THE STATE OF SOUTH CAROLINA
In the Supreme Court

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S.C. 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.: 2022-001489
Ct. App. Opinion No. 5921 (filed July 6, 2022)

Cynthia Wright and Richard Wright, Petitioners

v.

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

Of whom 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. are the Respondents.

RESPONDENT SOUTH CAROLINA DEPARTMENT OF TRANSPORTATION'S RETURN TO PETITIONER'S PETITION FOR WRIT OF CERTIORARI

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RESPONDENT SCDOT'S COUNTER-STATEMENT OF THE CASE

This appeal stems from a motorcycle/motor vehicle collision that occurred on October 6, 2012, while the Petitioners were traveling North on Highway U.S. 17A in Summerville, SC. Petitioner Richard Wright was driving the motorcycle and his wife, Petitioner Cynthia Wright was riding as a passenger. The accident occurred when the driver of a pick-up truck traveling southbound on U.S. 17A failed to yield to oncoming traffic and attempted to turn left into a Pilot Travel Center. The Plaintiffs' motorcycle struck the side of the pick-up truck causing the Plaintiffs' injuries. The police determined that the driver of the pick-up truck had a blood alcohol level of .12 and also had cocaine in his system.

Following the accident, on March 28, 2014, Petitioners filed suit against the South Carolina Department of Transportation, ("SCDOT"), Pilot Travel Centers, (Pilot), and C&A Unlimited.[1] The Petitioners field a separate action on February 9, 2016, against Marathon Petroleum Company, LP, f/k/a Marathon Ashland Petroleum, LLC, Ashley Land Surveying, Inc., f/k/a Ashley Engineering & Surveying, Inc., and Mulake Contractors. The two cases were consolidated.

On May 6, 2017, Pilot filed a motion for summary judgment. On May 4, 2017, the Honorable Roger M. Young issued an order granting Pilot's motion for summary judgment on the basis that Pilot did not owe a duty to Petitioners.

On May 2, 3, and 9, 2017, Speedway, SCDOT and Ashley Land Surveying, respectively, filed motions for summary judgment. Following a hearing, the Honorable Kristi L. Harrington granted the motions. On the Form 4 Order issued June 17, 2017, Judge Harrington held that the South Carolina Tort Claims Act barred Petitioners' suit against SCDOT. With regard to

[1] C&A Unlimited, Inc., was dismissed by stipulation on May, 2014.

Speedway and Ashley Land Surveying, Judge Harrington held there was no duty or proximate cause.

On July 19, 2017, the Petitioners served and filed a Notice of Appeal. After a full briefing, the Court of Appeals heard oral arguments on May 27, 2020. On July 6, 2022, the Court of Appeals issued a unanimous opinion affirming the rulings below. Specifically, the Court of Appeals held that SCDOT was entitled to immunity pursuant to S.C. Code Ann. § 15-78-60 *et al* and that Pilot, Speedway and Ashley Surveying owed no duty of care to the Petitioners. The Petitioners then filed a petition for rehearing which was also unanimously denied by the Court of Appeals on September 23, 2022.

On October 21, 2022, Petitioners filed a Petition for a Writ of Certiorari to the Supreme Court. However, as Petitioners do not set forth any "special and important reasons" as required by Rule 242(b), SCACR, SCDOT respectfully requests that the Court deny the petition.

STANDARD OF REVIEW

"A writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons." Rule 242(b), SCACR. Generally, the Court reviews the following factors when determining whether to exercise its discretion: (1) Where there are novel questions of law; (2) Where there is a dissent in the decision of the Court of Appeals; (3) Where the decision of the Court of Appeals is in conflict with a prior decision of the Supreme Court; (4) Where substantial constitutional issues are directly involved; (5) Where a federal question is included and the decision of the Court of Appeals conflicts with a decision of the United States Supreme Court.

In the present case, none of the factors are present. Accordingly, SCDOT respectfully requests that the Court deny the Petition for a Writ of Certiorari to the Court of Appeals.

COUNTERSTATEMENT OF THE FACTS

As stated above, this case stems from a motorcycle/motor vehicle accident that occurred on October 6, 2012, in Summerville, South Carolina. Petitioners were traveling North on Highway U.S. 17A on a motorcycle. Petitioner Richard Wright was driving and his wife, Petitioner Cynthia Wright, was a passenger. The accident occurred when a pick-up truck that had been traveling in the southbound lane of U.S. 17A failed to yield to oncoming traffic and attempted to turn left into the Pilot Travel Center. The Petitioners' motorcycle struck the side of the pick-up truck causing Petitioners' injuries. The police determined that at the time of the accident, the driver of the pick-up truck had a blood alcohol level of .12 and had cocaine in his system[2]. 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. (App.318, lines 7-24).

