

THE STATE OF SOUTH CAROLINA
In the Supreme Court

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AUG 16 2012

APPEAL FROM DARLINGTON COUNTY
Court of Common Pleas

S.C. SUPREME COURT

Paul M. Burch, Circuit Court Judge

Opinion No. 4979 (S.C.Ct. App. filed June 6, 2012)

Alberta Major, ... Petitioner,
v.

City of Hartsville, ... Respondent.

APPENDIX

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Other Counsel of Record:

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Attorney for Respondent

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AUG 16 2012

S.C. SUPREME COURT

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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM DARLINGTON COUNTY
Court of Common Pleas

Paul M. Burch, Circuit Court Judge

Case No. 2009-CP-16-0514

Alberta Major, ... Appellant,

v.

City of Hartsville, ... Respondent.

RECORD ON APPEAL

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STATE OF SOUTH CAROLINA)
COUNTY OF DARLINGTON)

Alberta Major,

Plaintiff,

vs.

City of Hartsville,

Defendant.

IN THE COURT OF COMMON PLEAS
FOR THE FOURTH JUDICIAL CIRCUIT

CASE NO.: 09-CP-16-0514

**ORDER GRANTING DEFENDANT'S
MOTION FOR SUMMARY JUDGMENT**

FILED
2010 OCT 4 AM 10:44
CLERK OF COURT
DARLINGTON COUNTY, S.C.

This matter came before the Court on Thursday, September 23, 2010, on the Motion of the Defendant City of Hartsville, for an Order of Summary Judgment dismissing this civil action filed by the Plaintiff, Alberta Major. William B. Woods, Esquire and Michael T. Miller, Esquire were present for the Defendant and Plaintiff, respectively. This court heard oral arguments and received a written Memorandum of Law from both counsel. The Court also requested that parties submit proposed orders after receiving deposition transcript of Mark Gokey, which was taken the day prior to the Court hearing this motion.

FACTS

On Monday, December 1, 2008, the Plaintiff Alberta Major was walking to a class at Coker College, where she was enrolled as a student. While walking to her class from the Byerly parking lot which was directly across the street from the Coker College campus, the Plaintiff allegedly stepped in a depression at the corner of East Carolina Avenue and Coker Avenue, and allegedly injured her right ankle. Thereafter on Thursday, December 4, 2008, the Plaintiff informed Coker College security, and the Defendant City of Hartsville, of the incident. Plaintiff subsequently sought medical care for her injuries, and then filed this lawsuit on July 15, 2009.

TRUE CERTIFIED COPY,

Scott B. Suggs

CLERK OF COURT/RMC
DARLINGTON COUNTY, S.C.

STANDARD OF REVIEW

Summary Judgment is appropriate when it is clear that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. Summer v. Carpenter, 328 S.C. 36, 492 S.E.2d 238 (S.C. 1997). The plain language of Rule 56, SCRPC, 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 County School District One, 330 S.C. 447, 499 S.E.2d 238 (Ct. App. 1998). In such a situation, there can be no genuine issue as to any material fact since a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial. Id. The moving party is entitled to judgment as a matter of law because the nonmoving party has failed to make a sufficient showing on an essential element of the case. Id.

DISCUSSION

- A. **The City of Hartsville was not on notice of any defect, rut or depression at the location of the Plaintiff's alleged slip.**

The Defendant, City of Hartsville, argues that it was not on any notice, constructive or otherwise, of any defect, rut or depression where the Plaintiff allegedly slipped at the corner of East Carolina Avenue and Coker Avenue. This Court agrees.

The South Carolina Tort Claims Act (SCTCA) is the exclusive remedy available for any tort committed by a governmental entity, its employees, or its agents. Richardson v. City of Columbia, 340 S.C. 515, 532 S.E.2d 10 (Ct. App. 2000). The SCTCA provides that "the State,

an agency, a political subdivision, and a governmental entity are liable for their torts in the same manner and to the same extent as a private individual under like circumstances, subject to the limitations upon liability and damages, and exemptions from liability and damages contained herein.” S.C.Code Ann. § 15-78-40 (2005). Balancing the interests of the state against the interests of a tort victim, the General Assembly, in S.C.Code Ann. 15-78-60, provided thirty-one exceptions whereby the state was exempted from liability. Adkins v. Varn, 312 S.C. 188, 439 S.E.2d 822 (1993). The applicable exception to the waiver of immunity contained in the Tort Claims Act regarding street maintenance provides that a governmental entity is not liable for a loss resulting from:

absence, condition, or malfunction of any sign, signal, warning device, illumination device, guardrail, or median barrier unless the absence, condition, or malfunction is not corrected by the governmental entity responsible for its maintenance within a reasonable time after actual or constructive notice.

Governmental entities are not liable for the removal or destruction of signs, signals, warning devices, guardrails, or median barriers by third parties except on failure of the political subdivision to correct them within a reasonable time after actual or constructive notice. Nothing in this item gives rise to liability arising from a failure of any governmental entity to initially place any of the above signs, signals, warning devices, guardrails, or median barriers when the failure is the result of a discretionary act of the governmental entity. The signs, signals, warning devices, guardrails, or median barriers referred to in this item are those used in connection with hazards normally connected with the use of public ways and do not apply to the duty to warn of special conditions such as excavations, dredging, or public way construction. Governmental entities are not liable for the design of highways and other public ways. Governmental entities are not liable for loss on public ways under construction when the entity is protected by an indemnity bond. *Governmental entities responsible for maintaining highways, roads, streets, causeways, bridges, or other public ways are not liable for loss arising out of a defect or a condition in, on, under, or overhanging a highway, road, street, causeway, bridge, or other public way caused by a third party unless the defect or condition is not corrected by the particular governmental entity responsible for the maintenance within a reasonable time after actual or constructive notice.*

S.C.Code Ann. § 15-78-60(15) (2005) (emphasis added).

In order for the City of Hartsville to be liable under the SCTCA, it would have been necessary for the City to have been on "notice" of a defect at the location of the Plaintiff's accident. The Defendant clearly showed through sworn deposition testimony of Officer Michael Sanchez, Coker College Security Office Burke Hoffman, and Hartsville Public Works Director Phil Gardner, neither the Defendant, City of Hartsville nor Coker College Security were aware of any rut, depression or defect where the Plaintiff allegedly stepped into a depression and injured herself. As further shown through deposition testimony neither the Defendant, City of Hartsville nor Coker College Security were aware of any prior falls or injuries involving anyone at the subject street corner even though both the city police and college security patrolled the area around the street corner nearly every day and sometime multiple times per day. (*See Deposition of Burke Hoffman, Coker College Security, Page 21, Lines 3-10 and Page 33, Lines 2-12*); (*See Deposition of Michael Sanchez, Hartsville Police Department, Page 23, Lines 6-15 and Page 28, Lines 10-20*); (*Deposition of Phil Gardner, Page 42, Line 21 - Page 43, Line 10.*)

Subsequent to the Summary Judgment hearing in this matter, the deposition of former Coker College employee and groundskeeper Mark A. Gokey was received by both parties. While Mr. Gokey's deposition testimony described the location where the Plaintiff allegedly slipped as "not a rut, it was an impression" and further described it as a "lowering slant" or "slope" (*Gokey Deposition Page 12 - Page 13*), at no point in Mr. Gokey's deposition did he testify as that he was aware of any prior defect at the location of, and within a reasonable time of, the Plaintiff's alleged injury. Mr. Gokey's lack of notice of any prior defects at the location of the Plaintiff's accident was further supported by his testimony that only work he performed at the street corner of the

Plaintiff's accident, prior to her alleged injury, was mowing the lawn because he thought it was Coke College property. (*Gokey Deposition, Page 16, lines 16-20*).

As such, the Defendant, City of Hartsville was not on notice, constructive or otherwise, of any defect, rut or depression and therefore the Plaintiff's claim is barred and the Defendant is immune from liability under the S.C. Tort Claims Act.

B. The Plaintiff had never observed or noticed any defect, rut or depression, despite her regular visits to the site of her alleged accident.

The Defendant, City of Hartsville, persuasively pointed out that despite attending Coker College as a student continuously since October of 2007, and regularly parking in the Byerly parking lot adjacent to the street corner where she allegedly slipped and injured herself, the Plaintiff testified in her deposition that she never noticed any defect, rut or depression at the subject street corner in her time as a student prior to her alleged accident. (*See Albert Major deposition, Page 29, Line 12 - Page 30, Line 5*).

Not only were the Defendant City of Hartsville, and Coker College, unaware of any depression, rut, defect or otherwise danger to the public, but the Plaintiff herself was unable to cite any prior experience or observation of any such rut or depression involving the subject street corner, even though she regularly crossed the street at this corner. When the Plaintiff did inform Coker College, and thereafter the City of Hartsville, the alleged depression or rut was filled by Coker College. As such, it is clear to this Court that the Plaintiff's lack of any previous experience with any defect, rut or depression at the location of her fall, despite her frequent use of the street corner, further supports the Defendant contention that it was not on any notice,

constructive or otherwise, of any defect, rut, or depression at the location of the Plaintiff's alleged accident.

C. Plaintiff's interpretation of "notice" is too broad and not applicable to this case, and is based upon dissimilar facts.

Plaintiff's reliance on Vaughan v. Town of Lyman, 370 S.C. 436, 635 S.E.2d 631 (2006), and Fickling v. City of Charleston, 372 S.C. 597, 643 S.E.2d 110 (Ct. App. 2007), are misplaced. Both of these cases involved clear and specific defects in sidewalks, and further involved testimony by city employees stating that they were on notice of a specific sidewalk hole prior to the Plaintiff's fall. In Vaughan, the town mayor even testified that he had been aware of the sidewalk defect for ten years. In the case at hand, the Plaintiff completely relies on testimony that cars and trucks were known to have periodically created ruts or depressions at the street corner over the years to satisfy the notice requirement under the SCTCA. In the case at hand, there is no testimony from anyone, including the Plaintiff, that shows any notice, constructive or otherwise, of any specific rut or depression at the location of the Plaintiff's accident in the days, weeks or months prior to the Plaintiff's accident. It appears that the Plaintiff equates knowledge of the periodic cutting of street corners by vehicles as to a "continual condition" that would put the Defendant, City of Hartsville, on notice at the moment a condition is created. In Fickling, the plaintiff fell in a sidewalk hole on Meeting Street in downtown Charleston while walking towards Market Street. There the accident was a hole that appeared to be crushed in with cracks radiating out from the hole. Importantly, a city employee testified that Charleston generally did not

conduct inspections of its sidewalks and only repaired its sidewalks after receiving a complaint. Fickling at 602, 113. Here, the Plaintiff's argument is not reasonable, especially when weighed with testimony that 1) no prior complaints about this street corner had been received in the days, weeks, or months by the City, the Police Department, or Coker College Security; 2) the Plaintiff herself was not aware of any problem with the street corner despite her frequent use of this very corner as a Coker College student; and 3) the clear fact that the Defendant inspected the street corner where the Plaintiff was injured numerous times in the past based upon deposition testimony from Phil Gardner that the City of Hartsville had corrected depressions in the past by filling and tamping the area affected. The Defendant, City of Hartsville, actively maintained its streets, and street corners; far above the level pointed out in Vaughn and Fickling. The Plaintiff's reliance on a notice standard that was applied in both a grocery store and hospital parking lot slip and fall case, which cited evidence of clear knowledge of a specific defect, and a failure to correct such defect, is neither appropriate nor reasonable in light of the facts of this case. (See Pinckney v. Winn Dixie Stores, Inc., 311 S.C. 1, 426 S.E.2d 327 (Ct. App. 1992) and Henderson v. St. Francis Community Hospital, 303 S.C. 177, 399 S.E.2d 767 (1990)). As stated in the S.C. Tort Claims Act, § 15-78-60(15), the Defendant's must have a reasonable time to correct any defect after any notice, constructive or otherwise, is given. Here the Defendant City of Hartsville, neither had notice, nor had a reasonable time to correct the alleged defect, rut or depression which allegedly injured the Plaintiff. The Court finds the alleged defect in this case involved nothing more than the periodic placement and correction of tire tracks on grass at a City of Hartsville street corner. The Court disagrees with the Plaintiff's assertion that the Defendant's knowledge of the periodic cutting of street corners was a continuous condition and finds that this did not place the Defendant

on constructive notice of the alleged defect, rut or depression in which the Plaintiff injured herself.

CONCLUSION OF LAW

Based upon the arguments of counsel and evidence presented, this Court finds that the Defendant, City of Hartsville, was not on notice, constructive or otherwise, of any defect, rut or depression at the location of the Plaintiff's alleged injury. Therefore, the Defendant is immune from liability pursuant to S.C. Tort Claims Act § 15-78-60(15).

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the Defendant City of Hartsville's Motion for Summary Judgment is hereby granted, and the Plaintiff's case is dismissed with prejudice.

AND IT IS SO ORDERED.


The Honorable Paul M. Burch
Judge of Fourth Judicial Circuit

October 12, 2010

24

Althea Major
PLAINTIFF(S)

ORDER

C.A. NO. 09 CP-16 514

- VS
City of Hartsville
DEFENDANT(S)

I. IT IS ORDERED THAT THE BELOW MOTION (S) BE STRUCK FROM THE ACTIVE MOTION CALENDAR FOR THE FOLLOWING REASON:

1. PLAINTIFF (S) MOTION _____

HEARD ON THIS _____ DAY OF _____

2. DEFENDANT (S) MOTION for summary judgment

HEARD ON THIS _____ DAY OF _____

3. RULINGS OF THE ABOVE MOTION(S) Hearings have

15 days to submit proposed
orders

4. OTHER _____

FILED
2010 SEP 23 PM 5:57
SCOTT B. SUGGS
CLERK OF COURT / R.D.S.
DARLINGTON COUNTY, S.C.

II. IT IS ORDERED THAT THE WITHIN ENTITLED CASE / MOTION (S) RULE BE:

1. TRANSFERRED TO THE JURY/ NON JURY CALENDAR _____

2. REFERRED TO SPECIAL REFEREE _____

3. CONTINUED UPON REQUEST OF PLAINTIFF AND/OR DEFENDANT BEYOND THE _____

TERM. REASON FOR CONTINUANCE: _____

4. OTHER: _____

DARLINGTON, S.C.

Sept. 23 2010

[Signature]
PRESIDING JUDGE

9/24/10

Alberta Major

IN THE COURT OF COMMON PLEAS

CIVIL ACTION COVERSHEET

2009-CP - 16-

vs.

09 CP 16 05 14

City of Hartsville

Defendant(s)

(Please Print)

Submitted By: Michael T. Miller

Address: P. O. Box 13057

Florence, SC 29504-3057

SC Bar #: 76894

Telephone #: 843-669-5634

Fax #: 843-669-5150

Other:

E-mail: mmiller@wukelalaw.com

NOTE: The cover sheet and information contained herein neither replaces nor supplements the filing and service of pleadings or other papers as required by law. This form is required for the use of the Clerk of Court for the purpose of docketing. It must be filled out completely, signed, and dated. A copy of this cover sheet must be served on the defendant(s) along with the Summons and Complaint.

