.[11]

Robert Clark, District 6 Engineering Administrator for SCDOT, testified the ARMS manual is one of several resources SCDOT engineers use in considering an encroachment permit for highway access. SCDOT reviews traffic load at the particular location, including the location of any traffic backups, the lanes needed, and the turning maneuvers available at the intersection. Other factors reviewed include the environment of the intersection−such as speed, traffic signal control, and sight distance—considered in conjunction with the encroachment permit application. SCDOT then uses "engineering judgment to say, okay, this looks like this is in substantial conformity with—with what our rules are."

Clark further noted the distances in the ARMS manual are suggested guidelines because "you have to look at the site that you've got and what the—what the traffic is doing at the site, how it's circulating on the site, and bring all those factors together to make that determination." He admitted that allowing Pilot to have three driveways for its degree of frontage did not fall within the general guidelines of the ARMS manual but explained that for a particular business:

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[11] Colvin defined the functional area of an intersection as "basically the turn lanes coming in and out of that intersection and the−the perception of that driver to be able to make those allowable turning movements in and out of that, in and out of that intersection." He testified that limiting or eliminating driveways within the functional area of an intersection is decided on a case-by-case basis. Moreover, certain exceptions to the ARMS manual applied to this location due to the driveways already in place prior to the Widening Project and the replacement of such access points.

> Again, it depends on internal circulation as to what you want to do. You may have a one-way pair. Or, if you've got trucks, you don't want trucks and automobiles to mix. So you take that and then you look at site plan and look at what's being used on the site to make an engineering judgment as to what is appropriate.

Based on the foregoing, we find the evidence establishes SCDOT weighed the competing considerations applicable to both the use of the travel center site and this area of Highway 17A when granting the encroachment permit for the requested driveways. These considerations included the pertinent provisions of and exceptions to the guidelines set forth in the ARMS manual, as well as other engineering standards, traffic loads, and access needs of the site.[12] Therefore, the circuit court properly found the Wrights' claims against SCDOT regarding the encroachment permit were barred by the applicable provisions of the South Carolina Tort Claims Act.

Conclusion

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[12] The affidavits of the Wrights' expert engineering witnesses do not raise the inferences necessary to achieve a different result. Both affidavits address industry standards *Pilot* allegedly ignored; they do not address the obligations and competing considerations SCDOT must address when providing private property owners access to a public roadway. For example, the affidavit of municipal and highway associate engineer Richard M. Balgowan speaks to what a "reasonably prudent company should do" and is at times inconsistent with our supreme court's holding in *Skinner*, *supra*, in stating "Pilot could have contacted SCDOT to implement a means to curtail the artificial condition and construct a safer form of ingress and egress to the facility" which disallowed left-hand turns. In referencing the encroachment permit request and categorizing the location of the driveways as an "artificial condition," Balgowan states in his opinion, "Pilot ignored industry standards and prioritized its own revenue over the safety of its customers and the general public." We find these statements regarding Pilot's actions and what it knew, should have known, or should have reported to SCDOT insufficient to overcome the Legislature's grant of immunity in the exceptions to governmental liability set forth in the plain language of the Tort Claims Act. *See e.g.*, S.C. Code Ann. § 15-78-60 (5), (15).

The circuit court's orders granting summary judgment are

AFFIRMED.

THOMAS, J., and HUFF, A.J., concur.

The South Carolina Court of Appeals

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 & Consulting, Inc., and Munlake Contractors, Inc., Defendants,

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

Appellate Case No. 2017-001563

ORDER

After careful consideration of the petition for rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing. Accordingly, the petition for rehearing is denied.

_____ J.

_____ J.

_____ A.J.

Columbia, South Carolina

FILED
Sep 23 2022

cc:
Kevin B. Smith, Esquire
S. Randall Hood, Esquire
Jordan Christopher Calloway, Esquire
Shawn Boyd Deery, Esquire
Jerome Bennett Crites, III, Esquire
Bruce Alan Berlinsky, Esquire
Mary Barnwell Ramsay, Esquire
Amanda R. Maybank, Esquire
R. Davis Howser, Esquire
Roy Pearce Maybank, Esquire
Andrew LaRoche Hethington, Esquire
The Honorable Roger M. Young, Sr.
The Honorable Kristi Lea Harrington

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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

Kevin B. Smith
Hoffman Law Firm
7087 Rivers Ave.
N. Charleston, SC 29406
(843) 769-7077
ksmith@hoffmanlaw.net

S. Randall Hood
Jordan C. Calloway
McGowan, Hood & Felder
1539 Health Care Drive
Rock Hill, SC 29732
(803) 327-7800
rhood@mcgowanhood.com
jcalloway@mcgowanhood.com

Shawn B. Deery
McGowan, Hood & Felder
1517 Hampton Street
Columbia, SC 29201
(803) 779-0100
sdeery@mcgowanhood.com

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]

[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,

/s/ Jordan C. Calloway
S. Randall Hood
Jordan C. Calloway
MCGOWAN, HOOD & FELDER, LLC
1539 Health Care Drive
Rock Hill, South Carolina 29732
803-327-7800 (phone)
rhood@mcgowanhood.com
jcalloway@mcgowanhood.com

Shawn B. Deery
MCGOWAN, HOOD & FELDER, LLC
1517 Hampton Street
Columbia, South Carolina 29201
(803) 779-0100
sdeery@mcgowanhood.com

Kevin B. Smith
HOFFMAN LAW FIRM
7087 Rivers Ave.
N. Charleston, SC 29406
(843) 769-7077
ksmith@hoffmanlaw.net

Attorneys for Appellants

Rock Hill, South Carolina
July 21, 2022

RECEIVED
Jul 21 2022
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.

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):

jsilverberg@sccourts.org
rdhowser@hnblaw.com
bruce@berlinskylawfirm.com
amanda@maybanklaw.com
roy@maybanklaw.com
bcrites@shumaker.com
mramsay@shumaker.com

/s/ Jordan C. Calloway
Attorney for Appellants

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

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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.

RECORD ON APPEAL (VOLUME 1)

Kevin B. Smith
Hoffman Law Firm
7087 Rivers Ave.
N. Charleston, SC 29406
(843) 769-7077
ksmith@hoffmanlaw.net

S. Randall Hood
Jordan C. Calloway
McGowan, Hood & Felder
1539 Health Care Drive
Rock Hill, SC 29732
(803) 327-7800
rhood@mcgowanhood.com
jcalloway@mcgowanhood.com

Shawn B. Deery
McGowan, Hood & Felder
1517 Hampton Street
Columbia, SC 29201
(803) 779-0100
sdeery@mcgowanhood.com
Attorneys for Appellants

Roy G. Maybank
Maybank Law Firm
531 Savannah Highway
PO Box 12579
Charleston, SC 29422
(843) 766-8101
roy@maybanklaw.com

Attorney for Respondent South Carolina Department of Transportation

J. Bennett Crites, III
Kathleen Fowler Monoc
Smith Moore Leatherwood LLP
25 Calhoun Street, Suite 250
Charleston, SC 29401
(843) 300-6600
bennett.crites@smithmoorelaw.com
katie.monoc@smithmoorelaw.com

Attorneys for Respondent Speedway, LLC

Bruce A. Berlinsky
Bruce A. Berlinsky, P.A.
P.O. Box 206 (29402)
One Carriage Lane, Bldg. F
Charleston, SC 29407

Attorney for Respondent Ashley Land Surveying, Inc.

William G. Besley
Jeffrey I. Silverberg
Howser, Newman & Besley, LLC
1508 Washington Street
PO Box 12009
Columbia, SC 29211
(803) 758-6000

Attorneys for Respondent Pilot Travel Centers, LLC

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STATE OF SOUTH CAROLINA

COUNTY OF BERKELEY

CYNTHIA WRIGHT and RICHARD WRIGHT,

Plaintiffs,

vs.

SOUTH CAROLINA DEPARTMENT OF TRANSPORTATION, PILOT TRAVEL CENTERS, LLC, SPEEDWAY, LLC, ASHLEY LAND SURVEYING, INC. F/K/A ASHLEY ENGINEERING & SURVEYING, INC. AND ASHLEY ENGINEERING & CONSULTING, INC., AND MUNLAKE CONTRACTORS, INC.

Defendants.

IN THE COURT OF COMMON PLEAS FOR THE NINTH JUDICIAL CIRCUIT

CASE NO: 2016-CP-08-334

ORDER OF DEFAULT

FILED
16 JUL -6 PM 2:08
CLERK OF COURT
BERKELEY COUNTY, S.C.

UPON reading the Summons and Complaint, and it appearing that the pleadings have been properly filed with the Clerk of this Honorable Court, and it further appearing by Affidavit of Plaintiff's attorney that the Defendant, Munlake Contractors, Inc., is in default for failure to answer, demurrer, or otherwise plead or appear to the Summons and Complaint; it is

ORDERED, that the Defendant, Munlake Contractors, Inc., be and are hereby declared to be in default.

AND IT SO ORDERED!!

Mary P. Brown | DW
~~PRESIDING JUDGE~~ Clerk of Court

Moncks Corner, South Carolina

Date 7/6/16

STATE OF SOUTH CAROLINA

COUNTY OF BERKELEY

Cynthia Wright and Richard Wright,

Plaintiffs,

vs.

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

Defendants.

IN THE COURT OF COMMON PLEAS
NINTH JUDICIAL CIRCUIT
2016-CP-08-00334

ORDER

FILED
17 MAY -4 PM 2:26
MARY P. BROWN
CLERK OF COURT
BERKELEY COUNTY, S.C.

Before this Court came Defendant Pilot Travel Centers, LLC's (Pilot) Motion for Summary Judgment. A hearing was held at the Berkeley County Courthouse on April 10, 2017. For the reasons provided below, Pilot's Motion for Summary Judgment is GRANTED.

Factual Background

Defendant Pilot owns a Pilot Travel Center gas station and convenient store ("Pilot Travel Center") that abuts Highway U.S. 17A in Summerville, South Carolina. On October 6, 2012, Plaintiffs were injured in a motor vehicle accident while traveling on their motorcycle in the left lane of U.S. 17A in front of the Pilot Travel Center. The accident occurred when a pick-up truck traveling in the opposite direction pulled into the median and attempted to make a legal left turn into one of the driveways of the Pilot Travel Center. The pick-up truck struck the Plaintiffs' motorcycle in the left lane of the highway. At the time of the accident, the driver of the pick-up truck had a blood alcohol level above the legal limit and was under the influence of cocaine. Plaintiffs contend that the accident would not have occurred had there been a solid raised median

in the highway preventing motorists from making a left-hand turn onto Pilot's premises, and that the absence of such a median created a dangerous condition on the highway. Plaintiffs also contend that the location and design of Pilot's driveways created a dangerous condition on the highway.

Pilot constructed the subject Pilot Travel Center in or around August 2002 after acquiring the real property and existing gas station on or about September 1, 2001. The existing gas station, which was owned by Speedway SuperAmerica, LLC, already had three driveways with access to U.S. 17A. There was no solid raised median in the highway preventing left turns into the existing gas station. Moreover, there has never been a solid raised median in this section of the highway.

Around the time the Pilot Travel Center was being built, the South Carolina Department of Transportation (SCDOT) was in the process of widening the section of U.S. 17A in front of the Pilot Travel Center (the "Widening Project"). SCDOT was also reconstructing the intersection adjacent to the existing gas station (the "Interchange Project"). The Widening Project and Interchange Project were completed on June 17, 2002 and November 1, 2003, respectively. SCDOT designed the plans for the Widening Project, but used an outside firm to design the plans for the Interchange Project. According to SCDOT, the design plans for the Widening Project never included a raised median.[1] The decision to not install a raised median in front of the Pilot Travel Center was made by Leland Colvin, Jr., who was the Program Manager for the Widening Project. This decision was made when the Widening Project design plans were prepared in 1998. SCDOT testified that Mr. Colvin's decision to use a painted flush median, rather than a raised median, was

[1] SCDOT testified that the initial design plans for the Interchange Project, which were prepared by an outside engineering firm, depicted a raised median in front of the Pilot Travel Center. However, the Interchange Project did not concern work performed to this section of U.S. 17A. SCDOT performed work to this section of U.S. 17A as part of the Widening Project. According to SCDOT, the presence of the raised median in the first iteration of the Interchange Project's design plans was simply a placeholder, representing the location of the highway in which the design plans for both projects would eventually be merged.

made in conformance with SCDOT's Highway Design Manual.[2] According to SCDOT, installing a raised median as part of the Widening Project would have been in contravention to the standards set forth in the SCDOT's Highway Design Manual.

In order to construct the driveways into the Pilot Travel Center, Pilot submitted an application for an encroachment permit to SCDOT on or about May 13. 2002.[3] SCDOT had to approve the design and location of the driveways to Pilot's property before issuing Pilot the encroachment permit. According to SCDOT, it conducts an independent analysis when evaluating whether to approve an encroachment permit to ensure that the proposed driveways conform to SCDOT's regulations and standards. SCDOT also considers highway safety and how the access to private property affects traffic and the general operation of the highway system. SCDOT testified that it has the ultimate authority to approve encroachment permits and never compromises the public's safety to accommodate a property owner's interests when evaluating such permits. SCDOT ultimately approved Pilot's encroachment permit application and issued Pilot a permit to construct the driveways to the Pilot Travel Center.

Plaintiffs filed a Complaint against Pilot and the South Carolina Department of Transportation on March 31, 2014.[4] Plaintiffs allege that Pilot owed the driving public a duty to construct its driveways in such a way as to prevent the existence of hazardous road conditions on the highway. Specifically, Plaintiffs allege Pilot was negligent for failing to construct its driveways

[2] Mr. Colvin served as one of SCDOT's Rule 30(b)(6) designees. Mr. Colvin metaphorically referred to SCDOT's Highway Design Manual as "the Bible" when it comes to designing highways in South Carolina.

[3] Although the existing gas station on the property had driveways allowing for ingress and egress directly from the highway, the driveways to the Pilot Travel Center were relocated as part of Pilot's rebuild.

[4] On February 9, 2016, Plaintiffs filed a separate action arising from the accident against Speedway LLC (successor in interest to Speedway SuperAmerica, LLC), Ashley Land Surveying, Inc. (engineering firm who performed work for Pilot in connection with the construction of the Pilot Travel Center), and Munlake Contractors, Inc. (general contractor of the Pilot Travel Center). The two actions have since been consolidated.

to prevent Plaintiffs from being stricken by other motorists attempting to turn left across traffic onto its premises. Plaintiffs further claim that Pilot is responsible for the absence of a solid raised median in the portion of the highway where Plaintiffs' accident occurred. Plaintiffs allege Pilot negotiated with SCDOT regarding the type of median to install on the highway.

Pilot moved for Summary Judgment on the grounds that Plaintiffs have failed to present evidence sufficient to raise a genuine issue of material fact that Pilot owed them any duty or breached any duty owed; or, that any alleged negligent act or omission on the part of Pilot proximately caused Plaintiffs' injuries.

Standard of Law

Summary judgment is appropriate when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Rule 56(c), SCRCP. When a party makes a motion for summary judgment that is supported by evidence, the adverse party may not rest on the allegations of the Complaint to overcome the motion but must demonstrate, by affidavit or other evidence, that a genuine issue of fact exists. Klippel v. Mid-Carolina Oil, Inc., 303 S.C. 127, 399 S.E.2d 163 (Ct. App. 1990); Dyer v. Moss, 284 S.C. 208, 325 S.E.2d 69 (Ct. App. 1985). The nonmoving party must make an affirmative effort to set forth specific facts showing that there is a genuine issue for trial in order to overcome a summary judgment motion. Baughman v. American Tel. & Tel. Co., 306 S.C. 101, 410 S.E.2d 537 (1991). "To survive summary judgment, the evidence presented must amount to more than mere speculation and conjecture." Harris Teeter, Inc. v. Moore & Van Allen, PLLC, 390 S.C. 275, 299, 701 S.E.2d 742, 754 (2010).

Analysis

Pilot maintains that it did not owe the Plaintiffs any duty to prevent them from getting in a motor vehicle accident on the highway in front of its property, and that therefore, it is entitled to judgment as a matter of law. This Court agrees.

In order for the Plaintiffs to recover on their negligence claim, they must first establish that Pilot owed them a duty of care.[5] Absent such a duty, Pilot is entitled to judgment as a matter of law. See Hurst v. E. Coast Hockey League, Inc., 371 S.C. 33, 37, 637 S.E.2d 560, 562 (2006) ("The court must determine, as a matter of law, whether the law recognizes a particular duty. If there is no duty, then the defendant in a negligence action is entitled to a judgment as a matter of law."). Under South Carolina law, a property owner whose land abuts a highway only owes a duty to motorists for highway conditions where the property owner "undertak[es] an activity that creates an artificial condition on the highway which is dangerous to travelers." Skinner v. South Carolina Dep't of Transp., 383 S.C. 520, 524-25, 681 S.E.2d 871, 874 (2009). Here, Plaintiffs cannot establish that Pilot created a dangerous artificial condition on the highway.

Plaintiffs allege the painted flush median in the highway in front of the Pilot Travel Center was a dangerous condition on the highway because it enabled motorists to make a left hand turn onto Pilot's premises. However, even if the median was a dangerous condition on the highway,[6] it was not a condition created by Pilot. SCDOT admits that it, and not Pilot, made the decision to not add a raised median in front of the Pilot Travel Center as part of the Widening Project. While Plaintiffs allege that Pilot negotiated SCDOT's decision to continue to use a painted flush median

[5] It is undisputed that Plaintiffs were neither invitees nor licensees of Pilot immediately prior to or at the time of the motor vehicle accident.

[6] The Court need not determine whether the median was a dangerous condition as alleged by Plaintiffs because the Court finds that Plaintiffs have failed to establish that Pilot created any artificial condition on the highway.

in the highway, Plaintiffs have failed to provide any evidence that such a negotiation took place beyond mere speculation and conjecture.[7] In fact, SCDOT maintains that there was no "negotiation" of the median and that there was never an expectation that there was going to be a raised median installed in front of the Pilot Travel Center.

Moreover, even if Pilot did negotiate with SCDOT concerning the median, this Court finds that such negotiation did not impose a duty on the part of Pilot to the Plaintiffs. Ultimately, the decision as to whether a raised median should be installed on a highway falls within the exclusive authority of SCDOT, which owns and controls the highway. See Giannini v. S. Carolina Dep't of Transp., 378 S.C. 573 n.1 (2008) (recognizing SCDOT has initial discretion to place median barriers on a highway); S.C. Code Ann. § 57-3-110(1) ("The Department of Transportation shall . . . [have the power and duty to] lay out, build and maintain public highways . . . including the exclusive authority to establish design criteria, construction specifications, and standards required to construct and maintain highways . . .."); S.C. Code Ann. § 57-3-110(3) ("The Department of Transportation shall . . . [have the power and duty to] cause the state highways to be marked with

[7] Plaintiffs' allegation that Pilot negotiated with SCDOT to prevent SCDOT from installing a raised median in front of the Pilot Travel Center is based solely upon handwritten notes on a letter dated August 28, 2000, from an SCDOT official to an employee of the prior owner of the subject property. However, these handwritten notes do not evidence that **Pilot** negotiated with SCDOT regarding the type of median to be used in the portion of the highway in front of the Pilot Travel Center. First, these handwritten notes were not made by an employee or agent of Pilot. Second, this particular letter is dated after the date by which SCDOT testified it made the decision to use a painted flush median on the highway instead of a raised median. Third, SCDOT testified that there was never a "negotiation" of the median, and that there was never an expectation that there was going to be a raised median installed in front of the Pilot Travel Center.

At the hearing on Pilot's Motion for Summary Judgment, Plaintiffs speculated that Pilot may have negotiated with SCDOT regarding the median as part of SCDOT's right-of-way acquisition of a portion of Pilot's property during the Interchange Project. However, the Title of Real Estate for this acquisition indicates that the right-of-way acquisition transaction was between SCDOT and the prior owner of Pilot's property. Moreover, Plaintiffs admitted it did not have any evidence that any such negotiation with Pilot took place. Therefore, even if a "negotiation" between Pilot and SCDOT could somehow create a duty on the part of Pilot with respect to the median, Plaintiffs cannot provide any evidence such a negotiation occurred beyond pure speculation, which is insufficient to survive summary judgment. Harris Teeter, Inc. v. Moore & Van Allen, PLLC, 390 S.C. 275, 299, 701 S.E.2d 742, 754 (2010) ("To survive summary judgment, the evidence presented must amount to more than mere speculation and conjecture.").

appropriate directions for travel and *regulate the travel and traffic along such highways*, subject to the laws of the State[.]" (emphasis added)). This decision-making authority arises from SCDOT's police power and duty to plan, maintain, and operate the state's highway system. See South Carolina State Highway Dep't v. Wilson, 254 S.C. 360, 365-66, 175 S.E.2d 391, 394 (1970) (noting that "the clear weight of authority from other jurisdictions is . . . that the construction of a median . . . is an exercise of the police power"); South Carolina State Highway Dep't v. Carodale Assocs., 268 S.C. 556, 561, 235 S.E.2d 127, 129 (1977) ("Re-routing and diversion of traffic are police power regulations."). Whether or not any negotiation of the median took place, the fact remains that only SCDOT has the authority to determine what type of median to install on the highway.

Furthermore, the median in question was part of the highway, and thus, under the exclusive control of SCDOT. Plaintiffs have failed to present any authority establishing that Pilot, as one of the property owners abutting the highway, has a duty to maintain, repair, or warn travelers of potentially dangerous conditions on the highway over which it has no control. The facts of this case are nearly identical to those in Allen v. Mellinger, 156 Pa. Commw. 113, 625 A.2d 1326 (1993). In that case, the plaintiffs attempted to make a left turn from the highway into the defendants' business premises when their vehicle was hit by a truck traveling in the opposite direction. Id. at 115. Relying on Restatement (Second) of Torts §349,[8] the Allen Court held that

[8] According to § 349:

> A possessor of land over which there is a public highway or private right of way is not subject to liability for physical harm caused to travelers upon the highway or persons lawfully using the way by his failure to exercise reasonable care
>
> (a) to maintain the highway or way in safe condition for their use, or
>
> (b) to warn them of dangerous conditions in the way which, although not created by him, are known to him and which they neither know nor are likely to discover.

the business owners owed no duty to the plaintiffs to maintain the highway in a safe condition or to warn them of any alleged dangerous condition on the highway. Id. at 118-119. According to the Allen Court, the Commonwealth owns the highway and "has the exclusive duty for the maintenance and repair of state highways." Allen at 118. The court further rejected the plaintiffs' argument that the business owners' failure to erect signs, paint lines or place curbing or barricades in the store's parking lot to indicate to customers the safest place to enter the parking lot created a dangerous condition. Allen at 119 n.1, 625 A.2d at 1329 n.1 (1993).

Like the business owners in Allen, here, Pilot owed no duty to the Plaintiffs to keep the highway in a safe condition or to warn Plaintiffs of any alleged dangerous condition on the highway. Medians are part of the highway subject to the exclusive control and authority of SCDOT. The decision to install a painted flush median on the subject highway was within the exclusive province of SCDOT as the governmental agency charged with the duty to design, maintain and operate the State's highways. SCDOT, not Pilot, has the duty to maintain medians. SCDOT, not Pilot, has the "duty to use reasonable care to keep streets and highways within its control in a reasonably safe condition for public travel." Ford v. South Carolina Dep't of Transp., 328 S.C. 481, 487, 492 S.E.2d 811, 814 (Ct. App. 1997). Thus, Pilot, as one of the landowners abutting U.S. 17A, has no duty (or authority) to maintain, repair, or warn others of potentially dangerous conditions on the highway over which it has no control.[9] See Skinner v. South Carolina Dep't of Transp., 383 S.C. 520, 524-25, 681 S.E.2d 871, 874 (2009). (noting that while "a contractor performing highway alterations owes a duty to travelers, . . . [there is] no analogous duty on the part of an owner of property abutting a highway who neither possesses nor controls

[9] SCDOT acknowledged during its Rule 30(b)(6) deposition that it owns and has control of US 17A, that it has the responsibility of maintaining highways in a safe condition and that it has the duty to investigate and determine whether changes need to be made to the highway.

the highway."); Miller v. City of Camden, 329 S.C. 310, 314, 494 S.E.2d 813, 815 (1997) ("one who has no control [over property] owes no duty.").

To the extent that Plaintiffs maintain that Pilot created a dangerous condition on the highway by virtue of constructing a driveway to the Pilot Travel Center that was accessible by motorists travelling on the opposite side of the highway, such argument lacks merit. See Skinner at 525 (evidence that it was motorists' utilization of the property owner's driveway that led to alleged dangerous condition was insufficient to establish business owner "created" a defect on the highway).

This Court holds that having a driveway on the highway, in and of itself, is not an artificial condition as contemplated by South Carolina case law. In Skinner, the South Carolina Supreme Court noted that the types of artificial conditions on the highway that would impose potential liability on a property owner include hazards that result from the conduct of the property owner's business, such as material spilled on the road or smoke emitted from a plant that drifts over the highway. Id. Simply having a driveway on the highway allowing for the ingress to and egress from one's business does not impose liability on the business owner for motor vehicle accidents that occur in the highway.

Furthermore, like with medians, SCDOT has the ultimate decision-making authority with respect to the placement and design of driveways with access to a highway. In order to construct or reconstruct a private driveway with access to a highway, a property owner must first obtain an encroachment permit from SCDOT. As part of the permitting process, SCDOT reviews the permittees' design plans to ensure compliance with SCDOT's regulations and standards concerning the design and location of driveways. SCDOT also reviews a permittee's encroachment application to ensure driveways do not create any safety concerns or impede efficient traffic

operations. SCDOT "may deny any request for any permit for any driveway . . . which in [its] judgment . . . may create a hazard to the traveling public." S.C. Code Ann. § 57-5-1090. Thus, Pilot could not have constructed the driveways to its property unless SCDOT deemed them to comply with SCDOT's design standards and determined that they were safe for the public.

Finally, Plaintiffs argue that Pilot can be held liable for their injuries because Pilot had notice of the danger posed by motorists making left-hand turns onto its property and failed to take any remedial action. Specifically, Plaintiffs allege Pilot was on notice of this danger by virtue of prior motor vehicle accidents that occurred in and around the Pilot Travel Centers' driveways. This Court finds that no such affirmative duty on the part of Pilot exists. "An affirmative legal duty exists only if created by statute, contract, relationship, status, property interest, or some other special circumstance." Rayfield v. South Carolina Dep't of Corr., 297 S.C. 95, 100, 374 S.E.2d 910, 913 (Ct. App. 1988). Plaintiffs cannot establish any source of a duty requiring Pilot to affirmatively act. Even if Plaintiffs could establish Pilot was aware of other motor vehicle accidents in the highway, having notice of other accidents does not give rise to a duty to warn. See Restatement (Second) of Torts § 349 (landowner owes no duty to warn travelers of dangerous conditions in the highway or private right-of-way which, although not created by him, are known to him). Moreover, foreseeability of an injury alone does not create a duty to act. South Carolina State Ports Auth. v. Booz-Allen & Hamilton, Inc., 289 S.C. 373, 376, 346 S.E.2d 324, 325 (1986). The occurrence of other motor vehicle accidents on U.S. 17A does not create an affirmative duty on the part of Pilot as a property owner abutting the highway.

Conclusion

In light of the foregoing, this Court finds that Plaintiffs cannot establish that Pilot owed them any duty as a landowner abutting the portion of the highway where Plaintiffs were injured. Therefore, Pilot is entitled to judgment as a matter of law.

IT IS ORDERED that Pilot's Motion for Summary Judgment shall be GRANTED, and all of Plaintiffs' causes of action against Pilot are DISMISSED.

AND IT IS SO ORDERED!

Roger M. Young Sr.
Presiding Judge

May 4/26, 2017
In Chambers, South Carolina

FORM 4

STATE OF SOUTH CAROLINA
COUNTY OF BERKELEY
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CASE NO. 2016- CP-08-0334

Cynthia Wright and Richard Wright,

PLAINTIFF(S)

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

DEFENDANT(S)

Submitted by:	**Attorney for :** ☐ Plaintiff ☐ Defendant or ☐ Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

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

☒ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered. ☐ See Page 2 for additional information.

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

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

☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT** (*CHECK APPLICABLE BOX*): ☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

FILED
JUN 26 PM 1:04
BERKELEY COUNTY, S.C.

IT IS ORDERED AND ADJUDGED: ☐ See attached order (formal order to follow) ☒ Statement of Judgment by the Court: Defendant Speedway, LLC's Motion for Summary Judgment is granted pursuant to SCRCP 56. There is no genuine issue of material fact as to the issues of duty and proximate cause for the claim alleged by Plaintiffs against Speedway, LLC. Defendant Ashley Land Surveying, Inc.'s Motion for Summary Judgment is granted pursuant to SCRCP 56. There is no genuine issue of material fact as to the issues of duty and proximate cause for the claim alleged by Plaintiffs against Ashley Land Surveying, Inc. Defendant South Carolina Department of Transportation (SCDOT)'s Motion for Summary Judgment is granted pursuant to SCRCP 56, as Plaintiffs' claims against Def. SCDOT are barred by the State Tort Claims Act, S.C. Code § 15-78-60 et seq.

ORDER INFORMATION

This order ☐ ends ☒ does not end the case.
Additional Information for the Clerk :

INFORMATION FOR THE JUDGMENT INDEX
Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)
		$
		$
		$

If applicable, describe the property, including tax map information and address, referenced in the order:

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk.
Note: Title abstractors and researchers should refer to the official court order for judgment details.
E-Filing Note: In E-Filing counties, the Court will electronically sign this form using a separate electronic signature page.

Circuit Court Judge	2151 Judge Code	6/26/2017 Date

For Clerk of Court Office Use Only

This judgment was entered on the day of , 20 and a copy mailed first class or placed in the appropriate attorney's box on this day of , 20 to attorneys of record or to parties (when appearing pro se) as follows:

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

CLERK OF COURT

Court Reporter:

E-Filing Note: In E-Filing counties, the date of Entry of Judgment is the same date as reflected on the Electronic File Stamp and the clerk's entering of the date of judgment above is not required in those counties. The clerk will mail a copy of the judgement to parties who are not E-Filers or who are appearing pro se. See Rule 77(d), SCRCP.

ADDITIONAL INFORMATION REGARDING DECISION BY THE COURT AS REFERENCED ON PAGE 1.

This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

STATE OF SOUTH CAROLINA	)	
	)	IN THE COURT OF COMMON PLEAS
COUNTY OF BERKELEY	)	NINTH JUDICIAL CIRCUIT
	)	2016-CP-08-0334
Cynthia Wright and Richard Wright,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	
	)	**ORDER DENYING PLAINTIFF'S**
South Carolina Department of Transportation, Pilot Travel Centers, LLC, Speedway, LLC, Ashley Land Surveying, Inc. f/k/a Ashley Engineering & Consulting, Inc., and Munlake Contractors, Inc.,	)	**MOTION TO ALTER OR AMEND THIS COURT'S MAY 4, 2017 ORDER**
	)	
Defendants.	)	

FILED
17 JUN -8 PM 4:56
BERKELEY COUNTY, S.C.
CLERK OF COURT

BACKGROUND

On April 10, 2017, this Court heard oral arguments on Defendant Pilot Travel Centers, LLC's Motion for Summary Judgment. This Court's Order granting defendant's motion was filed on May 4, 2017. On May 9, 2017, Plaintiff filed a Motion to Alter or Amend this Court's May 4, 2017 order pursuant to Rules 52 and 59, SCRCP.

DISCUSSION

"The power to open, modify or vacate a judgment is possessed solely by the court that rendered judgment." Coleman v. Dunlap, 306 S.C. 491, 494; 413 S.E.2d 15, 17 (1992). A Rule 59(e) motion is the proper "vehicle to request the trial court 'alter or amend the judgment,'" and "to seek 'reconsideration' of issues and arguments." Elam v. South Carolina Dept. of Transp., 361 S.C. 9, 21; 361 S.E.2d 772, 778 (2004). The Fourth Circuit has held "that Rule 59(e) motions can be successful in only three situations: (1) to accommodate an intervening change in controlling law; (2) to account for new evidence not available at trial; or (3) to correct a clear error of law or

prevent manifest injustice." Zinkand v. Brown, 478 F.3d 634, 637 (4th Cir. 2007) (internal citations omitted). Rules 52(c) and 59(f) provide that "[t]he motion may in the discretion of the court be determined on briefs filed by the parties without oral argument." Rules 52(c) and 59(f), SCRCP.

CONCLUSION

Having thoroughly considered the supporting and opposing arguments of counsel, Plaintiff's Motion to Alter or Amend this Court's Order of May 4, 2017 has failed to satisfy the above requirements, and is therefore denied.

IT IS THEREFORE ORDERED that Plaintiff's Motion to Alter or Amend this Court's Order of May 4, 2017 is DENIED.

IT IS SO ORDERED!

June 5, 2017
Charleston, South Carolina

Roger M. Young Sr.
Presiding Judge

STATE OF SOUTH CAROLINA COUNTY OF BERKELEY	IN THE COURT OF COMMON PLEAS FOR THE NINTH JUDICIAL CIRCUIT CASE NO: 2014-CP-08-_____
CYNTHIA WRIGHT, Plaintiff(s), vs. **SOUTH CAROLINA DEPARTMENT OF TRANSPORTATION, C & A UNLIMITED, INC. and PILOT TRAVEL CENTERS, LLC,** Defendant(s).	**SUMMONS**

TO THE DEFENDANTS ABOVE NAMED:

YOU ARE HEREBY SUMMONED and required to answer the Complaint in this action, a copy of which is herewith served upon you, and to serve a copy of your Answer upon the subscribers, at their offices at 7087 Rivers Avenue, North Charleston, South Carolina, 29406, within thirty (30) days after service thereof, exclusive of the day of such service; and if you fail to answer the Complaint within the time aforesaid judgment by default will be rendered against you for the relief demanded in the Complaint.

Kevin B. Smith
Hoffman Law Firm
7087 Rivers Ave.
N. Charleston, SC 29406
(843) 769-7077
ksmith@hoffmanlaw.net
Attorney for the Plaintiff

North Charleston, South Carolina

March 20, 2014

STATE OF SOUTH CAROLINA COUNTY OF BERKELEY	IN THE COURT OF COMMON PLEAS FOR THE NINTH JUDICIAL CIRCUIT CASE NO: 2014-CP-08-_____
CYNTHIA WRIGHT, Plaintiff, vs. **SOUTH CAROLINA DEPARTMENT OF TRANSPORTATION, C & A UNLIMITED, INC.** and **PILOT TRAVEL CENTERS, LLC,** Defendant.	**COMPLAINT** (Negligence Action) Jury Trial Requested

The Plaintiff, CYNTHIA WRIGHT, by her undersigned attorney, alleges in her complaint against the Defendants, SOUTH CAROLINA DEPARTMENT OF TRANSPORTATION, C & A UNLIMITED, INC. and PILOT TRAVEL CENTERS, LLC, and would respectfully show unto this Honorable Court:

1. The Plaintiff is a resident of the County of Dorchester County, State of South Carolina.

2. The Defendant, C & A UNLIMITED, INC. (hereinafter "McDonalds"), is a corporation organized and existing under the laws of the State of South Carolina. This corporation owns and maintains the McDonald's restaurant located at 1520 North Main Street in Summerville, South Carolina, in the County of Berkeley. At all times mentioned herein, this Defendant was acting through its agents, servants, and/or employees is and liable to the Plaintiff under the doctrine of *respondeat superior*.

3. The Defendant, PILOT TRAVEL CENTERS, LLC (hereinafter "Pilot Travel Center"), is a corporation organized and existing under the laws of Delaware, but is licensed to do business in the State of South Carolina and does substantial business in Berkeley County. This corporation owns and maintains the Pilot Travel Center gas station located at 1521 North

Main Street in Summerville, South Carolina, in the County of Berkeley. At all times mentioned herein, this Defendant was acting through its agent, servants, and/or employees and is liable to the Plaintiff under the doctrine of *respondeat superior*.

4. Pursuant to S.C. Code §1-30-10, Defendant, South Carolina Department of Transportation (hereinafter "SCDOT") is a Department of the Executive Branch of the Government of the State of South Carolina.

5. The Defendant, SCDOT, is one of the agencies as defined by S.C. §15-78-30(a) and governmental entities as defined by S.C. Code §15-78-30(d).

6. Upon information and belief, the Defendant, SCDOT, is a governmental entity charged with the duties of constructing, repairing and maintaining its system of highways in the State of South Carolina and keeping those public highways, including their rights of way, reasonably safe for use and travel by the road users.

7. Upon information and belief, Defendant, SCDOT has a principal place of business located in the County of Richland, State of South Carolina, and has agents and employees who perform work for its agency in the County of Berkeley, State of South Carolina.

8. This action against the SCDOT is brought pursuant to the South Carolina Tort Claims Act §15-78-10, et. seq., South Carolina Code of Laws (1976) as amended.

9. Upon information and belief, at all times mentioned herein, the agents, servants and/or employees of Defendant, SCDOT, were acting within the course and scope of their employment with the agency.

10. Under the doctrines of *respondeat superior*, master/servant, and principal/agent, Defendant, SCDOT, is liable for the torts of its agents, servants and/or employees in the same manner and to the same extent as a private individual under like circumstances.

11. Upon information and belief, at all times mentioned herein, the Defendant, SCDOT, by and through its agents, servants and/or employees had the right and/or power to direct and control the manner in which its agents, servants and/or employees performed work in and around the intersection of Interstate 26 and North Main Street in Berkeley County, South Carolina.

12. The negligent acts, omissions and liabilities of the Defendants, SCDOT, Pilot Travel Center and McDonalds, include those by its agents, principals, employees and/or servants, both directly and vicariously, pursuant to the non-delegable duty, corporate liability, apparent authority, agency, ostensible agency and/or *respondeat superior*.

13. This Court has jurisdiction over the parties and matters in controversy, and venue is proper in Berkeley County.

FACTUAL ALLEGATIONS

14. All other allegations contained herein, to the extent that they are not inconsistent with the following, are incorporated by reference.

15. In the early evening hours of October 6, 2012, the Plaintiff, Cynthia Wright, was a passenger on a motorcycle being driven by her husband on North Main Street just past the Interstate 26 overpass when another motorist, Daniel Sena, who was on the same road and headed directly towards her, turned left to enter the McDonald's and/or the Pilot Travel Center directly in front of the Plaintiff causing the vehicles to collide.

16. Upon information and belief, there was no center island or similar structure that would prevent motorists from making a left turn within the operational area of the intersection of Interstate 26 and North Main Street.

17. The absence of a center island or similar structure created a hazardous/dangerous condition, and the Defendant, SCDOT, owed a duty to the driving public to inspect the

highways, specifically the intersection of Interstate 26 and North Main Street, to prevent the existence of hazardous road conditions.

18. Upon information and belief, the Defendant, SCDOT, had prior knowledge of the hazardous/dangerous condition on the intersection of Interstate 26 and North Main Street prior to the time Plaintiff's vehicle was hit by Mr. Sena's vehicle.

19. Upon information and belief, said agent, servant and/or employee of Defendant, SCDOT, breached their duty of due care to the public and to the Plaintiff by not placing a center island or similar structure in the vicinity of the scene at Interstate 26 and North Main Street.

20. The hazardous and dangerous condition was not ascertainable to motorists, and especially this Plaintiff. Therefore the hazardous/dangerous condition was a latent defect, a hidden trap for the unwary motorist.

21. The failure to install a center island or similar structure posed a severe safety hazard to the motoring public which the Defendant, SCDOT, its agents, servants and employees, were fully aware of, and its failure to correct this defect was the direct and proximate cause of the aforementioned incident.

22. The Defendant, SCDOT, has a duty to inspect and maintain its system of highways of the State of South Carolina, for their full right of way, to determine if any dangerous conditions exist thereon, including intersections, and to take action to correct and/or repair such conditions if they present a hazard to the motoring public.

23. The Defendant, SCDOT, when aware of a condition presenting a hazardous condition to the motoring public, has an affirmative duty to respond to such notice in a timely manner, remedy such condition, and provide for the reasonably safe travel of the public upon the highway.

24. The Defendant, SCDOT, breached its duty of due care in allowing left hand turns at this intersection and by failing to inspect and/or remedy the dangerous condition, and, further, in failing to timely respond and correct such condition.

FOR A CAUSE OF ACTION OF

NEGLIGENCE BY THE SCDOT

25. All other allegations contained herein, to the extent that they are not inconsistent with the following, are incorporated by reference.

26. The absence of a center island or similar structure to prevent left turns created a hazardous condition and the Defendant, SCDOT, owed a duty to the driving public to construct the highway to prevent the existence of hazardous road conditions at the intersection of Interstate 26 and North Main Street, and if such hazardous condition is known to the Defendant, SCDOT, to make improvements to the highway and to correct/remove hazard in a timely manner.

27. The Defendant, SCDOT, knew or should have known of the hazardous road conditions existing at the intersection of Interstate 26 and North Main Street at the time and place in question and therefore had a duty to quickly remedy or take measures that would correct or prevent the hazard.

28. The presence of the dangerous condition of the highway at the intersection of Interstate 26 and North Main Street created an unreasonable risk of serious harm to anyone driving a vehicle on this section of North Main Street, especially this Plaintiff.

29. The Plaintiff is a member of the motoring public and North Main Street is a public highway in South Carolina and the Defendant, SCDOT, had a duty to ensure that North Main Street was constructed and maintained in a safe and proper manner, and that the Defendant, SCDOT breached its duty to the Plaintiff and was thereby negligent, grossly negligent, careless,

reckless and acted in violation of the duties owed to the Plaintiff in that it committed one or more of the following acts:

(a) improperly constructing and maintaining North Main Street and the entrances to businesses located thereon, to prevent motorists, specifically this Plaintiff, from being stricken by other motorist attempting to turn left across traffic when the Defendant SCDOT knew or reasonably should have known that the absence of a center island or similar structure and allowing a driveway in this area presented a danger to the motoring public;

(b) allowing McDonalds and Pilot Travel Center to have a driveway within the operational area of the intersection of Interstate 26 and North Main Street--a dangerous condition--when the SCDOT knew or should have known that such condition presented a danger to the motoring public;

(c) failing to use due diligence by regularly inspecting and/or maintaining their highways, including the intersection of Interstate 26 and North Main Street, to discover defects that endangered the motoring public;

(d) failing to properly maintain their highway, including driveways, to avoid risk of injury to motorists;

(e) failing to act as a reasonable person or agency charged with the duty of constructing, maintaining, and repairing the highways, including driveways, would have acted under the same or similar circumstances;

(f) failing to use the degree of care and caution that a reasonably prudent person would have exercised under the conditions then and there existing;

(g) failing to hire qualified agents, servants and/or employees to ensure that its agents, servants and/or employees performed their duties in a proper and safe manner;

(h) failing to train its agents, servants and/or employees to ensure that its agents, servants and/or employees performed their duties in a proper and safe manner;

(i) failing to provide proper and necessary supervision and monitoring to ensure that its agents, servants and/or employees performed their duties in a proper and safe manner;

(j) Violating the laws, statutes, regulations and/or ordinances of the State of South Carolina; and

(k) Is guilty of other negligent acts and omissions not specifically alleged but as the evidence at trial will show.

30. The negligence, gross negligence, carelessness, recklessness, willfulness and wantonness of the Defendant, SCDOT, through its agents, servants and/or employees, directly and proximately caused the injuries and losses of the Plaintiff as is hereafter set forth.

FOR A CAUSE OF ACTION OF

NEGLIGENCE BY MCDONALDS

31. All other allegations contained herein, to the extent that they are not inconsistent with the following, are incorporated by reference.

32. The driveway within the operational area of the intersection of Interstate 26 and North Main Street created a hazardous condition and the Defendant, McDonalds, owed a duty to the driving public to construct its driveway in such a way as to prevent the existence of hazardous road conditions at the intersection of Interstate 26 and North Main Street, and if such hazardous condition is known to the Defendant, McDonalds, to make improvements to the driveway and to correct/remove the hazard in a timely manner.

33. The Defendant, McDonalds, knew or should have known of the hazardous road conditions existing at the intersection of Interstate 26 and North Main Street at the time and place

in question and therefore had a duty to quickly remedy or take measures that would correct or prevent the hazard.

34. The presence of the dangerous condition of the highway and driveway at the intersection of Interstate 26 and North Main Street created an unreasonable risk of serious harm to anyone driving a vehicle on this section of North Main Street, especially this Plaintiff.

35. The Plaintiff is a member of the motoring public and North Main Street is a public highway in South Carolina and the Defendant, McDonalds, had a duty to ensure that its driveway was constructed and maintained in a safe and proper manner, and that the Defendant, McDonalds breached its duty to the Plaintiff and was negligent, grossly negligent, careless, reckless and acted in violation of the duties owed to the Plaintiff in that it committed one or more of the following acts:

(a) improperly constructing and maintaining the entrances to its business located at 1520 North Main Street in Summerville, South Carolina, to prevent motorists, specifically this Plaintiff, from being stricken by other motorist attempting to turn left across traffic when the Defendant, McDonalds, knew or reasonably should have known that having a driveway in this area presented a danger to the motoring public;

(b) having a driveway within the operational area of the intersection of Interstate 26 and North Main Street --a dangerous condition--when Defendant, McDonalds, knew or should have known that such condition presented a danger to the motoring public;

(c) failing to use due diligence by regularly inspecting and/or maintaining their driveway to discover defects that endangered the motoring public;

(d) failing to properly maintain and correct their driveway to avoid risk of injury to motorists;

(e) failing to act as a reasonable person or corporation would have acted under the same or similar circumstances;

(f) failing to use the degree of care and caution that a reasonably prudent person would have exercised under the conditions then and there existing;

(g) failing to hire qualified agents, servants and/or employees to ensure that its agents, servants and/or employees performed their duties in a proper and safe manner;

(h) failing to train its agents, servants and/or employees to ensure that its agents, servants and/or employees performed their duties in a proper and safe manner;

(i) failing to provide proper and necessary supervision and monitoring to ensure that its agents, servants and/or employees performed their duties in a proper and safe manner;

(j) Violating the laws, statutes, regulations and/or ordinances of the State of South Carolina; and

(k) Is guilty of other negligent acts and omissions not specifically alleged but as the evidence at trial will show.

36. Which negligence, gross negligence, carelessness, recklessness, willfulness and wantonness of the Defendant, McDonalds, and through its agents, servants and/or employees, directly and proximately caused the injuries and losses of the Plaintiff as is hereafter set forth.

FOR A CAUSE OF ACTION OF

NEGLIGENCE BY PILOT TRAVEL CENTER

37. All other allegations contained herein, to the extent that they are not inconsistent with the following, are incorporated by reference.

38. The driveway within the operational area of the intersection of Interstate 26 and North Main Street created a hazardous condition and the Defendant, Pilot Travel Center, owed a

duty to the driving public to construct its driveway in such a way as to prevent the existence of hazardous road conditions at the intersection of Interstate 26 and North Main Street, and if such hazardous condition is known to the Defendant, Pilot Travel Center, to make improvements to the driveway and to correct/remove the hazard in a timely manner.

39. The Defendant, Pilot Travel Center, knew or should have known of the hazardous road conditions existing at the intersection of Interstate 26 and North Main Street at the time and place in question and therefore had a duty to quickly remedy or take measures that would correct or prevent the hazard.

40. The presence of the dangerous condition of the highway and driveway at the intersection of Interstate 26 and North Main Street created an unreasonable risk of serious harm to anyone driving a vehicle on this section of North Main Street, especially this Plaintiff.

41. The Plaintiff is a member of the motoring public and North Main Street is a public highway in South Carolina and the Defendant, Pilot Travel Center, had a duty to ensure that its driveway was constructed and maintained in a safe and proper manner, and that the Defendant, Pilot Travel Center breached its duty to the Plaintiff and was negligent, grossly negligent, careless, reckless and acted in violation of the duties owed to the Plaintiff in that it committed one or more of the following acts:

(a) improperly constructing and maintaining the entrances to its business located at 1521 North Main Street in Summerville, South Carolina, to prevent motorists, specifically this Plaintiff, from being stricken by other motorist attempting to turn left across traffic when the Defendant, Pilot Travel Center, knew or reasonably should have known that having a driveway in this area presented a danger to the motoring public;

(b) having a driveway within the operational area of the intersection of Interstate 26 and North Main Street --a dangerous condition--when Defendant, Pilot

Travel Center, knew or should have known that such condition presented a danger to the motoring public;

(c) failing to use due diligence by regularly inspecting and/or maintaining their driveway to discover defects that endangered the motoring public;

(d) failing to properly maintain and correct their driveway to avoid risk of injury to motorists;

(e) failing to act as a reasonable person or corporation would have acted under the same or similar circumstances;

(f) failing to use the degree of care and caution that a reasonably prudent person would have exercised under the conditions then and there existing;

(g) failing to hire qualified agents, servants and/or employees to ensure that its agents, servants and/or employees performed their duties in a proper and safe manner;

(h) failing to train its agents, servants and/or employees to ensure that its agents, servants and/or employees performed their duties in a proper and safe manner;

(i) failing to provide proper and necessary supervision and monitoring to ensure that its agents, servants and/or employees performed their duties in a proper and safe manner;

(j) Violating the laws, statutes, regulations and/or ordinances of the State of South Carolina; and

(k) Is guilty of other negligent acts and omissions not specifically alleged but as the evidence at trial will show.

42. Which negligence, gross negligence, carelessness, recklessness, willfulness and wantonness of the Defendant, Pilot Travel Center, and through its agents, servants and/or

employees, directly and proximately caused the injuries and losses of the Plaintiff as is hereafter set forth.

DAMAGES

43. All other allegations contained herein, to the extent that they are not inconsistent with the following, are incorporated by reference.

44. As the direct and proximate result of the aforesaid negligent, grossly negligent, careless, reckless, willful and wanton acts and/or omissions of the Defendants, the Plaintiff:

(a) Suffered severe, life threatening injuries to various parts of her body;

(b) Was severely, seriously, painfully and permanently injured;

(c) Was forced to seek medical treatment and was hospitalized for a period of time;

(d) Will require lifetime medical treatment in the future;

(e) Was subjected to the administration of strong and potent drugs and medications;

(f) Suffered extreme, painful and dangerous injuries, including but not limited to, a traumatic brain injury, loss of a portion of her brain and head, a fracture in her head, pulmonary contusions, a takotsubo nonischemic cardiomyopathy, a fracture of her left toe, SIADH, an abdominal hematoma, and multiple other abrasions about her body;

(g) Sustained permanent scarring and disfigurement about her head and body;

(h) Has incurred and will incur in the future, substantial medical and doctors' bills due to her injuries;

(i) Was subjected to extreme pain, mental anguish, emotional distress, suffering and discomfort both in the past and in the future;

(j) Was humiliated and embarrassed before her friends, family, and neighbors;

(k) Is informed and believes that her earning capacity has been and will forever be impaired;

(l) Has been and will be prevented from attending to her usual and ordinary household duties; and

(m) Has been and will be prevented from pursing her normal hobbies and avocations and has suffered a severe loss of enjoyment of her life; and all to her damage, both actual and punitive, in an amount to be determined by the trier of fact.

WHEREFORE, Plaintiff demands a jury trial and judgment against Defendants, SCDOT, Pilot Travel Center and McDonalds, in an amount to be determined by the trier of fact, actual damages, consequential damages, punitive damages, for the costs of this action and for such other and further relief as this Honorable Court deems just and proper.

Respectfully submitted,

Kevin B. Smith
Hoffman Law Firm
7087 Rivers Ave.
N. Charleston, SC 29406
(843) 769-7077
ksmith@hoffmanlaw.net
Attorney for the Plaintiff

North Charleston, South Carolina

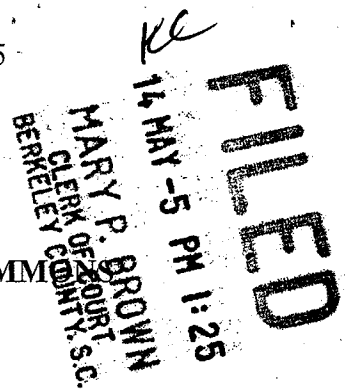
March 28, 2014

STATE OF SOUTH CAROLINA

COUNTY OF BERKELEY

IN THE COURT OF COMMON PLEAS FOR THE NINTH JUDICIAL CIRCUIT

CASE NO: 2014-CP-08-675



CYNTHIA WRIGHT and RICHARD WRIGHT,

Plaintiff(s),

vs.

