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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In The Supreme Court

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
Ct. App. Opinion No. 5921 (filed July 6, 2022)

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.,

Of whom

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

RESPONDENT PILOT TRAVEL CENTERS, LLC'S RETURN TO APPELLANTS' PETITION FOR WRIT OF CERTIORARI

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STATEMENT OF THE CASE

On March 31, 2014, Appellants filed a negligence and loss of consortium action against Pilot Travel Centers, LLC ("Pilot") and the South Carolina Department of Transportation ("SCDOT") arising from a motor vehicle accident that occurred on Highway U.S. 17A (the "Highway") in front of a Pilot Travel Center gas station ("Pilot Travel Center") owned by Pilot. The accident involved an intoxicated driver traveling in the opposite direction of the Appellants on the Highway who drove his truck into the Appellants' motorcycle while attempting to make a left hand turn into one of the Pilot Travel Center's entrances. Appellants subsequently filed a separate action arising from the accident against Speedway LLC[1] ("Speedway"), Ashley Land Surveying, Inc.[2] ("Ashley"), and Munlake Contractors, Inc.[3] The two actions were consolidated. Appellants allege 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. Appellants also contend that the location and design of Pilot's driveway created a dangerous condition on the Highway.

Pilot filed a Motion for Summary Judgment on May 12, 2016, on the grounds that Appellants 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 Appellants' injuries. After a hearing on April 10, 2017, the

[1] Speedway is the successor in interest to Speedway SuperAmerica, LLC, which owned the gas station located on the subject real property prior to Pilot acquiring this property in September 2001.

[2] Ashley Land Surveying, Inc. is an engineering firm Pilot retained to assist with obtaining an encroachment permit from SCDOT as part of Pilot's construction of the Pilot Travel Center.

[3] Munlake Contractors, Inc. was the general contractor of the Pilot Travel Center.

Honorable Roger M. Young, Sr. entered an order on May 4, 2017, granting summary judgment to Pilot. Judge Young held that Pilot did not owe Appellants any duty to support their negligence claims. Appellants filed a timely Motion to Alter or Amend Judgment pursuant to Rule 52, SCRCP and Rule 59, SCRCP, alleging that the Court erred in finding Pilot did not owe them a duty and arguing that genuine issues of fact remained concerning Pilot's breach of a duty and on the issue of proximate cause. Appellants' Motion to Alter or Amend Judgment was denied on June 8, 2017. SCDOT, Speedway, and Ashley filed their own motions for summary judgment in May and June 2017. These motions were heard by the Honorable Kristi Lea Harrington and, ultimately, granted. Appellants served a timely Notice of Appeal on July 19, 2017. Oral arguments were held on May 27, 2020. The Court of Appeals affirmed the Circuit Court's grant of summary judgment on July 6, 2022. On July 21, 2022, Appellants filed a Petition for Rehearing with the Court of Appeals. Pilot timely filed a return to that petition, on request of the Court of Appeals. On September 23, 2022, the Court of Appeals denied Appellants' Petition for Rehearing.

STATEMENT OF THE FACTS

This action arises from a motor vehicle accident that occurred on October 6, 2012, while Appellants were traveling North on the Highway in front of a Pilot Travel Center owned by Pilot. Appellant Richard Wright was driving a motorcycle, and his wife, Cynthia Wright, was riding as a passenger. The Appellants were traveling in the left lane when a pick-up truck traveling in the opposite direction stopped in the median with its left blinker on and suddenly turned left into the side of Appellants' motorcycle while attempting to turn into the driveway to the McDonald's restaurant attached to the Pilot Travel Center. The pick-up truck was driven by Daniel Sena ("Sena"), who admitted in his deposition that he was under the influence of alcohol and cocaine (R. p. 193, lines 20-24), and pled guilty to two counts of felony DUI. (R. p. 273, lines 7-21).