DOCKETING INFORMATION (Check all that apply)

*If Action is Judgment/Settlement do not complete

- ☒ JURY TRIAL demanded in complaint. ☐ NON-JURY TRIAL demanded in complaint.
- ☐ This case is subject to ARBITRATION pursuant to the Court Annexed Alternative Dispute Resolution Rules.
- ☒ This case is subject to MEDIATION pursuant to the Court Annexed Alternative Dispute Resolution Rules.
- ☐ This case is exempt from ADR. (Proof of ADR/Exemption Attached)

NATURE OF ACTION (Check One Box Below)

Contracts

- Constructions (100)
- Debt Collection (110)
- Employment (120)
- General (130)
- Breach of Contract (140)
- Other (199)

Torts - Professional Malpractice

- ☐ Dental Malpractice (200)
- ☐ Legal Malpractice (210)
- ☐ Medical Malpractice (220)
- ☐ Notice/ File Med Mal (230)
- ☐ Other (299)

Torts - Personal Injury

- ☐ Assault/Slander/Libel (300)
- ☐ Conversion (310)
- ☐ Motor Vehicle Accident (320)
- ☐ Premises Liability (330)
- ☐ Products Liability (340)
- ☒ Personal Injury (350)
- ☐ Wrongful Death (360)
- ☐ Other (399)

Real Property

- ☐ Claim & Delivery (400)
- ☐ Condemnation (410)
- ☐ Foreclosure (420)
- ☐ Mechanic's Lien (430)
- ☐ Partition (440)
- ☐ Possession (450)
- ☐ Building Code Violation (460)
- ☐ Other (499)

Inmate Petitions

- PCR (500)
- Mandamus (520)
- Habeas Corpus (530)
- Other (599)

Judgments/Settlements

- ☐ Death Settlement (700)
- ☐ Foreign Judgment (710)
- ☐ Magistrate's Judgment (720)
- ☐ Minor Settlement (730)
- ☐ Transcript Judgment (740)
- ☐ Lis Pendens (750)
- ☐ Transfer of Structured Settlement Payment Rights Application (760)
- ☐ Other (799)

Administrative Law/Relief

- ☐ Reinstate Driver's License (800)
- ☐ Judicial Review (810)
- ☐ Relief (820)
- ☐ Permanent Injunction (830)
- ☐ Forfeiture-Petition (840)
- ☐ Forfeiture-Consent Order (850)
- ☐ Other (899)

Appeals

- ☐ Arbitration (900)
- ☐ Magistrate-Civil (910)
- ☐ Magistrate-Criminal (920)
- ☐ Municipal (930)
- ☐ Probate Court (940)
- ☐ SCDOT (950)
- ☐ Worker's Comp (960)
- ☐ Zoning Board (970)

Special/Complex /Other

- Environmental (600)
- Automobile Arb. (610)
- Medical (620)
- Other (699)
- ☐ Pharmaceuticals (630)
- ☐ Unfair Trade Practices (640)
- ☐ Out-of State Depositions (650)
- ☐ Sexual Predator (610)

- ☐ Administrative Law Judge (980)
- ☐ Public Service Commission (990)
- ☐ Employment Security Comm (991)
- ☐ Other (999)

Submitting Party Signature:

Date:

JUL 15, 2009

Note: Frivolous civil proceedings may be subject to sanctions pursuant to SCRCP, Rule 11, and the South Carolina Frivolous Civil Proceedings Sanctions Act, S.C. Code Ann. §15-36-10 et. seq.

FOR MANDATED ADR COUNTIES ONLY

Allendale, Anderson, Beaufort, Colleton, Florence, Greenville,
Hampton, Horry, Jasper, Lexington, Pickens (Family Court Only), and Richland

SUPREME COURT RULES REQUIRE THE SUBMISSION OF ALL CIVIL CASES TO AN ALTERNATIVE DISPUTE RESOLUTION PROCESS, UNLESS OTHERWISE EXEMPT.

You are required to take the following action(s):

09 CP 160514

1. The parties shall select a neutral and file a "Proof of ADR" form on or by the 210th day of the filing of this action. If the parties have not selected a neutral within 210 days, the Clerk of Court shall then appoint a primary and secondary mediator from the current roster on a rotating basis from among those mediators agreeing to accept cases in the county in which the action has been filed.
2. The initial ADR conference must be held within 300 days after the filing of the action.
3. Pre-suit medical malpractice mediations required by S.C. Code §15-79-125 shall be held not later than 120 days after all defendants are served with the "Notice of Intent to File Suit" or as the court directs. (Medical malpractice mediation is mandatory statewide.)
4. Cases are exempt from ADR only upon the following grounds:
 - a. Special proceeding, or actions seeking extraordinary relief such as mandamus, habeas corpus, or prohibition;
 - b. Requests for temporary relief;
 - c. Appeals
 - d. Post Conviction relief matters;
 - e. Contempt of Court proceedings;
 - f. Forfeiture proceedings brought by governmental entities;
 - g. Mortgage foreclosures; and
 - h. Cases that have been previously subjected to an ADR conference, unless otherwise required by Rule 3 or by statute.
5. In cases not subject to ADR, the Chief Judge for Administrative Purposes, upon the motion of the court or of any party, may order a case to mediation.
6. Motion of a party to be exempt from payment of neutral fees due to indigency should be filed with the Court within ten (10) days after the ADR conference has been concluded.

**Please Note: You must comply with the Supreme Court Rules regarding ADR.
Failure to do so may affect your case or may result in sanctions.**

FILED
2008 JUL 15 PM 3:58
COTT B. SUGGS
CLERK OF COURT/R.O.D.
DARLINGTON COUNTY, S.C.

TRUE CERTIFIED COPY,
Cott B. Suggs
CLERK OF COURT/RMC
DARLINGTON COUNTY, S.C.

STATE OF SOUTH CAROLINA
COUNTY OF DARLINGTON

IN THE COURT OF COMMON PLEAS
FOURTH JUDICIAL CIRCUIT
Civil Action No. 2009-CP-16-_____

Alberta Major,

Plaintiff,

vs.

City of Hartsville,

Defendant.

09 CP 160514

SUMMONS FOR RELIEF
COMPLAINT SERVED
(JURY TRIAL DEMANDED)

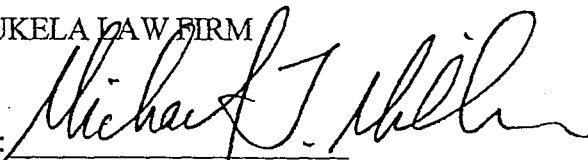
2009 JUL 15 PM 3:58
SCOTT B. SUGGS
CLERK OF COURT/R.O.D.
DARLINGTON COUNTY, S.C.

FILED

TO THE DEFENDANT ABOVE NAMED:

YOU ARE HEREBY SUMMONED and required to answer the Complaint in this action, of which a copy is hereby served upon you, and to serve a copy of your answer to the said Complaint on the subscribers at their offices at 403 Second Loop Road, Florence, S.C. within thirty (30) days after the service hereof, exclusive of the day of such service; and if you fail to answer the Complaint within the time aforesaid, the Plaintiff in this action will apply to the Court for the relief demanded in the Complaint and judgment by default will be rendered against you.

WUKELA LAW FIRM

BY: 

MICHAEL T. MILLER

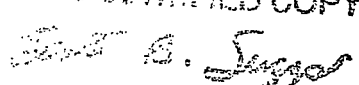
ATTORNEY FOR PLAINTIFF

POST OFFICE BOX 13057

FLORENCE SOUTH CAROLINA 29504

843-669-5634

DATED: 7/15/2009.

TRUE CERTIFIED COPY,

CLERK OF COURT/RMC
DARLINGTON COUNTY, S.C.

STATE OF SOUTH CAROLINA
COUNTY OF DARLINGTON

) IN THE COURT OF COMMON PLEAS
) FOURTH JUDICIAL CIRCUIT
) Civil Action No. 2009-CP-16-_____

Alberta Major,

Plaintiff,

vs.

City of Hartsville,

Defendant.

09 CP 16 05 14
COMPLAINT
(JURY TRIAL DEMANDED)

SCOTT B. SUGGS
CLERK OF COURT/R.O.
DARLINGTON COUNTY, S.C.
2009 JUL 15 PM 3:58

FILED

The Plaintiff, Alberta Major, by and through undersigned counsel, hereby makes the following claims and allegations:

JURISDICTION:

1. That the Plaintiff, Alberta Major, is a citizen and a resident of the County of Darlington, State of South Carolina.
2. That the Defendant, City of Hartsville, is a municipality in the State of South Carolina.
3. That the Defendant is subject to venue in this forum in that the events giving rise to the cause of action occurred in the County of Darlington, State of South Carolina.

FACTS:

4. That on or about December 1, 2008, the Defendant was the owner of the parcel of land at the southeast corner of Carolina and Coker Avenues in Hartsville, South Carolina.
5. That on or about December 1, 2008, the Plaintiff was walking to said corner from the southeast for the purpose of crossing the street, when she fell as a result of a hole that existed on the Defendant's premises.
6. That the City of Hartsville owes a duty to the Plaintiff to provide premises in a reasonably safe condition

TRUE CERTIFIED COPY,
Scott B. Suggs
CLERK OF COURT/RMC
DARLINGTON COUNTY, S.C.

7. That the City of Hartsville breached this duty by failing to ensure that the premises were reasonably safe.
8. That the City of Hartsville had adequate notice of said hole. 09 @ 160514
9. That as a direct and proximate result of falling due to the above-mentioned hole and the Defendant's breach of duty, the Plaintiff has suffered injuries and damages as hereinafter set out.
10. That as a direct and proximate result of Defendant City of Hartsville's negligence, carelessness, recklessness, gross negligence, and willful and wanton conduct, the Plaintiff has suffered injuries and damages as hereinafter set out.

DAMAGES:

11. That as a direct and proximate result of the above set out acts and omissions of the Defendant, City of Hartsville, Plaintiff was damaged in the following particulars:

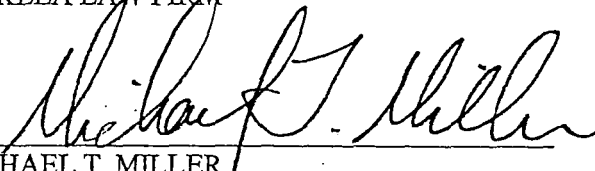
- a. Actual and Consequential damages resulting from Personal Injury, to
- i. Disability, past and future;
 - ii. Pain and suffering, past and future;
 - iii. Stress, anguish and anxiety, past and future;
 - iv. Medical costs, past and future;
 - v. Lost wages, past and future.

SCOTT B. SUGGS
CLERK OF COURT/R.D.D.
DARLINGTON COUNTY, S.C.

2009 JUL 15 PM 3:58

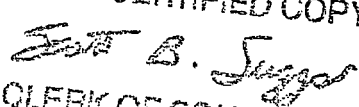
FILED

WUKELA LAW FIRM

BY: 
MICHAEL T. MILLER
ATTORNEY FOR PLAINTIFF
POST OFFICE BOX 13057
FLORENCE, SC 29504
843-669-5634

Florence, South Carolina

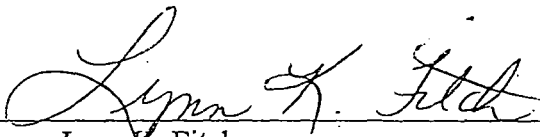
July 15, 2009

TRUE CERTIFIED COPY,

CLERK OF COURT/RMC
DARLINGTON COUNTY, S.C.

CERTIFICATE OF SERVICE

The undersigned, Lynn K. Fitch, of the Wukela Law Firm, hereby certifies that on the 23rd of July, 2009, she placed in an envelope, certified mail, return receipt requested, a certified copy of Summons and Complaint, in the matter of Alberta Major vs. City of Hartsville, C/A #09-CP-16-0514, and deposited the same in the United States Mail. Said envelope being addressed to the following person(s):

Mr. James L. Pennington
City Manager
P. O. Drawer 2497
Hartsville, South Carolina 29551



Lynn K. Fitch

IN THE COURT OF COMMON PLEAS
FOR THE FOURTH JUDICIAL CIRCUIT

CASE NO.: 09-CP-16-0514

ANSWER

(Jury Trial Demanded)

Defendant.)

FOR A FIRST DEFENSE

FOR A SECOND DEFENSE

18

allegations of Paragraph one of the Complaint, concerning the residence of the Plaintiff.

4. The Defendant City of Hartsville admits the allegations of Paragraph two of the Complaint.

5. In answering the allegations of Paragraph three of the Complaint, Defendant City of Hartsville admits so much of same as alleges that it is subject to venue in this forum based upon Plaintiff's pleadings, but denies that it has knowledge or information sufficient to form a belief as to the truth of the allegations of said paragraph concerning any specific events having occurred, and, therefore, denies same and demands strict proof thereof.

6. The Defendant City of Hartsville admits the allegations of Paragraph four of the Complaint, concerning its ownership of the property described therein.

7. In answering the allegations of Paragraph five of the Complaint, the Defendant denies that it has knowledge or information sufficient to form a belief as to the truth of the allegations of said paragraph, and, therefore, denies same and demands strict proof thereof.

8. In answering the allegations of Paragraph six of the Complaint, the Defendant City of Hartsville denies the allegations thereof, as stated, and craves reference to the South Carolina Tort Claims Act, S.C. Code Ann. § 15-78-10 et seq. as to the specific obligations, duties and the limitations upon liability and damages and exceptions from liability and damages as set forth therein.

9. Defendant City of Hartsville denies the allegations of Paragraphs seven and eight of the Complaint, and demands strict proof thereof.

10. In answering the allegations of Paragraphs nine, ten and eleven of the Complaint, the Defendant City of Hartsville denies that it has knowledge or information sufficient to form a belief as to the truth of the allegations of said paragraphs concerning the Plaintiff's alleged

injuries and damages, and, therefore, denies same and demands strict proof thereof, and further denies the remaining allegations of said paragraphs.

FOR A THIRD DEFENSE

11. The Defendant City of Hartsville would show that Plaintiffs' Complaint fails to state a claim upon which relief can be granted, and therefore this Defendant is entitled to dismissal of this action pursuant to SCRPC 12 (b)(6).

FOR A FOURTH DEFENSE

12. The Defendant City of Hartsville would show, that whatever injuries and damages as may have been sustained by the Plaintiff, as alleged in her Complaint, were due to and caused by the acts or inactions of some entity other than this Defendant, and over whom this Defendant has no right of supervision or control, and, therefore, the Defendant City of Hartsville is not liable to the Plaintiff in any amount whatsoever.

FOR A FIFTH DEFENSE

13. The Defendant City of Hartsville would affirmatively show that if the condition of the area where the Plaintiff was walking was such that this Defendant knew or should have known that it was foreseeable that someone would fall, which is specifically and emphatically denied, then the condition of the area was known, or should have been known by the Plaintiff, the danger of walking there was known or should have been known to the Plaintiff and the Plaintiff could have avoided the area for her own safety; and in failing to do so, the Plaintiff assumed an obvious and known risk by her conduct and is barred from recovery against this Defendant.

FOR A SIXTH DEFENSE

14. The Defendant is informed and believes that whatever injuries and damages as may have been sustained by the Plaintiff, as alleged in her Complaint, were due to her own negligent, careless, reckless and grossly negligent acts and/or omissions, and without which such injuries and damages would not have occurred, with such negligent, careless, reckless and grossly negligent acts and/or omissions on the Plaintiff being set forth herein below in the following particulars:

- a. in failing to maintain a proper lookout;
 - b. in failing to look where she was walking;
 - c. in failing to use the degree of care and caution that a reasonable and prudent person would have used under the circumstances and conditions then and there existing.
 - e. in such other and further particulars as may be shown at the trial of this matter;
- any one or more being a proximate cause of the Plaintiff's injuries and damages, if any, and therefore, this Defendant is not liable to the Plaintiff in any amount whatsoever.

FOR A SEVENTH DEFENSE

15. This Defendant is informed and believes that it is not liable for a loss resulting from the exercise of discretion or judgment by this Defendant or an employee, or the performance or failure to perform any act or service which is in the discretion or judgment of this Defendant or employee; and this Defendant does plead such discretionary immunity afforded by the S.C. Code Ann. § 15-78-60 (5) as an affirmative defense and complete bar to recovery.

FOR A EIGHTH DEFENSE

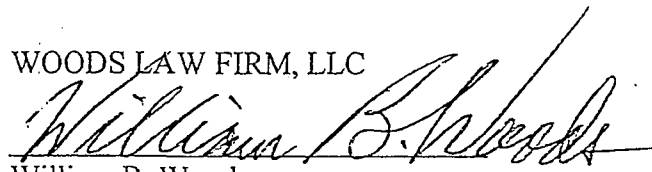
16. This Defendant is informed and believes that it is not liable for a loss resulting from

an act or omission of a person other than an employee of this Defendant, and this Defendant does plead such immunity afforded by the S.C. Code Ann. § 15-78-60 (20) as an affirmative defense and complete bar to recovery.

