

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM PICKENS COUNTY

Court of Common Pleas
Jessica A. Salvini, Circuit Court Judge

Case No. 2021-CP-39-00329
Court of Appeals Case No. 2025-001327

Michael and Mary Smith,
Appellants,
v.
King Asphalt, Inc.
Respondent.

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SC Court of Appeals

REPLY BRIEF OF APPELLANTS

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NOTE ON RECORD REFERENCES

The Record on Appeal has not yet been prepared. Rule 210(a), SCACR, sets the time for serving it after the last brief. Until then this brief identifies each source by its name, its date, and its page or deposition line. The list below shows where each of those sources is designated for inclusion in the Record, so that this Court and the respondent can locate any of them now. Appellants'

Designation of Matter was served July 6, 2026. Respondent's Designation of Matter was served August 5, 2026. Appellants' Supplemental Designation of Matter is served with this brief.

SCDOT Proposal and Contract No. 3948130, including the Special Provisions at pages 22, 23, and 24, the Notice to Contractors at page 7, and the head of the Special Provisions at page 9. Appellants' Designation item 7.

SCDOT 2007 Standard Specifications for Highway Construction, Subsection 107.9. Appellants' Supplemental Designation item 27.

Deposition of Douglas Eugene Limbaugh, Jr. Pages 42 through 44, Respondent's Designation item 20. Pages 32, 33, and 45, Appellants' Supplemental Designation item 26.

Depositions of Joe Daniel Laws, III, and Joshua Frazier Makison, complete transcripts. Exhibit D to Appellants' Surreply, Appellants' Designation item 21.

Transcript of the hearing held January 27, 2025. Appellants' Designation item 8.

Order Granting Summary Judgment, filed March 10, 2025. Appellants' Designation item 12.

Final Order Regarding Motion to Reconsider, filed May 27, 2025. Appellants' Designation item 22.

Respondent's Motion for Summary Judgment and Memorandum in support. Appellants' Designation item 4.

Respondent's Return to Plaintiffs' Motion for Reconsideration, filed April 18, 2025. Appellants' Designation item 18.

Appellants' Motion to Reconsider Pursuant to Rule 59(e), filed February 28, 2025. Appellants' Designation item 11.

Appellants' Second Supplemental Submission, filed April 11, 2025. Appellants' Designation item 16.

Appellants' Surreply to Defendant's Return, filed May 8, 2025. Appellants' Designation item 21.

Daily Work Reports of King Asphalt, Inc. (SCDOT Form CR 2-49.A), cited in this brief as Exhibits aa, aa1, aa2, and aa3, for March 6, March 12, March 22, and March 27, 2019, bearing Bates numbers 000278, 000279, 000280, and 000281 in that order. Daily Reports of Asphalt Roadway Inspection of SCDOT (Form 400.04), cited in this brief as Exhibits dd and dd1, for March 22 and March 27, 2019, bearing Bates numbers 000288 and 000290. All of these are exhibits filed December 13, 2024, with Appellants' Opposition to Motion for Summary Judgment and Cross Motion for Summary Judgment, Appellants' Designation item 5. Those are the Bates numbers borne by the exhibits as filed. Record page references will be supplied in the final brief under Rule 211, SCACR.

References in this brief to King Asphalt's brief are to the Initial Brief of Respondent served August 5, 2026, by its page number.

REPLY

We reply only to what King Asphalt argues in its brief. Our initial brief stands in full.

This case is not about what the difference between the lanes measured. King Asphalt says two inches or less. The trial court found two inches or less. By King Asphalt's own account, the new mat in the adjacent outside lane at the accident site was approximately 2 inches thick. We take them at their word. Two inches already exceeds the 1 inch King Asphalt's own contract allows between open lanes where one of them is milled. The dispute is whether that difference could be left unprotected and the lane opened to the public.

This case is about one sentence in that contract, at page 22 of the Special Provisions to SCDOT Proposal and Contract No. 3948130: “During surface planing and milling operations, grade elevation differences greater than 1 inch in areas with pavements composed of hot mixed asphalt (HMA) base courses, intermediate courses or surface courses and Portland cement concrete are PROHIBITED between adjacent travel lanes open to traffic unless otherwise directed by the Department.” King Asphalt's own daily work reports show that both eastbound lanes were milled in early March 2019 (Daily Work Reports for March 6 and March 12, 2019, Exhibits aa and aa1, Bates 000278 and 000279), and that on March 22, 2019 it paved the outside lane and left the inside lane milled (Daily Work Report for March 22, 2019, Exhibit aa2, Bates 000280). These exhibits, and every other exhibit cited by Bates number in this brief, were filed with Plaintiffs' Opposition to Defendant King Asphalt, Inc.'s Motion for Summary Judgment, Cross-Motion for Summary Judgment, and Prayer for Alternative Relief on December 13, 2024. Traffic was riding in the milled lane. Its brief then describes, at page 4, taking down the cones, the signs, the

barricades, and the arrow boards at the end of that workday and opening the road with that difference between the paved lane and the milled lane still there.