Appellants contend that the accident would not have occurred had there been a raised, non-traversable median in the Highway preventing motorists from making a left-hand turn onto Pilot's premises. Appellants also allege the location of Pilot's driveway on the Highway caused the accident. Sena testified that the accident was his fault and that Pilot was not to blame for his actions that night. (R. p. 277, line 21-p. 278, line 4). According to Sena, the fact that there was no solid raised median in the Highway does not negate the fact that it was his actions that led to the collision with Appellants' motorcycle. (R. p. 191, line 17-p.192, line 6). Sena testified that his failure to yield "was just bad judgment." (R. p. 188, lines 21-23).

I. History of the Pilot Travel Center

Pilot constructed the subject Pilot Travel Center in or around 2002 after acquiring the real property and existing gas station from Defendant Speedway, LLC in or around September 2001. (R. p. 166-167, at ¶¶ 5, 9). The existing gas station had three driveways with access to the Highway, and there was no raised non-traversable median in the Highway preventing left turns into the existing gas station from the southbound lane. (R. p. 166, at ¶ 7). In order to construct the driveways to the Pilot Travel Center, Pilot had to submit an application to the South Carolina Department of Transportation (SCDOT) for an encroachment permit. (R. p. 167, at ¶ 8). SCDOT had to approve the design and location of the driveways to Pilot's property before issuing Pilot the encroachment permit.[4] In May 2002, Pilot submitted an application to SCDOT for an encroachment permit, seeking approval of the location and design of its proposed driveways. (R. p. 167, at ¶ 8). SCDOT approved Pilot's application and issued Pilot an encroachment permit to construct the driveways to the Pilot Travel Center. *Id.*

[4]Although the original gas station on the property had driveways allowing for ingress and egress directly from the highway, the driveways to the property were relocated as part of Pilot's rebuild. (Bill Mulligan Dep. at 10:11-18, R. p. 434, line 11-18)

II. History of Highway U.S. 17A and the Median

At no point since the original construction of the Highway has there ever been a raised, non-traversable median in the portion of the Highway where this accident occurred. (R. p. 219, lines 7-21). Rather, the median in front of Pilot's property has always been a painted flush median, which allows motorists traveling in either direction to make left turns into the businesses abutting this portion of the Highway (on both sides). (R. p. 218, line 19-p. 220, line 1).

In the late 1990s and early 2000s, SCDOT engaged in two separate highway projects that modified the portion of the Highway in front of the Pilot Travel Center. The first project was widening the section of the Highway directly in front of the Pilot Travel Center (the "Widening Project"), and the second project involved reconstructing the intersection of I-26 and the Highway that was adjacent to the Pilot Travel Center (the "Interchange Project"). (Colvin Dep. 50:18-51:23, R. p. 349). These projects were initiated by SCDOT, not Pilot. (Colvin Dep. 51:1-5, R. p. 349). The design plans for the Widening Project were prepared internally by SCDOT staff in 1998. (Colvin Dep. 51:24–52:15, R. p. 349). SCDOT hired an outside firm to design the Interchange Project, and the plans for this project were prepared in 1999. (R. p. 216, lines 13-16; R. p. 221, lines 7-11). Importantly, the scope of the Interchange Project did not concern the portion of the Highway where the Appellants' accident occurred. Rather, the Interchange Project involved reconstructing the intersection adjacent to the Pilot Travel Center and the portion of the Highway on the opposite side of the intersection. (*See* Colvin Dep. 51:6-23, R. p. 349).