WHEREFORE, having fully answered the Complaint of the Plaintiff, Defendant City of Hartsville prays that same be dismissed, with costs, and for such other and further relief as the Court may deem just and proper.

This Defendant demands a jury trial.

WOODS LAW FIRM, LLC


William B. Woods

Post Office Box 2444

127 Library Hill Lane, Suite C

Lexington, South Carolina 29071

Attorney for Defendant

September 3, 2009

STATE OF SOUTH CAROLINA)
COUNTY OF DARLINGTON)

IN THE COURT OF COMMON PLEAS
FOR THE FOURTH JUDICIAL CIRCUIT

Alberta Major,

Plaintiff,

vs.

City of Hartsville,

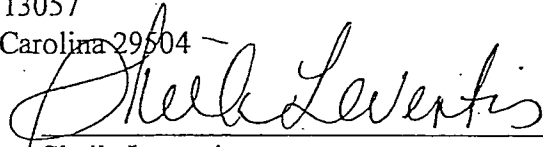
Defendant.

CASE NO.: 09-CP-16-0514

CERTIFICATE OF SERVICE

I, the undersigned employee of Woods Law Firm, LLC, do hereby certify that I have served Defendant City of Hartsville's Answer, and Interrogatories and Request for Production on Plaintiff, by personally mailing a copy of the same, postage prepaid, on the date shown below as follows:

Michael T. Miller, Esquire
Wukela Law Firm
Post Office Box 13057
Florence, South Carolina 29504


Sheila Leventis

September 3, 2009

STATE OF SOUTH CAROLINA)
COUNTY OF DARLINGTON)

COURT OF COMMON PLEAS
CASE NO. 09-CP-16-0514

ALBERTA MAJOR,

PLAINTIFF,

-VS-

CITY OF HARTSVILLE,

DEFENDANT,

)
)
)
)
) TRANSCRIPT OF RECORD
)
)
)
)
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)
)

Thursday,
September 23, 2010
Darlington, S.C.

B E F O R E:

HONORABLE PAUL M. BURCH, JUDGE

A P P E A R A N C E S:

MICHAEL T. MILLER, ESQUIRE
ATTORNEY FOR THE PLAINTIFF

and

WILLIAM B. WOODS, ESQUIRE
ATTORNEY FOR THE DEFENDANT

LINDA W. MCCALL
OFFICIAL REPORTER

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MOTION FOR SUMMARY JUDGMENT

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EXHIBITS

NONE

1 THURSDAY, SEPTEMBER 23, 2010

2 MOTION FOR SUMMARY JUDGMENT

3 DEPUTY CLERK OF COURT: The next case up is Major vs. City
4 of Hartsville, 2009-CP-16-514; number twenty-four.

5 THE COURT: All right.

6 Twenty-four.

7 MR. WOODS: If I may, Your Honor, I'd like to pass up a
8 Memorandum of Law in support of our Motion for Summary Judgment
9 on behalf of the City of Hartsville.

10 I'm Bill Woods.

11 Plaintiff's counsel filed on Thursday with the Court a
12 Memorandum in Opposition, and, Your Honor, this - - I represent
13 the City of Hartsville, and back in, ah, December 1, 2008, the
14 plaintiff Alberta Major who is seated back there in the corner
15 of the courtroom is a student over at Coker College, she was on
16 her way to class, and at the corner of Carolina - - East
17 Carolina and Coker Avenue, she was, ah, attempting or intending
18 to cross the street. She alleges that she stepped into some
19 type of hole or depression in the grass there at that corner,
20 and while she didn't fall to the ground, she sprained her right
21 ankle and brought suit as a result of that.

22 We have moved for summary judgment, Your Honor, on the
23 grounds that there is no evidence at all in this case that
24 defendant was on any notice either actual or constructive of any
25 rut or hole or defect in the, ah, City's property at that

1 corner.

2 A number of depositions have been taken in the case, and,
3 ah, including a gentleman who is a security officer over at, ah,
4 Coker.

5 It appears that on the day of this incident, the plaintiff
6 continued on to class. When she came back to her next class
7 some three days later reported it to the Coker College officials
8 who contacted the, ah, or somehow she also talked with security
9 who came over and looked at it.

10 He gave his deposition and says it was not a hole. It was
11 a depression but it appeared that it could have been something
12 caused by a truck or vehicle cutting that corner, ah, and
13 causing some type of rut there.

14 The city officer, Officer Sanchez, was also deposed. He
15 testified that following the report that he - - he got a call
16 after it was determined that the property was not Coker College
17 property but was City property.

18 He came over and examined it. He also classified it not as
19 a hole but as a depression. Ah, he says that he patrols that
20 area on a regular basis, that he'd never seen any defect,
21 depression, hole at that corner, that at some point two years he
22 traveled about the time this incident occurred. That was on
23 his regular beat.

24 The Coker College officer also testified that while that
25 was not Coker College property, it was an area adjacent to

1 Byerly Parking Lot right across the street from the school and
2 that he rode by there on a regular basis with his, ah, on his
3 golf cart patrolling. He had never noticed anything, ah, that
4 he thought constituted any problem.

5 Both testified that they knew of no one who had fallen,
6 tripped, stumbled, anything else at that corner or anyone who
7 had, ah, made any complaint about any defect, rut or hole there.

8 The, ah, city, ah, the city employee, Phil Gardner, was
9 deposed. Mr. Gardner testified that he was aware that from time
10 to time vehicles would cut that corner and that in the past - -
11 past years that it occurred and that the City had a policy in
12 place where that came to their knowledge, they would go there.
13 Fill it. Tamp it down and then check on it to make sure it
14 wasn't washing out.

15 There is absolutely - - and my belief is plaintiff's
16 counsel is going to take that testimony as his interpretation of
17 notice to the City that there was a rut or depression or some
18 problem there that constituted a danger to his client.

19 But there is absolutely no evidence that there was anyone
20 with the City on notice of any problem there in the days, weeks
21 and months prior to this incident.

22 And one of the more telling things about the case is that
23 the plaintiff herself was a student there at the college,
24 generally, on a regular basis twice a week would park her
25 vehicle in the Byerly Parking Lot and cross over into the

1 college and quite frequently crossed at this same area.

2 She testified that she had never noticed any depression or
3 hole or defect in that area, and we believe that that's very,
4 very important because she had much more, um, opportunity to
5 observe a problem if one existed than did the City who cleaned
6 the area around there or patrolled that area.

7 There's absolutely no evidence that this defect that she
8 alleges was there to cause her to stumble was ever there in any
9 time, um, no known time period prior to this incident that would
10 have put the, ah, City on notice or given them an opportunity to
11 learn of the defect.

12 And we believe that under the tort claims act that the
13 requirement has not been met, ah, that the plaintiff prove
14 either actual or constructive notice, and we believe that, ah,
15 summary judgment should be granted the City, Your Honor.

16 MR. MILLER: Your Honor, Michael Miller for the
17 plaintiff, Alberta Major.

18 I generally agree with Mr. Woods' recitation of the facts
19 in this case, um, but I do disagree with his interpretation of
20 the facts.

21 Ah, my client states that she parked in the Byerly Parking
22 Lot. Walked across the street to go to class. Stepped in a
23 depression that existed at that corner.

24 Four people that we know of have seen that depression: My
25 client, the plaintiff; a security guard for Coker; Hartsville

1 Police Department Officer and a maintenance gentleman from Coker
2 who filled in the depression.

3 We've taken the deposition of all four of those people.
4 The last one, Mr. Gokey who is the maintenance gentleman, we
5 took his deposition yesterday at 2:00 in the afternoon and if
6 necessary I request the opportunity to supplement my brief with
7 his testimony if necessary.

8 However, the plaintiff testified there was a hole filled
9 with grass. The security officer testified it appeared to be
10 a rut covered with grass - - with grass growing in it.

11 Um, the police officer testified that he thought it was a
12 concave depression, ah, situated such that it was cutting that
13 corner, and then Mr. Gokey yesterday afternoon testified that it
14 was a - - it was a depression longer than it was wide.

15 Now, it's our position that a vehicle cut that corner,
16 drove up on the grass and created a rut or a depression that
17 caused my client to fall. We think that testimony creates a
18 genuine issue of material fact.

19 Now - - now the question is the fact that that has - - it
20 existed, did that created an issue of constructive notice. We
21 argue for two reasons that it does.

22 One, it had to have happened of sufficient frequency that
23 the City should have been on notice.

24 The police officer observed vehicles cutting that corner
25 driving up on the grass. Officer Hoffman, the security guard,

1 testified that he had seen on numerous occasions. He'd even
2 seen tractor trailer trucks take that turn because it's a tight
3 turn, take that turn and drive up on the grass, and the City
4 Director of Parks and Leisure Services, Your Honor, testified on
5 page 31 of his deposition.

6 And I asked, "And this is vehicles taking a right onto
7 Carolina?"

8 "It is."

9 "Okay. This is a problem you've dealt with before in this
10 corner?"

11 "We have. We have observed vehicles making that turn for
12 years."

13 "Okay."

14 "Trucks, especially, can't make that turn without almost
15 taking that pole out."

16 "Okay. Has it caused depressions before?"

17 "Yes."

18 We think this constitutes conditions that are of such a
19 recurrent nature that the City had a policy and procedure in
20 place to deal with that recurrent condition, and he testified
21 that they did.

22 If they - - if they noticed that there was a depression,
23 they would send a crew out there and fill it in with sand or
24 clay but he said, "It was a fruitless effort because a few days
25 later it's, you know, right back in the same condition."

1 We think that the City had - - had - - was on constructive
2 notice of this condition. There's ample testimony that this
3 thing had been occurring in the past. It conditions to occur.

4 That corner has been paved and it's still occurring. There's
5 evidence of tire tracks going all over that corner.

6 We think that's a genuine issue of material fact as to
7 constructive notice, and that it's a liability, and, in general,
8 the defendant's motion should be denied.

9 MR. WOODS: If I may, Your Honor?

10 Again, I believe that plaintiff's - - I don't disagree with
11 the facts. I don't disagree that there was a depression there
12 on the date that, ah, this plaintiff says that she fell there.

13 Ah, there have been some different descriptions of the
14 depression, and I can tell you that in - - and I don't believe
15 that plaintiff's counsel disagrees - - that in the deposition
16 taken yesterday that he took of Mr. Gokey, Mr. Gokey said it did
17 not appear to be a rut to him and that he'd not seen the
18 vehicles drive over more than six to eight inches over the curve
19 area.

20 But whatever the, ah, matter is, what he would have the
21 City to do under his argument would be to, basically, post
22 somebody there, um, at all times so that when a truck or a car
23 or somebody should happen to cut that corner and leave a
24 depression that they could call in and have maintenance come and
25 fill it.

1 Um, I don't believe that that's a requirement under any of
2 the case law or, ah, certainly the statute does not require
3 that.

4 The, ah, the fact that the City had a policy in place and
5 did go there as, he says, "When they knew of a problem, they
6 would go there."

7 That's their -- that's their policy. When it was reported
8 to them by someone. It could be from the City. It could be
9 from the college. It could be from a pedestrian. They would go
10 there and fix it.

11 But there is just simply an absence of any testimony that
12 this condition was known or should have been known by anyone
13 from the college because there is absence of testimony as to
14 when the depression that she says she fell into or stepped into
15 and -- and sprained her ankle, there's no evidence of the
16 length of time that that had been there.

17 For all we know and all she knows, it could have occurred
18 from a truck coming around that corner that afternoon an hour
19 before she came, and I believe to hold the City responsible for
20 checking that every hour and it goes way, way, way beyond what's
21 required under any of the cases.

22 The cases, just to make a quick comment, the cases that he
23 relied on in his, ah, memorandum, one was a supermarket case and
24 the other was that gum ball case up in Greenville where both of
25 the places, both of the cases that he talked about and one other

1 case down in Charleston, they were defects that had been known,
2 that had been reported the specific defects, and one of the
3 cases he relied on, um, the Mayor said, "Yeah. I've known about
4 that problem for ten years."

5 That's not the case here. No one has testified that they
6 ever saw this defect that she says she tripped on prior to being
7 told about it, ah, by her three days later.

8 Thank you.

9 MR. MILLER: Your Honor, if I may?

10 Mr. Woods is asking the Court to impose an actual notice
11 standard. That's not what's required in this case.

12 The City doesn't have to have actual notice of the actual
13 hole that caused her injuries. They have to have notice that
14 vehicles are cutting this corner. They have had ample notice of
15 it. They said it's a recurrent problem. They had notice that
16 this was happening.

17 And as far as the burden on the City, the City should have
18 done exactly what they have done. They've paved it. There is
19 no grass on that corner. It's completely paved over.

20 Cars are still driving up on there as evidenced by tire
21 tracks but there's no more depression, and nobody is tripping
22 and falling.

23 We don't suggest that they need to have somebody on watch
24 watching that corner but I believe the City has acknowledged
25 this is a dangerous corner and has done what they need to do,

1 and we think that the plaintiff's motion should be denied.

2 RULING OF THE COURT

3 THE COURT: I'll leave it open fifteen days. You said
4 you wanted to get me some further - - is there some deposition
5 testimony you want to get to me in a brief or whatever, y'all
6 exchange them, and I'll leave it open fifteen days.

7 MR. MILLER: Thank you, Your Honor.

8 MR. WOODS: Thank you, Your Honor.

9 Would you like us to prepare a proposed order?

10 THE COURT: If you'd like. Send it with your brief.

11 MR. WOODS: All right. Thank you.

12 MR. MILLER: And, Your Honor, I had submitted the brief.

13 Have you received that?

14 THE COURT: Yes. We have.

15 MR. MILLER: Thank you.

16 (The Court adjourns the hearing of this case to address
17 other matters before the Court.)

18 - - - END OF TRANSCRIPT - - -

CERTIFICATE OF COURT REPORTER

14

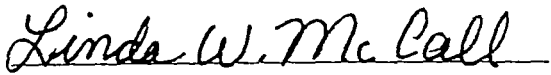
1 STATE OF SOUTH CAROLINA)

2 COUNTY OF DARLINGTON)

3
4 I, the undersigned Linda W. McCall, Official Court
5 Reporter for South Carolina Court Administration, do hereby
6 certify that the foregoing is a true, accurate and complete
7 Transcript of Record of all the proceedings had and evidence
8 introduced in the within referenced proceeding relative to the
9 captioned case, relative to appeal, in the Court of Common
10 Pleas, Darlington County, South Carolina.

1 I do further certify that I am neither of kin, counsel,
12 nor interest to any party hereto.

13 November 29, 2010

14 
15

16 Linda W. McCall

17 Official Reporter

1 A. Yeah.

2 Q. Okay. What are you, what, to your recollection,
3 and using this picture to refresh your memory, what
4 are you doing in these pictures?

5 A. My boss wanted me to go around the college to fill
6 in any type of divots or anything or any holes or
7 any -- try to keep it as level as possible around
8 the college if there was any type of divots.

9 Q. Okay.

10 A. And it would be all by my eyesight or if he told me
11 places to go to do it.

12 Q. Was this the only place where you were directed to
13 do that?

14 A. No. It was through the whole campus.

15 Q. Through the whole campus?

16 A. Uh-huh.

17 Q. Did he represent to you that this corner, that this
18 where you are standing in the pictures, was owned
19 by Coker College?

20 A. No. I did this on my own, I know that.

21 Q. So you --

22 A. I thought, I thought it was Coker College property,
23 but, you know, I can tell it's City property as you
24 can see it was four feet out or something like
25 that.

1 Q. Is that your golf cart?

2 A. Yes.

3 Q. The one you were given by the school?

4 A. Yes.

5 Q. Okay. And is there dirt in the back of it?

6 A. Yes.

7 Q. And that's what you were using to --

8 A. Yes.

9 Q. -- fill in, fill in these holes?

10 A. Yeah.

11 Q. Okay. Good. Had anyone indicated to you that
12 someone had injured themselves at that particular
13 corner a few days before you filled in this
14 particular depression?