SOUTH CAROLINA DEPARTMENT OF TRANSPORTATION, C & A UNLIMITED, INC. and PILOT TRAVEL CENTERS, LLC,

Defendant(s).

AMENDED SUMMONS

TO THE DEFENDANTS ABOVE NAMED:

YOU ARE HEREBY SUMMONED and required to answer the Complaint in this action, a copy of which is herewith served upon you, and to serve a copy of your Answer upon the subscribers, at their offices at 7087 Rivers Avenue, North Charleston, South Carolina, 29406, within thirty (30) days after service thereof, exclusive of the day of such service; and if you fail to answer the Complaint within the time aforesaid judgment by default will be rendered against you for the relief demanded in the Complaint.

Kevin B. Smith
Hoffman Law Firm
7087 Rivers Ave.
N. Charleston, SC 29406
(843) 769-7077
ksmith@hoffmanlaw.net
Attorney for the Plaintiff

North Charleston, South Carolina

May 1, 2014

STATE OF SOUTH CAROLINA COUNTY OF BERKELEY	IN THE COURT OF COMMON PLEAS FOR THE NINTH JUDICIAL CIRCUIT CASE NO: 2014-CP-08-675
CYNTHIA WRIGHT & RICHARD WRIGHT, Plaintiff, vs. **SOUTH CAROLINA DEPARTMENT OF TRANSPORTATION, C & A UNLIMITED, INC.** and **PILOT TRAVEL CENTERS, LLC,** Defendant.	**AMENDED COMPLAINT** (Negligence Action) Jury Trial Requested

FILED
14 MAY -5 PM 1:25
MARY P. BROWN
CLERK OF COURT
BERKELEY COUNTY, S.C.

The Plaintiffs, CYNTHIA and RICHARD WRIGHT, by thier undersigned attorney, allege in their complaint against the Defendants, SOUTH CAROLINA DEPARTMENT OF TRANSPORTATION, C & A UNLIMITED, INC. and PILOT TRAVEL CENTERS, LLC, and would respectfully show unto this Honorable Court:

1. The Plaintiffs are residents of the County of Dorchester County, State of South Carolina.

2. The Defendant, C & A UNLIMITED, INC. (hereinafter "McDonalds"), is a corporation organized and existing under the laws of the State of South Carolina. This corporation owns and maintains the McDonald's restaurant located at 1520 North Main Street in Summerville, South Carolina, in the County of Berkeley. At all times mentioned herein, this Defendant was acting through its agents, servants, and/or employees is and liable to the Plaintiff under the doctrine of *respondeat superior*.

3. The Defendant, PILOT TRAVEL CENTERS, LLC (hereinafter "Pilot Travel Center"), is a corporation organized and existing under the laws of Delaware, but is licensed to do business in the State of South Carolina and does substantial business in Berkeley County.

This corporation owns and maintains the Pilot Travel Center gas station located at 1521 North Main Street in Summerville, South Carolina, in the County of Berkeley. At all times mentioned herein, this Defendant was acting through its agent, servants, and/or employees and is liable to the Plaintiff under the doctrine of *respondeat superior*.

4. Pursuant to S.C. Code §1-30-10, Defendant, South Carolina Department of Transportation (hereinafter "SCDOT") is a Department of the Executive Branch of the Government of the State of South Carolina.

5. The Defendant, SCDOT, is one of the agencies as defined by S.C. §15-78-30(a) and governmental entities as defined by S.C. Code §15-78-30(d).

6. Upon information and belief, the Defendant, SCDOT, is a governmental entity charged with the duties of constructing, repairing and maintaining its system of highways in the State of South Carolina and keeping those public highways, including their rights of way, reasonably safe for use and travel by the road users.

7. Upon information and belief, Defendant, SCDOT has a principal place of business located in the County of Richland, State of South Carolina, and has agents and employees who perform work for its agency in the County of Berkeley, State of South Carolina.

8. This action against the SCDOT is brought pursuant to the South Carolina Tort Claims Act §15-78-10, et. seq., South Carolina Code of Laws (1976) as amended.

9. Upon information and belief, at all times mentioned herein, the agents, servants and/or employees of Defendant, SCDOT, were acting within the course and scope of their employment with the agency.

10. Under the doctrines of *respondeat superior*, master/servant, and principal/agent, Defendant, SCDOT, is liable for the torts of its agents, servants and/or employees in the same manner and to the same extent as a private individual under like circumstances.

11. Upon information and belief, at all times mentioned herein, the Defendant, SCDOT, by and through its agents, servants and/or employees had the right and/or power to direct and control the manner in which its agents, servants and/or employees performed work in and around the intersection of Interstate 26 and North Main Street in Berkeley County, South Carolina.

12. The negligent acts, omissions and liabilities of the Defendants, SCDOT, Pilot Travel Center and McDonalds, include those by its agents, principals, employees and/or servants, both directly and vicariously, pursuant to the non-delegable duty, corporate liability, apparent authority, agency, ostensible agency and/or *respondeat superior*.

13. This Court has jurisdiction over the parties and matters in controversy, and venue is proper in Berkeley County.

FACTUAL ALLEGATIONS

14. All other allegations contained herein, to the extent that they are not inconsistent with the following, are incorporated by reference.

15. In the early evening hours of October 6, 2012, the Plaintiffs, Cynthia Wright, was a passenger on a motorcycle being driven by her husband, the Plaintiff Richard Wright, on North Main Street just past the Interstate 26 overpass when another motorist, Daniel Sena, who was on the same road and headed directly towards her, turned left to enter the McDonald's and/or the Pilot Travel Center directly in front of the Plaintiffs' causing the vehicles to collide.

16. Upon information and belief, there was no center island or similar structure that would prevent motorists from making a left turn within the operational area of the intersection of Interstate 26 and North Main Street.

17. The absence of a center island or similar structure created a hazardous/dangerous condition, and the Defendant, SCDOT, owed a duty to the driving public to inspect the

highways, specifically the intersection of Interstate 26 and North Main Street, to prevent the existence of hazardous road conditions.

FILED
14 MAY -5 PM 1:25
MARY E. BROWN
CLERK OF COURT
BERKELEY COUNTY, S.C.

18. Upon information and belief, the Defendant, SCDOT, had prior knowledge of the hazardous/dangerous condition on the intersection of Interstate 26 and North Main Street prior to the time Plaintiffs' vehicle was hit by Mr. Sena's vehicle.

19. Upon information and belief, said agent, servant and/or employee of Defendant, SCDOT, breached their duty of due care to the public and to the Plaintiffs by not placing a center island or similar structure in the vicinity of the scene at Interstate 26 and North Main Street.

20. The hazardous and dangerous condition was not ascertainable to motorists, and especially these Plaintiffs. Therefore the hazardous/dangerous condition was a latent defect, a hidden trap for the unwary motorist.

21. The failure to install a center island or similar structure posed a severe safety hazard to the motoring public which the Defendant, SCDOT, its agents, servants and employees, were fully aware of, and its failure to correct this defect was the direct and proximate cause of the aforementioned incident.

22. The Defendant, SCDOT, has a duty to inspect and maintain its system of highways of the State of South Carolina, for their full right of way, to determine if any dangerous conditions exist thereon, including intersections, and to take action to correct and/or repair such conditions if they present a hazard to the motoring public.

23. The Defendant, SCDOT, when aware of a condition presenting a hazardous condition to the motoring public, has an affirmative duty to respond to such notice in a timely manner, remedy such condition, and provide for the reasonably safe travel of the public upon the highway.

24. The Defendant, SCDOT, breached its duty of due care in allowing left hand turns at this intersection and by failing to inspect and/or remedy the dangerous condition, and, further, in failing to timely respond and correct such condition.

FOR A CAUSE OF ACTION OF NEGLIGENCE BY THE SCDOT

25. All other allegations contained herein, to the extent that they are not inconsistent with the following, are incorporated by reference.

26. The absence of a center island or similar structure to prevent left turns created a hazardous condition and the Defendant, SCDOT, owed a duty to the driving public to construct the highway to prevent the existence of hazardous road conditions at the intersection of Interstate 26 and North Main Street, and if such hazardous condition is known to the Defendant, SCDOT, to make improvements to the highway and to correct/remove hazard in a timely manner.

27. The Defendant, SCDOT, knew or should have known of the hazardous road conditions existing at the intersection of Interstate 26 and North Main Street at the time and place in question and therefore had a duty to quickly remedy or take measures that would correct or prevent the hazard.

28. The presence of the dangerous condition of the highway at the intersection of Interstate 26 and North Main Street created an unreasonable risk of serious harm to anyone driving a vehicle on this section of North Main Street, especially these Plaintiffs.

29. The Plaintiffs are members of the motoring public and North Main Street is a public highway in South Carolina and the Defendant, SCDOT, had a duty to ensure that North Main Street was constructed and maintained in a safe and proper manner, and that the Defendant, SCDOT breached its duty to the Plaintiffs and was thereby negligent, grossly negligent, careless,

reckless and acted in violation of the duties owed to the Plaintiffs in that it committed one or more of the following acts:

(a) improperly constructing and maintaining North Main Street and the entrances to businesses located thereon, to prevent motorists, specifically this Plaintiff, from being stricken by other motorist attempting to turn left across traffic when the Defendant SCDOT knew or reasonably should have known that the absence of a center island or similar structure and allowing a driveway in this area presented a danger to the motoring public;

(b) allowing McDonalds and Pilot Travel Center to have a driveway within the operational area of the intersection of Interstate 26 and North Main Street--a dangerous condition--when the SCDOT knew or should have known that such condition presented a danger to the motoring public;

(c) failing to use due diligence by regularly inspecting and/or maintaining their highways, including the intersection of Interstate 26 and North Main Street, to discover defects that endangered the motoring public;

(d) failing to properly maintain their highway, including driveways, to avoid risk of injury to motorists;

(e) failing to act as a reasonable person or agency charged with the duty of constructing, maintaining, and repairing the highways, including driveways, would have acted under the same or similar circumstances;

(f) failing to use the degree of care and caution that a reasonably prudent person would have exercised under the conditions then and there existing;

(g) failing to hire qualified agents, servants and/or employees to ensure that its agents, servants and/or employees performed their duties in a proper and safe manner;

(h) failing to train its agents, servants and/or employees to ensure that its agents, servants and/or employees performed their duties in a proper and safe manner;

(i) failing to provide proper and necessary supervision and monitoring to ensure that its agents, servants and/or employees performed their duties in a proper and safe manner;

(j) Violating the laws, statutes, regulations and/or ordinances of the State of South Carolina; and

(k) Is guilty of other negligent acts and omissions not specifically alleged but as the evidence at trial will show.

30. The negligence, gross negligence, carelessness, recklessness, willfulness and wantonness of the Defendant, SCDOT, through its agents, servants and/or employees, directly and proximately caused the injuries and losses of the Plaintiffs as is hereafter set forth.

FOR A CAUSE OF ACTION OF NEGLIGENCE BY MCDONALDS

31. All other allegations contained herein, to the extent that they are not inconsistent with the following, are incorporated by reference.

32. The driveway within the operational area of the intersection of Interstate 26 and North Main Street created a hazardous condition and the Defendant, McDonalds, owed a duty to the driving public to construct its driveway in such a way as to prevent the existence of hazardous road conditions at the intersection of Interstate 26 and North Main Street, and if such hazardous condition is known to the Defendant, McDonalds, to make improvements to the driveway and to correct/remove the hazard in a timely manner.

33. The Defendant, McDonalds, knew or should have known of the hazardous road conditions existing at the intersection of Interstate 26 and North Main Street at the time and place

in question and therefore had a duty to quickly remedy or take measures that would correct or prevent the hazard.

34. The presence of the dangerous condition of the highway and driveway at the intersection of Interstate 26 and North Main Street created an unreasonable risk of serious harm to anyone driving a vehicle on this section of North Main Street, especially this Plaintiff.

35. The Plaintiffs are members of the motoring public and North Main Street is a public highway in South Carolina and the Defendant, McDonalds, had a duty to ensure that its driveway was constructed and maintained in a safe and proper manner, and that the Defendant, McDonalds breached its duty to the Plaintiffs and was negligent, grossly negligent, careless, reckless and acted in violation of the duties owed to the Plaintiffs in that it committed one or more of the following acts:

(a) improperly constructing and maintaining the entrances to its business located at 1520 North Main Street in Summerville, South Carolina, to prevent motorists, specifically these Plaintiffs, from being stricken by other motorist attempting to turn left across traffic when the Defendant, McDonalds, knew or reasonably should have known that having a driveway in this area presented a danger to the motoring public;

(b) having a driveway within the operational area of the intersection of Interstate 26 and North Main Street --a dangerous condition--when Defendant, McDonalds, knew or should have known that such condition presented a danger to the motoring public;

(c) failing to use due diligence by regularly inspecting and/or maintaining their driveway to discover defects that endangered the motoring public;

(d) failing to properly maintain and correct their driveway to avoid risk of injury to motorists;

(e) failing to act as a reasonable person or corporation would have acted under the same or similar circumstances;

(f) failing to use the degree of care and caution that a reasonably prudent person would have exercised under the conditions then and there existing;

(g) failing to hire qualified agents, servants and/or employees to ensure that its agents, servants and/or employees performed their duties in a proper and safe manner;

(h) failing to train its agents, servants and/or employees to ensure that its agents, servants and/or employees performed their duties in a proper and safe manner;

(i) failing to provide proper and necessary supervision and monitoring to ensure that its agents, servants and/or employees performed their duties in a proper and safe manner;

(j) Violating the laws, statutes, regulations and/or ordinances of the State of South Carolina; and

(k) Is guilty of other negligent acts and omissions not specifically alleged but as the evidence at trial will show.

36. Which negligence, gross negligence, carelessness, recklessness, willfulness and wantonness of the Defendant, McDonalds, and through its agents, servants and/or employees, directly and proximately caused the injuries and losses of the Plaintiff as is hereafter set forth.

FOR A CAUSE OF ACTION OF
NEGLIGENCE BY PILOT TRAVEL CENTER

37. All other allegations contained herein, to the extent that they are not inconsistent with the following, are incorporated by reference.

38. The driveway within the operational area of the intersection of Interstate 26 and North Main Street created a hazardous condition and the Defendant, Pilot Travel Center, owed a

duty to the driving public to construct its driveway in such a way as to prevent the existence of hazardous road conditions at the intersection of Interstate 26 and North Main Street, and if such hazardous condition is known to the Defendant, Pilot Travel Center, to make improvements to the driveway and to correct/remove the hazard in a timely manner.

39. The Defendant, Pilot Travel Center, knew or should have known of the hazardous road conditions existing at the intersection of Interstate 26 and North Main Street at the time and place in question and therefore had a duty to quickly remedy or take measures that would correct or prevent the hazard.

40. The presence of the dangerous condition of the highway and driveway at the intersection of Interstate 26 and North Main Street created an unreasonable risk of serious harm to anyone driving a vehicle on this section of North Main Street, especially these Plaintiffs.

41. The Plaintiffs are members of the motoring public and North Main Street is a public highway in South Carolina and the Defendant, Pilot Travel Center, had a duty to ensure that its driveway was constructed and maintained in a safe and proper manner, and that the Defendant, Pilot Travel Center breached its duty to the Plaintiffs and was negligent, grossly negligent, careless, reckless and acted in violation of the duties owed to the Plaintiffs in that it committed one or more of the following acts:

(a) improperly constructing and maintaining the entrances to its business located at 1521 North Main Street in Summerville, South Carolina, to prevent motorists, specifically these Plaintiffs, from being stricken by other motorist attempting to turn left across traffic when the Defendant, Pilot Travel Center, knew or reasonably should have known that having a driveway in this area presented a danger to the motoring public;

(b) having a driveway within the operational area of the intersection of Interstate 26 and North Main Street --a dangerous condition--when Defendant, Pilot

Travel Center, knew or should have known that such condition presented a danger to the motoring public;

(c) failing to use due diligence by regularly inspecting and/or maintaining their driveway to discover defects that endangered the motoring public;

(d) failing to properly maintain and correct their driveway to avoid risk of injury to motorists;

(e) failing to act as a reasonable person or corporation would have acted under the same or similar circumstances;

(f) failing to use the degree of care and caution that a reasonably prudent person would have exercised under the conditions then and there existing;

(g) failing to hire qualified agents, servants and/or employees to ensure that its agents, servants and/or employees performed their duties in a proper and safe manner;

(h) failing to train its agents, servants and/or employees to ensure that its agents, servants and/or employees performed their duties in a proper and safe manner;

(i) failing to provide proper and necessary supervision and monitoring to ensure that its agents, servants and/or employees performed their duties in a proper and safe manner;

(j) Violating the laws, statutes, regulations and/or ordinances of the State of South Carolina; and

(k) Is guilty of other negligent acts and omissions not specifically alleged but as the evidence at trial will show.

42. Which negligence, gross negligence, carelessness, recklessness, willfulness and wantonness of the Defendant, Pilot Travel Center, and through its agents, servants and/or

employees, directly and proximately caused the injuries and losses of the Plaintiff as is hereafter set forth.

FOR A CAUSE OF ACTION OF
LOSS OF CONSORTIUM ASSERTED BY RICHARD WRIGHT

43. All other allegations contained herein, to the extent that they are not inconsistent with the following, are incorporated by reference.

44. Due to the injuries to the Plaintiff's wife which were caused by the negligence of the Defendants, the Plaintiff, Richard Wright, has lost the companionship, company, services, fellowship, assistance and comfort in her society he previously enjoyed with his wife, Cynthia Wright.

DAMAGES - AS TO CYNTHIA WRIGHT

45. All other allegations contained herein, to the extent that they are not inconsistent with the following, are incorporated by reference.

46. As the direct and proximate result of the aforesaid negligent, grossly negligent, careless, reckless, willful and wanton acts and/or omissions of the Defendants, the Plaintiff, Cynthia Wright:

(a) Suffered severe, life threatening injuries to various parts of her body;

(b) Was severely, seriously, painfully and permanently injured;

(c) Was forced to seek medical treatment and was hospitalized for a period of time;

(d) Will require lifetime medical treatment in the future;

(e) Was subjected to the administration of strong and potent drugs and medications;

(f) Suffered extreme, painful and dangerous injuries, including but not limited to, a traumatic brain injury, loss of a portion of her brain and head, a fracture in her head, pulmonary contusions, a takotsubo nonischemic cardiomyopathy, a fracture of her left toe, SIADH, an abdominal hematoma, and multiple other abrasions about her body;

(g) Sustained permanent scarring and disfigurement about her head and body;

(h) Has incurred and will incur in the future, substantial medical and doctors' bills due to her injuries;

(i) Was subjected to extreme pain, mental anguish, emotional distress, suffering and discomfort both in the past and in the future;

(j) Was humiliated and embarrassed before her friends, family, and neighbors;

(k) Is informed and believes that her earning capacity has been and will forever be impaired;

(l) Has been and will be prevented from attending to her usual and ordinary household duties; and

(m) Has been and will be prevented from pursing her normal hobbies and avocations and has suffered a severe loss of enjoyment of her life; and all to her damage, both actual and punitive, in an amount to be determined by the trier of fact.

DAMAGES - AS TO RICHARD WRIGHT

47. All other allegations contained herein, to the extent that they are not inconsistent with the following, are incorporated by reference.

48. As the direct and proximate result of the aforesaid negligent, grossly negligent, careless, reckless, willful and wanton acts and/or omissions of the Defendants, the Plaintiff, Richard Wright:

(a) Suffered severe, life threatening injuries to various parts of his body;

(b) Was severely, seriously, painfully and permanently injured;

(c) Was forced to seek medical treatment and was hospitalized for a period of time;

(d) Will require lifetime medical treatment in the future;

(e) Was subjected to the administration of strong and potent drugs and medications;

(f) Suffered extreme, painful and dangerous injuries, including but not limited to, a fracture of his Fibula, a fracture of his Tibia, a fracture of his right hip, and multiple other abrasions about his body;

(g) Sustained permanent scarring and disfigurement about his body;

(h) Has incurred and will incur in the future, substantial medical and doctors' bills due to his injuries;

(i) Was subjected to extreme pain, mental anguish, emotional distress, suffering and discomfort both in the past and in the future;

(j) Was humiliated and embarrassed before his friends, family, and neighbors;

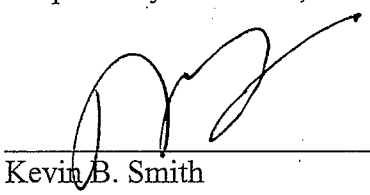
(k) Is informed and believes that his earning capacity has been and will forever be impaired; and

(l) Has lost the companionship, company, services, fellowship, assistance and comfort in her society he previously enjoyed with his wife, Cynthia Wright.

WHEREFORE, Plaintiffs demand a jury trial and judgment against Defendants, SCDOT, Pilot Travel Center and McDonalds, in an amount to be determined by the trier of fact, actual damages, consequential damages, punitive damages, for the costs of this action and for

such other and further relief as this Honorable Court deems just and proper.

Respectfully submitted,



Kevin B. Smith
Hoffman Law Firm
7087 Rivers Ave.
N. Charleston, SC 29406
(843) 769-7077
ksmith@hoffmanlaw.net
Attorney for the Plaintiff

North Charleston, South Carolina

May 1, 2014

STATE OF SOUTH CAROLINA)
) IN THE COURT OF COMMON PLEAS
COUNTY OF DORCHESTER)

Cynthia Wright and Richard Wright, Plaintiff(s))

CERTIFIED COPY
2015 OCT -8 AM 9:51
Cheryl Graham
CLERK OF COURT
DORCHESTER COUNTY

CIVIL ACTION COVERSHEET

2015-CP - 18 - 1947

vs.

Marathon Petroleum Company, LP f/k/a Marathon Ashland petroleum, LLC, Ashley Land Surveying, Inc. f/k/a Ashley Engineering & Surveying, Inc. and Ashley Engineering & Consulting, Inc., and Munlake Contractors, Inc.

Defendant(s))

Submitted By: Kevin B. Smith, Esquire
Address: Hoffman Law Firm
7087 Rivers Avenue, N. Charleston, SC 29406

SC Bar #: 70587
Telephone #: 843-769-7077
Fax #: 843-769-4567
Other:
E-mail: ksmith@hoffmanlaw.net
rhood@mcgowanhood.com

NOTE: The coversheet and information contained herein neither replaces nor supplements the filing and service of pleadings or other papers as required by law. This form is required for the use of the Clerk of Court for the purpose of docketing. It must be filled out completely, signed, and dated. A copy of this coversheet must be served on the defendant(s) along with the Summons and Complaint.

DOCKETING INFORMATION (*Check all that apply*)

**If Action is Judgment/Settlement do not complete*

- ☒ JURY TRIAL demanded in complaint. ☐ NON-JURY TRIAL demanded in complaint.
- ☐ This case is subject to ARBITRATION pursuant to the Court Annexed Alternative Dispute Resolution Rules.
- ☒ This case is subject to MEDIATION pursuant to the Court Annexed Alternative Dispute Resolution Rules.
- ☐ This case is exempt from ADR. (Proof of ADR/Exemption Attached)

NATURE OF ACTION (*Check One Box Below*)

Contracts
- ☐ Constructions (100)
- ☐ Debt Collection (110)
- ☐ General (130)
- ☐ Breach of Contract (140)
- ☐ Fraud/Bad Faith (150)
- ☐ Failure to Deliver/ Warranty (160)
- ☐ Employment Discrim (170)
- ☐ Employment (180)
- ☐ Other (199)

Torts - Professional Malpractice
- ☐ Dental Malpractice (200)
- ☐ Legal Malpractice (210)
- ☐ Medical Malpractice (220)

Previous Notice of Intent Case # 20____-NI-_____-_____
- ☐ Notice/ File Med Mal (230)
- ☐ Other (299)

Torts – Personal Injury
- ☐ Conversion (310)
- ☒ Motor Vehicle Accident (320)
- ☐ Premises Liability (330)
- ☐ Products Liability (340)
- ☐ Personal Injury (350)
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- ☐ Assault/Battery (370)
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- ☐ Other (399)

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- ☐ Claim & Delivery (400)
- ☐ Condemnation (410)
- ☐ Foreclosure (420)
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- ☐ Partition (440)
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- ☐ Building Code Violation (460)
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- ☐ PCR (500)
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- ☐ Reinstate Drv. License (800)
- ☐ Judicial Review (810)
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- ☐ Forfeiture-Petition (840)
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- ☐ Foreign Judgment (710)
- ☐ Magistrate's Judgment (720)
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- ☐ Transcript Judgment (740)
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- ☐ Magistrate-Civil (910)
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- ☐ SCDOT (950)
- ☐ Worker's Comp (960)
- ☐ Zoning Board (970)
- ☐ Public Service Comm. (990)
- ☐ Employment Security Comm (991)
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Special/Complex /Other
- ☐ Environmental (600)
- ☐ Automobile Arb. (610)
- ☐ Medical (620)
- ☐ Other (699)
- ☐ Sexual Predator (510)
- ☐ Pharmaceuticals (630)
- ☐ Unfair Trade Practices (640)
- ☐ Out-of State Depositions (650)
- ☐ Motion to Quash Subpoena in an Out-of-County Action (660)
- ☐ Pre-Suit Discovery (670)

Submitting Party Signature: _____ **Date:**

Note: Frivolous civil proceedings may be subject to sanctions pursuant to SCRCP, Rule 11, and the South Carolina Frivolous Civil Proceedings Sanctions Act, S.C. Code Ann. §15-36-10 et. seq.

FOR MANDATED ADR COUNTIES ONLY

Aiken, Allendale, Anderson, Bamberg, Barnwell, Beaufort, Berkeley, Calhoun, Charleston, Cherokee, Clarendon, Colleton, Darlington, Dorchester, Florence, Georgetown, Greenville, Hampton, Horry, Jasper, Kershaw, Lee, Lexington, Marion, Oconee, Orangeburg, Pickens, Richland, Spartanburg, Sumter, Union, Williamsburg, and York

SUPREME COURT RULES REQUIRE THE SUBMISSION OF ALL CIVIL CASES TO AN ALTERNATIVE DISPUTE RESOLUTION PROCESS, UNLESS OTHERWISE EXEMPT.

You are required to take the following action(s):

1. The parties shall select a neutral and file a "Proof of ADR" form on or by the 210th day of the filing of this action. If the parties have not selected a neutral within 210 days, the Clerk of Court shall then appoint a primary and secondary mediator from the current roster on a rotating basis from among those mediators agreeing to accept cases in the county in which the action has been filed.

2. The initial ADR conference must be held within 300 days after the filing of the action.

3. Pre-suit medical malpractice mediations required by S.C. Code §15-79-125 shall be held not later than 120 days after all defendants are served with the "Notice of Intent to File Suit" or as the court directs. (Medical malpractice mediation is mandatory statewide.)

4. Cases are exempt from ADR only upon the following grounds:

    a. Special proceeding, or actions seeking extraordinary relief such as mandamus, habeas corpus, or prohibition;

    b. Requests for temporary relief;

    c. Appeals

    d. Post Conviction relief matters;

    e. Contempt of Court proceedings;

    f. Forfeiture proceedings brought by governmental entities;

    g. Mortgage foreclosures; and

    h. Cases that have been previously subjected to an ADR conference, unless otherwise required by Rule 3 or by statute.

5. In cases not subject to ADR, the Chief Judge for Administrative Purposes, upon the motion of the court or of any party, may order a case to mediation.

6. Motion of a party to be exempt from payment of neutral fees due to indigency should be filed with the Court within ten (10) days after the ADR conference has been concluded.

Please Note: **You must comply with the Supreme Court Rules regarding ADR. Failure to do so may affect your case or may result in sanctions.**

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
CERTIFIED COPY
COUNTY OF DORCHESTER) FIRST JUDICIAL CIRCUIT
2015 OCT -8 AM 9:56

Cynthia Wright and Richard Wright,) C.A. No.: 2015-CP-18-1947
CLERK OF COURT
DORCHESTER COUNTY

Plaintiffs,)

vs.) **SUMMONS**
(Jury Trial Requested)

Marathon Petroleum Company, LP f/k/a Marathon Ashland Petroleum, LLC, Ashley Land Surveying, Inc. f/k/a Ashley Engineering & Surveying, Inc. and Ashley Engineering & Consulting, Inc., and Munlake Contractors, Inc.

Defendants.)

YOU ARE HEREBY SUMMONED and required to Answer the Complaint in this action, a copy of which is herewith served upon you, and to serve a copy of your Answer to said Complaint on the subscriber at his office at 1539 Healthcare Drive, Rock Hill, South Carolina, 29732, within thirty (30) days from the service hereof, exclusive of the date of such service; and if you fail to Answer the Complaint within the time aforesaid, judgment by default will be rendered against you for the relief demanded in the Complaint.

Kevin B. Smith
SC Bar No.: 70587
HOFFMAN LAW FIRM
7087 Rivers Ave.
N. Charleston, SC 29406
(843) 769-7077
ksmith@hoffmanlaw.net

S. Randall Hood
MCGOWAN, HOOD & FELDER, LLC
1539 Health Care Drive
Rock Hill, South Carolina 29732
803-327-7800 (phone)
rhood@mcgowanhood.com

Shawn B. Deery
MCGOWAN, HOOD & FELDER, LLC
1517 Hampton Street
Columbia, South Carolina 29201
(803) 779-0100 (Columbia)
sdeery@mcgowanhood.com

Attorneys for the Plaintiffs

Rock Hill, South Carolina

October 1, 2015

STATE OF SOUTH CAROLINA CERTIFIED COPY) IN THE COURT OF COMMON PLEAS

COUNTY OF DORCHESTER 2015 OCT -8 PM 9:51) FIRST JUDICIAL CIRCUIT

Cynthia Wright and Richard Wright,) C.A. No.: 2015-CP-18-1947

CLERK OF COURT DORCHESTER COUNTY

Plaintiffs,)

vs.)

Marathon Petroleum Company, LP f/k/a Marathon Ashland Petroleum, LLC, Ashley Land Surveying, Inc. f/k/a Ashley Engineering & Surveying, Inc. and Ashley Engineering & Consulting, Inc., and Munlake Contractors, Inc.)

Defendants.)

COMPLAINT
(Jury Trial Requested)

Cynthia Wright and Richard Wright (hereinafter by name or collectively "Plaintiffs"), complaining of the above-named Defendants – Marathon Petroleum Company, LP f/k/a Marathon Ashland Petroleum, LLC (hereinafter "Marathon"), Ashley Land Surveying, Inc. f/k/a Ashley Engineering & Surveying, Inc. and Ashley Engineering & Consulting, Inc. (hereinafter "Ashley") and Munlake Contractors, Inc. (hereinafter "Munlake") – would respectfully show unto this Honorable Court as follows:

[Note: This matter is related to another action Plaintiffs previously filed against the South Carolina Department of Transportation and Pilot Travel Centers, LLC. That action (2014–CP–08-675) is currently pending in the Berkeley County Court of Common Pleas. Plaintiffs anticipate that to best serve judicial economy, they will file a motion for complex case designation along with a motion to consolidate the two actions in this Court].

THE PARTIES, JURISDICTION, AND VENUE

1. Plaintiffs Cynthia and Richard Wright are and were at all times relevant to the allegations in this Compliant, citizens and residents of Dorchester County, South Carolina.

2. Upon information and belief, Defendant Marathon Petroleum Company, LP, f/k/a Marathon Ashland Petroleum, LLC, (hereinafter "Marathon") is a company organized and existing under the laws of the State of Delaware.

3. Marathon is listed on the South Carolina Secretary of State's website as a foreign corporation whose registered agent is CT Corporation System, 2 Office Park Court (Suite 103), Columbia, S.C. 29223.

4. Marathon currently, and at all times relevant to the allegations contained herein, transacts and transacted business in multiple counties throughout the State of South Carolina.

5. Upon information and belief, Marathon is a supplier of gasoline to resellers and customers in the Midwest, Gulf Coast, and Southeast regions of the United States.

6. Upon information and belief, Marathon operates and or operated (at the times relevant to this Complaint) convenience stores and/or gas stations throughout the locations described in Paragraph 4 and in South Carolina in particular.

7. Upon information and belief, Marathon's servants, agents, or employees (in conjunction with, or independent of, another similar company – Pilot Travel Centers, LLC (hereinafter "Pilot")) – were involved in the construction, planning, and/or rebuilding of a gas station/convenience store located at 1521 North Main Street

in Summerville, South Carolina currently operating under the name "Pilot Travel Center."

8. Upon information and belief, at the times relevant to the allegations contained in this Complaint, the gas station/convenience store at the location described in Paragraph 7, was being operated by Marathon and Pilot as a joint venture, was co-owned by the two companies, or was otherwise operated in a manner involving input from both companies.

9. Upon information and belief, Defendant Ashley Land Surveying, Inc. f/k/a Ashley Engineering & Surveying, Inc. and Ashley Engineering & Consulting, Inc. (hereinafter "Ashley"), is a company organized and existing under the laws of the State of South Carolina.

10. Ashley is listed on the South Carolina Secretary of State's website as a domestic corporation with its registered agent located at 306 Sangaree Parkway, Summerville, S.C. 29483.

11. Ashley, currently and at all times relevant to the allegations contained herein, transacts and transacted business in multiple counties throughout the State of South Carolina, including Dorchester and Berkeley Counties.

12. Upon information and belief, Ashley provides surveying, construction, consulting, and planning services for, among other things, commercial site development throughout South Carolina.

13. Upon information and belief, Ashley's servants, agents, or employees were involved in the construction, planning, and/or rebuilding of the Pilot Travel Center gas station/convenience store located at 1521 North Main Street in Summerville, South Carolina.

14. In this capacity, among other things, Ashley applied for, and was granted, an Encroachment Permit (for encroaching on land under the control of the South Carolina Department of Transportation) for the construction of asphalt driveways at the Pilot Travel Center at issue in this litigation.

15. Upon information and belief, Defendant Munlake Contractors, Inc. (hereinafter "Munlake") is a corporation organized and existing under the laws of the State of Missouri.

16. Munlake is listed on the South Carolina Secretary of State's website as a foreign corporation whose registered agent is National Registered Agents, Inc., 2 Office Park Court (Suite 103), Columbia, S.C. 29223.

17. Munlake, currently, and at all times relevant to the allegations contained herein, transacts and transacted business in multiple counties throughout the State of South Carolina.

18. Upon information and belief, Munlake is, among other things, a pre-construction consulting, construction management, and general contracting firm that operates throughout the United States.

19. Upon information and belief, servants, agents, or employees of Munlake were involved in the construction, planning, or rebuilding of the Pilot Travel Center at 1521 North Main Street in Summerville South Carolina at issue in this litigation.

20. Upon information and belief, Munlake was the general contractor for the Pilot Travel Center gas station/convenience store described above that is at the heart of this lawsuit.

21. At all times relevant to this action, the agents, servants, and/or employees of Marathon, Ashley, and Munlake were agents or employees of each company and were

acting within the course and scope of his or her employment and/or agency, or apparent agency.

22. The negligent acts, omissions, and liability of Marathon, Ashley, and Munlake includes that of their agents, principals, employees, and/or servants, both directly and vicariously, pursuant to principles of non-delegable duty, corporate liability, apparent authority, agency, ostensible agency, and/or respondeat superior.

23. Dorchester County, South Carolina is the proper venue for this action as the Plaintiffs and one of the Defendants – Ashley – resides in Dorchester County.

24. Though there is diversity of citizenship among some of the parties, Plaintiffs and Defendant Ashley are both citizens and residents of the State of South Carolina.

JOINT AND SEVERAL LIABILITY

25. The above-named Defendants – Marathon, Ashley, and Munlake – are jointly and severally liable for all the damages alleged herein since their negligent, grossly negligent, reckless, and wanton acts and omissions, singularly, or in combination, are the contributing proximate cause(s) of Plaintiffs' damages and injuries.

GENERAL FACTUAL ALLEGATIONS

26. All other allegations contained herein, to the extent that they are not inconsistent with the following, are incorporated by reference.

27. In the early evening hours of October 6, 2012, Plaintiff Richard Wright was operating a motorcycle with his wife, Plaintiff Cynthia Wright, who was riding on the rear of the motorcycle as a passenger.

28. As Plaintiffs were traveling on North Main Street in Summerville, South Carolina (Highway 17A just past the Interstate 26 overpass), another motorist, Daniel Sena, was on the same road and traveling in the opposite direction.

29. In an effort to turn into the Pilot Travel Center, Mr. Sena turned left across Plaintiffs' lane of travel directly in the path of Plaintiffs' motorcycle. As a result, Plaintiffs' motorcycle collided with Mr. Sena's vehicle in a violent and severe collision.

30. Plaintiffs were thrown from the motorcycle and although both suffered serious injuries, Plaintiff Cynthia Wright suffered particularly serious and debilitating head injuries, which required multiple operations and/or surgeries.

31. Upon information and belief, no unmountable median or similar structure existed between the lanes that would prevent motorists from making a left turn (across opposing lanes of traffic) into the Pilot Travel Center on this portion of North Main Street.

32. The absence of an unmountable median or similar structure to prevent vehicle traffic from crossing opposing lanes creates and created, a hazardous and dangerous condition that was responsible for Plaintiffs' injuries and damages.

33. This hazardous and dangerous condition was not ascertainable to motorists traveling on North Main Street (Highway 17A) and especially Plaintiffs. Therefore the hazardous/dangerous condition amounted to a latent defect and a hidden trap for the unwary motorists using this highway.

34. Upon information and belief, when originally constructed, the subject portion of North Main Street (Highway 17A) contained an unmountable median that would have prevented the subject accident.

35. Upon information and belief, in the process of planning, constructing, and/or rebuilding the Pilot Travel Center at this location, the above-named Defendants participated in the destruction, removal, and/or redesign of the portion of North Main Street (Highway 17A) that contained the unmountable median barrier.

36. Upon information and belief, in September of 2000, agents, servants, or employees of Defendant Marathon negotiated with representatives from the South Carolina Department of Transportation (SCDOT) to remove the unmountable median barrier that existed at the subject location.

37. Upon information and belief, the purpose behind removing the unmountable median barrier was to increase traffic into the Pilot Travel Center at the subject location.

38. Upon information and belief, these negotiations took place and the barrier removed even though Marathon knew, or should have known, that removing the barriers would result in vehicles making illegal turns across several lanes of oncoming traffic in the Pilot Travel Center.

39. In fact, this is exactly what happened and what caused damages and injuries as further described herein to Plaintiffs.

40. Upon information and belief, at the heart of these negotiations (for the median barrier's removal) was a desire of Marathon to increase vehicular traffic into the Pilot Travel Center, and thereby increase sales and profits.

41. These negotiations were undertaken with a reckless disregard for the safety of the motoring public, specifically including Plaintiffs, which use this portion of North Main Street (Highway 17A) in Summerville, South Carolina.

42. Upon information and belief, in July 2002, Defendant Ashley participated in the redesign of the Pilot Travel Center.

43. Among other things, and as noted previously, Ashley applied for, and was granted, an Encroachment Permit – S-08-020161 – in July 2002, that contemplated Defendant Ashley constructing (or supervising the construction of) 4 asphalt driveways for commercial and truck access at or around the subject Pilot Travel Center.

44. Upon information and belief, at least one of these driveways is immediately across from the location of the subject accident and the portion of North Main Street (Highway 17A) where the unmountable median was removed.

45. Upon information and belief, Defendant Ashley participated in the approval, removal, or redesign of the unmountable median at the location of the subject accident.

46. Upon information and belief, Defendant Munlake was the general contractor for the construction, planning, and/or rebuilding of the subject Pilot Travel Center.

47. In this capacity, Munlake either participated in, approved, directed, or was otherwise involved in the decision to remove, and/or the actual removal, of the unmountable median at the location of the subject accident along North Main Street (Highway 17A) and in front of the subject Pilot Travel Center.

48. As a result of Defendants' actions in removing the unmountable median, in addition to other acts of malfeasance, Plaintiffs suffered serious and grievous injuries and damages, including medical bills in excess of one million dollars.

49. All Defendants, their employees and/or agents, had duties to Plaintiffs and their actions were negligent, grossly negligent, wanton and reckless, and contributed to the subject accident.

50. As a result of Defendants' negligent, grossly negligent, wanton and reckless actions, the subject collision resulted in Plaintiffs' injuries and damages.

FOR A FIRST CAUSE OF ACTION
(Negligence)

51. Plaintiffs repeat and reallege Paragraphs 1 through 50 as though fully set forth herein verbatim and would further allege:

AS TO DEFENDANT MARATHON

52. Plaintiffs are informed and believe that Defendant Marathon owed multiple duties to Plaintiffs, including, but not limited to, ensuring that the design and construction of the subject Pilot Travel Center was safe for the motoring public.

53. Defendant Marathon was negligent, careless, wanton, reckless, and grossly negligent at the time and place hereinabove mentioned in the following particulars:

a. In negotiating the removal of the unmountable barrier at the accident location;

b. In negotiating the removal of the unmountable barrier at the accident location when it knew or should have known that removing the unmountable median would result in automobile traffic illegally crossing oncoming lanes of traffic;

c. In negotiating the removal of the unmountable barrier when it knew or should have known that doing so would create a latent defect – hazardous to vehicular traffic;

d. In putting profits above the safety of the motoring public;

e. In improperly constructing, or causing to be constructed, the entrances to the subject Pilot Travel Center in such a way as to prevent motorists from being stricken by vehicles illegally crossing North Main Street (Highway 17A) at the accident location;

f. In negotiating the unmountable barrier's removal when it was foreseeable that motorists would illegally cross North Main Street;

g. In generally failing to use the degree of care and caution that a reasonably prudent company would have used under the same or similar circumstances; and

h. In such other particulars as may be proved through the use of discovery in this matter.

AS TO DEFENDANT ASHLEY

54. Plaintiffs are informed and believe that Defendant Ashley owed multiple duties to Plaintiffs, including, but not limited to, ensuring that the design and construction of the subject Pilot Travel Center was safe for the motoring public.

55. Defendant Ashley was negligent, careless, wanton, reckless, and grossly negligent at the time and place hereinabove mentioned in the following particulars.

a. In improperly constructing, or causing to be constructed, the entrances to the subject Pilot Travel Center in such a way as to prevent motorists from being stricken by vehicles illegally crossing North Main Street (Highway 17A) at the accident location;

b. In participating in, approving, or suggesting the unmountable barrier's removal when it was foreseeable that motorists would illegally cross North Main Street (Highway 17A);

c. In participating in, approving, or suggesting the unmountable barrier's removal when it was foreseeable that it would create an unsafe condition for the motoring public at the accident location;

d. In generally failing to use the degree of care and caution that a reasonably prudent company would have used under the same or similar circumstances; and

e. In such other particulars as may be proved through the use of discovery in this case.

AS TO DEFENDANT MUNLAKE

56. Plaintiffs are informed and believe that Defendant Munlake owed multiple duties to Plaintiffs including, but not limited to, ensuring that the design and construction of the subject Pilot Travel Center was safe for the motoring public.

a. In improperly constructing, or causing to be constructed, the subject Pilot Travel Center (including, but not limited to, the driveways used for ingress and egress to same) in such a way as to prevent motorists from being stricken by vehicles illegally crossing North Main Street (Highway 17A) at the accident location;

b. In participating in, approving, or suggesting the unmountable barrier's removal when it was foreseeable that motorists would illegally cross North Main Street (Highway 17A);

c. In participating in, approving, or suggesting the unmountable barrier's removal when it was foreseeable that it would create an unsafe condition for the motoring public at the accident location;

d. In generally failing to use the degree of care and caution that a reasonably prudent contractor would have used under the same or similar circumstances; and

e. In such other particulars as may be proved through the use of discovery in this case.

FOR A SECOND CAUSE OF ACTION
(Loss of Consortium)

57. Plaintiffs hereby repeat and reallege Paragraphs 1 through 56 as though fully set forth herein verbatim and would further allege:

58. As a direct and proximate result of the negligent, carless, reckless, wanton, grossly negligent, and willful actions or inactions by Defendants, their agents, and/or employees, and the breach of duties owed to Plaintiffs, Plaintiff Richard Wright has lost the care, companionship, comfort, society, and consortium of his wife, Plaintiff Cynthia Wright, for which he is entitled to recover actual and consequential damages in an amount to be determined by the jury to be full and just at the trial of this action.

DAMAGES – AS TO CYNTHIA WRIGHT

59. Plaintiffs hereby repeat and reallege Paragraphs 1 through 58 as though fully set forth herein verbatim and would further allege:

60. As the direct and proximate result of the aforesaid negligent, grossly negligent, careless, reckless, willful and wanton acts and/or omissions of the Defendants, Plaintiff Cynthia Wright:

a. Suffered severe life-threatening injuries to various parts of her body;

b. Was severely, seriously, painfully, and permanently injured;

c. Was forced to seek medical treatment and was hospitalized for a period of time;

d. Will require lifetime medical treatment in the future;

e. Suffered extreme injuries, including, but not limited to, a traumatic brain injury, loss of a portion of her brain and head, skull fracture, pulmonary contusions, cardiomyopathy, left toe fracture, an abdominal hematoma, and multiple abrasions over her body;

f. Permanent scarring and disfigurement;

g. Has and will in the future incur medical bills and expenses;

h. Extreme pain, mental anguish, emotional distress, suffering and discomfort both in the past and future;

i. Loss of earning capacity;

j. Loss of the enjoyment of life that she will never fully recover; and

k. Other damages as will be shown through discovery in this matter.

DAMAGES – AS TO PLAINTIFF RICHARD WRIGHT

61. Plaintiffs hereby repeat and reallege Paragraphs 1 through 60 as though fully set forth herein verbatim and would further allege:

62. As a direct and proximate result of the aforesaid negligent, grossly negligent, careless, reckless, willful and wanton acts and/or omissions of the Defendants, Plaintiff Richard Wright:

a. Suffered severe, life-threatening injuries to various parts of his body;

b. Was severely, seriously, painfully, and permanently injured;

c. Will require lifetime medical treatment in the future;

d. Suffered extreme, painful, and dangerous injuries, including, but not limited to, fractures of his fibula, tibia, right hip and abrasions over the rest of his body;

e. Permanent scaring and disfigurement;

f. Substantial medical bills past and future;

g. Extreme pain, discomfort, mental anguish, emotional distress, and discomfort past and future;

h. Loss of earning capacity past and future;

i. Loss of the enjoyment of life that he will never fully recover;

j. Loss of his wife's companionship, company, services, fellowship, assistance, and comfort in her society that he enjoyed prior to the subject accident; and

k. Other damages as will be shown through discovery in this matter.

WHEREFORE, Plaintiffs respectfully pray for judgment against the above-named Defendants for all actual and consequential damages in an amount to be determined by the jury at the trial of this action. Additionally, Plaintiffs pray for judgment against these Defendants for the costs and disbursements of this action and for such other and further relief as this Court deems is just and proper.

Signature on following page

Kevin B. Smith
HOFFMAN LAW FIRM
7087 Rivers Ave.
N. Charleston, SC 29406
(843) 769-7077
ksmith@hoffmanlaw.net

S. Randall Hood
MCGOWAN, HOOD & FELDER, LLC
1539 Health Care Drive
Rock Hill, South Carolina 29732
803-327-7800 (phone)
rhood@mcgowanhood.com

Shawn B. Deery
MCGOWAN, HOOD & FELDER, LLC
1517 Hampton Street
Columbia, South Carolina 29201
(803) 779-0100 (Columbia)
sdeery@mcgowanhood.com

Attorneys for the Plaintiffs

Rock Hill, South Carolina

October 1, 2015

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF BERKELEY	)	NINTH JUDICIAL CIRCUIT
Cynthia Wright and Richard Wright,	)	C.A. No.: 2016-CP-08-334
Plaintiffs,	)	
vs.	)	**AMENDED SUMMONS** (Jury Trial Requested)
Speedway, LLC, Ashley Land Surveying, Inc. f/k/a Ashley Engineering & Surveying, Inc. and Ashley Engineering & Consulting, Inc., and Munlake Contractors, Inc.	)	
Defendants.	)	

FILED
2016 MAR 14 PM 1:08
MARY P. BROWN
CLERK OF COURT
BERKELEY COUNTY, SC

YOU ARE HEREBY SUMMONED and required to Answer the Complaint in this action, a copy of which is herewith served upon you, and to serve a copy of your Answer to said Complaint on the subscriber at his office at 1539 Healthcare Drive, Rock Hill, South Carolina, 29732, within thirty (30) days from the service hereof, exclusive of the date of such service; and if you fail to Answer the Complaint within the time aforesaid, judgment by default will be rendered against you for the relief demanded in the Complaint.

Kevin B. Smith
SC Bar No.: 70587
HOFFMAN LAW FIRM
7087 Rivers Ave.
N. Charleston, SC 29406
(843) 769-7077
ksmith@hoffmanlaw.net

S. Randall Hood
MCGOWAN, HOOD & FELDER, LLC
1539 Health Care Drive
Rock Hill, South Carolina 29732
803-327-7800 (phone)
rhood@mcgowanhood.com

Shawn B. Deery
MCGOWAN, HOOD & FELDER, LLC
1517 Hampton Street
Columbia, South Carolina 29201
(803) 779-0100 (Columbia)
sdeery@mcgowanhood.com

Attorneys for the Plaintiffs

Rock Hill, South Carolina

March 10, 2016

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF BERKELEY	)	NINTH JUDICIAL CIRCUIT
	)	
Cynthia Wright and Richard Wright,	)	C.A. No.: 2016-CP-08-334
	)	
Plaintiffs,	)	
	)	
vs.	)	**AMENDED COMPLAINT**
	)	(Jury Trial Requested)
Speedway, LLC, Ashley Land Surveying, Inc. f/k/a Ashley Engineering & Surveying, Inc. and Ashley Engineering & Consulting, Inc., and Munlake Contractors, Inc.	)	
	)	
Defendants.	)	
	)	

FILED
2016 MAR 14 PM 1:08
MARY P. BROWN
CLERK OF COURT
BERKELEY COUNTY, SC

Per the Consent Order dated February 9, 2016, this Complaint is hereby amended to reflect the substitution of Speedway, LLC for Marathon Petroleum Company, LP f/k/a Marathon Ashland Petroleum, LLC.

Cynthia Wright and Richard Wright (hereinafter by name or collectively "Plaintiffs"), complaining of the above-named Defendants – Speedway, LLC (hereinafter "Speedway"), Ashley Land Surveying, Inc. f/k/a Ashley Engineering & Surveying, Inc. and Ashley Engineering & Consulting, Inc. (hereinafter "Ashley") and Munlake Contractors, Inc. (hereinafter "Munlake") – would respectfully show unto this Honorable Court as follows:

[Note: This matter is related to another action Plaintiffs previously filed against the South Carolina Department of Transportation and Pilot Travel Centers, LLC. That action (2014–CP–08-675) is currently pending in the Berkeley County Court of Common Pleas. Plaintiffs anticipate that to best serve judicial economy, they will file a

motion for complex case designation along with a motion to consolidate the two actions in this Court].

THE PARTIES, JURISDICTION, AND VENUE

1. Plaintiffs Cynthia and Richard Wright are and were at all times relevant to the allegations in this Compliant, citizens and residents of Dorchester County, South Carolina.

2. Upon information and belief, Defendant Speedway is a company organized and existing under the laws of the State of Delaware.

3. Speedway is listed on the South Carolina Secretary of State's website as a foreign corporation whose registered agent is CT Corporation System, 2 Office Park Court (Suite 103), Columbia, S.C. 29223.

4. Speedway currently, and at all times relevant to the allegations contained herein, transacts and transacted business in multiple counties throughout the State of South Carolina.

5. Upon information and belief, Speedway is a supplier of gasoline to resellers and customers in the Midwest, Gulf Coast, and Southeast regions of the United States.

6. Upon information and belief, Speedway operates and or operated (at the times relevant to this Complaint) convenience stores and/or gas stations throughout the locations described in Paragraph 4 and in South Carolina in particular.

