THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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SC Court of Appeals

APPEAL FROM PICKENS COUNTY
Court of Common Pleas
C/A No. 2021-CP-39-00329
Jessica A. Salvini, Circuit Judge

Appellate Case No. 2025-001327

Michael and Mary Smith,..... Appellants,

v.

King Asphalt, Inc.,..... Respondent,

# FINAL BRIEF OF RESPONDENT

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## Statement of the Issue on Appeal

Under SCDOT's guidelines, during paving operations, a contractor is to maintain lane closures wherever the grade elevation difference between travel lanes is greater than two inches; during milling operations the allowable difference is one inch. The evidence showed that the lane where the accident occurred had been reopened following a paving operation that resulted in a regulation compliant two-inch thick asphalt surface. Appellants had no expert who could competently challenge the evidence of Respondent's compliance with the regulations when reopening the lane. Was summary judgment on those grounds proper?

## Statement of the Case

On March 23, 2021, the appellants, Michael and Mary Smith ("the Smiths"), filed a lawsuit in the Pickens County Court of Common Pleas, seeking damages for the injuries they suffered in a traffic collision. The accident in question occurred on March 22, 2019 on Highway 8 near Easley, South Carolina, which at the time was undergoing repairs. In addition to Themistoklis Economou, the driver allegedly responsible for the collision, the Smiths sued the South Carolina Department of Transportation ("SCDOT") and its milling and paving contractor, King Asphalt, Inc. In their complaint, the Smiths asserted causes of action for negligence, recklessness, and loss of consortium against all defendants. (R. p. 38-48).

The Smiths waited until the summer of 2021 to serve the Summons and Complaint. (R. pp. 50-51; R. pp. 65-66). While King Asphalt and Economou answered the Complaint on August 2, 2021 and September 3, 2021, respectively, SCDOT immediately moved to dismiss the Complaint because of its failure to state a claim in light of the South Carolina Tort Claims

Act. (R. p. 53). The motion was not heard, however, because shortly after its filing the Smiths stipulated to the dismissal of all claims against SCDOT. (R. p.55)

Nearly three years into the litigation, which involved extensive discovery and motion practice, the Smiths settled with Economou and dismissed him from the case. (R. pp. 78-79). Shortly thereafter, on January 19, 2024, King Asphalt moved for summary judgment. (R. pp. 81-82). The motion was based on the lack of competent evidence raising an issue of fact regarding King Asphalt's negligence in either managing traffic in the work zone or in the performance of the road repair; and in particular, the motion was based on the Smiths' failure to retain an expert who could contradict the testimony of the SCDOT's and King Asphalt's employees as to King Asphalt's compliance with the applicable standards and specifications. (R. pp. 81-81; R. pp. 570-773). In response, the Smiths filed a cross-motion for summary judgment, contending that King Asphalt was negligent *per se* and therefore expert testimony was not necessary. (R. pp. 85-544.)

Upon hearing the motions on January 27, 2026, the Honorable Jessica Salivini, Circuit Judge, granted summary judgment in King Asphalt's favor and denied the Smiths' motion. (R. pp. 1511-1530; R. pp. 7-22). The Smiths immediately moved the court to reconsider its decision. (R. pp. 825-866). They argued that the court misapplied SCDOT's specifications because the applicable provision mandated continued lane closure when the height differential between a milled lane and an adjacent paved lane exceeded one and not two inches. (R. pp. 825-866). In its Return in Opposition to the Smiths' motion, King Asphalt directed the court's attention to the opening clause of that provision which restricted its application to the milling operations, which by the time of the accident had long been completed. (R. pp. 1298-1302). By Order of

March 27, 2025, Judge Salvini denied the motion for reconsideration and this appeal followed. (R. pp.31-32).

## Statement of the Facts

In 2018, SCDOT engaged King Asphalt to resurface a portion of Highway 8, a four-lane road in Pickens County. (R. pp. 647-773). Under the contract with SCDOT, King Asphalt was to perform removal and full depth patching of the distressed areas of the road, mill the top two inches of the entire existing roadway, and then repave the road with hot-mixed asphalt. (R. pp. 647-773). The project was to be completed by July 31, 2019. (R. p. 662).