15 A. A few days after?

16 Q. A few days before?

17 A. I don't think so.

18 Q. Was there, in fact, a depression or rut or hole in
19 that location?

20 A. Yes. I would say not a rut, it was an impression.

21 Q. Okay. And that's evidenced by the fact that you're
22 filling something in?

23 A. Right.

24 Q. Okay. Describe in your recollection, and we have
25 other photos here which actually might be better

1 served, I've got one, two, three, four, five, six
2 pictures, pages of pictures. I'm not going to mark
3 these as exhibits yet, but, if you would, just
4 review these to refresh your memory.

5 A. (Deponent complies) Uh-huh.

6 Q. Okay. Describe for me if you can, based on your
7 recollection, what the depression looked like that
8 you filled in on this day?

9 A. I would say two to three inch on a slope going
10 down, some type of impression like that, but there
11 was grass growing over it.

12 Q. Growing in it?

13 A. Over it.

14 Q. Growing over it?

15 A. Yes.

16 Q. What do you mean by that?

17 A. There was, there was grass growth that's been
18 growing there for quite a while from my
19 understanding.

20 Q. I'm not clear on your description. You say it was
21 a two to three inch deep?

22 A. Yes.

23 Q. What words would you describe it as?

24 A. A lower level -- it was a lowering slant.

25 Q. A slant? Okay. Was it --

1 A. Uh-huh.

2 MR. WOODS: Objection.

3 Q. How long was it?

4 A. I would probably say at least two feet.

5 Q. Okay. At least two feet? What -- how wide was it?

6 A. Maybe a foot.

7 Q. Okay. So something along this nature. Was one end
8 deeper than another end or was it a general uniform
9 depthness? Depth?

10 A. Your first statement? What was the, what was the
11 first thing you said?

12 Q. Was it deeper on one end than the other?

13 A. Yeah, it was deeper on one end than the other.

14 Q. It was?

15 A. Uh-huh.

16 Q. Okay. Have you had to do work at this corner
17 before?

18 A. No. Well, yes, I have. I mowed the lawn there.

19 Q. You mowed the lawn there?

20 A. Yeah, in that area. I would, you know, yeah.

21 Q. We've taken previous testimony in this case where a
22 number of individuals have indicated that they have
23 seen vehicles come on Coker Avenue, come to this
24 intersection and attempt to take a right onto
25 Carolina Avenue and in the process they've driven

NOTICE OF MOTION AND MOTION
FOR SUMMARY JUDGMENT

William B. Woods, Esquire
Address: Post Office Box 2444
Lexington, South Carolina 29071
phone: (803) 808-8088 fax: (803) 808-8090
e-mail: other:

SECTION I: Hearing Information

SECTION II: Motion/Order Type

for relief or action by the court as set forth in the attached proposed order.

William B. Woods 4/12/10
Signature of Attorney for ☐Plaintiff / ☐Defendant Date submitted

☐ Indigent Status ☐ State Agency v. Indigent Party
☐ Sexually Violent Predator Act ☐ Post-Conviction Relief
☐ Motion for Stay in Bankruptcy
☐ Motion for Publication ☐ Motion for Execution (Rule 69, SCRPC)
☐ Proposed order submitted at request of the court; or,
 reduced to writing from motion made in open court per judge's instructions
 Name of Court Reporter: _____
☐ Other: _____

CODE: _____ Date: _____

CONTESTED.—AMOUNT DUE:

STATE OF SOUTH CAROLINA)

COUNTY OF DARLINGTON)

Alberta Major,)

Plaintiff,)

vs.)

City of Hartsville,)

Defendant.)

IN THE COURT OF COMMON PLEAS
FOR THE FOURTH JUDICIAL CIRCUIT

CASE NO.: 09-CP-16-0514

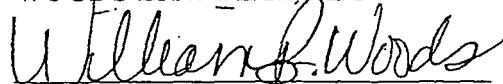
NOTICE OF MOTION AND
MOTION FOR SUMMARY JUDGMENT
ON BEHALF OF DEFENDANT
CITY OF HARTSVILLE

TO: MICHAEL T. MILLER, ESQUIRE, ATTORNEY FOR THE PLAINTIFF:

YOU WILL PLEASE TAKE NOTICE that on the tenth (10th) day following service of this motion upon you, or at such time as may be set by the court, the Defendant City of Hartsville, will move for summary judgment pursuant to Rule 56, SCRCRCP. This motion is based on the ground that no genuine issue as to any material fact exists to the liability of Defendant City of Hartsville which was not placed on notice as required under the S.C. Tort Claims Act.

This Motion shall be supplemented by such deposition testimony, affidavit, and a memorandum of law as Defendant deems necessary.

WOODS LAW FIRM, LLC



William B. Woods

Post Office Box 2444

127 Library Hill Lane, Suite C

Lexington, South Carolina 29071

Attorney for Defendant

April 12, 2010

STATE OF SOUTH CAROLINA)
COUNTY OF DARLINGTON)

IN THE COURT OF COMMON PLEAS
FOR THE FOURTH JUDICIAL CIRCUIT

Alberta Major,)
Plaintiff,)

CASE NO.: 09-CP-16-0514

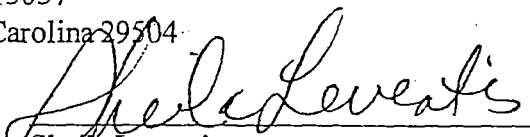
vs.)

CERTIFICATE OF SERVICE

City of Hartsville,)
Defendant.)

I, the undersigned employee of Woods Law Firm, LLC, do hereby certify that I have served Defendant's Notice of Motion and Motion for Summary Judgment on Plaintiff, by personally mailing a copy of the same, postage prepaid, on the date shown below as follows:

Michael T. Miller, Esquire
Wukela Law Firm
Post Office Box 13057
Florence, South Carolina 29504


Sheila Leventis

April 12, 2010

STATE OF SOUTH CAROLINA

COUNTY OF DARLINGTON

FILED

2010 SEP 17

PM 12:33

IN THE COURT OF COMMON PLEAS

FOURTH JUDICIAL CIRCUIT

Civil Action No.: 2009-CP-16-514

Alberta Major,

Plaintiff,

vs.

City of Hartsville,

Defendant.

JOSEPH B. SUGGS
CLERK OF COURT/R.O.D.
DARLINGTON COUNTY, S.C.

**PLAINTIFF'S MEMORANDUM
IN OPPOSITION TO DEFENDANT'S
MOTION FOR SUMMARY JUDGMENT**

TO: THE DEFENDANT ABOVE-NAMED AND THEIR ATTORNEY, WILLIAM B. WOODS, ESQUIRE:

The Plaintiff, Alberta Major, by and through the undersigned counsel hereby offers the following in opposition to Defendant's Motion for Summary Judgment:

I. BACKGROUND

This matter arises out of a fall that occurred on December 1, 2008 when the Plaintiff fell due to a depression that existed in the small patch of grass at the corner of East Carolina and Coker Avenues in Hartsville, South Carolina.

At the time the Plaintiff, a resident of Florence, was taking evening classes at Coker College. Dep. of Alberta Major, p. 11, l. 11-16, attached as Exhibit 1. On the day in question, she parked in the Coker College Byerly parking lot, on the southeast corner of East Carolina and Coker Avenues. Id. at p. 20, l. 20. The Plaintiff estimates that it was sometime between 4:15 pm and 4:45 pm. Id. at p. 26, l. 10 – p. 27, l. 1. She states that got out of her car and walked up to the East Carolina Avenue sidewalk, where she took a left and continued to follow the sidewalk to the intersection of East Carolina and Coker Avenues. Id. at p. 21, l. 8-11. Immediately before the sidewalks from both East Carolina and Coker Avenues reach the corner and intersect, they

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end, leaving a small batch of grass at the corner. See Exhibit 2. Id. at p. 28, l. 19 – p. 29, l. 4; p. 31, l. 3-10. The Plaintiff, desiring to cross East Carolina Avenue at the intersection was forced to walk on this patch of grass because there was no sidewalk at this corner at the time. Id. at p. 31, l. 3-10; p. 32, l. 16 – p. 33, l. 2. In the process of doing so she stepped in a depression that existed at that location. Id. As stated by the Plaintiff at her deposition:

I stopped at the corner and as I checked for traffic, no one was coming. So I made a step to step across the street. My foot slipped down into a hole, and my knee, kind of, buckled to the right. But I was able to—because cars had started coming at that point. I was able to compose myself and I, kind of, hobbled on across the street. Id. at p. 21, l. 11-18.

The Plaintiff returned to Hartsville on Thursday December 4, 2008 for her next regularly scheduled class. Id. at p. 37, l. 3-5. At this time she reported the incident to Coker College officials, who sent security officer Burke Hoffman to investigate. Id. at p. 38, l. 6 – p. 39, l. 11. Mr. Hoffman advised the Plaintiff that the property upon which the incident occurred was owned by the City of Hartsville, not Coker College. Dep. of Burke Hoffman, p. 10, l. 5-13, attached as Exhibit 3. Mr. Hoffman recommended that the Plaintiff contact the city. Id. Shortly thereafter, the Plaintiff called the Hartsville Police Department and Officer Michael Sanchez arrived at the intersection to investigate the incident. Dep. of Albert Major, p. 41, l. 11 – p. 42, l. 2.

As a result of this incident, the Plaintiff sustained a right ankle sprain and has received treatment from McLeod Regional Medical Center, McLeod Orthopaedic Associates, and McLeod Physical Therapy. Id. at p. 59, l. 25 – p. 60, l. 3.

A Summons and Complaint for this action was filed on July 15, 2009, alleging premises liability. Counsel for the Defendant submitted an Answer on September 3, 2009.

II. SUMMARY JUDGMENT STANDARD

South Carolina Rule of Civil Procedure 56(c) states that summary judgment should only be granted when “there is no genuine issue as to any material fact” and when “the moving party is entitled to a judgment as a matter of law.” See Glover v. County of Charleston, 606 S.E.2d 773, 775; 361 S.C. 634, 638 (2004). “In determining whether any triable issues of fact exist for summary judgment purposes, the evidence and all inferences which can be reasonably drawn from the evidence must be viewed in the light most favorable to the nonmoving party.” Id. (emphasis added). Summary judgment should not be granted when “further inquiry into the facts of the case is desirable to clarify the application of the law.” Gadson v. Hembree, 613 S.E.2d 533, 535; 364 S.C. 316, 320 (2005). In addition, summary judgment is improper “even when there is no dispute as to the evidentiary facts; if there is a dispute as to the conclusions to be drawn therefrom.” Laurens Emergency Med. Specialists v. M.S. Bailey & Sons Bankers, 355 S.C. 104, 108-109, 584 S.E.2d 375, 377 (2003). Above all, courts must remember that summary judgment is a “drastic remedy which should be cautiously invoked so that a litigant is not improperly deprived of a trial on disputed factual issues.” Madison ex rel. Bryant v. Babcock Ctr., Inc., 638 S.E.2d 650, 655; 371 S.C. 123, 134 (2006).

III. ARGUMENT

A. SUMMARY JUDGMENT SHOULD BE DENIED DUE TO THE EXISTENCE OF GENUINE ISSUES OF MATERIAL FACT AS TO THE DEFENDANT’S LIABILITY REQUIRING RESOLUTION OF A JURY.

Summary judgment in this case should be denied because issues of material fact exist as to the Defendant’s liability, specifically whether the Defendant received adequate notice of the condition that caused the Plaintiff’s injuries. The Plaintiff argues, and intends to show, that the

testimony in this case supports this assertion and supports the position that the Defendant received adequate notice of the condition pursuant to South Carolina law.

1. The proper notice inquiry to apply to this case is whether the Defendant received constructive notice of the condition that caused the Plaintiff's injuries.

In its motion, the Defendant argues that "no genuine issue as to any material fact exists to the liability of Defendant City of Hartsville which was not placed on notice as required under the S.C. Tort Claims Act [S.C. Code § 15-78-10 et seq.]." (Defendant's Notice of Motion and Motion for Summary Judgment on Behalf of Defendant City of Hartsville). As this Court is well aware, the South Carolina Tort Claims Act ("Tort Claims Act") defines the limits under which a plaintiff can pursue a civil action against a governmental entity within the State of South Carolina. Section 15-78-60 provides forty (40) exceptions to the waiver of immunity provided by the Tort Claims Act. However, pursuant to § 15-78-40 if none of these exceptions apply, then governmental entities are "liable for their torts in the same manner and to the same extent as a private individual under like circumstances."

In this case, the common law imposes a duty on landowners to maintain their premises in a reasonably safe condition. See Hughes v. Children's Clinic, P.A., 269 S.C. 389, 397, 237 S.E.2d 753, 756 (1977). This rule requires a showing of actual or constructive notice on the part of the premises-owner of the condition that caused the plaintiff's injuries in order for the plaintiff to prevail. See Gilliland v. Pierce Motor Co., 235 S.C. 268, 274, 111 S.E.2d 521, 523-24 (1959).

Being that this case is one against a governmental entity, it necessary to consult the Tort Claims Act to determine whether this statute alters the common law rule. Indeed, there are two (2) possible provisions that could possibly relate to the case at bar, however as will be evident, only one of them can be properly applied.

The first of these provisions is found at § 15-78-60(15), which states in relevant part:

Governmental entities responsible for maintaining highways, roads, streets, causeways, bridges, or other public ways are not liable for loss arising out of a defect or a condition in, on, under, or overhanging a highway, road, street, causeway, bridge, or other public way caused by a third party unless the defect or condition is not corrected by the particular governmental entity responsible for the maintenance within a reasonable time after actual or constructive notice. (emphasis added)

It is the Plaintiff's position, as will be argued below, that this is the only applicable provision of the Tort Claims Act in this case.

The other possible provision, which the Plaintiff anticipates the Defendant will argue should apply, is found at § 15-78-60(16), and states in its entirety that governmental entities are not responsible for losses that result from:

maintenance, security, or supervision of any public property, intended or permitted to be used as a park, playground, or open area for recreational purposes, unless the defect or condition causing a loss is not corrected by the particular governmental entity responsible for maintenance, security, or supervision within a reasonable time after actual notice of the defect or condition. (emphasis added)

There are two main differences between these provisions: 1) the type of premises to which the provisions apply, and 2) the notice standards required. Subsection (15) applies to highways, roads, streets, causeways, bridges, or other public ways, and requires a showing of either actual or constructive notice of the condition that causes the injury. In contrast, subsection (16) applies to public property "intended or permitted to be used as a park, playground, or open area for recreational purposes," and requires a showing of actual notice of the condition that caused the plaintiff's injury.

It is the Plaintiff's position that subsection (15) is the only provision that can be applied to this case because the land upon which the Plaintiff was injured is a public way, tantamount to

a sidewalk, by virtue of its location and use by the general public. In contrast, the Plaintiff argues that this small patch of land is not a park, playground, or recreational area.

In Vaughn v. Town of Lyman, 370 S.C. 436, 635 S.E.2d 631 (2006), attached as Exhibit 4, the South Carolina Supreme Court addressed several issues very similar to the case at bar, including which standard should apply in an action against a governmental entity for injuries sustained on a town sidewalk. Vaughn involved an action for personal injuries that the plaintiff sustained when she fell as a result of a broken sidewalk in the Town of Lyman, South Carolina. The plaintiff sued under a statutory and common law theory of negligence.¹ With regard to the common law theory, the Court stated that “municipalities which have full and complete control over the streets and highways within their corporate limits are liable in damages for injuries sustained in consequence of their failure to use reasonable care to keep them in a reasonably safe condition.” Vaughn, 370 S.C. at 443, 635 S.E.2d at 635. Importantly, the Court stated that pursuant to South Carolina law, a sidewalk is included in the definition of a street. Id., see also Fickling v. City of Charleston, 372 S.C. 597, 604, 643 S.E.2d 110, 114 (Ct.App. 2007) (“The South Carolina Code defines a ‘sidewalk’ as a portion of a street.”).