7. Upon information and belief, Speedway's servants, agents, or employees (in conjunction with, or independent of, another similar company – Pilot Travel Centers, LLC (hereinafter "Pilot")) – were involved in the construction, planning,

and/or rebuilding of a gas station/convenience store located at 1521 North Main Street in Summerville, South Carolina currently operating under the name "Pilot Travel Center."

8. Upon information and belief, at the times relevant to the allegations contained in this Complaint, the gas station/convenience store at the location described in Paragraph 7, was being operated by Speedway and Pilot as a joint venture, was co-owned by the two companies, or was otherwise operated in a manner involving input from both companies.

9. Upon information and belief, Defendant Ashley Land Surveying, Inc. f/k/a Ashley Engineering & Surveying, Inc. and Ashley Engineering & Consulting, Inc. (hereinafter "Ashley"), is a company organized and existing under the laws of the State of South Carolina.

10. Ashley is listed on the South Carolina Secretary of State's website as a domestic corporation with its registered agent located at 306 Sangaree Parkway, Summerville, S.C. 29483.

11. Ashley, currently and at all times relevant to the allegations contained herein, transacts and transacted business in multiple counties throughout the State of South Carolina, including Dorchester and Berkeley Counties.

12. Upon information and belief, Ashley provides surveying, construction, consulting, and planning services for, among other things, commercial site development throughout South Carolina.

13. Upon information and belief, Ashley's servants, agents, or employees were involved in the construction, planning, and/or rebuilding of the Pilot Travel Center gas

station/convenience store located at 1521 North Main Street in Summerville, South Carolina.

14. In this capacity, among other things, Ashley applied for, and was granted, an Encroachment Permit (for encroaching on land under the control of the South Carolina Department of Transportation) for the construction of asphalt driveways at the Pilot Travel Center at issue in this litigation.

15. Upon information and belief, Defendant Munlake Contractors, Inc. (hereinafter "Munlake") is a corporation organized and existing under the laws of the State of Missouri.

16. Munlake is listed on the South Carolina Secretary of State's website as a foreign corporation whose registered agent is National Registered Agents, Inc., 2 Office Park Court (Suite 103), Columbia, S.C. 29223.

17. Munlake, currently, and at all times relevant to the allegations contained herein, transacts and transacted business in multiple counties throughout the State of South Carolina.

18. Upon information and belief, Munlake is, among other things, a pre-construction consulting, construction management, and general contracting firm that operates throughout the United States.

19. Upon information and belief, servants, agents, or employees of Munlake were involved in the construction, planning, or rebuilding of the Pilot Travel Center at 1521 North Main Street in Summerville, South Carolina at issue in this litigation.

20. Upon information and belief, Munlake was the general contractor for the Pilot Travel Center gas station/convenience store described above that is at the heart of this lawsuit.

21. At all times relevant to this action, the agents, servants, and/or employees of Speedway, Ashley, and Munlake were agents or employees of each company and were acting within the course and scope of his or her employment and/or agency, or apparent agency.

22. The negligent acts, omissions, and liability of Speedway, Ashley, and Munlake includes that of their agents, principals, employees, and/or servants, both directly and vicariously, pursuant to principles of non-delegable duty, corporate liability, apparent authority, agency, ostensible agency, and/or respondeat superior.

23. Berkeley County, South Carolina is the proper venue for this action as the Plaintiffs and one of the Defendants – Ashley – resides in Berkeley County.

24. Though there is diversity of citizenship among some of the parties, Plaintiffs and Defendant Ashley are both citizens and residents of the State of South Carolina.

JOINT AND SEVERAL LIABILITY

25. The above-named Defendants – Speedway, Ashley, and Munlake – are jointly and severally liable for all the damages alleged herein since their negligent, grossly negligent, reckless, and wanton acts and omissions, singularly, or in combination, are the contributing proximate cause(s) of Plaintiffs' damages and injuries.

GENERAL FACTUAL ALLEGATIONS

26. All other allegations contained herein, to the extent that they are not inconsistent with the following, are incorporated by reference.

27. In the early evening hours of October 6, 2012, Plaintiff Richard Wright was operating a motorcycle with his wife, Plaintiff Cynthia Wright, who was riding on the rear of the motorcycle as a passenger.

28. As Plaintiffs were traveling on North Main Street in Summerville, South Carolina (Highway 17A just past the Interstate 26 overpass), another motorist, Daniel Sena, was on the same road and traveling in the opposite direction.

29. In an effort to turn into the Pilot Travel Center, Mr. Sena turned left across Plaintiffs' lane of travel directly in the path of Plaintiffs' motorcycle. As a result, Plaintiffs' motorcycle collided with Mr. Sena's vehicle in a violent and severe collision.

30. Plaintiffs were thrown from the motorcycle and although both suffered serious injuries, Plaintiff Cynthia Wright suffered particularly serious and debilitating head injuries, which required multiple operations and/or surgeries.

31. Upon information and belief, no unmountable median or similar structure existed between the lanes that would prevent motorists from making a left turn (across opposing lanes of traffic) into the Pilot Travel Center on this portion of North Main Street.

32. The absence of an unmountable median or similar structure to prevent vehicle traffic from crossing opposing lanes creates and created, a hazardous and dangerous condition that was responsible for Plaintiffs' injuries and damages.

33. This hazardous and dangerous condition was not ascertainable to motorists traveling on North Main Street (Highway 17A) and especially Plaintiffs. Therefore the hazardous/dangerous condition amounted to a latent defect and a hidden trap for the unwary motorists using this highway.

34. Upon information and belief, when originally constructed, the subject portion of North Main Street (Highway 17A) contained an unmountable median that would have prevented the subject accident.

35. Upon information and belief, in the process of planning, constructing, and/or rebuilding the Pilot Travel Center at this location, the above-named Defendants participated in the destruction, removal, and/or redesign of the portion of North Main Street (Highway 17A) that contained the unmountable median barrier.

36. Upon information and belief, in September of 2000, agents, servants, or employees of Defendant Speedway negotiated with representatives from the South Carolina Department of Transportation (SCDOT) to remove the unmountable median barrier that existed at the subject location.

37. Upon information and belief, the purpose behind removing the unmountable median barrier was to increase traffic into the Pilot Travel Center at the subject location.

38. Upon information and belief, these negotiations took place and the barrier removed even though Speedway knew, or should have known, that removing the barriers would result in vehicles making illegal turns across several lanes of oncoming traffic in the Pilot Travel Center.

39. In fact, this is exactly what happened and what caused damages and injuries as further described herein to Plaintiffs.

40. Upon information and belief, at the heart of these negotiations (for the median barrier's removal) was a desire of Speedway to increase vehicular traffic into the Pilot Travel Center, and thereby increase sales and profits.

41. These negotiations were undertaken with a reckless disregard for the safety of the motoring public, specifically including Plaintiffs, which use this portion of North Main Street (Highway 17A) in Summerville, South Carolina.

42. Upon information and belief, in July 2002, Defendant Ashley participated in the redesign of the Pilot Travel Center.

43. Among other things, and as noted previously, Ashley applied for, and was granted, an Encroachment Permit – S-08-020161 – in July 2002, that contemplated Defendant Ashley constructing (or supervising the construction of) 4 asphalt driveways for commercial and truck access at or around the subject Pilot Travel Center.

44. Upon information and belief, at least one of these driveways is immediately across from the location of the subject accident and the portion of North Main Street (Highway 17A) where the unmountable median was removed.

45. Upon information and belief, Defendant Ashley participated in the approval, removal, or redesign of the unmountable median at the location of the subject accident.

46. Upon information and belief, Defendant Munlake was the general contractor for the construction, planning, and/or rebuilding of the subject Pilot Travel Center.

47. In this capacity, Munlake either participated in, approved, directed, or was otherwise involved in the decision to remove, and/or the actual removal, of the unmountable median at the location of the subject accident along North Main Street (Highway 17A) and in front of the subject Pilot Travel Center.

48. As a result of Defendants' actions in removing the unmountable median, in addition to other acts of malfeasance, Plaintiffs suffered serious and grievous injuries and damages, including medical bills in excess of one million dollars.

49. All Defendants, their employees and/or agents, had duties to Plaintiffs and their actions were negligent, grossly negligent, wanton and reckless, and contributed to the subject accident.

50. As a result of Defendants' negligent, grossly negligent, wanton and reckless actions, the subject collision resulted in Plaintiffs' injuries and damages.

FOR A FIRST CAUSE OF ACTION
(Negligence)

51. Plaintiffs repeat and reallege Paragraphs 1 through 50 as though fully set forth herein verbatim and would further allege:

AS TO DEFENDANT SPEEDWAY

52. Plaintiffs are informed and believe that Defendant Speedway owed multiple duties to Plaintiffs, including, but not limited to, ensuring that the design and construction of the subject Pilot Travel Center was safe for the motoring public.

53. Defendant Speedway was negligent, careless, wanton, reckless, and grossly negligent at the time and place hereinabove mentioned in the following particulars:

a. In negotiating the removal of the unmountable barrier at the accident location;

b. In negotiating the removal of the unmountable barrier at the accident location when it knew or should have known that removing the unmountable median would result in automobile traffic illegally crossing oncoming lanes of traffic;

c. In negotiating the removal of the unmountable barrier when it knew or should have known that doing so would create a latent defect – hazardous to vehicular traffic;

d. In putting profits above the safety of the motoring public;

e. In improperly constructing, or causing to be constructed, the entrances to the subject Pilot Travel Center in such a way as to prevent motorists from being stricken by vehicles illegally crossing North Main Street (Highway 17A) at the accident location;

f. In negotiating the unmountable barrier's removal when it was foreseeable that motorists would illegally cross North Main Street;

g. In generally failing to use the degree of care and caution that a reasonably prudent company would have used under the same or similar circumstances; and

h. In such other particulars as may be proved through the use of discovery in this matter.

AS TO DEFENDANT ASHLEY

54. Plaintiffs are informed and believe that Defendant Ashley owed multiple duties to Plaintiffs, including, but not limited to, ensuring that the design and construction of the subject Pilot Travel Center was safe for the motoring public.

55. Defendant Ashley was negligent, careless, wanton, reckless, and grossly negligent at the time and place hereinabove mentioned in the following particulars.

a. In improperly constructing, or causing to be constructed, the entrances to the subject Pilot Travel Center in such a way as to prevent motorists from being stricken by vehicles illegally crossing North Main Street (Highway 17A) at the accident location;

b. In participating in, approving, or suggesting the unmountable barrier's removal when it was foreseeable that motorists would illegally cross North Main Street (Highway 17A);

c. In participating in, approving, or suggesting the unmountable barrier's removal when it was foreseeable that it would create an unsafe condition for the motoring public at the accident location;

d. In generally failing to use the degree of care and caution that a reasonably prudent company would have used under the same or similar circumstances; and

e. In such other particulars as may be proved through the use of discovery in this case.

AS TO DEFENDANT MUNLAKE

56. Plaintiffs are informed and believe that Defendant Munlake owed multiple duties to Plaintiffs including, but not limited to, ensuring that the design and construction of the subject Pilot Travel Center was safe for the motoring public.

a. In improperly constructing, or causing to be constructed, the subject Pilot Travel Center (including, but not limited to, the driveways used for ingress and egress to same) in such a way as to prevent motorists from being stricken by vehicles illegally crossing North Main Street (Highway 17A) at the accident location;

b. In participating in, approving, or suggesting the unmountable barrier's removal when it was foreseeable that motorists would illegally cross North Main Street (Highway 17A);

c. In participating in, approving, or suggesting the unmountable barrier's removal when it was foreseeable that it would create an unsafe condition for the motoring public at the accident location;

d. In generally failing to use the degree of care and caution that a reasonably prudent contractor would have used under the same or similar circumstances; and

e. In such other particulars as may be proved through the use of discovery in this case.

FOR A SECOND CAUSE OF ACTION
(Loss of Consortium)

57. Plaintiffs hereby repeat and reallege Paragraphs 1 through 56 as though fully set forth herein verbatim and would further allege:

58. As a direct and proximate result of the negligent, carless, reckless, wanton, grossly negligent, and willful actions or inactions by Defendants, their agents, and/or employees, and the breach of duties owed to Plaintiffs, Plaintiff Richard Wright has lost the care, companionship, comfort, society, and consortium of his wife, Plaintiff Cynthia

Wright, for which he is entitled to recover actual and consequential damages in an amount to be determined by the jury to be full and just at the trial of this action.

DAMAGES – AS TO CYNTHIA WRIGHT

59. Plaintiffs hereby repeat and reallege Paragraphs 1 through 58 as though fully set forth herein verbatim and would further allege:

60. As the direct and proximate result of the aforesaid negligent, grossly negligent, careless, reckless, willful and wanton acts and/or omissions of the Defendants, Plaintiff Cynthia Wright:

a. Suffered severe life-threatening injuries to various parts of her body;

b. Was severely, seriously, painfully, and permanently injured;

c. Was forced to seek medical treatment and was hospitalized for a period of time;

d. Will require lifetime medical treatment in the future;

e. Suffered extreme injuries, including, but not limited to, a traumatic brain injury, loss of a portion of her brain and head, skull fracture, pulmonary contusions, cardiomyopathy, left toe fracture, an abdominal hematoma, and multiple abrasions over her body;

f. Permanent scarring and disfigurement;

g. Has and will in the future incur medical bills and expenses;

h. Extreme pain, mental anguish, emotional distress, suffering and discomfort both in the past and future;

i. Loss of earning capacity;

j. Loss of the enjoyment of life that she will never fully recover; and

k. Other damages as will be shown through discovery in this matter.

DAMAGES – AS TO PLAINTIFF RICHARD WRIGHT

61. Plaintiffs hereby repeat and reallege Paragraphs 1 through 60 as though fully set forth herein verbatim and would further allege:

62. As a direct and proximate result of the aforesaid negligent, grossly negligent, careless, reckless, willful and wanton acts and/or omissions of the Defendants, Plaintiff Richard Wright:

a. Suffered severe, life-threatening injuries to various parts of his body;

b. Was severely, seriously, painfully, and permanently injured;

c. Will require lifetime medical treatment in the future;

d. Suffered extreme, painful, and dangerous injuries, including, but not limited to, fractures of his fibula, tibia, right hip and abrasions over the rest of his body;

e. Permanent scaring and disfigurement;

f. Substantial medical bills past and future;

g. Extreme pain, discomfort, mental anguish, emotional distress, and discomfort past and future;

h. Loss of earning capacity past and future;

i. Loss of the enjoyment of life that he will never fully recover;

j. Loss of his wife's companionship, company, services, fellowship, assistance, and comfort in her society that he enjoyed prior to the subject accident; and

k. Other damages as will be shown through discovery in this matter.

WHEREFORE, Plaintiffs respectfully pray for judgment against the above-named Defendants for all actual and consequential damages in an amount to be determined by the jury at the trial of this action. Additionally, Plaintiffs pray for

judgment against these Defendants for the costs and disbursements of this action and for such other and further relief as this Court deems is just and proper.

Signature on following page

Kevin B. Smith
HOFFMAN LAW FIRM
7087 Rivers Ave.
N. Charleston, SC 29406
(843) 769-7077
ksmith@hoffmanlaw.net

S. Randall Hood
MCGOWAN, HOOD & FELDER, LLC
1539 Health Care Drive
Rock Hill, South Carolina 29732
803-327-7800 (phone)
rhood@mcgowanhood.com

Shawn B. Deery
MCGOWAN, HOOD & FELDER, LLC
1517 Hampton Street
Columbia, South Carolina 29201
(803) 779-0100 (Columbia)
sdeery@mcgowanhood.com

Attorneys for the Plaintiffs

Rock Hill, South Carolina

March 10, 2016

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF BERKELEY	)	C/A NUMBER: 2014-CP-08-675
Cynthia Wright and Richard Wright, Plaintiffs, vs. South Carolina Department of Transportation, C & A Unlimited, Inc. and Pilot Travel Centers, LLC, Defendants.		**ANSWER TO AMENDED COMPLAINT** (Jury Trial Demanded)

The Defendant, Pilot Travel Centers, LLC, above named, by and through their undersigned attorney, hereby answers the Amended Complaint of the Plaintiff's as follows:

FOR A FIRST DEFENSE

1. Except as is hereinafter specifically admitted, each and every allegation contained in said Amended Complaint is denied.

2. This Defendant admits the allegations contained in Paragraph One (1) of the Amended Complaint upon present information and belief.

3. This Defendant is without information or knowledge sufficient to form a belief as to the truth of the allegations contained in Paragraph Two (2) of the Amended Complaint, and therefore, denies said allegations and requests strict proof thereof.

4. This Defendant admits only so much of the allegations contained in Paragraph Three (3) of the Amended Complaint as alleges that it is authorized to do business in the State of South Carolina and owns and operates the Pilot Travel Center gas station located at 1521 North

Main Street in Summerville, South Carolina in the county of Berkeley; however the remaining allegations in said paragraph contained are denied.

5. This Defendant is without information or knowledge sufficient to form a belief to the truth of the allegations contained in Paragraphs Four (4), Five (5), Six (6), Seven (7), Eight (8), Nine (9), Ten (10) and Eleven (11) of the Amended Complaint as pertain to the Defendant SCDOT, and therefore, denies said allegations and requests strict proof thereof.

6. This Defendant denies the allegations contained in Paragraph Twelve (12) of the Amended Complaint.

7. This Defendant can neither admit nor deny the allegations contained in Paragraph Thirteen (13) of the Amended Complaint as jurisdiction and venue are matters of law for the Court and cannot be conferred by the parties.

8. This Defendant answers Paragraph Fourteen (14) of the Amended Complaint consistent with its answers to Paragraphs One (1) through Thirteen (13) above.

9. This Defendant can only admit so much of the allegations contained in Paragraph Fifteen (15) of the Amended Complaint as alleges that about the time and place alleged an accident occurred between a motorcycle being driven by the Plaintiff's husband and agent and a car being driven by Daniel Sena; however, this Defendant is without information or knowledge sufficient to form a belief as to the truth of the remaining allegations contained in Paragraph Fifteen (15) of the Complaint, and therefore, denies said allegations and requests strict proof thereof.

10. This Defendant is without information or knowledge sufficient to form a belief as to the truth of the allegations contained in Paragraph Sixteen (16) of the Amended Complaint, and therefore, denies said allegations and requests strict proof thereof.

11. This Defendant denies the allegations contained in Paragraph Seventeen (17) of the Amended Complaint.

12. This Defendant is without information or knowledge sufficient to form a belief as to the truth of the allegations contained in Paragraphs Eighteen (18) and Nineteen (19) of the Amended Complaint, and therefore, denies said allegations and requests strict proof thereof.

13. This Defendant denies the allegations contained in Paragraph Twenty (20) of the Amended Complaint.

14. This Defendant is without information or knowledge sufficient to form a belief as to the truth of the allegations contained in Paragraphs Twenty-One (21), Twenty-Two (22), Twenty-Three (23) and Twenty-Four (24) of the Amended Complaint, and therefore, denies said allegations and requests strict proof thereof.

15. This Defendant answers Paragraph Twenty-Five (25) of the Amended Complaint consistent with its answers to Paragraphs One (1) through Twenty-Four (24) above.

16. This Defendant is without information or knowledge sufficient to form a belief as to the truth of the allegations contained in Paragraphs Twenty-Six (26), Twenty-Seven (27), Twenty-Eight (28), Twenty-Nine (29) and Thirty (30) of the Amended Complaint, and therefore, denies said allegations and requests strict proof thereof.

17. This Defendant answers Paragraph Thirty-One (31) of the Amended Complaint consistent with its answers to Paragraphs One (1) through Thirty (30) above.

18. This Defendant denies the allegations contained in Paragraph Thirty-Two (32), Thirty-Three (33), Thirty-Four (34), Thirty-Five (25) and Thirty-Six (36) of the Amended Complaint.

19. This Defendant answers Paragraph Thirty-Seven (37) of the Amended Complaint consistent with its answers to Paragraphs One (1) through Thirty-Six (36) above.

20. This Defendant denies the allegations contained in Paragraphs Thirty-Eight (38), Thirty-Nine (39), Forty (40), Forty-One (41) and Forty-Two (42) of the Amended Complaint.

21. This Defendant answers Paragraph Forty-Three (43) of the Amended Complaint consistent with its answers to Paragraphs One (1) through Forty-Two (42) above.

22. This Defendant denies the allegations contained in Paragraph Forty-Four (44) of the Amended Complaint

23. This Defendant answers Paragraph Forty-five (45) of the Amended Complaint consistent with its answers to Paragraphs One (1) through Forty-four (44) above.

24. This Defendant denies the allegations contained in Paragraph Forty-six (46) of the Amended Complaint.

25. This Defendant answers Paragraph Forty-seven (47) of the Amended Complaint consistent with its answers to Paragraphs One (1) through Forty-Six (46) above.

26. This Defendant denies the allegations contained in Paragraph Forty-Eight (48) of the Amended Complaint.

FOR A SECOND DEFENSE

27. Any injuries or damages sustained by the Plaintiffs, as set forth in the Amended Complaint, were due to and caused by the sole negligence, recklessness, willfulness and wantonness of the Plaintiff or Plaintiff's husband and agent in one or more of the following particulars:

(a) In failing to keep a proper lookout;

(b) In failing to keep the Plaintiff's husbands motorcycle under proper control;

(c) In failing to use brakes, if any there were;

(d) In driving too fast for conditions;

(e) In recklessly participating in a joint venture with her husband; and

(f) In such other particulars as may be shown by the evidence at trial

all in violation of the statutes and laws of the State of South Carolina, and by reason thereof, Plaintiffs are not entitled to recover from this Defendant.

FOR A THIRD DEFENSE

28. Any injuries or damages as were allegedly sustained by the Plaintiffs at the time and place alleged in the Amended Complaint, if any, upon information and belief, were due to and proximately caused by the negligence, recklessness, willfulness and wantonness of the Plaintiffs or Plaintiffs' agent or others, which contributed more than fifty (50%) percent to cause the accident and the Plaintiffs' resulting injuries and damages, if any, in one or more of the following particulars as heretofore set forth in the Second Defense stated above, which allegations are realleged and incorporated herein by reference, and therefore this Defendant has no liability to the Plaintiffs.

FOR A FOURTH DEFENSE

29. Even assuming this Defendant was careless, negligent, grossly negligent, willful, wanton or reckless in any respect, which is expressly denied, and even if any such conduct on its part operated as a greater than fifty (50%) percent cause of the accident and the Plaintiffs' resulting injuries and damages, if any, which are also expressly denied, this Defendant is entitled to a determination as to the percentage which the Plaintiffs' or Plaintiffs' agent's negligent, grossly negligent, reckless and willful conduct contributed to this accident and to a reduction of

any amount awarded to Plaintiffs by an amount equal to the percentage of their own negligent, grossly negligent, reckless, willful and wanton conduct.

FOR A FIFTH DEFENSE

30. Any claim on behalf of the Plaintiffs for punitive damages is barred by the provisions of the United States and the South Carolina Constitutions.

31. That Plaintiffs' claim for punitive damages violates both the Fourteenth Amendment of the United States Constitution and Article 1, Section 3, of the South Carolina Constitution in that the jury's unfettered power to award punitive damages in any amount it chooses is wholly devoid of a meaningful standard and is inconsistent with due process guarantees.

32. That Plaintiffs' claim for punitive damages violates the Fifth, Sixth and Fourteenth Amendments of the United States Constitution and Article 1, Section 3 of the South Carolina Constitution, for even if it could be argued that a standard governing the imposition of punitive damages exists, this standard is void for vagueness.

33. That the Plaintiffs' claim for punitive damages violates the equal protection clause of the Fourteenth Amendment of the United States Constitution and Article 1, Section 3 of the South Carolina Constitution, in that the amount of punitive damages is based upon the wealth of these Defendants.

34. That the Plaintiffs' claim for punitive damages violates the Federal doctrine of separation of powers and Article 1, Section 8 of the South Carolina Constitution for the reason that punitive damages are a creation of the judicial branch of government which invades the province of the legislative branch of government.

FOR A SIXTH DEFENSE

35. Further answering, this Defendant would show that if the Plaintiffs were injured or damaged as they allege, their injuries and damages were due to and/or caused by the sole negligent acts or omissions of their opposing driver, Daniel Sena, or some other person or entities over whom this Defendant had no control. As such, this Defendant pleads the superseding and/or intervening negligence of a third party or parties as a complete defense to this action.

FOR A SEVENTH DEFENSE

36. The Plaintiffs' Amended Complaint fails to state facts sufficient to constitute a cause of action against this Defendant, and therefore, should be dismissed as a matter of law.

FOR A EIGHTH DEFENSE

37. That the Plaintiffs' Amended Complaint fails to include the proper and necessary parties to this lawsuit, and all proper parties should be included on any future verdict form pursuant to S.C. statutory law.

FOR A NINTH DEFENSE

38. That this Defendant should be entitled to an offset for any monies paid by other parties or non-parties to Plaintiffs as a result of this accident.

WHEREFORE, this Defendant prays that the Amended Complaint of the Plaintiffs be dismissed, with costs, and for such other and further relief as this Court deems just and proper.

HOWSER, NEWMAN & BESLEY, L.L.C.

By

William G. Besley, Esquire
1508 Washington Street
Post Office Box 12009
Columbia, South Carolina 29211
(803) 758-6000
ATTORNEY FOR THE DEFENDANT PILOT TRAVEL CENTERS, LLC.

May 16, 2014

STATE OF SOUTH CAROLINA COUNTY OF BERKELEY	IN THE COURT OF COMMON PLEAS
Cynthia Wright and Richard Wright, Plaintiffs, vs. Speedway LLC, Ashley Land Surveying, Inc., f/k/a Ashley Engineering & Surveying, Inc. and Ashley Engineering & Consulting, Inc., and Munlake Contractors, Inc. Defendants.	Civil Action No. 2016-CP-08-334 **ANSWER TO AMENDED COMPLAINT BY DEFENDANT SPEEDWAY LLC** (Jury Trial Requested)

FILED
2016 APR -4 AM 10:17
CLERK OF COURT
BERKELEY COUNTY, SC

The Defendant Speedway LLC (hereinafter "Defendant") answering Plaintiffs' Amended Complaint (hereinafter "Complaint") herein, would respectfully show unto this Honorable Court as follows:

FOR A FIRST DEFENSE

1. Defendant lacks sufficient knowledge and information so as to form a belief as to the allegations contained in Paragraph 1 of the Complaint and thus denies the same at this time and demands strict proof thereof.

2. Defendant admits the allegations of Paragraphs 2 and 3 of the Complaint.

3. In response to Paragraph 4 of the Complaint, Defendant admits only so much of the allegations as could be construed to allege that Defendant exited the South Carolina market and did not transact business in South Carolina as of 12:01 a.m. on September 1, 2001 when Defendant assigned and transferred all of its interests to Pilot Travel Centers, LLC. Defendant thereafter re-entered the South Carolina market and began transacting business as of September 30, 2014. Any remaining allegations contained in Paragraph 4 of the Complaint inconsistent with or in addition to the above stated admissions are denied, and strict proof thereof is

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demanded.

4. In response to Paragraph 5 of the Complaint, Defendant admits only so much of the allegations as could be construed to allege that it is an operator of a chain of combination gas stations and convenience stores with gas pumps in the Midwest and Southeast regions of the United States. Any remaining allegations contained in Paragraph 5 of the Complaint inconsistent with or in addition to the above stated admissions are denied, and strict proof thereof is demanded.

5. In response to Paragraph 6 of the Complaint, Defendant admits only so much of the allegations as could be construed to allege that it operated combination gas stations and convenience stores with gas pumps in South Carolina up until 12:01 a.m. on September 1, 2001 and thereafter beginning on September 30, 2014. Any remaining allegations contained in Paragraph 6 of the Complaint inconsistent with or in addition to the above stated admissions are denied, and strict proof thereof is demanded.

6. Defendant lacks sufficient knowledge and information so as to form a belief as to the allegations contained in Paragraph 7 of the Complaint and thus denies the same at this time and demands strict proof thereof.

7. In response to Paragraph 8 of the Complaint, Defendant admits only so much of the allegations as could be construed to allege that it was previously involved with a joint venture with Pilot Travel Centers, LLC with respect to a convenience store with multiple gas pumps located at 1521 North Main Street, Summerville, South Carolina, that a merger between Defendant and Pilot Travel Centers, LLC was completed on August 31, 2001, that as of 12:01 a.m. on September 1, 2001 Defendant assigned and transferred all of its interests to Pilot Travel Centers, LLC, that as of 12:02 a.m. September 1, 2001 Pilot Travel Centers, LLC became the surviving entity and owner of the property, gas station, and convenience store in question, and

that the joint venture between Defendant and Pilot Travel Centers, LLC ceased to exist thereafter. Any remaining allegations contained in Paragraph 8 of the Complaint inconsistent with or in addition to the above stated admissions are denied, and strict proof thereof is demanded.

8. Paragraphs 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, of the Complaint, are not directed to Defendant, and accordingly, no response is required from Defendant. To the extent that Paragraphs 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, and 20 of the Complaint attempt to allege or do allege any causes of action, claims, acts, errors or omission as to Defendant, those allegations are denied, and strict proof thereof is demanded.

9. Defendant lacks sufficient knowledge and information so as to form a belief as to the allegations contained in Paragraph 21 of the Complaint as directed to it and thus denies the same and demands strict proof thereof.

10. Defendant denies the allegations contained in Paragraph 22 of the Complaint directed to it, and strict proof thereof is demanded.

11. Defendant admits the allegations of Paragraph 23 of the Complaint.

12. Defendant admits, upon information and belief, the allegations of Paragraph 24 of the Complaint.

13. Defendant denies the allegations contained in Paragraph 25 of the Complaint directed to it, and strict proof thereof is demanded.

14. Defendant lacks sufficient knowledge and information so as to form a belief as to the allegations contained in Paragraphs 26, 27, 28, 29, 30, 31, and 32 of the Complaint and thus denies the same and demands strict proof thereof.

15. Defendant denies the allegations contained in Paragraphs 33 and 34 of the Complaint, and strict proof thereof is demanded.

16. Defendant lacks sufficient knowledge and information so as to form a belief as to the allegations contained in Paragraphs 35, 36, 37 and 38 of the Complaint and thus denies the same at this time and demands strict proof thereof.

17. Defendant denies the allegations contained in Paragraphs 39, 40, and 41 of the Complaint, and strict proof thereof is demanded.

18. Paragraphs 42 and 43 of the Complaint are not directed to Defendant, and accordingly, no response is required from Defendant. To the extent that Paragraphs 42 and 43 of the Complaint attempt to allege or do allege any causes of action, claims, acts, errors or omission as to Defendant, those allegations are denied, and strict proof thereof is demanded.

19. Defendant lacks sufficient knowledge and information so as to form a belief as to the allegations contained in Paragraph 44 of the Complaint and thus denies the same and demands strict proof thereof.

20. Paragraphs 45, 46, and 47 of the Complaint are not directed to Defendant, and accordingly, no response is required from Defendant. To the extent that Paragraphs 45, 46, and 47 of the Complaint attempt to allege or do allege any causes of action, claims, acts, errors or omission as to Defendant, those allegations are denied, and strict proof thereof is demanded.

21. Defendant denies the allegations contained in Paragraphs 48, 49, and 50 of the Complaint as directed to it, and strict proof thereof is demanded.

22. In response to Paragraph 51 of the Complaint, Defendant repeats and re-alleges all preceding Paragraphs of its Answer as if fully set forth herein verbatim.

23. Defendant denies the allegations contained in Paragraph 52 and Paragraph 53 and all of its subparagraphs of the Complaint, and strict proof thereof is demanded.

24. Paragraphs 54, 55 and all of its subparagraphs, and 56 and all of its subparagraphs of the Complaint are not directed to Defendant, and accordingly, no response is required from

Defendant. To the extent that Paragraphs 54, 55 and all of its subparagraphs, and 56 and all of its subparagraphs of the Complaint attempt to allege or do allege any causes of action, claims, acts, errors or omission as to Defendant, those allegations are denied, and strict proof thereof is demanded.

25. In response to Paragraph 57 of the Complaint, Defendant repeats and re-alleges all preceding Paragraphs of its Answer as if fully set forth herein verbatim.

26. Defendant denies the allegations contained in Paragraph 58 of the Complaint, and strict proof thereof is demanded.

27. In response to Paragraph 59 of the Complaint, Defendant repeats and re-alleges all preceding Paragraphs of its Answer as if fully set forth herein verbatim.

28. Defendant denies the allegations contained in Paragraph 60 of the Complaint, including all subparagraphs, and strict proof thereof is demanded.

29. In response to Paragraph 61 of the Complaint, Defendant repeats and re-alleges all preceding Paragraphs of its Answer as if fully set forth herein verbatim.

30. Defendant denies the allegations contained in Paragraph 62 of the Complaint, including all subparagraphs, and strict proof thereof is demanded.

31. Defendant denies the allegations contained in the "Wherefore" Paragraph of the Complaint, which is the remainder of the Complaint, and strict proof thereof is demanded.

32. Defendant denies each and every allegation of the Complaint not otherwise admitted, modified, or explained.

FURTHER ANSWERING FOR A FURTHER AND AFFIRMATIVE DEFENSE

33. Defendant pleads the doctrine of comparative negligence and alleges that the negligence and/or recklessness of the Plaintiffs were greater than any negligence which may be established against the Defendant, and therefore, Plaintiffs are barred from recovery.

FURTHER ANSWERING FOR A FURTHER AND AFFIRMATIVE DEFENSE

34. The Plaintiffs' damages, if any, were due solely to, caused wholly by, and were the direct and proximate result of the criminal activity of a third party other than the Defendant over whom the Defendant had no control so as to bar recovery herein.

FURTHER ANSWERING FOR A FURTHER AND AFFIRMATIVE DEFENSE

35. That upon information and belief, even if any of the damages alleged in Plaintiffs' Complaint were proximately caused by the acts and/or omissions of this Defendant, which is otherwise denied except for the purposes of this affirmative defense, this Defendant did not and could not have foreseen that Plaintiffs' damages, if any, could have proximately resulted from this Defendant's acts of omissions, which is denied.

FURTHER ANSWERING FOR A FURTHER AND AFFIRMATIVE DEFENSE

36. Should this Defendant have been found to breach any duty owed to Plaintiffs, which is denied, such breach has no causal relationship to the damages claimed by Plaintiffs and Plaintiffs' claims are barred and limited on account thereof.

FURTHER ANSWERING FOR A FURTHER AND AFFIRMATIVE DEFENSE

37. Defendant pleads the doctrine of comparative negligence and alleges that the negligence and/or recklessness of the Plaintiffs were greater than any negligence, if any, which may be established against the Defendant, and therefore, the Plaintiffs are barred from recovery. Defendant further alleges that any injury and damage sustained by the Plaintiffs was due to and caused by the negligence and/or willfulness of the Plaintiffs, combining, concurring and contributing with the negligence and/or willfulness, if any, on the part of the Defendant, and that any amount of recovery awarded to the Plaintiffs for the alleged injuries and damage shall be

reduced by the Court based on the percentage of negligence and/or willfulness attributed to the Plaintiffs.

FURTHER ANSWERING FOR A FURTHER AND AFFIRMATIVE DEFENSE

38. Defendant would respectfully show that each and every cause of action set forth in the Complaint fails to state a claim upon which relief can be granted. Plaintiffs' Complaint should therefore be dismissed pursuant to Rule 12 of the Rules of Civil Procedure.

FURTHER ANSWERING FOR A FURTHER AND AFFIRMATIVE DEFENSE

39. Defendant would show the claims of the Plaintiffs for punitive damages against the Defendant cannot be sustained because any award of punitive damages under South Carolina law by a jury that (1) is not provided standards of sufficient clarity for determining the appropriateness, and the appropriate size, of the punitive damages award, (2) is not adequately instructed on the limits of punitive damages imposed by the applicable principles of deterrence and punishment, (3) is not expressly prohibited from awarding punitive damages, or determining the amount of an award of punitive damages, in whole or in part, on the basis of invidiously discriminatory characteristics, including the resident, wealth, and corporate status of Defendant, (4) is permitted to award punitive damages under a standard for determining liability for punitive damages that is vague and arbitrary and does not define with sufficient clarity the conduct or mental state that makes punitive damages permissible, and (5) is not subject to trial court and appellate judicial review for reasonableness and furtherance of legitimate purposes on the basis of objective standards, would violate Defendant's due process and equal protection rights guaranteed by the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution and by the South Carolina constitutional provisions, Article I, Section 3, providing for due process and equal protection, and would be improper under the common law and public policies

of the State of South Carolina.

FURTHER ANSWERING FOR A FURTHER AND AFFIRMATIVE DEFENSE

40. Defendant would allege and show that any injuries and damages sustained by the Plaintiffs as alleged in the Complaint, which are denied, were due to and were caused and occasioned by the intervening and superseding negligence, carelessness, recklessness, heedlessness, willfulness and wantonness of some other party or parties over whom the Defendant had no supervision or control, and the Defendant does plead such intervening and superseding negligence, carelessness, recklessness, heedlessness, willfulness and wantonness as the direct and proximate cause of the injuries and damages sustained by the Plaintiffs as alleged in the Complaint.

FURTHER ANSWERING FOR A FURTHER AND AFFIRMATIVE DEFENSE

41. Punitive damages are inappropriate in this case since the Defendant did not engage in any malicious, reckless, wrongful or intentional conduct upon which an award of punitive damages would be based.

FURTHER ANSWERING AND FOR A FURTHER AND AFFIRMATIVE DEFENSE

42. That to the extent applicable to the within action, the Defendant affirmatively pleads all of the defenses referenced in Rule 8(c) of the South Carolina Rules of Civil Procedure.

FURTHER ANSWERING AND FOR A FURTHER AND AFFIRMATIVE DEFENSE

43. That upon information and belief the statute of repose may serve to bar any recovery to Plaintiffs herein.

FURTHER ANSWERING FOR A FURTHER AND AFFIRMATIVE DEFENSE

44. This Defendant did not owe any purported duty to the Plaintiffs so as to bar the

Plaintiffs from recovery against this Defendant.

FURTHER ANSWERING FOR A FURTHER AND AFFIRMATIVE DEFENSE

45. Defendant would allege and show that any injuries and damages sustained by the Plaintiffs as alleged in the Complaint, which are denied, were due to and were caused and occasioned by the sole negligence, carelessness, recklessness, heedlessness, willfulness and wantonness of some other party or parties over whom the Defendant had no supervision or control, and the Defendant does plead such sole negligence, carelessness, recklessness, heedlessness, willfulness and wantonness as the direct and proximate cause of the injuries and damages sustained by the Plaintiffs as alleged in the Complaint.

FURTHER ANSWERING FOR A FURTHER AND AFFIRMATIVE DEFENSE

46. No award for punitive damages shall exceed the statutory limits contained in S.C. Code Ann. § 15-32-510 et seq. Defendant hereby pleads all limitations and relief contained therein and demand that any claim for punitive damages be bifurcated pursuant to these code sections.

FURTHER ANSWERING FOR A FURTHER AND AFFIRMATIVE DEFENSE

47. Defendant would allege and show it is entitled to a set off for a credit for any monies paid to Plaintiffs by any third parties for the injuries and damages they seek recovery for in the present or companion lawsuit.

FURTHER ANSWERING FOR A FURTHER AND AFFIRMATIVE DEFENSE

48. Plaintiffs' claims are barred by the doctrine of assumption of the risk and/or applicable statutory law of the State of South Carolina in that assuming, but not admitting the area in question was dangerous, the Plaintiffs discovered and were aware of such, assumed

such risk and by their conduct proceeded, thus resulting in the alleged injury.

FURTHER ANSWERING FOR A FURTHER AND AFFIRMATIVE DEFENSE

49. Defendant pleads that the alleged dangerous condition(s), if any, was/were open and obvious; therefore Plaintiffs are barred from recovery.

FURTHER ANSWERING FOR A FURTHER AND AFFIRMATIVE DEFENSE

50. That assuming but not admitting that Defendant was involved in the planning, permitting, construction, or rebuilding process of the area and property in question at 1521 North Main Street, Summerville, South Carolina, that the same was ultimately approved and supervised by the South Carolina Department of Transportation and/or other municipal, county, or other governmental entity as being in compliance with industry, engineering and professional standards, the same which serves as complete bar to Plaintiffs' claims herein.

FURTHER ANSWERING FOR A FURTHER AND AFFIRMATIVE DEFENSE

51. That even if this Defendant was negligent, which is specifically denied, this Defendant was less than fifty percent liable for the total fault alleged. Accordingly, joint and several liability should not apply to this action as it relates to this Defendant and this Defendant should be held liable only for the percentage of fault, if any, to be determined by the trier of fact. Additionally this Defendant hereby reserves the right to seek all remedies, rights and privileges available to them pursuant to S.C. Code Ann. § 15-38-15

FURTHER ANSWERING AND FOR A FURTHER AND AFFIRMATIVE DEFENSE

52. Defendant incorporates herein by reference all applicable affirmative defenses of any other party to the present or companion lawsuit.

FURTHER ANSWERING FOR A FURTHER AND AFFIRMATIVE DEFENSE

53. Defendant hereby gives notice that it intends to rely upon such other affirmative defenses as may become available or apparent during the course of discovery, and thus reserves the right to amend its Answer to assert any such defenses.

WHEREFORE, having fully answered, Defendant prays that the Complaint be dismissed, for the costs of defending this action, and for such other relief as the Court and jury deem just and proper.

Respectfully Submitted:

SMITH MOORE LEATHERWOOD LLP

J. Bennett Crites, III
Mary B. Ramsay
25 Calhoun Street, Suite 250
Charleston, South Carolina 29401
Ph. 843.300.6600
Fax 843.300.6700
bennett.crites@smithmoorelaw.com
mary.ramsay@smithmoorelaw.com
Attorneys for Defendant Speedway LLC

March 29, 2016
Charleston, South Carolina

CHARLESTON 77204.1

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF BERKELEY	)	CASE NO.: 2014-CP-08-675
	)	
CYNTHIA WRIGHT AND RICHARD WRIGHT,	)	**South Carolina Department of Transportation's Answer to Amended Complaint (Jury Trial Demanded)**
Plaintiffs,	)	
v.	)	
SOUTH CAROLINA DEPARMENT OF TRANSPORTATION, C & A UNLIMITED, INC. AND PILOT TRAVEL CENTERS, LLC,	)	
Defendants.	)	

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MARY P. BROWN
CLERK OF COURT
BERKELEY COUNTY, SC

The Defendant, the South Carolina Department of Transportation, (hereinafter "this Defendant"), answers the Amended Complaint of the Plaintiffs as follows:

1. This Defendant denies each and every allegation of the Plaintiffs' Amended Complaint that is not herein now specifically admitted.

2. This Defendant is without sufficient information as to form an opinion as to the allegations contained in Paragraph 1 of the Plaintiffs' Amended Complaint and therefore denies the same with strict proof thereof demanded.

3. This Defendant is without sufficient information as to form an opinion as to the allegations contained in Paragraph 2 of the Plaintiffs' Complaint and therefore denies the same with strict proof thereof demanded.

4. This Defendant is without sufficient information as to form an opinion as to the allegations contained in Paragraph 3 of the Plaintiffs' Amended Complaint and therefore denies the same with strict proof thereof demanded.

5. In response to Paragraphs 4 and 5 of the Plaintiffs' Amended Complaint, this Defendant admits it is a state agency as contemplated by the South Carolina Tort Claims Act but denies the remaining allegations with strict proof thereof demanded.

6. This Defendant denies as written the allegations contained in Paragraph 6 of the Plaintiff's Complaint with Strict proof thereof demanded.

7. In response to Paragraph 7 of the Plaintiffs' Amended Complaint, this Defendant admits it is a state agency as contemplated by the South Carolina Tort Claims Act and performs work throughout the State of South Carolina but denies the remaining allegations with strict proof thereof demanded.

8. Paragraph 8 of Plaintiffs' Amended Complaint states conclusions of law to which no response is required. To the extent the allegations contained in Paragraph 8 requires a response, this Defendant lacks sufficient information to form a belief as to the truth of the allegations, and therefore, denies the same and demands strict proof thereof.

9. This Defendant denies as written the allegations contained in Paragraphs 9, 10 and 11 of the Plaintiffs' Amended Complaint with strict proof thereof demanded.

10. To the extent the allegations contained in Paragraph 12 of the Plaintiffs' Amended Complaint are against this Defendant, this Defendant denies the allegations in Paragraph 12 of the Plaintiffs' Amended Complaint, with strict proof thereof demanded.

11. Paragraph 13 of Plaintiffs' Amended Complaint states legal conclusions to which no responses is required, to the extent a response is required the same is denied.

FACTUAL ALLEGATIONS

12. In response to Paragraph 14 of the Plaintiffs' Amended Complaint, this Defendant repeats and realleges its responses to the allegations of Paragraphs 1 through 11 above as if set forth herein.

13. In response to Paragraphs 15 through 24 of the Plaintiffs' Amended Complaint, this Defendant, upon information and belief, admits an accident occurred on or about October 6, 2012 between the Plaintiffs and a driver by the name of Daniel Sena, who was operating his vehicle in an unlawful manner, including but not limited to performing an illegal left hand turn, in addition to likely being charged with Felony DUI, leaving the scene of an accident, and possibly driving under a suspended drivers license and possession of cocaine. Upon information and belief, Mr. Sena, after striking the Plaintiffs, drove off from the scene of the accident leaving the Plaintiffs lying in the road. Upon information and belief, Mr. Sena was eventually caught by South Carolina Law Enforcement persons and was then charged with various crimes. All remaining and inconsistent

allegations contained in Paragraphs 15 through 24, not specifically admitted, are hereby denied with strict proof thereof demanded.

FOR A CAUSE OF ACTION OF NEGLIGENCE BY THE SCDOT

14. In response to Paragraph 25 of the Plaintiffs' Amended Complaint, this Defendant repeats and realleges its responses to the allegations of Paragraphs 1 through 13 above as if set forth herein.

15. This Defendant denies the allegations contained in Paragraphs 26 through 29 (including subparts a-k) and 30 of the Amended Complaint, and therefore denies the same, with strict proof thereof demanded.

FOR A CAUSE OF ACTION OF NEGLIGENCE BY MCDONALDS

16. In response to Paragraph 31 of the Plaintiffs' Amended Complaint, this Defendant repeats and realleges its responses to the allegations of Paragraphs 1 through 15 above as if set forth herein.

17. Paragraphs 32 through 35 (including subparts a-k) and 36 do not contain allegations against this Defendant and therefore do not require a response. To the extent a response is required, this Defendant denies the allegations contained in those paragraphs and demands strict proof thereof.

FOR A CAUSE OF ACTION OF
NEGLIGENCE BY PILOT TRAVEL CENTER

18. In response to Paragraph 37 of the Plaintiffs' Amended Complaint, this Defendant repeats and realleges its responses to the allegations of Paragraphs 1 through 17 above as if set forth herein.

19. Paragraphs 38 through 41 (including subparts a-k) and 42 do not contain allegations against this Defendant and therefore do not require a response. To the extent a response is required, this Defendant denies the allegations contained in those paragraphs and demands strict proof thereof.

FOR A CAUSE OF ACTION OF
LOSS OF CONSORTIUM ASSERTED BY RICHARD WRIGHT

20. In response to Paragraph 43 of the Plaintiffs' Amended Complaint, this Defendant repeats and realleges its responses to the allegations of Paragraphs 1 through 19 above as if set forth herein.

21. To the extent Paragraph 44 of the Plaintiffs' Amended Complaint is directed at this Defendant, this Defendant denies the allegations with strict proof thereof demanded.

DAMAGES AS TO CYNTHIA WRIGHT

22. In response to Paragraph 45 of the Plaintiffs' Amended Complaint, this Defendant repeats and realleges its responses to the allegations of Paragraphs 1 through 21 above as if set forth herein.

23. To the extent Paragraph 46 (including subparts a-m) of the Plaintiffs' Amended Complaint is directed at this Defendant, this Defendant denies the allegations with strict proof thereof demanded.

DAMAGES AS TO RICHARD WRIGHT

24. In response to Paragraph 47 of the Plaintiffs' Amended Complaint, this Defendant repeats and realleges its responses to the allegations of Paragraphs 1 through 23 above as if set forth herein.

25. To the extent Paragraph 48 (including subparts a-l) of the Plaintiffs' Amended Complaint is directed at this Defendant, this Defendant denies the allegations with strict proof thereof demanded and the Plaintiff's prayer for relief being the remaining causes of action.

FURTHER ANSWERING AND AS AN AFFIRMATIVE DEFENSE, THIS DEFENDANT ALLEGES:
(Qualified Immunity)

26. This Defendant was at all times acting within official and discretionary capacity and as such is entitled to qualified immunity.

FURTHER ANSWERING AND AS AN AFFIRMATIVE DEFENSE THIS DEFENDANT ALLEGES:
(Absolute Sovereign Immunity – Eleventh Amendment)

27. This Defendant in his official capacity is an arm of the of the State of South Carolina and, as such, is absolutely immune to suit under the laws of the United States, the State of South Carolina, and common law sovereign immunity as well as the Eleventh Amendment of the United States Constitution.

FURTHER ANSWERING AND AS AN AFFIRMATIVE DEFENSE
THIS DEFENDANT ALLEGES:
(Acts of Plaintiffs, Comparative Fault)

28. Any injuries or damages sustained by Plaintiffs were caused by reason of Plaintiffs' own wrongful, illegal, and improper acts, willfulness, reckless misconduct, and gross comparative negligence.

FURTHER ANSWERING AND AS AN AFFIRMATIVE DEFENSE,
THIS DEFENDANT ALLEGES:
(Punitive Damages Unconstitutional)

29. That any award or assessment of punitive damages as prayed for by the Plaintiffs would violate this Defendant's constitutional rights under the Fifth, Sixth and Fourteenth Amendments of the United States Constitution and comparable provisions of the South Carolina Constitution, in addition to those provisions under the South Carolina Tort Claims Act.

FURTHER ANSWERING AND AS AN AFFIRMATIVE DEFENSE,
THIS DEFENDANT ALLEGES:
(No Constitutional Violation)

30. The alleged actions/inactions claimed by the Plaintiffs did not rise to the level of constitutional violations and the Plaintiffs did not suffer any infringement of constitutional and/or federal rights, privileges or immunities.

FURTHER ANSWERING AND AS AN AFFIRMATIVE DEFENSE
THIS DEFENDANT ALLEGES:
(Comparative Negligence)

31. That even if this Defendant was negligent as described in the Complaint, which is specifically denied, the Plaintiffs' alleged injuries and damages, if any, resulted from, were due to, and were the actual and proximate cause of the

Plaintiffs' own negligence and carelessness, and such negligence was greater than the alleged negligence of this Defendant, so as to bar or reduce the Plaintiffs' recovery against this Defendant.

FURTHER ANSWERING AND AS AN AFFIRMATIVE DEFENSE
THIS DEFENDANT ALLEGES:
(12(b)(6) S.C.R.C.P.)

32. Plaintiffs' fail to state facts sufficient to constitute a cause of action against this Defendant and any claim against this Defendant should be dismissed pursuant to Rule 12(b)(6) South Carolina Rules of Civil Procedure.

FURTHER ANSWERING AND AS AN AFFIRMATIVE DEFENSE
THIS DEFENDANT ALLEGES:
(Sovereign Immunity-Tort Claims Act)

33. This Defendant alleges that the Plaintiffs' Amended Complaint is barred or otherwise limited by the provisions of the South Carolina Tort Claims Act, and, specifically, by Section §15-78-60 (1), (2), (3), (4), (5), (7), (8), (10), (12), (13), (15), (16), (17), (20), (21), (25) and (27) of the Act.

FURTHER ANSWERING AND AS AN AFFIRMATIVE DEFENSE
THIS DEFENDANT ALLEGES:
(Comparative/Contributory Negligence)

34. This Defendant alleges that any injuries or damages alleged by the Plaintiffs, if any, which this Defendant expressly denies, were due to and caused by the contributory and comparative negligence, carelessness, willfulness, wantonness and recklessness of the Plaintiff in an amount exceeding fifty percent 50% of the total causal negligence, if any, in the same particulars as set forth below so as to bar

the Plaintiffs' claim as to this Defendant. In the alternative, this Defendant alleges that the injuries and damages alleged by the Plaintiffs, if any, which the this Defendant expressly denies, were due to and caused by the comparative negligence, carelessness, willfulness, wantonness and recklessness of others, who this Defendant has no control, and in an amount to be determined by the trier of fact, so as to reduce the Plaintiffs' claims proportionally, pursuant to South Carolina Law.

