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SC Court of Appeals

STATE OF SOUTH CAROLINA	IN THE COURT OF COMMON PLEAS
COUNTY OF PICKENS	FOR THE THIRTEENTH JUDICIAL CIRCUIT
Michael and Mary Smith, Plaintiffs, v. King Asphalt Inc., Defendant.	C/A No. 2021-CP-39-00329 **ORDER GRANTING DEFENDANT KING ASPHALT, INC.'S MOTION FOR SUMMARY JUDGMENT AND DENYING PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT**

This matter came before the court on the defendant King Asphalt, Inc.'s motion for summary judgment and the plaintiffs Michael and Mary Smith's cross-motion for summary judgment. Present and representing the parties at the hearing held on January 27, 2025, were Catharine Garbee Griffin of Baker, Ravenel & Bender, LLP, for the defendant, and the plaintiff Michael Smith, *pro se*. The plaintiff Mary Smith did not appear at the hearing despite proper notice.

Having considered the record, the applicable law, and arguments made both in the parties' memoranda and at the hearing, this court grants King Asphalt's motion for summary judgment and denies the plaintiffs' cross-motion.

BACKGROUND

The plaintiffs, Michael and Mary Smith ("Plaintiffs" or "the Smiths"), initiated this action to recover damages for injuries they sustained in an accident that occurred on March 22, 2019, on Highway 8, Gentry Memorial Highway, near Pickens, South Carolina, when a moped on which they traveled collided with a car driven by Themistoklis Economou. The collision occurred in the area of the highway that was being repaved. For this reason, in addition to Economou, the Smiths

sued the South Carolina Department of Transportation ("SCDOT") and its milling and paving contractor, King Asphalt, Inc. The Smiths have since voluntarily dismissed SCDOT and, having reached a settlement, dismissed their claims against Economou with prejudice, thus leaving King Asphalt as the only defendant.

In their complaint, the Smiths asserted causes of action of negligence and recklessness, alleging that King Asphalt failed, among other things, to have proper signage alerting motorists to the upcoming road conditions; to utilize only one lane until the crew completed the scheduled work for the day; and to comply with the guidelines set by SCDOT for Work Zone Traffic Control. (Comp. ¶ 22). They further alleged that King Asphalt removed the orange cones separating the two lanes and a worker who picked up the cones caused and contributed "to confusion in the flow of traffic, when a better/safer methodology was available." (Compl. ¶ 11.) According to the complaint, King Asphalt was negligent because it had a duty "to use due care with the use of proper signage to alert drivers to the upcoming road construction, for drivers to reduce their speed, and for drivers to be prepared to stop to avoid injuries to both motorists and road crew." (Compl. ¶ 19.)

King Asphalt moved for summary judgment because the Smiths have not retained an expert who could testify as to standards of care applicable to King Asphalt and to King Asphalt's alleged failure to adhere to them when performing its scope of work under contract with SCDOT. The Smiths, on the other hand, cross-moved for summary judgment, presenting in their brief a highly technical argument whereby, through calculations and analysis of data contained in the documents produced in discovery, they attempt to prove King Asphalt's failure to adhere to SCDOT-mandated requirements and establish its negligence *per se.*

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APPLICABLE LEGAL STANDARD

Under Rule 56 of the South Carolina Rules of Civil Procedure, the judgment sought by the moving party "shall be rendered forthwith if 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. "The plain language of Rule 56(c), SCRCP, mandates the entry of summary judgment, after adequate time for discovery and upon motion, 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 at trial." *Etheredge v. Richland School Dist. I*, 330 S.C. 447, 453, 499 S.E.2d 238 (Ct. App. 1998).

"In ruling on a motion for summary judgment, the evidence and the inferences which can be drawn therefrom should be viewed in the light most favorable to the nonmoving party." *Gilmer v. Martin*, 323 S.C. 154, 156, 473 S.E.2d 812, 813 (Ct. App. 1996). It is not sufficient, however, that a nonmoving party creates an inference that is not reasonable or raises an issue of fact that is not genuine. *Evans v. Stewart*, 370 S.C. 522, 636 S.E.2d 632, 635 (Ct. App. 2006). A "party opposing summary judgment 'cannot create a genuine issue of material fact through mere speculation or the building of one inference upon another.'" *Gibson v. Epting*, 426 S.C. 346, 353, 827 S.E.2d 178, 182 (Ct. App. 2019) (quoting *Beale v. Hardy,* 769 F.2d 213, 214 (4th Cir. 1985)).