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 who admits his actions where the cause of Petitioners' injuries, Petitioners contend that the accident would not have occurred had the SCDOT designed and built a raised concrete median as part of the U.S. 17A improvement projects that were completed in 2002 and 2003, that would have prevented motorists from making left-hand turns into the Pilot Travel Center. Petitioners further contend that the location and design of Pilot's entrances caused the Petitioners' accident.

The area where the accident occurred underwent two SCDOT projects during the late 1990s and early 2000s. SCDOT widened the intersection of U.S. 17A in front of the Pilot Travel

[2] For purposes of this response, the counterstatement of facts has been abbreviated. For a full recitation of the facts, SCDOT refers to its final brief to the Court of Appeals.

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. (App.p.339, lines 7-9)

Before either of the SCDOT 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 U.S. 17A, and there was no raised concrete median preventing left turns into the existing gas station. (App.p.344, lines 1-10). In fact, there has never been a raised median preventing left hand turns into that location. (App.p.344, lines 11-15). In 2001, Pilot acquired the existing gas station, redeveloped the property, and constructed the current Pilot Travel Center. (App.p.242-243)

Leland Colvin is currently the Deputy Secretary of Engineering for SCDOT, and at the time was the project manager for both the Interchange Project and the Widening Project. (App. p. 326, line 23 - p. 327, line 9). 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. (App. p. 341, line 2 - p. 342, line 16). 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. (App. p. 342, line 23 - p. 343, line 3). 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. (App. p. 342, line 23 -p. 343, line 16). Mr. Colvin testified that the SCDOT Highway Design Manual is "the Bible" for design projects in the State of South Carolina. (App. p. 343, lines 17-20).

As previously stated, 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. (App. p. 344, line 22 - p. 345, line 13). 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 together. (App. p. 333, lines 6-24). 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 were corrected to accurately reflect the Highway Design Manual. (App. p. 335, lines 14-24). Again, Mr. Colvin testified numerous times that there has never been a raised median preventing left-hand turns at the portion of U.S. 17A in front of the Travel Center nor was a raised median ever considered because doing so would have violated the SCDOT Highway Design Manual. (App. p. 343, lines 4-20).

With regard to the driveways which provide ingress and egress to the Pilot Travel Center, Mr. Colvin stated that there were three existing driveways providing ingress and egress to the property before Pilot redeveloped the property to construct the Travel Center. (App. p. 344, lines 1-6). In order to construct the driveways to the Travel Center, Pilot had to submit an encroachment permit application to SCDOT. Mr. Colvin testified that SCDOT has to approve encroachments on to the DOT right-of-way and that when reviewing an encroachment permit application, SCDOT considers safety and how the access to the private property affects traffic and the general operation of the highway. (App. p. 330, lines 16-19).

Robert Clark, a District 6 Engineering Administrator with the SCDOT, testified that when SCDOT employees review an encroachment permit for access to the roadway, they use their 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. (App. p. 350, lines 3-20). SCDOT also uses its manuals and design criteria. (App. p. 351, line 8 - p. 352, line 6). Mr. Clark testified that it is impossible for all encroachments to be in exact conformance with the design manuals. He 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 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." (App. p. 354, line 13 - p. 355, line 2).

Mr. Clark testified that the ARMS manual is just one of several different sources or resources that SCDOT uses when evaluating an encroachment permit for access to the roadway:

> 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 have got to have a certain amount of sight distances 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 look like it is in substantial conformity with – with what our rules are.

(App. p. 351, line 16 - p. 352, line 6).

When specifically asked regarding the distances 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 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 of those factors together to make that determination." (App. p. 353, lines 11-20).

The evidence in the record establishes that SCDOT exercised its discretion with regard to its decisions regarding the use of a flush median and the granting of the encroachment permits. Moreover, there is no evidence in the record that SCDOT had any notice, constructive or actual, that the location at issue was a "hazardous condition" as alleged by Petitioners. The Court of Appeals property held that SCDOT is entitled to immunity pursuant to the South Carolina Tort Claims Act, and accordingly, this Court should deny the Petition for a Writ of Certiorari to the Court of Appeals.

I. The Court of Appeals Properly Held that SCDOT is Entitled to Immunity pursuant to S.C. Code Ann. § 15-78-60(5) and (15).