FURTHER ANSWERING AND AS AN AFFIRMATIVE DEFENSE THIS DEFENDANT ALLEGES:
(Determination of Proportional Liability)

35. This Defendant alleges that the injuries and damages alleged by the Plaintiffs, if any, which this Defendant expressly denies, were due to and were the direct and proximate result of, at least partially if not solely, of the other individuals and/or companies involved in this incident, if any so existed, so as to entitle this Defendant to a determination of proportional liability as to any concurring negligence, if so found, pursuant to S.C. Code Ann. § 15-78-100.

FURTHER ANSWERING AND AS AN AFFIRMATIVE DEFENSE THIS DEFENDANT ALLEGES:
(Limitation of Remedies)

36. Any recovery by Plaintiffs must be limited to the remedies allowed under the South Carolina Tort Claims Act, including but not limited to S.C. Code Ann. § 15-78-120(a)(1) and (2) and S.C. Code Ann. § 15-78-120(b).

FURTHER ANSWERING AND AS AN AFFIRMATIVE DEFENSE
THIS DEFENDANT ALLEGES:
(Public Duty Rule)

37. This cause of action fails to state a claim against Defendant South Carolina Department of Transportation in that as a matter of law the Defendant violated no duty which it owed to the Plaintiffs for which the Plaintiffs are entitled to relief in the form of damages.

FURTHER ANSWERING AND AS AN AFFIRMATIVE DEFENSE
THESE DEFENDANTS ALLEGE:
(Statute of Limitations)

38. The Plaintiffs failed to file and serve the Amended Complaint in a timely manner on this Defendant and is therefore barred by the applicable statute of limitations.

FURTHER ANSWERING AND AS AN AFFIRMATIVE DEFENSE
THESE DEFENDANTS ALLEGE:
(No Proximate Cause)

39. That, even if these Defendants was negligent, as alleged in the Amended Plaintiff's Complaint, which is specifically denied, the actions or omissions of this Defendant were not the direct or proximate cause of any injury alleged by the Plaintiff and therefore these Defendants are not liable for any damages allegedly sustained by the Plaintiff.

FURTHER ANSWERING AND AS AN AFFIRMATIVE DEFENSE
THIS DEFENDANT ALLEGES:
(Failure to State a Claim Pursuant to Rule 12(b)(6))

40. The allegations contained in the Plaintiff's Complaint fail in their entirety to state a claim upon which relief may be granted against this Defendant.

FURTHER ANSWERING AND AS AN AFFIRMATIVE DEFENSE
THIS DEFENDANT ALLEGES:
(Laches, Waiver, Estoppel)

41. The Plaintiffs' claims are barred by laches, waiver and/or estoppel.

FURTHER ANSWERING AND AS AN AFFIRMATIVE DEFENSE,
THIS DEFENDANT ALLEGES:
(No Causation)

42. No acts or omissions on the part of this Defendant were the proximate cause, or the cause in fact, of the alleged injuries.

FURTHER ANSWERING AND AS AN AFFIRMATIVE DEFENSE,
THIS DEFENDANT ALLEGES
Rule 12(b)(7) and Rule 19

43. Defendant, South Carolina Department of Transportation, moves for the dismissal of this action pursuant to Rule 12(b)(7) of the South Carolina Rules of Civil Procedure for the failure to join parties under Rule 19 of the South Carolina Rules of Civil Procedure. In the alternative, this Defendant moves for the joinder of Daniel Sena as a person, businesses and/or corporations or any other party, whether person, business and/or corporation who through discovery, is found to be needed for just adjudication as set forth in S.C. R.C.P 19(a)(1) so as to allow just application of S.C. Code Ann. § 15-78-100.

FURTHER ANSWERING AND AS AN AFFIRMATIVE DEFENSE
THIS DEFEDANT ALLEGES
(Sole, Intervening and Superseding Negligence of a Third-Party)

44. The Defendant South Carolina Department of Transportation alleges that the injuries and damages alleged by the Plaintiffs, if any, which the Defendant South Carolina Department of Transportation expressly denies, were due to and

caused by the negligence of a third-party so as to be the sole proximate cause of Plaintiffs' alleged injuries and damages, if any, so as to bar Plaintiffs' claims as to Defendant South Carolina Department of Transportation.

FURTHER ANSWERING AND AS AN AFFIRMATIVE DEFENSE
THIS DEFENDANT ALLEGES:
(Reservation and Non-Waiver)

45. This Defendant reserves any additional and further defenses as may be revealed by additional information through the course of discovery and investigation in a manner that is consistent with the South Carolina Rules of Civil Procedure.

FURTHER ANSWERING AS FOR A FIRST CAUSE OF ACTION AND ASSERTING CROSS CLAIMS AGAINST THE FOLLOWING:
Pilot Travel Centers LLC.
(Contractual Indemnity)

This Defendant, The South Carolina Department of Transportation, reasserts and realleges the previous allegations of this answer as fully and completely as if restated herein verbatim.

46. If this Defendant is compelled to pay damages for any reason in this matter, this Defendant would allege that any liability this Defendant has for the Plaintiffs' damages would be an imputation of liability upon this Defendant as a result of wrongful acts or omissions committed by Pilot Travel Center LLC though their agent Gary Bloom, Project Manager and/or agent for Pilot Travel Center LLC, Roy B. Parsons III, AIA, Registered Architect, and/or agent for Pilot Travel Center LLC, Ashley Engineering and Consultants of Summerville, South Carolina, for the design of this Pilot property through the Application and Encroachment Permit No.

5-08-080161 dated May 13, 2002 to which a jury deems contributed or caused the Plaintiff's damages.

47. This Defendant is entitled to full contractual indemnification, along with all attorney fees and all associated expert fee and defense costs, for defending this matter against Pilot Travel Center LLC negligence though their agent Gary Bloom, Project Manager and/or agent for Pilot Roy B. Parsons III, AIA, Registered Architect, and/or agent for Pilot Ashley Engineering and Consultants of Summerville, South Carolina, by way of contractual indemnification provisions contained in the Application and Encroachment Permit No. 5-08-080161, dated May 13, 2002, the amount of any monies this Defendant is adjudged to owe the Plaintiffs or which it pays the Plaintiffs in settlement of Plaintiffs' claims, plus the cost of investigating and defending the claims including reasonable attorney's fees.

48. This Defendant is informed and believes that it is entitled to a judgment, based on the contractual indemnification provisions, against Pilot Travel Center LLC though their agent Gary Bloom, Project Manager and/or agent for Pilot Roy B. Parsons III, AIA, Registered Architect, and/or agent for Pilot, Ashley Engineering and Consultants of Summerville, South Carolina, for the design of this Pilot property through the Application and Encroachment Permit No. 5-08-080161 dated May 13, 2002, for the full amount of any judgment the Plaintiffs obtain against this Defendant in this matter and in addition, all costs of investigating and defending this claim including reasonable attorney's fees for this Defendant's attorneys.

WHEREFORE, having fully answered the Plaintiffs' Amended Complaint, this Defendant prays as follows:

a) That the Plaintiffs' action be dismissed with prejudice;

b) The Court add additional parties to this claim for just adjudication;

c) For trial by jury on all issues so triable;

d) For costs and disbursements of this action;

e) That the Plaintiffs' claim for any damages not allowed or in excess of that provided by the South Carolina Tort Claims Act be stricken;

f) For a determination of proportional liability;

g) For a judgment for this Defendant in its cross claims for indemnity/contribution against Co Defendant Pilot et al an its agents; and

h) For such other and further relief as this Court deems just and proper.

MAYBANK LAW FIRM, LLC
531 Savannah Highway
P.O. Box 12579
Charleston, SC 29422
P: (843) 766-8101
F: (843) 766-8103
Email: Roy@maybanklaw.com

Roy P. Maybank (S.C. # 69643)
Attorneys for Defendant
South Carolina Department of Transportation

Dated: 6/13/2014

Charleston, South Carolina

STATE OF SOUTH CAROLINA COUNTY OF BERKELEY	)	IN THE FAMILY COURT 2016-CP-08-334
CYNTHIA WRIGHT, PLAINTIFF, vs. SOUTH CAROLINA DEPARTMENT OF TRANSPORTATION, PILOT TRAVEL CENTERS, LLC, SPEEDWAY, LLC, ASHLEY LAND SURVEYING, INC., F/K/A ASHLEY ENGINEERING & SURVEYING, INC., and ASHLEY ENGINEERING & CONSULTING, INC., AND MUNLAKE CONTRACTORS, INC. DEFENDANTS.	)	MOTION HEARING TRANSCRIPT OF RECORD

Monday, April 10, 2017
Moncks Corner, South Carolina

B E F O R E:

The Honorable Roger M. Young, Sr.

Maria Dempsey, RPR
Official Court Reporter
Berkeley County Family Court
Ninth Judicial Circuit
Moncks Corner, South Carolina

APPEARANCES

Kevin B. Smith, Esq.
Jordon Calloway, Esq.
Attorney for Plaintiff

Jeffrey Ian Silverberg, Esq.
Attorney for Defendant
Pilot Travel Centers, LLC

Roy Pearce Maybank, Esq.
Attorney for Defendant
South Carolina Department of Transportation

Jerome Bennett Crites, III, Esq.
Attorney for Defendant
Speedway, LLC

Bruce Alan Berlinsky, Esq.
Attorney for Defendant
Ashley Surveying & Engineering

INDEX TO PROCEEDINGS

PAGE

MOTION HEARING 3

CERTIFICATE OF THE COURT REPORTER

EXHIBITS

(No Exhibits Proffered.)

THE COURT: Next I've got Wright versus Marathon. All right. Pilot versus Wright versus Marathon. What have we got?

MR. SILVERBERG: Your Honor, my name is Jeff Silverberg, and I represent Pilot Travel Centers, LLC in this action. This is our motion for summary judgment. Let me first just ask for the Court's indulgence, because there's quite a bit I'd like to try to get through this morning, because although the facts aren't that complex, we were recently, you know, served with -- the plaintiff's counsel recently submitted a long memo in opposition, and some affidavits of experts on the eve of this hearing, that I believe have a number of, I guess, assertions and allegation, and they're not based on the record. And so I'd like to clear them up, because I think it makes what otherwise is a very straightforward case seem more complex than it is. So I would like to address that. If at any point you think I've talked enough, I'm sure you'll let me know.

THE COURT: Who do you represent?

MR. SILVERBERG: Pilot Travel Centers, LLC. It's our motion for summary judgment, and my name is Jeff Silverberg.

MR. MAYBANK: Your Honor, we are all in the case. I'm Roy Maybank on behalf of the South Carolina Department of Transportation.

MR. CRITES: Bennett Crites on behalf of Speedway.

MR. BERLINSKY: Bruce Berlinsky for Ashley Surveying & Engineering.

THE COURT: Okay. Y'all just here to listen to him? Is there more than one motion?

MR. SILVERBERG: It's one motion. It's one single motion. It's Pilot's motion in this case.

THE COURT: Okay.

MR. SILVERBERG: I guess they're here for moral support.

THE COURT: They're just there for...

MR. SILVERBERG: As I was saying, if you think I've talked too much, perhaps you'll let me supplement with a response memo to their -- the memo of law, if need be.

And do you have the copy of the memo in support I submitted last Thursday? If not, I have a copy. I only have one copy. I assume you have a copy.

All right. Your Honor, today the plaintiffs are going to ask this Court to hold that a business owner that -- whose property abuts a highway, has a duty to protect travelers on that highway from being hit by a drunk driver who was under the influence of cocaine is, in a nutshell, is what this case is about. My client, Pilot Travel Centers LLC, owns a Pilot Travel Center gas station that abuts Highway US 17-A off of the I-26 exit in

Summerville, South Carolina. And the plaintiffs are asking this Court to hold that my client can be held liable for an automobile accident that involved the plaintiffs and another driver in the portion of the highway that is in front of our Pilot Travel Center.

Let me -- I'd like to provide a brief introduction to the facts of the case. In order to do that, I think it would be helpful if the Court looked at what's Exhibit B of my memo, which is a photograph, and I can just hand this up.

So this photograph is an aerial view of the Pilot Travel Center, which is at the top. And at the bottom, across the highway, is actually another gas station. I believe that's a Hess station. Now, I started to confuse myself which was east, west, north, south or whatnot, so I'll just kind of give directions based on this photograph.

What happened is, in this case, is on the night of October 6th, 2012, the plaintiffs were on a motorcycle traveling through the intersection to the right of this photograph towards the Pilot station in the left-hand lane, past the Pilot station, when at the same time an individual by the name of Daniel Sena, driving a pickup truck, was traveling in the left lane on the opposite side of the highway in the opposite direction. He was driving with a blood alcohol level above the legal limit, and he was under the influence of cocaine. He was also driving without a

suspended license due to a prior DUI.

What happens is that Mr. Sena turns on his left blinker, gets into the median right across from the driveway to the Pilot Travel Center that's highlighted on this photo. And his testimony, Daniel Sena's testimony is that he attempted to make a left turn in, and he hit the plaintiff's motorcycle, injuring the plaintiff. So the important thing here is, the accident occurred entirely in the highway. Neither Mr. Sena nor plaintiffs were invitees or licensees of the Pilot Travel Center.

According to Sena's testimony, he simply just didn't see the plaintiffs. He didn't see the motorcycle when he attempted to make the -- what was a legal, otherwise legal left turn. And he said, there's no reason I didn't see it, just bad judgment on my part. Can't blame anyone else but myself. I take full responsibility for the accident. All right. That, that right there is what this case is about, that accident. And then the plaintiffs have sued --

THE COURT: So he was wanting to make a left-hand turn into the Pilot?

MR. SILVERBERG: That was his testimony.

THE COURT: But he never turned into the Pilot?

MR. SILVERBERG: He never turned into the Pilot. He hit the plaintiffs.

THE COURT: So this happened in that little median

area?

MR. SILVERBERG: Well, I guess in the left lane. The left lane --

THE COURT: Well, you've got an X written, drawn, written on there.

MR. SILVERBERG: And Your Honor, I apologize, I'm not sure exactly what the X represents. This was an exhibit to Sena's deposition.

THE COURT: Hold on. It's already confusing enough to understand these, but to mark it with something and say, well, I don't know what that means, doesn't make my job easier. So what does the X stand for?

MR. SILVERBERG: Well, I could look at the testimony, but I believe this was -- perhaps plaintiff's counsel can elicit.

MR. SMITH: Judge, X is where he was turning left. The wreck happened in the right-hand inside lane just before X got into the Pilot Travel Center. The plaintiffs were traveling from Summerville down the overpass, heading straight towards Moncks Corner.

MR. SILVERBERG: Well, the testimony is that the plaintiffs were in the left lane, traveling left lane. No dispute the accident occurred in the highway. Now, the plaintiff's have sued Pilot Travel Center. They've also sued the Department of -- South Carolina Department of

Transportation. They've sued the prior owners of this property, which is Speedway, LLC. They've also sued Ashley Engineering, which did some design work for Pilot. And they sued the general contractor of this Pilot station.

The main claims are that the Pilot -- the plaintiffs are claiming that this median, this flush painted median in this photograph I've shown the Court, should have been a raised median, and that that would have prevented this incident; and that the driveway on our property was somehow -- there is a design flaw, and that somehow caused the accident, creating some sort of dangerous condition on the highway.

We filed the present motion on our viewing that, you know, we didn't owe any duty to the plaintiffs just by virtue of abutting this highway. That even if there was a duty, we didn't breach any duty, and the plaintiffs can establish that any duty may or may not have breached caused -- was a proximate cause of this accident or the plaintiff's injuries.

So let me just address, I guess, the duty argument first. The plaintiffs first must establish that we owe them a duty to prove their negligence action against us. They can't show duty, their claim fails. Now, in South Carolina, there's no common law duty owed by a property owner that abuts a highway to travelers. There's no just general duty.

Okay. In Skinner v. South Carolina Department of Transportation, which is 3-83-SC-520, in this case, the South Carolina Supreme Court did say that a property owner whose land abuts a highway only owes a duty to travelers for highway conditions where the property owner has undertaken an activity that creates an artificial condition on the highway which is dangerous to travelers.

Here, the plaintiffs cannot establish that Pilot created a dangerous artificial condition on the highway to serve as the basis of any duty. As I alluded to a little while ago, the allegations are that the dangerous conditions on the highway was the fact that this flush painted median should have been a raised median. And then again, the driveway that Mr. Sena testified was trying to turn into created an artificial condition that was dangerous on the highway. I'll take them one at a time.

The absence of the median. Even assuming that the absence of a raised median in this highway was a dangerous condition, it was not a condition on the highway created by Pilot. It was a condition created by the South Carolina Department of Transportation. All right. The decision as whether or not a median, a raised median, should be installed on a highway falls within the exclusive authority of the South Carolina Department of Transportation, because they are the state agency with the police power and the

duty, the exclusive authority to plan, maintain, and operate state highway, thus state highway system in our state, and we cite the several cases and statutes in our memo to support those propositions.

You know, the Department of Transportation has the exclusive authority to design the highways and to -- which includes the placement of traffic control structures, such as the raised median, you know, that the plaintiffs allege should have been in. In fact, the Department of Transportation, in their 30(b)(6) deposition, they said it was their decision not to put a raised median in that intersection.

The plaintiffs cannot point to any authority establishing that Pilot, merely by being an abutting property owner, had a duty to maintain or repair or warn others of the fact that there was no median here, because we don't have control of the highway. We don't have control of the median, which is part of the highway. One of the cases we cite in our memo is pretty on point. It's a Pennsylvania case, Allen v. Mellinger. In that case -- the facts are very similar. In that case, the plaintiffs were actually trying to make a left turn into a business property, and they were hit by someone as they were doing that, and the Commonwealth of Pennsylvania applied -- applying the Restatement Second of Torts Section 349, said that the

business owners owe no duty to the plaintiffs to maintain the highway in a safe condition. All right. Section 349, it's in a footnote in our memo, to speed things up, but it's essentially paraphrasing here, and it says, the possessor of land that is on a public highway, you know, is not liable by his failure to maintain the highway in a safe condition or to warn others, other travelers of dangerous conditions, even if they know of dangerous conditions. They just have no duty.

So using that statement, the Commonwealth Court of Pennsylvania in Allen v. Mellinger, basically said no duty was owed. The Court said, look, the highway is the -- you know, the Commonwealth owns the highway, has the exclusive duty for maintenance and repair of state highways. You know, the Court also rejected the argument of the plaintiffs in that case, that the business owner's failure to erect signs in their driveways or place curbing or barricades in the parking lot to indicate the safest place to turn into the property. The Court rejected that argument, then saying that argument didn't create a dangerous condition.

The Court said, even if this left turning lane, similar in our case, this median, even if it was a dangerous condition, all right, it was a condition of the highway, which is the responsibility of the Commonwealth of Pennsylvania, which is what we have here, like in Allen.

Even if the absence of a raised median was a dangerous condition, it was the condition of the highway created by the Department of Transportation.

So it seems pretty straightforward, however, perhaps to try to get around this, the plaintiffs allege that, well, Pilot somehow was involved in the decision to not put a raised median there. In other words, we negotiated or we somehow influenced the Department of Transportation's decision. Now, this might be a good time to point it out, in the memo and all that we submitted to the Court, I mean, I counted no less than 22 times does the plaintiff allege that Pilot negotiated the removal of a median. That's just simply not true. It's just not supported by any of the evidence in this case.

And in order to explain that, I'm going to have to just give you some more background into where this allegation that Pilot somehow influenced the decision not to put a raised median, I'm just going to have to explain where this comes from. So Pilot acquired this property on or about September 1st, 2001. When the property was acquired, there was already a gas station there. That gas station already had three entrances to the highway, okay, just like it does today. Now, there was never a median in that highway. The DOT has testified there was never a raised median in this highway.

Okay. Now, Pilot started to rebuild, to redesign and rebuild the existing gas station. They started to build it in around 2002, I think. I believe it was the testimony that it was August of 2002. It just so happens that around this time, the Department of Transportation had two ongoing projects in the area. And so I'm going to refer to the photograph I was referring to earlier. There were two projects in this area going on the same time as this Pilot Travel Center was being built. One, according to Department of Transportation, was what I will call the interchange project; that's what I refer to it in my memo. And with that, my understanding of what that project was, if you look at the photograph, you see on the right side, that interchange, it was basically to redesign and redevelop that interchange, and then all the way to the right of this photograph that cuts off to Summerville. So from the stop bar on the left side of that intersection, all the way to the right, that's what was referred to -- was the interchange project. That the plans for that project were designed by -- the Department of Transportation had an outside firm design those plans.

The second project was actually widening the highway right in front of the Pilot station. These were two projects going on around the same time. The widening plans were actually designed internally by the Department of

Transportation. And this is important, because the plans for the widening project, which were prepared in 1998, never had a raised median in them. They weren't there. There was never a raised median. Okay. Now, the DOT did testify that in the plans for the interchange project, that again, we're dealing with an area not related to the portion of the highway in front of our Travel Center. That interchange project was -- the designs that were prepared by, again, an outside firm did show, on one of their plans, a marker for a raised median right here, but the DOT testimony, their 30(b)(6) said, that was just a placeholder. It was a placeholder because we had to, at one point, take our widening plans, and we had to put them together with the outside firm's interchange plans, but there was never an intention for there to be a raised median here. That was just the outside firm having to put something there, a placeholder. And so the decision -- the testimony of the Department of Transportation was, the decision that a raised median was never -- it was never anticipated there be a raised median in here, and it was just a placeholder.

And I bring this distinction because one of the arguments is that, again, the original plans of the Department of Transportation, the plaintiffs claim it showed a raised median that was removed, and that's just not what the Department of Transportation has testified to. They

said there was never an expectation that there would be a raised median, and that decision was made by the Department of Transportation. The person who made that decision was deposed. He was one of the designees. He said, I made this decision when the widening plans were prepared in 1998. So to suggest otherwise, to suggest that there was always -- there was at one point plans for a raised median is just not accurate when you consider the testimony of the Department of Transportation.

Okay. So having explained that, the next question is, all right, well, then where's the evidence that plaintiff's counsel is alleging 22 times in their memo that the Pilot negotiated the median? Well, that comes from this document. This is the alleged smoking gun in this case. This is a letter dated August 28th. It's from Tommy Smoak from the Department of Transportation to a Robert Gru (phonetic) -- I think it may be Grivy (phonetic), with Marathon Ashland Petroleum, which I'll represent was part of the prior property owners before Pilot came along. It's dated August 28th, 2000.

Plaintiffs are relying on these handwritten notes on the bottom. You know, I'm not going to read them all, but you'll see the first line in parenthesis, it says, negotiated median removal and drive cuts (phonetic). This handwriting on this August 28th letter is what the

plaintiffs are relying on to argue that we negotiated the removal of the median. Again, the removal of the median, that according to the Department of Transportation plans, was never intended to even be there. I'll tell you why that's -- this offers no support for that proposition, and that's because, again, look at the date. The date is August 28th, okay, 2000. The Department of Transportation testified that the decision not to include a raised median was in the original widening plans, which were prepared in 1998. Okay. We got a date conflict there. Then Mr. Gru isn't an employee of Pilot. All right. Pilot wasn't involved at this point. He's never been an employee of Pilot. Therefore, you can't somehow say that this has anything -- this is any evidence that Pilot negotiated with the Department of Transportation. The Department of Trans -- the individual who made the decision to not have the median in the widening plans, he doesn't recall ever talking to anyone from Pilot about the median.

So again, this letter doesn't really prove in any way that Pilot had any involvement in the decision of whether or not to have a median in front of Pilot Travel Center, notwithstanding the allegations in the Plaintiff's memo of law. In fact, the Department of Transportation, their deposition, the deposition lasted over 10 hours. All right. We're talking about 400 pages of a 30(b)(6)

deposition, and several times the Department of Transportation's designee said there was no negotiation of the median. I'll just quote one excerpt of that long deposition. It's from Leland Colvin, who was a designee. It's from one Page 117 to 118, and there were some prefatory comments, but the substantive question was:

Well, let me ask you this. Was there any negotiation in the decision to go with the flush median as opposed to the raised median? Answer: No. I mean, not -- not from my perspective, no. Definitely not from my perspective. From my perspective, it was purely engineering -- it was a purely engineering decision based on the highway design manual.

And I'll represent to you that the highway design manual is allegedly the bible in terms of the Department of Transportation's design plans. They use that whenever they're designing something. They refer to it as their bible. So the deponent said, it was a purely engineering decision based on the highway design manual, based on the difference of the two projects, the purpose and need. Certainly, one would have been easier for Mr. Smoak to negotiate than another one, but no, it was not removed as a result of right-of-way acquisition. It was removed as a result of meeting of the plans, and the purpose and need of the two projects, and matching the highway design manual. That's the DOT's deposition

testimony. No negotiation took place.

And I will point out, despite the fact that plaintiff's counsel says 22 times in their memo that we negotiated or altered the plans that to get rid of the median, in Footnote 7, they actually -- the plaintiffs actually acknowledge that there was no negotiation. The plaintiffs acknowledge the Department of Transportation asserts the change in median design was unrelated to its discussions with Pilot. Pilot's VP of development testified he was unaware of whether there were earlier plans for a raised median.

In light of the evidence described in the negotiated resolution regarding the median and the parties' differing accounts, the issue presents a question of fact that a jury must resolve. I would submit to the Court there's no question of fact here. There's no scintilla of evidence that Pilot had anything to do with the decision of whether or not a raised median should be added, again, added, because there never was one, ever, to the portion of the highway in front of our Travel Center. So again, I would argue that there was no duty as it relates to the presence of a raised median.

The next allegation is that the construction of our driveway had something to -- somehow created a dangerous condition on the highway. I referenced the Skinner case

where it says you're only responsible for artificial dangerous conditions you can create on the highway. I'd come across a South Carolina case stating that a driveway in and of itself can be considered a dangerous artificial condition on a highway. In fact, if you look at the Skinner opinion, it sets forth what artificial conditions they're talking about. They're talking about situations where a business spills material on the roadway or emits smoke on the roadway. That's the artificial condition contemplated by our case law. And just think about the ramifications of that. If every business owner along this highway is going to be liable simply for having a driveway on its -- on the highway. It would be one thing maybe if there was something defective about the driveway itself, but that's not the case here.

And then I will add to this. I will add that, again, the Department of Transportation has the exclusive authority when it comes to determining where a business can put its driveways. A business can't just start building driveways. They have to get an encroachment permit. They have to submit that to the Department of Transportation.

According to the Department of Transportation, the location of driveways are part of the design of the highway, and as we've discussed, the Department of Transportation has the statutory duty to design the highways of our state.

They have control over the highways of our state. The Department of Transportation testified that they reviewed the business owner's design plans, the permit for an encroachment. They review those to ensure that they comply with the DOT regulations and the standards concerning the design and location in driveways. They also will review this permit to make sure that the driveways do not create safety concerns in the highway. That's part of their review process, and they use their independent analysis to determine whether or not those driveways should be allowed.

And in this case, Pilot submitted a encroachment permit, and it was granted. Therefore, Pilot could not have constructed these driveways to its property, unless the Department of Transportation determined that they comply with the Department of Transportation's design standards, and determine that they were safe for the public.

Briefly, I'll address, you know, there's some indication, well, you know, Pilot, you should have been aware of potential dangers on the highway because there were other accidents on the highway. Well, you know, there's no affirmative duty to act. All right. A legal duty -- an affirmative legal duty only exists if it's created by statute, contract, relationship status, property interest, or some other special circumstance. Here, that didn't exist.

There's no duty to affirmatively act. In fact, the Department of Transportation said, we don't expect business owners to tell us if there's accidents on their property. And I will add that there's no evidence in this case that anyone at Pilot was aware of any accidents that occurred in this same manner. There's been no testimony to that effect. And foreseeability of an injury alone, under our case law does not create a duty to act. So I'd argue there's no duty simply, even if you were to assume that there were a lot of accidents here.

Now, plaintiff's counsel attached to their memo Exhibit 14, this collision report. And they allege in their memo, there's over 254 accidents in this area, and at least a third of them involve turns into the Pilot station. Well, I would submit to the Court that that's not what this shows. In fact, there's no testimony in the record explaining what this collision report says or does not say. It doesn't tell you the exact locations of accidents. It gives general coordinates. It doesn't tell you -- it doesn't prove that any one accident was caused by not having a raised median. And in the absence of any testimony explaining what this does show, I would ask the Court to disregard any representations as to the amount of accidents that involved this particular driveway, because of the plaintiffs have failed to present any admissible evidence that this report

shows what they say it does.

All right. So to finish up the duty. There is no duty on the part of Pilot with respect to any dangerous conditions created by the median, because we didn't control the median. The Department of Transportation controls the median. There's also no duty owed by virtue of simply having a driveway, especially here where the driveway was approved by the Department of Transportation, and deemed to comply with their standards, both safety and otherwise.

So having established that we do not owe the plaintiffs duty to move to breaches of that duty, and again, thank you for the Court's indulgence in letting me go through all this. The two breaches, essentially, one is that, that's alleged, one is that we created an artificial condition, we being Pilot, by negotiating the removal of the median. Well, as I've said, and acknowledging probably, that's just false.

There's no evidence that Pilot in any way negotiated the removal of the median or was in any way involved in the discussions on whether or not the median should be there. So I'm not going to address that breach, because I think I've covered it. There's no dispute that the Department of Transportation made the decision, when it was doing the widening project, not to put that median there. It was a decision made before Pilot acquired the property. So let's

talk about the improper design of the driveways, because I think that's the other alleged breach of this alleged duty that we owed the plaintiffs. And before I address it specifically, now probably is a good time to briefly address the affidavits of plaintiffs' experts, which were sent to us, again, I think it was Thursday of last week, may have been Wednesday of last week, but nonetheless, I have to say, I'm going to address them essentially together, because they're pretty much verbatim substantively.

These affidavits essentially just opine on matters of law, which is within the sole providence of this Court. Dawkins v. Fields 354 SC 58, in general, expert testimony on issues of law is inadmissible. If you look at these, you know, Paragraphs 5 through 8, all they talk about are what the experts think are the duty owed by Pilot. All right. That's an issue of law for the Court. Paragraph 11 of both affidavits, both talk about what an artificial condition is. Again, I'd argue that that's for the Court to determine. Paragraph -- the rest of these, I mean, the rest of these affidavits, again, just make absurd statements not based on any evidence in the record or some of them don't even appear to be within the expert's alleged field of expertise. They contain the same allegations that Pilot somehow negotiated the removal of the median and that was a breach of duty. As I've explained to you, that's just not factually correct.

So they also talk about -- they both opine that it's their opinion that the absence of the median caused the damages. At one point they say, it's my belief the only reason why there's no median in there is because Pilot had a monitary incentive for there not be one. Again, it just doesn't make sense. It's not based on anything, because the Department of Transportation has said that they chose not to put a raised median. And so I would just ask the Court to disregard this based on Dawkins vs. Fields, where Superior Court, you know, agreed that an expert's affidavit shouldn't be considered, because although it offered some helpful factual information, the majority of the affidavit was simply just legal argument as to why summary judgment should be denied.

The Court noted in Dawkins that the affidavit just read like it could be plaintiffs' oral argument to the Trial Court. And I would submit to the Court that that's exactly what these affidavits are, and therefore, since they primarily contain legal arguments and conclusions, they should be disregarded. Notwithstanding that, let's talk about what they say about the breach of the duty allegedly owed with respect to the design of the highways. As I can tell, as I can, I guess, deduce from these, they're alleging that these -- this particular driveway didn't comply with one of the handbooks that the Department of Transportation

uses when evaluating whether or not to grant an encroachment permit to a business.

The first design flaw, I think, that they're saying is that it wasn't within the functional -- is that the driveway was within the functional area of the intersection. Now, I won't get too much into that. I'll just say that my understanding is that the functional area of intersection basically just refers to the amount of distance required for people entering that intersection to be able to navigate the intersection. Well, as we know, this accident happened well beyond the intersection. And even to the extent that that functional area of an intersection, having a driveway there creates a dangerous condition, there's no evidence that this particular driveway was within that functional area.

The DOT, at least one DOT official said that that wasn't -- that he didn't think that was within the functional area. And even the plaintiffs' expert, I think in Paragraph 9, both of them say -- they don't say it was within the functional area, they say it was too close to the functional area. They don't explain why that was a problem in this case or how that proximately caused the accident, but that's one of the allegations.

The other allegation is that, well, according to DOT's handbook, which again DOT said was just guidelines that they would use, and they don't always comply with them,

is the distance between the two driveways. Well, what does that have to do with this accident? Whether it's 100 feet, 200 feet, the distance between the two driveways had nothing to do with the fact that you had a drunk driver under the influence of cocaine failing to yield. So to the extent that's even true, that the distance between the driveways were not in compliance with some handbook, that wasn't the proximate cause of the accident.

Finally, the proximate cause issue, there's no evidence that any act or omission of Pilot proximately caused the plaintiffs' accident, when the cause of plaintiffs' injury may be as reasonably attributed to an act for which the defendant is not liable as to one for which he is liable. The plaintiff has failed to carry the burden of establishing the defendant's conduct proximately caused his injuries. That's McKnight vs. South Carolina Department of Corrections, 385 SC 380. Ordinarily, proximate cause is a question for the jury, for when the evidence is susceptible to only one inference, it becomes a matter of law for the Court.

I would argue that the only inference here is that the proximate cause of this accident was Mr. Sena, the at-fault driver, who was driving under the influence of alcohol and cocaine, failed to yield the right-of-way. He testified that it was ultimately his actions that caused

this accident. He can't blame anyone else but himself. He simply didn't see the plaintiffs' motorcycle and used bad judgment. He testified he doesn't blame Pilot. He doesn't blame the Department of Transportation. He doesn't blame the absence of a raised median. The only one who blames Pilot and the absence of a raised median are the plaintiffs.

Plaintiffs cannot establish that the raised median would have prevented this accident. All they can say is that it could have. You know, the plaintiff herself, one of the plaintiffs, Cynthia Wright, testified that she couldn't say whether or not the presence of this median would have prevented this drunk driver from doing what he did that day. So the plaintiffs had put forth just no admissible evidence that -- with respect to the driveways, no evidence that the spacing of driveways or its relation to the intersection in any way was the proximate cause of this accident.

So again, I appreciate the Court's time. In sum, the plaintiff owed no duty. Even if they owed a duty, there's no breach as a matter of law, and there's no evidence that any alleged breach proximately caused the plaintiffs' injuries. Thank you.

THE COURT: Who's talking?

MR. CALLOWAY: Good morning, Your Honor. Jordon Calloway, Kevin Smith, on behalf of the plaintiffs, Wrights. Your Honor, the plaintiffs were injured in that accident

right in front of the Pilot station, and there have been hundreds of accidents since Pilot took over and rebuilt this area. Your Honor, there was a duty under Skinner and under South Carolina Common Law, for them, if they created an artificial condition, which was dangerous to people on the highway, had a duty of reasonable care. Specifically under Skinner, the duty is stated as follows: When an individual or business is undertaking an activity that creates an artificial condition on the highway, which is dangerous to travelers, there is a duty on behalf of Pilot.

So that's part of the duty that we're relying on. The artificial conditions that they've created, both on their property and within the highway itself, which made the highway substantially more dangerous to the Wrights, and was a proximate cause of the accident, which caused the injuries to the plaintiff. That's the argument as it relates to duty.

THE COURT: Do you have any authority to stand for the proposition that Pilot is responsible for what DOT decided to ultimately do with that road?

MR. CALLOWAY: No, but the problem with that argument is they, Pilot, was heavily involved in the decision as to what was going to go on in the middle of that road.

THE COURT: Doesn't matter once DOT, a government agency, decides what to do. It's the end of the game.

MR. CALLOWAY: I disagree, Your Honor, for a couple of reasons.

THE COURT: Well, convince me otherwise, because right now, you have a big uphill battle.

MR. CALLOWAY: Your Honor, as it was explained by Pilot, when the plans were made for the driveways, they were made or supposed to be made by Pilot according --

THE COURT: This accident didn't take place in the driveway. It took place in the median.

MR. CALLOWAY: Well, it took place on the side of the -- side of the road, but not specifically in the median. The median was involved, but it was on the right side of the road they were traveling in.

THE COURT: It didn't take place in the driveway, did it?

MR. CALLOWAY: No, but it doesn't happen without the driveway in the condition they were in, without the driveway violating the ARMS manual.

THE COURT: Well, every business has got to have a driveway in order to get in to, right?

MR. CALLOWAY: Don't disagree with that, Your Honor, but they have a duty to comply with the ARMS manual on how they design those driveways. Now, they put in four driveways here. They're too close together. The ARMS manual says, for a 45-mile-an-hour road, 250 feet apart,

those are the rules. You want to attach your business to the highway, you've got to comply with DOT rules.

THE COURT: But where the driveway is at didn't cause the wreck. The accident didn't take place in the driveway.

MR. CALLOWAY: But -- I don't mean to interrupt Your Honor.

THE COURT: You did it.

MR. CALLOWAY: If the driveways' not there because you have to space them 250 feet apart, and they're further up the road, then it is a big impact on where this accident took place. It affects -- and the reason why that 250 feet rule is there, is so that people trying to turn are going to have enough time to see people coming. And so those rules are in effect for safety. DOT says that's a safety requirement. And they also say that under -- in this case, Pilot didn't meet those requirements under the ARMS manual. So they acknowledged those driveways too close together.

DOT also admits that at least one, possibly two of those driveways were within the functional area of that intersection. That too is a safety regulation. If you're right next to the intersection, people coming in at 45 miles an hour, it makes things much more difficult for a person making a left turn there. So that's why we get the driveway, for those two reasons, because they were too close together, and because they were so close to the functional

area of the intersection; that's what our experts say. That's what DOT essentially admitted, is that they were within, or at least a couple of them were within the functional area of the intersection.

Now, as it relates to the median, the letter that you have in front of you indicates that there was a negotiation that took place. The original plan, and this is in Colvin's testimony, the original plan for that median was, it was going to have a raised median. Then they come in -- Mr. Colvin also said, when the property owners came to us, they wanted the raised median gone. They wanted it gone. So they come, and there was a negotiated, as discussed here, where they say, we want the raised median out and we want these driveways. So those sorts of things.

And as this letter says, it says, in other words, the unmalleable median has been eliminated from the plan. Now, when defense counsel told you, well, it was never really in the plan. Well, that's not what the language of this letter says. It says it was eliminated from the plan. For something to be eliminated from the plan, it had to have been a part of the plan originally.

Also, to the extent they said there were no negotiations. They say we made that decision on our own. Well, that's not consistent with the plain language of this letter either. Negotiations are a two-party process. That

doesn't indicate that DOT made this decision on their own. There was a negotiation, and after the negotiation, this raised median was eliminated from the plan. That's what the letter says. So we have now -- we have this evidence that this property owner is coming to DOT and saying, we'd really like to have that gone. And then we've got this saying, well, the original plan was for it to be in there, and after the negotiations, we're eliminating that from the plan.

So to say they didn't have any involvements in what happened with that median is inconsistent with this. I understand Mr. Colvin says otherwise, but a jury should have to decide which one is right, which one is more credible. The plain language of this letter that says two parties negotiated? And Mr. Colvin says, no, that was all us. That's exactly the kind of question of fact that a jury should resolve.

And that brings us back to Skinner. That's the artificial condition we're talking about back here, creating an artificial condition on a highway dangerous to travelers, and that's what happened in this case. The median and the driveways, which were dangerous conditions, which caused a danger, which led to the accident involving the Wrights.

We don't dispute at all that Mr. Sena has some responsibility for this, no problem admitting that at all. Our statement is that both DOT and Pilot have a

responsibility, because both Pilot and DOT were involved in the process of getting that median in place. Also, specifically as it relates to the driveways, Pilot put together the plan for those driveways. Took them to DOT, and then constructed those driveways outside the context of the ARMS manual, the South Carolina Department of Transportation Regulations, which is also important under Skinner, because what Skinner said, in part, was that the plaintiff in that case could not rely on the ARMS manual as a duty creating mechanism. Why? Because in that instance, the plaintiffs, who were just property owners who had heavy horse trailers that were causing ruts beside the road, in that case they didn't have to get an encroachment permit. They weren't subject to the ARMS manual requirements.

Different case here. This is a party -- a commercial party trying to link their property to the highway, and they had a responsibility and obligation, and in fact, did send an encroachment permit to DOT. And so this is a different case than Skinner on the facts, but the duty that Skinner recognized is appropriate and does apply here in this case.

We also say in our memo, Your Honor, other bases for duty under South Carolina, for example, Restatement Second of Torts Section 321, which has been recognized as a duty creating mechanism on the Field (phonetic) case. And that

section basically says that you have a duty to act when a defendant's behavior creates a danger, specifically if an act or doesn't act, and subsequently realizes or should realize that it's created an unreasonable risk of causing physical harm to another, he's under a duty to use reasonable care to prevent the risk from taking effect.

So defense counsel mentioned the idea that there is no affirmative duty to act. Well, under section 321, there can be. And we believe, Your Honor, that that applies to this case, as it relates to breach, the two breaches. Specifically, the negotiations which we already talked about, the two pieces of evidence, specifically the letter that Your Honor has in front of him, and also, the driveways themselves.

The ARMS manual, which a part of the exhibits we submitted to the Court, the ARMS manual says, in particular on Page 10, driveways should be as far as possible from the intersection. As SCDOT admitted in their deposition, that one or two of the driveway's within the functional area of this intersection; that's Mr. Clark's testimony, and also Mr. Colvin's testimony. Also, in the ARMS manual on Page 9, there's a table which specifically talks about the distance that each driveway must be from one another, and DOT's 30(b)(6) designees admitted that one or two -- this is Mr. Clark's testimony -- did not meet that standard.

As it relates to proximate causation, one last thing on breach. We do have two experts that submitted affidavits, which identified breaches of the standard care. In other words, they identified that the way these driveways were designed, and the way they were implemented, violated engineering standards. So to say that those are simply legal conclusions is inaccurate. These are civil engineers. Engineers who do highway management and intersection management, that sort of thing, and they're saying, we've looked at the ARMS manual, we've looked at the national standards and compared them to what Pilot did here, and they breached those standards. So we've got Skinner saying that ARMS manual can possibly be a source of duty. We've got expert testimony establishing breach of duty under the ARMS manual and national standards, and so that satisfies the breach element.

As it relates to proximate causation. Defense counsel essentially seemed to indicate that didn't matter if there's a raised median there or not. Well, that's kind of inconsistent with what their own witness says. Basically, their witness admitted -- why do you have a raised median? We asked him. He says, well, to prevent left turns. That's why it's there. That's why it would ever be there. To force someone further down the intersection or say you can't do a left turn here, you've got to go to the traffic light

up there here, or you have to not take a left turn there, go make a U-turn and make a right turn. That's why raised medians are there. DOT basically provided similar testimony.

They also cited the testimony of the at-fault driver to essentially say he admitted that the median didn't have anything to do with this. Let me quote one line from Mr. Sena's deposition. He said, quote, the raised median could have prevented my accident and a lot more accidents, and any more to come. That's Mr. Sena's testimony on Page 119 of his deposition. So we've got the testimony of the at-fault driver, and we've also got basically the fact that this median could have an impact, as stated by DOT and the Pilot's representative himself. Also have experts, and the experts' affidavit, they have proximate cause opinions in there as well.

Your Honor, based on those principles, and also relying on the principles stated in our memorandum established on Friday, we believe that the defendant's motion should be denied. There was a duty in this case under South Carolina Common Law and Skinner. There were breaches in these two ways described a few moments ago, and there is evidence, at least specifically a scintilla of evidence on that question of fact of proximate cause, we ask that the motion should be denied.

MR. SMITH: Your Honor, can I just add one thing, specifically your question regarding duty?

THE COURT: Go ahead.

MR. SMITH: You know, I've lived with this case for quite a while now, and as I listen to the presentation over here, I was, you know, of course scrambling around, because I don't believe that paints the picture of what happened here. Your Honor, we have a position -- well, sort of a twofold position here, we have. The first position would simply be that when you undertake an action, you undertake that action with the duty to act reasonably and responsibly, especially with regards to creating dangerous conditions. That's our primary position. Okay. And I believe the case law says that when you're doing things that are going to affect a roadway, you're building driveways, you're having something taken out, you should have a duty to do that. Okay. That's the question of law, Judge, and that's the tougher question.

But the second part of our argument is the easier question for you. What if Pilot's involvement was more than simply we submitted for approval, they approved it, we built what they approved, right? What if it's more than that? What if there was actually, Judge, some money changing hands? What if there was some financial gain? What if Pilot had more involvement than what they said? We do know

this, Judge, at the same time all this was going on, there was a deal, a right-of-way acquisition, where the DOT was negotiating with Pilot to buy some land, a right-of-way acquisition, the land in front of the Pilot, right.

Well, we know from the time line here, within three or four months of this letter, the acquisition is made, the deal is struck. Here's the important thing, Judge. There's only really two considerations when you're talking about buying some land. How much it costs and how much land you're buying, right? Pilot here, in their -- in the text that they wrote, negotiated the removal of a raised median, but here's how you tie it to the money changing hands. There is specific testimony from Mr. Colvin, the representative of the DOT, stating that the removal of the raised median was part of the right-of-way acquisition. What that means is that in the land deal, that they were deciding how much land and how much to pay for it, that there was also this discussion of the removal of the raised median.

Now, DOT goes and destroys the original appraisals for that land before we can get our hands on them, but Judge, there is an open question of fact here. When you read about the negotiation for the removal of the raised median that was in the original plans that everyone says is removed, the unmountable median that would have prevented

the left-hand turn that caused this wreck, but when you take that, and then you take the DOT telling us that, oh, yeah, that removal of the raised median was part of our negotiation to buy that land, Judge, there's an issue of fact out there. There is an issue of fact.

A jury, at this point, could easily conclude that Pilot didn't just simply submit plans. That Pilot possibly offered to sell the land for cheaper in order to get the median removed, and to get their three driveways all within the functional area of the intersection. You know, counsel for Pilot told you, oh, you know, there's an issue about where they are.

When we held up the very map -- the very map, and asked the DOT to point to the functional area of the intersection, do you know where he put his mark? On the first one and in the middle of the second one. The DOT says that. And Judge, the significance there is, at this point, you've got six lanes of traffic. You got three lanes coming from Moncks Corner. You got three lanes coming from Summerville. It is a busy intersection.

Time has proved to show it's a deadly intersection, but we always knew it was busy. With the functional area of the intersection, the placement of driveways and the raised median, you don't want people making left-hand turns in and out across three lanes of traffic at 45 miles an hour,

because you know what happens when you do that, Judge. You create a book of business. A book of accidents of 254 wrecks occurring in front of that Pilot, right. And Judge, what we didn't give you was every single accident report, because we just thought it would just not be received, to be honest with you, electronically or bogging down the Court's file. I have every single accident report. There's 254. And interestingly, Judge, the DOT has found an extra 40 that I didn't even know about. Brings us up to close to 300 wrecks in the 10 years since they made these changes.

So Judge, there's an open issue of fact as to what level of involvement they did, and I hope that you will agree that if they had more than just simply submitting these plans, getting it approved and building what was approved, if they did more, if this was part of the deal, the land deal, if they paid less for the land in return for getting the removal of the raised median, and all of these driveways directly in the functional area of the intersection, which the DOT's manual say never do because it's not safe, Judge, that's an issue of fact, and if it's not an --

THE COURT: Do you have proof of this?

MR. SMITH: Well, I've got the letter talking about the negotiation. We have got the testimony saying the removal of the raised median was part of the right-of-way

acquisition.

MR. SILVERBERG: Your Honor, can I respond?

THE COURT: Yep. Are you finished?

MR. SMITH: Yes, sir.

MR. SILVERBERG: The problem with what-ifs is that there's no evidence for what-ifs. That's why they're what-ifs. Let me nip this in the bud right now.

Plaintiffs' Exhibit 7 to the Department of Transportation's 30(b)(6) is the Title to Real Estate for this right-of-way acquisition they're referring to. You will notice that Pilot did not sell the right-of-way. The prior owner, SuperAmerica, Speedway SuperAmerica sold the right-of-way in it looks like October 2000, again, before Pilot got on the scene. So that what-if, opposing counsel doesn't have to do any more investigation as to what if, as to what was part of those negotiations, because Pilot wasn't even part of those negotiations.

Quickly, the letter, again, this letter, first of all, the portion they're referring to, I would argue is hearsay. These handwritten notes? Hearsay. Okay. And it's not -- it's dated August. It's not Pilot. These aren't written by a Pilot employee. There's no dispute. And then I read you the quote that said that the removal of the median had nothing to do with the right-of-way acquisition. It was on 117 to 118 of the Colvin dep, of the

Department of Transportation's 30(b)(6). I mean, there's not -- it's such a long deposition transcript, and I wouldn't, you know, ask you to go through it, but the Department of Transportation said the decision not to put the median was made as part of the 1998 widening plans not to, you know, not to include it.

This letter is not a scintilla of evidence. There's just too many reasons why. This isn't a Pilot letter. Not Pilot. I wrote it on here. I don't know how else to convey that message. All right. So the median, you know, one thing I failed to tell Your Honor, was that the Department of Transportation testified that the reason why they decided not to put a raised median in there or add one -- remember, there was never one there to begin with, even though the preexisting gas station also had three entrances on this. There was never one there to begin with, but the reason why is because according to the highway design manual that the Department of Transportation uses, again, the bible of highway design for the Department of Transportation, according to the Department of Transportation, that bible required them not to put a median. And if they would have put a raised median, that would have been in contravention to that design manual. That is the 30(b)(6) testimony of the Department of Transportation.

And I'm just going to dispute flat out the fact that

no one's testified that this specific driveway, to the extent this is even relevant, was within the functional area of the deposition [sic]. The plaintiff -- the plaintiff, Richard Wright, who was driving the motorcycle, his testimony suggests that he saw the truck, and he actually consciously decided not to slow down, because he didn't want to give Mr. Sena the impression that he was making the left -- that he was allowing the left turn to be made.

There's no problem with how close this driveway is to the intersection. There's no evidence to back that up. It's just absurd to suggest that Pilot -- there was any quid pro quo. Pilot wasn't on the scene when the decision not to put a median was made and --

THE COURT: Is that true?

MR. SMITH: No, sir, and it's flatly true. Your Honor, if I could hand up a document that clears all of this up. Basically, in the letter that we've been talking about with the negotiation, you've got Marathon Ashland Petroleum, LLC. That's the title here. And Your Honor, what we've got -- and I've just got one copy here, and I'll hand it to you, but you can see here that Pilot talks about in 2002, here, somebody at SCDOT, we've been playing phone tag. I am the project manager for Pilot Travel Centers, LLC, a combination, parenthesis, a combination of Marathon Ashland Petroleum, LLC, and Pilot Corporation. So that it wasn't us

back then because of this Marathon Ashland Petroleum, LLC, here's Pilot themselves writing in. Let me tell you who Marathon Ashland Petroleum, LLC is. I'm sorry, let me tell you who Pilot Travel Center is, a combination of Marathon Ashland Petroleum, LLC, and Pilot Corporation. Judge, to say this wasn't us is just flatly untrue. And anyway, I'll hand this up to you. It's part of our exhibits in our memorandum.

MR. SILVERBERG: And Your Honor, I won't dispute that there was -- that Pilot Travel Centers acquired the property, but it was after the date of that letter. It was in 2001.

MR. SMITH: Judge, the point is, is that when these negotiations are taking place with Marathon Ashland Petroleum, LLC, it's Pilot Corporation who's doing this.

MR. SILVERBERG: There's no evidence of that, Your Honor.

MR. SMITH: Except the letter you're holding in your hand.

MR. SILVERBERG: No, that does not -- that letter does not show that these handwritten -- that Pilot negotiated the median. All it shows is that at some point, Pilot Corporation entered a joint venture to create Pilot Travel Centers, LLC. The plaintiffs did sue Pilot Corporation. The plaintiffs did sue Marathon Ashland. They sued Pilot

Travel Centers, LLC, which did not acquire this property until 2001.

MR. SMITH: And Your Honor, I guess the response we would have is, this is an open question of fact. I mean, it's something that I can tell you're interested in. We think a jury is going to be interested in it.