"The purpose of summary judgment is to expedite disposition of cases which do not require the services of a fact finder. In that way, a motion for summary judgment is akin to a motion for a directed verdict because in each instance, one party must lose as a matter of law." *George v. Fabri*, 345 S.C. 440, 452, 548 S.E.2d 868 (2001) (internal citations and quotation marks omitted).

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FACTS

Based on the testimonial and documentary evidence in the record, the court finds the following material facts to be established beyond genuine issue:

In late March 2019, King Asphalt performed road construction work on Highway 8, Gentry Memorial Highway, a four-lane road in Pickens County, South Carolina, under a contract with SCDOT. The contract called for full depth patching of certain areas, the removal of two inches of existing asphalt, and its replacement with a new asphalt surface. Before the work began on the project, King Asphalt installed permanent signs for the work site, which signs were approved by SCDOT and were installed in accordance with SCDOT's Primary Route Daytime Lane Closure Drawing. These permanent construction signs stayed in place until SCDOT conducted its final inspection of the project. In addition to the permanent signs, SCDOT required installation of temporary traffic control devices when a lane closure was necessary.

The Highway 8 project had been ongoing for some time before March 22, 2019, when the Smiths' accident occurred. By then, King Asphalt had already milled both eastbound lanes and began to repave them. The work progressed in sections, lane by lane—only after a section of one lane was completed, which would usually take more than a day, depending on the length of the section being paved, the work on the adjacent lane would begin: the asphalt mix was put into a paving machine, which laid the asphalt down at a specified controlled rate. The lane's surface was then compacted with a roller, in accordance with SCDOT guidelines, to achieve thickness of two inches. The work in the area where the collision took place had been finished, inspected, and accepted by SCDOT, which had documented daily both the quality of the asphalt, its level of compaction, and the ultimate thickness. The grade elevation difference between the paved lane and the unpaved lane was either two inches or less, as required by SCDOT and verified by its inspector.

On March 22, 2019, King Asphalt's crew installed new asphalt on the outside lane of Highway 8, eastbound, in the vicinity of Old Easley Pickens Highway. The inside lane had been milled and was in that condition at the time. To lay the new asphalt in the designated outside lane and to allow the traffic to flow unimpeded in the inside lane, King Asphalt closed the outside lane, in accordance with SCDOT standards and specifications, by placing cones at the beginning of the closed section, tapering the closing of the outside lane to direct the live traffic to the inside one. Beyond the taper closing the outside lane, King Asphalt placed cones every 50 feet throughout the work zone. When the work was finished for the day, the temporary signs and the cones delineating the lanes were removed. King Asphalt would open the closed lane by picking up the cones in reverse order, starting from the end of the closed section and proceeding toward the taper marking the beginning of the closure. The section of the highway that was subject to the temporary lane closure was thus becoming shorter with removal of each cone. Once a cone was removed, the outside lane beyond that point would become immediately available to the motorists.

Michael Smith had been aware of the repaving project and the temporary lane closures on Highway 8 for several months preceding the accident: they were "peeling up the asphalt and putting new fresh asphalt down." (Smith Dep. 104:6–7.) On March 22, 2019, he and his wife, riding a moped, attempted to cross Highway 8 from its northern side and then join the eastbound traffic and proceed onto Old Easley Pickens Highway. Beforehand, Michael Smith had observed a King Asphalt's truck picking up the cones. After traversing the westbound lanes and the paved median, they entered the eastbound inside lane. Fully aware of the grade differential between the milled inside lane and the newly paved outside lane, Smith brought his moped to a complete stop before entering the outside lane at a right angle. At that moment, Economou was travelling in the

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outside lane. His vehicle and the Smiths' moped collided when the Smiths entered the outside lane in front of Economou.