The question is not whether King Asphalt could have a difference in height while it was doing the work. It could. The work cannot be done without one. The question is whether it could take down the cones, the signs, the barricades, and the traffic control and open the lane to the public while that difference was still there. The contract says no. King Asphalt's brief never answers that question. It argues about 2 inches, about experts, and about what its witnesses understood the specification to be.

King Asphalt tells this Court that we no longer maintain the differential was greater than two inches. That misstates our position. Accepting their number did not give up the rule. It left the rule as the only question in the case. That is what our brief says at page 3, and King Asphalt quoted the passage with the middle left out. The sentence it left out is this: "Even 2 inches is more than the 1 inch the contract allows." The next sentence, which it did not quote at all, is this: "The only question is which rule applies, and the contract answers it." Those two sentences are our argument. The whole passage is at page 3 of our brief and the Court can read it there.

1. The contract did not allow King Asphalt to open the lane with this condition still there.

King Asphalt says 2 inches was allowed. The height by itself was not the violation. Opening the lane with that difference beside a milled lane was. The contract permits the difference to exist, and the work cannot be done without one. What it does not permit is opening the lane to the public while the difference is there. Where the pavement is milled, a difference greater than 1 inch between adjacent travel lanes open to traffic is PROHIBITED, and the closure stays in place while the difference exists. King Asphalt's argument misreads both paragraphs it relies on.

King Asphalt argues that the 1-inch rule applies only while milling is going on, and that because it was paving on March 22, the 2-inch paragraph governed. The contract answers that itself. Page 23 of the Special Provisions to SCDOT Proposal and Contract No. 3948130 says how to end the difference: “either mill the adjacent travel lane or pave the milled travel lane as necessary to eliminate the grade elevation difference prior to opening the travel lane to traffic at these locations.” King Asphalt did neither, and it opened the lane. It paved the outside lane and left the inside lane milled, which is what created the difference in the first place. Opening the lane with that difference still there is the violation. The 1-inch rule is quoted at the start of this brief. The contract does not forbid the difference from ever existing. The work cannot be done without one. What it forbids is putting the public on it. The words open to traffic are the whole rule. The rule is written about the condition of the road and who is exposed to it, not about which machine is running that day. A grade difference between two open lanes is a condition. It sits in the road whether the crew is milling, paving, or gone for the night. A milled surface does not stop being milled because the paving machine is running in the other lane.

King Asphalt's own daily work reports date the milling. The Daily Work Report for March 6, 2019, Exhibit aa, Bates 000278, records two inch milling of the inside lane. The Daily Work Report for March 12, 2019, Exhibit aa1, Bates 000279, records milling of the outside lane. King Asphalt tells this Court that milling concluded on March 12, but March 12 is the day it milled the lane it later paved. The lane the traveling public was riding in on March 22 had been milled six days before that, and it was still milled that day.

King Asphalt's own brief supplies the condition the rule describes. At page 4 its statement of the facts says the inside lane had already been milled and remained in that condition on March 22, and that traffic was directed into that lane. And King Asphalt's whole argument is that the grade

difference between that milled lane and the newly paved outside lane was two inches or less. That is a milled lane open to traffic, next to a paved lane, with a 2-inch grade difference between them. Those are the exact conditions the 1-inch rule names: milled pavement, adjacent travel lanes, open to traffic, and a difference over 1 inch. King Asphalt's own statement of the facts describes the condition its contract prohibits.

The 2-inch paragraph King Asphalt relies on reads, on the same page 22 of the Special Provisions: "During paving operations, the Department requires lane closures at all times where grade elevation differences and drop-offs greater than 2" exist adjacent to or between the travel lanes of a roadway opened to traffic, unless otherwise specified by these special provisions." That paragraph sets the general limit during paving, and by its own last clause it gives way where the special provisions specify otherwise. They do, in the sentence quoted above, where the pavement is milled. The lane the public was riding in was milled. That is the paragraph that governs it.