At the outset of the project, King Asphalt installed permanent signage alerting motorists about the road construction. (R. p.607 lines 21–24). These signs remained in place until SCDOT's final inspection at the conclusion of the project. (R. p. 607 line 25-p. 608 lines 1-2). SCDOT also required installation of additional temporary traffic control devices whenever a lane needed to be closed, which King Asphalt did in accordance with SCDOT's Primary Route Daytime Lane Closure Drawing. (R. p. 606 lines 13–16.)

King Asphalt began work in January 2019, and by March 22, 2019—the day of the Smiths' accident—it had already milled both eastbound lanes of Highway 8 and began to install new asphalt surface. (R. p. 610 lines 2–12; R. p.592 lines 6–19.) The repaving was performed in sections, lane by lane—after a section of one lane was fully resurfaced, the work on an adjacent lane would begin. (R. p. 592 lines 6–14.) A paving machine laid the asphalt at a specific rate and the lane's surface was then compacted with a roller, in accordance with SCDOT guidelines, to achieve thickness of two inches. (R. p. 594 lines 15-23; R. pp. 595-598). Each day of the paving operation, SCDOT documented the quality of the asphalt, its level of compaction, and the thickness of the surface. (R. pp 600 lines 19-25- 601, lines 1-9). Before

the newly paved lane could be reopened, King Asphalt's and SCDOT's inspectors verified that the height difference between the levels of the paved lane and the unpaved lane did not exceed two inches. (R. p. 602:1-24; R. p.611 lines 10-24-612 lines 1-4 ).

On March 22, 2019, King Asphalt's crews were paving the outside eastbound lane in the vicinity of Old Easley Pickens Highway; the inside lane in that area, which had already been milled, remained in that condition that day. (R. p. 610 lines 1–4; R. p.590 lines 8-25-p. 591 lines 4-20.) To lay the new asphalt, King Asphalt closed the outside lane by placing cones at the beginning of the segment of the lane undergoing re-pavement, tapering the closing of the outside lane and thus directing traffic to the inside lane, as specified by SCDOT. (R. p. 1455 lines 13–23: R. 1457-1458; R. p. 609 lines 8-21). King Asphalt then placed additional cones every 50 feet in order to delineate the work zone in the outside lane from the milled inside lane in which traffic continued. (R. p. 614 lines 4–11).

At the end of that workday, the temporary signs—fourteen warning signs, an arrow board, barricades transitioning traffic to the open lane, a sign in the middle of the barricades and a second arrow board—and the cones delineating the lanes were removed. (R. p. 614:15–17; p. 615: 12–22.) A crew in a pickup truck, travelling against the flow of the traffic, opened the outside 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. (R. p. 615:12-22; R. pp. 1458 line 25- 1459 lines 2–8; R. pp. 1480 lines 24-25- 1481 lines 1-10). 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. (R. 616 lines 11-:21; R. p. 1459 lines 15–21; R. p. 1481 lines.1–18).

The appellant Michael Smith had known of the repaving project and the temporary lane closures on Highway 8 for weeks and months leading to March 22, 2019. (R.pp. 619-620). That day, the Smiths, riding together on a moped, in the inside lane of Highway 8, attempted to cross the outside lane to turn right into Old Easley Pickens Highway. (R. p. 621 lines 1–6). As the Smiths were about to do so, Mr. Smith, who drove the moped, noticed the truck picking up the cones and opening the inside lane. (R. pp. 625-626). After crossing from their lane of travel, the Smiths entered the eastbound inside lane. (R. p. 622 lines 11–14). Fully aware of the grade differential between the milled inside lane and the newly paved outside lane, Mr. Smith first stopped the moped and then attempted to drive onto the outside lane. (R. p. 622-625). At that moment, Themistoklis Economou, in a BMW sedan, had already been travelling in the outside lane. (R. pp. 635-636). The car and the moped collided when the Smiths entered the outside lane in front of Economou. (R. p. 639 ll. 2-13).