The South Carolina Tort Claims Act governs all tort claims against governmental entities. It is the exclusive civil remedy for any tort committed by a governmental entity or its employees or agents. S.C. Code Ann. § 15-78-20(b). Section 15-78-60 sets out forty "exceptions" to this waiver of sovereign immunity which significantly limit the tort liability of governmental entities, and those limitations and exemptions must be liberally construed in favor of limiting liability of the State. S.C. Code Ann. § 15-78-20(f).

The sections most applicable to the case at hand and relied upon by the Court of Appeals are S.C. Code Ann. § 15-78-60(5) and (15). S.C. Code Ann. §15-78-60(5), is the "discretionary immunity" section and provides that a governmental entity is not liable for a loss resulting from, "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." Likewise, Section (15), which is known as the design immunity section, also provides in pertinent part, that a government entity is not liable for the:

> (15) absence, condition, or malfunction of any sigh, sign, 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, waring devices, guardrails, or median barriers referred to in this time are those used in connections with hazards normally connected with the sue of public ways and do not apply to the duty to warn of special conditions such as excavations, dredging, or public way construction....

As written, the South Carolina Tort Claims Act, specifically provides immunity to governmental entities with regard to any loss caused by the absence of a median or lack of a median in the initial design or any loss arising from a defect or condition on any public way unless, after notice, the defect is not corrected within a reasonable amount of time. S.C. Code 15-78-60(15). Discretionary immunity, based on the sections also cited above is contingent on proof the governmental 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, 511 S.E.2d 355, 357 (Sup. Ct. 1999).

A. The Court Properly Applied South Carolina Code Ann. § 15-78-60(15) with Regard to the Decision to Install a Flush Median.

For the first time in their Petition for Rehearing, Petitioners made the argument that the evidence in the record does not establish that the flush "median placement was decision was a discretionary act of SCDOT." They contend that *Wooten v. S.C Dept. of Transp.*, 333 S.C. 464, 511 S.E.2d 355 (Sup. Ct. 1999) required the Court to apply "section 15-78-60's limited

discretionary liability for initial placement decisions not the broader design immunity" referenced in the section. (Petition for Rehearing p.9). Petitioners repeat this argument in their Petitioner for Certiorari. However, Petitioners, never presented this argument to the circuit court or the Court of Appeals. Previously, they took the position that "while decisions regarding medians are generally immune, SCDOT can face liability when a defective median is not corrected 'within a reasonable time after actual or constructive notice." (App p.1035-1036). As the argument regarding whether the median placement was a discretionary act has not previously been raised, it is not properly before the Court. *See Kennedy v. S.C. Ret. Sys.*, 349 S.C. 531, 564 S.E.2d 322 (2001) ("The appellants have the responsibility to identify errors on appeal, not the Court. South Carolina cases clearly hold that one cannot present and try a case on one theory and then attack the result below by presenting another theory on appeal.").

To the extent the Court considers this argument, SCDOT has always taken the position that the decision to install the flush median was within the discretion of the SCDOT. Accordingly, the record is replete with evidence to support the holding that the decision that SCDOT is intitled to immunity pursuant to S.C. Code Ann. § 15-78-60(15) based upon the provisions contained therein.

Discretionary immunity is contingent on proof the governmental 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, 511 S.E.2d 355, 357 (Sup. Ct. 1999).

Mr. Leland Colvin, the Deputy Secretary of Engineering for SCDOT and the project manager for both the Interchange Projected and the Widening Project of 17A, testified at length regarding the considerations and the evolution of the engineering decision to install a flush

median. Mr. Colvin stated that a raised median was never planned for the project, but rather was a "placeholder" put in by the outside design professional working on another project. (App. p. 1156; p.345, lines 2-14). He further testified that it was his job as program manager to "marry" the two set of plans together to come up with a final design. (App. p. 1156; p.335, lines 14-24). Additionally, Mr. Colvin testified that when making the decision on how to "marry" the two plans together, a raised mediation was not an option for the location at issue in this case because such a median would not have been compliant with the SCDOT Highway Design Manual, which is considered the "Bible" for design projects in South Carolina. (App. p. 1157; p.343, lines 4-20).

Further, as discussed in the Court of Appeals' opinion, Mr. Colvin was questioned by Petitioners regarding his decision to install the flush two-way flat median instead of a raised, non-traversable median with regard to the guidelines contained in SCDOT's 2008 ARMS manual and the South Carolina Department of Transportation Highway Design Manual. This testimony established that the tables in the ARMS manual showed that a "continuous two-way left turn lane, which is what we have . . . 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 non-traversable median as noted in this table." (App. p. 11-12). Further, when questioned about whether there was anything that prohibited SCDOT from installing a raised median, Mr. Colvin testified that such a median would have been outside the Highway Design Manual guidelines and in conflict with the Highway Design Manual. (App. p. 12-13).