According to SCDOT, the design plans for the Widening Project never included the installation of a raised median in front of the Pilot Travel Center. (Colvin Dep. 253:17-254:3 R. p. 216-217). The original design plans for the Interchange Project, which were prepared by an outside firm, did show a raised median in front of the Pilot Travel Center. (R. p. 217, line 21-p. 218, line

2). However, SCDOT testified that the inclusion of the raised median in the original design plans for the Interchange Project was simply a "placeholder" until SCDOT ultimately merged its Widening Project plans with the Interchange Project plans.[5] (R. p. 217, line 21-p. 218, line 10; R. p. 220, lines 6-14). There was never an expectation that there was going to be a raised median in front of the Pilot Travel Center as part of the Widening Project.[6] (R. p. 221, lines 16-21). Leland Colvin, the SCDOT program manager who oversaw the Widening Project and Interchange Project, (Colvin Dep. 9:23-10:2, R. p. 339), testified that he was the one who made the decision to not add a raised median to the portion of the Highway in front of the Pilot Travel Center, and that this decision was made when the plans were prepared in 1998. (R. p. 231, line 20-p. 232, line 8). According to Mr. Colvin, the decision to keep the painted flush median was made in conformance with SCDOT's Highway Design Manual, which SCDOT considers "the Bible" for designing highways in the state. (R. p. 217, lines 4-20). He also testified that the installation of a raised

[5] Leland Colvin was the SCDOT program manager for the Widening Project and Interchange Project. (Colvin Dep. 9:23-10:2, R. p. 339). He served as one of SCDOT's 30(b)(6) deponents and testified that the "construction joint" for the two projects—i.e. the point on the Highway where the two projects met one another—occurred at the intersection of Farmington Road and the Highway. (Colvin Dep. 98:5-7, R. p. 361). This construction joint was before the area where the accident occurred and was where the Interchange Project plans depicted a raised median. (*See* R. pp. 128, 194).

[6] Appellants claim SCDOT design plans initially called for a raised non-traversable median (*E.g.*, Appellants' Petition at pp. 3-4, 9). This repeated allegation is, at best, misleading. There is no admissible evidence in the record to indicate that SCDOT ever intended to use a non-traversable median to prevent left turns into Pilot's property. To the contrary, Mr. Colvin repeatedly stated that the plans for the Widening Project never contained a raised, non-traversable median, and that to the extent a raised non-traversable median was depicted on the plans for the completely separate Interchange Project, this median was simply a "placeholder". (*E.g.* R. p. 220, lines 6-14) Moreover, Appellants' citations to Mr. Colvin's testimony to support the proposition on page 9 of their petition that "SCDOT. . .was approached by Pilot Travel Center's owners for the express purposes of removing the plan for a raised median"," is also a misrepresentation of his testimony. The testimony cited, subject to objections, refers to Marathon Ashland, not Pilot. (*See* Colvin Dep. 80-81, R. pp. 356-357). Mr. Colvin testified that he did not recall ever speaking with anyone from Pilot regarding his decision to install a flush median, and there was no negotiation with Pilot regarding the median**.** (Colvin Dep. 99-100, R. p. 361; R. p. 222, lines 17-25).

median as part of the Widening Project would have been in contravention of the standards set forth in the SCDOT Highway Design Manual. *Id.*

ARGUMENT

To prevail on their claims, Appellants must establish that (1) Pilot owed them a duty; (2) Pilot breached that duty by a negligent act or omission; (3) and that Appellants' damages were proximately caused by this breach. *Hubbard v. Taylor*, 339 S.C. 582, 588, 529 S.E.2d 549, 552 (Ct. App. 2000). Pilot did not owe Appellants any duty of care as alleged in the Complaint, and therefore, the trial court and Court of Appeals properly granted Pilot 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."). Appellants allege that Pilot owed them a duty of care to prevent them from getting in a motor vehicle accident in the Highway in front of its property. However, this Court 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." [7] *Id.* As the trial court held, and the Court of Appeals affirmed, Appellants cannot establish that Pilot engaged in an activity that created a dangerous artificial condition on the highway. (R. p. 6).

[7] 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.