The defendant, Town of Lyman, argued that the Tort Claims Act precludes an imposition of liability in that case. In this regard, the Court stated “[t]here is only one exception to the waiver of immunity contained in the Tort Claims Act regarding street maintenance,” which they cite as § 15-78-60(15). 370 S.C. at 445, 635 S.E.2d at 636. This is the provision highlighted above pertaining to highways, roads, streets, causeways, bridges, or other public ways, and which requires a showing of either actual or constructive notice of the condition that causes the plaintiff’s injuries. Based on the finding that this was the only provision of the Tort Claims Act

¹ The statutory cause of action was based on S.C. Code § 5-27-120, which requires municipalities to “keep in good repair all the streets, ways and bridges within the limits of the city or town.” The Court rejected this theory, finding that this statute did not create a private right of action.

that applied to injuries occurring on municipality's sidewalks, the Court then applied a constructive notice standard and reversed the lower court's granting of summary judgment to the defendant. Id.

The holding of Vaughn was affirmed in the case Fickling v. City of Charleston, 372 S.C. 597, 643 S.E.2d 110 (Ct.App. 2007), which also involved a plaintiff who suffered injuries as a result of a poorly maintained sidewalk, specifically by stepping in a hole in the sidewalk. Fickling, like Vaughn, also imposed a standard of constructive notice of the condition that caused the plaintiff's injuries, and ultimately reversed the lower court's granting of directed verdict in favor of the municipality. 372 S.C. at 609-10, 643 S.E.2d at 116-17. Together, these cases unequivocally establish that in actions involving injuries sustained as a result of conditions existing on municipal sidewalks, the plaintiff need only prove that the municipality had constructive notice of the condition.

In the instant case, the Plaintiff asserts that a constructive notice standard should apply because the land upon which the depression existed was a public way, tantamount to a sidewalk, and should not be considered recreational land. This is supported by the fact that the sidewalk ended a few yards from the intersection and that the Plaintiff had no choice but to walk on the grass if she was to cross at the intersection. This fact was acknowledged by counsel for the Defendant at the Plaintiff's deposition, who in questioning stated, "you had gotten out of your car and walked straight out to the sidewalk and walked down toward that corner, that as you got to the corner, not all the way to the very corner, the sidewalk ran out." Dep. of Alberta Major, p. 28, l. 20-24. Because the sidewalk ended immediately before the intersection, and because this was a common road crossing point for students of Coker College who, like the Plaintiff, park in the lot across East Carolina Avenue from the college, this small patch of land should be

considered as a sidewalk. Id. at p. 32, l. 20 – p. 33, l. 2. For this reason, the Plaintiff asserts that if any provision of the Tort Claims Act applies to limit liability it should only be § 15-78-60(15), which only requires a showing of constructive notice of the condition.

It is anticipated that the Defendant will attempt to argue that § 15-78-60(16) should be applied to impose an actual notice standard in this case. To this the Plaintiff argues that such an application would be grossly inappropriate because this land was not a park, playground, or recreational area. Instead it was simply a piece of grass and dirt at the intersection of two roads and two sidewalks. Plus, a review of cases which have applied subsection (16) indicate that this provision is strictly construed to only apply when the location of the injury is in fact a park, playground, or recreational area. See Strother v. Lexington County Recreation Comm'n, 332

S.C. 54; 504 S.E.2d 117 (1998) (plaintiff injured while playing softball on a softball field owned by Lexington County Recreation Commission); Richardson v. City of Columbia, 340 S.C. 515; 532 S.E.2d 10 (Ct.App. 2000) (injuries sustained at a baseball field complex owned by Richland County Recreation Commission); and Dema v. Shore Enters., 312 S.C. 528; 435 S.E.2d 875 (Ct.App. 2000) (involved injuries at a public beach, although the issue of actual notice was not addressed because liability was not found due to other preliminary issues). It also bears mentioning that the Defendant has never asserted that this patch of grass was recreational land. To read subsection (16) to include a small patch of land at an intersection would be an offensive expansion of the applicability of this provision.

Alternatively, the Plaintiff argues that if the Court finds that neither of these provisions apply, pursuant to S.C. Code § 15-78-40 the common law rule shall apply, which in this case would be a constructive notice standard. See Gilliland, 235 S.C. 268, 111 S.E.2d 521 (1959).

In light of the foregoing, the Defendant's Motion for Summary Judgment should be denied if there exists a genuine issue of material fact as to whether the Defendant had constructive notice of the depression that caused the Plaintiff's injuries. It is the Plaintiff's position that such issues of fact do indeed exist and therefore the Defendant's motion must be denied.

2. The Defendant's motion should be denied because of the existence of genuine issues of material fact concerning the Defendant's liability, in particular pertaining to the Defendant's constructive notice of the condition that injured the Plaintiff.

Having established that a constructive notice standard applies to this case, the question now becomes whether there exists evidence supporting the argument that the Defendant had constructive notice of the depression that caused the Plaintiff's injuries. The Plaintiff asserts that such evidence exists, and when viewed in a light most favorable to the Plaintiff the Defendant's motion must be denied.

First, there is a great deal of testimony in this case about the specific depression that caused the Plaintiff's injuries. As far as the Plaintiff has been informed, there are only four (4) individuals who personally viewed the depression, or hole, at issue in this case: the Plaintiff, Coker College security guard Burke Hoffman, Hartsville Police Officer Michael Sanchez, and former Coker College maintenance personnel Mark Gokey.² The Plaintiff testified that the depression was a hole, but did not testify as to what she thought caused the hole. Additionally, she stated that "there was grass growing all over it—or growing down in it actually. And of course, there were leaves around." Dep. of Alberta Major, p. 40, l. 17-19.

² Plaintiff's counsel alerts the Court that at the time this brief was composed the deposition of Mark Gokey had not yet been taken. The deposition is scheduled for Wednesday, September 22, 2010 at 2:00 pm, the afternoon before the hearing on the Defendant's motion.

Mr. Hoffman described the depression as a "rut with leaves covered [sic] it." Dep. of Burke Hoffman, p. 11, l. 15-16. When asked what he thought caused the rut, Mr. Hoffman stated:

A: I do know from observations from over the years, that cars, they come—and not only when I'm in the parking lot, but when I'm on campus looking back towards that way, that cars come and cut that corner. And cut it, you know, a lot of times it—they just roll, and don't come to a complete stop. And they, you know, they go on.

Q: When you say, they cut the corner, what do you mean by that?

A: Well, they come up, and they look that way, and—and they cut real sharp, you know, to the right.

Q: And drive on the grass?

A: Yeah.

Id. at p. 22, l. 4-16.

Mr. Hoffman further testified that he has also seen large tractor-trailer trucks drive onto the grass when they take the right turn onto East Carolina Avenue. Id. at p. 28, l. 18 – p. 29, l. 9.

Officer Michael Sanchez, an employee of the City of Hartsville, described the condition as follows, "there was a sidewalk and it was a foot away from that sidewalk and it appeared to be some kind of a relief, a concave depression in the road or in the, in the dirt there with grass growing in it and very sparse leaf coverage around it." Dep. of Michael Sanchez, p. 17, l. 17-22, attached as Exhibit 5. He further described it as "a little bit of depression in that corner," which was "maybe eight to twelve inches long," and which did not appear to be a "dug hole." Id. at p. 17, l. 25 – p. 18, l. 1; p. 18, l. 13; p. 37, l. 25 – p. 38, l. 2. He further described the orientation of the depression as such that it appeared to be cutting the corner. Id. at p. 19, l. 18 – p. 20, l. 14. As to how the depression was created, Officer Sanchez testified:

A: Other than traffic, that's the only thing I could think of.

Q: Explain traffic, what you mean by that?

A: Vehicles often cross over sidewalks and corners and we find this happening throughout the City a lot where people

cut corners and it could have been something generated from just constant wear and tear. I know I've observed many a vehicle travel through a corner like that and go over it. That could be a possibility.

Q: So you're saying a vehicle when they're turning that corner, they drove up on the grass?

A: Yes.

Q: Possibly?

A: Uh-huh.

Q: Have you observed a vehicle do that at that corner?

A: Yes.

Id. at p. 21, l. 25 – p. 22, l. 16.

Finally, the deposition of the City of Hartsville's Director of Parks and Leisure Services, Phillip A. Gardner, was taken on March 18, 2010, and is attached hereto as Exhibit 6. Although Mr. Gardner did not personally observe the depression at issue in this case, he did testify of his knowledge concerning vehicles driving on the grass at that corner creating ruts. While looking at pictures of the corner identified as Plaintiff's Exhibit 6, Mr. Gardner was asked, "do you see any evidence of cars cutting that corner and driving across that corner?" to which he replied:

A: If you'll follow the edge right here, you can see where it's just been worn, worn out by vehicles.

Q: And you're looking at where the grass meets the pavement?

A: Yes.

Q: Okay. On what would appear to be the Coker Street side?

A: Yes.

Q: And is that what this road is coming in right here?

A: This is Coker.

Q: Yeah.

A: And this is Carolina.

Q: Okay.

A: And you can see where this is—and if this were not there, you would probably see more evidence of it on up toward the pole.

Q: Okay. And is this from vehicles taking a right onto Carolina?

A: It is.

Q: Okay. And this is a problem that you've dealt with before up in this corner?

A: We have—have observed vehicles making that turn for years.

Q: Okay.

A: Trucks especially can't make that turn without taking—almost taking that pole out.

Q: Okay. Has it caused depressions before?

A: Yes.

Id. at p. 31, l. 19 – p. 32, l. 24.

Continuing, Mr. Gardner testified:

Q: Okay. You say that over the years y'all have observed vehicles and when you say trucks, you talking about tractor-trailers?

A: Yes.

Q: They're taking—they take that turn and it can be difficult for tractor-trailers to make that sharp of turn?

A: It's a really hard turn for them.

Q: That they often drive up on the grass?

A: Yes.

Q: And that's something y'all have had to deal with before?

A: Yes.

Q: How has your department addressed that issue in the past?

A: They've gone back and they have put sand or clay back in that area, but it was—it was a fruitless effort because a few days later, it's, you know, right back in the same condition so after two or three attempts, they just kept an eye on that area to make sure that it did not create, you know, some sort of a, you know, problem at a later time.

Id. at p. 34, l. 13 – p. 35, l. 9.

Along these same lines, when questioned by counsel for Defendant Mr. Gardner testified further concerning his department's established procedure for dealing with ruts and depressions caused by vehicles driving on the grass while turning at that corner, stating:

Q: If, in fact, your crew had noticed that a tractor-trailer had cut that corner and left a deep groove or rut there, would they have done anything to address that?

A: Yes, they would have.

Q: What would they have done?

A: They would have gone in and back-filled it and tamped it tight and observed the area to make sure that it was packed well and did not wash out or settle.

Id. at p. 43, l. 1 – 10.

The foregoing testimony serves to create a genuine issue of material fact as to the Defendant's liability, particularly as to whether they received constructive notice of the depression. In Fickling, the Court adopted another jurisdiction's statement of constructive notice, quoting, "[c]onstructive notice arises when a condition has existed for such a period of time that a municipality in the use of reasonable care should have discovered the condition."

Fickling, 372 S.C. at 610, 643 S.E.2d at 117 (Ct.App. 2007)(citation and quotations omitted).

The Court also discussed two other South Carolina premises liability cases which:

involved conditions [that] were of such a recurrent nature that the defendants were chargeable with constructive notice on the day of the accident because they established certain patterns wherein the recurrence is of such a nature as to amount to a continual condition and this, coupled with other facts may be sufficient to create a jury issue as to constructive notice. . . Id. (citations and quotations omitted).

Ultimately in Fickling the Court determined that a directed verdict in favor of the municipality was erroneous considering their finding that:

[i]n the light most favorable to Fickling, there was at least some evidence that (1) there were numerous City personnel within the area of the defect who could have seen and reported the problem; (2) the condition had existed for a while; and (3) the City had an established policy in place to deal with defects in the sidewalks, and problems with the sidewalks were an expected and "recurrent" or "continual" condition of which it had notice. Id. at 609-10, 117.

The case at bar is very similar to Fickling, and similarly, summary judgment should be denied.

First, two city employees, Officer Sanchez and Phillip Gardner, testified that they knew vehicles cut that corner and drove onto the grass creating ruts. Mr. Hoffman corroborated this testimony saying that he has personally observed both vehicles and tractor-trailers doing this. Second, Mr.

Gardner testified that his crew routinely maintains the streetscape on East Carolina Avenue.³ Third, Mr. Gardner testified that he and his crew had an established procedure for dealing with ruts and depressions created by vehicles at that corner, as excerpted above. He testified that upon learning of a rut his crew would have "gone in and back-filled it and tamped it tight and observed the area to make sure that it was packed well and did not wash out or settle." Dep. of Phillip Gardner, p. 43, l. 7-10.

Finally, Mr. Gardner, as well as Officer Sanchez and Mr. Hoffman, testified that this condition was a recurrent and continual problem, stating that "[w]e have . . . observed vehicles making that turn for years," and that these vehicles have "caused depressions before." *Id.* at p. 32, l. 18-23. He further testified that efforts to fill in depressions created by vehicles at that corner are futile because "a few days later, it's . . . right back in the same condition." *Id.* at p. 35, l. 4-6. Officer Sanchez testified that he has personally "observed many a vehicle travel through a corner like that" and drive up on the grass. Dep. of Michael Sanchez, p. 22, l. 7-12. And Mr. Hoffman testified that he has personally observed vehicles cutting that corner and drive on the grass, even stated that had observed a tractor-trailer doing this very same thing the week before his deposition. Dep. of Burke Hoffman, p. 22, l. 4-10; p. 28, l. 25 – p. 29, l. 9.

These facts all serve to create a genuine issue of material fact as to the Defendant's negligence, in particular whether the City had constructive notice of the depression. The Plaintiff asserts that the City was well aware that vehicles were creating ruts at that corner due to the nature of the intersection, as well as due to the lack of a paved sidewalk at that corner. The Plaintiff asserts that whether the City had actual notice of the depression that caused the Plaintiff's incident is irrelevant because based on previous experience with that corner, the City

³ Mr. Gardner testified that his crew does maintenance and beautification on a particular intersection every three to five weeks, unless a problem arises, and that this crew was in the vicinity of the intersection at issue in this case at least twice the week of the accident. Dep. of Phillip Gardner, p. 16, l. 5-7; p. 20, l. 5-11.

should have known there was a rut there. For these reasons, a jury issue exists as to the Defendant's liability, and the Defendant's motion should be denied.

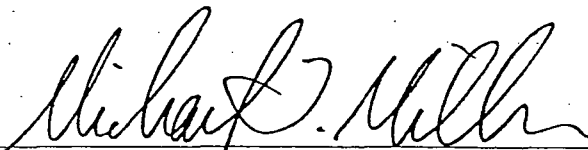
V. CONCLUSION

In sum, the Plaintiff asserts that a constructive notice standard applies in this case because: 1) that is the common law standard for premises liability actions of this nature, and 2) if the common law is deemed to be modified by the Tort Claims Act in this case, that statute does not alter the constructive notice standard. See § 15-78-60(15). Since a constructive notice standard applies, the Plaintiff next asserts that the Defendant did indeed have constructive notice of the depression, or rut, that caused the Plaintiff's injuries. This is evidenced by the testimony in this case, which when viewed in a light most favorable to the Plaintiff, serves to create a genuine issue of material fact as to the Defendant's negligence. Because such factual issues exist, the services of a jury are required, and the Defendant's Motion for Summary Judgment should be denied.

