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STATE OF SOUTH CAROLINA COUNTY OF PICKENS Michael and Mary Smith, Plaintiffs, vs. Themistoklis Economou and King Asphalt Inc., Defendants.	IN THE COURT OF COMMON PLEAS FOR THE THIRTEENTH JUDICIAL CIRCUIT CASE NO.: 2021-CP-39-00329 **PLAINTIFFS' RESPONSE TO DEFENDANT'S MEMORANDUM IN SUPPORT OF SUMMARY JUDGMENT AND ARGUMENTS AT THE HEARING**

PLAINTIFFS' RESPONSE TO DEFENDANT'S MEMORANDUM IN SUPPORT OF SUMMARY JUDGMENT AND ARGUMENTS AT THE HEARING

Introduction

On January 27, 2025, at 11:30 AM, a hearing was conducted in Courtroom 4 of the Pickens County Courthouse before the Honorable Jessica A. Salvini. Defendant, King Asphalt, Inc., seeks summary judgment, arguing that Plaintiffs' claims fail for lack of expert testimony. However, Defendants' own filings and admissions establish indisputable proof of negligence per se, relieving Plaintiffs of any burden to further prove liability.

Because Defendants have conceded to multiple statutory and regulatory violations under South Carolina law and SCDOT regulations, no genuine dispute of material fact remains, and summary judgment must be granted in favor of Plaintiffs as a matter of law for negligence *per se*.

In the alternative, should the Court decline to grant summary judgment for Plaintiffs, Defendants' motion must still be denied. Their arguments rest on a misapplication of the summary judgment standard by using Federal Rules of Civil Procedure instead of the SC Rules of Civil Procedure in a South Carolina Court.

> "Fed.R.Civ.P. 56(c). Rule 56(c) mandates entry of summary judgment "against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case." Celotex Corp. v. Catrett, 477 U.S. 317, 322, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). (Page 8 of Memorandum)

Does not exist in the South Carolina Rules of Civil Procedure and is accompanied with an improper conflation of factual disputes with legal insufficiency, and a reliance on an alleged lack of expert testimony—none of which overcome the dispositive weight of their own admissions.

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Opposing counsel's reliance on Federal Rule of Civil Procedure 56(c) and federal case law in this South Carolina state court proceeding is misplaced and should be disregarded. The Federal Rules of Civil Procedure do not govern proceedings in South Carolina state courts. Instead, the South Carolina Rules of Civil Procedure (SCRCP) apply, specifically SCRCP Rule 56 for summary judgment motions.

While the federal Celotex standard may be persuasive, it is not binding on South Carolina courts. The South Carolina Supreme Court has recently clarified the state's summary judgment standard in The Kitchen Planners, LLC v. Samuel E. Friedman (August 23, 2023). The court emphasized the "genuine issue of material fact" standard and rejected the "mere scintilla" approach. Under South Carolina law, the non-moving party must show that a reasonable inference can be drawn from the evidence to defeat a summary judgment motion.

Furthermore, South Carolina courts have developed their own body of case law interpreting SCRCP Rule 56. The state standard, while similar in some respects to the federal standard, may be interpreted and applied differently in South Carolina courts. Therefore, opposing counsel's reliance on FRCP 56(c) and federal case law is inappropriate and potentially misleading in this state court proceeding. This Court should apply the summary judgment standard as articulated by the South Carolina Supreme Court and interpreted through South Carolina case law, rather than federal standards that do not directly apply in this forum.

Since negligence per se is established through statutory violations, no expert testimony is required to prove liability.

Accordingly, Plaintiffs request that the Court grant their motion for summary judgment based on Defendants' admissions as no further proof is needed. In the alternative, the Court should find that genuine issues of material fact remain, Defendants' motion must be denied, and this case should be scheduled for trial.

The Plaintiff further requests the Court to take judicial notice of all Codes, regulations, depositions and other supporting evidence submitted by Plaintiff or provided by King Asphalt, Inc. and SCDOT.

I. DEFENDANT'S ADMISSIONS IN IT'S MEMORANDUM TO SUPPORT IT'S MOTION FOR SUMMARY JUDGMENT INDISPUTABLY PROVES PLAINTIFF'S CASE

Defendant King Asphalt, Inc. has, through its own admissions, documentary evidence, and contractual obligations, conclusively established liability under South Carolina law and SCDOT regulations. Their memorandum, admissions, filings, depositions, and contract provisions confirm multiple violations of statutory and regulatory safety standards, including the failure to mitigate a prohibited lane height differential exceeding one inch and the unlawful removal of a traffic control safety scheme. These violations constitute **negligence per se**, as they breach clearly defined duties imposed by SCDOT Division 600 regulations and South Carolina law, which are designed to protect the public from precisely this type of harm.

Defendants' own admissions, evidence and concessions demonstrate that their actions directly caused the accident, leaving no room for dispute as to their liability. By violating these mandatory safety standards, King Asphalt, Inc. is liable as a matter of law, and no genuine issue of material fact remains for trial.

As such, the Court is compelled to grant summary judgment in favor of the Plaintiffs. Defendants' memorandum, admissions, filings, depositions, and contract provisions (preclude Plaintiffs providing further proof), coupled with their violations of law, demand nothing less than a ruling in Plaintiffs' favor as a matter of law.