DISCUSSION

Under South Carolina law, to prove negligence and recover damages, one must establish (1) a duty of care owed by the defendant; (2) a breach of that duty; and (3) damage proximately resulting from the breach. *Charleston Dry Cleaners & Laundry, Inc. v. Zurich Am. Ins. Co.*, 355 S.C. 614, 618, 586 S.E.2d 586, 588 (2013). While the existence of a duty of care is an issue of law, the existence of the remaining elements of the negligence cause of action is a factual matter—each one of them needs to be proven by preponderance of admissible evidence. *See Nelson v. Piggly Wiggly Cent., Inc.,* 390 S.C. 382, 391, 701 S.E.2d 776, 780–781 (S.C. App. 2010). This court finds, as a matter of law, that the Smiths cannot carry this burden absent assistance of an expert witness.

The Smiths' case is predicated on King Asphalt's alleged failure to adhere to the South Carolina Department of Transportation's work zone traffic control guidelines. In their brief, the Smiths specifically state that King Asphalt failed "to comply with . . . Division 600 Regulations, SCDOT Standard Specifications for Highway Construction and contract-specific provisions." The evidence in the record shows, however, that King Asphalt followed SCODT's guidelines and complied with the applicable standards and regulations.

According to the testimony of Douglas Limbaugh, the designated representative of King Asphalt, the two mile section of Highway 8 in question was repaved in accordance with the SCDOT standards and accepted by SCDOT: the entire section was first milled to the depth of two inches and then, on March 22, 2019, the paving machine laid a layer of asphalt that was ultimately two inches thick. (Limbaugh Dep. 15:2–9, 22:22–24:14.) Limbaugh further testified that the grade elevation between the unpaved lane and the paved lane did not exceed two inches, as required by

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SCDOT, and confirmed by SCDOT's inspector who was present on site at all times. (Limbaugh Dep. 44:5–24.) According to Limbaugh, the lane was reopened by "picking up cones and removing the apparatus that delineates the closed lane and the open lane from the end of the project and back towards the beginning," (Limbaugh Dep. 34:1–8) which is an SCDOT-prescribed manner of reopening a lane closure as attested to by Joshua Makinson, SCDOT's district construction engineer. (Makinson Dep. 18:1–10.)

According to the Smiths, King Asphalt's liability hinges on the allegedly premature removal of traffic control cones, which removal in turn can be judged as premature only by reference to the grade differential between the lanes. In opposing King Asphalt's motion and supporting theirs, the Smiths claim that the differential was equal to 2.16 inches. They have arrived at that figure not by a measurement in the area where the accident occurred, which Michael Smith admitted at the hearing neither he nor his wife took, but through an elaborate calculation based on the figures found in the Daily Report of Asphalt Roadway Inspection (SCDOT Form 400.04) for March 22, 2019, and the SCDOT paving standard.

Note here that "evidence of industry safety standards is relevant to establishing the standard of care in a negligence case." *Elledge v. Richland/Lexington Sch. Dist. Five*, 352 S.C. 179, 186, 573 S.E.2d 789, 793 (2002) (citations omitted). And the evidence of such standards is generally offered "in connection with expert testimony which identifies it as illustrative evidence of safety practices or rules generally prevailing in the industry, and as such it provides support for the opinion of the expert concerning the proper standard of care." *Id.* at 188, 573 S.E.2d at 794 (citing *McComish v. DeSoi*, 42 N.J. 274, 200 A.2d 116, 121 (N.J. 1964)).

Under South Carolina Rules of Evidence, "[i]f scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a

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witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise." Rule 702, SCRE. Expert testimony becomes absolutely necessary, however, "in cases in which the subject matter falls outside the realm of ordinary lay knowledge. Stated differently, expert evidence is required where a factual issue must be resolved with scientific, technical, or any other specialized knowledge." *Watson v. Ford Motor Co.,* 389 S.C. 434, 445, 699 S.E.2d 169, 175 (2010). Unlike a lay witness, who may testify only as to matters within his or her personal knowledge and may not offer opinion that requires special knowledge, skill, experience, or training, an expert witness is permitted to state an opinion based on facts not within his or her firsthand knowledge. *Id.* at 446, 699 S.E.2d at 175.