Appellants' new "discretionary act argument," is a merely guise to again advance the theory that the decision to install the flush median was not in the sole discretion of SCDOT but rather based on "negotiations" with Pilot and/or other private entities based on handwritten notes, dated August 28, 2000. Mr. Colvin's testimony in the record establishes and the Court of

Appeals Opinion reflects that there were no negotiations regarding the flush median and that the decision was within the sole discretion of the SCDOT. (App. p.267, line 7-p.268, line 1; p.453; p.1155-1156).

The Court of Appeals properly held, "the record established the decision to implement a flush median as opposed to a raised median remained an SCDOT engineering decision." Further, as recognized by the Court, "the decision to use a flush median in [Mr. Colvin's] 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.'" (App. p.6).

B. The Court Properly Held that SCDOT'S Approval of the Encroachment Permit was a Discretionary Act and therefore, SCDOT was entitled to Immunity Pursuant to South Carolina Code Ann. § 15-78-60(5).

Petitioners also argue that SCDOT's approval of the encroachment permit was not a discretionary act because the driveways were not in strict conformance with the ARMS manual. The Court of Appeals properly rejected this argument as well.

As previously stated, to establish discretionary immunity, the governmental entity must prove the governmental employees, faced with alternatives, actually weighed competing considerations and made a conscious choice. *Pike v. SCDOT*, 343 S.C. 224, 540 S.E.2d 87 (2000), see also *Wooten v. South Carolina DOT*, 333 S.C. 464, 511 S.E.2d 355, 357 (1999) (Discretionary immunity is contingent on proof the governmental entity, faced with alternatives, actually weighed competing considerations and made a conscious choice using accepted professional standards.).

The record establishes that with regard to the driveway, Mr. Colvin stated that there were three existing driveways providing ingress and egress to the property before Pilot redeveloped

the property to construct the Travel Center. (App. p.344, lines 1-6). In order to construct the driveways to the Travel Center, Pilot had to submit an encroachment permit application to SCDOT. Mr. Colvin testified that SCDOT has to approve encroachments on to the DOT right-of-way and that when reviewing an encroachment permit application, SCDOT considers safety and how the access to the private property affects traffic and the general operation of the highway. (App. p. 330, lines 1-25).

Robert Clark, a District 6 Engineering Administrator with the SCDOT, testified that when SCDOT employees review an encroachment permit for access to the roadway, they use their 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. (App. p. 350, lines 3-20). SCDOT also uses its manuals and design criteria. (App. p. 351, line 8 - p. 352, line 6). As cited above, Mr. Clark testified that it is impossible for all encroachments to be in exact conformance with the design manuals unless you are starting a development with a "clean slate." However, when you have properties that have been in existence for many years, "you're trying to do the best you can to create an efficient, effective and safe interface with the road system. (App. p. 354, line 13 - p. 355, line 2).

Mr. Clark further testified that the ARMS manual is just one of several different sources or resources that SCDOT uses when evaluating an encroachment permit for access to the roadway and that SCDOT has to use its engineering judgement. (App. p. 351, line 16 - p. 352, line 6). When specifically asked regarding the distances 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, that distances in the manual are suggestions and that

you have to look at different factors at the site such as the traffic and traffic circulation to make a determination. (App. p. 353, lines 11-20)

The Court of Appeals properly held that SCDOT employees "weighed competing considerations and made a conscious choice in granting the encroachment permit. . . ." It recognized that numerous factors are considered by SCDOT other than the ARMS manual when reviewing encroachment permits, and that the ARMS maula allows for exceptions to the guidelines. (App. p.15-16). The Court also properly recognized that that even though allowing Pilot to have three driveways did not fall into the general guidelines of the ARMS manual, SCDOT considered other factors such as circulation, keeping semi-trucks and automobiles separate, and the site plan in general. (App. p.15-16).

The Court of Appeals also properly determined that neither of Appellants' expert affidavits were appliable to the discretionary immunity analysis of SCDOT as both affidavits address the alleged violations of Pilot, not SCDOT. The Court of Appeals held in pertinent part, "Both affidavits address industry standards *Pilot* allegedly ignored; they do not address the obligations and competing considerations SCDOT must address with providing private property owners access to a public roadway. . . . 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 the 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)." (App. p.16, nt.12).