Here, Appellants allege that the dangerous condition that caused their accident was the painted flush median in the Highway that allowed Sena to make a legal left hand turn onto Pilot's premises. Appellants also contend that the location of the driveway on Pilot's property (that Sena was attempting to turn into at the time of the accident) created a dangerous condition on the Highway. However, neither the painted flush median or the location of Pilot's driveway impose a duty on the part of Pilot to prevent the Appellants' motorcycle from being hit by an intoxicated driver on the Highway. For the reasons set out below, this Court should deny Appellants' petition.

I. THE LOWER COURTS DID NOT IMPROPERLY WEIGH COMPETING EVIDENCE, AS THE UNCONTROVERTED FACTS ESTABLISH THAT SCDOT, NOT PILOT, EXCLUSIVELY DECIDED TO RETAIN THE MEDIAN DESIGN.

Appellants have failed to establish that Pilot engaged in any activity that created the painted flush median. It is undisputed that a painted flush median has existed at this location long before the Pilot Travel Center was built on Pilot's property. (*E.g.,* R. p. 166, at ¶ 7). In fact, the pre-existing gas station at this location had three driveways with access to the Highway and motorists were able to make left hand turns into the property. [8] *Id*. Moreover, SCDOT testified that it made the decision to leave the painted flush median in place as part of the Widening Project and that this decision was made at the time the Widening Project plans were prepared in 1998. (Colvin Dep. 283:20-284:8, R. p. 407). Therefore, SCDOT's testimony establishes that the decision to keep the existing painted flush median in the Highway was made prior to Pilot acquiring the subject property in September 2001. (Colvin Dep. 283:20-284:8, R. p. 407; *see* R. p. 166, at ¶ 5). There is no evidence in the record that any decision regarding the type of median to place in this section of

[8] There was also a gas station on the opposite side of the highway prior to the Widening Project that had driveways that allowed motorists traveling northbound on the highway to make left turns into the property. (Colvin Dep. 278-279, R. p. 406).

the Highway occurred after Pilot acquired the subject property. The timeline of events itself makes it impossible for the Appellants to establish Pilot was responsible for the absence of a raised non-traversable median in the section of the Highway in front of its property.

Notwithstanding the above timeline, Appellants argue that Pilot is responsible for the absence of a non-traversable median in the Highway because it "negotiated" with SCDOT to remove a non-traversable median from SCDOT's plans.[9] As evidence of this, Appellants rely solely on unauthenticated handwritten notes on a letter dated August 28, 2000, from an SCDOT official to a representative of Marathon Ashland Petroleum, LLC. As an initial matter, this letter and the handwritten notes are hearsay, and thus, inadmissible for purposes of challenging Pilot's motion for summary judgment. *See Hall v. Fedor*, 349 S.C. 169, 175-76, 561 S.E.2d 654, 657 (Ct. App. 2002) ("materials used to support or refute a motion for summary judgment must be those which would be admissible in evidence."); *Hansen v. DHL Labs., Inc.*, 316 S.C. 505, 510, 450 S.E.2d 624, 627 (Ct. App. 1994), *aff'd*, 319 S.C. 79, 459 S.E.2d 850 (1995) ("A genuine issue of fact … can be created only by evidence which would be admissible at trial."). However, even if this document and the notes thereon were admissible, they do not evidence any "negotiation" between Pilot and SCDOT for several reasons. First, there is no evidence that the individual who allegedly wrote these notes was an employee or agent of Pilot. In fact, Pilot did not even acquire the subject property until September 2001. (R. p. 166, at ¶ 5). Second, SCDOT testified that the decision to keep a painted flush median in front of the Pilot Travel Center was made in 1998,

[9] SCDOT testified that the Widening Project plans never called for a non-traversable median in the Highway in front of the Pilot Travel Center. (*E.g.*, R. p. 221, lines 16-24; R. p. 222, lines 17-25). Therefore, it is a misrepresentation to state that such a median was ever removed from SCDOT's plans. (*See* Colvin Dep. R. p. 219, line 22-p. 220, line 5).