**Standard of Review**

Summary judgment is reviewed by this Court under the standard that governs the trial court under Rule 56(c), SCRCP. *Englert, Inc. v. Netherlands Ins. Co.*, 315 S.C. 300, 302, 433 S.E.2d 871, 873 (Ct. App. 1993). In other words, the appellate court sits "in the same position as the circuit court." *S.C. Pub. Interest Found. v. Calhoun Cty. Council*, 432 S.C. 492, 495, 854 S.E.2d 836, 837 (2021).

Rule 56(c) provides that 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 rule's plain language 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).

## Argument

**Summary judgment for King Asphalt was properly granted because the Smiths failed to present evidence of all the elements of negligence.**

The Smiths' theory of recovery against King Asphalt was based on negligence. Therefore, in order to prevail, they must establish (1) a duty of care King Asphalt had owed them; (2) its breach of that duty; and (3) damage proximately resulting from the breach. *See e.g., Charleston Dry Cleaners & Laundry, Inc. v. Zurich Am. Ins. Co.*, 355 S.C. 614, 618, 586 S.E.2d 586, 588 (2013). The existence of a duty of care is an issue of law; its breach and the existence of causally linked damages, however, are factual matters that need 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). The Smiths could not prove negligence, let alone recklessness, on King Asphalt's part, because they lacked the evidence necessary to establish the standard of care incumbent upon King Asphalt as a paving contractor, and presented no evidence of its breach. The record lacks any evidence of King Asphalt's wrongdoing. On the contrary, the available evidence indicates that King Asphalt acted in accordance with the applicable standards.

**A. King Asphalt demonstrated that it had complied with SCDOT's specifications for re-opening the newly paved lane to the motorists.**

The Smiths' case against King Asphalt is predicated upon its alleged failure to adhere to the South Carolina Department of Transportation's work zone traffic control guidelines—the 2007 Standard Specifications for Highway Construction, Division 600: Traffic Control, which were incorporated into King Asphalt's contract. These specifications prescribe conditions necessary for reopening lanes that had been temporarily closed to traffic: "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." (R. p. 668). The evidence before the court shows that King Asphalt acted in accordance with this requirement at the time in question: the closure was maintained throughout the workday and was removed only after the new asphalt surface had been laid and compacted to achieve thickness of two inches. (R. pp. 595-595).

The paving operation was preceded by the milling phase of the project; it concluded on March 12, 2019, ten days before the Smiths' accident. During that phase, King Asphalt's crews removed a two-inch-thick layer of the original asphalt. (R. pp. 611-613). Shortly thereafter, King Asphalt proceeded to install the new hot-mixed asphalt surface on the eastbound lanes of Highway 8. Douglas Limbaugh, the vice-president of Milling and Reclamation Services at King Asphalt, testified in his deposition that all the road work done on March 22, 2019 was accepted by SCDOT. (R. pp. 597-598). According to Limbaugh, "everything was started and finished in that area. Everything was tacked and paved. Everything that was paved was compacted." (R. p. 598 lines. 3–4).

**B. The Smiths lacked competent evidence necessary to prove King Asphalt's fault.**

The Smiths presented no admissible evidence of the allegedly improper height differential between the eastbound lanes. In fact, they no longer maintain that the differential was greater than two inches: "The court's own order said that the height difference was 2 inches or less and treated that as allowed. We do not argue about the number. . . . There is no fight about the facts on this issue." (Brief of Appellants at 3). They claim instead that the removal of the cones delineating the lanes was premature precisely because the differential equaled two inches. (Brief of Appellants at 3). The Smiths now rest their entire case on the applicability of another lane-closure specification—one that does in fact prohibit "grade elevation differences greater than 1 inch . . . between adjacent travel lanes open to traffic." (R. p. 668.) Their reliance on this provision, however, is grossly misplaced.

As the introductory clause of the provision literally states, it pertains only to "planing and milling operations."[1] (R. p. 668). In other words, when a contractor performs the milling part of a road repair project, grinding down and removing a layer of worn asphalt, the grade elevation difference between the milled lane and a yet-to-be milled lane reopened to traffic cannot exceed one inch, or—in case of both lanes having been milled—the lanes' levels must be within an inch of each other. This one-inch standard was indeed applicable to the operation King Asphalt had completed on March 12, 2019.[2] It did not apply, however, when King

[1] "*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." (Contract p. 22) (emphasis added.)