1. Defendants Have Admitted the Accident Occurred in an SCDOT Work Zone

For six years, King Asphalt falsely denied that the accident occurred within an SCDOT work zone. However, in their Memorandum in Support of Summary Judgment, Defendants have now conceded that the accident occurred in an active work zone:

> "The SCDOT, through its contract, provided permanent signs designating the area as a construction zone for the duration of the project."
> *(Defendants' Memorandum, Page 3, Last Paragraph)*

South Carolina Code § 56-5-1535(F)(1) defines a work zone by the presence of "Road Work Ahead" and "End Road Work" signs. The presence of these signs (within which the accident site resided) means the entire highway section remained a work zone throughout the life of the project, regardless of the movement/ebb and flow of various temporary traffic control devices within the zone.

> "SECTION 3. Section 56-5-1535(F)(1) of the 1976 Code is amended to read:
>
> (1) 'Highway work zone' means an area of a roadway, bridge, shoulder, median, or associated right of way, where construction, maintenance, utility work, accident response, towing, 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."

Note the differentiation between small road repairs with temporary signage and major projects (with miles of all five lanes being milled and paved) with permanent signage. By conceding this fact, Defendants have admitted that all SCDOT safety and traffic control requirements (Division 600) applied at the time of the accident, which they indisputably violated.

This admission destroys their prior argument that work zone safety standards were irrelevant and confirms that they were subject to strict safety and traffic control requirements, which they systematically ignored.

2. Defendants Have Admitted to a Lane Height Differential That Violates SCDOT Regulations

King Asphalt's own filings confirm that at the time of the accident, there was a lane height differential of 2 inches between the newly paved outside lane (LOSL) and the milled inside lane (LISL):

> "With respect to the area where the plaintiffs claim the accident occurred, Limbaugh, the vice-president of Milling and Reclamation Services at King Asphalt testified that "everything was started and finished in that area. Everything was tacked and paved. Everything that was paved was compacted." (Dep. of Limbaugh p 32-33). All the road work done on March 22, 2019 was accepted by the S.C. DOT. (Dep. of Limbaugh p. 32-33). Limbaugh also testified that S.C. DOT documented on a daily basis both the quality and the thickness of the asphalt and the compaction of the asphalt. (Dep. of Limbaugh, p. 42-43). Limbaugh further testified that the grade elevation difference between the paved lane and non-paved lane was either two inches or less which is the DOT requirement. (Dep. of Limbaugh p. 44). S.C. DOT engineer, Laws, also confirmed that the DOT regulation was that the lane differential not exceed two inches. (Dep. of Laws, p.19) S.C. DOT had their own inspector on site for every project and the inspector would have inspected the lane differential to make sure that the measurement was two inches. (Dep. of Limbaugh, p. 44). Zachary Michael, King Asphalt's Director of Personnel and Safety, also testified that the asphalt was installed according to SCDOT specifications in the outside lane, allowing for a two-inch differential between the milled lane and the newly asphalted right lane. (Dep. of Michael, p. 36). Michael testified that King Asphalt did "exactly as S.C. DOT contracted us to do." (Dep. of Michael, p. 37). He specifically stated that the contract required that they remove two inches of the asphalt and install two inches which is what they did. (Dep. of Michael, p. 38)."(Defendants' Memorandum, Page 5)

> "The King Asphalt road construction crew then installed new asphalt in the outside lane on March 22, 2019. To place the new asphalt in the designated outside lane and allow the traffic to flow unimpeded in the inside lane, King Asphalt, according to the specifications of S.C. DOT, implemented a temporary lane closure of the lane in which they were performing paving operations. To close a lane, King Asphalt would have placed delineation devices or cones at the beginning of the lane closure, tapering the closing of the lane to direct the live traffic to the left lane while construction was being done in the right lane. (Dep. of Laws, pp. 27-29). Beyond the taper closing the lane, King Asphalt would have placed cones every 50 feet in the work zone to protect the ongoing construction activities of their employees from the danger of the traffic. (Dep. of Michael, p. 46). The standard established by the S.C. DOT and within the road construction industry allows for temporary lane closures so that work can safely proceed in one lane while traffic proceeded in the adjacent lane. "*(Defendants' Memorandum, Page 5,)*

Defense counsel is adamant, SCDOT inspectors checked it, King Asphalt, Inc. personnel made sure it was two inches, Daily Inspection Reports (Form 400.04) said it was 2.16 inches, RCE Joe Laws said it was two inches. Everybody is 1000% sure it was two inches. In fact swore, under oath in depositions that it was 220 lbs/sq (two inches). **[see attached EXHIBIT F]**

Defendants admitted the condition of the highway at the accident site on March 22, 2019 as:

> "It is not disputed that at the time of the collision between the moped operated by Smith and the car operated by Economou that the inside left lane had been milled and was in that condition and the outside lane had been paved with new asphalt." (Page Four of Defendant's Memorandum **[attached Exhibit E]**)

Defendant's and SCDOT provided a paving record for March 22, 2019 and every portion of highway paved that day (including the accident site) exceeded 220lb/Sq YD **[see attached EXHIBIT K]**. Michaels explanation of the conversion of lb/sq yd is 220lb/sq yd = 2 inches. (see page 62 **[see attached EXHIBIT H]** SCDOT formula for converting lb/sq yd is 105 lbs = 1 inch **[see attached EXHIBIT Q]**

Only one problem, two inches is 100% greater than what Division 600 regulations and King Asphalt, Inc.'s contract permitted it to be. Creating a hazardous condition PROHIBITED by regulation.