THE COURT: Well, I mean, it's interesting, except for the fact that once -- I mean, these are all things that I -- ultimately, DOT's responsible for what got put and not put in that median and, you know, if they negotiated with somebody to put in or not put in a raised median, ultimately, that's on the DOT, and I don't think you get co-conspirator status by virtue of negotiations that you or someone else had with SCDOT. They're ultimately the ones that made the decision to put that in or not put in a raised median.

You know, to me this case boils down to duty. If that accident took place within the driveway Pilot, then maybe I could see, you know, Pilot having some responsibility. But this took place in a median where which somebody wanted to turn into that driveway, and that doesn't fall on Pilot. And I don't think -- that's the law.

You got a big, thick book of what you say are accidents that took place in that area. That may keep DOT in the case later on, but it's not their motion that's here

today and, you know, in order to -- as I understand the law on these kind of things, is to get DOT on the hook because you've got to show, oh, they had notice that this was a dangerous condition, something should have been done. Well, you may have it.

But as far as Pilot goes, Pilot's not responsible for maintaining that road. Pilot's not responsible for building that road. And having a driveway into your business is not what is, I think, within the definition of an artificial condition to incur liability in this instance.

MR. SMITH: Well, Judge, I mean, what is there -- let me just ask you just straight out. If it turns out money changed hands --

THE COURT: Don't ask the Judge questions, but well, you make arguments and I rule.

MR. SMITH: I mean, if money changed hands, if Pilot had more involvement than simply --

THE COURT: You don't have any evidence that the money changed hands, other than there was a negotiation about a right-of-way somewhere else. Ultimately, that's not illegal. If they were negotiating with somebody down the road, it's not illegal, but ultimately, this is SCDOT's road. They built it, they designed it, they signed off on everything that's there. Pilot didn't. People negotiate for things all along the way; where can I have my curb cut.

Well, all sorts of things.

But I mean, to put liability on Pilot or any other business that's along the way and say, well, they should have done something about people turning in there, and there's accidents that take place there, unless it took place on their driveway, I don't see how they or any other business could be responsible for what happened in a median that was out there, which in this instance is where the people were at, waiting to turn into that turn. That's what I said.

MR. SMITH: I mean, without a driveway, he ain't making this left-hand turn.

THE COURT: You'll obviously stand here and argue with me all day. You prepare an order, and you can appeal it, all right?

MR. SILVERBERG: Thank you, Your Honor.

(END OF TRANSCRIPT OF RECORD.)

CERTIFICATE OF REPORTER

State of South Carolina)
)
County of Berkeley)

I, Maria Dempsey, Official Court Reporter for the Ninth Judicial Circuit of the State of South Carolina, do hereby certify that the foregoing is a true, accurate and complete Transcript of Record of the proceedings had and evidence introduced in the trial of the captioned case, relative to appeal, in the Family Court for Berkeley County, South Carolina, on the 10th day of April 2017.

I do further certify that I am neither of kin, counsel, nor interest to any party hereto.

June 7, 2017

_____

Maria Dempsey, RPR
Official Court Reporter
Charleston County Family Court
Ninth Judicial Circuit
Moncks Corner, South Carolina

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF BERKELEY	)	C/A NUMBER: 2014-CP-08-675

Cynthia Wright and Richard Wright,

Plaintiffs,

vs.

South Carolina Department of Transportation, C & A Unlimited, Inc. and Pilot Travel Centers, LLC,

Defendants.

DEFENDANT PILOT TRAVEL CENTERS, LLC'S NOTICE OF MOTION AND MOTION FOR SUMMARY JUDGMENT

COPY

TO: KEVIN B. SMITH, ESQUIRE, S. RANDALL HOOD, ESQUIRE AND SHAWN DEERY, ESQUIRE, ATTORNEYS FOR THE PLAINTIFFS, AND THE PLAINTIFFS, CYNTHIA WRIGHT AND RICHARD WRIGHT:

YOU WILL PLEASE TAKE NOTICE that the undersigned attorneys for Defendant Pilot Travel Centers, LLC, will move before the Presiding Judge of the Ninth Judicial Circuit at the Berkeley County Courthouse, at such time and place as may be set by the Court, for an Order pursuant to Rule 56, SCRCP, granting summary judgment to Defendant Pilot Travel Centers, LLC, on the grounds that the Plaintiffs have failed to present evidence sufficient to raise a genuine issue of material fact that Pilot Travel Centers, LLC, owed them any duty or breached any duty owed. Further, Plaintiffs have failed to present any evidence establishing that their injuries were caused by any negligent act or omission of Pilot Travel Centers, LLC. In the absence of evidence sufficient to raise a genuine issue of material fact on necessary elements of the Plaintiffs' claim(s), Defendant Pilot Travel Centers, LLC, is entitled to summary judgment as a matter of law.

This Motion will be supported by the attached affidavit of Bill Mulligan (Exhibit A), the pleadings, depositions, discovery, the South Carolina Rules of Civil Procedure, applicable statutes and case law, any memorandum as may be submitted, and such other matters as may be acceptable to the Court.

HOWSER, NEWMAN & BESLEY, L.L.C.

By: _____

William G. Besley
Jeffrey I. Silverberg
1508 Washington Street
Post Office Box 12009
Columbia, South Carolina 29211
(803) 758-6000
ATTORNEY FOR DEFENDANT PILOT TRAVEL CENTERS, LLC

May 6, 2016

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF BERKELEY	)	C/A NUMBER: 2014-CP-08-675

Cynthia Wright and Richard Wright,

Plaintiffs,

vs.

South Carolina Department of Transportation, C & A Unlimited, Inc. and Pilot Travel Centers, LLC,

Defendants.

AFFIDAVIT OF BILL MULLIGAN

Personally appeared before me the undersigned, after being duly sworn, deposes and says:

1. The contents of this affidavit are based on my own personal knowledge.

2. I am of sound mind and over eighteen years of age.

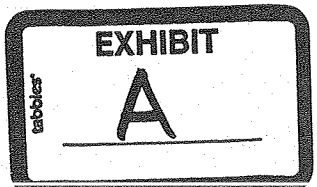
3. I am familiar with the allegations alleged by the Plaintiffs in the above-captioned lawsuit pending in Berkeley County.

4. Beginning in 1994, I began serving as the Director of Construction for Pilot. That Directorship later became a Vice President's position, and I have continuously served as the Vice President of Construction to the present date, which title is now Vice President of Development.

5. On or about September 1, 2001, Pilot acquired the existing gas station and real property located at 1521 North Main Street, Summerville, South Carolina 29483 (the "Property").

6. After acquiring the Property in September 2001, Pilot redesigned and constructed a new Pilot Travel Center station on the Property.

7. When Pilot acquired the Property, the existing gas station located on the Property had three driveways with access to U.S. Hwy 17-A. There was no raised median in the highway preventing left turns into the existing gas station from the southbound lane.



8. Pilot was required to obtain an encroachment permit from the South Carolina Department of Transportation ("SCDOT") before Pilot could construct the driveways to the new Pilot Travel Center. In order to obtain the permit, the location and design of Pilot's driveways had to be approved by the SCDOT. In May 2002, Pilot submitted an application for an encroachment permit to the SCDOT, seeking approval of the location and design of its proposed driveways. The encroachment application was approved, and the SCDOT issued Pilot a permit to construct the driveways.

9. Construction of the Pilot Travel Center began in or around August 2002. Around the time the Pilot Travel Center was being planned/constructed, SCDOT was also performing an improvement project to the intersection of I-26 and U.S. Hwy 17-A, which was adjacent to the Property. The SCDOT did not install a raised median in the highway to prevent left turns into the Pilot Travel Center as part of the improvement project.

Bill Mulligan

April 28, 2016

Sworn to before me this 28th

day of April, 2016

Sherry L. Blake (L.S.)

Notary Public for Tennessee

My commission expires: 9-11-16

SHERRY L. BLAKE
STATE OF TENNESSEE
NOTARY PUBLIC
KNOX COUNTY

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF BERKELEY	)	C/A NUMBER: 2016-CP-08-00334

Cynthia Wright and Richard Wright,

Plaintiffs,

vs.

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

Defendants

DEFENDANT PILOT TRAVEL CENTERS, LLC'S MEMORANDUM IN SUPPORT OF SUMMARY JUDGMENT

This matter comes before the Court on Defendant Pilot Travel Centers, LLC's ("Pilot") motion for Summary Judgment in the above-captioned action. For the reasons set forth below, Pilot respectfully requests that the Court grant its Motion.

STATEMENT OF FACTS

This action arises from a motor vehicle accident that occurred on October 6, 2012, while Plaintiffs were traveling North on Highway U.S. 17A on a motorcycle. Plaintiff Richard Wright was driving the motorcycle, and his wife, Plaintiff Cynthia Wright, was riding as a passenger. The accident occurred when a pick-up truck that had been travelling in the southbound lane of U.S. 17A (opposite lane of traffic) stopped in the median with its left blinker on and then suddenly turned left into the side of Plaintiffs' motorcycle. The accident occurred on a portion of U.S. 17A located in front of a Pilot Travel Center gas station ("Pilot Travel Center") owned by Pilot. The driver of the pick-up truck, Daniel Sena (Sena), testified that he had intended to make

a left turn into one of the entrances to the Pilot Travel Center (Daniel Sena Deposition, May 6, 2015, 70-72, attached hereto as **Exhibit A**[1]; *see also* Sena Dep. Ex. 3, attached hereto as **Exhibit B**). Police later determined that Sena had a blood alcohol level of .12, and Sena tested positive for Cocaine in his system shortly following the accident. Plaintiffs contend that the accident would not have occurred had there been a solid raised concrete median in the highway that prevented motorists travelling southbound from making a left-hand turn onto Pilot's premises. Plaintiffs also contend that the location and design of Pilot's entrances somehow caused the motor vehicle accident.

Pilot constructed the subject Pilot Travel Center in or around August 2002 after acquiring the real property and existing gas station on or about September 1, 2001. (Aff. of Bill Mulligan ¶¶ 5, 9, attached as **Exhibit C**). The existing gas station already had three driveways with access to US 17A, and there was no raised concrete median in the highway preventing left turns into the existing gas station. (*Id.* at ¶ 7). In fact, there has never been a raised median in this section of the highway. (Rule 30(b)(6) Deposition of SCDOT, Leland Colvin, Jr., March 13, 2017, at 256, attached hereto as **Exhibit D**[2]).

Around the time the Pilot Travel Center was being built, the South Carolina Department of Transportation (SCDOT) was in the process of widening the section of U.S. 17A in front of the Pilot Travel Center (the "Widening Project"). SCDOT was also reconstructing the intersection adjacent to the existing gas station (the "Interchange Project"). The Widening Project and Interchange Project were completed on June 17, 2002 and November 1, 2003, respectively. (**Exhibit D** 216). SCDOT designed the plans for the Widening Project, but used an

[1] All excerpts of Sena's deposition cited in this Memorandum are attached as **Exhibit A**.

[2] All excerpts of the deposition of Leland Colvin, Jr., who served as one of SCDOT's Rule 30(b)(6) designees, cited in this Memorandum are attached as **Exhibit D**.

outside firm to design the plans for the Interchange Project. (**Exhibit D** 252-53). According to SCDOT, the design plans for the Widening Project never included a raised median (**Exhibit D** 253:17-254:3) The decision to not install a raised median in front of the Pilot Travel Center was made by Leland Colvin, Jr., (Colvin) who was the Project Manager for the Widening Project. (**Exhibit D** 252:2-5, 255). This decision was made when the Widening Project design plans were prepared in 1998. (**Exhibit D** 283:20-285:2). Colvin's decision to use a flush median (rather than a raised median) was made in conformance with SCDOT's Highway Design Manual, which SCDOT considers "the Bible" for designing highways in the state. (**Exhibit D** 254). In fact, according to SCDOT, installing a raised median as part of the Widening Project would have been in contravention to the standards set forth in the SCDOT Highway Design Manual (**Exhibit D** 254).

In order to construct the entrances/driveways to the subject gas station, Pilot had to submit an application to SCDOT for an encroachment permit. (**Exhibit C** ¶ 8; **Exhibit D** 274). SCDOT had to approve the design and location of the driveways to Pilot's property before issuing Pilot the encroachment permit. (**Exhibit C** ¶ 8, **Exhibit D** 274-75). In evaluating whether to approve the encroachment permit, SCDOT conducts an independent analysis to ensure that the proposed driveways conform to its regulations and standards (**Exhibit D** 275). SCDOT also considers safety and how the access to private property affects traffic and the general operation of the highway system (**Exhibit D** 48-50). SCDOT has the ultimate authority to approve encroachment permits (**Exhibit D** 277). SCDOT would never compromise the public's safety to accommodate a property owner's interests when it comes to approving encroachment permits (**Exhibit D** 267-69). SCDOT ultimately approved Pilot's encroachment permit application and

issued Pilot a permit to construct the entrances/driveways to the Pilot Travel Center. (**Exhibit C** ¶ 8)

On March 31, 2014, Plaintiffs filed the present negligence action against Pilot and SCDOT arising from the accident.[3] Plaintiffs allege that SCDOT was negligent for failing to install a raised median in the highway that prevented left-hand turns into the Pilot Travel Center. Plaintiffs also allege that SCDOT was negligent for allowing Pilot to have an entrance/exit where it was located on the property. Additionally, Plaintiffs allege in their Complaint that Pilot owed the driving public a duty to construct its entrance/exit "in such a way as to prevent the existence of hazardous road conditions [on the highway]" and was negligent for failing to construct and maintain its entrance/exit "to prevent . . . [Plaintiffs] from being stricken by other motorist[s] attempting to turn left across traffic . . . ." (Amend. Compl. ¶¶38, 41). Plaintiffs further claim that Pilot is responsible for the painted/flush median being utilized by SCDOT as opposed to a raised concrete median. Their allegation is that Pilot allegedly influenced SCDOT's decision on which type of median to install on the roadway in front of the Pilot Travel Center.[4]

Pilot filed the present Motion for Summary Judgment based on the grounds that Plaintiffs have failed to present evidence sufficient to raise a genuine issue of material fact that Pilot owed

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[3] On February 9, 2016, Plaintiffs filed a separate action against several other parties in connection with the accident. The two actions have since been consolidated.

[4] Plaintiffs' allegation that Pilot influenced or negotiated with SCDOT to prevent SCDOT from installing a raised median in front of Pilot's property is based solely upon handwritten notes on a letter from an SCDOT official to an employee of the prior owner of the subject property dated August 28, 2000. These notes were not made by an employee or agent of Pilot or SCDOT. Not only did SCDOT indicate that the decision to use a painted/flush median instead of a raised median was made when the design plans of the Widening Project were prepared in 1998 (prior to this letter), but SCDOT also testified that there was never a "negotiation" of the median. (**Exhibit D** 260:16–262:5, 283:20-285:2). Leland Colvin, the SCDOT employee who made the decision to use a painted/flush median, testified that he does not recall ever talking to anyone from Pilot about the median prior to making his decision. (*See* **Exhibit D** 99:16 – 100:5). SCDOT testified multiple times throughout its Rule 30(b)(6) deposition that it made the decision as part of the Widening Project to use a painted/flush median instead of a raised median, and that there was never an expectation that there was going to be a raised median installed in front of the Pilot Travel Center. (**Exhibit D** 260:16-24). Plaintiffs cannot produce even a scintilla of evidence that Pilot did anything to influence SCDOT's independent decision to use a painted/flush median in front of the Pilot Travel Center.

them any duty or breached any duty owed, or, that any alleged negligent act or omission on the part of Pilot proximately caused Plaintiffs' injuries.

STANDARD OF LAW

Summary judgment is appropriate when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." SCRCP 56(c). When a party makes a motion for summary judgment that is supported by evidence, the adverse party may not rest on the allegations of the Complaint to overcome the motion but must demonstrate, by affidavit or other evidence, that a genuine issue of fact exists. *Klippel v. Mid-Carolina Oil, Inc.*, 303 S.C. 127, 399 S.E.2d 163 (Ct. App. 1990); *Dyer v. Moss*, 284 S.C. 208, 325 S.E.2d 69 (Ct. App. 1985). The nonmoving party must make an affirmative effort to set forth specific facts showing that there is a genuine issue for trial in order to overcome a summary judgment motion. *Baughman v. American Tel. & Tel. Co.*, 306 S.C. 101, 410 S.E.2d 537 (1991).

DISCUSSION

In order to prevail at trial, Plaintiff must establish that (1) Pilot owed them a duty; (2) Pilot breached that duty by a negligent act or omission; (3) and that Plaintiffs' damages were proximately caused by this breach. *Hubbard v. Taylor*, 339 S.C. 582, 588, 529 S.E.2d 549, 552 (Ct. App. 2000). As will be discussed below, Plaintiff has failed to create a genuine issue of material fact regarding these essential elements of their claims.

I. Plaintiffs have failed to establish that Pilot owed them a duty of care.

Defendant did not owe Plaintiffs any duty of care as alleged in the Complaint, and therefore, Pilot is entitled to summary judgment. *See Hurst v. E. Coast Hockey League, Inc.*, 371

S.C. 33, 37, 637 S.E.2d 560, 562 (2006) ("The court must determine, as a matter of law, whether the law recognizes a particular duty. If there is no duty, then the defendant in a negligence action is entitled to a judgment as a matter of law.).

Plaintiffs allege that Pilot owes a duty of care to all motorists traveling on the highway in front of its property.[5] However, the Supreme Court of South Carolina has refused to recognize such a broad duty. *See Skinner v. S. Carolina Dep't of Transp.*, 383 S.C. 520, 524-25, 681 S.E.2d 871, 874 (2009) (noting that there is no general common law duty of care owed to travelers "on the part of an owner of property abutting a highway who neither possesses nor controls the highway."). To the contrary, a property owner whose land abuts a highway only owes a duty to travelers for highway conditions where the property owner "has undertaken an activity that creates an artificial condition on the highway which is dangerous to travelers." *Id.* Here, the Plaintiffs cannot establish that Pilot created a dangerous artificial condition on the highway to serve as the basis of any duty.[6]

Plaintiffs allege that the dangerous condition that led to the subject accident was the absence of a solid raised median in the highway to prevent left hand turns onto Pilot's premises. However, the decision as to whether a raised median should be installed on a highway falls within the exclusive authority of SCDOT. *See Giannini v. S. Carolina Dep't of Transp.*, 378 S.C. 573, n. 1 (2008) (recognizing SCDOT has initial discretion to place median barriers on a highway); S.C. Code Ann. § 57-3-110 (1) ("The Department of Transportation shall . . . [have the power and duty to] lay out, build and maintain public highways and bridges, including the

[5] Plaintiffs cannot establish that Pilot owed them a duty under a traditional premises liability theory as it is undisputed that the motor vehicle accident underlying this action did not occur on Pilot's property, and that Plaintiffs were neither invitees nor licensees of Pilot prior to the motor vehicle accident.

[6] Examples of artificial conditions created by a property owner include spilling material on a roadway, emitting smoke that drifts over the highway, or creating traffic jams on the highway due to plant shift changes. *Skinner*, at 525, 681 S.E.2d at 874.

exclusive authority to establish design criteria, construction specifications, and standards required to construct and maintain highways and bridges"). This decision-making authority arises from SCDOT's police power and duty to plan, maintain, and operate the state's highway system. *See Brashier v. S. Carolina Dep't of Transp.*, 327 S.C. 179, 190-91, 490 S.E.2d 8, 14 (1997) *overruled on other grounds by I'On, L.L.C. v. Town of Mt. Pleasant*, 338 S.C. 406, 526 S.E.2d 716 (2000) (recognizing SCDOT's police power and duty to plan, maintain and operate the state highway system); *S. Carolina State Highway Dep't v. Wilson*, 254 S.C. 360, 365-66, 175 S.E.2d 391, 394 (1970) (noting that "the clear weight of authority from other jurisdictions is . . . that the construction of a median . . . is an exercise of the police power"); *S. Carolina State Highway Dep't v. Carodale Assocs.*, 268 S.C. 556, 561, 235 S.E.2d 127, 129 (1977) ("Re-routing and diversion of traffic are police power regulations."). Simply put, SCDOT has ultimate control over the design and construction of highways and the placement of traffic control structures such as raised medians. *See* S.C. Code Ann. § 57-3-110 (3) ("The Department of Transportation shall . . . [have the power and duty to] cause the state highways to be marked with appropriate directions for travel and *regulate the travel and traffic along such highways*, subject to the laws of the State[.]" (emphasis added)). One need only review South Carolina's takings jurisprudence to recognize that a business owner whose land abuts a state highway cannot usurp the authority of SCDOT to construct a solid median on a that highway. *See e.g., Hilton Head Auto., LLC v. S. Carolina Dep't of Transp.*, 394 S.C. 27, 32, 714 S.E.2d 308, 311 (2011) (business owner not entitled to just compensation where SCDOT closed a median crossover on the highway that prevented customers from continuing to make an immediate left turn onto business premises); *Hardin v. S. Carolina Dep't of Transp.*, 371 S.C. 598, 641 S.E.2d 437 (2007) (SCDOT's decision to close a median crossover did not disturb business owner's property rights because business

still had access to and from the public road system); *S. Carolina State Highway Dep't v. Carodale Assocs.*, 268 S.C. 556, 561, 235 S.E.2d 127, 129 (1977) ("[a] landowner has no property right in the continuation or maintenance of the flow of traffic past its property. Traffic on the highway, to which they have access, is subject to the same police power regulations as every other member of the traveling public.") Moreover, SCDOT testified that it, and not Pilot, made the decision to not install a raised median in the portion of US 17A in front of the Pilot Travel Center. (**Exhibit D** 255).

The facts of this case are comparable to those in *Skinner v. S. Carolina Dep't of Transp.*, 383 S.C. 520, 524-25, 681 S.E.2d 871, 874 (2009) and *Allen v. Mellinger, 156 Pa. Cmwlth.* 113, 625 A.2d 1326 (1993). In *Skinner*, the Plaintiffs were injured in a motor vehicle accident after being hit head on by another motorist whose car crossed the center line of the highway. *Id.* at 522. The at-fault motorist lost control of her vehicle when she veered onto the highway's shoulder near a driveway leading to a stable and subdivision. *Id.* Plaintiffs filed suit against several parties, including SCDOT and the owners of the driveway and stable. *Id.* Plaintiffs' theory of liability against the owners was based on the argument that the at-fault motorist could not regain control of her vehicle due to deep shoulder ruts created by those using the driveway. *Id.* at n. 1. The trial court granted the owners summary judgment, finding that the owners of the driveway and stable owed no duty to the Plaintiffs.[7] The South Carolina Supreme Court affirmed the trial court's holding that the owners owed no duty, noting that the shoulders were part of the highway and that SCDOT, not the owners, had the responsibility to maintain them. Moreover, the Court held that the ruts themselves were "natural consequences of highway use," and that an abutting landowner can only be liable for artificial conditions it creates, such as emitting smoke

[7] The trial court also held that the Plaintiffs' claim failed for lack of proximate cause; however, the South Carolina Supreme Court did not address this holding.

over the highway or spilling material on the highway. Thus, the owners did not have a duty to warn travelers of the shoulder ruts or to protect them from encountering them. *Id.* at 523.

Similarly, in *Allen*, the Commonwealth Court of Pennsylvania was presented with facts nearly identical to the facts at hand. The plaintiffs attempted to make a left hand turn from the highway into the defendants' business premises when their vehicle was hit by a truck traveling in the opposite direction. *Allen*, at 115. Relying on Restatement (Second) of Torts §349[8], the *Allen* Court held that the business owners owed no duty to the plaintiffs to maintain the highway in a safe condition. According to the *Allen* Court, the Commonwealth owns the highway and "has the exclusive duty for the maintenance and repair of state highways." *Allen*, at 118. The court further rejected the plaintiffs' argument that the business owners' failure to erect signs, paint lines or place curbing or barricades in the store's parking lot to indicate to customers the safest place to enter the parking lot created a dangerous condition. *Allen*, at 119, n. 1, 625 A.2d at 1329 n.1 (1993).

Like the driveway and stable owners in *Skinner* and the business owners in *Allen*, Pilot did not create a dangerous condition on the highway. Even if the absence of a raised median was a dangerous condition, it was a condition on the highway created by SCDOT. Medians, like highway shoulders, are part of the highway subject to the control and authority of SCDOT; and the decision to install a painted median, as opposed to a raised median, on the subject highway

---

[8] According to § 349,

> A possessor of land over which there is a public highway or private right of way is not subject to liability for physical harm caused to travelers upon the highway or persons lawfully using the way by his failure to exercise reasonable care
>
> (a) to maintain the highway or way in safe condition for their use, or
>
> (b) to warn them of dangerous conditions in the way which, although not created by him, are known to him and which they neither know nor are likely to discover

was within the exclusive province of SCDOT as the governmental agency charged with the duty to design, maintain and operate the State's highways. SCDOT, not Pilot, has the duty to maintain medians. SCDOT, not Pilot, has the "duty to use reasonable care to keep streets and highways within its control in a reasonably safe condition for public travel." *Ford v. S. Carolina Dep't of Transp.*, 328 S.C. 481, 487, 492 S.E.2d 811, 814 (Ct. App. 1997). Thus, Pilot, as one of the landowners abutting US 17A, has no duty (or authority) to maintain, repair, or warn others of potentially dangerous conditions on the highway over which it has no control.[9]

To the extent that Plaintiffs maintain that Pilot created a dangerous condition on the highway by virtue of constructing a driveway to the property that was accessible by motorists travelling southbound, such argument lacks merit. *See Skinner*, at 526 (evidence that it was motorists' utilization of the property owner's driveway that led to alleged dangerous condition was insufficient to establish business owner "created" a defect on the highway). First, Plaintiffs cannot establish that the driveway Sena was attempting to turn into on the date of the incident itself was dangerous. Second, and most importantly, like with the decision of which type of median to install on a highway, it is SCDOT who has the ultimate decision-making authority with respect to the placement and design of driveways. (*See* **Exhibit D** 274-76). According to SCDOT, driveway locations are part of the design of the highway. (**Exhibit D** 169:23–170:8). In order to construct or reconstruct a private driveway with access to a highway, a property owner must first obtain an encroachment permit from SCDOT. S.C. Code Ann. 57-5-1080; (**Exhibit D** 274). As part of the permitting process, SCDOT reviews the permittees' design plans to ensure compliance with SCDOT regulations and standards concerning the design and location of

[9] SCDOT acknowledged during its Rule 30(b)(6) deposition that it owns and has control of US 17A, that it has the responsibility of maintaining highways in a safe condition and that it has the duty to investigate and determine whether changes need to be made to the highway (**Exhibit D** 213, 269)

driveways (**Exhibit D** 274-76). SCDOT also reviews a permittee's encroachment application to ensure driveways do not create any safety concerns or impede efficient traffic operations. (**Exhibit D** 48-50; ACCESS AND ROADSIDE MANAGEMENT STANDARDS, October 1996, at 5, attached as **Exhibit E**). SCDOT "may deny any request for any permit for any driveway . . which in [its] judgment . may create a hazard to the traveling public." S.C. Code Ann. § 57-5-1090. Even after driveways are constructed, SCDOT has the authority to require "driveways be narrowed, widened, or removed in order to correct safety and operational problems." (**Exhibit E** 6). Thus, Pilot could not have constructed the driveways to its property unless SCDOT deemed them to comply with SCDOT's design standards and determined that they were safe for the public. Moreover, had the driveways been deemed unsafe to the public at any time over the nine (9) years between the completion of Pilot's gas station and the Plaintiffs' accident, SCDOT had the authority to require Pilot to change them.

To the extent that Plaintiffs maintain that Pilot can be held liable for their injuries because Pilot had notice of the danger posed by motorists making left-hand turns onto its property[10] and failed to take any remedial action, no such affirmative duty on the part of Pilot exists. "An affirmative legal duty exists only if created by statute, contract, relationship, status, property interest, or some other special circumstance." *Rayfield v. S. Carolina Dep't of Corr.*, 297 S.C. 95, 100, 374 S.E.2d 910, 913 (Ct. App. 1988). Plaintiffs cannot establish any source of a duty requiring Pilot to affirmatively act.[11] Having notice of other accidents that had occurred

[10] Plaintiffs allege Pilot was on notice of the danger its driveways posed to motorists by virtue of prior motor vehicle accidents that occurred in and around the entrance to Pilot's property.

[11] Even if Pilot did owe Plaintiffs some duty to affirmatively act, which is denied, as discussed above, Pilot did not have the authority to install a raised median or relocate the driveways on its property absent the approval of SCDOT. *See* S.C. Code Ann. 57-5-1080 (" . . it shall be unlawful for any person to open up, construct or reconstruct any private driveway . which is intended for use by any vehicles in entering or leaving such highway unless a permit for such driveway . . shall have been obtained from the Department).

on the highway does not give rise to a duty to warn. *See Restatement (Second) of Torts* § 349 (landowner owes no duty to warn travelers of dangerous conditions in the highway or private right-of-way which, although not created by him, are known to him). Moreover, foreseeability of an injury alone does not create a duty to act. *S. Carolina State Ports Auth. v. Booz-Allen & Hamilton, Inc.*, 289 S.C. 373, 376, 346 S.E.2d 324, 325 (1986). Finally, SCDOT testified that it does not expect businesses to notify it of accidents on the highway in front of the businesses' property. (**Exhibit D** 231).

In light of the foregoing, Plaintiffs cannot establish that Pilot owed them any duty as a landowner abutting the portion of the highway where Plaintiffs were injured.

II. Plaintiffs have failed to establish any negligent act or omission on the part of Pilot

Even if Plaintiffs can establish that Pilot owed them some duty, Plaintiffs cannot establish a breach of this duty as a matter of law. To prove Pilot breached a duty, Plaintiffs must establish a "negligent act or omission" on the part of Pilot. *Bishop v. S. Carolina Dep't of Mental Health*, 331 S.C. 79, 88, 502 S.E.2d 78, 82 (1998) ("To establish a cause of action in negligence, three essential elements must be proven: (1) duty of care owed by defendant to plaintiff; (2) breach of that duty *by a negligent act or omission*; and (3) damage proximately resulting from the breach of this duty." (Emphasis added)). Here, Plaintiffs have failed to present evidence of either a negligent act or omission.

Plaintiff cannot establish a negligent act or omission on the part of Pilot. As discussed above, Pilot did not have any decision-making authority with respect to which type of median to be placed on the highway. Moreover, the location and design of Pilot's driveways were approved by SCDOT as part of the encroachment permit review process. Since Plaintiffs cannot establish any breach of a duty, Plaintiffs' claims against Pilot fail as a matter of law.

III. Plaintiffs cannot establish that their damages were the proximate cause of any negligence on the part of Pilot as a matter of law.

In order to recover against Pilot, Plaintiffs must establish Pilot's alleged negligence was the proximate cause of their injuries. *McKnight v. S. Carolina Dep't of Corr.*, 385 S.C. 380, 387, 684 S.E.2d 566, 569 (Ct. App. 2009). "When the cause of a plaintiff's injury may be as reasonably attributed to an act for which the defendant is not liable as to one for which he is liable, the plaintiff has failed to carry the burden of establishing the defendant's conduct proximately caused his injuries." *Id.* "For an intervening act to break the causal link and insulate the tortfeasor from further liability, the intervening act must be unforeseeable." *Dixon v. Besco Eng'g, Inc.*, 320 S.C. 174, 180, 463 S.E.2d 636, 640 (Ct. App. 1995). "Ordinarily, proximate cause is a question for the jury, but when the evidence is susceptible to only one inference, it becomes a matter of law for the court."

Here, there is no evidence that any act or omission of Pilot proximately caused Plaintiff's accident. To the contrary, Sena, himself, testified that the accident was his fault and that Pilot was not to blame for his actions that night. (**Exhibit A** 108:21–109:4) Plaintiff Cynthia Wright also testified that Sena bears responsibility for hitting her and her husband, and that she cannot say whether the existence of a raised median would have prevented the accident. (Cynthia Wright Deposition, February 26, 2015, at 58, 69, attached as **Exhibit F**[12]) According to Plaintiff Cynthia Right, "I think [Sena] was determined to go to McDonald's regardless . . ." (**Exhibit F** 68:22–69:3). According to Sena, the fact that there was no raised median in the highway does not negate the fact that it was his actions that led to the collision with Plaintiff's vehicle. (**Exhibit A** 118-19) He testified that he simply did not see the Plaintiffs' motorcycle when he attempted to make a left turn into Pilot's parking lot. (**Exhibit A** 73) Sena indicated that his failure to yield

[12] All excerpts of Plaintiff Cynthia Wright's deposition cited in this Memorandum are attached as **Exhibit A**.

"was just bad judgment." (**Exhibit A** 106) Moreover, Sena admitted that he was under the influence of alcohol and cocaine at the time of the accident (**Exhibit A** 122) Thus, to the extent a negligent act or omission of Pilot did occur, which is denied, Sena's actions were an intervening cause of Plaintiffs' injuries. *See Stephens v. CSX Transp., Inc.*, No 27587, 2015 WL 6735757, at *10 (S.C. Nov. 4, 2015) (noting that the fact plaintiff consumed alcohol and prescription medication prior to driving her vehicle was not reasonably foreseeable and could have served as the intervening cause of the accident).

Moreover, as has been discussed above, to the extent Plaintiffs allege that the failure to install a raised median proximately caused the accident, such failure cannot be attributed to Pilot SCDOT, not Pilot, has exclusive control over the highway and the ultimate decision as to which type of median should be placed on a highway. Similarly, it was SCDOT that ultimately approved the design and location of Pilot's driveways.

Thus, Plaintiffs cannot establish that any negligence on the part of Pilot proximately caused their injuries as a matter of law.

CONCLUSION

In light of the foregoing reasons, Pilot respectfully requests that the Court grant its Motion for Summary Judgment.

HOWSER, NEWMAN & BESLEY, L.L.C.

By: _____

William G. Besley
Jeffrey I. Silverberg
1508 Washington Street
Post Office Box 12009
Columbia, South Carolina 29211
(803) 758-6000
ATTORNEY FOR DEFENDANT PILOT TRAVEL CENTERS, LLC

April 6, 2017

Exhibit A

In the Matter Of:

Wright, Cynthia & Richard v SCDOT, et al.

Daniel James Sena

May 06, 2015

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there are two on 17A. Would you agree with me on that?

A. Yes, sir.

Q. Then there's a fourth one back here which is for the trucks?

A. Yes, sir.

Q. All right. If you would --

MR. MAYBANK: Do you mind him -- we're going to mark this. Let's go ahead and mark it now so we don't forget.

(DFT. EXH. 3, Google Aerial Photograph of Accident Site, was marked for identification.)

BY MR. MAYBANK:

Q. All right. If you would for the record, I'm going to show you. This right here is the left turn lane that you were referring to that you could come up to to take a left on the frontage road; right?

A. Yes, sir.

Q. All right. At some point you were going to come into one of these entrances; correct?

A. Yes, sir.

Q. Can you circle the entrance with my pen -- or, actually, let me do this. Can you

highlight the entrance you were going to come into?

A. (Marking.)

Q. Okay. As you approached that entrance if you would, with my pen, would you put an arrow where you were driving and approaching that?

A. (Marking.)

Q. Okay. And you have -- yes. Unfortunately, you were going in the opposite direction. Let me ask you this. Instead of the arrow being in the oncoming traffic --

MR. BESLEY: I think he understood your question to be the direction generally.

BY MR. MAYBANK:

Q. I'm sorry. In the oncoming area, could you put the arrow of where you were driving?

A. Yes, sir. I'm sorry, I didn't see that there. It's right here. That's where the truck was, here. (Marking.)

Q. Okay. At what point -- if that's where your truck was, at what point did you begin to merge into that area?

A. You want me to put another arrow or X?

Q. If you kind of do, like, a little loop as if you're pulling into it which would be where?

A. (Marking.)

Q. Very good. And with your permission I'm going to just do a little thing there. (Marking.) So -- and it was your intent to take the left into the yellow marked highlighted entrance?

A. Correct.

Q. Did you at any time, to your recollection, come to a full stop in that median before you made that left-hand turn?

A. Yes, sir. I did.

Q. Okay. A full stop prior to the left-hand turn. You saw how many vehicles approaching you at that time, to the best of your knowledge?

A. To the best of my knowledge I want to say at least two.

Q. And did you wait for two vehicles to pass you before you made that left turn lane?

A. Yes, sir. I did.

Q. Okay. Is it a true statement that at no time prior to hitting the motorcycle did you ever see the motorcycle?

A. I'm sorry. Repeat that.

Q. Yes. You were not driving that night with the purpose of running into anybody, were you?

A. No, sir.

Q. Okay. Had you seen the motorcycle before impact, is it a true statement that you would not have taken a left in front of them?

A. Yes, sir.

Q. All right. So the question is, is it a fair statement or true statement to say that before you made that left turn to come into that McDonald's you simply didn't see the motorcycle?

A. Correct.

Q. Okay. When was your first realization that you had -- that you had had an accident?

A. As soon -- when I had the accident? I realized we was going to have an accident before we even had the collision. I seen the cars pass, I cut my wheel and went to turn. And when I went to turn I just glanced back this way and they were -- they were there. I slammed on brakes and my vehicle was halfway between that yellow line there and they said they hit -- they clipped the front corner of my vehicle. It was there and they couldn't avoid it.

Q. So you were already into the lane of travel prior to impact and right at impact?

A. Dead stop -- I was dead stopped by the time they hit me.

Q. Because you had seen them coming?

DANIEL JAMES SENA - EX. BY MR. BESLEY

motorcycle that's reflective that you could have seen other than the headlight?

A. No, sir.

Q. Was it easier to see the car next to them than it was the motorcycle?

A. Yes, sir.

Q. Why was that?

A. It's a larger -- larger object. I -- as you can look in the picture -- may I use this? At nighttime, as you have the traffic light right there at the intersection going in the frontage road or whatever, there's cars stopped at that light. You come to a stop. I just made a judgment that the headlight that I seen was at that intersection and not, you know, coming toward me.

Like I said, the light changed -- it didn't change suddenly but it changed from green to yellow. And as I seen yellow, I seen the two cars coming through and, obviously, I was anticipating on the cars on the other side of the light not to come through. I mean, I wouldn't say that there wasn't no reason why I wouldn't see it. It was just bad judgment, I'd say.

Q. And basically, as I understood your testimony a little while ago, you messed up because

DANIEL JAMES SENA - EX. BY MR. BESLEY

work, undressed, got out of my work clothes, drank a beer and grabbed a second beer and went to my back door in the back of my truck and then did the cocaine.

Q. Okay.

A. And --

Q. And -- okay. Go ahead.

A. Smoked a cigarette, my wife came out with the list, you know, and then off to McDonald's.

Q. No other alcohol, no shots of anything?

A. No, sir.

Q. Nothing. Did it surprise you that you were a .10 alcohol level?

A. Yes, sir. If not, I would not have given consent to a Breathalyzer. In my own personal opinion, I just figured I wouldn't fail a Breathalyzer with two beers in my system.

Q. You're absolutely certain it was just two beers?

A. Yes, sir.

Q. Do you take full responsibility for the accident?

A. Yes, sir. I do.

Q. You don't blame the DOT for the accident?

DANIEL JAMES SENA - EX. BY MR. BESLEY

A. No, sir.

Q. You don't blame Pilot Gas Station for the accident?

A. No, sir.

Q. Okay. And whose truck were you driving?

A. That was our truck, mine and my wife's -- registered to her but ours.

Q. When you say it was yours or ours, is that because you both paid for it? Or why do you say it's ours?

A. When you're married, ain't half of everything yours?

Q. All right. Fair enough. Had you driven that truck previously?

A. Yes, sir.

Q. You were familiar with it?

A. Yes, sir. Just got home from work in it.

Q. And you had permission to drive that truck?

A. Yes, sir.

MR. BESLEY: I think that's all I've got for you at this time. Thanks -- wait, let me back up. I just want to confirm.

Q. I've got some pictures here in front of

DANIEL JAMES SENA - EX. BY MR. SMITH

Q. Okay. Do you know that in the original plans for widening this road and building these -- this Pilot Travel Center, do you know that in the original plans there was a requirement for a raised median?

A. No, sir. That's not something I would look into. That's something that sucks, I can say that.

Q. And do you know that the Pilot Travel Center got that requirement removed for the raised median?

MR. BESLEY: I'm going to object to the form of the question. That's mischaracterizing evidence and testimony.

THE WITNESS: No, sir. I was not aware.

BY MR. SMITH:

Q. Not aware of that. But you're going to accept responsibility for what you did; is that true?

A. Yes, sir. I was the driver of the vehicle.

Q. You're not looking to place blame anywhere else?

A. I mean, that's -- you say there was something in the original plans. I'm not going to

say that was the reason why -- what happened happened. I mean, that could have prevented my accident and a lot more accidents and any more to come. I'm not going to post blame on -- my actions on them for that evening because I was the one that was behind the vehicle.

Q. Sure.

A. I can leave it at that.

Q. And you told Mr. Maybank you're clearly sorry and remorseful for what happened?

A. Yes, sir. I am.

Q. And do you think about -- obviously while you're here being incarcerated, I mean, do you think about what happened and why you're here and things like that pretty often?

A. Every day.

Q. All right. And the fact that you have accepted responsibility for all this, does that help you deal with it and grow and mature and heal from all this?

A. It was -- yes. There's no way, you've got to -- lesson learned. Just be more cautious out there.

MR. SMITH: That's all I have. Thank you.

Q. Are you aware that it's illegal to drive as treating it as a lane, but it is not illegal to turn?

A. Yes, sir. I am aware of that.

Q. And that's why you made that turn; right?

A. That's because you can come to a stop to make a turn, but you can't go past 30 feet?

Q. You're the licensed driver, but I'll take that at your word. So, now, if it's a legal turn and you're making a legal turn, assuming that there was a wall eight feet tall in front of you at that given time, you couldn't have taken that turn; right?

A. Correct.

Q. But you were making a legal turn on that night. You simply did not see the Wrights before you turned, did you?

A. Correct.

Q. All right. And you're under the influence of alcohol?

A. Yes, sir.

Q. You're under the influence of cocaine?

A. Yes, sir.

Q. Cocaine was in your possession at the

Exhibit B

PENGAD 800-631-6989

DEFENDANT'S EXHIBIT

3

CSR4

Scott Sills

Exhibit C

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF BERKELEY	)	C/A NUMBER: 2014-CP-08-675

Cynthia Wright and Richard Wright,

Plaintiffs,

vs.

South Carolina Department of Transportation, C & A Unlimited, Inc. and Pilot Travel Centers, LLC,

Defendants.

AFFIDAVIT OF BILL MULLIGAN

Personally appeared before me the undersigned, after being duly sworn, deposes and says:

1. The contents of this affidavit are based on my own personal knowledge.

2. I am of sound mind and over eighteen years of age.

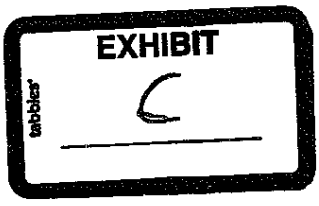
3. I am familiar with the allegations alleged by the Plaintiffs in the above-captioned lawsuit pending in Berkeley County.

4. Beginning in 1994, I began serving as the Director of Construction for Pilot. That Directorship later became a Vice President's position, and I have continuously served as the Vice President of Construction to the present date, which title is now Vice President of Development.

5. On or about September 1, 2001, Pilot acquired the existing gas station and real property located at 1521 North Main Street, Summerville, South Carolina 29483 (the "Property").

6. After acquiring the Property in September 2001, Pilot redesigned and constructed a new Pilot Travel Center station on the Property.

7. When Pilot acquired the Property, the existing gas station located on the Property had three driveways with access to U.S. Hwy 17-A. There was no raised median in the highway preventing left turns into the existing gas station from the southbound lane.



8 Pilot was required to obtain an encroachment permit from the South Carolina Department of Transportation ("SCDOT") before Pilot could construct the driveways to the new Pilot Travel Center. In order to obtain the permit, the location and design of Pilot's driveways had to be approved by the SCDOT. In May 2002, Pilot submitted an application for an encroachment permit to the SCDOT, seeking approval of the location and design of its proposed driveways. The encroachment application was approved, and the SCDOT issued Pilot a permit to construct the driveways.

9. Construction of the Pilot Travel Center began in or around August 2002. Around the time the Pilot Travel Center was being planned/constructed, SCDOT was also performing an improvement project to the intersection of I-26 and U.S. Hwy 17-A, which was adjacent to the Property. The SCDOT did not install a raised median in the highway to prevent left turns into the Pilot Travel Center as part of the improvement project.

Bill Mulligan

April 28, 2016

Sworn to before me this 28th

day of April, 2016

Notary Public for Tennessee

My commission expires: 9-11-16

SHERRY L. BLAKE
STATE OF TENNESSEE
NOTARY PUBLIC
KNOX COUNTY
(E.S.)

Exhibit D

STATE OF SOUTH CAROLINA
IN THE COURT OF COMMON PLEAS
NINTH JUDICIAL CIRCUIT
COUNTY OF BERKELEY

CYNTHIA WRIGHT AND RICHARD WRIGHT,

Plaintiffs,

vs. CASE NO. 2016-CP-08-334

SOUTH CAROLINA DEPARTMENT OF TRANSPORTATION, C & A UNLIMITED, INC., and PILOT TRAVEL CENTERS, LLC, SPEEDWAY, LLC, ASHLEY LAND SURVEYING, INC., F/K/A ASHLEY ENGINEERING & SURVEYING, INC., and ASHLEY ENGINEERING & CONSULTING, INC., and MUNLAKE CONTRACTORS, INC.

Defendants.

VIDEOTAPE
DEPOSITION OF: LELAND D. COLVIN, JR.

DATE: March 13, 2017

TIME: 11:35 AM

LOCATION: SCDOT District 6
6355 Fain Boulevard
North Charleston, SC

TAKEN BY: Counsel for the Plaintiffs

REPORTED BY: TERRI L. BRUSSEAU, RPR, CRR

A. WILLIAM ROBERTS, JR., & ASSOCIATES

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because the Department of Transportation is required more -- is required to care more about safety than what a property owner thinks will make him or her more money. Is that true?

A. Yeah. Our -- yes. We -- we are charged with providing safe, reasonable access to the state highway system.

Q. All right. And safety takes precedent over any wishes that private corporations may have that may result in them making more or less money? Safety trumps that?

A. Yes.

Q. Okay. And would you say that safety is the primary concern for any decision regarding access to private property?

A. Yes. I would say safety and the operation of the state highway system are the two primary functions that the DOT looks at for access to the state highway system.

Q. And I -- and I read a -- a little bit about that. And -- and I think that term, to me, seemed to say that we know what safety is, but the operation of the road, that's about traffic issues and stuff, about the road functioning smoothly and not backing up and -- is that what you were talking

about, the second end of it?

A. Yes. I mean, that -- that -- the -- the operation, the functionality of that roadway. In other words, you've got a different safety standard for a interstate system that does not have any access points, then an urban arterial, then a minor arterial, then a neighbor street. So each -- no one roadway is treated the same with regards to the reasonable expectation of those drivers.

Each functional class of that highway has different safety components that -- that are tied to that, which is -- which I would say most drivers understand those reasonable expectations. They've got a -- you know, driving along an interstate with higher speeds, less conflict points versus driving along a neighborhood street. And then you've got those roads in between those two.

Q. But in any of those situations where it's an interstate or it's a major highway or a neighborhood or a -- or a smaller street, in any of those situations, there's two concerns that the Highway Department would -- I'm sorry -- the Department of Transportation would have that would trump the wishes of private property owners. And those two concerns would be, number one, safety,

and, number two, the functioning of the highway or roadway in question?

A. Yes.

Q. Okay.

A. That's a fair statement, yes, sir.

Q. All right. Let's talk about -- and I think that maybe even Question 1 under yours? Let me get to the page so I don't have to keep flipping here.

So the history of the design, that Number 1 --

A. Sure.

Q. -- why it was decided to -- decided to separate the north- and southbound lanes, barrier-type median, that seems to be your topic rather than Mr. Clark's, right?

A. Correct.

Q. Okay. So talk to me about this history of the design here.

A. Sure. Well, first thing I think you've got to recognize, there's two different projects and they just happen to start in at Farm -- at the intersection of 17A and Farmington.

Q. And let me ask you -- let me stop you right there.

call that construction joint, whatever you want to call it, that terminus of one and the -- and the starting point of the other one and marrying those two together, that's when the correction was made to show that -- that flush painted median.

Q. All right. Was that around the time of this letter, marrying those two together?

A. Yes.

Q. Okay.

A. Yes, sir.

Q. Okay.

VIDEO TECHNICIAN: Fifteen minutes, counselor.

MR. SMITH: Okay.

BY MR. SMITH:

Q. All right. Whose decision was it to change the plans from what was in the interchange project from a raised median to a flush median in the final plans? Whose decision was that?

A. That was my decision as the program manager.

Q. Okay. Now, what discussions did you have with anyone associated with the property owners or the people developing what is now the Pilot Travel Center with regards to that raised

median?

A. I wouldn't have had -- I don't recall any direct contact. That would have been through our right-of-way acquisition agent, which was Tommy Smoak.

Q. Okay.

A. So as the PM, I'm coordinating those. I'm not saying from time to time, do I have a direct conversation with the property owner, I do. Generally speaking, that is done through our right-of-way agents. Again, Tommy was our right-of-way manager down here out of -- out of our local office. And that's one thing I would do is we -- you know, kind of like I said early on, is the PM part of that job duty is kind of quarterbacking between purpose and need, environmental, right-of-way, plan development, right-of-way acquisition, and construction.

Q. Okay.

A. So as part of that, yes, that where when Tommy went out, I started reviewing the interchange plans in conjunction with the road widening plans and said, nope, the plan is from Farmington east, we're going with that flush median.

Q. And I imagine you're probably already familiar what the functional area of an intersection is. And what does that -- I know that -- the language in here. But if you could just explain to sort of a layperson, what is the functional area of an intersection?

MR. CRITES: Kevin, what page are you on on the ARMS manual?

MR. SMITH: I'm sorry. Page 9.

MR. MAYBANK: Thank you.

MR. SMITH: I have an extra if you want it. I did bring an extra of that. I don't think it's in there.

MR. CRITES: Okay. I know it was an exhibit in Mulligan's deposition.

MR. SMITH: Oh, yeah, it probably was. I better get my version out.

BY MR. SMITH:

Q. So functional area of an intersection, how would you explain to kind of a layperson what that is?

A. To a layperson, it's basically the turn lanes coming in and out of that intersection and the -- the perception of that driver to be able to make those allowable turning movements in and out

of that, in and out of that intersection.

Q. Okay. And if you could, could you use maybe one of our exhibits or maybe you can grab a new one -- what I want you to do is tell me where the functional intersection of this intersection, this 17A and Farmington is. It looks like we had a clean one here on Exhibit Number 6.

A. Okay.

Q. First of all, was that ever defined? Is there a document anywhere that you're aware of that defines where the functional area of the intersection between Farmington Road and Highway 17 is?

A. No.

Q. Okay. And was -- in the decision with the driveways and the raised median, was the functional area of the intersection considered in that process?

A. Yes. I mean, I think that's part of the design itself when you look at -- as -- as stated in the ARMS manual, the left turn lanes coming to and from intersections and -- and how you maneuver that, yes, that's part of the highway design of 17A.

Q. But in -- in all of the documents, the

of the intersection?

A. Yes.

Q. Okay. And do you believe that limiting or eliminating driveways within the functional area of an intersection improves safety in the vicinity of an intersection?

MR. MAYBANK: Same objection.

THE WITNESS: Eliminating driveways?

BY MR. SMITH:

Q. Or limiting. Limiting or eliminating driveways within the functional area of an intersection improves safety in the vicinity of an intersection.

A. It -- I would say that's case by case.

Q. Okay. Well, how about -- how about here, let me ask you this: Are the driveways in the functional area of the intersection, the driveways in the Pilot Center -- Travel Center on 17A, are those driveways within the functional area of the intersection with 17A and Farmington Road?

A. I believe one of the three are, yes. Yes.

Q. And is there a -- just, you know, is -- is there a general rule or principle that you would initially start with when you think about allowing

driveways in the functional area of an intersection? A general principle like it doesn't really matter or we need to be real careful about this or that's a really safe thing to do and that's something we should look at trying to implement?