[2] The Smiths acknowledged March 12, 2019 as the date of completion of the milling operation in multiple court filings, e.g.: Plaintiffs' Motion to Reconsider; Plaintiffs' Response to Defendant's Memorandum in Support of Summary Judgment.

Asphalt completed paving the outside lane on March 22, 2019. According to the testimony of SCDOT's engineers Joe Laws and Joshua Makison, the two-inch standard applied to the grade differential between lanes at the time of the Smiths' accident. (R. p. 1449, lines 22-24; R. p. 1453, lines 3-19; R. pp. 1456 lines 24-25- p. 1457, lines 1-3.)

**C. Without testimony from an expert, the Smiths cannot effectively counter the SCDOT engineers' testimony on the applicability of the two-inch grade differential standard and King Asphalt's compliance therewith.**

"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)).

The confusion the Smiths exhibit in regard to applicability of the relevant standard demonstrates that they cannot prove their case without the testimony of an expert. Explication of the standards set by "Division 600: Traffic Control" and their application to the facts of the case require testimony in the form of opinions or inferences, which the Smiths cannot provide as such opinions would not be "rationally based on the perception of the witness . . . and [would] require special knowledge, skill, experience or training." Rule 701, SCRE.

Terms such as "hot mixed asphalt (HMA) base courses" and "planing and milling operation," to name a few, are not matters familiar to an average juror. Similarly, the analysis of King Asphalt's performance of its scope of work requires more than common knowledge and the 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).

The Smiths identified no witness who could contradict the testimony of SCDOT's engineers and King Asphalt's employees, and they have no capacity to testify to these construction issues. In order to prove their case, the Smiths were required to present expert testimony from an expert with appropriate credentials and relevant experience in the field of highway construction. At the hearing before Judge Salvini, however, Mr. Smith stated that he did not intend to retain such an expert. (R. pp. 1525-1526.) Without an expert to prove their case and counter the testimony of the SCDOT witnesses and the King Asphalt witnesses, the trial court properly granted summary judgment to King Asphalt.

## Conclusion

After years of discovery and multiple depositions, Michael and Mary Smith failed to gather evidence capable of proving the existence of the essential elements of their claims against King Asphalt. Because they presented no evidence from a testifying expert, they did not establish the standard of care for the road construction practices—including the relevant signage and criteria for temporary lane closures—and did not prove King Asphalt's deviation from such standards. For this reason, the circuit court's decision to grant summary judgment in King Asphalt's favor was appropriate and should be affirmed.

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# CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief complies with Rule 211(b), SCACR.

October 2, 2026

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I, Catharine Garbee Griffin of Baker, Ravenel & Bender, LLP, Attorneys for Respondent, hereby certify that on this 2nd day of October, 2026 I have served the Final Brief of Respondent in the above-referenced matter on all counsel of record via electronic mail to the e-mail address shown below and by US Mail to the address below:

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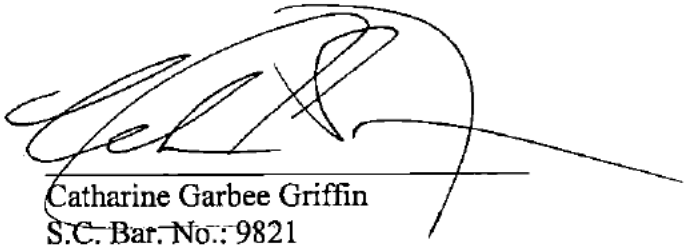
A copy of the email serving the same is attached.



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Re: Michael and Mary Smith v. King Asphalt, Inc.
C.A. No.: 2025-001327
Claim No.: 08975431
Our File No.: 7603.663

Dear Ms. Kitchings:

Attached for filing in the above-referenced matter please find the Final Brief of Respondent. By copy of this letter, the same is being served upon all parties of record via electronic mail and US Mail. The Proof of Service thereof will be filed separately.

I will also be delivering one (1) bound copy of the Final Brief of Respondent to be filed with the court today along with a copy to be clocked in and returned with the courier.

If you have any questions concerning this letter, please do not hesitate to contact me.

Yours truly,

Catharine Garbee Griffin
CGG:wh
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