Fortunately, all of the regulatory language we need is found on Pages 22 and 23 of the rather voluminous document filed by Defendants. [see attached EXHIBIT G]

First, we should address the standard, mentioned by Defense counsel during the hearing, as related to "grade elevations and drop-offs" and show it's irrelevant application to the instant case. King Asphalt Proposal/Contract Page 22, third paragraph from bottom declares a standard for "grade elevations and drop-offs".

> "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. Maintain lane closure restrictions at all times unless otherwise directed by these special provisions." (King Asphalt Proposal/Contract Page 22, third paragraph from bottom **[see attached EXHIBIT G]**)

This two-inch standard is possibly the standard Defense counsel is mistakenly attempting to apply to the instant case. "Grade elevations and drop-offs" have to do with the shoulders and outside edges of the roadway. Not between adjacent lanes of travel, which is explicitly addressed in the next paragraph.

SCDOT regulatory/contract provisions in the Proposal/Contract Document and SCDOT Division 600 regulations filed by Defendants (Page 22, Next to Last Paragraph) explicitly PROHIBITS lane height differentials greater than 1 inch during surface planing and milling operations, with

adjacent travel lanes pavements composed of hot mixed asphalt (HMA) base courses and a planed surface:

> "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 Proposal/Contract Page 22, next to last paragraph **[see attached EXHIBIT G]**)

Defendants' own work reports confirm that the height differential remained for five full days (March 22, 2019 - March 27,2019) before being corrected, violating their contractual obligation to keep the lane closed until the differential was mitigated. The regulations only have one acceptable method of mitigation:

> "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." (King Asphalt Proposal/Contract Page 23, first paragraph **[see attached EXHIBIT G]**)

Note the directive's instructions that the lane will remain closed until one of these two mitigation methods are utilized to remove the safety violation.

The primary function of "shall" in legal drafting is to impose a mandatory obligation or duty on the subject of the sentence;

> "The Contractor shall install all lane closures as directed by the Standard Specifications For Highway Construction (latest edition), the Standard Drawings For Road Construction, these special provisions, the MUTCD, and the Engineer. The Contractor shall close the travel lanes of two-lane two-way roadways by installing flagging operations. The Contractor shall close the travel lanes of multilane roadways as directed by the typical traffic control standard drawings designated for lane closures on primary routes." (King Asphalt Proposal/Contract Page 23, sixth paragraph **[see attached EXHIBIT G]**)

Not adhering to these guidelines is a direct regulatory violation, making negligence per se undeniable. There is no material dispute remaining—the only question left is whether the Court will enforce the law.

3. Defendants Have Falsely Claimed That Milling and Paving Were Performed "Consecutively"

Defendants falsely claim that milling and paving were performed consecutively, implying there was no period where a hazardous height differential existed. However, their own Daily Work Report/Inspections records covering the accident site prove this claim is false:

Date	Operation	Result
March 6, 2019	Inside lane (LISL) milled to -2 inches	Left a height differential with the paved outside lane.
March 12, 2019	Outside lane (LOSL) milled	Both lanes were milled evenly for a brief period.
March 22, 2019	Outside lane (LOSL) paved with 2+ inches	Created a 2-inch differential with the still-milled inside lane (LISL).
March 27, 2019	Inside lane (LISL) paved	Finally eliminated the height differential, five days after the accident.

For at least five days (March 22-27 - beginning at 5PM March 22, 2019), the lane height differential exceeded the legal 1-inch limit for two lanes with a milled lane and paved lane adjacent to each other, was unmitigated as directed by regulation, and exposed the Plaintiffs and the public to hazardous road conditions.

Defendants' claim that paving and milling occurred "consecutively" is demonstrably false, and their misrepresentation of these facts is further evidence of their bad faith litigation tactics.

4. Defendants Have Admitted to Removing Traffic Control Devices Before Law Enforcement Arrived

Defendants admit they initially placed cones between the milled and paved lanes but later removed them (after the accident and before law enforcement arrived to investigate), exposing motorists to a PROHIBITED hazard:

> "To place the new asphalt in the designated outside lane and allow the traffic to flow unimpeded in the inside lane, King Asphalt, according to the specifications of S.C. DOT, implemented a temporary lane closure of the lane in which they were performing paving operations. To close a lane, King Asphalt would have placed delineation devices or cones at the beginning of the lane closure, tapering the closing of the lane to direct the live traffic to the left lane while construction was being done in the right lane."
> *(Defendants' Memorandum, Page 5, Paragraph 2)*
>
> "When the work was finished for the day, the temporary signs and cones which had been placed for the safety of the King Asphalt employees and the motoring public would be removed. King Asphalt would open the closed lane by picking up the delineation devices, the cones, in reverse order from how the lane was closed. (Dep. of Michael, p. 54). As each cone was removed from the highway, it would be considered to be the end of the lane closure, thus allowing the traffic to proceed in that lane. (Dep. of Michael, p. 54). Once each cone for the lane closure was picked up, then the closed lane was completely reopened for traffic to flow. (Dep. of Michael, p. 55). The motoring public would know

that the lane was open for use because there would be no cones in the area which had previously indicated that the lane was closed. (Dep. of Michael, p. 55).