which is two years prior to the date of the letter on which the notes are written.[10] (*See* R. p. 675). Finally, SCDOT testified that it did not "negotiate" the removal of any median and that there was never any expectation that a non-traversable median would be placed in front of the Pilot. (R. p. 217, lines 4-12). Therefore, to the extent Appellants rely on this inadmissible letter to create an issue of fact as to whether Pilot owed them a duty, such reliance is misplaced; and Appellants cannot survive summary judgment based upon the argument that a jury could disbelieve the uncontroverted testimony of Mr. Colvin that no negotiations took place between Pilot and SCDOT concerning his decision to maintain the existing flush median design. *See Hoard v. Roper Hosp., Inc.*, 387 S.C. 539, 549, 694 S.E.2d 1, 6 (2010) ("One may not . . . avoid summary judgment by asserting that a jury may disbelieve uncontradicted evidence. . . . A plaintiff cannot create a genuine issue of material fact with the argument that the jury does not have to believe a witness.").

II. THE LOWER COURTS PROPERLY APPLIED *SKINNER* IN FINDING PILOT DID NOT OWE THE APPELLANTS A DUTY.

In *Skinner v. SCDOT*, this Court established when an abutting landowner may be liable for a highway condition. *See Skinner v. S. Carolina Dep't of Transp.*, 383 S.C. 520, 524-25, 681 S.E.2d 871, 874 (2009). In South Carolina, the "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 (emphasis added). That is precisely the rule of law applied by the Court of Appeals and the trial court. As both lower courts found, Appellants have not produced evidence that Pilot "created an artificial condition on Highway 17A," and even assuming *arguendo* a flush painted median could be an "artificial

[10] Even if for *arguendo*, the decision to use a flush median was made around the alleged date of the handwritten notes contained on the letter from SCDOT to the prior owner of the property, this date is still a year prior to Pilot acquiring the property. (*See id.*; R. p. 675).

condition" as stated in *Skinner*, the statutory duties and testimony of SCDOT establishes the median design is solely attributable to SCDOT, not Pilot. *Wright v. S.C. DOT*, 877 S.E.2d 788, 793 (Ct. App. 2022)

The trial court and Court of Appeals correctly recognized that SCDOT ultimately has the exclusive authority and control over the Highway, and that Pilot, as one of the property owners abutting the Highway, did not have a duty to maintain, repair or warn travelers of potentially dangerous conditions on the Highway over which it has no control.[11] (R. p. 8). These statutory responsibilities, combined with the absence of evidence that Pilot played any part in the median design, makes summary judgment appropriate. As both lower courts determined, the facts of the present case are very similar to those in *Allen v. Mellinger,* 156 Pa. Cmwlth. 113, 625 A.2d 1326 (1993). In *Allen*, 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[12], the *Allen* Court held

[11] 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 Associates*, 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 non-traversable 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)

[12] 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.

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.

Like the business owner in *Allen*, Pilot did not create a dangerous condition on the Highway. Even assuming *arguendo* the absence of a raised median was a dangerous condition, it was a condition on the Highway created by SCDOT. Medians are part of the highway[13] and subject to the control and authority of SCDOT; and the decision to install a painted median as opposed to a solid raised median on the 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. 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 the Highway, has no duty (or authority) to maintain, repair, or warn others of potentially dangerous conditions on the Highway over which it has no control.[14]

[13] S.C. Code 57-3-120 defines "highway" as including "the entire area within the right-of-way" and "all other facilities commonly considered component parts of highways."

[14] SCDOT acknowledged during its Rule 30(b)(6) depositions that it owns and has control of the Highway, 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. (R. p. 212, lines 14-25; R. p. 226, lines 12-14).