A. Yeah. I mean, I think driveway locations is -- is a part of the design of the highway. Absolutely.

Q. And allowing driveways in the functional area of an intersection is generally frowned upon in the decisions that you all make.

MR. MAYBANK: Objection.

BY MR. SMITH:

Q. Is that a fair statement?

MR. MAYBANK: Object to the form.

THE WITNESS: Not in a vacuum, I would not think that's a fair statement.

BY MR. SMITH:

Q. Okay. Oh, I'm sorry. I -- I asked you to do something, then I just kind of moved on from something else.

You were going to take one of those exhibits and you were going to circle for me the area -- the functional area of the -- the functional area of the intersection. I may have

Q. So the question is: Would you disagree with a traffic engineer who said, you know what, this driveway, this driveway, this driveway, and this driveway, which is all of the four -- the four driveways closest to Farmington Road going backwards to Moncks Corner, that all four of those driveways are within the functional area of the intersection?

I know people can differ on, you know, things. But is that -- is that something you'd see that engineers could differ on, whether or not those four are in? Or are you just saying these three are in it, that -- that one, last one, that ain't in it, that's definitely not in it?

MR. MAYBANK: Object to the form.

THE WITNESS: Me provide testimony in the deposition, these -- these three are definitely in it. This one, in my opinion, is not in it.

BY MR. SMITH:

Q. Okay.

MR. MAYBANK: So for the record, which one is not in it?

THE WITNESS: I -- I --

MR. MAYBANK: Nobody knows what these three means.

THE WITNESS: The -- the two drives going into the Hess station are in the functional area. The westernmost drive into the Pilot station is in the functional area. In my opinion, the eastern -- the eastern vehicle drive is not in the functional area.

BY MR. SMITH:

Q. But you -- you -- you would agree with me that when you circled the functional area of the intersection initially, both drives at the Pilot Travel Center were in the functional area of the intersection that you drew? Is that fair to say?

I mean, your mark's there, a driveway is here.

A. Yeah. I also noticed that -- noted it was approximate. I mean, I don't -- it's -- it's hard to be able to make a decision -- a -- an engineering decision on an 8.5 by -- 8.5-by-11 sheet of paper.

Q. Okay. I got you.

So if we're going to go back and have somebody else try and define the functional area of this intersection, we know what the ARMS says, the area beyond the physical intersection compromise (sic) decision and maneuvering distance plus any

raised median, would you -- would the DOT rely on Pilot and the engineers they hire that that request is a safe request?

A. I -- I can't answer that question.

Q. Okay. Plans that double profits at the cost of safety should never be approved. True?

MR. MAYBANK: Object to the form.

THE WITNESS: Ask -- ask that one more time.

BY MR. SMITH:

Q. Plans that double profits at the cost of safety should never be approved.

A. Absolutely.

Q. Okay. Does the Department of Transportation have a responsibility to maintain highways in a safe condition?

A. Absolutely.

Q. That includes making changes to the highways that the Department of Transportation learns are unsafe?

A. Absolutely.

Q. And does the DOT have a duty to investigate and determine if changes are needed to be made to a highway?

A. Absolutely.

any similar studies ever done between 2000 and 2013?

A. Not that I'm aware of.

Q. And the -- the project here was finished at around 2003, was it not? I think that was the final inspection date?

A. The widening project was completed June 17, 2002. And the interchange project was completed November 1st, 2003.

Q. Okay. So basically ten years after those changes were made was the first accident study that the Department of Transportation undertook?

A. It was the first study that I'm aware of.

Q. Okay.

MR. MAYBANK: And -- and just for the record, the continued objection to any of the traffic safety studies and admissibility thereof.

MR. SMITH: Okay.

MR. MAYBANK: But ask him whatever you want.

BY MR. SMITH:

Q. Now, what -- what did -- what did this tell you?

advised the DOT that we've just noticed a lot of accidents in front of our property, what would the DOT's response to that be? Would they at least look into it?

A. Certainly.

Q. Maybe pull a -- an accident analysis for that area?

A. That would be one thing that we would do.

Q. And given the history of this project here with the original plan for a raised median, then it's -- then it's taken away, does the DOT have any expectation that the business owner who successfully negotiated away the raised median, that they would come back to the DOT at some point and -- if -- if large number of accidents were taking place in front of their location?

MR. CRITES: Objection.

BY MR. SMITH:

Q. Would the DOT expect them to come back and let them know something like that?

MR. CRITES: Object to the form.

MR. MAYBANK: Object to the form.

THE WITNESS: No. That's -- that's not part of how we -- how we do business, no.

LELAND D. COLVIN, JR. - EX. BY MR. CRITES

A. Yes, sir.

Q. And were you somebody as the project -- I believe you said you were the project manager earlier?

A. Correct.

Q. You were actually on-site for the widening project?

A. During that time, my office was in Columbia; but, yes, I certainly made site visits, absolutely.

Q. Okay. And during that widening project, do you recall there actually being another convenience store there at any point in time that was a Speedway?

A. I -- I can't recall the details of that.

Q. Okay. But the 17 widening project, that stretched from essentially in front of this -- the Pilot Travel Center, what is now the Pilot Travel Center, towards Moncks Corner, correct?

A. Correct.

Q. And the design professional for that project was the South Carolina Department of Transportation, correct?

A. Correct.

LELAND D. COLVIN, JR. - EX. BY MR. CRITES

Q. You testified earlier that there was a contemporaneous ongoing project which was the I-26 interchange with 17A, correct?

A. Correct.

Q. And that was a project that essentially started at Farmington Road and went towards Summerville, correct?

A. Yes, sir. Correct.

Q. Okay. So it just so happened that it was in the same general vicinity but two different projects, correct?

A. Correct.

Q. And the design professional for that project was the Arcadis engineering firm, I believe, correct?

A. Correct.

Q. Okay. Mr. Smith talked a lot about the questions about removing the median, and I know we reserved or preserved all objections until a later date. But some of the -- some of the questions were objected to, some of them weren't. So I just want to go through just to clarify a couple things.

The design plans for the 17A widening project which was in front of what is now the Pilot Travel Center did not nor did it ever include a

LELAND D. COLVIN, JR. - EX. BY MR. CRITES

raised median or a nontraversable median; is that correct?

A. That's correct.

Q. And I believe your testimony earlier was that there was never an expectation during the 17A widening project in front of the Pilot Travel Center to have a raised or a nontransversable median because to do so would have been not compliant with the South Carolina Department of Transportation Highway Design Manual; is that correct?

A. That's correct.

Q. So to have put one in in front of the Pilot would have been in contravention to your own manual, correct?

A. Correct.

Q. And I believe you referred to that manual as the bible for design projects in the state of South Carolina; is that correct?

A. Yes, sir.

Q. Okay. Now, somebody, a design professional with Arcadis with the other project that didn't have anything to do with -- with the 17A widening project, but the interchange project with I-26, drew in some sort of raised median or

LELAND D. COLVIN, JR. - EX. BY MR. CRITES

nontransversable median; is that correct?

A. Correct.

Q. Okay. But again, they were not the design professional for the widening project, correct?

A. Correct.

Q. Okay. And at some point in time with traffic flow, the DOT had to marry the two projects together, correct?

A. Correct.

Q. And at some point in time, you as the -- the program manager for that project with the Department of Transportation made the decision in conformance with the South Carolina Highway Design Manual that that was -- that a raised median was not going in front of the Pilot Travel Center, correct?

A. Correct.

Q. Okay. So there was never a raised median in front of the Pilot preventing a left-hand turn in that was ever installed or constructed on that roadway, correct?

A. Correct.

Q. Okay. And let me ask you this: Before the widening project began and there was a -- there

LELAND D. COLVIN, JR. - EX. BY MR. CRITES

was a business there, I'll represent to you it was a Speedway before it became a -- a Pilot Travel Center. But there was a business there with driveways that provided ingress and egress from 17A into that business; is that correct?

A. Yes, sir.

Q. Okay. And at that time there was not a raised median preventing left-hand turns into that business, correct?

A. Correct.

Q. There's never been a raised median on that stretch of Highway 17A in front of what is now the Pilot Travel Center, correct?

A. Correct. There -- there was -- I'd have to see the limits. There -- there is a raised median that was installed in conjunction with the new location of roadway to the intersection just to the east. I -- I don't think the limits of that got in front of the -- the Pilot station.

Q. Okay.

A. I think that's correct.

Q. All right. So any discussion earlier about a -- a raised median or a nontransversable median being removed, it was never removed from the roadway itself, correct?

LELAND D. COLVIN, JR. - EX. BY MR. CRITES

A. Correct.

Q. Nor was it ever removed from the design plans for the 17A widening project right in front of the Pilot Travel Center, correct?

A. Correct.

Q. It was -- I believe you referred to it earlier as a placeholder?

A. Correct.

Q. And it was a placeholder that was put in by another design professional who was in charge of another project that was not the 17A widening project right in front of the Pilot Travel Center, correct?

A. Correct.

Q. Mr. Smith spent a lot of time asking you questions about Exhibit 5, which is the letter dated August 28, 2000, to Mr. Greiwe from Tommy Smoak. And as I understand it, Mr. Smoak is no longer employed with the Department of Transportation, correct?

A. That's correct.

Q. Did he retire?

A. He did retire.

Q. Do you know how long ago he retired?

A. I don't have the specific dates.

LELAND D. COLVIN, JR. - EX. BY MR. CRITES

Q. Okay. So your testimony earlier was that the design plans as per the South Carolina Department of Transportation for the 17A widening project, I believe, were dated in 1998. Was it December of '98; is that correct?

A. Yes, that's correct.

Q. And then the interchange plans that were provided by the design professional Arcadis were dated July of 1999; is that correct?

A. The -- the right-of-way plans set for that, correct.

Q. Okay. All right. And the letter that we're talking about here is dated August of 2000, correct?

A. Correct.

Q. And your testimony earlier was that there was never an expectation that -- that there was going to be a raised median that was going to be put in in front of that Pilot Travel Center as part of this widening project; is that correct?

A. That's correct.

Q. And it was always going to be a flush paved median, correct?

A. Correct.

Q. You testified a little while ago that

LELAND D. COLVIN, JR. - EX. BY MR. CRITES

you thought that the characterization of -- let me see if I can find where I wrote it -- the characterization of people negotiating out the raised median was inaccurate. And I think that was in response to one of the -- the later questions that Mr. Smith had asked you about Exhibit 5.

And so I guess my question to you would be: What would there have been to have negotiated if the position of the DOT all along was that this raised median was never in the design plans to begin with, nor was this raised median even in conformance with the South Carolina Highway Design Manual? If it wasn't there to begin with, it was never going to be called -- and your manual didn't even call for it, what was there to negotiate? Do you know?

A. I -- I believe my previous testimony alluded that that was not a negotiation, that it was -- it was really -- it was just a combination of the plans, putting them together, that the widening project had a paving -- paid -- a flush paved median east of Farmington. And the correction of the interchange plans was just that, it was not a negotiation. It was just a correction of the plan to accurately reflect the Highway

LELAND D. COLVIN, JR. - EX. BY MR. CRITES

Design Manual.

Q. And I think if I can use your own words, you, number one, talked about it as being a clarification. Would that be fair to say?

A. Yes.

Q. Okay. But I think, also, you referred to it earlier -- if I can find it -- was that when you were talking about the two designs, the marrying of these two projects essentially was the widening design plans were correcting the interchange design plans. Is that fair to say, as it relates to the raised median?

And I'm not trying to put words in your mouth, so if I've misspoke or I've misquoted you...

A. I -- I think that the revision to the interchange plans between the right-of-way plans and the construction plan is a result of us marrying the two projects together.

Q. Okay. But at the end of the day, the design plans always called for a painted -- the design plans for the 17A widening project in front of what is now the Pilot Travel Center always called for just a painted flush median?

A. Correct.

Q. And the design of that stretch of

LELAND D. COLVIN, JR. - EX. BY MR. CRITES

when Speedway was in South Carolina, when Speedway left, anything about a joint venture between itself and Pilot, when it began, when it ceased to exist, anything like that?

A. Not aware of any of that.

Q. Okay. You talked earlier about -- about that DOT has duties and responsibilities that are set out per statute, I believe. Did you say that?

A. I did.

Q. Okay. And does DOT have the statutory duty to move traffic safely among the public highways of this state?

A. Yes.

Q. And the DOT doesn't compromise safety, correct?

A. Correct.

Q. Safety is of utmost importance to the DOT, correct?

A. Yes.

Q. Because as Mr. Smith talked to you earlier about, I mean, if you compromise safety and you make a decision that's in contradiction to your Highway Design Manual, people can get hurt, correct?

LELAND D. COLVIN, JR. - EX. BY MR. CRITES

A. Yes.

Q. Okay. And to the extent that a business owner or a private individual came to the DOT and asked a question about driveways or curb cuts or access, is there anything illegal about them doing that?

A. No.

Q. Okay. Does the DOT receive requests often in terms of an encroachment permit or in terms of access to and from their property, be it a -- a personal individual or be it a business?

A. I'd say daily.

Q. Okay. It's not unusual or uncommon, correct?

A. Correct.

Q. And the DOT can say yes or it can say no, correct?

A. We would apply our engineering judgment and guidelines to appropriately address that request.

Q. And I appreciate that. It's -- I'm just trying to move this through for you to try and get you out of here, but I'll slow down. But I appreciate the -- the more explained answer, if you will.

LELAND D. COLVIN, JR. - EX. BY MR. CRITES

Applying those engineering design principles to a request that somebody might make, the DOT's position, though, is they're never going to compromise the safety of the individual or the public-at-large to accommodate a business if they don't believe that that's the right decision or the correct decision, correct?

A. Yes.

Q. The 17A widening project plans, those were DOT plans, correct?

A. Correct.

Q. Okay. And 17A is a DOT owned and controlled roadway, correct?

A. Yes.

Q. The discussion about the raised median, understanding that it was never in the design plans to begin with for the 17A widening project, but I'm just curious: Can you just describe for me what the dimensions of it would have been in terms of how wide it was, how tall it would have been, if it's feathered or tapered?

A. I would have to -- I'd have to refer back to my design documents, but it's -- no, I -- I don't know the dimensions right off the top of my head.

LELAND D. COLVIN, JR. - EX. BY MR. BESLEY

BY MR. BESLEY:

Q. Okay. And SCDOT would have the final and ultimate decision on any road of theirs or even the encroachment of driveways leading to that road. Would that be correct?

A. Correct.

Q. That would be based upon your DOT rules and regulations and even the national standards, as the other lawyers have pointed out; is that correct?

A. It would be based on the DOT standards, that -- that those standards took into account national standards.

Q. Okay. So in order for Pilot to construct entrances and exits to their property, Pilot had to submit an encroachment permit application to the SCDOT; is that correct?

A. Yes. That's how -- that's how our new -- that's how new encroachments are provided as via an encroachment permit process.

Q. Okay. And I know earlier you said you had not reviewed the one that you were shown, but you saw an encroachment permit; is that correct?

A. Sure. Yes.

Q. Okay. And so SCDOT had to approve the

LELAND D. COLVIN, JR. - EX. BY MR. BESLEY

design and location of the entrances and exits to Pilot's property before issuing the encroachment permit. Is that how it works?

A. Correct. Yes, sir.

Q. Okay. And a -- property owners can't do it themselves without your approval and your authority, and it must conform with your regs and standards; is that correct?

A. Correct.

Q. Okay. And someone at SCDOT would review the encroachment permit and make sure it's proper and give an independent analysis, would make sure it complies with your rules and standards; is that correct?

A. Correct.

Q. Okay. The SCDOT would not rely upon the person submitting the encroachment permit that it would be exactly up to your standards and rules. You guys give it an independent evaluation, make sure it's correct; and if it's not, you tell them, let's change it in these certain ways; is that correct?

A. Yeah. There's a review for conformity of the permit that was submitted by a licensed PE.

Q. Okay. And it does not get approved

LELAND D. COLVIN, JR. - EX. BY MR. BESLEY

unless the SCDOT says it's approved; is that correct?

A. Yes. The DOT approves the encroachment permit.

Q. Okay. You're not relying upon a landowner who submits an encroachment permit to you to make sure that the plan that they suggested is safe. You guys take a look at it yourself and determine if it's according with your regs and standards; is that correct?

A. I think there's some responsibility on the permittee to design it accordingly as well. In other words, we're not doing the design on behalf of the permittee. We're reviewing the permittee design for encroachment of the SCDOT right-of-way. We're not taking responsibility for that. In other words, a traffic impact study, we are relying that professional standards were used to determine that traffic -- traffic impact study.

Q. Okay. But not a traffic impact study, but just an encroachment permit to determine the location and widths of an ingress and egress on someone's property, that's something that you guys would take a look at yourselves and make that determination?

LELAND D. COLVIN, JR. - EX. BY MR. BESLEY

MR. MAYBANK: Object to the form.

THE WITNESS: Yes. We would review the encroachment permit as submitted by the permittee for conformance to our regulations.

BY MR. BESLEY:

Q. Okay. So perhaps not with the traffic study, you might -- you might rely upon someone who submits that to you to make sure it's correct. But for things that you can take a look at, your engineers take a look at, you make that determination on your own?

MR. MAYBANK: Object to the form.

THE WITNESS: I -- I would not say that, no.

BY MR. BESLEY:

Q. Okay. Does the SCDOT have the ultimate right to approve encroachment permits?

A. Absolutely.

Q. No one gets to tell you what is approved or not. You guys make that decision?

A. Absolutely.

Q. Okay. And do you know what happen -- has happened to the area? You know, you've been shown some diagrams and collision analysis over the last few years, a little while ago in the

in the last 18 months or so, there's been an additional position added at the district office that would review commercial permits, correct.

Q. Okay.

A. So certain permits that would follow that new form, resident -- other permits would follow the same procedure.

Q. The old procedure?

A. Yes, sir.

Q. Essentially residential, the old procedure; commercial then goes direct to -- to district office?

A. Essentially, yes, sir. Yes, sir.

MR. BERLINSKY: Okay. I don't have anything further.

MR. SMITH: I do have a couple. Pass that down.

EXAMINATION

BY MR. SMITH:

Q. Mr. Colvin, I -- I just want to confirm something you just said, that the decision regarding the differences between the interchange improvement project and widening project, difference being raised median in one, no raised median in the other, that the decision to square

that difference was made sometime before 2001?

A. Absolutely, yes.

Q. Okay. That decision was not made -- the final decision on that was not made in '98 or '99?

A. The design of the widening project between Farmingdale going east towards 17A, yes, it was made in 19 -- 1998.

Q. All right. But then sometime after 1998 when you took -- looking at these two plans with the interchange project and with the widening project, sometime before 2001, the decision was made about how are we going to square these two. One's got a median and one doesn't. The final decision, final construction plan was made sometime in 2001 or sooner about this raised median?

MR. CRITES: Object to the form.

BY MR. SMITH:

Q. Do you see what I'm trying to get at?

A. Yeah, yeah -- no. I mean, the -- the widening plans that started at Farmington was done in 1998.

Q. Okay.

A. And that's -- that's what -- that -- that -- so that's -- that's the ruling set.

Sometime between '99 and 2001, the interchange plans were updated to reflect the widening plans.

Q. Okay. Okay. Now, that company Arcadis, that was a -- a company that was hired by the DOT. True?

A. Yes, correct.

Q. Okay. And either -- whether it was the DOT in-house professionals or the Arcadis, these plans, both the interchange improvement plans and the widening project, both of those plans were developed for the DOT, right?

A. Correct. Yes.

Q. Okay. And whether it was plans developed by Arcadis, these are still the DOT's plans for the interchange improvement project, right?

A. That's correct.

Q. They were just technically written by somebody else, right?

A. They were designed by somebody else, but are DOT plans.

Q. Okay. And so part of the DOT's plans at some point were to have a raised median in this section in front of the Pilot Travel Center?

MR. CRITES: Object to the form.

Exhibit E

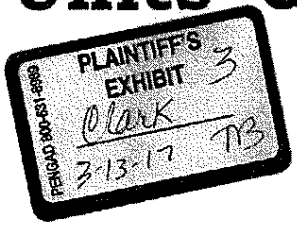
ACCESS and ROADSIDE MANAGEMENT STANDARDS

SCDOT

South Carolina Department of Transportation

Dual Units of Measurement:

US Customary Units & INTERNATIONAL Metric SYSTEM OF UNITS



South Carolina Department of Transportation
Traffic Engineering Section
955 Park Street
Post Office Box 191
Columbia, South Carolina 29202-0191

1996 Edition

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Access and Roadside Management Standards is published by the South Carolina Department of Transportation and may be obtained at a cost of $5.00 per copy from the Director of Traffic Engineering at the above address.

As the need arises *Access and Roadside Management Standards* is revised, updated, and distributed within the South Carolina Department of Transportation. Others are responsible for obtaining the most current edition.

The mission of the South Carolina Department of Transportation is to provide South Carolina the best possible intermodal transportation systems and services for the safe, efficient movement of people and goods, and stewardship of the State's environment and natural beauty.

quirements shall apply; however, the Department shall not issue a permit for an encroachment that meets local standards but violates the provisions of *Access and Roadside Management Standards*. Similarly, the Department's issuing of an encroachment permit does not relieve the applicant of the need to comply with local requirements, even if more restrictive.

2B REVIEW AND APPROVAL

Early submittal of the Application for Encroachment Permit will allow for proper review and approval prior to completion of design so that any required revisions can be incorporated into the construction plans. The time involved in reviewing applications will depend upon the complexity of the application. All permits will be reviewed and returned as soon as practicable. Verbal approval will not be given to permit any work until an encroachment permit for the work has been issued. All extensions, amendments or additions to existing permits must be in writing.

2C PERFORMANCE BONDS

The Department may require a performance bond before issuance of an encroachment permit. Any such requirement shall be included in the special provisions of the permit, and evidence of the bond shall be attached to the permit. The amount of the bond shall be equal to 1.5 times the estimated construction cost or $5,000, whichever is greater. The purpose of such a bond is to ensure compliance with all terms of the permit by providing, in cases of noncompliance, for any and all damages and costs incurred in collecting damages through legal or other appropriate means. A bond shall be released only when the work described on the permit has been completed to the satisfaction of the Department.

2D CONDITIONS AND LIMITATIONS

2D-1 Traffic Safety and Operational Restraints

Safety and efficient traffic operations are important considerations in the review of Application for Encroachment Permits. In some cases it may be necessary to restrict access because of safety problems or operational restraints due to geometry, vertical grades, horizontal curves, or other conditions. Access at points within or near acceleration lanes or channelization may be restricted, limited, or prohibited. If operational or safety concerns exist, the application may be forwarded to the Director of Traffic Engineering for review.

2D-2 Land Use Changes and Redevelopment

When there is a change in land use which will affect the amount, type, or intensity of traffic activity to a site, the Department reserves the right to require submission of a new Application for Encroachment Permit. For example, a residential lot may be rezoned to allow for a professional office which will generate commercial traffic. In this case the Department may require the existing access

to be revised to better accommodate the expected traffic even if no significant building renovations are planned. In some cases the number and/or width of driveways allowed may change depending upon the land use change and the current standards. This provision will also apply to existing accesses when a property is redeveloped with the same general land use

2D-3 Subdividing Large Parcels

Access to future subdivided parcels shall be considered in the initial Application for Encroachment Permit's review process. The Department will not be obligated to allow direct access for any parcels which may be subdivided from a larger overall development at a later date. See also subsection 3C-2 2 on outparcels

2D-4 Setback

The area to which the driveway provides access shall be sufficiently large for stopping, parking, and maneuvering of vehicles completely off the right-of-way.

2D-5 Maintenance Responsibilities

The owner shall be responsible for the maintenance of access points, including any drainage structures, for areas within the rights-of-way of State maintained facilities. An encroachment permit is not required for routine maintenance such as mowing, patching potholes, clearing pipes and ditches, applying seal coating, and repairing minor erosion damage

The Department shall be responsible for the maintenance of permittee-provided crossovers, auxiliary lanes, and right-of-way.

2D-6 Retrofitting by the Department

The Department may require driveway accesses to be modified to conform to these standards. This may require that some driveways be narrowed, widened, or removed in order to correct safety and operational problems. Preferably, such actions should be considered during the preconstruction phase. When this is required as part of a road improvement project, it will be done by the Department as part of the construction contract

2D-7 Private or Commercial Use of Right-of-Way

Pursuant to Sections 57-7-210 and 57-25-10 of the *Code of Laws of South Carolina* (1976 as amended), erecting fruit and vegetable stands on the right-of-way, displaying automobiles for sale on the right-of-way, or any other private or commercial uses of the right-of-way are prohibited. Some exceptions, such as placing banners across the roadway for which encroachment permits or letters of authorization have been issued in accordance with these standards are allowed.

Exhibit F

IN THE COURT OF COMMON PLEAS
FOR THE STATE OF SOUTH CAROLINA
BERKELEY COUNTY
DEPOSITION OF CYNTHIA WRIGHT

CYNTHIA WRIGHT and
RICHARD WRIGHT,
Plaintiff,
vs. CASE NO. 2014-CP-08-675
SOUTH CAROLINA DEPARTMENT OF
TRANSPORTATION, C&A UNLIMITED,
INC., and PILOT TRAVEL
CENTERS, LLC.,

Defendants.

DEPONENT: CYNTHIA WRIGHT
DATE: February 26, 2015
TIME: 11:10 A.M.
LOCATION: HOFFMAN LAW FIRM
7087 Rivers Avenue
North Charleston, South Carolina

REPORTED BY: TRISHA RARICK
MAGNA LEGAL SERVICES
(866) 624-6221
WWW.MagnaLS.com

hurt because of somebody's stupidity. And I'm sorry, but that's the way I feel.

Q Sure. Now, you don't know of any legal requirement or duty by SCDOT that will require them to put what you are describing as that raised median in that area of your accident, do you?

A No, sir. No.

Q Okay. And I believe you testified, and you were right, that somebody took a left in front of you, correct?

A Yes, sir.

Q You are a bus driver or you were a bus driver, correct?

A Yes, sir.

Q All right. You're a licensed driver?

A Yes.

Q Do you believe that the individual that took that left in front of you bears responsibility for hitting you and your husband?

A Yes.

Q Do you know the man who took a left in front of you?

A I know of him.

Q Have you ever met him before?

A Yes.

THE WITNESS: C-H-I-N-N-E-R-S.

MR. BESLEY: Thank you.

BY MR. MAYBANK:

Q Thank you for that. All right. So is it your opinion then, or your -- the reason you're suing DOT -- I have got your complaint, but I like to hear from the people -- is that you felt that there should have been some kind of raised median at that area where the accident occurred?

A Yes.

Q All right.

A And that comes from also being a bus driver. It's a safety factor. You can't just cut in front of somebody, you know, like that. And also like that I'll never be the same, and I've accepted that, but somebody else shouldn't have to suffer for somebody as dumb as that.

Q Ms. Wright, you understand Mr. Sena was under the influence of alcohol; is that correct?

A And cocaine, yes. He tested positive for it.

Q Okay. And cocaine. Do you believe the presence of a raised barrier would have stopped somebody who was driving under the alcohol -- under the influence of both alcohol and drugs from making

that turn?

A Maybe. But at the same time, I think he was determined to go to McDonald's regardless, and I don't know. It may be he's said, well, I didn't see the motorcycle and just pulled out thinking he was going to make it. But I think if there was a median there, it would have kind of like stopped you a little bit and make you think more than not have one there, and you just pull on across.

Q All right. So you don't -- you can't say here or testify whether or not the existence of a median would have preventing the accident or not?

A No.

Q Okay. You have been driving a motorcycle since 1978?

A Uh-huh.

Q You have to say yes.

A Yes.

Q Since 1978, to the time of the accident, had you ever worn a motorcycle helmet?

A Yes.

Q All right. And did you regularly wear a motorcycle helmet?

A No.

Q Okay. I understand in the state of South

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF BERKELEY	)	CASE NO.: 2016-CP-08-00334
	)	
CYNTHIA WRIGHT AND RICHARD WRIGHT	)	
	)	
	)	
Plaintiffs,	)	
	)	**DEFENDANT SOUTH CAROLINA**
vs.	)	**DEPARTMENT OF TRANSPORTATION'S**
	)	**MEMORANDUM IN SUPPORT OF**
	)	**MOTION FOR SUMMARY JUDGMENT**
SOUTH CAROLINA DEPARTMENT OF TRANSPORTATION, PILOT TRAVEL CENTERS, LLC, SPEEDWAY LLC, ASHLEY LAND SURVEYING, INC., F/K/A ASHELY ENGINEERING & CONSULTING, INC., AND MUNLAKE CONTRACTORS, INC.	)	
	)	
Defendants.	)	

The Defendant, South Carolina Department of Transportation, (hereinafter, "SCDOT"), hereby submits this memorandum in support of its motion for summary judgment. This motion is based on the fact that there are no issues of material fact that the accident at hand was solely caused by any others other than the driver Daniel Sena who was under the influence of alcohol and cocaine. Moreover, the State Tort Claims Act S.C. Code Ann. 15-78-60 et seq., bars Plaintiffs' claims that SCDOT improperly designed the area in question. As discussed below, Plaintiffs' argument does not turn on whether SCDOT improperly maintained the location of the accident or had notice that a hazardous condition may exist, but rather on the fact that the original design was improper.

FACTS

This case stems from a motor vehicle accident that occurred on October 6, 2012, while Plaintiffs were traveling North on Highway U.S. 17A on a motorcycle. Plaintiff Richard Wright was driving the motorcycle and his wife, Cynthia Wright, was riding as his passenger. The accident occurred when a pick-up truck that had been traveling in the southbound lane of U.S.17A (the opposite lane of traffic), failed to yield to oncoming traffic and attempted to turn left into a Pilot Travel Center. The Plaintiff's motorcycle struck the side of the pick-up truck causing the Plaintiffs' injuries. As will be discussed in detail below, the police determined that at the time of the accident, the driver of the pickup truck had a blood alcohol level of .12 and had cocaine in his system.

The driver of the pick-up truck was Daniel Sena (hereinafter "Sena"). Mr. Sena testified he intended to make a left-hand turn into the Pilot Travel Center in order to pick up McDonald's for his family for dinner. (Deposition of Daniel Sena attached as Exhibit A p.51[1]). Mr. Sena testified that ten (10) to fifteen (15) minutes before the accident, he had come home from work, changed his clothes, drank two beers, and done cocaine. (Exhibit A p.107-108).

Mr. Sena testified that he was extremely familiar with the intersection in question and had driven the route for many years of his life. (Exhibit A p.63-64). Mr. Sena stated that he was at a full stop in the median waiting to make the left

[1] All deposition excerpts of Daniel Sena are attached as Exhibit A; Leland Colvin excerpts are attached as Exhibit B; and Robert Clark excerpts are attached as Exhibit C).

hand turn[2]. He waited for two vehicles to pass when he began to make the left turn. (Exhibit A p.72). After starting the turn, Mr. Sena said he saw the Wright's motorcycle and slammed on his breaks but he could not avoid the collision. (Exhibit A p.73-74).

Immediately following the accident, Mr. Sena fled the scene. He did not call 911, or get out to see if anyone was injured. He testified that he was "scared" because he had cocaine in his possession, had been drinking alcohol and was driving even though his license had been suspended for a previous DUI arrest. (Exhibit A p.79-81). Mr. Sena was almost immediately apprehended by police as there was an undercover team in the area about to conduct a meth raid, and they followed him. (Exhibit A p.81).

Mr. Sena was taken into custody where it was determined that his blood alcohol level was .12 and that he had cocaine in his system. Mr. Sena ultimately pled guilty to two counts of felony DUI, leaving the scene of an accident with great bodily injury, and possession of cocaine. (Exhibit A p.89-90).

Mr. Sena does not blame SCDOT, Pilot or anyone else for the accident and takes full responsibility for the accident. (Exhibit A p.108-109). Mr. Sena admits that it was his duty to ensure that there was no coming traffic before taking the left turn and that he is the sole cause of the Wrights' injuries. (Exhibit A p.76; p.93).

Despite the fact that the accident was caused by an impaired driver who 10 to 15 minutes before the accident was drinking beer and doing cocaine and admits that his actions caused the Plaintiffs' accident and injuries, Plaintiffs contend that the

[2] Contrary to Sena's testimony, video of the accident shows that Mr. Sena did not come to a stop in the median.

accident would not have occurred had the SCDOT designed and built a raised concrete median on US 17A that would have prevented motorists from making left-hand turns into the Pilot Travel Center. Plaintiffs further contend that the location and design of Pilots entrances somehow caused the Plaintiffs' accident.

As the basis of Plaintiffs' complaint is the design of the highway in front of the Pilot Travel Center, some background regarding the location of the accident and the immediate vicinity is necessary.

The area where the accident occurred underwent two SCDOT projects during the late 1990s and early 2000s. SCDOT widened the section of U.S. 17A in front of the Pilot Travel Center ("the Widening Project"), and reconstructed the intersection at the exit from I-26 at Farmington Road as you head toward Summerville (the Interchange Project"). The widening project was completed on June 17, 2002 and the Interchange Project was completed on November 1, 2003. (Exhibit B, p.216).

Before either of the projects began, there was an existing gas station in the location of the current Pilot Travel Center. The existing gas station had driveways with access to US 17A, and there was no raised concrete mediation preventing left turns into the existing gas station. In fact, there has never been a raised median preventing left hand turns into that location. (Exhibit B p.256). In 2001, Pilot acquired the existing gas station, and constructed the current Pilot Travel Center. (See Pilot's memorandum in support of motion for Summary judgment previously filed).

Leland Colvin is currently the Deputy Secretary of Engineering for SDCOT, and at the time, was the project manager for both the Interchange Project and the Widening Project of 17A. (Exhibit B p.9-10). Mr. Colvin testified that SCDOT designed the plans for the Widening Project, but used an outside firm to design the plans for the Interchange Project. (Exhibit B p.252-253).

Mr. Colvin stated that the design plans for the Widening Project did not nor did they ever, include a raised median in front of the Pilot Travel Center. In fact, Mr. Colvin stated that a raised median was never considered for the location because it would not have been compliant with the SCDOT Highway Design Manual. (Exhibit B p.253-254[3]).

The design plans for the Interchange Project were prepared by an outside design firm. The Interchange plans showed a raised median in front of the Pilot Travel Center as a placeholder for how the project to the east of Farmington Road would accept traffic. (Exhibit B p.257). Mr. Colvin explained that as the program manager for these two projects, he had to look at them "in totality" and marry the two plans to together. (Exhibit B p.84-85). When the plans were "married" to show how the projects would come together, the Interchange Plans showing the raised median in front of the Pilot had to be corrected to accurately reflect the Highway Design Manual. (Exhibit B p.87).

Mr. Colvin testified numerous times that there never has been a raised median preventing left hand turns at the portion of US 17A in front of the Pilot

[3] While Mr. Colvin testified that the South Carolina Highway Design Manual is "the Bible" for design projects in the State of South Carolina. (Exhibit B p.254).

Travel Station, nor was a raised median ever considered during the Widening Project because doing so would have violated the South Carolina Highway Design Manual.

With regard to the driveways which provide ingress and egress to the Pilot Travel Station, Mr. Colvin stated that there were existing driveways providing ingress and egress to the property before Pilot constructed the Travel Center. (Exhibit B p.256). Mr. Colvin testified that SCDOT has to approve encroachments on the DOT right-of-way and that it considers safety and how the access to the private property affects traffic and the general operation of the highway. (Exhibit B p.48-50; p.273).

Robert Clark, another 30(b)(6) representative of SCDOT testified that when SCDOT reviews an encroachment permit for access to the road way, it uses is engineering judgment which consists of reviewing the traffic in the area, the type of development, and the operations at the particular intersection. This includes analyzing traffic backups, the amount of storage, and types of turning maneuvers. (Exhibit C p.14). SCDOT also uses its manuals and design criteria. (Exhibit C p.17-18). Mr. Clark testified that it is impossible for all encroachments to be in exact conformance with the design manuals. Mr. Clark explained,

> If we lived in the Midwest or lived in Phoenix where everything's laid out in a grid and, as cities grow, they're always growing in a grid and every block is the same, and as you grow out, you have the opportunity to have a clean slate, you can do that.
>
> When you have properties that have been cut up for 3 or 400 years and you've got redevelopment going on on this

> properties, you don't have a clean slate, but your are trying to do the best you can to create an efficient, effective, and safe interface with the road system.

(Exhibit C p.34-35).

Mr. Clark testified that they use the ARMS manual[4] as one of several different sources or resources when evaluating an encroachment permit for access to the roadway:

> We use information in our ARMS manual, we use information relating the SCDOT, we use design criteria. So, there's a lot of inputs and a lot of different sources or resources you can go to. For instance, depending on speed or the signal controlled intersection, you have got to have a certain amount of sight distance to the actual signal ahead in order to see it, process it and react to it. [S]o . . .each intersection is reviewed, the information that's being asked for in an encroachment permit is reviewed, and then we use a lot of resources and . . .engineering judgment to say, okay, this looks like it is in substantial conformity with – with what our rules are.

(Exhibit C p.17-18).

When specifically asked regarding the distance of between driveways and the requirements in the ARMS manual and whether these were considered at the time the encroachment permit was issued to Pilot, Mr. Clark reiterated,

> Distances in the manual in place at the time where probably considered. But again, **these are suggestions.** And you have to look at the site that you've got and what the—what the traffic is doing at the site, how it's circulating on the site, and bring all those factors together to make that determination.

(Exhibit C p.20).

[4] Mr. Colvin also testified that the ARMS manual is one of several resources used by the SCDOT when evaluating encroachment permits and that the ARMS manual provides examples for exceptions and procedures to gain the exceptions. (Exhibit B, p.45)

The facts establish that Plaintiffs accident was solely caused by the actions of a driver under the influence of alcohol and cocaine. Plaintiffs' argument turns not on facts that SCDOT had notice of a dangerous condition or that the location of the accident was a hazard to the driving public, but rather is based on the grounds that SCDOT improperly designed and constructed a flush painted median and that it improperly approved an encroachment permit with regard to the driveways at the Pilot. This claim fails and is barred by the South Carolina State Tort Claims Act. § 15-78-60(1)(2)(3)(4)(5)(9)(13) and (15). The evidence established that the design plans for the Widening Project in front of the Pilot Travel Center never included a raised median, and in fact, constructing a raised median in that location would have been in violation of the South Carolina Highway Design Manual. There is no evidence that SCDOT improperly maintained the median or that it had any notice that the flush median was a hazard.

Likewise, to the extent Plaintiffs allege that SCDOT is at fault for the design and location of the driveways into the Pilot Travel Center, those claims are barred by the State Tort Claims Act § 15-78-60 et seq. Again, Plaintiffs presented no evidence that the encroachment permit which allowed the installation of the driveways into the Pilot Travel Center was improperly approved during construction. Plaintiffs also have not presented any evidence that SCDOT failed to maintain the driveways at the Pilot Travel Center or had notice that the driveways were a hazard to the driving public.

SUMMARY JUDGMENT STANDARD

Summary judgment is appropriate when "the pleadings, deposition, answer to interrogatories, and admissions on file, together with the affidavits, if any show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." SCRCP 56(c). When a party makes a motion for summary judgment that is supported by the evidence, the adverse party may not rest on the allegations of the Complaint to overcome the motion by must demonstrate, by affidavit or other evidence that a genuine issue of fact exists. *Klippel v. Mid-Carolina Oil, Inc.*, 303 S.C. 127, 399 S.E.2d 163 (Ct. App. 1990); *Dyer v. Moss*, 284 S.C. 208, 325 S.E.2d 69 (Ct. App. 1985). The nonmoving party must make an affirmative effort to set forth specific facts showing that there is a genuine issue for trial in order to overcome a summary judgment motion.

ARGUMENT

I. The State Tort Claims Act Bars Plaintiffs' Claims Against SCDOT.

Plaintiffs have not presented any evidence that SCDOT improperly designed the location of the accident or that it had notice that the location was a dangerous condition.

Nonetheless, S.C. Code Ann. 15-78-60 provides that a governmental entity is liable for any loss caused by:

> **(1)** legislative, judicial, or quasi-judicial action or inaction;
>
> **(2)** administrative action or inaction of a legislative, judicial, or quasi-judicial nature;

(3) execution, enforcement, or implementation of the orders of any court or execution, enforcement, or lawful implementation of any process;

(4) adoption, enforcement, or compliance with any law or failure to adopt or enforce any law, whether valid or invalid, including, but not limited to, any charter, provision, ordinance, resolution, rule, regulation, or written policies;

(5) the exercise of discretion or judgment by the governmental entity or employee or the performance or failure to perform any act or service which is in the discretion or judgment of the governmental entity or employee;

(9) entry upon any property where the entry is expressly or impliedly authorized by law;

(13) regulatory inspection powers or functions, including failure to make an inspection, or making an inadequate or negligent inspection, of any property to determine whether the property complies with or violates any law, regulation, code, or ordinance or contains a hazard to health or safety;:

(15) absence, condition, or malfunction of any sign, signal, warning device, illumination device, guardrail, or median barrier unless the absence, condition, or malfunction is not corrected by the governmental entity responsible for its maintenance within a reasonable time after actual or constructive notice. Governmental entities are not liable for the removal or destruction of signs, signals, warning devices, guardrails, or median barriers by third parties except on failure of the political subdivision to correct them within a reasonable time after actual or constructive notice. Nothing in this item gives rise to liability arising from a failure of any governmental entity to initially place any of the above signs, signals, warning devices, guardrails, or median barriers when the failure is the result of a discretionary act of the governmental entity. The signs, signals, warning devices, guardrails, or median barriers referred to in this item are those used in connection

> with hazards normally connected with the use of public ways and do not apply to the duty to warn of special conditions such as excavations, dredging, or public way construction. Governmental entities are not liable for the design of highways and other public ways. Governmental entities are not liable for loss on public ways under construction when the entity is protected by an indemnity bond. Governmental entities responsible for maintaining highways, roads, streets, causeways, bridges, or other public ways are not liable for loss arising out of a defect or a condition in, on, under, or overhanging a highway, road, street, causeway, bridge, or other public way caused by a third party unless the defect or condition is not corrected by the particular governmental entity responsible for the maintenance within a reasonable time after actual or constructive notice

South Carolina Code Ann. §15-78-60(15), specifically grants a governmental entity discretionary immunity from any loss caused by the absence of a median or the lack of a median in the initial design. Discretionary immunity based on the sections sited above is contingent on proof the government entity, faced with alternatives, actually weighed competing considerations and made a conscious choice using accepted professional standards. *Wooten v. South Carolina DOT*, 333 S.C. 464, 468, 511 S.E.2d 355, 357 (Sup. Ct.1999). The only other exception is contained in S.C. Code Ann. 15-78-60 (15), and involves a situation when the governmental entity had actual or constructive notice of an alleged defect and does not correct the condition in a reasonable amount of time of the notice.

In the present case, with regard to Plaintiffs argument that SCDOT failed to install a raised median at the time of construction based on the Interchange Project

Plans, the evidence establishes that Leland Colvin, the program manager for both projects, was responsible for "marrying" the two design plans together. Mr. Colvin testified that a raised median was never contemplated by the Widening Project, and that in fact, installing a raised median would have been in violation of the South Carolina Highway Manual. Accordingly, he used his discretion weighed his options and using professional standards made the decision with regard to the installation of the median and corrected the raised-median "placeholder" that was incorrectly depicted in the Interchange Project plans. Accordingly, SCDOT is immune from suit based on S.C. Code Ann. Sections (1), (2), (3), (4), (5), (9), (13) and (15).

With regard to Plaintiffs' argument that SCDOT "negotiated" with Pilot to remove the raised median from the design plans, Mr. Colvin testified that he did not speak with anyone from Pilot regarding his decision to install a flush median, and that there was no negotiation. (Exhibit B pgs.99, 105, 260).

Plaintiff also argues that the driveways into the Pilot Travel Center violate provisions of the ARMS manual as they are too close to one another and too close to the intersection of the roadway. This issue was specifically addressed by Mr. Clark when he testified that when dealing with property that has been in existence for long periods of time and is being redeveloped, it is impossible to require every provision in every manual be met. According to Mr. Clark, SCDOT uses its best judgment to ensure a safe, efficient, and effective interface with the roadway.

Moreover, Mr. Clark testified that the ARMS manual referenced by Plaintiff is just one of several resources or sources that SCDOT uses when evaluating an

encroachment permit and that SCDOT uses its engineering judgment to determine whether the permit is in substantial conformity with SCDOT rules.

To the extent that Plaintiff argues that SCDOT was on notice of any problems with the location of the accident, and therefore, falls into the exception cited in S.C. Code Ann. 15-78-60(15), this argument to fails.

When addressing the design immunity contained in S.C. Code Ann. 15-78-60(15), South Carolina Supreme Court has focused on whether the SCDOT notice of a hazardous condition and does not take corrective measures in a reasonable amount of time. *Id.*

In *Wooten,* a twelve-year old was hit by a car while attempting to cross a multi-lane roadway. Her mother brought suit alleging that SCDOT was negligent in failing to install a traffic lights that would allow adequate time for a pedestrian to cross, or provide pedestrian walk signals or to warn pedestrians of the hazardous nature of the intersection.

In holding that the discretionary design immunity provision of S.C. Code 15-78-60 (15) was not applicable, the *Wooten* Court cited to testimony that from a SCDOT official that the intersection where the child was struck was a dangerous intersection for pedestrians in that crossing time available for pedestrians was not sufficient to cross the width of the road, and that the time allowed for pedestrians to cross varied because the signal was traffic-actuated. The Court also relied on testimony that established the SCDOT violated guidelines on pedestrian signals

mandated that pedestrian signals be installed at intersections when there is not adequate time to cross. *Id.*at 469, 511 S.E.2d 355, 357.

In *Giannini v. SCDOT*, 378 S.C. 573, 664 S.E.2d 450 (2008), a car traveling North on I-77 hydroplaned and crossed over the median and into southbound traffic colliding with the cars driven by the plaintiffs. One person was killed and the others seriously injured. Plaintiffs claimed that SCDOT was negligent in failing to install barriers that would have prevented the car from crossing into southbound traffic. SCDOT argued that it was immune from liability pursuant to S.C. Code Ann. § 15-78-60(15), in both its directed verdict motion and its J.N.O.V. motion.

The Supreme Court held that the trial court properly denied the motions based on S.C. Code Ann. 15-78-60(15). The Court found there was notice of a defective condition as there had been several cross-over accidents within the two mile stretch of where the *Giannini* accident occurred that those accidents had been publicized by the local media. *Id* at 580, 378 S.E.2d 573, 580.

In *Pike v. SCDOT*, 343 S.C. 224, 540 S.E.2d 87 (2000), the Plaintiff's wife was killed in a car accident. Plaintiff alleged that SCDOT was negligent in failing to remove a sign from the roadway which obstructed motorists' view of oncoming traffic. The *Pike* Court found there was evidence that SCDOT had notice of problems at this intersection because it had received letters regarding this specific intersection. In fact, SCDOT even sent an employee to the intersection in response to one letter which specifically complained about the sign blocking the view of

oncoming traffic and calling the intersection "dangerous." However, nothing was done.

Pike, Wooten and *Giannini* all turned on facts establishing that SCDOT had some type of notice of a defective condition or, as in *Wooten,* that the condition violated its regulations, and failed to correct it. In the present case, Plaintiff does not cite to notice of a defective condition but rather argues that a raised median should have been installed during original construction based on the fact that the Interchange Project Plans, which were separate and distinct from the Widening Project Plans, originally showed a raised median.

According to Plaintiffs if the raised median depicted in the Interchange Project plans had been installed during construction the accident would not have occurred because there could be no left-hand turns into the Pilot Travel Center. However, that argument fails as the installation of the raised median would have been in violation of the South Carolina Highway Design Manual. (Exhibit B, p.253-254)[5]. Plaintiffs have not presented any evidence that SCDOT was negligent or had any notice, actual or constructive that the flushed median or the driveways were defective condition.

To the extent Plaintiffs rely on a traffic study of the area of the accident that was completed by Public Safety as part of its traffic safety program. First, these traffic studies are inadmissible pursuant to 23 U.S.C 148(h)(4) and 23 U.S.C. 409

[5] Plaintiff has argued that a raised median would have prevented Sena from turning left. However, raised medians are not "non-transversable". Emergency vehicles must be able to drive over raised medians. (Exhibit B p.101). There is no way to predict whether a driver under the influence of alcohol and cocaine would have attempted the left turn had a raised median been installed.

(Exhibit E). Nonetheless, the traffic study was done in October of 2013 approximately a year after the Plaintiffs' accident. Therefore, it is inapplicable any analysis to whether SCDOT had any actual or constructive notice. The argument that SCDOT did not conduct a traffic study in the ten years since the completion of the Widening and Interchange Project even though this intersection is highly traveled relies on an impossible standard. It simply is not possible for SCDOT to monitor and study all highly traveled intersections in the State.

The case law is clear in that the courts in *Pike, Wooten,* and Giannini focused on actual evidence that SCDOT had notice of a defective condition at a location. The fact that accidents occurred is not the standard. If it was, virtually every intersection in Charleston would be considered a defective.

The flush median was designed and constructed properly and to have installed a raised median as advocated by Plaintiffs would have been in violation of the South Carolina Highway Design Manual. Moreover, Plaintiffs have not presented any evidence that SCDOT had any notice of a problem with the median or driveways prior to the Plaintiffs' accident

The Plaintiffs' accident is a terrible situation which was caused solely by Daniel Sena who made the decision to drive with a suspended license and while under the influence of both alcohol and cocaine.

CONCLUSION

In light of the foregoing reasons, SCDOT respectfully requests that the Court grant its motion for summary judgment.

MAYBANK LAW FIRM
531 Savannah Highway
Post Office Box 12579
Charleston, SC 29422
Phone: (843) 766-8101
Fax: (843) 766-8103
E-mail: roy@maybanklaw.com

Roy P. Maybank (S.C. #69643)
Attorneys Defendant South Carolina
Department of Transportation

Dated: 6/6/2017

Charleston, South Carolina

CERTIFICATE OF SERVICE

I certify that on this date a copy of the foregoing was served on each party or counsel of record by ☐ mailing, ☒ e-mailing, ☐ facsimile, or ☒ hand delivery in the manner prescribed by the applicable Rule of Civil Procedure.

This 6 day of June, 2017.

Teresa L. Winter

EXHIBIT A

STATE OF SOUTH CAROLINA
COURT OF COMMON PLEAS
COUNTY OF BERKELEY

CYNTHIA WRIGHT AND RICHARD WRIGHT,

Plaintiffs,

vs. CASE NO. 2014-CP-08-675

SOUTH CAROLINA DEPARTMENT OF TRANSPORTATION, C&A UNLIMITED, INC. AND PILOT TRAVEL CENTERS, LLC,

Defendants.

DEPOSITION OF: DANIEL JAMES SENA

DATE: May 6, 2015

TIME: 10:17 A.M.

LOCATION: Walden Correctional Institution
4340 Broad River Road
Columbia, SC

TAKEN BY: Counsel for the Defendant SCDOT

REPORTED BY: LORI S. MORTGE,
Certified Court
Reporter, CCR

A. WILLIAM ROBERTS, JR., & ASSOCIATES

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AWR A. WILLIAM ROBERTS, JR., & ASSOCIATES (800) 743-DEPO
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the time from -- basically the time you woke up and what you did that day.

A. We got up, left, went to work. My shop was in Ravenel, South Carolina. We was working in downtown Charleston that day. We was working -- we worked late, so five or six in the evening, I'd say. Left work, went back -- went back to the shop, dropped the work truck off and got my own personal vehicle, went back to Summerville.

Was at the house, had a couple of drinks at the house. At that time I had left -- left the house and I went to McDonald's to get dinner for the kids and there was the accident.

Q. Okay. You answered the question exactly as I asked you and I appreciate that. I'm going to have to kind of dissect it a little bit more.