And the contract says what to do when the difference is over the limit. Page 23 of the Special Provisions reads: "If a grade elevation difference in excess of the specified acceptable ranges exist, either mill the adjacent travel lane or pave the milled travel lane as necessary to eliminate the grade elevation difference prior to opening the travel lane to traffic at these locations. Maintain the lane closure restrictions at all times unless otherwise directed by these special provisions." Those two fixes match the two ways the mismatch can exist: one lane milled down while the other still stands at full height, or one lane still milled while the other has been paved back up. The contract wrote a cure for both directions, and neither one was performed at this location. King Asphalt's Daily Work Report for March 27, 2019, Exhibit aa3, Bates 000281, and SCDOT's Daily Report of Asphalt Roadway Inspection for the same day, Exhibit dd1, Bates

000290, show the milled inside lane at the place where the collision occurred was not paved until that day, five days after. And the paving is what makes the difference. Both lanes had been milled. There was no step between them until King Asphalt paved one lane and left the other milled. The mat goes down in one pass, so the step arrives at full height the moment the lane is paved. The contract does not ask how big the step was. It asks whether the lane was open to traffic while the step was there. King Asphalt's witnesses can be right about every number they gave and still not answer that question. What the public was let onto was not just a 2-inch difference. It was an unprotected 2-inch difference, with the traffic control gone.

Page 23 of the Special Provisions says more than that. It reads: "The installation of traffic control devices are required in all areas where those areas immediately adjacent to a travel lane open to traffic have been altered in any manner by work activities, including but not limited to activities such as grading, milling, etc." And: "Install the traffic control devices immediately upon initiating any alterations to the areas immediately adjacent to or within 15 feet of the near edge line of the adjacent travel lane."

The contract also ties warning signs to the condition rather than to the number. Page 22 of the Special Provisions requires Grooved Pavement signs in advance of milled or surface planed pavement surfaces, and requires that they be installed "immediately upon creation of this pavement condition" and maintained "until this pavement condition is eliminated." And at page 24, amending Subsection 611.4.1.2, the contract provides: "Whenever travel lanes with acceptable grade elevation differences are open to traffic, provide Uneven Lanes signs (W8-11-48) or Uneven Pavement signs (W8-11A-48)." Those signs are to be installed adjacent to roadways with uneven pavement surfaces between travel lanes, at intervals no greater than 2600 feet. Even where the difference is within the acceptable range, the contract requires the public to

be warned that it is there. King Asphalt's own brief describes the signs coming down, at page 4. The area immediately adjacent to the lane the public was riding in had been milled. The contract required devices there, and it required them from the moment the alteration began.

Our Second Supplemental Submission, filed April 11, 2025, put the rule for this in front of the trial court: words are given their plain meaning unless that reading leads to an absurd result. *City of Rock Hill v. Harris*, 391 S.C. 149, 705 S.E.2d 53 (2011), citing *Kiriakides v. United Artists Commc'ns, Inc.*, 312 S.C. 271, 440 S.E.2d 364 (1994). Our Surreply of May 8, 2025 made this exact argument against King Asphalt's reading, that doubling the limit where milling and paving sit side by side gives drivers less protection at the moment the road is most dangerous, citing *Unisun Ins. Co. v. Schmidt*, 339 S.C. 362, 529 S.E.2d 280 (2000). In *Unisun* our Supreme Court refused a reading that would have taken away a passenger's coverage the moment an unauthorized driver took the wheel. The absurdity argument is not new on appeal. It was briefed below and never answered.

It is King Asphalt's reading that fails that test. A safety limit set at 1 inch to protect drivers from a milled edge does not double because the contractor started paving somewhere on the project. The hazard did not change.

And when this contract means a different number, it says so out loud. The same 1-inch paragraph writes one express exception. It allows “a grade elevation difference of 1 and a half inches” during surface planing and milling operations “for removal of Open-Graded Friction courses ONLY.” The word ONLY is in capital letters in the contract. When a rule writes out its exceptions, it applies to everything it did not except. *Hodges v. Rainey*, 341 S.C. 79, 533 S.E.2d 578 (2000). A narrow exception written for one named operation does not stretch to cover

another. And words get their plain and ordinary meaning. A court does not stretch or shrink a rule with a forced reading, and it reads each term next to the terms around it. *State v. Landis*, 362 S.C. 97, 606 S.E.2d 503 (Ct. App. 2004). The contract writes its exceptions plainly. It wrote none that doubles the limit during paving. King Asphalt is asking this Court to add an exception the contract's drafters knew how to write and did not.

And King Asphalt skipped a sentence. On the same page 22 of the Special Provisions, directly after the 1-inch rule, the contract says that during any surface planing and milling operations, “lane closures are required at all times where grade elevation differences and drop-offs greater than the acceptable measurements specified heretofore exist adjacent to or between travel lanes open to traffic unless otherwise specified by the department.” The acceptable measurement it points back to for milled pavement between open adjacent lanes is the 1 inch the contract had just specified. So the contract did not only prohibit the condition. It required the lane to stay closed while the condition existed. And the special provision on page 23 that says how to fix the difference before opening the lane does not say during milling or during paving. It applies whenever the difference is over the specified acceptable range. King Asphalt's whole argument is that the rules switched when the paver started. On its own account the traffic control came down at the same site at the end of that workday. The contract has a rule for that moment too, and the rule is close the lane until the difference is gone.