This court finds that paving industry standards, the manner in which a work zone is to be marked and secured by a road-paving contractor, and the applicable rules, regulations and specifications are not matters familiar to an average juror. The testimony of King Asphalt and SCDOT witnesses and the complexity of Plaintiffs' proof, which their submission to the court in and of itself clearly demonstrates, indicate necessity of expert testimony. The Smiths need an expert because, in the words of the United States Court of Appeals for the Fourth Circuit in *Kale v. Douthitt*, 274 F.2d 476, 481 (4th Cir. 1960), the finding of King Asphalt's liability depends "on the existence of facts which are not common knowledge, and which are peculiarly within the knowledge of men whose experience or study enables them to speak with authority upon the subjects in question." *Id.* The jury's "conclusions to be drawn from the facts stated, as well as knowledge of the facts themselves, depend on professional or scientific knowledge not within the range of ordinary training or intelligence." *Id.*

King Asphalt's and SCDOT's witnesses who attested to King Asphalt's compliance with applicable SCDOT guidelines, are industry professionals, with pertinent credentials and

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experience. The Smiths, on the other hand, have no evidence that contradicts their testimony. Plaintiffs cannot prove negligence, let alone recklessness, on King Asphalt's part, without competent evidence that establishes the scope of the duty or standard of care incumbent upon King Asphalt as a paving contractor, and that shows that such duty had been breached, leading to their injuries. The analysis of King Asphalt's performance of its scope of work requires more than the common knowledge and experience of a layperson. Expert testimony is required in this case because "juries must be informed of the criteria upon which a defendant's conduct is to be judged." *Kemmerlin v. Wingate*, 274 S.C. 62, 65, 261 S.E.2d 50, 51 (1979). Plaintiffs have no witness, who by virtue of his or her education, training and experience, could be competent to inform the jury on what signage was required for a construction zone, the process of the removal of safety devices, the requirements for the road construction, or which SCDOT guidelines King Asphalt failed to follow.

This court must reject the Smiths' contention that the Daily Report of Asphalt Roadway Inspection (SCDOT Form 400.04), establishes a breach of a duty of care on King Asphalt's part. The Smiths argue that a layperson can look at the report, look at a manual and then divide the amount of asphalt used in a specific area of the project without any consideration of the daily use of the asphalt, road topography, the depth of the milling, the depth of the asphalt, and then determine that the difference between the milled lane and the newly paved lane exceeded two inches and thus violated the SCDOT standards. This court finds that in order to reliably interpret the Daily Report and present it to the jury the Smiths will need an expert who will have examined and determined the precise depth of the milling under the new asphalt and the depth of the new asphalt. No lay witness can do that, nor can the Smiths themselves, who by their own admission are not adequately literate.

This court likewise rejects the Smiths' argument that these are matters of common knowledge and experience akin to those found in the caselaw the Smiths cite, in which the courts found no need for expert testimony. This court notes that one of the opinions the Smiths cite is nonexistent—*Ingram v. Norfolk Southern Railway Co.*, 365 S.C. 545, 618 S.E.2d. 418 (2005) (a Lexis search of the S.E.2d citation reveals a West Virgina case of *Wood v. Acordia of W.Va. Inc.*)—and only two may be relevant. Contrary to the Smiths' short summary, *Wise v. Broadway*, 315 S.C. 273, 433 S.E.2d 587 (1993), did not involve "absence of traffic control signage." It involved a rear-end collision in which the at-fault driver was found to have violated the statute regulating the proper distance between vehicles and whether such negligence per se was the evidence of recklessness necessary for the punitive-damages award. Similarly, *Austin v. Specialty Transportation Services, Inc.*, 258 S.C. 298, 594 S.E.2d 867 (Ct. App. 2004), involved a collision caused by a driver who disobeyed a stop sign. Contrary to the Smiths' summary, the opinion does not mention the word "expert." The cases of *Brouwer v. Sisters of Charity Providence Hospitals*, 763 S.E.2d 200, 205 (S.C. 2014) and *Hickam v. Sexton Dental Clinic*, 295 S.C. 164, 367 S.E.2d 453 (Ct. App. 1988), while somewhat relevant are distinguishable. Both involve medical malpractice and the common knowledge exception to the statutory requirement for expert testimony. Unlike here, the facts in those cases were simple and easy to understand: in *Hickman* a dental assistant jammed an object into a patient's mouth when taking a dental impression and caused an injury; in *Brouwer* the court held that a "Notice of Intent to Sue" did not require an affidavit of an expert where the alleged malpractice consisted in the hospital staff failing to make sure that the patient who was allergic to latex was not exposed to it—the information that the patient was allergic was included in the surgery consent form and the pre-anesthesia evaluation and was displayed on the wristband. The *Brouwer* court held that the negligent act, that is the