A. All right.

Q. You were working at Sweatman's Heating & Air that day?

A. Yes, sir.

Q. How do you spell that? Do you know?

A. It's S-W-E-A-T-M-A-N-S.

Q. And that was in Ravenel?

A. Yes, sir.

Q. Where in Ravenel are they located?

A. Yes, sir.
Q. And then there would be down that road a place called The Cove?
A. Yes, sir.
Q. Is there a sign on that Sangaree Parkway that says The Cove that I would then turn into?
A. Yes, sir.
Q. Okay. And you think that's about a half a mile from this intersection?
A. Correct.
Q. I mean, pardon me, from the scene of this accident?
A. Correct.
Q. Mr. Sena, is it a fair statement to say -- I dare say a true statement to say that you had been very familiar with the intersection area of the 199 exit, the Pilot station, the McDonald's and that whole intersection area that the -- where the accident occurred?
A. Correct.
Q. This is something you drove daily?
A. Yes, sir.
Q. For many years of your life?
A. Yes, sir.
Q. And you've seen where it's gone from two

lanes to four lanes?

A. Yes, sir.

Q. All right. You've seen the road improvement, the markings on the ground, the stop lights in the air, the stop signs around you. And so you were familiar with the environment as presented just in this whole general area?

A. Yes, sir.

Q. And specifically as to this Kangaroo -- pardon me, this Pilot/McDonald's gas station area?

A. Yes, sir.

Q. Okay. You left the house?

A. Correct.

Q. You had two beers?

A. Correct.

Q. You had been given an order?

A. Yes, sir.

Q. You were going to McDonald's to buy dinner for -- is just your daughter -- your sons or is it you and your wife as well?

A. For the whole family.

Q. Okay. At any time prior to the accident did you feel that you were unable to drive the vehicle in a safe manner?

A. No, sir.

Q. Very good. And with your permission I'm going to just do a little thing there. (Marking.) So -- and it was your intent to take the left into the yellow marked highlighted entrance?

A. Correct.

Q. Did you at any time, to your recollection, come to a full stop in that median before you made that left-hand turn?

A. Yes, sir. I did.

Q. Okay. A full stop prior to the left-hand turn. You saw how many vehicles approaching you at that time, to the best of your knowledge?

A. To the best of my knowledge I want to say at least two.

Q. And did you wait for two vehicles to pass you before you made that left turn lane?

A. Yes, sir. I did.

Q. Okay. Is it a true statement that at no time prior to hitting the motorcycle did you ever see the motorcycle?

A. I'm sorry. Repeat that.

Q. Yes. You were not driving that night with the purpose of running into anybody, were you?

A. No, sir.

Q. Okay. Had you seen the motorcycle before impact, is it a true statement that you would not have taken a left in front of them?

A. Yes, sir.

Q. All right. So the question is, is it a fair statement or true statement to say that before you made that left turn to come into that McDonald's you simply didn't see the motorcycle?

A. Correct.

Q. Okay. When was your first realization that you had -- that you had had an accident?

A. As soon -- when I had the accident? I realized we was going to have an accident before we even had the collision. I seen the cars pass, I cut my wheel and went to turn. And when I went to turn I just glanced back this way and they were -- they were there. I slammed on brakes and my vehicle was halfway between that yellow line there and they said they hit -- they clipped the front corner of my vehicle. It was there and they couldn't avoid it.

Q. So you were already into the lane of travel prior to impact and right at impact?

A. Dead stop -- I was dead stopped by the time they hit me.

Q. Because you had seen them coming?

A. Yes, sir. I slammed on brakes. I had enough time to put my hands up to block the airbag. That gives you enough -- but then almost five seconds before they hit me.

Q. Did your -- did your airbag deploy?

A. Yes, sir. Correct, they did.

Q. Do you know -- could you tell then, as you were seeing them coming at you, do you know whether or not they had shifted lanes to come into -- is this -- now, did the impact occur in the lane -- this outside lane closest to where you were turning?

A. Yes, sir. It did.

Q. Okay. Could you tell if at any time *prior -- well, let me strike that poor question. You had begun the left turn lane?*

A. Yes, sir.

Q. Begun the left turn out of that lane. You saw them for a period of seconds, just long enough to brace for the airbag to deploy?

A. Yes, sir.

Q. Do you know whether or not -- or if you could tell whether or not the Wrights had shifted from either the far right lane or the center lane to get into that lane of traffic coming into you?

Q. That your -- if you're testifying that you were fully stopped in this median and you were then going to take a left to pass three -- to cross three lanes of traffic to pull into that Piggly Wiggly -- pardon me, to that McDonald's, that you were taking a left into oncoming traffic?

A. Yes, sir.

Q. And would you agree with me that it is your duty, as a driver, to defer and to ensure that there's no oncoming traffic before you take that left?

A. Yes, sir.

Q. Okay. And that when you took that left into oncoming traffic, whether or not you saw them or not, that the fault of causing that accident with the Wrights and their motorcycle was your -- was caused by your driving?

A. Yes, sir.

Q. Okay. What happened after the collision?

A. I got scared and I left the scene.

Q. Why did you get scared? Because, frankly, you don't look like a guy that scares very often.

A. I didn't -- I didn't know what to think

A. (Marking.)

Q. That's about what we thought. Now, from that impact as -- you see how you had this line and kind of showed your approach in your stop?

A. Yes, sir.

Q. Show me where the direction and how you would have pulled away and which lanes you would have been in, and take me all the way through this Hess area.

A. Actually come through here -- I can't quote if I went all three lanes at one time or not, but I come this way here and there was a turn off -- used to be a turn off right there. I don't know what they got going on there now, but...

Q. Did you take a right in front of the Hess?

A. Actually --

Q. This is the Hess.

A. Yes, sir. I corrected myself on that. On this frontage road right here, once you turn here it went like this. Before this development or whatever this is right here, you used to turn right here and the frontage road -- all that was started right there. (Indicating.)

Q. So the cross mount was incorrect; okay?

A. Yes, sir.
Q. What's left there is correct?
A. Yes, sir.
Q. And as you were speeding away from the accident did you know anybody had been hurt at that point?
A. Apparently the driver.
Q. That's after the fact; right?
A. What do you mean? Hold on.
Q. Sure. You came up to take a left into the McDonald's?
A. Yes, sir.
Q. You had the accident?
A. Yes, sir.
Q. You freaked out or what did -- you got scared?
A. Yes, sir.
Q. And you took off?
A. Yes, sir.
Q. At any of -- at any point of our discussion I just had with you, did you know that anybody had even been hurt?
A. To my knowledge, no, sir.
Q. Okay. Was the reason you were scared was also because you were driving under a suspended

license for the second time?

A. I mean -- well, that's a little petty charge, not really the reason to leave the scene of the accident with an injury involved. I wouldn't say that's the reason. It could have been something to help build up to the...

Q. How about the two beers with the suspended license as well?

A. Yes, sir. I'd say at the time in my -- I had cocaine in my possession at the time of this accident. I would say that was more of the whole mix all together, the suspended license, knowing I had alcohol and along with the cocaine possession, it wasn't the best decision but I'd rather not be there with all that.

Q. All right. Understood. You left. Do you know how you were caught?

A. Yes, sir. There's currently -- in these three spots here, (indicating), there was an undercover surveillance team about to go do a bust on a meth raid somewhere down the street and they witnessed the whole entire thing. As I left the scene of the accident they followed me down here. And this Westvaco Road is a one-way road, has a guard gate, or was. And as I got to the guard gate

if you've got marriage certificates and all that SCDC policy, you have to have the name on all the documents, stating your legal kids and legal wife so they can see you. In anticipation of coming to prison we, you know, went and had it finalized and put it on paper.

Q. Did you go to court on this?

A. Yes, sir.

Q. Did you have a trial?

A. No, sir. I took a plea deal.

Q. Do you know when that was?

A. June 19, 2014.

Q. 2014 you say?

A. Yes, sir.

Q. And do you know what you pled to?

A. Pled to failing DUI times two.

Q. What does that mean?

A. Two counts of felony DUI.

Q. Is that because there were two people injured?

A. Yes, sir.

Q. Okay.

A. Leaving the scene of the accident with great bodily injury.

Q. All right. Anything else?

Q. Yeah.

A. No, sir. We were the only two there -- or three.

Q. You would agree with me that you were the sole cause of Mr. and Mrs. Wright's injuries in this case?

A. Yes, sir.

Q. Have you ever been incarcerated other than when you were at Berkeley County Detention Center the night of this accident prior to this day -- prior to that day?

A. Incarcerated in SCDC, or just period?

Q. Just period.

A. I've done, you know, time -- overnighters, you know, from all the charges we stated earlier. You get arrested, spend the night in jail, make PR bond the next day. Get out and it's up to you to come back to court and pay your fines or whatever.

Q. Have you ever written and apologized to Mrs. Wright for causing these injuries to her?

A. No, sir. I was told that I'm not allowed to contact within written form or verbal form to the victims, period, by my attorney.

Q. Okay. And just -- I don't want to know

A. They gave me time served for the possession so that wasn't, I guess, part of this part of the process.

Q. Did you not -- were you not sentenced to five months for a cocaine possession?

A. Yes, sir. But that was the time -- they gave me time served for the time I served in Berkeley County.

Q. You had been incarcerated with the South Carolina Department of Corrections since June 19, 2014?

A. Yes, sir.

Q. Did you receive -- you received the credit for the five months?

A. Yes, sir.

Q. Okay. When are you eligible for parole? Do you know?

A. It keeps changing, because they keep wanting to switch me from institution to institution. As of right now I believe it is December of this year -- or between December and January of 2016.

Q. December 2015 --

A. Yes, sir.

Q. -- and January 2016? All right. At

you turned too soon?

A. Correct.

Q. When was the last time, as far as minutes or whatever, that you would have had something alcoholic to drink or any drugs that you took prior to this accident?

A. I was at my house drinking that beer ten minutes prior to the accident.

Q. Ten minutes?

A. Between 10, 15 minutes of just jotting some stuff down on a piece of paper, you know, to get ready to go.

Q. Now, the number two for beers has been thrown out here today. Is that number that you think is accurate? You had a .10 was your blood alcohol content, that's what you testified; is that correct?

A. Yes, sir.

Q. Was it just two beers or was it more than two beers?

A. No, sir. The two beers I had at my house.

Q. And you took the cocaine before the beers?

A. No, sir. I come in -- I come in from

DANIEL JAMES SENA - EX. BY MR. BESLEY

work, undressed, got out of my work clothes, drank a beer and grabbed a second beer and went to my back door in the back of my truck and then did the cocaine.

Q. Okay.

A. And --

Q. And -- okay. Go ahead.

A. Smoked a cigarette, my wife came out with the list, you know, and then off to McDonald's.

Q. No other alcohol, no shots of anything?

A. No, sir.

Q. Nothing. Did it surprise you that you were a .10 alcohol level?

A. Yes, sir. If not, I would not have given consent to a Breathalyzer. In my own personal opinion, I just figured I wouldn't fail a Breathalyzer with two beers in my system.

Q. You're absolutely certain it was just two beers?

A. Yes, sir.

Q. Do you take full responsibility for the accident?

A. Yes, sir. I do.

Q. You don't blame the DOT for the accident?

DANIEL JAMES SENA - EX. BY MR. BESLEY

A. No, sir.

Q. You don't blame Pilot Gas Station for the accident?

A. No, sir.

Q. Okay. And whose truck were you driving?

A. That was our truck, mine and my wife's -- registered to her but ours.

Q. When you say it was yours or ours, is that because you both paid for it? Or why do you say it's ours?

A. When you're married, ain't half of everything yours?

Q. All right. Fair enough. Had you driven that truck previously?

A. Yes, sir.

Q. You were familiar with it?

A. Yes, sir. Just got home from work in it.

Q. And you had permission to drive that truck?

A. Yes, sir.

MR. BESLEY: I think that's all I've got for you at this time. Thanks -- wait, let me back up. I just want to confirm.

Q. I've got some pictures here in front of

EXHIBIT B

STATE OF SOUTH CAROLINA
IN THE COURT OF COMMON PLEAS
NINTH JUDICIAL CIRCUIT
COUNTY OF BERKELEY

COPY

CYNTHIA WRIGHT AND RICHARD WRIGHT,

Plaintiffs,

vs. CASE NO. 2016-CP-08-334

SOUTH CAROLINA DEPARTMENT OF TRANSPORTATION, C & A UNLIMITED, INC., and PILOT TRAVEL CENTERS, LLC, SPEEDWAY, LLC, ASHLEY LAND SURVEYING, INC., F/K/A ASHLEY ENGINEERING & SURVEYING, INC., and ASHLEY ENGINEERING & CONSULTING, INC., and MUNLAKE CONTRACTORS, INC.

Defendants.

VIDEO

VIDEOTAPE DEPOSITION OF: LELAND D. COLVIN, JR.

DATE: March 13, 2017

TIME: 11:35 AM

LOCATION: SCDOT District 6
6355 Fain Boulevard
North Charleston, SC

TAKEN BY: Counsel for the Plaintiffs

REPORTED BY: TERRI L. BRUSSEAU, RPR, CRR

A. WILLIAM ROBERTS, JR., & ASSOCIATES

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respect to topics -- Topic Number 2?

A. I am. There is -- I think Robert and I have a little bit of overlap.

Q. I saw that.

A. Especially in -- in relation to encroachment permits. They are approved out of the district office, so there's a little bit overlap. But yes, I am prepared to talk about Topic 2.

Q. All right. And do you believe -- well, I think you may have touched on this. The question is: Do you believe you are the most qualified to talk about this topic or to testify about this topic? And I know you've identified another person with some duplication in terms of the subjects, but do you think you're more qualified than him or less qualified or you're equally qualified?

A. I would say we're equally qualified.

Q. Okay. And who was it that designated you to speak on the matters listed in Topic Number 2?

A. Mr. Maybank.

Q. Okay. Do you know why you were chosen?

A. I was the program manager for this job for both the interstate widening job as well as the 17A widening job at the time of -- of the

preconstruction and construction documents were prepared.

Q. All right. All right. So I wanted to just put that down, because we may refer to this later.

So you were the program manager for the widening job that was going on on Highway 17A at the time?

A. Yes, sir.

Q. And also for the requests being made by the folks associated with -- with Pilot for changes in the entrances, exits, and things like that?

A. Yeah. The -- the right-of-way negotiation was part of that project. Yes, that is part of it.

Q. And that's how we would refer to it, the right-of-way?

A. Correct.

Q. So there would be the road widening and then the right-of-way?

A. There's about four components: There is environmental; there is what we call preconstruction, which is development of the plans; and then you have the right-of-way acquisition; and then you have the construction. So it is one of

kind of separated those out. The issues with the highway and the issues with the parking lot, all of that would be included?

A. Yes. Yes, sir.

Q. Okay. And so what is your official position as you sit here today?

A. I am the deputy secretary for engineering.

Q. And how long have you been in that position?

A. Permanently, it will be a year in June; but I was acting for about roughly eight months prior to that.

Q. So a couple of years, about?

A. Roughly, not quite. 18 months.

Q. Okay. And then what were you doing prior to that?

A. Prior to that, I was the chief engineer for location and design.

Q. And how long did you do that?

A. For about a year.

Q. Okay. And what about before that?

A. Before that, I was chief engineer for operations.

Q. Okay. And length of that?

to that, so there is a -- there is an exception process as -- as well that does -- that's within this -- incorporated within the manual itself.

Q. So what's in the ARMS manual is mandatory, but the ARMS manual itself provides examples for exceptions and procedures to -- to gain those exceptions. Is that a fair summary?

A. That is correct.

Q. Okay.

A. Yes.

MR. CRITES: Kevin, when you were referring to the manual as being mandatory, is that the South Carolina Highway Design Manual?

MR. SMITH: I'm talking about the ARMS manual.

MR. CRITES: Okay.

BY MR. SMITH:

Q. And maybe I'll -- I'll head off his question in advance.

The South Carolina Highway Design Manual, is that also a set of mandatory rules that would provide instances for exceptions and a set of procedures to try and qualify for those exceptions?

A. Yes, sir, it does. It provides a -- a process for exceptions to the manual.

because the Department of Transportation is required more -- is required to care more about safety than what a property owner thinks will make him or her more money. Is that true?

A. Yeah. Our -- yes. We -- we are charged with providing safe, reasonable access to the state highway system.

Q. All right. And safety takes precedent over any wishes that private corporations may have that may result in them making more or less money? Safety trumps that?

A. Yes.

Q. Okay. And would you say that safety is the primary concern for any decision regarding access to private property?

A. Yes. I would say safety and the operation of the state highway system are the two primary functions that the DOT looks at for access to the state highway system.

Q. And I -- and I read a -- a little bit about that. And -- and I think that term, to me, seemed to say that we know what safety is, but the operation of the road, that's about traffic issues and stuff, about the road functioning smoothly and not backing up and -- is that what you were talking

about, the second end of it?

A. Yes. I mean, that -- that -- the -- the operation, the functionality of that roadway. In other words, you've got a different safety standard for a interstate system that does not have any access points, then an urban arterial, then a minor arterial, then a neighbor street. So each -- no one roadway is treated the same with regards to the reasonable expectation of those drivers.

Each functional class of that highway has different safety components that -- that are tied to that, which is -- which I would say most drivers understand those reasonable expectations. They've got a -- you know, driving along an interstate with higher speeds, less conflict points versus driving along a neighborhood street. And then you've got those roads in between those two.

Q. But in any of those situations where it's an interstate or it's a major highway or a neighborhood or a -- or a smaller street, in any of those situations, there's two concerns that the Highway Department would -- I'm sorry -- the Department of Transportation would have that would trump the wishes of private property owners. And those two concerns would be, number one, safety,

and, number two, the functioning of the highway or roadway in question?

A. Yes.

Q. Okay.

A. That's a fair statement, yes, sir.

Q. All right. Let's talk about -- and I think that maybe even Question 1 under yours? Let me get to the page so I don't have to keep flipping here.

So the history of the design, that Number 1 --

A. Sure.

Q. -- why it was decided to -- decided to separate the north- and southbound lanes, barrier-type median, that seems to be your topic rather than Mr. Clark's, right?

A. Correct.

Q. Okay. So talk to me about this history of the design here.

A. Sure. Well, first thing I think you've got to recognize, there's two different projects and they just happen to start in at Farm -- at the intersection of 17A and Farmington.

Q. And let me ask you -- let me stop you right there.

got to make sure that they're not ending -- you know, multiple lanes going into a section that only had a couple lanes to receive this. They had to do their due diligence to say, okay, I -- I am building a safe intersection through my project.

Now me, as a -- me, as the program manager, I had to look at the project that was to the east of Farmington that Arcadis was not responsible for that design, and I had to mirror those two projects together at the intersection of Farmington.

Q. Okay.

A. So when I looked -- when that -- so when you looked at both of those in its totality, not looking at one project versus just the second project, when you look at those in that totality, that's when we made those decisions. Say, okay, here's what we're planning on the widening project; Arcadis, it doesn't match what's being designed as part of the interchange; we need to go through that design to make sure they marry up, that on the widening project from Farmington out towards Moncks Corner, that was always going to be a flush median. So Arcadis need to, as part of their iteration, need to match that design to the east of

Farmington. It had -- certainly had a raised median and a controlled access, not only a raised median, you had controlled access from the interstate proper out to Farmington. From Farmington east you had a -- what we refer to as a flush painted median.

Q. Okay. But before that flush painted median was in the plans, the plans included a requirement for a raised median for that whole area, the flush median, which -- which --

A. Yes, sir. There -- there was -- there was a --

MR. MAYBANK: Object.

MR. CRITES: Object to the form.

MR. MAYBANK: Which -- which plans are you referring to?

MR. SMITH: Any of the plans.

BY MR. SMITH:

Q. What I'm saying here is when we look at the project originally, the plans, and I mean drawings or the requirements for building, whatever it be, the specs, whatever we want to call them, the original plans for the property on 17A in front of the Pilot Travel Center, those original plans included the requirement for a raised median. And

MR. BERLINSKY: Well, you know, I -- I agree wholeheartedly with what you're saying.

MR. MAYBANK: Here's -- you know, I think you all are confusing one another.

MR. SMITH: Well, what -- what I'm hearing from him is that portions of the interchange project blended into the road widening. Because when doing the inter -- interchange project, they are drawing in this raised median as part of accepting these lanes from the widening project into their interchange improvement project.

BY MR. SMITH:

Q. That's what I heard you say.

A. Yes. When -- when -- in my job as the program manager for the project, we had to take a set of design plans that were done by a consultant, a set of design plans for the widening -- it doesn't really matter who did them -- and marry those two plans together.

Q. Okay.

A. And as part of that marrying and coming up with that final design, it was -- the final design was a flush painted median and not a raised median.

Q. Okay.

call that construction joint, whatever you want to call it, that terminus of one and the -- and the starting point of the other one and marrying those two together, that's when the correction was made to show that -- that flush painted median.

Q. All right. Was that around the time of this letter, marrying those two together?

A. Yes.

Q. Okay.

A. Yes, sir.

Q. Okay.

VIDEO TECHNICIAN: Fifteen minutes, counselor.

MR. SMITH: Okay.

BY MR. SMITH:

Q. All right. Whose decision was it to change the plans from what was in the interchange project from a raised median to a flush median in the final plans? Whose decision was that?

A. That was my decision as the program manager.

Q. Okay. Now, what discussions did you have with anyone associated with the property owners or the people developing what is now the Pilot Travel Center with regards to that raised

Q. Okay. Now, with regards to the original, we saw some mention of a unmountable median. Does unmountable mean uncrossable?

A. Yes, un -- unmountable meaning uncross -- uncrossable. And I'm not sure that -- yes, that is what that word means.

Q. Okay. And is that -- is a raised median also a nontraversable median?

A. A -- a -- a raised median serves two purposes. A raised median serves for channelization and for access control. It's transversable from the standpoint that, yes, we want that median to be transversable for emergency services. So I don't want to contradict myself, but yes. The -- the intent of that is, yes, for everyday morning traffic -- well, not transversable, is it unmountable? That's why I say the term unmountable is probably -- this was done by -- I don't even know whose signature this is. I don't believe this is a DOT -- I don't believe that's a DOT person, but I -- I think that term probably is inaccurate. Certain -- but I don't want to mislead you. A -- a -- a raised median is not intended to be transversed by the motoring public.

Q. Yeah.

A. Does it matter how I mark that?

Q. Just put a straight line. Okay.

And so --

MR. MAYBANK: Hold on. Write above that, two-way left turn lane. And then put the arrow back towards where it's going. There you go. Perfect. Thank you.

BY MR. SMITH:

Q. All right. So talk to me about the function of the two-way left turn lane. So if a -- if a driver is coming from Moncks Corner, right, and they want to go turn into one of the driveways at the Pilot Travel Center, what's the function of this turn lane in that situation? How early are they -- is it designed so that they're supposed to get into it? How much are they supposed to get into it? Are they supposed to get into it at all? Tell me about the -- the functioning of that per the plans or per its design.

A. Sure. So a -- so a two-way left turn lane is that flush median. And what that allows that -- the -- the purpose of that would allow a person turning left --

Q. Um-hum. Coming from Moncks Corner?

any similar studies ever done between 2000 and 2013?

A. Not that I'm aware of.

Q. And the -- the project here was finished at around 2003, was it not? I think that was the final inspection date?

A. The widening project was completed June 17, 2002. And the interchange project was completed November 1st, 2003.

Q. Okay. So basically ten years after those changes were made was the first accident study that the Department of Transportation undertook?

A. It was the first study that I'm aware of.

Q. Okay.

MR. MAYBANK: And -- and just for the record, the continued objection to any of the traffic safety studies and admissibility thereof.

MR. SMITH: Okay.

MR. MAYBANK: But ask him whatever you want.

BY MR. SMITH:

Q. Now, what -- what did -- what did this tell you?

was a business there, I'll represent to you it was a Speedway before it became a -- a Pilot Travel Center. But there was a business there with driveways that provided ingress and egress from 17A into that business; is that correct?

A. Yes, sir.

Q. Okay. And at that time there was not a raised median preventing left-hand turns into that business, correct?

A. Correct.

Q. There's never been a raised median on that stretch of Highway 17A in front of what is now the Pilot Travel Center, correct?

A. Correct. There -- there was -- I'd have to see the limits. There -- there is a raised median that was installed in conjunction with the new location of roadway to the intersection just to the east. I -- I don't think the limits of that got in front of the -- the Pilot station.

Q. Okay.

A. I think that's correct.

Q. All right. So any discussion earlier about a -- a raised median or a nontransversable median being removed, it was never removed from the roadway itself, correct?

LELAND D. COLVIN, JR. - EX. BY MR. CRITES

A. Yes, sir.

Q. And were you somebody as the project -- I believe you said you were the project manager earlier?

A. Correct.

Q. You were actually on-site for the widening project?

A. During that time, my office was in Columbia; but, yes, I certainly made site visits, absolutely.

Q. Okay. And during that widening project, do you recall there actually being another convenience store there at any point in time that was a Speedway?

A. I -- I can't recall the details of that.

Q. Okay. But the 17 widening project, that stretched from essentially in front of this -- the Pilot Travel Center, what is now the Pilot Travel Center, towards Moncks Corner, correct?

A. Correct.

Q. And the design professional for that project was the South Carolina Department of Transportation, correct?

A. Correct.

LELAND D. COLVIN, JR. - EX. BY MR. CRITES

Q. You testified earlier that there was a contemporaneous ongoing project which was the I-26 interchange with 17A, correct?

A. Correct.

Q. And that was a project that essentially started at Farmington Road and went towards Summerville, correct?

A. Yes, sir. Correct.

Q. Okay. So it just so happened that it was in the same general vicinity but two different projects, correct?

A. Correct.

Q. And the design professional for that project was the Arcadis engineering firm, I believe, correct?

A. Correct.

Q. Okay. Mr. Smith talked a lot about the questions about removing the median, and I know we reserved or preserved all objections until a later date. But some of the -- some of the questions were objected to, some of them weren't. So I just want to go through just to clarify a couple things.

The design plans for the 17A widening project which was in front of what is now the Pilot Travel Center did not nor did it ever include a

LELAND D. COLVIN, JR. - EX. BY MR. CRITES

raised median or a nontraversable median; is that correct?

A. That's correct.

Q. And I believe your testimony earlier was that there was never an expectation during the 17A widening project in front of the Pilot Travel Center to have a raised or a nontransversable median because to do so would have been not compliant with the South Carolina Department of Transportation Highway Design Manual; is that correct?

A. That's correct.

Q. So to have put one in in front of the Pilot would have been in contravention to your own manual, correct?

A. Correct.

Q. And I believe you referred to that manual as the bible for design projects in the state of South Carolina; is that correct?

A. Yes, sir.

Q. Okay. Now, somebody, a design professional with Arcadis with the other project that didn't have anything to do with -- with the 17A widening project, but the interchange project with I-26, drew in some sort of raised median or

LELAND D. COLVIN, JR. - EX. BY MR. CRITES

was a business there, I'll represent to you it was a Speedway before it became a -- a Pilot Travel Center. But there was a business there with driveways that provided ingress and egress from 17A into that business; is that correct?

A. Yes, sir.

Q. Okay. And at that time there was not a raised median preventing left-hand turns into that business, correct?

A. Correct.

Q. There's never been a raised median on that stretch of Highway 17A in front of what is now the Pilot Travel Center, correct?

A. Correct. There -- there was -- I'd have to see the limits. There -- there is a raised median that was installed in conjunction with the new location of roadway to the intersection just to the east. I -- I don't think the limits of that got in front of the -- the Pilot station.

Q. Okay.

A. I think that's correct.

Q. All right. So any discussion earlier about a -- a raised median or a nontransversable median being removed, it was never removed from the roadway itself, correct?

LELAND D. COLVIN, JR. - EX. BY MR. CRITES

A. Correct.

Q. Nor was it ever removed from the design plans for the 17A widening project right in front of the Pilot Travel Center, correct?

A. Correct.

Q. It was -- I believe you referred to it earlier as a placeholder?

A. Correct.

Q. And it was a placeholder that was put in by another design professional who was in charge of another project that was not the 17A widening project right in front of the Pilot Travel Center, correct?

A. Correct.

Q. Mr. Smith spent a lot of time asking you questions about Exhibit 5, which is the letter dated August 28, 2000, to Mr. Greiwe from Tommy Smoak. And as I understand it, Mr. Smoak is no longer employed with the Department of Transportation, correct?

A. That's correct.

Q. Did he retire?

A. He did retire.

Q. Do you know how long ago he retired?

A. I don't have the specific dates.

Q. Okay. So your testimony earlier was that the design plans as per the South Carolina Department of Transportation for the 17A widening project, I believe, were dated in 1998. Was it December of '98; is that correct?

A. Yes, that's correct.

Q. And then the interchange plans that were provided by the design professional Arcadis were dated July of 1999; is that correct?

A. The -- the right-of-way plans set for that, correct.

Q. Okay. All right. And the letter that we're talking about here is dated August of 2000, correct?

A. Correct.

Q. And your testimony earlier was that there was never an expectation that -- that there was going to be a raised median that was going to be put in in front of that Pilot Travel Center as part of this widening project; is that correct?

A. That's correct.

Q. And it was always going to be a flush paved median, correct?

A. Correct.

Q. You testified a little while ago that

LELAND D. COLVIN, JR. - EX. BY MR. BESLEY

A. Correct.

Q. Okay. But again, and I think it's clear, at least to me at this point in time, that with respect to any raised median that was to be in front of the Pilot during the widening project on Highway 17A, that was never in the SCDOT design plans, correct?

A. Correct.

MR. CRITES: Thank you, Mr. Colvin. I don't have any other questions for you.

THE WITNESS: Yes, sir.

EXAMINATION

BY MR. BESLEY:

Q. Mr. Colvin, I know it's been a long day. It's now, what, 6:30. We've been going since 10:00 this morning, but I have a few more questions for you, hopefully pretty quick.

The SCDOT has the -- has to approve anything that a landowner or business that abuts your -- one of your roads wants to do with their business that would affect your road. Is that not correct?

MR. MAYBANK: Object to the form.

THE WITNESS: We have to approve encroachment on the DOT right-of-way.

EXHIBIT C

STATE OF SOUTH CAROLINA
IN THE COURT OF COMMON PLEAS
NINTH JUDICIAL CIRCUIT
COUNTY OF BERKELEY

COPY

CYNTHIA WRIGHT AND RICHARD WRIGHT,

Plaintiffs,

vs. CASE NO. 2016-CP-08-334

SOUTH CAROLINA DEPARTMENT OF TRANSPORTATION, C & A UNLIMITED, INC., and PILOT TRAVEL CENTERS, LLC, SPEEDWAY, LLC, ASHLEY LAND SURVEYING, INC., F/K/A ASHLEY ENGINEERING & SURVEYING, INC., and ASHLEY ENGINEERING & CONSULTING, INC., and MUNLAKE CONTRACTORS, INC.

Defendants.

VIDEO

VIDEOTAPE
DEPOSITION OF: ROBERT T. CLARK

DATE: March 13, 2017

TIME: 7:16 PM

LOCATION: SCDOT District 6
6355 Fain Boulevard
North Charleston, SC

TAKEN BY: Counsel for the Plaintiffs

REPORTED BY: TERRI L. BRUSSEAU, RPR, CRR

A. WILLIAM ROBERTS, JR., & ASSOCIATES

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don't really have to go through a formal process to draw a line, no.

Q. Okay. But as far as when the Department of Transportation was considering the application for encroachment permit, Exhibit Number 2, no one at the Department of Transportation specifically defined where the functional area of the intersection was. True?

A. No, you don't have to specifically define it. You -- you look, review operations at a particular intersection. And you determine what are the backups, how much amount of -- of laneage is needed for storage, what are the turning maneuvers, how many left turns, how many right turns that makes the traffic. All those things fit into it.

But no, you don't go draw a line. But you have that information when you use your engineering judgment reviewing the encroachment permit.

Q. Okay. But my question was very specific.

A. And I said no.

Q. Okay. I just -- let me give you another opportunity to -- to do that because I --

of the intersection, meaning the upstream functional area, would be somewhere around 425 feet from the intersection.

A. Okay.

Q. Is that true?

A. If that's what it says, that's what that report and that researcher said.

Q. And when the Department of Transportation is considering Exhibit Number 2, the application for encroachment permit, there isn't a document anywhere that indicates the reaction time, the queue length, any of these things used to determine the functional area of the intersection. There's no document anywhere that defines what any of those factors were. True?

A. Well, we -- we use information in our ARMS manual, we use information relating to the SCDOT, we use design criteria. So there's a lot of inputs and a lot of different sources or resources you can go to. For instance, depending on speed or the signal controlled intersection, you've got to have a certain amount of sight distance to the actual signal ahead in order to see it, process it, and react to it.

So, you know, again it -- it -- each

intersection is reviewed, the information that's being asked in an encroachment permit is reviewed, and then we use a lot of resources and then engine -- excuse me -- engineering judgment to say, okay, this looks like this is in substantial conformity with -- with what our rules are.

Q. But there's no document that exists to show that the DOT determined what was the reaction time, the queue length, any of these things. There's not a document anywhere that shows --

A. No.

Q. -- those things were defined?

A. No, sir. There doesn't need to be.

Q. And when you said you used the ARMS manual in terms of -- of considering the application which listed these driveways, the DOT never made a determination under Page 20, or this Table 3-3, and determined whether or not this was a low, medium -- a low, medium, or high or major volume driveway?

A. Well, probably the engineer, in reviewing it, would have used the -- this -- the -- the document in place at the time and probably did look at that or used his knowledge of a similar facility to determine what those volumes may be.

A. -- I don't recall that sort of language in it.

Q. Okay.

A. But generally when you're reviewing it, you -- again, you know the intersection, you know what the traffic is, and you make a determination as to where driveways should be --

Q. Okay.

A. -- using the general guidance in our guidelines.

Q. And let me ask you this: When Exhibit 2 was considered, were these distances here between driveways, were those considered?

A. Distances in the manual in -- in place at the time were probably considered. But again, these are suggestions. And you have to look at the site that you've got and what the -- what the traffic is doing at the site, how it's circulating on the site, and bring all those factors together to make that determination.

Q. Is there any document that reflects that thought process?

A. Probably not anymore, but there probably was at the time.

Q. And what would that be called?

reviewing a permit.

Q. But --

A. Without question.

Q. Okay. But -- but in this specific case, there's no --

A. I can't lead you to written documentation, but I can testify that we always use the ARMS manual as a resource in reviewing encroachment applications.

Q. Okay. Is it usual that the -- the standards in the ARMS manual, is it usual that they're just flat-out disregarded?

A. I won't say that. I won't say they're flat-out disregarded. I will say that they're not always in exact compliance with every written word in there. If we lived in the midwest or lived in Phoenix where everything's laid out in a grid and, as cities grow, they're always growing in a grid and every block's the same, and as you grow out, you have the opportunity to have a clean slate, you can do that.

When you have properties that have been cut up for 3 or 400 years and you've got redevelopment going on on those properties, you don't have a clean slate, but you're trying to do

the best you can to create an efficient, effective, and safe interface with the road system.

Q. Does the DOT expect corporations submitting encroachment applications for encroachment permits, does the DOT expect those private corporations to conform to the industry safety standards?

A. We -- we ask a -- a corporation would have a professional engineer doing their site plans. And as an engineer, according to their ethics, they would do that.

Q. Okay. Because as Mr. Colvin was talking about, you know, you all don't draw up these plans. You look at whether or not to approve them or not, right?

A. That's correct.

Q. And you depend on the corporation to consider the safety standards when they're drawing up the plans they're asking you to approve?

A. We --

MR. BESLEY: Object to the form of the question.

THE WITNESS: We depend on their professional engineer to.

BY MR. SMITH:

EXHIBIT D

Disclaimer

Protection of Data from Discovery & Admission into Evidence

23 U.S.C. 148(h)(4) states "Notwithstanding any other provision of law, reports, surveys, schedules, lists, or data compiled or collected for any purpose relating to this section [HSIP], shall not be subject to discovery or admitted into evidence in a Federal or State court proceeding or considered for other purposes in any action for damages arising from any occurrence at a location identified or addressed in the reports, surveys, schedules, lists, or other data."

23 U.S.C. 409 states "Notwithstanding any other provision of law, reports, surveys, schedules, lists, or data compiled or collected for the purpose of identifying, evaluating, or planning the safety enhancement of potential accident sites, hazardous roadway conditions, or railway-highway crossings, pursuant to sections 130, 144, and 148 of this title or for the purpose of developing any highway safety construction improvement project which may be implemented utilizing Federal-aid highway funds shall not be subject to discovery or admitted into evidence in a Federal or State court proceeding or considered for other purposes in any action for damages arising from any occurrence at a location mentioned or addressed in such reports, surveys, schedules, lists, or data."

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.

RECORD ON APPEAL (VOLUME 2)

Kevin B. Smith
Hoffman Law Firm
7087 Rivers Ave.
N. Charleston, SC 29406
(843) 769-7077
ksmith@hoffmanlaw.net

S. Randall Hood
Jordan C. Calloway
McGowan, Hood & Felder
1539 Health Care Drive
Rock Hill, SC 29732
(803) 327-7800
rhood@mcgowanhood.com
jcalloway@mcgowanhood.com

Shawn B. Deery
McGowan, Hood & Felder
1517 Hampton Street
Columbia, SC 29201
(803) 779-0100
sdeery@mcgowanhood.com
Attorneys for Appellants

Roy G. Maybank
Maybank Law Firm
531 Savannah Highway
PO Box 12579
Charleston, SC 29422
(843) 766-8101
roy@maybanklaw.com

Attorney for Respondent South Carolina Department of Transportation

J. Bennett Crites, III
Kathleen Fowler Monoc
Smith Moore Leatherwood LLP
25 Calhoun Street, Suite 250
Charleston, SC 29401
(843) 300-6600
bennett.crites@smithmoorelaw.com
katie.monoc@smithmoorelaw.com

Attorneys for Respondent Speedway, LLC

Bruce A. Berlinsky
Bruce A. Berlinsky, P.A.
P.O. Box 206 (29402)
One Carriage Lane, Bldg. F
Charleston, SC 29407

Attorney for Respondent Ashley Land Surveying, Inc.

William G. Besley
Jeffrey I. Silverberg
Howser, Newman & Besley, LLC
1508 Washington Street
PO Box 12009
Columbia, SC 29211
(803) 758-6000

Attorneys for Respondent Pilot Travel Centers, LLC

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STATE OF SOUTH CAROLINA COUNTY OF BERKELEY	)	IN THE COURT OF COMMON PLEAS
Cynthia Wright and Richard Wright, Plaintiffs, vs. South Carolina Department of Transportation, Pilot Travel Centers, LLC, Speedway LLC, Ashley Land Surveying, Inc., f/k/a Ashley Engineering & Surveying, Inc. and Ashley Engineering & Consulting, Inc., and Munlake Contractors, Inc. Defendants.	)	Civil Action No. 2016-CP-08-334 **Speedway LLC's Motion for Summary Judgment**

2017 MAY -2 AM 11:33
CLERK OF COURT
BERKELEY COUNTY, SC

TO: KEVIN B. SMITH, ESQUIRE, ATTORNEY FOR PLAINTIFFS:

The Defendant Speedway LLC (hereinafter Speedway), pursuant to Rule 56 of the South Carolina Rules of Civil Procedure, moves for summary judgment in its favor in this action. In support of this motion, Speedway shows the following to the Court:

1. No genuine issue of material fact exists and Speedway is entitled to judgment as a matter of law because Speedway owed no duty to Plaintiffs to prevent the subject auto accident from occurring on a public highway owned and maintained by the South Carolina Department of Transportation. The Plaintiffs have failed to – and cannot as a matter of law – present evidence sufficient to raise a genuine issue of material fact that Speedway owed them any duty; or breached any duty owed to them; or that any alleged negligent act or omission on the part of Speedway proximately caused Plaintiffs' injuries.

2. As a matter of law, the South Carolina Department of Transportation (hereinafter SCDOT) had the statutory sole, exclusive, and final authority over the subject road, including its design and construction, and SCDOT had a non-delegable duty in fulfilling its statutory obligations which cannot, as a matter of law, be delegated to Speedway.

3. In addition, there is no genuine issue of material fact that Speedway was not the proximate cause of the Plaintiffs' injuries. Rather, the drunk driver in this action was the sole proximate cause of the subject accident and that, as a matter of law, Speedway could not have been the proximate cause because the alleged duty was neither owed to Plaintiffs nor breached by Speedway.

4. As a matter of law, Speedway's motion for summary judgment should be granted because at least one element of plaintiff's claim cannot withstand the summary judgment standard. In this case, Speedway posits that there is no genuine issue of material fact that Speedway owed any legal duty to the Plaintiffs; that Speedway could not therefore have breached any duty; and that, in any event, the drunk driver was the sole proximate cause and Speedway could not have been a proximate cause for Plaintiffs' damages because there was no duty or breach.

5. At a hearing on April 10, 2017, the Honorable Roger M. Young, Sr. heard Defendant Pilot Travel Centers, LLC's (hereinafter Pilot) motion for summary judgment on similar grounds in that Plaintiffs failed to present evidence sufficient to raise a genuine issue of material fact that Pilot owed them any duty or breached any duty owed; or, that any alleged negligent act or omission on the part of Pilot proximately caused Plaintiffs' injuries. The Court essentially ruled that, as a matter of law: (1) SCDOT owns, controls and maintains the highway in question, and it has the sole authority to determine what type of median to install, if any; SCDOT solely determines what type of access an abutting property owner should be granted to an SCDOT

owned, controlled and maintain highway; and SCDOT, as the design professional, has the sole authority to determine the applicable and appropriate highway design plans and the implementation with respect to the same; (2) any suggested or hypothetical negotiation between SCDOT and any other third party (specifically, Pilot) with respect to medians on or access to the highway would not create a duty on the part of the third party (even if such alleged negotiations did exist) given SCDOT's exclusive ownership, control, maintenance, and authority over the highway, the median, and the placement and design of driveways with access to a highway; and (3) no affirmative legal duty exists in the absence of a statute, contract, relationship, status, property interest, or some other special circumstance, and that Plaintiffs could not establish any source of an affirmative duty that would have been owed to these Plaintiffs on the part of a third party (specifically, Pilot).

In sum, the Court held that Plaintiffs failed to present evidence sufficient to raise a genuine issue of material fact that Pilot owed them any duty or breached any duty owed; or, that any alleged negligent act or omission on the part of Pilot proximately caused Plaintiffs' injuries.

The Court's merits ruling against the Plaintiffs in this same matter confirms the absence of a legal duty owed by a third party such as Speedway; the absence of any alleged breach of such duty by a third party such as Speedway; and the absence of a third party such as Speedway from being the proximate cause.

Given the Court's ruling on the merits in these regards, Plaintiffs should be precluded from re-litigating them as to this Defendant who is similarly situated to Pilot. Speedway is a third party who lacked any authority over the design and construction of the highway or any ownership of the highway. To the extent the Court's summary judgment ruling goes un-appealed, such decision becomes the law of this case. Regardless, Speedway's motion for

summary judgment should be granted because, similar to what the Court has already recognized in this case, there was no duty owed as a matter of law, there can be no breach of a duty (that wasn't owed), and Speedway (like Pilot) could not have been a proximate cause to Plaintiffs' injuries.

5. Speedway's motion is supported by the pleadings, the discovery, the deposition testimony, the Court's prior ruling on these same issues, any affidavits that may be submitted, and South Carolina law.

WHEREFORE, Speedway moves that the Court enter summary judgment in favor of Speedway and for such other and further relief in favor of Speedway as the Court deems just and appropriate.

SMITH MOORE LEATHERWOOD LLP

J. Bennett Crites, III
Kathleen Fowler Monoc
25 Calhoun Street, Suite 250
Charleston, South Carolina 29401
Ph. 843.300.6600
Fax 843.300.6700
bennett.crites@smithmoorelaw.com
katie.monoc@smithmoorelaw.com

Attorneys for Defendant Speedway LLC

April 27, 2017
Charleston, South Carolina

CHARLESTON 92404.1

STATE OF SOUTH CAROLINA COUNTY OF BERKELEY Cynthia Wright and Richard Wright, Plaintiffs, vs. South Carolina Department of Transportation, Pilot Travel Centers, LLC, Speedway LLC, Ashley Land Surveying, Inc., f/k/a Ashley Engineering & Surveying, Inc. and Ashley Engineering & Consulting, Inc., and Munlake Contractors, Inc. Defendants.	)	IN THE COURT OF COMMON PLEAS Civil Action No. 2016-CP-08-334 **Speedway LLC's Memorandum in Support of its Motion for Summary Judgment**

INTRODUCTION AND SUMMARY

This case arises out of an October 6, 2012 motor vehicle accident which occurred when Plaintiffs were traveling North on Highway U.S. 17A (hereinafter "the highway") in Berkeley County. Plaintiff Richard Wright was driving the motorcycle and Plaintiff Cynthia Wright was his passenger. As they were traveling northbound on the highway, a grossly intoxicated driver,[1] Daniel Sena (hereinafter "Sena"), was traveling southbound on the highway in a pick-up truck. Sena's truck then proceeded into the Highway 17A painted median, and he suddenly turned left into the side of Plaintiffs' motorcycle thereby injuring the Plaintiffs.

[1] Police determined Sena's blood alcohol level was .12 and he tested positive for cocaine in his system shortly following the accident. Sena pled guilty to two charges of Felony Driving Under the Influence Involving Great Bodily Injury, one charge of Hit and Run Involving Accident with Great Bodily Injury, and one charge of Possession of Cocaine, 1st Offense. He was sentenced to 10 years and a $10,000.00 fine, suspended to 5 years and a $5,000.00 fine, and 5 years' probation on the DUI and Hit and Run charges, all to run concurrent. He was sentenced to 5 months and given credit for time served on the Possession charge. *See* documents on file with Berkeley County Clerk of Court bearing indictment numbers 2013-GS-08-00352, 2013-GS-08-00353, 2013-GS-08-00338, and 2013-GS-08-00572.

The accident occurred on the stretch of highway immediately in front of the Pilot Travel Center located at 1521 North Main Street in Summerville, South Carolina (hereinafter "Pilot"), and Sena testified he was turning left in to the subject Pilot to go to the McDonald's attached thereto. But for the fact that Sena was driving under the influence at the time of the accident, the left turn that Sena attempted from the flush painted median was a legal left turn. (Colvin Dep. at pp. 102:21-24, Ex. A.). The Plaintiffs now seek to hold these Defendants responsible. They have alleged that the accident would not have occurred but for the drunk driver's ability to make a left hand turn in to the Pilot and that the location and design of Pilot's entrances somehow caused the motor vehicle accident.

The Plaintiffs allege that Speedway's role in this arises out of Speedway's alleged role in the "construction, planning, and/or rebuilding of a gas station/ convenience store" now known as the subject Pilot. (Am. Compl. at ¶ 7.) The Plaintiffs allege that "at the times relevant to the allegations contained in this Complaint, [the subject Pilot] was being operated by Speedway and Pilot as a joint venture, was co-owned by the two companies, or was otherwise operated in a manner involving input from both companies." (Am. Compl. at ¶ 8.) Specifically, the Plaintiffs allege that in September of 2000, Speedway representatives negotiated with representatives of the South Carolina Department of Transportation (SCDOT) to remove the unmountable median barrier that existed at the subject location to increase traffic (and therefore sales and profits) to the subject Pilot. (Am. Compl. at ¶¶ 36-37, 40.) The Plaintiffs allege that "these negotiations took place and the barrier removed even though Speedway knew, or should have known, that removing barriers would result in vehicles making illegal turns across several lanes of oncoming traffic" in to the subject Pilot. (Am. Compl. at ¶ 38.) Regardless of these unsubstantiated allegations and alleged negotiations, and as discussed below, Leland Colvin, Jr., one of the

30(b)(6) designees for the South Carolina Department of Transportation, testified that the design plans for the Highway 17A widening project were date stamped in 1998, with the decision therefore already having been made before 2000 that there would not be a raised or unmountable median in front of the Pilot. (Colvin Dep. at pp. 260:1-262:5, Ex. A.). Colvin was the program engineer for the Highway 17A widening project on behalf of the SCDOT.

With respect to their negligence claim, the Plaintiffs contend that "Speedway owed multiple duties to Plaintiffs, including, but not limited to, ensuring that the design and construction of the subject Pilot Travel Center was safe for the motoring public." (Am. Compl. at ¶ 52.) They contend that:

> Speedway was negligent, careless, wanton, reckless, and grossly negligent at the time and place hereinabove mentioned in the following particulars:
>
> (a) *In negotiating the removal* of the unmountable barrier at the accident location;
>
> (b) *In negotiating the removal* of the unmountable barrier at the accident location when it knew or should have known that removing the unmountable median would result in automobile traffic illegally crossing oncoming lanes of traffic;
>
> (c) *In negotiating the removal* of the unmountable barrier when it knew or should have known that doing so would create a latent defect - hazardous to vehicular traffic;
>
> (d) In putting profits above the safety of the motoring public;
>
> (e) *In improperly constructing, or causing to be constructed, the entrances to the subject Pilot Travel Center* in such a way as to prevent motorists from being stricken by vehicles illegally crossing North Main Street (Highway 17A) at the accident location;
>
> (f) *In negotiating the unmountable barrier's removal* when it was foreseeable that motorists would illegally cross North Main Street;
>
> (g) In generally failing to use the degree of care and caution that a reasonably prudent company would have used under the same or similar circumstances; and
>
> (h) In such other particulars as may be proved through the use of discovery in this matter.

(Am. Compl. at ¶ 53) (emphasis added).

Speedway contends that there is no genuine issue of material fact that it has any liability associated with the same. As set forth below, Speedway sold the subject property to Pilot more than 11 years before the accident in question and more than 13 years before this lawsuit was filed. Notwithstanding the Plaintiffs' allegations set forth in the Amended Complaint, the proof demonstrates that Speedway had no authority or role in the decision-making process with respect to either the driveway design and construction or the median design and construction. As set forth below, SCDOT admitted it made the sole decision with respect to the median in front of the Pilot and that it had the final authority over Pilot's encroachment permit application which authorized placement and construction of driveways into the Pilot. Moreover, there was never an unmountable barrier that was *removed* because there was never an unmountable barrier to begin with – neither on the road nor in the SCDOT design plans for the 17A widening project in front of the Pilot Travel Center. (Colvin Dep. at pp. 256:7-257:14, Ex. A.)[2]

Speedway filed its motion for summary judgment on May 2, 2017.

It should be noted that on April 10, 2017, the Honorable Roger M. Young, Sr. heard Defendant Pilot's Motion for Summary Judgment and on May 4, 2017 issued an Order granting that Motion. A copy of that signed Order is attached hereto as Exhibit B. Speedway respectfully requests that the Court take judicial notice of the facts as set forth in the Order.[3] As set forth below, Speedway is similarly situated to Pilot in its case for summary judgment, yet Speedway arguably has a stronger case for summary judgment because it is even more attenuated from the SCDOT control of the road and decision-making process than Pilot.

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[2] Leland Colvin, Jr. served as one of SCDOT's Rule 30(b)(6) designees.

[3] *Freeman v. McBee*, 280 S.C. 490, 494, 313 S.E.2d 325, 327 (Ct. App. 1984)("A court can take judicial notice of its own records, files and proceedings for all proper purposes including facts established in its records. 31 C.J.S., Evidence, Section 50(1), p. 1018-1021. It is not error for a judge to take judicial notice of what was stated in a former opinion in a prior action of the same case.").

STATEMENT OF UNDISPUTED FACTS

SCDOT's Exclusive Decision-Making Regarding Highway Design and Construction

In the 30(b)(6) deposition of SCDOT, it was acknowledged that no one other than the SCDOT has the statutory duty to move traffic safely among the public highways of South Carolina. (Colvin Dep. at pp. 267:11-14, Ex. A.) Safety is their primary concern. (Colvin Dep. at pp. 48, 267, Ex. A.) SCDOT has the final and ultimate decision on any road of theirs and also over the encroachment of driveways leading to that road based on SCDOT rules and regulations which take into account national standards. (Colvin Dep. at pp. 274, Ex. A.) Property owners can't design and locate entrances and exits to South Carolina highways without SCDOT approval, authority, and confirmation that such designs conform with SCDOT rules and standards. (Colvin Dep. at pp. 274:25-276:4, Ex. A.)

Speedway's Attenuated Involvement with the Subject Property and Lack of Involvement with the Encroachment Process

The subject accident occurred more than a decade after Speedway sold the property to Pilot, and Pilot admits it was owner of the store in the relevant time frame. (*See* Mulligan Aff., Ex. C.) As set forth in the Affidavit of Bill Mulligan, Director of Construction for Pilot, "Pilot acquired the existing has station and real property located at 1521 North Main Street, Summerville, South Carolina 29483" "on or about September 1, 2001." (Mulligan Aff. at ¶ 5, attached hereto as Ex. C.)