Despite the duty announced in *Skinner*, Appellants cite a compilation of cases for the proposition that an abutting landowner owes a duty in "any instance" where a hazard exists upon a highway "legally traceable to it." (Appellants' Petition p. 11). The two cases primarily relied upon by Appellants—*Shaw* and *Epps*—predate this Court's clarification in *Skinner* of the limited circumstance in which an abutting landowner may be liable for highway conditions.[15] Putting aside the factual impossibility that Pilot persuaded SCDOT to maintain a flush median (addressed *supra* § I), the notion that Pilot is somehow responsible for Speedway "'negotiat[ing]' a planned raised median out of the plans" as Appellants allege in their Petition, (Appellants' Petition p. 7), is not only unsupported by the record, it contravenes well-settled case law holding that 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 exclusive authority to establish design criteria, construction specifications, and standards required to construct and maintain highways and bridges.").

Lastly, Appellants seem to compare Pilot's position in this case to a highway contractor, rather than an adjacent property owner. (Appellants' Petition p. 12) But Pilot, unlike a roadway

[15] In *Epps*, a 1994 South Carolina District Court Order, the court attempted to anticipate what duty an abutting landowner may owe to maintain a public sidewalk under South Carolina law in the absence of precedent. *See Epps v. United States*, 862 F. Supp. 1460, 1465 (D.S.C. 1994) In *Shaw*, the Court of Appeals citied *Epps* for the proposition that an abutting landowner may have liability for hazards on a sidewalk where "a special property interest" exists, prompting the court to reverse a grant of summary judgment, because there was a factual dispute whether the complained of portion of the sidewalk was actually owned by the abutting property owner. *Shaw v. City of Charleston*, 351 S.C. 32, 43, 567 S.E.2d 530, 536 (Ct. App. 2002)

contractor, never had possession or control of Highway 17A. As an adjacent property owner, Pilot never took possession and control of the highway, as a roadway contractor would, to perform work. [16] The *Skinner* court took care to explicitly reject the notion that an abutting landowner has a duty of care similar to that of a roadway contractor who, unlike an abutting property owner, *does* have possession and control over roadways in the performance of roadwork. *See Skinner*, at 524-525, 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.")

III. THE LOWER COURTS DID NOT HOLD THAT SCDOT'S STATUTORY AUTHORITY ABSOLVED PILOT OF A DUTY, AS IT HELD PILOT OWED NO SUCH DUTY.

Appellants argue the Court of Appeals erred in concluding SCDOT's statutory responsibility over public ways absolves a private actor that "participates in creating a highway hazard." *Id*. Appellants misinterpret the Court's holding.

The Court of Appeals did not hold that SCDOT's statutory responsibility serves as a per se prohibition of a duty on Pilot. SCDOT's exclusive statutory authority and Appellants' inability to prove Pilot had any possession and control over Highway 17A and the median design warranted a finding of no duty. *Wright v. S.C. DOT*, 877 S.E.2d 788, 793 (Ct. App. 2022) ("[T]he Wrights failed to establish any private entity owed them a duty of care because neither Pilot nor Speedway

[16] For example, the South Carolina Supreme Court held in *Dorrell v. SCDOT* that a paving contractor owed a duty of care at common law to the traveling public where its paving work created a hazardous drop off that caused a car accident. *See Dorrell v. SCDOT*, 361 S.C. 312, 605 S.E.2d 12 (2004) Again, in *Sessions v. Dickerson, Inc.*, the Supreme Court held a contractor could be liable to a pedestrian who fell into an unguarded catch basin created by the contractor during a road widening project on Highway 501. *See Sessions v. Dickerson, Inc.*,265 S.C. 579, 220 S.E.2d 876 (1975)

possessed or controlled the highway; possession and control of highways lies with SCDOT.”))[17] Thus, the Court did not err by holding SCDOT’s statutory control and authority over 17A precludes liability on Pilot. SCDOT’s exclusive statutory authority, in addition to the absence of evidence that Pilot had possession and control over Highway 17A and the decision to install a flush median, warranted a finding of no duty. The same is true with respect to the driveways and SCDOT’s grant of encroachment permits. The Court of Appeals did not hold SCDOT’s statutory authority precluded liability on Pilot; instead, the Court of Appeals held “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.” *Wright*, 877 S.E. 2d. at 793-94. No such duty is supported under *Skinner*.