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surgery performed with latex gloves despite the warnings that resulted in severe allergic reaction, fell within the common knowledge exception.

The facts at issue in this case, however, and in particular the milling depth and the thickness of the new layer of asphalt, location of the accident, standards of care, industry standards, and regulatory requirements for lane closures and re-openings, are far from simple and easy to understand. Indeed, a jury will need assistance of an expert to fully comprehend and weigh the evidence.

CONCLUSION

Because they have no testifying expert,[1] Plaintiffs cannot establish the standard of care for the road construction practices of King Asphalt, including the signage on the construction site, the temporary lane closure criteria, and the alleged deviation from such standard of care that could constitute the breach element of their negligence and recklessness claims. Furthermore, they will not be able to challenge King Asphalt's witnesses who have testified that King Asphalt complied with the applicable standards and SCDOT requirements. For this reason, King Asphalt is entitled to judgment as a matter of law.

THEREFORE, the defendant King Asphalt, Inc.'s motion for summary judgment is hereby **GRANTED** and the plaintiffs Michael and Mary Smith's cross-motion for summary judgment is **DENIED**.

AND IT IS SO ORDERED.

____
The Honorable Jessica Salvini

[1] At the hearing on January 27, 2025, the plaintiff Michael Smith informed this court that Plaintiffs did not intend to retain an expert.

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Pickens Common Pleas

Case Caption: Michael Smith , plaintiff, et al VS Themistoklis Economo , defendant, et al

Case Number: 2021CP3900329

Type: Order/Summary Judgment

So Ordered

Jessica A. Salvini

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STATE OF SOUTH CAROLINA COUNTY OF PICKENS	))	IN THE COURT OF COMMON PLEAS THIRTEENTH JUDICIAL CIRCUIT
Michael and Mary Smith, Plaintiff, vs. King Asphalt, Inc., Defendants.	)))))))	FINAL ORDER REGARDING MOTION TO RECONSIDER Case No.: 2021-CP-39-00329

A Rule 59(e), SCRCP motion to reconsider and to alter or amend has been received, filed with the Court on February 28, 2025, and served on the Court on February 28, 2025. Plaintiffs' then filed a Supplement – Plaintiffs' Motion to Reconsider Pursuant to Rule 59(e) on March 20, 2025 and served it upon the Court on March 21, 2025. As previously explained, pursuant to Rule 59(f), SCRCP, the Court, in its discretion, may decide the motion based on briefs without oral argument. The Court indicated to the parties by prior order in the Initial Order Regarding Motion for Reconsideration that it would decide the issues on written submissions. Further, the Court informed the parties that written submissions were not required by the non-moving party, and that the moving party could rely upon its filings or supplement. Plaintiffs then filed a Motion for Leave to File a Surreply to Defendant's Return to Plaintiffs' Motion to Reconsider, which this Court granted. The deadlines to file written submissions regarding this motion has now passed.

After careful consideration of the able arguments and filings of Counsel and review of the record, the Court is unable to discover any material fact or principle of law that either has been overlooked or disregarded and further finds no error of law or fact not appropriately considered.

Accordingly, the Motion for Reconsideration made pursuant to Rule 59, SCRCP, [1] is respectfully DENIED.

IT IS SO ORDERED.

Presiding Judge's Signature Page to Follow.

[1] The Court, in its discretion, has determined this Motion on the filings, without oral argument, pursuant to Rule 59(f), SCRCP.

Pickens Common Pleas

Case Caption: Michael Smith , plaintiff, et al VS Themistoklis Economo , defendant, et al

Case Number: 2021CP3900329

Type: Order/Other

So Ordered

Jessica A. Salvini

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