Joseph Laws, the resident construction engineer for S.C. DOT, testified that the removal of the traffic cones falls under the 2007 SCDOT Standards and Specifications Manual and the traffic control plan of the contractor. (Dep. of Joseph Laws, p. 25). Laws testified that cones are typically removed from the back taper to the front taper against the traffic to open the lane. (Dep. of Laws, pp. 9 and 28- 29).(Defendants' Memorandum, Page 6, Paragraph 2)

SCDOT regulations make deployment of a full traffic control scheme mandatory:

"Supplement and delineate the shoulder edges of travel lanes through work zones with traffic control devices to provide motorists with a clear and positive travel path. Utilize portable plastic drums unless otherwise directed by the Department. Vertical panels may be used where specified by the plans and directed by the RCE. 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" (Proposal page 23. paragraph 4 **[see attached EXHIBIT G]**)

However:

- **SCHP dashcam footage** confirms that no cones, barrels, vertical panels, or other required traffic control devices (from either the general traffic control plan for work zones or the lane delineation) were present at the time of the accident.
- **GPS data from King Asphalt's cone truck** shows it was actively removing traffic control devices just minutes before the accident.
- **Witnesses confirm** that King Asphalt's crew removed the cones, reopening the hazardous lane prematurely.
- **Defendants by counsel admitted to removal of SCDOT work zone traffic control devices prior to law enforcement arrival.**

The Only Possible Conclusions:

- King Asphalt never set up the required safety devices of the general traffic control scheme, violating contract requirements.
- King Asphalt installed them but removed them before law enforcement arrived, suggesting a deliberate cover-up. SCHP dashcam verified no traffic control of any kind was visible for a half mile approaching the accident scene and a half mile down the road past the accident scene. Division 600 and King Asphalt, Inc.'s proposal/contract state:

Either scenario constitutes reckless disregard for safety, justifying punitive damages.

5. Defendants' Violations Were Financially Motivated—Justifying Uncapped Punitive Damages

Under **S.C. Code Ann. § 15-32-530(C)**, punitive damages caps are removed when:

- A violation was motivated by financial gain.
- The defendant knowingly failed to comply with laws protecting public safety.

King Asphalt:

- Was paid $150,000 for traffic control but failed to implement a compliant safety plan.
- Cut costs by minimizing traffic control deployment, or not deploying the full scheme.
- Removed cones (or never placed them) and safety devices, prioritizing profit over public safety.
- Denying safety incidents to maintain a sufficiently high CPS (Contractor performance Score) permitting King Asphalt, Inc. to bid on future contracts
- Knowingly misrepresented facts to evade liability.

This meets the statutory threshold for **uncapped punitive damages**, meaning there is no legal basis for limiting the damages awarded against them.

Conclusion: No Genuine Issues of Material Fact Remain

In plain English, King Asphalt, Inc. has admitted—and thereby stipulated—that it was operating an SCDOT work zone on March 22, 2019, governed by SCDOT regulations and South Carolina law. King Asphalt, Inc. admitted to active work at the accident site in the eastbound lanes of Highway 8 (Gentry Memorial Highway) between Owen Lane and Old Easley Pickens Highway. **[see attached EXHIBIT G page 53 at line 11] [see attached EXHIBIT H]** Specifically, the fast lane was milled two inches as per the contract, and the slow lane was freshly paved with Hot Mixed Asphalt (HMA) with a mat of two inches or greater, creating a lane height differential of more than two inches. **[see attached EXHIBIT E,F] [see attached EXHIBIT L,M,N,O,P,R]**

King Asphalt, Inc., through its counsel, admits it deployed a traffic control delineation scheme (traffic cones) to isolate the slow lane for paving operations. Critically, King Asphalt, Inc. also admits to retrieving that lane isolation scheme by driving a company vehicle against traffic—westbound in the eastbound slow lane—opening the slow lane to traffic. This action permitted a driver traveling through the zone in the fast lane, single-file behind Plaintiff's moped, to take the slow (right) lane and strike Plaintiff's moped as it lawfully attempted to cross that lane to exit the highway.

Notably, King Asphalt, Inc. removed the SCDOT mandated traffic control safety scheme without first mitigating the prohibited safety hazard of a lane height differential greater than one inch—a violation of its contract, SCDOT Division 600 regulations, and South Carolina law.

But for King Asphalt, Inc.'s unlawful and premature removal of the safety scheme (prior to mitigating the known safety hazard of a lane height differential exceeding one inch between a milled and HMA 'Hot Mixed Asphalt' paved lane) before opening the lane to traffic—permitting a driver to emerge from the single file line of vehicles traversing the work zone in the fast lane and taking the unlawfully opened lane, striking the Plaintiff's moped lawfully crossing the lane to exit the highway to the right, this accident would not have occurred.

King Asphalt, Inc.'s admissions establish every fact necessary to prove negligence per se. Their own statements, combined with the clear mandates of SCDOT regulations and South Carolina statutory law, leave no genuine issue of material fact for trial. The Court must grant summary judgment for Plaintiffs as a matter of law.

WHEREFORE, Plaintiffs respectfully request that the Court grant their Motion for Summary Judgment and enter judgment in their favor.