King Asphalt points to deposition answers from its employees and SCDOT witnesses saying two inches. Read what those answers say. The Limbaugh answer King Asphalt relies on at page 7 of its brief begins on the page before. In full, at Limbaugh Dep. 32:25 to 33:4, it reads: “But where we started to where we finished that day, everything was started and finished in that area.

Everything that was tacked was paved. Everything that was paved was compacted. Through

acceptance with the SCDOT.” King Asphalt prints that answer as “Everything was tacked and paved,” cites it as 33:3 to 4, and ends it before the last sentence. The full answer says nothing about the difference in height between the paved outside lane and the milled inside lane. It is about the thickness of the new asphalt, which is the paving specification, not about when a lane beside a milled surface may be opened to traffic.

King Asphalt tells this Court that according to Mr. Laws and Mr. Makison the two inch standard applied at the time of our accident, and cites only pages of Mr. Laws. It cites nothing from Mr. Makison for that statement. King Asphalt's Return to our Rule 59(e) motion, filed April 18, 2025, quoted Mr. Makison's answer as Makison Dep. 13:3 to 10, one line short of its end, and told the trial court that Mr. Makison had testified “quite the contrary.” Our Surreply, filed May 8, 2025, gave the trial court the missing line, the citation as 13:7 to 11, and Mr. Makison's complete transcript as its Exhibit D. The Final Order Regarding Motion to Reconsider was filed May 27, 2025, after our correction. King Asphalt's own Designation of Matter dates the order May 27, 2025. Its brief says March 27, 2025. The order both sides designated is the May 27 order. What Mr. Makison actually said about the specification is in the record. His full answer, at Makison Dep. 13:7 to 11, reads: “if you've got asphalt, the differential can be up to two inches. For a milled surface, it's one inch.” That is SCDOT's own district construction engineer giving the rule this case is about, in the excerpt King Asphalt itself put before the trial court. His next answer, at Makison Dep. 13:14 to 18, gave the rest. Asked whether he had ever seen a differential greater than two inches, he said he had not, and then explained: “it is allowed to be that way on a temporary basis, meaning while the traffic control is setup. But by the time the traffic control is removed, the differential should be within our specification.” The difference may exist behind

the cones, and the cones may not come up until the difference is within the rule. For a milled surface, the rule is 1 inch.

King Asphalt's answer to all of this is that SCDOT accepted the work. It did. But what SCDOT accepted was the asphalt. King Asphalt's own brief says what was documented, at pages 3 and 4: "Each day of the paving operation, SCDOT documented the quality of the asphalt, its level of compaction, and the thickness of the surface." None of that is a finding that the lane could be opened to traffic with the difference between the lanes still there. Mr. Makison drew the same line himself, in the answer quoted above. Accepting the mat says nothing about when the cones come up. Mr. Laws said the same thing about the cones, at Laws Dep. 29:2 to 6: "So those would be removed at the end of the construction operation after everything has been safened (sic) up. And typically they would remove it from the back taper towards the front." Asked what SCDOT's specifications were, Mr. Laws answered, at Laws Dep. 23:15 to 19: "Specifically, our 2007 SCDOT standards and specifications manual. Also our special provisions in the contract. Special provisions supersede our 2007 SCDOT standards and specifications." So if King Asphalt reaches for the manual's general language, SCDOT's own engineer has already said the special provisions control, and the special provisions are the pages carrying the 1-inch rule.

The two SCDOT witnesses King Asphalt relies on were not there. Asked what he was doing on March 22, 2019, Mr. Laws answered, at Laws Dep. 9:19 to 22: "I was -- I took a look back, and I was actually off work that day. I was on annual leave. But as far as work goes, I was a resident construction engineer for Pickens County." Asked to characterize his involvement with this contract, Mr. Makison answered, at Makison Dep. 9:6 to 9: "I had no involvement. At the time this one was done I was still the RCE, I believe it was, over the special projects in that period. So I didn't have any knowledge of it." Asked whether he had been brought in to help, he answered,

at 9:13 to 15: “I helped with the FOIA request that came through for some documents, and I helped make sure those documents were gathered and provided.” Both transcripts are in the record. King Asphalt designated each of them in full.

And every number anyone has offered in this case, two inches, two inches or less, is more than the 1 inch the contract allows between open lanes where one is milled. No number they offer complies with the 1-inch rule, so the exceedance is settled on their own figures. What is left is the second half of the rule, which is that the lane could not be opened to the public while the difference was there.