Respectfully submitted,

WUKELA LAW FIRM

BY:



MICHAEL T. MILLER

ATTORNEY FOR PLAINTIFF

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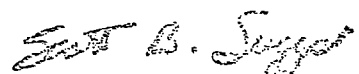
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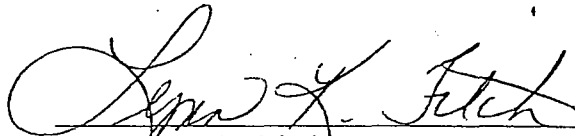
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CERTIFICATE OF SERVICE

The undersigned, Lynn K. Fitch, of the Wukela Law Firm, hereby certifies that on the 17th of September, 2010, she placed in an envelope Plaintiff's Memorandum in Opposition to Defendant's Motion for Summary Judgment in the matter of Alberta Major vs. City of Hartsville, Civil Action No. 2009-CP-16-514, and deposited the same in the United States Mail. Said envelope being addressed to the following person(s):

William B. Woods, Esquire
Woods Law Firm, LLC
Post Office Box 2444
Lexington, SC 29071


Lynn K. Fitch

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State of South Carolina)) In the Court of Common Pleas County of Darlington) Alberta Major,) C/A No: 09-CP-16-0514) Plaintiff(s),)) Deposition vs.)) of City of Hartsville,) Defendant(s),) ALBERTA MAJOR) Deposition of ALBERTA MAJOR, taken before Robin Spaniel, Verbatim Court Reporter and Notary Public in and for the State of South Carolina, scheduled for 10:00 a.m. and commencing at the hour of 10:06 a.m., Tuesday, January 19, 2010, at the Town Hall, Hartsville, South Carolina. Reported by: Robin Spaniel	3 1 STIPULATIONS 2 This deposition is being taken pursuant to the 3 South Carolina Rules of Civil Procedure. 4 ----- 5 The reading and signing of this deposition is 6 reserved by the deponent and counsel for the 7 respective parties. 8 9 Whereupon, 10 ALBERTA MAJOR, being duly sworn and cautioned 11 to speak the truth, the whole truth, and 12 nothing but the truth, testified and deposed 13 as follows: 14 Court Reporter: State your full name for the 15 record, please. 16 Witness: Alberta Major 17 ----- 18 DIRECT EXAMINATION 19 BY MR. WOODS: 20 Q Ms. Major, my name, again, is Bill Woods. I 21 represent the City of Hartsville in a lawsuit that 22 you have brought in connection with an incident 23 that occurred back on December 1, 2008. And 24 according to your complaint, you fell on city 25 property as you were preparing to cross the street
APPEARANCES For the Plaintiff(s): Michael T. Miller, Esquire Wukela Law Firm PO Box 13057 Florence, South Carolina 29504 For the Defendant(s): William B. Woods, Esquire Woods Law Firm, LLC 127 Library Hill Lane, Suite C Lexington, South Carolina 29071 Also Present: Sharon Skipper INDEX Stipulations 3 Direct Examination by Mr. Woods 3 Errata Sheet 78 Certificate 79 EXHIBITS None	4 1 to go to class, an evening class, I believe. And I 2 want to ask you some questions today about the 3 incident itself. The injuries you sustained, the 4 medical treatment you have incurred as a result of 5 that, those injuries. And I know something about 6 them, because your attorney has given me copies of 7 the medicals. And I'll be going through them. I 8 know it's been awhile. So if -- you know, I don't 9 expect you to remember every visit. And I won't be 10 asking you, I don't think, about every visit that 11 you went -- went there and what was said and done. 12 But I will probably ask you about some of them 13 generally. Because I do want to find out as much 14 as I can about what happened to you, and what 15 treatment you've had, and how you're doing now. In 16 addition to those kind of questions, I'm going to 17 be asking you some general background questions. I 18 know your attorney has talked with you about the 19 deposition, and what to expect from the deposition, 20 and the kind of questions I'd be asking, that kind 21 of thing. In addition to his talking with you 22 about that, I'll tell you, please don't try to 23 answer a question if you don't understand it. And 24 the reason I ask you that is so when we leave here 25 today, I'll be pretty sure that the answers you've

5 1 given are actually to the questions I asked. So if 2 you have any questions, any doubts about what I'm 3 asking, please don't hesitate to tell me that you 4 don't understand my question, or ask me to repeat 5 it, or rephrase it. I won't -- my feelings won't 6 get hurt and -- by that. So don't feel 7 uncomfortable with -- with telling me you don't 8 understand my question. I won't intentionally ask 9 you a confusing question. But I apologize ahead of 10 time if I ask you one that sounds confusing. And 11 it could be because I'm thinking about your last 12 answer and trying to think of the next question. 13 And it, it may be confusing. If something like 14 that occurs, please just ask me to rephrase it or 15 repeat it. 16 I need to ask you if you are on any type of 17 medications, drugs, legal, illegal, prescription, 18 over-the-counter, anything, alcohol, anything that 19 would make it difficult today for you to understand 20 my questions or give responses to my questions? 21 A No. 22 Q All right. And since we've started the deposition, 23 I am required by the court rules to tell you, if 24 something comes up during the course of the 25 deposition that you have a question about, like the	7 1 me, is that your maiden name -- 2 A Yes. 3 Q -- or your previous married name? 4 A Maiden name. 5 Q Maiden name. Okay. Who are you engaged to at 6 present? 7 A Carroll Bonner. 8 Q Carroll? 9 A Bonner, B-o-n-n-e-r. 10 Q Bonner. And where does Mr. Bonner live? 11 A Quinby, SC in Florence. 12 Q Okay. And I take it he was not with you at the 13 time this incident occurred? 14 A Correct. 15 Q So he wouldn't know anything first-hand about what 16 happened? 17 A Not first-hand. No. 18 Q I take it he might know something about the 19 injuries and how you've done since then? 20 A Yes. 21 Q Uh-huh. Where does Mr. Bonner work? 22 A CSX Railroad in Florence. 23 Q Where? 24 A CSX Railroad in Florence. 25 Q In Florence?
6 1 procedure, or a question that I asked, whether it's 2 something I ought to be asking you, rather than 3 turning to your attorney, which you would be more 4 comfortable with, and say, "Is this something I've 5 got to do," or "Can we talk about it?", like you 6 used to be able to do up till three or four years 7 ago, you have to ask me. "Is that a question you 8 can ask me?" or "Do I have to answer that?" Or -- 9 I don't think that's going to happen, seldom if 10 ever does, but if you get to that point where you - 11 - you feel like I'm getting too personal in asking 12 you something that I maybe shouldn't, ask me about 13 it. I'll tell you why I'm asking, all right? And 14 if I tell you an answer or give you a response that 15 your attorney feels is not correct, he certainly 16 has the opportunity and the right to step in and 17 say whatever he wants to say to you about it. All 18 right. Tell me, please, for the record, your full 19 name. 20 A Alberta Major. 21 Q Okay. Are you married, single, divorced, what? 22 A Engaged. 23 Q Engaged. Ever been married? 24 A Yes. 25 Q All right. And your name "Major" that you've given	8 1 A Yes. 2 Q But you said he lived in Columbia or Florence? 3 A Quinby. 4 Q Quinby. Okay. I'm sorry. 5 A It's a community -- a community -- 6 Q Yeah. I know where Quinby is. I just didn't -- 7 I'm sorry. I misunderstood you. To your 8 knowledge, has Mr. Bonner been employed in the past 9 for anyone in Darlington County? 10 A No. 11 Q Okay. And let me ask you about your previous 12 marriage. What was your husband's name? 13 A Henry Stephens. 14 Q Henry Stephens? 15 A Yes. 16 Q And where does Mr. Stephens live now, you know? 17 A I have no clue. 18 Q Okay. Probably not in Darlington County? 19 A Probably not. I think he's in Sumter County, I 20 think. 21 Q Okay. 22 A But I don't know. 23 Q Okay. When the two of you were married, where did 24 y'all live? 25 A In Florence.

9 1 Q Okay. And tell me today what is your current 2 address? 3 A [REDACTED] 4 Q And where is that? 5 A Florence. 6 Q Florence? 7 A Uh-huh. 8 Q And about how long have you lived there? 9 A Fourteen, fifteen years. 10 Q Who, if anyone, lives at that address with you? 11 A No one. 12 Q Is that a home -- 13 A Yes. 14 Q -- that you own or are buying -- 15 A Buying. 16 Q -- or that you are renting? 17 A Buying. 18 Q Okay. Tell me, what is your date of birth, please? 19 A [REDACTED] 20 21 MR. WOODS: And if we can go off the record for 22 just a minute. 23 (Off the Record) 24 25 Q Just to get a little background about you, are you	11 1 Q In that -- your position, you don't teach any 2 courses, or do you? 3 A I have done positions where the teacher has been 4 out for maternity leave. I do long -- long-term 5 subbing positions in the building. I work clerical 6 in the office. I work with our assistant 7 principal. So I, kind of, do a bit of everything. 8 That's why I'm at Coker now. 9 Q Okay. Trying to -- to learn even more? 10 A Absolutely. 11 Q What -- what are you -- what's your intention to -- 12 to achieve in your future employment from your 13 class work at Coker now? 14 A I attend to go through the Master's program for 15 Special Ed. So that I can become certified in 16 Special Ed. 17 Q Uh-huh. Well, it seems that that's still an area 18 in South Carolina that -- where they need teachers. 19 As opposed to a lot of the other -- other areas 20 where teachers can't find work now. 21 A I agree. 22 Q Are you from Florence originally? 23 A Sumter. 24 Q Sumter. I'm from Manning originally. So we're not 25 --
10 1 employed now, either full-time or part-time? 2 A Full-time. 3 Q Where is that? 4 A Florence School District One. 5 Q And what do you do with them? 6 A I'm a para professional for Moore Intermediate 7 School. I've been there 14 years. 8 Q Okay. At Moore? 9 A Intermediate School. 10 Q All right. I take it Moore has an elementary there 11 also? 12 A Well, intermediate, we have all fifth and sixth 13 graders. 14 Q And you say a para professional? 15 A Yes. 16 Q What does -- what -- what do you do in that 17 capacity? 18 A A little bit of everything. What it actually is, 19 it's a -- another term that they have given to 20 assistants who have taken certain tests to become 21 certified in that area. 22 Q Okay. Yeah. I don't think -- when I went through 23 school, they didn't have that. I was just 24 wondering. 25 A It's a new title.	12 1 A My mom is too. 2 Q -- too far apart. And what was her name? What was 3 her maiden name? 4 A Adger. 5 Q I'm -- 6 A Adger. 7 Q Adger? 8 A Uh-huh. 9 Q While I'm at that -- that area, do you have any 10 relatives who reside in Darlington County? 11 A No. 12 Q All right. 13 A Not that I know of. 14 Q Okay. Have you ever been employed by anyone, or 15 for any company, or individual in Darlington 16 County? 17 A No. 18 Q Your connection, at present, with Darlington County 19 is Coker College? 20 A Yes. 21 Q How long have you been attending Coker now? 22 A A little over three years. 23 Q Is this the first time, these last three years, the 24 first time that you have been a student at Coker? 25 A No.

13 1 Q You've been a student here in the past? 2 A Yes. 3 Q All right. Tell me something about your -- your 4 educational background. I take it you graduated 5 from high school in the Florence area? 6 A In Sumter. 7 Q Oh, that's right. I'm sorry. In Sumter. 8 A Uh-huh. 9 Q Which -- 10 A Sumter High School. 11 Q Sumter High. What year was that? 12 A '77. 13 Q And since you graduated from Sumter High, what 14 additional professional, educational, formal 15 education have you obtained? 16 A I attended Frances Marion briefly, and then Coker 17 briefly. And then I just took a period off. 18 Q Okay. 19 A So now I'm back. 20 Q While I'm in this area, you have filed a lawsuit 21 against the City of Hartsville in connection with 22 this matter. In the past, prior to this, have you 23 ever sued anyone else for anything? 24 A No. 25 Q Has anyone ever sued you for anything?	15 1 Q All right. And since that time, have you ever been 2 charged or arrested for any, other driving under 3 influence, or with suspended license -- 4 A No. 5 Q -- or anything of that nature? Have you ever been 6 charged or arrested for any other thing other than 7 this DUT? 8 A When I was seven -- 16 or 17, I dated this young 9 man that was involved with another young lady and 10 there were just some accusations made and that was 11 it. 12 Q And were you arrested as a result of that? 13 A No. 14 Q Okay. 15 A Well, I went to -- I had to go to court for it. 16 Q You had to go to court? 17 A Yeah. It was supposed to be some damage to some 18 clothing or something to that affect. 19 Q All right. But were you still in high school at 20 that time? 21 A Uh-huh. Well, I had just gotten out of high 22 school. 23 Q All right. Anything else? 24 A Nope. 25 Q All right. Have you ever been injured in any type
14 1 A No. 2 Q And I know your attorney has told you that I'm 3 going to ask you this question, because most 4 attorneys ask it. Have you ever been arrested? 5 A Yes. 6 Q And tell me about where and when. 7 A Twelve years ago I was leaving a party and I had 8 had too much to drink and -- or I thought I'd had 9 too much to drink and that's when the incident 10 happened. It may have been 13 years ago. 11 Q All right. Twelve -- anyway, 12 or 13 -- 12 A Yeah. 13 Q -- years ago. And what type of incident was it? 14 A I was pulled over in a road blocker, and they 15 wanted me to do a Breathalyzer, and I refused to do 16 it. 17 Q Okay. 18 A So they said by the fact that I refused to do it. 19 Q I understand. 20 A Right. 21 Q But when you said, "that's when the incident," I 22 didn't know whether -- whether a fight had ensued. 23 A No. No. No. No. No. 24 Q At the party. 25 A No. No.	16 1 of accident, automobile accident, another fall, 2 anything of that nature, say in the past 15 years 3 or so where you had to receive medical treatment? 4 A No. 5 Q In Florence, do you have a doctor you consider your 6 family doctor? 7 A Yes. 8 Q Who is that? 9 A Her name is Susan, I believe, Montrose. 10 Q Susan Montrose? 11 A Uh-huh. 12 Q Where is she located? 13 A It's on Second Loop. I don't know the exact 14 address. 15 Q All right. Does she work in a practice -- 16 A Yes. 17 Q -- that's got a name like -- 18 A I think it's Palmetto Practice, I think. 19 Q That was going to be my guess. I was just starting 20 to say, like, something like Palmetto Practice. 21 A I think that's -- I'm thinking that's what it is. 22 But I know it's on Second Loop. 23 Q Okay. Well, I'm sure Attorney Miller would know 24 because his office is not probably too far from 25 where this is. But that's okay. And when you were