The record establishes that the Court of Appeals properly held that SCDOT weighed competing considerations when reviewing the encroachment permit for the driveways and the

decision to grant the encroachment permit was a discretionary act as contemplated by S.C. Code Ann. § 15-78-60(5).

C. The Court of Appeals Properly Held there was No Evidence that SCDOT had Notice that the Intersection at issue was a "Hazardous Condition."

Petitioners' argument regarding whether SCDOT had actual or constructive notice and of what alleged defect, (the flush median, the driveways, or broadly, "the intersection"), has changed throughout this appeal. Accordingly, SCDOT refers to its Brief to the Court of Appeals, and its Response to the Petition for Rehearing for a full discussion. In fact, at oral argument and as recognized in the Court of Appeal's Opinion, Petitioner's agreed that constructive notice, not actual notice is the theory upon which they base their claims. (App. p. 13).

In their Petition for Certiorari, Petitioners seemingly argue that the Court of Appeals misapplied the definition of 'constructive notice" because the Court of Appeals should not have focused "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." (Petition for Certiorari to the Court of Appeals, p.16). However, this assertion does not change the fact that Petitioners presented no evidence that SCDOT had any notice of a hazardous condition at the intersection prior to the Petitioner's accident that would have triggered a duty to take further action.

First, the Petitioners rely on a traffic study of the area of the accident that was completed by the Department of Public Safety. However, these traffic studies are inadmissible pursuant to 23 U.S.C.A §409. Second, as recognized by the Court of Appeals, the traffic study was done in October of 2013, approximately a year after the Appellants' accident. Therefore, it is inapplicable to the analysis of whether SCDOT was on notice of a hazardous condition at the time or prior to the accident at issue. Additionally, accepting Appellant's argument that SCDOT

was negligent because it did not conduct a traffic study of the area in the ten years since the completion of the Interchange and Widening Project even though the intersection is highly traveled creates an impossible standard. It simply is not possible for SCDOT to monitor and study all highly traveled intersections in the State. Moreover, Appellants do not cite to any regulation, mandate or statute requiring SCDOT to conduct traffic studies within a certain time period.

The Petitioners also cite to "expert testimony" on page 749 of the Appendix, "notes from a SCDOT representative" on page 449 of the Appendix, and "a database listing a large number of collisions in the area on pages 442-423, and 838-869. (Petition for a Writ of Certiorari, p.17). None have any bearing on whether SCDOT had notice of any hazardous condition.

The expert "testimony" is actually the affidavit of their expert Richard M. Balgowan which as discussed above, addresses the liability of Pilot not SCDOT. With regard to the "notes of a SCDOT representative," this reference is actually to the deposition testimony of SCDOT's Leland Colvin in which he testifying regarding a diagram with notes from a person other than himself dated August 2000, prior to the issuance of the encroachment permits. Initially, it should be noted that this testimony has never been referenced in this appeal by Petitioners previously. Further, the actual exhibit from Mr. Colvin's deposition is not in the Appendix. Accordingly, it should not be considered by the Court.

Nonetheless, a full reading of the deposition transcript in the Appendix reveals that when handed the exhibit, which was marked as Exhibit Number 13 to his deposition, Mr. Colvin testified that they were not his own and that he "believe[d] these are Mr. Smoak's notes –notes referring to the ingress and egress into and out of the gas station/convenience stores." (App.p.449, deposition page 246, line 3-p.248, line 25). Further, when asked by Petitioners'

counsel if the alleged "inadequate radii" in Exhibit 13 were approved, Mr. Colvin testified as follows,

> Q: So, you—you're going to infer that the radii that are shown in Exhibit 13 were ultimately approved?
>
> A: No. I would say just the opposite of that.

(App.p.450, deposition page 250, lines 2-12). Finally, "database listing a large number of collisions" referred to by Petitioners is actually "information that [Petitioners'] counsel acquired . . . from the South Carolina Department of Public Safety" not information in the possession of SCDOT. (See Appellants' final brief, App.pp.1027-28).

None of Petitioners' assertions are sufficient to establish that SCDOT had constructive notice of any hazardous condition. Accordingly, the Court of Appeals properly rejected the argument.

CONCLUSION

Petitioners have not presented any "special reasons" as required by Rule 242(b), to warrant the issuance of a writ of certiorari. Based on the reasons above, SCDOT respectfully requests that the Court deny the Petition.

Respectfully Submitted,

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Charleston, South Carolina