The Order Granting Summary Judgment, filed March 10, 2025, shows where its two inch finding came from. Mr. Limbaugh's answer, at Limbaugh Dep. 44:5 to 8, reads: “The grade elevation difference between the paved lane and the non paved lane was either two inches or less. Yes. Which is the SCDOT requirement. Or it would not have been reopened to traffic.” The fact section of the March 10, 2025 order reads: “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.” The court took a witness's statement of what the specification required and wrote it down as a finding about the road. And the last sentence of Mr. Limbaugh's answer states the consequence: over the requirement, the lane would not have been reopened to traffic. King Asphalt designated pages 42 through 44 of Mr. Limbaugh's transcript, so this answer is in the record by King Asphalt's own hand. And the same order rejected our calculation from King Asphalt's own daily reports because we took no measurement, while accepting two inch testimony from witnesses who took no measurement either and were not there. Mr. Laws was asked, at Laws Dep. 16:11 to 17, whether “there is a measurement done on the difference between the two lanes after a day of work” and answered “Yes, sir.” Asked “Who is responsible

for the measurement?” he answered “The contractor is responsible.” Asked “The contractor is King Asphalt?” he answered “Yes, sir.” And the way that measurement is done is on paper. The mat is verified from the daily report: the tons of asphalt placed, the area covered, and the pounds per square yard, checked against the specification rate printed on SCDOT's own form. Nobody cores the road at the end of the day. Our calculation was that same arithmetic, from the same form, for the same day. The court rejected it as expert work while crediting witnesses who did no arithmetic and took no measurement at all. The same standard was not applied to both sides. At summary judgment, every inference belonged to us.

The March 10, 2025 order also says we have no evidence that contradicts their testimony. Page 22 of King Asphalt's contract is that evidence. It says 1 inch and it says PROHIBITED. A written rule that says 1 inch contradicts testimony that 2 inches was allowed, and a document does not need an expert to say what it says. The same contract is evidence on the question the order never reached, because it required the lane closure to stay in place while the difference existed and required traffic control devices where the area beside an open lane had been milled. The contract sets the standard. A witness's memory of the contract does not replace the page it is printed on. Where a witness's answer conflicts with the written contract, that conflict is a dispute for a jury, not a ground for judgment.

King Asphalt lists causation among the elements and then argues only the standard of care. Causation was never decided. The trial court ended this case on the expert question and made no finding about cause. *Whitlaw v. Kroger Co.*, 306 S.C. 51, 410 S.E.2d 251 (1991), says the same thing from the other direction: proving the violation is not the end of it, and the causal connection still has to be shown. That is a question for a jury, not a ground for judgment. King Asphalt's own account supplies the connection. Its brief says, at page 4: “With the removal of

each cone, the closed section of the highway became shorter and the newly paved outside lane was then available to the drivers.” The trial court found the same thing. Page 5 of the March 10, 2025 order reads: “Once a cone was removed, the outside lane beyond that point would become immediately available to the motorists.” On King Asphalt's own facts, the lane the collision happened in was open to traffic only because the cones had been taken up. Whether that is a cause of what followed is for a jury.

And what the rule required here was not something King Asphalt had to do to the road. It was something it had to keep doing. The contract let the difference exist so long as the lane stayed closed. The closure was the protection. When the cones, the signs, the barricades, and the arrow boards came down while the difference was still there, the protection stopped, and what the traveling public met was the condition the contract calls PROHIBITED with nothing left in front of it.

King Asphalt's quotation of the 1-inch rule ends with the words “unless otherwise directed by the Department.” There is no such direction anywhere in the record. Summary judgment cannot stand on a fact that is not in the record, and it cannot stand on a fact read against us. At summary judgment, the evidence and all reasonable inferences are viewed in the light most favorable to us. *Fleming v. Rose*, 350 S.C. 488, 567 S.E.2d 857 (2002).

2. No expert was needed to read King Asphalt's own contract.

King Asphalt says our case needed an expert. Our claim is negligence. Our case in the trial court was that King Asphalt broke written safety rules. Where a duty is fixed by written law, proof of the violation is itself proof that due care was not used. *Whitlaw v. Kroger Co.*, 306 S.C. 51, 410 S.E.2d 251 (1991), quoting *Rayfield v. South Carolina Department of Corrections*, 297 S.C. 95,