IN THE ALTERNATIVE PLAINTIFF REQUSETS DISMISSAL OF PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT AND THIS CASE TO BE SCHEDULED FOR TRIAL FOR THE FOREGOING REASONS

II. STANDARD OF REVIEW ARGUMENT

Defendant King Asphalt, Inc. has misapplied the standard for summary judgment in South Carolina courts. Their reliance on federal case law, particularly *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986), and Federal Rule of Civil Procedure 56, is misplaced, as this case is governed by South Carolina law. Under South Carolina law, summary judgment is only appropriate where no genuine issues of material fact exist, and the movant carries the burden of proving that they are entitled to judgment as a matter of law. See *Baughman v. Am. Tel. & Tel. Co.*, 306 S.C. 101, 410 S.E.2d 537 (1991). The South Carolina Supreme Court has repeatedly emphasized that summary judgment should be granted cautiously, particularly in negligence cases where factual disputes must be resolved by a jury. See *Hancock v. Mid-South Mgmt. Co.*, 381 S.C. 326, 673 S.E.2d 801 (2009).

A. South Carolina's Stricter Summary Judgment Standard

Unlike the federal standard, South Carolina law disfavors summary judgment, particularly in cases involving negligence. In *Baughman v. AT&T*, the South Carolina Supreme Court made it clear that the moving party bears the burden of eliminating any genuine issue of material fact. Here, Defendant has not met this burden. In fact, their memorandum concedes material factual disputes by emphasizing the alleged complexity of lane height differentials, traffic control protocols, and SCDOT regulatory compliance. Their own argument contradicts their assertion that no material facts are in dispute.

Moreover, *Hancock v. Mid-South Mgmt. Co.* reiterates that courts must view the evidence in the light most favorable to the non-moving party. Given the documented violations of SCDOT regulations and the contract's explicit lane height differential limits, summary judgment is improper in this case.

B. Expert Testimony is Not a Legal Requirement

Defendant falsely claims that expert testimony is a prerequisite for proving their liability. However, South Carolina courts have repeatedly held that expert testimony is not required when the subject matter is within common knowledge or when statutory violations constitute negligence per se. See *Watson v. Ford Motor Co.*, 389 S.C. 434, 699 S.E.2d 169 (2010). The factual issues in this case—whether King Asphalt's lane height differential exceeded SCDOT limits and whether traffic control devices were improperly removed—are straightforward and do not require expert interpretation. *Rayfield v. South Carolina Dep't of Corr.*, 297 S.C. 95, 374 S.E.2d 910 (Ct. App. 1988), establishes that statutory violations may constitute negligence per se, further negating the need for expert testimony.

C. Genuine Issues of Material Fact Exist

Summary judgment is inappropriate where genuine factual disputes remain. Plaintiffs have provided substantial evidence demonstrating that:

1. **King Asphalt exceeded the 1-inch lane height differential limit** (documented at 2.16 inches in the work logs and daily reports).
2. **Traffic control devices were prematurely removed**, creating an unmarked hazardous condition (corroborated by SCHP dashcam footage).
3. **Depositions contradict Defendant's assertions**, as none of King Asphalt's deponents or SCDOT employee deposition references had direct knowledge of site conditions or factual details at the time of the accident. Their testimony merely stated they were certain King Asphalt, Inc. had complied with SCDOT guidelines in their application of their paving contract.

These facts, which are supported by objective evidence, must be evaluated by a jury. *Hancock v. Mid-South Mgmt. Co.* and *Baughman v. AT&T* confirm that summary judgment is improper when such disputes exist.

D. Granting Summary Judgment Would Be Reversible Error

South Carolina appellate courts have consistently reversed summary judgments where factual disputes exist. Dismissing this case based solely on the absence of an expert witness would be an improper application of Rule 56(c), as South Carolina courts have ruled that expert testimony is not required in all negligence cases. Given the clear statutory and regulatory violations in this case, an appellate court would likely find such a ruling premature and improper.

E. Summation

In this case, Defendant's own memorandum and hearing arguments create more questions than answers regarding material facts, thereby precluding summary judgment. See **Hancock v. Mid-South Mgmt. Co.**, 381 S.C. 326, 673 S.E.2d 801 (2009) (viewing all evidence in the light most favorable to the non-moving party).

Summary judgment is appropriate only where "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 burden rests on the movant to establish the absence of any genuine dispute of material fact. See **David v. McLeod Reg'l Med. Ctr.**, 367 S.C. 242, 626 S.E.2d 1 (2006).

The defendant has failed to meet their burden under South Carolina's strict summary judgment standard. Their motion relies on an improper application of federal law, a flawed argument regarding expert testimony, and an attempt to bypass genuine issues of material fact. South Carolina law is clear: negligence cases involving factual disputes belong before a jury. Plaintiffs respectfully request that this Court deny Defendant's motion for summary judgment.

III. Defendant's Argument Relating to Expert Testimony

Defendant's primary argument—that expert testimony is required pretrial to explain their liability—is legally and factually incorrect. Negligence per se arises when a party violates a statute or regulation designed to protect the public, and such violations serve as proof of duty and breach. See **Whitlaw v. Kroger Co.**, 306 S.C. 51, 410 S.E.2d 251 (1991). Plaintiffs' case rests on three core violations:

1. **Lane height differentials exceeding SCDOT limits:**
    - Defendant's own contract specifies that lane height differentials during milling/paving operations must not exceed 1 inch for adjacent HMA lanes (Division 600, SCDOT regulations). The documented height differential of 2.16 inches at the accident scene is clear, objective evidence of a violation.
2. **Removal of traffic control devices and premature lane reopening:**
    - Evidence shows that King Asphalt removed work zone signs and prematurely reopened a hazardous lane to traffic, violating their contractual obligations and endangering the public.
3. **Obstruction of the post-accident investigation:**
    - Defendant's removal of traffic control devices post-accident hampered the investigation, as corroborated by the amended TR-310 accident report. This further underscores their negligence and bad faith.