Speedway had no involvement with either the encroachment permitting or driveway construction of the subject Pilot at issue in this case. In May of 2002, almost a year after Speedway's transfer of title to Pilot, Pilot submitted its application for an encroachment permit from SCDOT. (Mulligan Aff. at ¶ 8, Ex. C.) In its application, Pilot sought "approval of the

location and design of its proposed driveways." (Mulligan Aff. at ¶ 8, Ex. C.)[4] SCDOT ultimately approved Pilot's encroachment permit application and issued Pilot a permit to construct the driveways to the Pilot Travel Center. (Mulligan Aff. at ¶ 8, Ex. C.) The Pilot construction began in or around August of 2002.[5] (Mulligan Aff. at ¶ 9, Ex. C.) Again, this was a year *after* Speedway sold the property and was no longer involved. (*See* Answer of Speedway to Pls.'s Am. Compl., ¶ 7.)

At the relevant times, SCDOT always planned for a flush paved median on the section of highway in front of the Pilot, and SCDOT never planned, constructed, or removed a solid, raised, unmountable median at that location.

Plaintiffs' case against Speedway hinges on the existence and subsequent removal of a solid raised unmountable median in the section of the highway outside of the subject Pilot. However, there is now no dispute that the SCDOT was the design professional for the 17A widening project, that there was never an expectation during the widening project in front of the Pilot to have a solid, raised, unmountable median, at that was never planned, designed, built, or removed by SCDOT in that location. (Colvin Dep. at pp. 252:18-254:20; p. 256-257, Ex. A.) The SCDOT plan was always for the median to be a flush painted median. (Colvin Dep. at pp.

[4] According to SCDOT, it conducts an independent analysis when evaluating whether to approve an encroachment permit to ensure that the proposed driveways conform to SCDOT's regulations and standards. (Colvin Dep. at p. 275:10-15, Ex. A.) SCDOT also considers highway safety and how the access to private property affects traffic and the general operation of the highway system. (Colvin Dep. at pp. 48-50, Ex. A.) SCDOT testified that it has the ultimate authority to approve encroachment permits and never compromises the public's safety to accommodate a property owner's interests when evaluating such permits. (Colvin Dep. at pp. 267-69 & p. 277, Ex. A.)

[5] Around the same time as Pilot sought the encroachment permit and began its construction, SCDOT was also in the process of widening the section of US 17A in front of the subject Pilot. In addition, SCDOT was reconstructing the Interstate 26 interchange intersection adjacent to the existing gas station. The widening project was completed in June of 2002, and the Interstate 26 interchange intersection project was completed in November of 2003. (Colvin Dep. at pp. 51-52 & 216:7-9, Ex. A.) SCDOT was the design professional and designed the plans for the widening project but hired an outside firm to design the Interstate 26 interchange intersection project plans. (Colvin Dep. at pp. 252-253, Ex. A.)

260, Ex. A.) This decision was made in 1998 by Leland Colvin, Jr., the Project Manager for the Widening Project. (Colvin Dep. at pp. 252:2-5, 255, 283:20-285:2, Ex. A.) Colvin said that decision was made in conformance with SCDOT's Highway Design Manual, which SCDOT considers "the Bible" for designing highways in the state, and that the installation of a raised median as a part of the widening project would have been in contravention of the standards set forth in the SCDOT Highway Design Manual. (Colvin Dep. at pp. 254, Ex. A.)

Any confusion with respect to plans that showed a raised median in front of the Pilot were plans from another design professional on an unrelated, but contemporaneous project. (*See* n. 5, *supra*.) As Colvin testified: (1) the median that the other design professional drew in on the Interstate 26 plans was simply a placeholder as the SCDOT never intended for a raised median to be present in front of the Pilot; (2) it was always going to be a flush median; and (3) today it is still a flush median. Colvin testified that, as the SCDOT program manager for both projects, he ultimately married the two projects and corrected the unrelated Interstate 26 design plans to accurately reflect what was designed in the applicable 17A widening design plans and what was called for in the South Carolina Highway Design Manual. Colvin also testified that there was no negotiation of anything by any party; rather, it was simply a combination and clarification of the plans to reflect what had already been decided. (Colvin Dep. at pp. 83:4 – 84:24; 260:1 – 262:1, Ex. A.)

Colvin further testified that this decision was a pure engineering decision in compliance with the then applicable South Carolina Highway Design Manual and that the decision was based on purpose and need. (Colvin Dep. at pp. 270:10 – 271:16, Ex. A.) As previously stated, the SCDOT highway design manual that was used for the 17A widening project in effect at the time of design did not require a raised median in front of the Pilot. Of import in this regard is that this

design manual was approved by the Federal Highway Administration as part of this 17A widening project because 17A is a federally eligible route and this project received federal funds to complete this project. (Colvin Dep. at pp. 271:17 – 272:8, Ex. A.)

STANDARD ON SUMMARY JUDGMENT

"The purpose of summary judgment is to expedite disposition of cases which do not require the services of a fact finder." *Dawkins v. Fields*, 354 S.C. 58, 69, 580 S.E.2d 433, 438–39 (2003) *(quoting George v. Fabri,* 345 S.C. 440, 452, 548 S.E.2d 868, 874 (2001)). Summary judgment is appropriate where there is no *genuine* issue of any material fact and the moving party is entitled to judgment as a matter of law. *Id.* (citing Rule 56(c), S.C. R. Civ. P.) (emphasis added).

The South Carolina Supreme Court has established that "[t]he plain language of Rule 56(c) mandates the entry of summary judgment ... against a party who fails to make a showing sufficient to establish the existence of an element essential to the party's case, and on which that party will bear the burden of proof." *Hansson v. Scalise Builders of S.C.,* 374 S.C. 352, 357–58, 650 S.E.2d 68, 71 (2007) (quoting *Baughman v. Amer. Tel. & Tel. Co.,* 306 S.C. 101, 116, 410 S.E.2d 537, 545-46 (1991)). The Court must therefore determine whether the plaintiff has established a prima facie case as to each element of a claim when ruling on a summary judgment motion. *Hansson v. Scalise Builders of S.C.,* 374 S.C. 352, 357–58, 650 S.E.2d 68, 71 (2007).

Where, as here, the Defendant moves for summary judgment, "a court cannot properly deny the motion after only finding that a genuine issue of material fact exists as to one element of the plaintiff's claim" and, instead, "the court must determine that a genuine issue of material fact exists for each essential element of the plaintiff's claim." *Hansson v. Scalise Builders of S.C.,* 374 S.C. 352, 358, 650 S.E.2d 68, 71 (2007). In other words, the Court should grant a

defendant's Motion where, as here, there is no genuine issue of material fact as to an essential element of Plaintiff's claim (i.e., Speedway's alleged breach of a duty). *See also Celotex Corp. v. Catrett*, 477 U.S. 317, 322–23, 106 S. Ct. 2548, 2552, 91 L. Ed. 2d 265 (1986).

LEGAL ARGUMENTS

This clear case does not require the services of a fact finder. As a matter of law, where there is no duty, then the Defendant is entitled to judgment as a matter of law.

> In a negligence action, a plaintiff must show that (1) the defendant owes a duty of care to the plaintiff, (2) the defendant breached the duty by a negligent act or omission, (3) the defendant's breach was the actual and proximate cause of the plaintiff's injury, and (4) the plaintiff suffered an injury or damages. The court must determine, as a matter of law, whether the law recognizes a particular duty. If there is no duty, then the defendant in a negligence action is entitled to a judgment as a matter of law.

Madison ex rel. Bryant v. Babcock Ctr., Inc., 371 S.C. 123, 135–36, 638 S.E.2d 650, 656 (2006) (internal citations omitted).

As discussed more completely below, Speedway – as a matter of law – could neither owe nor assume a duty in this case. Nor could Speedway have been the proximate cause given that, as a matter of law, Speedway lacked a duty which exclusively belongs to SCDOT, and given that, the supposed raised median that Speedway allegedly negotiated the removal of never existed to begin with. As set forth herein, the record shows that Plaintiffs' claims against Speedway (namely, that it allegedly negotiated with SCDOT the removal of an alleged raised unmountable median in 2000) are impossible because it is undisputed that (1) the plans for a flush painted median on the subject stretch of highway were finalized by SCDOT and date-stamped 1998; (2) SCDOT neither planned a raised median nor built a raised median at that time; and (3) even if it had, it cannot be disputed that SCDOT as a matter of law is the only decision-maker for state highway design, including median selection and placement. Accordingly, there can be no *genuine* issue of material fact precluding summary judgment in favor of Speedway.

I. Speedway's Motion for Summary Judgment should be granted because, as a matter of law, the South Carolina Department of Transportation has the sole, exclusive, and final authority over the subject road, including its design and construction. The South Carolina Department of Transportation has a non-delegable duty which could not, as a matter of law, have been assigned to Speedway. There is no evidence or authority which supports Plaintiffs' allegation that Speedway owed or breached a duty owed to these Plaintiffs.

The South Carolina Department of Transportation (hereinafter "SCDOT") had the sole, exclusive, and final authority over the subject road, including its design and construction.

The South Carolina General Assembly has made clear that the South Carolina Department of Transportation "shall . . .(1) lay out, build, and maintain public highways and bridges, **including the exclusive authority to establish design criteria, construction specifications, and standards required to construct and maintain highways** and bridges . . ." S.C. Code Ann. § 57-3-110 (emphasis added). *See also County of Charleston, South Carolina v. South Carolina Dept. of Transp*, 2015 WL 9942667 (S.C.Com.Pl.), 2 (recognizing SCDOT's exclusive authority over design criteria, construction specifications and standards required to construct and maintain highways and bridges); *Brashier v. S. Carolina Dep't of Transp.*, 327 S.C. 179, 192, 490 S.E.2d 8, 15 (1997) overruled on other grounds by *I'On, L.L.C. v. Town of Mt. Pleasant*, 338 S.C. 406, 526 S.E.2d 716 (2000) ("To accomplish its functions and purposes of 'the systematic planning, construction, maintenance, and operation of the state highway system ... consistent with the needs and desires of the public, SCDOT has the following relevant powers. Generally, it has the power to "lay out, build, and maintain public highways and bridges.' It may 'enter into such contracts as may be necessary for the proper discharge of its functions and duties," and "do all other things required or provided by law.'").[6]

[6] With respect to the driveway design and placement and implementation of access to and from a highway, SCDOT similarly has the ultimate decision-making authority and is the final arbiter when it comes to encroachment permits. SCDOT reviews the permittees' design plans to ensure compliance with SCDOT regulations and standards concerning the design and location of

The decision as to whether a raised median should be installed on a highway falls within the exclusive authority of SCDOT, which owns and controls the highway. *See* S.C. Code Ann. § 57-3-110 (3) ("The Department of Transportation shall . . . [have the power and duty to] cause the state highways to be marked with appropriate directions for travel and *regulate the travel and traffic along such highways*, subject to the laws of the State[.]" (emphasis added); *Giannini v. S. Carolina Dep't of Transp.*, 378 S.C. 573, n. 1 (2008) (recognizing SCDOT has initial discretion to place median barriers on a highway). As noted by Judge Young, "whether or not any negotiation of the median took place, the fact remains that only SCDOT has the authority to determine what type of median to install on the highway." (Order at p. 7, Ex. B.)

Significantly, the SCDOT's above-described duties are non-delegable. "The DOT does in fact have a duty to maintain safe roads and to discover and remedy potential hazards . . ." *Saxon v. S.C. Dep't of Transp.*, No. 2004-UP-435, 2004 WL 6331800, at *5 (S.C. Ct. App. July 23, 2004). *See Simmons v. Tuomey Reg'l Med. Ctr.*, 341 S.C. 32, 43–44, 533 S.E.2d 312, 318 (2000) (recognizing that "a person or entity entrusted with important duties in certain circumstances may not assign those duties to someone else and then expect to walk away unscathed when things go wrong" and notes that a "municipality has a non-delegable duty to provide safe streets even when maintenance is undertaken by the state Highway Department, and remains vicariously liable for injuries caused by defective repairs"). Accordingly, Speedway is entitled to summary judgment because of SCDOT's non-delegable and exclusive duty to provide

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driveways; SCDOT further reviews a permittees' encroachment application to ensure driveways do not create any safety concerns or impede on efficient traffic operations. The South Carolina Code provides that the SCDOT "may deny any request for any permit for any driveway . . . which in [its] judgment . . . may create a hazard to the traveling public. S.C. Code § 57-5-1090. As a matter of law, SCDOT is the gatekeeper for public safety with respect to highway access and driveway design. As previously stated, however, Pilot alone dealt with the encroachment permitting process and dealing with SCDOT and Speedway had no involvement with this aspect of Plaintiff's case.

safe roads. As a matter of law Speedway cannot be held responsible for SCDOT's ultimate decisions with respect to median and driveway/ highway access design and implementation. This is especially the case since the record is clear that, by SCDOT's own admissions, it was the sole decision-maker and there is no evidence that Speedway played any part in the median-decision-making process to begin with.

Finally, it should be noted that Judge Young concluded that as a matter of law Pilot did not owe the Plaintiffs any duty to prevent them from getting in a motor vehicle accident on the highway in front of its property. (Order at pp. 5-10, Ex. B.) *See Rayfield v. S. Carolina Dep't of Corr.*, 297 S.C. 95, 100, 374 S.E.2d 910, 913 (Ct. App. 1988) ("An affirmative legal duty exists only if created by statute, contract, relationship, status, property interest, or some other special circumstance."). As was the case with Pilot, Plaintiffs have established no legal duty owed to them by Speedway. If the property and store owner and operator at the time of Plaintiffs' accident owed no duty to Plaintiffs, Speedway submits that it is even more attenuated from the circumstances giving rise to Plaintiffs' allegations than Pilot as simply a former property owner. Speedway further incorporates the findings and determinations set forth in Judge Young's Order by reference and further seeks relief in accordance with the Order.

II. Speedway's Motion for Summary Judgment should further be granted because there is no genuine issue of material fact that Speedway did not proximately cause the Plaintiffs' injury. Because Speedway did not breach a duty that it did not owe, it cannot as a matter of law be the proximate cause. Rather, the drunk driver was the sole proximate cause of Plaintiffs' injuries in this case.

Where, as here, it has been established as a matter of law that there is no duty of care, the Court may abstain from deciding proximate cause. *See Comer v. Tandy Corp.*, 295 S.C. 133, 135, 367 S.E.2d 436, 436 (Ct. App. 1988) ("Because we hold Tandy owed no duty of care to Comer under the circumstances of this case, we do not reach the issue of proximate cause.").

Notwithstanding, even if there were a duty owed in this case, there is no genuine issue of material fact that Speedway's negligence was not the proximate cause of the Plaintiffs' injuries.

The record is clear that Plaintiffs' allegations as to Speedway's role in their accident are false. There was no raised median to begin with so there could be no removal. Even if there had been, Speedway did not and could not have played any part in SCDOT's exclusive determination made in 1998 to place a flush painted median in front of the Pilot, an engineering determination based on purpose and need and based on the South Carolina Highway Design Manual. As a matter of law, negligence is not actionable unless it is a proximate cause of the injury. "[P]roximate cause is the efficient, or direct, cause—the thing which brings about the injuries complained of." *Goode v. St. Stephens United Methodist Church*, 329 S.C. 433, 447, 494 S.E.2d 827, 834 (Ct. App. 1997).

> Proximate cause requires proof of both causation in fact and legal cause. Causation in fact is proved by establishing the injury would not have occurred "but for" the defendant's negligence. Legal cause is proved by establishing foreseeability. Foreseeability is determined by looking to the natural and probable consequences of the complained of act, although it is not necessary to prove that a particular event or injury was foreseeable.

Madison ex rel. Bryant v. Babcock Ctr., Inc., 371 S.C. 123, 146–47, 638 S.E.2d 650, 662 (2006) (internal citations omitted).

The Plaintiffs essentially seek to impute the unquestionable civil liability of the criminally convicted drunk driver in this case over to these Defendants because there was not a raised median in the road. Sena's guilt in this regard is undisputed by evidence of his guilty pleas as noted above. *See In re Estate of Elfayer*, 325 Ill. App. 3d 1076, 1083, 757 N.E.2d 581, 588 (2001) (recognizing precedent which absolves government entities from liability because the drunk driver is the sole proximate cause because the roadway merely provides a location, and also holding that a drunk driver is an effective intervening cause breaking any causal chain

between alleged defects in an intersection and resulting injuries). In *Elfayer*, the appellate court held that the median was, at most, merely a condition in the accident which made the crash possible and that it did not cause the driver's reckless driving (where it was undisputed the reckless driver was highly intoxicated and high on cocaine).[7] The reckless driving in that case was the sole subsequent independent act which broke the causal connection between the alleged defect in the median's height and the decedent's death. The appellate court held that the trial court didn't err in holding that neither the median nor the defendant's alleged failure to maintain its height was a proximate cause of the accident. *Elfayer*, 325 Ill. App. 3d at 1083–84, 757 N.E.2d at 588. In that case "the defendant did not owe [the deceased] a duty of care to insure that the median prevented [the drunk driver] from crossing over in to his lane of traffic."[8]

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[7] The court recognized:

> A municipality is required to maintain its traveled ways according to their normal and intended uses. *DiBenedetto,* 153 Ill.2d at 71–72, 178 Ill.Dec. 777, 605 N.E.2d 571. A municipality has no duty to initially erect median barriers on its roadways. *O'Brien v. City of Chicago,* 285 Ill.App.3d 864, 871, 221 Ill.Dec. 134, 674 N.E.2d 927 (1996); *Hull v. City of Chicago,* 236 Ill.App.3d 405, 406, 177 Ill.Dec. 128, 602 N.E.2d 1300 (1992). It is only when the municipality has undertaken to build a median barrier that it can be held liable. *Ross v. City of Chicago,* 168 Ill.App.3d 83, 87, 118 Ill.Dec. 760, 522 N.E.2d 215 (1988); see *O'Brien,* 285 Ill.App.3d at 871, 221 Ill.Dec. 134, 674 N.E.2d 927 (municipality not liable unless actually undertakes improvement). However, even then, the municipality is not an insurer of all accidents that occur as a result of the median. *Ross,* 168 Ill.App.3d at 87, 118 Ill.Dec. 760, 522 N.E.2d 215. Liability attaches "only when the [median], itself, creates an unreasonably dangerous condition." *Ross,* 168 Ill.App.3d at 87, 118 Ill.Dec. 760, 522 N.E.2d 215. In other words, the median must directly render the roadway physically defective, thereby making travel unreasonably dangerous. See *Ross,* 168 Ill.App.3d at 89, 118 Ill.Dec. 760, 522 N.E.2d 215; *Harding v. Chicago Park District,* 34 Ill.App.3d 425, 429, 339 N.E.2d 779 (1975).

In re Estate of Elfayer, 325 Ill. App. 3d 1076, 1080–81, 757 N.E.2d 581, 585 (2001).

[8] With respect to foreseeability, the court held:

> While this accident may have been foreseeable in retrospect, that foreseeability is tempered by the great deviation from the ordinary course of travel that occurred

Moreover, the plaintiff failed to provide evidence that the defendant breached a duty "if any existed" and that the median's height (not the drunk driver's independent act of driving drunk) was the proximate cause. Even if all elements could have been proven, the government entity would have been immune from its decision with respect to the median. Given those facts and circumstances, *summary judgment* as to the government was proper.

Here, Speedway is even further removed from the causal chain than the government and could not have been the proximate cause of Plaintiffs' injuries. It is undisputed (1) that SCDOT had the sole and exclusive statutory decision-making authority over the median decision on US 17A; (2) that the decision to install a flush painted median was in fact exclusively made by SCDOT; (3) that the SCDOT plans to install a flush painted median were finalized and stamped by SCDOT in 1998; (4) that Speedway transferred title to the subject property to Pilot in 2001; (5) that Pilot, alone, submitted the encroachment application, which was approved by SCDOT in accordance with SCDOT standards; and (6) that Speedway had nothing to do with the

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> here. Alvarez, while driving drunk and high on cocaine, crossed over a median that in no way was intended to carry vehicular traffic. This is not the type of accident one would expect to occur under normal driving circumstances. Even if it were foreseeable, the magnitude of guarding against this injury and the consequences of placing that burden on defendant would be too great; no municipality would undertake even the most minor or necessary improvements on our roads for fear of facing liability. See *Washington,* 188 Ill.2d at 239, 242 Ill.Dec. 75, 720 N.E.2d 1030 (magnitude of burden to be placed on municipality is relevant factor to issue of duty); *DiBenedetto,* 153 Ill.2d at 72, 178 Ill.Dec. 777, 605 N.E.2d 571; *O'Brien,* 285 Ill.App.3d at 874, 221 Ill.Dec. 134, 674 N.E.2d 927. Therefore, we conclude that defendant did not owe Elfayer a duty of care to insure that the median, an outlying and unused portion of the roadway, would prevent Alvarez, a drunk driver, from crossing over into oncoming traffic.

In re Estate of Elfayer, 325 Ill. App. 3d 1076, 1081–82, 757 N.E.2d 581, 586 (2001).

encroachment process. Even so, Speedway submits that the criminal acts of the reckless and intoxicated driver amount to the sole proximate cause of the injuries in question.

There can be no question of fact that Speedway was not the proximate cause of the Plaintiffs' injuries and is entitled to summary judgment. All decisions with respect to highway design and construction fall to SCDOT as a matter of South Carolina law. Under the facts of this case, there was no legal duty by Speedway to erect a barrier to prevent vehicle cross-over accidents caused by drunk drivers. As a matter of law, Speedway could not have done so and therefore cannot, as a matter of law, be the proximate cause. Moreover, Plaintiffs' causal allegations as to Speedway are not supported by the record. However, the lack of a median did not create the dangerous circumstance – only the driver who used the highway in contravention of its intended use and purpose for lawful traveling.

III. Speedway is entitled to summary judgment because there is no "genuine" issue of material fact precluding summary judgment.

The gravamen of Plaintiffs' Complaint as to Speedway arises out of a SCDOT letter dated August 28, 2000, which included handwritten notes that stated among other things:

> 9/5 Per Phone Verification w/ T. Smoak (Negotiated Median Removal & Drive Cuts. 1. Approved to have painted median only from western curb cut to stop bar (stop light). In other words, the unmountable median has been eliminated from the plan.

This caused Plaintiffs to believe that Speedway had some role in "negotiating" the "removal" of a raised median.

However, based on the record and based on South Carolina law, there can be no "genuine" issue of material fact that Speedway is entitled to judgment as a matter of law as to Plaintiffs' claims against it. Specifically, and as established by SCDOT's own testimony: (1) SCDOT decided what kind of median would be placed on the subject highway; (2) there was

never a raised median on the subject highway outside of the Pilot; (3) there never a raised median in a SCDOT plan for that portion of the highway outside of the Pilot. As established by Mr. Colvin's testimony on behalf of SCDOT, the plans for the flush painted median on the subject stretch of highway were finalized in 1998 (Colvin Dep. at pp. 252:2-5, 255, 283:20-285:2, Ex. A); it is therefore impossible for Speedway to have "negotiated" the removal of a non-existent raised median in 2000. As testified to by Mr. Colvin: "I think the label that the gas station negotiated the removal of a raised median is not an accurate statement." (Colvin Dep. at p. 235:16-18, Ex. A.) "That raised median was removed as a result - - it was moved from the interchange plans as a result of tying the interchange to the 17A widening plans." (Colvin Dep. at p. 235:25 – 236:3, Ex. A.) Later on in his deposition Colvin went on to affirmatively state there was no negotiation:

> I believe my previous testimony alluded that that was not a negotiation, that it was – it was really – it was just a combination of the plans, putting them together, that the widening project had a paving – paid – a flush paved median east of Farmington. And the correction of the interchange plans was just that, it was not a negotiation. It was just a correction of the plan to accurately reflect the Highway Design Manual.

(Colvin Dep. at p. 261:7 – 262:1, Ex. A.)

As previously established, SCDOT has the sole, exclusive, and final statutory authority over the subject highway pursuant to South Carolina law. Accordingly, even if Speedway had in any way negotiated (which the record shows it did not and that, in fact, the plans were finalized two years prior to the alleged "negotiation"), SCDOT – by law – is and was the final decision maker for all highway design issues, to include the design/construction (or not, as was the case here) of a raised median.

In addition, the record demonstrates that Speedway was not involved with the encroachment permitting process. By Pilot's admissions, Pilot was the encroachment permit

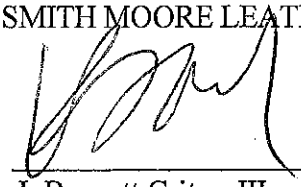
applicant, and, by SCDOT's admissions, SCDOT – in accordance with its statutory authority – approved it.

For all of these reasons, there is no "genuine" issue of material fact precluding summary judgment as to Speedway.

CONCLUSION

Plaintiffs' claims against Speedway fail as a matter of law. Pursuant to the standard on summary judgment, if Plaintiffs fail to meet their burden on summary judgment as to any essential element of their claim, summary judgment must be granted in favor of the Defendant. Because the South Carolina Department of Transportation has the sole, exclusive, and final statutory authority over the subject highway including its design and construction, and a non-delegable duty that could not have been transferred to Speedway, Plaintiffs cannot succeed on an essential element of their claim. Without a duty that would have been owed to Plaintiffs, there can be no breach of a duty by Speedway. Nor can Speedway have proximately caused Plaintiffs' injuries as a matter of law or fact. Finally, there is no genuine issue of material fact precluding summary judgment because it is now undisputed that the median designs were finalized two years prior to the alleged "negotiations." There was never a raised median to begin with (in actuality or in SCDOT's design plans) so its removal could not have been "negotiated." For these and all of the reasons set forth above, Speedway requests that the Court GRANT its motion in full and that it be awarded summary judgment and dismissed from this case.

SMITH MOORE LEATHERWOOD LLP



J. Bennett Crites, III
Kathleen Fowler Monoc
25 Calhoun Street, Suite 250
Charleston, South Carolina 29401
Ph. 843.300.6600
Fax 843.300.6700
bennett.crites@smithmoorelaw.com
katie.monoc@smithmoorelaw.com

Attorneys for Defendant Speedway LLC

June 5, 2017
Charleston, South Carolina

EXHIBIT A

EXHIBIT
A
ALL-STATE LEGAL®

STATE OF SOUTH CAROLINA
IN THE COURT OF COMMON PLEAS
NINTH JUDICIAL CIRCUIT
COUNTY OF BERKELEY

CYNTHIA WRIGHT AND RICHARD WRIGHT,
Plaintiffs,
vs. CASE NO. 2016-CP-08-334
SOUTH CAROLINA DEPARTMENT OF TRANSPORTATION, C & A UNLIMITED, INC., and PILOT TRAVEL CENTERS, LLC, SPEEDWAY, LLC, ASHLEY LAND SURVEYING, INC., F/K/A ASHLEY ENGINEERING & SURVEYING, INC., and ASHLEY ENGINEERING & CONSULTING, INC., and MUNLAKE CONTRACTORS, INC.

Defendants.

VIDEOTAPE
DEPOSITION OF: LELAND D. COLVIN, JR.

DATE: March 13, 2017

TIME: 11:35 AM

LOCATION: SCDOT District 6
6355 Fain Boulevard
North Charleston, SC

TAKEN BY: Counsel for the Plaintiffs

REPORTED BY: TERRI L. BRUSSEAU, RPR, CRR

A. WILLIAM ROBERTS, JR., & ASSOCIATES
Fast, Accurate & Friendly
Charleston, SC (843) 722-8414
Hilton Head, SC (843) 785-3263
Myrtle Beach, SC (843) 839-3376
Columbia, SC (803) 731-5224
Greenville, SC (864) 234-7030
Charlotte, NC (704) 573-3919

APPEARANCES OF COUNSEL:

ATTORNEYS FOR THE PLAINTIFFS
CYNTHIA WRIGHT AND RICHARD WRIGHT:

HOFFMAN LAW FIRM
BY: KEVIN B. SMITH
AMANDA STERNS
7087 Rivers Avenue
North Charleston, SC 29406
(843) 769-7077
ksmith@hoffmanlaw.net
asterns@hoffmanlaw.net

ATTORNEYS FOR THE DEFENDANT
SOUTH CAROLINA DEPARTMENT OF TRANSPORTATION:
MAYBANK LAW FIRM, LLC
BY: ROY P. MAYBANK
531 Savannah Highway
Charleston, SC 29407
(843) 766-8101
roy@maybanklaw.com

ATTORNEYS FOR THE DEFENDANT
PILOT TRAVEL CENTERS, LLC:
HOWSER, NEWMAN & BESLEY, LLC
BY: WILLIAM G. BESLEY
1508 Washington Street
Columbia, SC 29201
(803) 758-6000
wbesley@hnblaw.com

ATTORNEYS FOR SPEEDWAY, LLC:

SMITH, MOORE, LEATHERWOOD, LLP
BY: J. BENNETT CRITES, III
KATIE FOWLER MONOC
25 Calhoun Street, Suite 250
Charleston, SC 29401
(843) 300-6653
bennett.crites@smithmoorelaw.com
katie.monoc@smithmoorelaw.com

ATTORNEYS FOR THE DEFEN
ASHLEY LAND SURVEYING, INC., F/K/A
ASHLEY ENGINEERING & SURVEYING, INC.,
AND ASHLEY ENGINEERING & CONSULTING, INC.
BRUCE A. BERLINSKY
One Carriage Lane, Building F
Charleston, SC 29407
(843) 852-2202
bruce@berlinskylawfirm.com

ALSO PRESENT:
Douglas A. Browne, Video Technician
Clint A. Davis
Robert T. Clark

(INDEX AT REAR OF TRANSCRIPT)

VIDEO TECHNICIAN: Good morning. We are now on the record. Today's date is March 13, 2017. The time is approximately 11:35 AM.

This is the video deposition of Leland Colvin as the 30(b)(6) representative for the South Carolina Department of Transportation, taken by counsel for the Plaintiff. The location today is 6355 Fain Boulevard in North Charleston, South Carolina.

My name is Douglas Browne, legal videographer representing A. William Roberts, Jr. and Associates. This deposition is taken in the matter of Cynthia Wright and Richard Wright versus South Carolina Department of Transportation, et al., Case Number 2016-CP-08-334.

Counsel present, please introduce yourselves for the record.

MR. SMITH: My name is Kevin Smith. I represent Cynthia and Richard Wright.

MR. MAYBANK: Roy Maybank on behalf of the South Carolina Department of Transportation.

MR. BERLINSKY: Bruce Berlinsky, Ashley Surveying & Engineering.

MR. BESLEY: Bill Besley on behalf of Pilot Travel Centers.

MS. MONOC: Katie Monoc for Speedway.
MR. CRITES: Bennett Crites for Speedway.
VIDEO TECHNICIAN: And would the court reporter please swear in the witness and we may begin.

LELAND D. COLVIN, JR.,
being first duly sworn, testified as follows:

EXAMINATION

BY MR. SMITH:

Q. Please state your name.
A. Leland Donald Colvin, Jr.
Q. My Colvin, my name is Kevin Smith. I represent Cynthia and Richard Wright with regards to a collision back in October of 2012.
The purpose for today's deposition is to ask you some questions about certain topics that we had provided notice of prior to today.
And before we get into that, tell me about your deposition experience. Have you ever done this before?
A. I have.
Q. About how many times?
A. I've probably done a half dozen or so right-of-way cases and this will be my second one

involved in a collision.
Q. Okay. Right-of-way cases, what are those?
A. Condemn -- like condemnation-type cases.
Q. Okay. And so collisions, this is the second time you've --
A. Yes.
Q. -- testified? Okay.
What were the circumstances of the first time?
A. A very similar situation where there was a -- a left turn, a right-angle collision in the Mount Pleasant area.
Q. Okay. Do you remember who the attorney was or the case name or how long ago that was?
A. Oh, it's probably been eight or nine years ago.
Q. Okay.
A. I don't recall.
Q. Sure.
A. I -- I don't recall.
Q. So ground rules for a deposition, they're usually the same, but we're required to tell you certain things before we start these.

If you don't ask -- understand a question that I've asked, please ask me to clarify that question. And that would go for any lawyer in the room, if they ask you a question, ask that person to clarify if it's unclear. Okay?
A. Sure.
Q. If I ask you a question, I'm going to assume that you understood it and answered it truthfully. Is that fair?
A. Sure.
Q. All right. And do you understand your testimony today is about a lawsuit involving Cynthia and Richard Wright?
A. I am.
Q. All right. Do you understand that the answers you give today may be used in court?
A. Yes, sir.
MR. SMITH: Okay. And I'll attach as Exhibit Number 1 to this deposition a copy of the deposition Notice. I think I brought enough.
BY MR. SMITH:
Q. So I'll attach that as --
A. Thank you.
Q. -- Exhibit Number 1 to your deposition today.

(PLF. EXH. 1, Plaintiffs' Second Amended 30(b)(5) and 30(b)(6) Notice of Videotaped Deposition to Defendant South Carolina Department of Transportation, was marked for identification.)
BY MR. SMITH:
Q. Do you know what that is?
A. I do.
Q. All right. You've seen it before?
A. I have, yes, sir.
Q. And who was it that showed it to you?
A. Mr. Maybank.
Q. All right. And this is a deposition Notice requiring the Department of Transportation to designate a person to testify on its behalf?
A. Correct.
Q. All right. And do you understand that the Department of Transportation is required to fully prepare that person to provide all information known or reasonably available to the Department of Transportation in response to the matters listed?
A. Yes, sir.
Q. All right. And are you the person that's been designated by the Department of Transportation to speak on their behalf with

respect to topics -- Topic Number 2?
A. I am. There is -- I think Robert and I have a little bit of overlap.
Q. I saw that.
A. Especially in -- in relation to encroachment permits. They are approved out of the district office, so there's a little bit overlap. But yes, I am prepared to talk about Topic 2.
Q. All right. And do you believe -- well, I think you may have touched on this. The question is: Do you believe you are the most qualified to talk about this topic or to testify about this topic? And I know you've identified another person with some duplication in terms of the subjects, but do you think you're more qualified than him or less qualified or you're equally qualified?
A. I would say we're equally qualified.
Q. Okay. And who was it that designated you to speak on the matters listed in Topic Number 2?
A. Mr. Maybank.
Q. Okay. Do you know why you were chosen?
A. I was the program manager for this job for both the interstate widening job as well as the 17A widening job at the time of -- of the

preconstruction and construction documents were prepared.
Q. All right. All right. So I wanted to just put that down, because we may refer to this later.
So you were the program manager for the widening job that was going on on Highway 17A at the time?
A. Yes, sir.
Q. And also for the requests being made by the folks associated with -- with Pilot for changes in the entrances, exits, and things like that?
A. Yeah. The -- the right-of-way negotiation was part of that project. Yes, that is part of it.
Q. And that's how we would refer to it, the right-of-way?
A. Correct.
Q. So there would be the road widening and then the right-of-way?
A. There's about four components: There is environmental; there is what we call preconstruction, which is development of the plans; and then you have the right-of-way acquisition; and then you have the construction. So it is one of

four phases of a typical highway construction project.
Q. But just in terms of how we refer to the decisions made about the -- the road in front --
A. Yes.
Q. -- raised median, no raised median, markings, things like that, if we compare that to the request for curb cuts and driveways and things like that, would those be two different things? I'm just trying to figure out how we refer to them later.
A. Yeah -- no. I mean, the design of the road and -- and whether you put a raised median in it or not is really separate, generally separate from the right-of-way negotiation. There are certainly cut curbs that are -- the -- the width of the curbs, the radiuses, existing curbs where they're at is generally different. I don't know that you can say 100 percent separation. But generally the design of the road in general is separate from the right-of-way acquisition associated with it, in general. It's kind of hard to --
Q. Okay.

A. -- completely separate the two.
Q. Could we maybe -- just for the purpose of today, we can just talk about the issues on the highway versus the issues in the parking lot?
A. Yes.
Q. Okay. And -- and -- and just so you know, what I'm referring to if we -- if we do that, so the issues with the highway would be what I talked about before, the raised median, the lanes, the paint markings, signs, and stuff like that. The issues with the parking lot would be the curb cuts into the sidewalk and the different driveways and whatever requirements were done with regards to that. Okay?
A. Sure.
Q. All right. And as the project manager, you were over both of those --
A. Yeah.
Q. -- things. Is that true?
A. The program manager is almost like the quarterback. They kind of facilitate -- facilitate going from basically project inception all the way through project closeout. So that includes those four phases of a project, yes, sir.
Q. All right. And it also includes how I

kind of separated those out. The issues with the highway and the issues with the parking lot, all of that would be included?

A. Yes. Yes, sir.

Q. Okay. And so what is your official position as you sit here today?

A. I am the deputy secretary for engineering.

Q. And how long have you been in that position?

A. Permanently, it will be a year in June; but I was acting for about roughly eight months prior to that.

Q. So a couple of years, about?

A. Roughly, not quite. 18 months.

Q. Okay. And then what were you doing prior to that?

A. Prior to that, I was the chief engineer for location and design.

Q. And how long did you do that?

A. For about a year.

Q. Okay. And what about before that?

A. Before that, I was chief engineer for operations.

Q. Okay. And length of that?

A. Approximately two years.

Q. Okay. And before that?

A. Director of construction.

Q. Okay. And how long did you do that one?

A. Approximately four years.

Q. What time frame are we at about now?

A. I'm going back at -- starting director of construction is 2010, and these are approximate number of years.

Q. Sure. So you -- okay. And then go back from there, if you can.

A. Kind of a little bit of a -- a dual duty. I was the stable guy, design-build engineer, but during -- during that time, I was put on special assignment. I came in at the tail end of the construction of the Ravenel Bridge, and then I oversaw the demolition of the old Grace Memorial, Memorial bridges. So within that one job, I kind of had a little bit of a special assignment.

Q. Okay. So the Ravenel Bridge was a pretty big deal when --

A. Yeah. I came in on the tail end of that. I wish I could take credit for that and have that feather in my cap, but unfortunately can't.

Q. All right. And what -- what kind of time frame are we talking about there?

A. That was from early 2005 to 2010. That was -- and when -- that was a state-wide design build engineer, including that special assignment. Special assignment was only -- a little less than two years.

Q. All right. And then back --

A. Before that, I was the program manager for the Charleston area, which basically included Charleston, Dorchester, and Berkeley Counties.

Q. And how long did you do that?

A. For about eight years.

Q. And then back from there?

A. Before that, I was in hydrology, in a hydrology section as a design engineer for roughly 18 months.

Q. Hydrology, that's a totally different thing, right?

A. Yeah. It's -- it's more of a -- it's definitely in the design for sure, very technical.

Q. Okay. And we're all -- we're still talking about the Department of Transportation, right?

A. Correct, yes.

Q. Okay. That's more runoffs and things like that?

A. Yeah. It's -- it's -- you know, of course, it's the drainage design of highways as well. So yeah.

Q. Okay. I wrote 18. Why did I do that?

A. 18 months, roughly.

Q. Okay. And then before that?

A. Before that, I was in Barnwell maintenance. I was a very entry-level engineer, did that for about 18 months. And before that, I was in traffic engineering, again as an entry-level engineer, doing signal design.

Q. About 18 months?

A. Yes, sir. And hopefully that adds up to about 22 years.

Q. Okay. Are you prepared to provide all the information known or reasonably available to the Department of Transportation with respect to Topic Number 2 in the deposition Notice?

A. I am, except -- with the exception of the encroachment permit piece of it. With regards to the right-of-way acquisition, the safety project, the interchange project, and the 17A widening project, I'm prepared for all those.

Q. All right. And help me separate out the encroachment tier. What does that mean?
A. There -- there was -- Nexton Parkway has been recently, I don't know the -- the time frame, very recently was installed. And as part of that, they have to come to SCDOT for an encroachment permit. So there's been some changes to 17A very recently --
Q. Okay.
A. -- with regards to accepting that new location roadway onto our system, as far as connection -- not -- not on our system -- well, as far as connection with 17A. And I -- that was -- that's done here locally. So -- and that's where I think I mentioned very early on, Robert and I have a little bit of overlap. And that's where Robert would speak on that subject.
Q. And how about the encroachment issues or the encroachment permit filed by the folks that are associated with the entity of the Pilot Travel Center, Marathon Ashland Petroleum, and the people that -- that took over after that? Were you involved with that?
A. Not with the encroachment permit per se. As -- as related to the widening project,

I was involved in that.
Q. The widening project?
A. Yes, sir.
Q. And the encroachment, correct me if I'm wrong, would be really the curb cuts --
A. Correct.
Q. -- and driveways and things like that?
A. That is correct, yes, sir.
Q. Okay.
A. And part of the right-of-way acquisition also included the acquisition of land as well.
Q. Okay. So you're going to talk about, with respect to this particular project and on Highway 17A in front of the Pilot Travel Center, you're going to talk about more of the highway issues out front. And then Mr. Clark would talk about the curb cuts and things like that?
A. Sure.
Q. Okay.
A. And there will be a little bit of overlap there.
Q. All right. And what did you do to prepare for today?
A. We've had a couple meetings, kind of

divvied up some of the topics; went back and reviewed the plans, both the interchange and the widening. There's also a -- another project that's in this area that's related, reviewed that. Went back and looked at our design manuals and -- and see that the -- that the road was designed correctly and did meet all of our design manuals. And that was through -- through both looking at manuals as well as talking to the folks that's in charge of those manuals.
Q. Okay. And who were the folks you talked to?
A. Both Jamie Kendall as well as Rob Bedenbaugh.
Q. Okay.
A. Robert and I and Clint and Mr. Maybank.
Q. Okay. All right. So did -- did -- did you get together with -- with Mr. Davis and Mr. Clark in preparation for today?
A. We did.
Q. Okay.
A. We did.
Q. And how much time do you think you spent overall preparing for the deposition today?
A. Overall, probably 20 to 30 hours.

Q. Okay.
A. Between looking at stuff, gathering information, getting copies made, traveling, discussion, between 20 and 30 hours.
Q. And you said that part of what you did was to look at the -- the highway and figure out if it was in conformity with the different safety standards. I think you mentioned the ARMS manual?
A. No. The Highway Design Manual.
Q. Okay.
A. Yes.
Q. Did you -- all right. So I was going to ask you: What -- what -- what all manuals did you -- did you look at?
A. I started off looking at the updated Highway Design Manual. And when we had our first meeting, I met with Mr. Maybank and he informed me that I needed to go back and -- and refer to the Highway Design Manual that was in place at the time of design. So I had to go back and go to a -- an earlier version of that. So those are two design manuals that I looked at in reference to this -- to the subpoena -- or deposition might be the more perfect word.
Q. Would that be this?

A. No, it isn't. No, sir.
Q. Highway Design Manual is what you said?
A. Yes, SCDOT's Highway Design Manual.
Q. Okay. And that's different from the ARMS?
A. Yes.
Q. And what is the difference between the ARMS manual and the Highway Design Manual?
A. The Highway Design Manual talks about the design of -- of roads or a separate bridge, and it talks about the different cross-section elements, whether it's vertical curbs, horizontal curbs, number of lanes, width of lanes, intersections, medians, median types, those type of things, radii. Just the different elements of a roadway itself.
We've got a -- we've got a Highway Design Manual that we follow internally as well as -- as well as any consultant engineers that would do design work for us in designing roadways.
Q. Okay. And -- and so how would -- could you tell us the difference between the ARMS manual and the Highway Design Manual?
A. Sure. The ARMS manual is -- is our roadside access manual, and that's used to provide

guidelines on companies, developers, private individuals coming in to DOT and asking for access to the state highway system.
Q. Okay. That would be the curb cuts and driveways and stuff?
A. Correct.
Q. Okay.
A. Correct.
Q. How about the -- the access management in the vicinity of intersections published by the United States Department of Transportation, the Federal Highway Administration, do you know what that is?
A. I know that that exists in South Carolina. Our ARMS, we -- we work very closely with the division office with Federal Highway Administration. They approve our manuals that we use to receive federal funds, and we've got state ARMS manuals that we follow that's in general compliance with AASHTO. Same thing with our highway design manuals. We've got manuals specific to South Carolina that's approved out -- out of our division office for federal highways.
Q. And I noticed a lot of the information that's in the ARMS manual is pretty much identical

to what's in this?
A. Very, very similar, yes, sir.
Q. Okay. It seems like they cover a lot of the same topics.
A. Yes. They -- the AASHTO is an organization of state transportation agencies, state -- national, excuse me. And we are certainly a member of AASHTO as well. There's national standards. And then a lot of states, they adopt local standards that are in general compliance, but they may be more specific to local conditions within those state boundaries. And certainly the SCDOT follows that same practice.
Q. Okay. Did you have any part in compiling any of the documents that have been produced to us either as a result of a 30(b)(5) portion of this deposition Notice or previous requests that anyone has made?
A. Yes, sir. We -- I was -- I was intimately involved in -- in putting together some of the packages that Mr. Maybank provided.
Q. Okay. And did you -- did you -- in your mind, the documents that you found and -- and provided and were ultimately produced, did you feel like that was a complete set?

A. I do, yes, sir.
Q. Okay. Did you notice anything missing that you recall from the project?
A. Not -- not in -- not in relation to this deposition, no, sir.
Q. Okay. And when I talk about the project, really what I'm talking about is, you know, the roadwork done in front of the Pilot Travel Center, that is the Pilot Travel Center today on 17A, anywhere between, you know, 2000 and I think 2004.
A. Correct. No -- no, sir. Again, I -- we do have a retention schedule that we follow. But based on everything that we should still have in our files, I felt like we got a complete -- complete data set that was provided.
Q. Okay. And I talked to Mr. Davis a little bit about this. But with regards to letters and correspondence and stuff like that is -- are those -- did you put that stuff together, the -- this is something everyone's been asking everybody about in this case, and I'll just show it to you, this letter here from Mr. Smoak to Ashland Petroleum. Is there -- do you know how to say that name?

A. I'm going to butcher that name.
Q. Greiwe?
A. That's close enough.
Q. All right. So like letters like this, did you have a -- any hand in -- in -- in putting together this letter among the others?
A. I was part of that, yes, I -- I was.
Q. Okay.
A. I was part of that. You know, we have files at headquarters within different divisions at headquarters, files at the district office and files in our regional right-of-way office. And -- so yes.
Q. And we're going to get into this a little bit more specifically, but just simply with regards to the -- the document production there, you know, this letter -- and we'll -- we'll attach it later because we're going to get into it.
But this talks about the highway drawings for the 17A project, and there's a mention here of a negotiated median removal. What we're looking for are other letters or correspondence, anything having to do with really this topic. And this looks to be a -- a note from Mr. -- from Mr. Greiwe here talking about certain things.

We're looking for the background of all this. Did you find any kind of --
A. We did not. I mean, this is part of our right-of-way file that goes -- and I think there's the actual acquisition document as well, but we -- we did not. These type of correspondence would be outside doing of our retentions, the retention schedule.
Q. But -- and so -- but given the fact that this one here exists, is it fair to say that the other correspondence with regards to that particular subject should exist as well?
MR. MAYBANK: Object to the form.
BY MR. SMITH:
Q. You can go ahead and answer.
A. I believe everything that we had was provided, to the best of my knowledge.
Q. Okay. But what -- what I'm saying is: And since -- since we have this letter that deals with the median removal, would it be fair to assume that the other letters about the median removal would be -- would have been turned over as well?
MR. CRITES: Object to form.
MR. MAYBANK: Same objection.
THE WITNESS: I mean, I -- again, I -- I believe all -- everything that we had in relation to this matter was provided by the Department.
BY MR. SMITH:
Q. Okay. Do you think any of the letters or correspondence dealing with the median removal, do you think any of those were destroyed?
MR. CRITES: Object to the form.
MR. MAYBANK: Same objection.
THE WITNESS: Not that I'm aware of, but most likely.
BY MR. SMITH:
Q. Were you --
A. Not that I'm aware of any specific letters that were or weren't destroyed, but so it's -- it's hard for me to tell you what was or wasn't destroyed.
Q. Okay. And when we've seen in some of the other -- some of the other documents -- and I apologize, this handwriting is going to be kind of small -- but one of these other ones, it's a -- it's a plat here and painted median and stuff per Leland Colvin. That would be you, right?
A. That's myself, yes, sir.
Q. All right. So you were actually involved in the issue of the median, were you not?

A. I was, yes, sir.
Q. Okay.
A. Yes, sir.
Q. And so letters and correspondence and conversations going on about the raised median, you would have been a part of those?
A. Yes, sir.
Q. Okay. And that's what I'm saying, did -- did -- from your memory of being a part of those conversations and a part of that process, did you look at any of the stuff provided and say, hey, this must have been destroyed or this isn't here or where is that? Were you satisfied that this was a complete production for at least that issue?
A. Yes, sir.
Q. Okay. I'm sorry. I had a long way of getting to the question.
A. No, no, you're fine.
Q. I want to ask you -- and this really just simply relates to all of the topics here: But can you tell me what are the three most important things the Department of Transportation has learned as a result of this lawsuit?
MR. MAYBANK: Object to the form.
BY MR. SMITH:

Q. You can go ahead.
A. I think that this reinforced the -- that -- that we followed our Highway Design Manual, I think is one of the questions that's part of the -- this issue here is, did DOT follow their design and our design -- the highway design in a safe manner. And I'm -- I'm glad to say, yes, we have.
Q. And would the same be true for maintenance issues?
A. As far as I'm aware of. I didn't delve into the maintenance issue, more the design of the roadway and kind of how it related to the -- to my deposition. But when I looked at the two projects, the interchange and the widening project, and the design especially related to the raised median, whether it existed or not existed, I am very confident that we met -- met the intent in certainly almost verbatim of our Highway Design Manual that we design roads by.
Q. Okay. And I'm going to ask you some sort of general questions here, and -- and these relate to Topic Number 2, Parts 4 and 14. If you could -- oh, you're already to the page.
So Number 4 talks about the DOT's

duties in ensuring the location will be safe and free from hazards. And it's kind of a general subject there.
A. Right.
Q. And Number 14 talks about the applicable safety standards and things like that. Okay?
A. Right, yes, sir.
Q. So do you believe the South Carolina Department of Transportation must only approve safe highway plans?
A. Yes.
Q. All right. And is the reason for that to prevent injury or death to other people on the road?
A. Yes, the -- the reasonable expectations. There's four E's of traffic safety, and engineering is one of the four E's.
Q. All right. And I -- I think I may have misspoken. The reason for only approving safe highway plans, is that to prevent injury or death to everyone using the road?
A. Reasonable, again, when I look at -- when I look at traffic safety, it's -- it's known amongst the community there's four E's. There's

education, there's enforcement, there's emergency, and there's engineering. And the -- and the Department of Transportation plays into a couple of those.
Certainly education, we -- we partner with the Department of Public Safety and engineering, so yes. That's part of that, is to -- is provide a -- a reasonably safe highway network.
Q. Okay. Do you believe the South Carolina Department of Transportation must follow industry safety standards when considering changes to a highway or the additions of driveways?
A. Yes.
Q. And is the reason for that to prevent injury or death to everyone using the road?
A. It is to ensure that we provide sound, safe engineering. Again, we can't -- we can't protect the motoring public from themselves sometimes. You have impaired drivers, you have drivers that are texting. So as to the reasonable expectation of engineering standards from a safety -- safety concern, yes. If they are reasonably using those roadways in state statute, the -- the engineering side of that should -- should -- should work.

Q. Okay. So one of the reasons that the Department of Transportation must follow the industry safety standards when considering changes to the highway or the additions of driveways, one of the reasons to follow these industry standards is to prevent injury or death to everybody using the road?
MR. CRITES: Object to the form.
MR. MAYBANK: Object to the form.
BY MR. SMITH:
Q. You can go ahead.
A. Yeah. That are using the road as intended.
Q. Okay.
A. That's following all state laws and statute, correct.
Q. Would it not encompass people just, you know, alongside the highway? Can you see how decisions regarding driveways or highways would also affect people, you know, on foot walking as pedestrians?
A. Certainly. I -- I think both the pedestrians and bicyclists are modes of transportation that's taken into account with our -- our highway design there. Yes, sir,