374 S.E.2d 910 (Ct. App. 1988). And whichever label the claim carries, written safety standards are how the standard of care is established in a case like this one. *Elledge v. Richland/Lexington School District Five*, 352 S.C. 179, 573 S.E.2d 789 (2002). Either way the criteria are written down, and either way no expert is needed to read them. The written rule here is the page 22 provision quoted at the start of this brief, in King Asphalt's own contract, which King Asphalt filed with the trial court. King Asphalt says we could not establish the standard of care owed by a paving contractor. Our Supreme Court has already identified it. In *Dorrell v. South Carolina Department of Transportation*, 361 S.C. 312, 605 S.E.2d 12 (2004), a paving contractor working under an SCDOT contract left a grade difference in the road. The Court held the contractor owed a duty of care to the injured driver, both from its contract with SCDOT and from the common law, and that the duty ran to the driver even though he was not a party to that contract. It held the duty went further than what the contract required. Whether the contractor breached it was for a jury, and summary judgment was reversed. The rule was restated in *Skinner v. South Carolina Department of Transportation*, 383 S.C. 520, 681 S.E.2d 871 (2009), where the Court said that South Carolina common law only imposes a duty for highway conditions where a business has undertaken an activity that creates an artificial condition on the highway which is dangerous to travelers, and that a contractor performing highway alterations owes a duty to travelers. A milled lane beside a newly paved one is not a natural condition of the road. King Asphalt made it. So the duty here does not depend on what our claim is called. It comes from the common law, and the written rules say what that duty required. The same duty is in this contract. The contract states twice, at the Notice to Contractors on page 7 and again at the head of the Special Provisions on page 9, that the project is to be constructed under the Department's Standard Specifications for Highway Construction, Edition of 2007. Those Standard Specifications

provide at 107.9: “At all times, conduct the work in such a manner as to reasonably provide for the safety and convenience of the traveling public and of the residents along and adjacent to the highway and to offer the least practicable obstruction to the flow of traffic.” The lanes King Asphalt milled and paved on Highway 8 were the work it contracted to perform. The contract does not forbid the difference from ever existing. The work cannot be done without one. What it forbids is leaving that difference open to traffic. When the difference is over 1 inch, the lane stays closed until it is fixed. The trial court's own order said the height difference was 2 inches or less.

Experts exist to explain things ordinary people cannot understand on their own. Here the two things that have to be compared are both written down. Page 22 of the contract says 1 inch and says PROHIBITED. The trial court's order says the height difference was 2 inches or less. A jury does not need an expert to hold those two sentences next to each other. The second question needs no expert either. Whether the lane was opened to the public while the difference was still there comes from King Asphalt's own account of the cones, the signs, the barricades, and the arrow boards coming down at the end of that workday.

And there is a second problem the Court should not lose sight of. No rule and no court order ever told us, before the judgment, that we had to hire an expert or our case would end. The first ruling that said an expert was required was the judgment itself. A requirement announced for the first time in the order that ends the case is not notice. It is the end of the case.

King Asphalt's brief says, at page 2, that its motion was based on our failure to retain an expert. Its Motion for Summary Judgment said we needed an expert, and we answered in writing that we did not, because in negligence per se the standard of care is written in the statute and the

contract. Whether the law required an expert was the disputed question. And King Asphalt filed no memorandum of law with its motion. Its Memorandum in Support of King Asphalt's Motion for Summary Judgment and in Opposition to Plaintiffs' Cross-Motion for Summary Judgment bears an electronic filing stamp of January 27, 2025 at 8:38 AM, the morning of the hearing, a year after the motion. The judge said at the start of the hearing that she had just been handed up the defendant's memorandum, and before taking the motions under advisement she said: "I'm a judge that reads everything. She handed up her memorandum. I haven't had a chance to read it because she just handed it to me." Transcript of the January 27, 2025 hearing, 13:25 to 14:2.

King Asphalt argues that the confusion it says we show about which standard applies proves an expert was needed. That is backwards. What a written rule means is a question of law for the court, answered by the plain words of the rule. *Hodges v. Rainey*, 341 S.C. 79, 533 S.E.2d 578 (2000). The rule here is a contract term, and the answer is the same. When a contract's words are plain, the words alone decide what it does, and the court's duty is to enforce the contract the parties made, even if one side now says the bargain was unwise or unreasonable. *Ellis v. Taylor*, 316 S.C. 245, 449 S.E.2d 487 (1994). Rule 701, SCRE, which King Asphalt cites, is about witnesses giving opinions at trial. Reading a document is not opinion testimony. King Asphalt's own lawyer argues the meaning of the contract at pages 7 and 8 of its brief, and quotes the 1-inch provision in full in a footnote there, without any expert. If a lawyer can argue what the contract means in a brief, a judge can decide what it means as law. Two sides disagreeing about what a document says is not proof an expert was required. It is proof the question belonged to the court reading the contract.