These violations are factual matters supported by documentary evidence, depositions, and photographic proof. Contrary to Defendant's claims, these facts do not require expert testimony to be understood by a jury. See **Watson v. Ford Motor Co.**, 389 S.C. 434, 699 S.E.2d 169 (2010) (expert testimony is unnecessary where the subject matter is within common knowledge).

Defense counsel's repeated references to Economou, the driver of the car involved in the accident, are irrelevant and misleading. Plaintiffs have settled with Economou, and his actions came after the fact of King Asphalt's premature reopening of the unsafe lane. Had the lane not been opened in violation of safety standards, the accident would not have occurred. Defense counsel's reliance on this irrelevant point is an improper attempt to distract from King Asphalt's direct negligence.

IV. Defendant's Concession of Material Issues of Fact

Defendant's argument that expert testimony is required inadvertently concedes the existence of material issues of fact. By emphasizing the complexity of lane height differentials, traffic control protocols, and compliance with SCDOT standards, Defendant implicitly acknowledges that these issues are factual and contested. Summary judgment is inappropriate where material factual disputes exist, as recognized in **Baughman v. American Tel. & Tel. Co.**, 306 S.C. 101, 410 S.E.2d 537 (1991).

V. Plaintiffs' Evidence Supports Negligence Per Se

1. **Lane Height Differential Evidence**:
    - The documented 2.16-inch height difference exceeds the 1-inch limit set forth in SCDOT's Division 600 standards. This evidence is objective, measurable, and undisputed by Defendant's deponents, none of whom conducted specific measurements at the scene.
    - **Distinction Between Contract Provisions**: Defense counsel's oral argument wrongly asserted that the 2-inch drop-off rule applies as the prevailing standard in this case. This is incorrect. The **2-inch limit** pertains to general shoulder drop-offs or transitions where construction has been completed, and traffic is stabilized. In contrast, the **1-inch limit** explicitly applies to **milling operations** involving adjacent lanes open to traffic, as is the situation here. The stricter 1-inch standard governs this case due to the ongoing milling and paving work at the time of the incident, and Defendant's failure to adhere to this standard directly caused the unsafe conditions.
2. **Photographic and Video Evidence**:
    - Dashcam footage and still images from the accident scene visually depict the hazardous height variance (berm) that caused the moped's loss of control. These visuals are comprehensible to a lay jury and do not require expert interpretation. Additionally, the Plaintiffs have submitted a still image captured from the SCHP dashcam video, which clearly shows the exact position of the car and moped immediately after the accident in relation to Owen Lane and the associated bridge. This photographic evidence definitively establishes the location of the incident and refutes the defense counsel's unfounded claim during the hearing that the Plaintiffs have not proven where the accident occurred. Furthermore, deposition testimony from Limbaugh, the Defendant's 30(b)(6) witness, reinforces the unreliability of the defense's assertions. Limbaugh admitted he was in charge of milling operations but lacked direct knowledge of the specific incident, testifying instead about general practices and "how it is supposed to be done," rather than

facts specific to this case. This testimony demonstrates the speculative nature of Defendant's claims regarding compliance in this instance. Moreover, Zachary Michael confirmed on page 62 of his deposition that a 220 lbs/sq yard application corresponds to a two-inch finished mat, further supporting the evidence of the lane height differential exceeding regulatory limits at the accident site.

3. **Contractual Violations:**
    - Defendant's contract prohibits opening lanes with unsafe conditions. Their removal of traffic control devices and premature lane reopening breached these provisions and directly contributed to the accident. See **Koontz v. Thomas**, 333 S.C. 702, 511 S.E.2d 407 (Ct. App. 1999) (contractual violations as evidence of negligence).
4. **Selective and Misleading Use of Depositions:**

Defendant has relied on deposition testimony selectively, omitting key admissions that negate their claims. Defense counsel has quoted excerpts from the depositions of Limbaugh, Laws, Michael, and Makison, but none of them claimed direct knowledge of any details of the accident. Instead, they referred to general practices or what "should have been" done. Michael and Limbaugh are employees of King Asphalt and suffer a distinct conflict of interest in their testimony. For example:

- **Douglas Limbaugh,** the Defendant's 30(b)(6) witness, admitted on page 6 of his deposition that he had no direct knowledge of the investigation into the incident and spoke only to general practices. **[attached Exhibit B]**
- **Joe Daniel Laws III** admitted on page 9 of his deposition that he was off on annual leave on the day of the accident. Furthermore, he confirmed on page 16 that the first time he heard about the accident was in 2021 (two years after the fact). This demonstrates his lack of direct knowledge and undermines the credibility of his testimony as evidence of compliance. **[attached Exhibit D]**
- **Zachary Michael** acknowledged that the Defendant's office did not have established protocols to ensure notification of incidents unless someone else reported them. On page 7, lines 17-20 of his deposition, Michael explicitly stated that he would not be able to answer anything about this specific accident, further underscoring the speculative and irrelevant nature of his testimony in relation to the incident. He also claimed they were unaware of the accident until contacted via email months after the fact. **[attached Exhibit A]**
- **Joshua Frazier Makison** admitted on page 9 of his deposition that he had no involvement with the 3948130 contract and that his only connection to this matter was assisting in answering the FOIA request. This admission highlights the irrelevance of his testimony to the substantive issues in this case and further exposes defense counsel's misrepresentation of deposition content. **[attached Exhibit C]**

These omissions by defense counsel mischaracterize the facts and attempt to create a misleading narrative. The full depositions reveal that none of the witnesses had specific knowledge of the conditions at the accident site or compliance with safety standards during the relevant time.