IV. THE COURT OF APPEALS PROPERLY DECLINED TO ADDRESS PROXIMATE CAUSE, AND NO NEGLIGENT ACT OR OMISSION ON THE PART OF PILOT PROXIMATELY CAUSED APPELLANTS’ INJURIES.

Appellants argue in their petition that the Court of Appeals’ decision declining to reach the merits of the proximate cause issue should be reviewed by this Court, because Pilot owes a duty. As set out above, Pilot owed Appellants no duty, and therefore, the Court of Appeals properly declined to reach proximate cause.

Nevertheless, Appellants contend there exists in the record “the required scintilla of evidence” to defeat summary judgment. However, Appellants cannot establish any act or omission on the part of Pilot proximately caused their injuries.

[17] The Court of Appeals cited to SCDOT’s sole control, as South Carolina courts have on prior occasion when there is no evidence an abutting landowner shares in that possession or control. *Dunbar v. Charleston & Western Carolina Railway Company,* 211 S.C. 209, 44 S.E.2d 314 (1947) (“[W]e come back to the fact that here we have a collision . . . at a junction of two highways which were located by public authorities *over which such authorities had and now have sole control*. The railroad company having no control or discretion in the location, construction or maintenance thereof, it is difficult to see how a collision occurring at this intersection of two highways is to be treated differently from one occurring at the intersections of any other two highways.”))

> 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. For an intervening act to break the causal link and insulate the tortfeasor from further liability, the intervening act must be unforeseeable. 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.

McKnight v. S. Carolina Dep't of Corr., 385 S.C. 380, 387, 684 S.E.2d 566, 569 (Ct. App. 2009).

Here, there is no evidence that any act or omission of Pilot proximately caused Appellants' 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. (R. p. 189, line 21-p. 190, line 4). According to Sena, the fact that there was no solid raised median in the Highway does not negate the fact that it was his actions that led to the collision with Appellants. (R. p. 191, line 22-p. 192, line 6). Sena testified that his failure to yield "was just bad judgment." (R. p. 188, lines 21-23). Even Appellant Cynthia Wright acknowledged that she could not say whether the presence of a raised non-traversable median would have prevented the accident. (R. p. 243, lines 10-13). According to Cynthia Wright, she believes Sena "was determined to go to McDonald's regardless . . .." (R. p. 243, lines 2-3). Cynthia Wright also testified that Sena bears responsibility for hitting her and her husband. (R. p. 241, lines 17-20)

Moreover, Sena admitted that he was under the influence of alcohol and cocaine at the time of the accident. (R. p. 193, lines 20-24). Thus, even if there was some causal connection between some alleged negligent act or omission on the part of Pilot, both of which are adamantly denied, Sena's decision to drive under the influence of alcohol and cocaine and to fail to yield to oncoming traffic was an intervening act and the proximate cause of the Appellants' accident. *See Stephens v. CSX Transp., Inc.*, 415 S.C. 182, 204, 781 S.E.2d 534, 546 (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); *Ziemba v. Mierzwa*, 142 Ill. 2d 42, 52-53, 566 N.E.2d 1365, 1369 (1991) (holding at-fault driver's violation of his own statutory duty by failing to yield to oncoming traffic was not reasonably foreseeable).

Moreover, as has been discussed above, to the extent Plaintiffs allege that the failure to install a raised median proximately caused the accident, such a 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. The same is true with respect to the location of Pilot's driveway.

CONCLUSION

For the reasons discussed above, as well as for any other ground appearing on the record, Respondent Pilot Travel Centers, LLC respectfully requests this Court deny Appellants' Petition.

Respectfully submitted,

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