King Asphalt points to the hearing transcript at page 16 and says Michael told the court we did not intend to retain an expert. The record answers it. The transcript shows what came just before

that answer. Michael began reading a written statement into the record and did not get through his first sentence. He read that King Asphalt violated South Carolina law by failing to properly mark the work zone, and the Court stopped him there, at Tr. 15:8 to 9: “Okay. So let me stop you there, Mr. Smith. That is the issue.” The Court then turned to the expert question and asked how the Smiths could prove the difference without an expert. The answer King Asphalt cites came out of that exchange. Our position, stated in writing before and after the hearing, was that no expert is required to survive summary judgment on a negligence per se claim. And our Second Supplemental Submission, filed April 11, 2025, while our motion to reconsider was still pending, told the court in writing that we were prepared to retain an expert for trial if the court found one necessary. The court denied the motion anyway. The first court order that said an expert was required was the order that ended the case, and no chance was ever given to meet a requirement announced and enforced in the same ruling.

The court said it takes an expert to read these reports. The reports are built to be read. King Asphalt reports the quantities it places. SCDOT enters those quantities on its own form so that its inspectors can run the calculation, and the report is signed afterward. The Daily Report of Asphalt Roadway Inspection for March 22, 2019, Exhibit dd, Bates 000288, puts the specification rate in one column and the rate actually placed in the column beside it, load by load, station by station. Putting those two columns next to each other is how King Asphalt and SCDOT checked the work every working day of this project, with no expert anywhere. Comparing the specification rate to the rate actually placed gives the thickness of the mat laid in that section. Where the lane beside it is still milled, that thickness is the difference between the two lanes. Any time that difference is more than 1 inch, the contract prohibits opening the lane to traffic. SCDOT's road inspector signed that report for March 22, 2019, and SCDOT's Resident

Construction Engineer signed it a week later. King Asphalt's own Daily Work Report for the same day, Exhibit aa2, Bates 000280, records the same work in the same lane. Neither document is ours. We read their records and the State's, side by side, the way the form asks, and the court ruled that reading was beyond a jury.

And King Asphalt's own Memorandum in Support, filed January 27, 2025, closed this door on itself. At page 13 it told the trial court: "If you follow the Smiths' logic here, you must know the precise level of milling in the adjacent lane to know what the depth of the asphalt is in the newly paved lane. There is no testimony on this issue and no evidence from an expert." And: "There also must be testimony from an expert, through taking core samples, as to the precise depth of the milling under the new asphalt and the depth of the new asphalt." If that is true, then King Asphalt's own witnesses had no basis to say the difference was two inches or less, because they took no core samples and made no measurements. If it is not true, and people familiar with the job can speak to the road from the records, then a jury reading the same records can do the same without an expert. King Asphalt cannot have it both ways.

King Asphalt's brief states our claim and then never engages it. At page 2 it tells this Court that we contended King Asphalt was negligent per se and that expert testimony was therefore not necessary, and it cites our cross-motion for that. So King Asphalt knows what our claim is. At page 6 its argument heading says we failed to present evidence of all the elements of negligence, and its first sentence of argument says our theory of recovery was based on negligence. From that point forward the brief argues duty, breach, and damages proven by a preponderance. The words negligence per se do not appear again in the argument. The Table of Authorities at page iii lists no case about negligence per se. The issue King Asphalt restates at page 1 leaves it out.

King Asphalt has not argued that a written rule cannot supply the standard of care in this case. It has not argued that the contract provision does not apply to us. King Asphalt never engages the way we proved our claim, and its silence is not a reason to affirm.

King Asphalt relies on two cases for its expert requirement. Neither one says what King Asphalt needs it to say.

Kemmerlin v. Wingate, 274 S.C. 62, 261 S.E.2d 50 (1979), was a malpractice case against accountants. The standard of care there was the degree of skill and care that members of that profession in that locality usually exercise. That standard is not written down anywhere. It lives in the practice of the profession. The Court said expert testimony would usually be necessary in such a case because the subject lies beyond ordinary lay knowledge, and it was in that setting that the Court said juries must be informed of the criteria by which a defendant's conduct is judged. That is the sentence King Asphalt quotes. Our case does not have that problem. The criteria are already written. They are printed in King Asphalt's own contract and they say 1 inch. *Kemmerlin* asks that the jury be told the criteria. Here the criteria can be handed to the jury on a page.

Elledge v. Richland/Lexington School District Five, 352 S.C. 179, 573 S.E.2d 789 (2002), is a problem for King Asphalt, not for us. In *Elledge* the trial court kept written safety standards away from the jury, and our Supreme Court agreed with the Court of Appeals that keeping them out was error. The rule the case states is that evidence of industry safety standards is admissible to establish the standard of care in a negligence case. The standards in *Elledge* were guidelines that the defendant had never adopted and that carried no force of law, and they were admissible even so. The rule in our case is not a guideline. It is a term of the contract King Asphalt signed,

written by the Department that hired it. If unadopted industry guidelines come in, a binding contract provision comes in. In *Elledge* an expert was needed to show that unadopted national guidelines applied to that school district at all. No witness is needed to show that King Asphalt's own contract applied to King Asphalt. It signed it, and it filed it with the trial court itself.