17 1 telling that, I've been to his office a number of 2 times. And I've been through there a number of 3 times. I can picture, and a sign was flashing in 4 my mind here Palmetto something Practice. 5 A I think it's Palmetto Medical Practice, I think. 6 Q All right. In connection with the injuries that 7 you contend that were caused as the result of your 8 fall, did you see Ms. Montrose? 9 A No. 10 Q All right. Have you been - and I see these bills 11 are from McLeod Regional Medical - have you ever 12 been hospitalized or treated at McLeod before this 13 for anything? 14 A Yes. 15 Q And when approximately? 16 A Approximately eight years ago. 17 Q All right. 18 A Eight -- Yeah. About eight years ago. Seven or 19 eight. Something like that. 20 Q Okay. And what was that in connection with? 21 A I had some gynecological issues. 22 Q Okay. Anything other than -- than that where 23 you've received treatment at McLeod? 24 A There were two separate incidents that were like 25 back to back.	19 1 Q And that was -- I meant to tell you. That you need 2 to answer verbally. 3 A Okay. 4 Q Instead of nodding your head and shaking your head. 5 Because those microphones don't pick it up. She 6 can see it and I can see it. 7 A Okay. 8 Q Was the other young lady charged? 9 A Yes. 10 Q All right. But you were not charged? 11 A No. 12 Q You just had to appear there because she was 13 charged? 14 A Yes. 15 Q To testify? 16 A Right. 17 Q And that was over in Sumter or here? 18 A Yes. In Sumter. It's been so long -- yeah. 19 Q All right. All right. My understanding of the 20 incident that we're here today about is that it 21 occurred on December 1, 2008. Is that your 22 recollection and understanding of it? 23 A Yes. 24 Q And what day of the week was that, do you recall? 25 A I'm thinking it was Monday.
18 1 Q Okay. 2 A Within the same year. 3 Q All right. And in that connection, I should've 4 asked you, do you have any children? 5 A No. 6 Q Okay. There's another hospital there in Florence, 7 isn't it? 8 A Carolinas. 9 Q Carolinas. Have you been hospitalized there for 10 anything? 11 A Yes. 12 Q And what was that in ... 13 A It's in relation to the same incident that happened 14 when I was a teenager. This young lady broke into 15 my home and stabbed me. 16 Q Okay. And you were living in Sumter at that time? 17 A I was living in Florence. She came to Florence. 18 Q Okay. You had just gotten out -- just graduated? 19 A Yes. 20 Q Okay. And she followed you over to Florence? 21 A She sure did. 22 Q And that's the one you had to go to court for? 23 A (Nonverbal response.) 24 Q And that's yes? 25 A Yes.	20 1 Q That's my recollection as well. Tell me, had you 2 worked that day? 3 A Yes. 4 Q And over at your school there in Florence? 5 A Yes. 6 Q And do you recall anything about the weather 7 conditions that day? 8 A It seemed like it had been raining. If not that 9 particular day, you know, for a while prior to 10 that. 11 Q All right. Do you remember anything particular 12 about that day other than -- or -- or prior to your 13 getting to this point where the incident happened? 14 A Nothing stands out. 15 Q Okay. When you came over from Florence to 16 Hartsville to attend class at Coker, do you recall 17 where you parked that day? 18 A Yes. 19 Q Where was that? 20 A Byerly Parking Lot right under the camera. 21 Q All right. What kind of car do you drive? 22 A Red Volkswagen. 23 Q All right. You want to make sure that was safe 24 there. 25 A Well, that's why I parked -- well -- well, I parked

21 1 there because we get out late at night. 2 Q Yeah. 3 A So I like to be as close to that camera as I can. 4 Q Okay. And tell me then how, when you got out of 5 your car, tell me how you proceeded from that point 6 there where the camera is to the point where this 7 happened. 8 A I got out of my car and I walked directly towards 9 the sidewalk. And then I made a left because I was 10 going to go to check my box before I went on to 11 class. And I stopped at the corner and as I 12 checked for traffic, no one was coming. So I made 13 a step to step across the street. My foot slipped 14 down into a hole, and my knee, kind of, buckled to 15 the right. But I was able to -- because cars had 16 started coming at that point. I was able to 17 compose myself and I, kind of, hobbled on across 18 the street. I went on to class because this 19 particular professor locks his door if you're not 20 there when he begins class. And then he lets you 21 in when he thinks it's the right time. 22 Q Okay. Makes an example of you in front of 23 everybody? 24 A Absolutely. No extenuating circumstances. He just 25 locks the door.	23 1 classes that -- that time? 2 A That term? 3 Q You know, well, did you -- we'll go to that term. 4 Term would've started, I guess, in September, 5 August, or when? 6 A It would've started maybe the end of -- end of 7 October, beginning of November. Because each term 8 is for eight weeks. 9 Q Oh, okay. 10 A And we were about to get out of school. 11 Q Had you attended classes there the term before 12 which would've been up to the October? 13 A Yes. 14 Q How -- how many months had you been enrolled there 15 in night school this -- this time. Not term, but 16 this time since you started going back. I think 17 you told me you'd been going about three years, 18 now? 19 A Right. 20 Q Do you remember when it was that you first began 21 going back this time to school, about when? 22 A Okay. I'm going back possibly three years. And 23 I'm thinking it was in October when I started that 24 term. Because I remembered that time had just 25 changed. Because I came home and forgot I only had
22 1 Q And how -- how many nights per week were you 2 attending class at that time? 3 A Two. 4 Q And that would've been Monday and Thursday? 5 A Thursday. 6 Q Was the route that your traveled from your car to 7 the point where this incident happened that night, 8 was that the route that you generally took -- 9 A Yes. 10 Q -- when you were going over to class? 11 A Yes. 12 Q And you said you went by -- were going by to check 13 your box, where is that located? 14 A In the Student Union Building. 15 Q Do all of the evening class people have boxes 16 there? 17 A Yes. 18 Q And I take it you check, what, assignments, or what 19 do you -- 20 A Just for miscellaneous things that are placed in 21 the boxes. 22 Q Okay. Notices from the school about things? 23 A Absolutely. 24 Q Okay. At that time this incident happened on 25 December 1, 2008, how long had you been attending	24 1 one headlight. And when I got ready to go home, I 2 couldn't see that well. So it had to been when the 3 time was changing. That's like in September, 4 October, something like that. 5 Q All right. Was it that same year or was that the 6 year before this when you started in 2007. If 7 you've been going there three years now. 8 A It would have -- okay. I'm confused. Could you 9 clarify that, please? 10 Q Yeah. What I'm -- what I'm getting at, my 11 understanding is that at sometime in the past that 12 you had attended Coker for a short while. Then 13 there was time period when you did not -- 14 A Right. Right. 15 Q -- attend classes at Coker. Then you started back, 16 correct? 17 A Right. 18 Q All right. What I'm trying to find is when it was 19 when you started back for this last period of time 20 that you've been going. 21 A I will say it was approximately October of 2007. 22 Q Okay. And have you been going continuously -- 23 A Yes. 24 Q -- since then? 25 A Yes.

25 1 Q And since you started there in October of 2007 or 2 thereabouts -- and I guess we could check with the 3 school or you could check with the school, and they 4 could tell you exactly when it was. 5 A Yes. 6 Q But was it your normal practice to park there in 7 the Byerly Parking Lot? 8 A Yes. 9 Q Is that a parking lot that is probably closest 10 parking lot to where you attended classes, night 11 classes? 12 A Usually. But even if it's not, that's where I park 13 because of the security camera. 14 Q Okay. Was that lot also generally patrolled, based 15 on your observations, by security personnel at 16 Coker? 17 A Rarely. 18 Q Rarely? 19 A Rarely. 20 Q Okay. But you knew it did have a security camera 21 that somebody was hopefully watching? 22 A Absolutely. 23 Q Okay. And the route that you took from your car -- 24 and -- and I know that you probably got there 25 sometimes and somebody else already had your	27 1. somewhere in there. 2 Q Okay. And -- 3 A More or less. 4 Q Well, yeah. I'm looking at a couple of things that 5 -- that appears that that's -- I'm looking at 6 something from Corporal Burke Hoffman that says, 7 "At 4:30 p.m., while on patrol," and I'm looking at 8 an incident report from Officer Sanchez with the 9 city who also places it at 1630, which would be 10 4:30. So in any event, you walked there along the 11 normal route that you took. It was daylight. Did 12 you observe anything particular about the area 13 where you fell as you were walking that day? Prior 14 to the fall. 15 A No more than there was, like, a bunch of leaves 16 that was just all around. Because there's, I 17 think, an oak tree or something that's near there. 18 So it was just leaves scattered everywhere. 19 Q All right. Was that generally the case when you 20 went by in the fall? Obviously, if it was the 21 spring or summer it may not be leaves there like it 22 might be in the fall or winter, but was that 23 generally the way it was? 24 A Yes. 25 Q All right. Did you -- had you noticed that at some
26 1 favorite parking spot. But generally, when you -- 2 you -- I take it you tried to park as close to the 3 parking camera as you could? 4 A Yes. 5 Q And the route that you took that night, or that 6 evening, was that basically the same route that you 7 generally always took? 8 A More or less. 9 Q Uh-huh. 10 A When this happened, though, it was daylight. 11 Because I get on campus normally every day no later 12 than 4:15, 4:30. 13 Q Okay. And at the time this occurred, it was 14 daylight? 15 A Yes. 16 Q And December the 1st, I guess -- well I know the 17 days get dark pretty early. Because we just passed 18 through that. I was surprised when I walked out of 19 my office to get something out of my car last night 20 even, and say, gosh, it's dark, and it's, I think 21 not quite six o'clock. I was expecting it to be 22 lighter. But my -- Do you recall approximately 23 what time of day it was when this incident 24 occurred? 25 A I would say maybe 4:30, a quarter till five,	28 1 times the area would be free of leaves as you were 2 going, maybe have grass? 3 A It wasn't a conscious thought. No. 4 Q All right. That wasn't something that you were 5 concentrating on -- 6 A No. 7 Q -- or thinking about now? All right. 8 A It was just seasonal in appearance. I mean -- 9 Q Ma'am? 10 A It's seasonal in appearance. 11 Q Yeah. Right. Okay. On all of the times that you 12 had walked through that area prior to this evening 13 or this afternoon, had you ever noticed anything 14 about the area that you believed was unsafe? 15 A I -- well, the sidewalk was a little bit in -- 16 which, I guess, the growth of trees, the sidewalk 17 looks a little off, but nothing specific that 18 stands out. 19 Q My recollection is that back at that point in time 20 as you walked -- say if you had gotten out of your 21 car and walked straight out to the sidewalk and 22 walked down toward that corner, that as you got to 23 the corner, not all the way to the very corner, the 24 sidewalk ran out. Is that -- here's a photograph 25 here --

29 1 A Uh-huh. 2 Q -- that -- and -- and this, I believe, is the end 3 of the sidewalk, is that right? 4 A Uh-huh. 5 Q And I know your attorney has seen -- seen these 6 photographs. And -- and that had been the way it 7 was there the entire time you had been going -- 8 when I say that way, the sidewalk had been to that 9 point during all the time you had been walking that 10 way going to class? 11 A Yes. 12 Q All right. And you were familiar with that fact 13 that the sidewalk ran out? 14 A Yes. 15 Q All right. It doesn't run out there now, correct? 16 It's been -- 17 A Correct. 18 Q -- paved beyond that. And on any occasion when you 19 had walked through that way in the past, prior to 20 this evening or this afternoon, had you ever seen a 21 hole there that -- or something that looked like a 22 hole? 23 A No. 24 Q During the time when, say when there weren't leaves 25 on the -- on the ground there, hadn't noticed	31 1 never fell to the ground? 2 A No. I did not fall. I slipped into a hole. 3 Q Let me show you another photograph that may be a 4 better or more representative photograph of how the 5 sidewalk ends there. In this photograph -- and 6 I'll show it to your attorney. So he'll know which 7 one. This is -- is this representative, at least 8 to the way the sidewalk came and ended and the 9 grassy area began? 10 A Yes. 11 Q All right. And right here is this the stop sign? 12 A Yes. 13 Q I can tell because even though the top was cut off, 14 I see the reflection there. Is that -- that's 15 where the stop sign is, correct? 16 A Yes. 17 Q And when you walked there that day, I take it that 18 you walked all the way down to the street that 19 comes in. And that is -- is that Coker, Coker 20 Avenue? Or is -- there's a street that comes 21 across here. What's the big street, the main 22 street that you were going to have to cross over? 23 A Carolina. 24 Q All right. And the street that comes in, is that 25 Coker?
30 1 anything, any hole or depression there? 2 A No. 3 Q And I take it that on the evening that this 4 happened, you didn't notice anything? 5 A I did not. 6 Q And -- and tell me again now, how it was, you know, 7 describe for me the -- the experience, the fall, 8 how you stepped. 9 A As I said, I stopped on the corner. Because on 10 that corner there's a stop sign that's right 11 besides where I stopped. 12 Q Uh-huh. 13 A And the traffic coming down, I think that's 14 Carolina Avenue, is just one steady flow. So I 15 stopped at the corner to check for the traffic. 16 And I when I took a step to step out is when my 17 foot slipped. It slipped in a hole. 18 Q Uh-huh. 19 A I did not fall, I stumbled. I slipped into the 20 hole, and I, kind of, gained -- well, I gained my 21 balance and my composure. And I, kind of, hobbled 22 on across the street. Because my foot was kind of 23 -- well, I was more embarrassed at the time than 24 anything else. So I just, kind of, kept going. 25 Q I understand that feeling. So you -- you actually	32 1 A I don't know. 2 Q Okay. 3 Q Not right off hand, I don't know. 4 Q All right. You were not going to walk across this 5 street as you -- we were looking into this 6 photograph, walking beyond the sidewalk, you were 7 not going to go across that side street, is that 8 right? 9 A Not that day. No. 10 Q Okay. And I take it then that -- that there's a 11 pole, a light pole you can -- or some type of power 12 pole. You see that? 13 A Yes. 14 Q And that was present at the time, correct? 15 A At the time, yes. 16 Q And I take it then that you walked to the corner 17 and would've walked on the other side of where that 18 pole is? 19 A Yes. 20 Q And is that the way you generally walked when you 21 went to class there? 22 A I do because of the fact that one, they have to 23 stop at that corner before they can make a right 24 turn. And two, if they're coming up Carolina 25 Avenue, and then would want to make a left, they

33 1 have to pull out and then slow there to turn. So I 2 thought it was the safest point. 3 Q Okay. And -- now, when you stepped, I think you 4 told you me that as you stepped and your knee sort 5 of buckled to the right? 6 A Yes. 7 Q And you were able to regain your balance, though, 8 and continue on across the street? 9 A Yes. 10 Q And you went on to class that day? 11 A Ed Ebert's class. Yes. 12 Q To that evening class? 13 A Yes. 14 Q Which -- what class was that you were taking, do 15 you remember? 16 A I think it was Elementary Science and Ed Ebert was 17 the instructor -- was the professor. 18 Q And did you advise him of what occurred or anyone 19 there at the school that evening of -- 20 A No. 21 Q -- what had occurred? 22 A No. 23 Q Are you aware of anyone who witnessed the incident? 24 A Not that I know -- I'm aware of. 25 Q Okay. When you came back out after class, did you	35 1 A My attorney has a copy and they have been provided 2 to you. Yes. 3 Q Now, I've got some photographs. Photographs that I 4 -- we've been looking at. 5 A Uh-huh. 6 Q These -- these are not photographs that you took -- 7 A Yes. 8 Q -- the following day? 9 A Yes. 10 Q You sure of that? 11 A Yes. 12 Q Well, tell me then, how it was that someone from 13 the college had already gone there and put dirt 14 there the next day? 15 A I thought that was curious too. I was curious 16 about that as well. The gentleman was there doing 17 it as I was taking the pictures. 18 Q Did you talk with that individual? I think there's 19 a picture of him here somewhere. The person that 20 was -- I see a golfcart. I take it you took those 21 pictures of the -- 22 A I sure did. 23 Q -- golf cart? That was a -- well, I never got 24 these others here. Somewhere I know I saw -- oh, 25 yeah. Here's a black and white one.
34 1 come by that same way and take another look at the 2 area? 3 A No. 4 Q Okay. Did you come back that same way though? 5 A No. 6 Q All right. Well, how did you come back to your 7 car? 8 A I left the science building, and there's a little 9 brick thing that, kind of, breaks up the grassy 10 area. 11 Q Uh-huh. 12 A People cross in that area as well. So that 13 particular night, I think I came across that little 14 brick area. 15 Q All right. Did you return to the area to take a 16 look at it before Thursday when you came back to 17 class? 18 A Yes. 19 Q All right. When was it that you -- 20 A The very next morning. 21 Q All right. Did you take any photographs of the 22 area? 23 A Yes. 24 Q And do you have those photographs, or did you 25 provided them to your attorney?	36 1 A Actually. Actually. Actually. 2 Q Did you -- do you understand that this person in 3 the photograph is a Coker employee? 4 A I had no idea who he was. 5 Q Okay. You didn't recognize the golf cart as being 6 -- 7 A There was no -- that's why I took different angles. 8 There was nothing on there to indicate that. 9 Q Okay. Do you know the individual at all? 10 A No. 11 Q Did you talk with him? 12 A When he saw me with the camera, he asked me was 13 there anything he could do for me. 14 Q Uh-huh. 15 A And now that I think back, I took that picture 16 after I reported it to them. So it would've been 17 that Friday morning. Because I reported it that 18 Thursday afternoon. When I came -- came back that 19 Friday morning, this is what he was doing. But all 20 -- the only thing he said to me -- or asked me, was 21 there anything he could do for me. And I told him 22 no, I was fine. And I turned and I left. 23 Q Okay. Well, that was my understanding. That's why 24 I was asking you about this. It was my 25 understanding that -- that -- the individual from