Such selective and incomplete reliance on deposition testimony demonstrates a disingenuous attempt by defense counsel to obscure the facts of the case and mislead the Court.

VI. Defendant's Procedural Tactics

Defendant's last-minute submission of a 15-page memorandum, seven depositions excerpts, and a 127-page contract proposal at the hearing is a transparent attempt to disadvantage the pro se Plaintiffs. This includes misleading reliance on deposition testimony, such as Joe Laws stating he was off the day of the incident, undermining the credibility of the defense's factual assertions. Additionally, defense counsel only included select pages of the depositions, making a disingenuous attempt to falsely mislead the Court by omitting portions of those same depositions that negate their claims. By cherry-picking deposition excerpts, defense counsel leaves a mischaracterization of the facts and presents an incomplete and misleading narrative.

Additionally, the Court's decision to interrupt and prematurely cut off Plaintiffs' response during the hearing further hindered their ability to fully articulate their position. Instead the entire focus became the Defense counsels expert witness issue. Plaintiffs respectfully note that this procedural imbalance has prejudiced their ability to address the baseless arguments advanced by defense counsel, many of which serve only to obfuscate and distract from the central issues of negligence per se and bad faith conduct. Courts have long recognized that pro se litigants must be given leeway to present their case without being overwhelmed by such tactics. See **Sundown Operating Co. v. Intedge Indus., Inc.**, 383 S.C. 601, 681 S.E.2d 885 (2009) (liberal construction of pro se pleadings).

VII. Defense Counsel's Inflammatory Reference to UPL

In Defendant's memorandum, counsel included a note at the bottom of page 11, that raises the specter of Unauthorized Practice of Law (UPL), in a transparent attempt to prejudice the Court against the Plaintiffs. Defense counsel is well aware of the inflammatory effect of the "buzzword" UPL has on members of the legal profession. However, Judge Gravely has already ruled that the subject of UPL is not within the jurisdiction of this Court, explicitly directing defense counsel to take the matter up with the South Carolina Supreme Court if they wish to pursue it. Defense counsel has had 11 months to pursue these allegations; but, Plaintiffs speculate defense counsel does not want to answer Mr. Pressly's affirmative defense of emergency due to defense counsel's well-documented misconduct or being scrutinized for her litigations tactics towards a *pro se* litigant forestalled that pursuit.

For defense counsel to continue referencing UPL in an attempt to influence this Court is not only irrelevant but constitutes misconduct. Such behavior is a clear attempt to distract from the substantive issues of this case, and it raises the question of whether such actions amount to contempt of court. Plaintiffs respectfully request that the Court admonish defense counsel for continuing to raise this matter improperly and disregard these inflammatory references entirely. Defense counsel's prior conduct, including inappropriate communications and attempts to influence the Court, was a contributing factor in the recusal of the Honorable G.D. Morgan, Jr.

This pattern of behavior underscores the importance of maintaining procedural fairness in the current proceedings.

VIII. Interference with Plaintiffs' Efforts to Secure Substitute Counsel

Defense counsel's conduct—including the submission of inflammatory and irrelevant filings, as well as engaging in negative commentary about Plaintiffs in the public record—has directly interfered with Plaintiffs' ability to secure substitute counsel. Rather than allowing defense counsel to unfairly assail a pro se litigant, the Court, in the interest of fairness and justice, should address and remedy this interference. Such tactics reflect a pattern of obstruction and bad faith designed to deny Plaintiffs a fair opportunity to litigate their claims on the merits. This behavior undermines the judicial process and should not be rewarded with a grant of summary judgment.

IX. No Pretrial Requirement for Expert Testimony

During the hearing, the Court inquired whether the Plaintiffs planned to hire an expert witness, to which the Plaintiff responded in the negative. However, it is important to emphasize that this decision is not final and is not one that the pro se Plaintiff can or should make at this juncture. Such a determination would typically be made by an attorney representing the Plaintiff, once substitute counsel is secured. The Plaintiff's current status as a pro se litigant should not be unfairly used to draw adverse inferences or make premature decisions regarding the need for expert testimony.

South Carolina courts have held that expert testimony is not required where statutory or regulatory violations serve as the basis for negligence. See **Rayfield v. South Carolina Dep't of Corr.**, 297 S.C. 95, 374 S.E.2d 910 (Ct. App. 1988) (violation of a statute constitutes negligence per se as a matter of law when facts are undisputed). Plaintiffs' evidence—dashcam footage, measurements, and contractual provisions—establishes clear statutory violations without the need for expert analysis. Thus, any decision about hiring an expert should not prejudice the Plaintiff's ability to proceed, especially given the straightforward nature of the evidence supporting their claims. Here, the factual evidence is straightforward and within the comprehension of a lay jury.