The sentence King Asphalt takes from *Elledge*, that such evidence is “generally offered” along with expert testimony, says generally, not always. It describes what usually happens in cases where experts are testifying. It does not turn an expert into a requirement. The same opinion quotes authority holding that safety code evidence is “admissible as an alternative to or utilized to buttress expert testimony”, *Brown v. Clark Equipment Co.*, 62 Haw. 530, 618 P.2d 267 (1980), with the emphasis added by our Supreme Court itself. King Asphalt has taken a case about letting a written standard reach the jury and used it to argue that a written standard cannot reach a jury without an expert. *Elledge* holds the opposite of what King Asphalt asks this Court to do here.

3. King Asphalt still does not answer the work zone statute.

Our third issue is the work zone statute, S.C. Code Section 56-5-1535(F)(1). We cite it for what it defines, not as the source of King Asphalt's duty. The statute defines a highway work zone and requires the devices that mark it to meet applicable standards and be properly installed. It reads: “Highway work zone' means an area of a roadway, bridge, shoulder, median, or associated right of way, where construction, maintenance, utility work, accident response, or other incident response is being performed. The work zone must be marked by signs, channeling devices, barriers, pavement markings, or work vehicles, and extends from the first traffic control device erected for purposes of controlling the flow of motor vehicles through the work zone, including

signs reducing the normal speed limit, to the 'END ROAD WORK' sign or the last temporary traffic control device. The signs, channeling devices, barriers, pavement markings, or work vehicles must meet state Department of Transportation standards, the provisions of Section 56-5-4700, or National Fire Protection (NFPA) standards, and must be installed properly.” That requirement is not incidental. It makes the marking part of what a work zone legally is, so the zone's boundaries, and the rules that apply inside them, depend on the devices being present and correct. Where the zone begins and ends decides what rules apply inside it and who has to follow them. That matters because a violation of written law is not a separate claim. It is how a negligence claim gets proved when written law, and not a witness's opinion, supplies the standard of care. *Whitlaw v. Kroger Co.*, 306 S.C. 51, 410 S.E.2d 251 (1991), quoting *Rayfield v. South Carolina Department of Corrections*, 297 S.C. 95, 374 S.E.2d 910 (Ct. App. 1988). That is why we asked the trial court to read it.

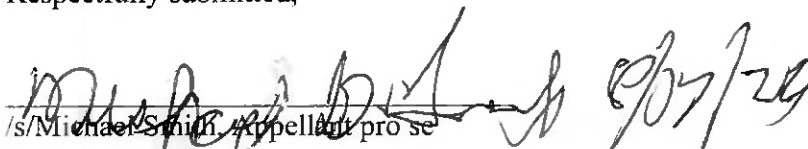
King Asphalt's brief does not mention it. The trial court's order did not mention it. King Asphalt never briefed it below: its memorandum in support of its motion never mentions it, and its Return to our Rule 59(e) motion never mentions it. Our third issue stands unanswered. The trial court ended this case without reading the statute we asked it to read. No court has yet asked what the statute requires of a work zone, or measured this one against it.

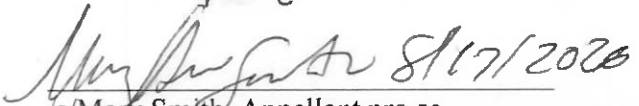
CONCLUSION

The trial court took the wrong number from King Asphalt's own contract, never reached the question the contract actually asks, which is whether the lane could be opened to the public while that difference was still there and the traffic control was gone, required an expert that no rule and no order had ever required before the judgment itself, and never addressed the statute we asked it

to read. King Asphalt's brief does not cure any of that. We ask this Court to reverse the order granting summary judgment.

Respectfully submitted,


/s/ Michael D. Smith, Appellant pro se


/s/ Mary Smith, Appellant pro se

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Dated: August 17, 2026

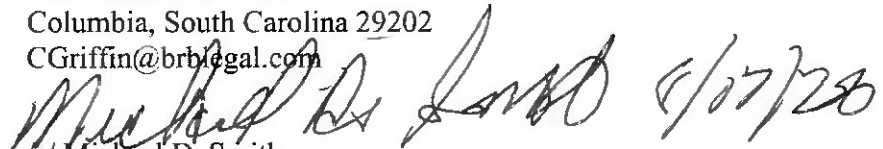
CERTIFICATE OF SERVICE

I hereby certify that on August 17, 2026, I served a true and correct copy of the foregoing

REPLY BRIEF OF APPELLANTS with Certificate of Service via email upon:

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