X. Conclusion

Granting summary judgment solely based on the absence of an expert witness prior to trial is likely to be considered reversible error on appeal in South Carolina. This conclusion is supported by several key points:

1. The summary judgment standard in South Carolina requires that there be no genuine issue of material fact. The mere absence of an expert witness does not necessarily mean there are no factual disputes to be resolved at trial.
2. Expert testimony is not always required to establish negligence, especially in cases involving negligence per se due to statutory or regulatory violations. The South Carolina

Court of Appeals has held that expert testimony is not required where such violations serve as the basis for negligence.

3. The decision to require expert testimony is typically made based on the complexity of the issues involved, not as a blanket requirement for all cases. In situations where the facts are within the common knowledge and experience of lay jurors, expert testimony may not be necessary.
4. Granting summary judgment based solely on the lack of an expert witness before trial could be seen as prematurely deciding the case without allowing the plaintiffs the opportunity to present their evidence fully.
5. South Carolina courts have recognized that pro se litigants should be given some leeway in presenting their cases. Dismissing a case at the summary judgment stage due to lack of expert testimony, especially for pro se plaintiffs, could be viewed as overly harsh and potentially reversible.

Given these factors, an appellate court would likely view such a summary judgment decision as premature and an improper application of the summary judgment standard, making it subject to reversal on appeal. This conclusion is further supported by case law:

- **Watson v. Ford Motor Co., 389 S.C. 434, 699 S.E.2d 169 (2010)**: This case affirms that expert testimony is not required when the subject matter is within common knowledge or experience, such as the issues in this case involving lane height differentials and contractual violations.
- **Hancock v. Mid-South Mgmt. Co., 381 S.C. 326, 673 S.E.2d 801 (2009)**: This case emphasizes that summary judgment is inappropriate when there are genuine issues of material fact, and evidence must be viewed in the light most favorable to the non-moving party.
- **Sundown Operating Co. v. Intedge Indus., Inc., 383 S.C. 601, 681 S.E.2d 885 (2009)**: This case highlights that courts should liberally construe pro se pleadings, underscoring the importance of ensuring fairness for self-represented litigants.

These cases collectively reinforce the principle that granting summary judgment based solely on the absence of an expert witness prior to trial would be improper and subject to reversal.

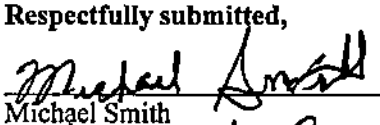
The defendant has failed to meet their burden under SCRCP Rule 56(c). Their arguments not only fail to eliminate material issues of fact but also introduce new ones, highlighting the necessity of a trial. Plaintiffs have presented ample evidence of statutory and contractual violations, which form the backbone of their negligence per se claim. Expert testimony is not required at this stage, and Defendant's procedural tactics should not be rewarded with dismissal.

IN THE ABSENCE of the Court ruling in Plaintiff's favor and granting summary judgment, based on admissions by Defendants in their Memorandum in Support of Summary Judgment (with attached exhibits) and Defense counsel's arguments at the hearing.

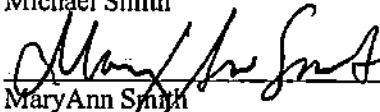
Plaintiffs respectfully request that this Court deny Defendant's motion for summary judgment and allow this case to proceed to trial. Furthermore, the Plaintiffs respectfully ask the Court to

take steps to facilitate a fair and level playing field by curbing Defense counsel's efforts to obstruct the Plaintiffs' attempts to secure substitute counsel. Proceeding to trial without an attorney would not only prejudice the Plaintiffs but also result in inefficiencies and waste the Court's and all parties' time. Ensuring Plaintiffs have the opportunity to obtain adequate representation is as critical to the integrity of these proceedings as any other consideration at this stage.

Respectfully submitted,



Michael Smith — January 30, 2025
Date



MaryAnn Smith — January 30, 2025
Date

Pro Se Plaintiffs
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Clerk of Court Pickens County, SC
JAN 30, 25 AM 9:50

STATE OF SOUTH CAROLINA COUNTY OF PICKENS Michael and Mary Smith, Plaintiffs, vs. Themistoklis Economou and King Asphalt Inc., Defendants.	IN THE COURT OF COMMON PLEAS FOR THE THIRTEENTH JUDICIAL CIRCUIT CASE NO.: 2021-CP-39-00329 **CERTIFICATE OF SERVICE**

CERTIFICATE OF SERVICE

I hereby certify that a copy of this **PLAINTIFFS' RESPONSE TO DEFENDANT'S MEMORANDUM IN SUPPORT OF SUMMARY JUDGMENT AND ARGUMENTS AT THE HEARING** (and Exhibits) were served upon the following counsel of record:

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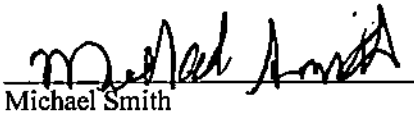
The documents were served via the following methods:

By Email to: CGriffin@brblegal.com
Date of email service: January 30, 2025

To the above address by U.S. Mail via certified mail (return receipt requested),
Certified Mail Number: USPS 70210950000135867934
Date of Mailing: January 30, 2025

Respectfully submitted,



January 30, 2025
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Clerk of Court Pickens County, SC
JAN 30 '25 AM 9:30

EXHIBITS

A - R

PLAINTIFFS' RESPONSE TO DEFENDANT'S MEMORANDUM IN SUPPORT OF SUMMARY JUDGMENT AND ARGUMENTS AT THE HEARING

CA# 2021-CP-39-00329