37 1 Coker didn't come over there until that Friday. 2 A That's exactly right. That's -- yeah. 3 Q Okay. Did you return at all before that Thursday 4 when you came back to class? 5 A No. 6 Q All right. And I understand these photographs were 7 taken -- you say now on that Friday. 8 A Yes. 9 Q But did you come back without a camera or anything 10 to look? 11 A No. 12 Q Okay. So you came back to class the Thursday 13 following this incident, which would've been 14 December the 4th? 15 A Right. 16 Q And that was your next regular scheduled class? 17 A Yes. 18 Q And when you parked that evening, you parked at the 19 same place? 20 A Did last night too. 21 Q Okay. And nobody's done any damage to you or the 22 red Volkswagen? 23 A No. 24 Q All right. It sounds like a good place to park. 25 And when you came along that afternoon, did you	39 1 Q And what did the -- it was a female? 2 A Yes. 3 Q And what did this person tell you to do? 4 A To find security and have them to take a report. 5 Q All right. And what did you -- was there a 6 security person in the building or you had to go 7 outside to find one? 8 A Well, I was -- I was -- okay. She told -- she told 9 me to go find security. I went over to where my 10 car was and I think this gentleman was circling the 11 parking lot at the time. 12 Q Okay. 13 A Yes. Because I remember telling her, I see 14 security now and I'll talk with him. 15 Q All right. So you were on the telephone with her 16 at that time or was she with you? 17 A Well, I spoke to her face to face. And then she 18 suggested that I find security. So when I left her 19 office, I was looking for security. And I had to 20 go back to my car. And he just happened to be over 21 the parking lot. 22 Q All right. You saw security there. But you made a 23 comment about you said, "I see security now." 24 A That's after. Because I called her to tell her 25 that I had found someone working for security.
38 1 then observe the area -- I mean, you go there and 2 look to see, I want to take a better look now at 3 where I stepped or anything? 4 A That Thursday evening? 5 Q Yes. 6 A No. What had happened is I had gone to the Student 7 Building and I was talking with them about 8 something else. I can't remember what it was. And 9 I explained to her then that I had hurt my foot. 10 Q Who was that that you talked with, do you remember? 11 A Not right off hand. But I know she was upstairs. 12 And she was the -- the individual that instructed 13 me to -- to get a report -- have a report taken. 14 Q All right. And what did you do -- now, this was in 15 the Student -- 16 A I'm pretty sure that's where I was. 17 Q -- Student Building? That's where you said your 18 box was located or is that different? 19 A Yes. I'm pretty sure that's where I was. Because 20 I normally to go financial aid over there and 21 financial aid doesn't have a second floor. So it 22 must have been there. 23 Q All right. And you spoke with someone, you say, 24 was upstairs? 25 A Yes.	40 1 Q Oh, okay. All right. And did you know the 2 security officer? 3 A Just by face. 4 Q And you told whoever it was that you were talking 5 with on the telephone that you saw security and, I 6 guess, she said fine or good or something like 7 that. And did you then tell the security officer 8 what had occurred? 9 A Yes. 10 Q And did you point out to the security officer where 11 it was that you fell? 12 A We walked over and took a look at it. 13 Q All right. And what do you -- what's your 14 recollection of the area after, you know, being 15 there, and then observing it closely, I take it, at 16 that point, as far as how it looked. 17 A Well, I noticed that there was grass growing all 18 over it -- or growing down in it actually. And, of 19 course, there were leaves around. 20 Q Basically, when you went there on Thursday with the 21 officer, did the area, at least to you, look like 22 it did when you were there on Monday? 23 A Pretty much so. 24 Q All right. No one had put the dirt -- 25 A No.

41 1 Q -- that you've got in the photographs? Okay. Did 2 the officer make any statements to you, or comments 3 to you, about it? 4 A He immediately said this is not our property. You 5 need to contact the city. 6 Q And did he tell you he was going to write up a 7 report or anything? 8 A Well, he took a little notepad out of his shirt. 9 And he jotted down my name, and as far as I could 10 tell, that was the gist of it. 11 Q All right. And did you, in fact, follow his 12 instructions and report it? 13 A I did. 14 Q Right then? 15 A Yes. Well, after I was done with the conversation 16 with him. Yeah. 17 Q All right. I mean, did you go in -- had to go in 18 and get the telephone number? Did he know the 19 number? 20 A I don't remember where I got the number from. I 21 may have even called 91 -- 411 or something. I 22 don't really remember. 23 Q All right. And did someone from the Hartsville 24 Police Department come over? 25 A Yes.	43 1 A From class came by. 2 Q -- saw you talking with him? 3 A Right. 4 Q And did any of them come over to inspect the area 5 where you fell? 6 A They had already looked at it. Yeah. They looked 7 at it while I was talking with him. 8 Q And who are these people? 9 A I -- a lot of people in class I don't even know by 10 name. Because the class is so brief. But there's 11 -- oh, gosh. I can't even think of her name. 12 Q Are you still attending classes with any of them 13 that you know that came by there that day? 14 A No. 15 Q Do you know how to locate or contact any of these 16 individuals? 17 A One of them, possibly. 18 Q All right. Male, female? 19 A Female. Tall, blonde. 20 Q Do you know where she works? 21 A She used to -- she used to work for the school 22 district. But she was not in Florence. But she 23 told me her job had ended. That much I do 24 remember. I -- I couldn't -- I think I could find 25 out who she is.
42 1 Q Do you remember who it was? 2 A Officer Sanchez. 3 Q All right. Was he anyone that you knew, or just 4 met him there? 5 A No. He just met me there. 6 Q And do you -- you recall his name? Or do you 7 recall it from looking at it on a report? 8 A Well, I looked at his badge when he first came up. 9 Q Okay. He was alone? 10 A Yes. 11 Q And what did you and officer Sanchez talk about? 12 A I took him over, he looked at the hole as well. 13 And he said this property belongs to Coker. 14 Q All right. 15 A And a few of my classmates came by because I was 16 going to be locked out of the classroom. So they 17 said they would tell Dr. Ebert that I was outside 18 and the police -- in the parking lot with the 19 policeman. 20 Q All right. You were sitting there in the police 21 car talking with him? 22 A No. 23 Q Oh, you were standing out there -- I misunderstood 24 what you said. You were there -- that the people 25 that you knew said --	44 1 Q Okay. All right. If you would get that 2 information. Get it to your attorney. So he can 3 get it to me, I would appreciate it. Now, on the 4 afternoon of the 4th of December, the Coker 5 security didn't take any photographs? 6 A Not that I'm aware of. Not while I was there. 7 Q And Officer Sanchez didn't take any photographs 8 while you were there? 9 A No. 10 Q Was -- by the time he left there -- at -- or by the 11 time he arrived, had it sort of gotten dark by that 12 time? 13 A A little darker. Yes. 14 Q And you returned the next morning, correct? 15 A Yes. 16 Q For the purpose of taking photographs? 17 A Yes. 18 Q And when you arrived, this individual was there -- 19 A Yes. 20 Q -- with dirt and the golf cart was there. Did you 21 ask him anything as to whether he took any 22 photographs? 23 A No. 24 Q Have you ever talked with him again after that day 25 --

45 1 A No. 2 Q -- when he asked if he could help you? 3 A No. 4 Q While you were there that day, did anyone from the 5 security or police department come up? 6 A No. 7 Q Have you ever talked with the security officer 8 again about this incident? 9 A No. Oh, yes. I asked him if I could have a copy 10 of the report that he took. And he said no. 11 Q He said no you couldn't have -- 12 A He said no I could not. 13 Q Have you tried to get one from Coker? 14 A No. I just left it alone. 15 Q At the time that you talked with the officer and 16 gave him information about the incident -- I want 17 to say the security officer and the time you talked 18 with Officer Sanchez, had you been to a doctor, 19 emergency room, anyone for any treatment? 20 A After I -- I went that weekend. 21 Q All right. But -- when -- at the time you spoke 22 with those two officers -- 23 A No. 24 Q -- on the 4th, you had not -- 25 A I had not.	47 1 you knew -- well, anything about the incident that 2 day? 3 A I mentioned it in class that I had stepped in a 4 hole and hurt my foot. I mean, not to anyone in 5 particular. I just, kind of, stated it. 6 Q And did you return to work the next day on Tuesday? 7 A I don't recall right off hand. But I may have. 8 Probably did. 9 Q All right. And you were working full-time at that 10 time? 11 A Uh-huh. 12 Q Correct? 13 A Yes. 14 Q And then you would've worked Tuesday and Wednesday, 15 and Thursday and then come back to -- 16 A Yes. 17 Q -- school on that Thursday -- 18 A Yes. 19 Q -- when you reported it? And then was it -- do you 20 remember what day it was when you -- and I've got 21 the information here. I can -- according to the 22 outline given me by your attorney, it appears the 23 first date of treatment was December the 6th. So 24 that would've been, I take it, on Saturday, does 25 that sound right?
46 1 Q -- gotten treatment. Okay. And so you went that 2 weekend? 3 A Yes. 4 Q And where was the first place you went for 5 treatment? 6 A The emergency room at McLeod Hospital. 7 Q On the date of this incident, December 1st, 8 following the incident, did you believe that you 9 had sustained any injuries which needed to be 10 treated? 11 A I did. 12 Q All right. What problems were you having, or what 13 -- what was hurting you that you thought may need 14 some medical treatment? 15 A My right ankle. 16 Q You say you went on to class that -- that 17 afternoon? Did you have ankle pain -- 18 A Yes. 19 Q -- during the class? 20 A Yes. 21 Q Any other pain anywhere other than your ankle? 22 A My knee hurt somewhat. 23 Q Your right knee? 24 A Yes. 25 Q Did you tell anyone there, friend, classmate that	48 1 A Yes. 2 Q And that was at McLeod ER. What did they do for 3 you there that day? 4 A They examined it. I think they even X-rayed it. 5 Q Do you remember what the doctor or nurse told you 6 about -- what they thought the problem was? 7 A Possibly a hairline fracture or a severe sprain. 8 Q They -- what else did they do for you? 9 A They set up appointments for me to see another 10 physician and to schedule for physical therapy. 11 Q They did that all there at the emergency room? 12 A I'm pretty sure they did. 13 Q Who was the doctor that you went to see -- 14 A I don't recall her name. 15 Q -- following that? I don't mean the one at the 16 emergency room. But after -- who was the person 17 they set up someone for you to see? 18 A Gosh. I don't recall his name. 19 Q All right. Was it somebody at McLeod -- 20 A Yes. 21 Q -- Orthopaedic though? 22 A Yes. 23 Q All right. And was that the doctor that set up the 24 physical therapy, you think -- 25 A I think it was.

49 1 Q -- or was it the ER? 2 A I think it was. 3 Q All right. And according to the records given me 4 by your attorney, it shows McLeod Orthopaedic 5 Associates December the 16th, '08 which is about 6 ten days after your visit that Saturday to the ER. 7 Does that sound about right? 8 A I'm not quite sure about that. 9 Q All right. I see -- the only bill or record that I 10 see -- or the first one that I see here is McLeod 11 Orthopaedic that shows a date of 12/16/08. Do you 12 have any reason to believe -- and I also see a form 13 that was filled out apparently by you that shows a 14 date of 12/16. 15 A Then that must be right. 16 Q But I'm going to look back and make sure that 17 there's nothing else -- else there. I see a report 18 that says from McLeod Orthopaedic. It says new 19 patient see today for right ankle injury. And this 20 says date seen 12/16/2008. Probably correct? 21 A Apparently. 22 Q All right. And at that time when you went to 23 McLeod Orthopaedics, what was the nature of your 24 problems then? What was hurting? 25 A My ankle was still hurting. I'm thinking the	51 1 A Well, he came in and assessed the situation. He 2 instructed me to get a brace for my right foot, and 3 he supplied me with a pair of crutches. 4 Q Okay. Did he give you any medication? 5 A I don't recall. Not physicals [sic] when you take 6 right at the point. He may have put me on a 7 prescription. But I -- I don't even recall that 8 right now. 9 Q Okay. What about at the ER when you went there 10 initially, did -- 11 12 MR. WOODS: And she just gave me a note to Mr. -- 13 Officer Hoffman is here. So we will have -- 14 we will have him. 15 16 Q When you went to the ER, do you remember whether 17 they gave you any -- any type of prescription? 18 A I don't recall. 19 Q In the form that you filled out for the doctor, 20 when you went there on the 16th -- and I think 21 that's Dr. Rodney Allen. That sound -- 22 A That sounds right. 23 Q -- sound right? When it says, "What is your main 24 complaint and when did it begin?" You've got 25 "12/1/08 right ankle hurts. Stepped in hole and
50 1 doctor at the emergency room suggested ice, heat, 2 elevation, that type of thing. And that's what I'm 3 trying to recall. At this point I'm kind of foggy 4 on that. 5 Q All right. But it was your right ankle -- 6 A Yes. 7 Q -- was the problem? 8 A Yes. 9 Q Do you recall on that date, December 16th, which 10 was a couple of weeks after this incident, were you 11 having any problems with your knee or any other 12 area at that point in time to your recollection? 13 A I was still having issues, if that's what you mean. 14 Q No. At that time, when you went there -- 15 A Yes. 16 Q -- were you still having problems with -- 17 A Yes. 18 Q -- your knee? 19 A Yes. Well, the knee was minor compared to what -- 20 how my ankle was feeling. But, yes. 21 Q Okay. And this doctor, I'm sure, is the one that -- 22 -- that sent you for physical therapy. Because I 23 see a note here where he did. But was there any 24 kind of treatment that he gave to you, or did for 25 you at that time on the 16th when you went to him?	52 1 twisted ankle." Didn't mention anything about 2 knee. And that's why I was asking whether you were 3 still having problems with your knee at the time. 4 you -- you went there. And I know in the review of 5 symptoms, there's a note that says problems with -- 6 -- they're asking questions or have a list of 7 things. "Problems with new joint pain within the 8 last 60 days." You circled yes. And wrote in 9 ankle. Do you remember filling out that form, or a 10 form like that? 11 A I don't recall right offhand, but this is my 12 handwriting. 13 Q Okay. 14 A But I don't recall right offhand doing that. 15 Q And anyway, as a result of going there to see Dr. 16 Allen, you were referred to physical therapy -- 17 A Yes. 18 Q -- correct? And that was at McLeod Regional 19 Medical Physical Therapy? 20 A Yes. 21 Q Is McLeod Orthopaedics there in the hospital 22 building? 23 A Yes. 24 Q And physical therapy -- McLeod Physical Therapy 25 also?

53 1 A Yes. 2 Q So a one stop shop. Is that about right? 3 A Sounds like it. 4 Q And do you recall -- and I know from seeing the 5 note here that your attorney prepared of the form - 6 - do you recall about how long you went to physical 7 therapy? 8 A Six to eight weeks, something like that. I'm not 9 quite sure. 10 Q I haven't gone through myself to check every date 11 and write them down. And I'm going to look to see 12 the bill again. Because I noticed that his note 13 says 1/29/09 through 2/26/09 which is a little less 14 than a month. But I was thinking that it had 15 actually been a little bit longer than that. I'll 16 look back and see if I can -- and the physical 17 therapy bills are always like this. I don't know 18 why, but it's difficult to -- to go through them 19 and come up with the exact dates. I'm looking at 20 this list of bills, and it would appear that there 21 was a physical therapy evaluation on December 31st 22 of '08 which would actually be longer than that 23 January 29th. It shows the first treatment -- is 24 still difficult for me to know. But it looks like 25 January the 5th, '09. Which might be more like the	55 1 Q During the time that you were receiving your 2 physical therapy treatments, do you -- were you 3 required to wear certain kinds of shoes, or just 4 had to wear tennis shoes while they were -- 5 A They were the special kinds of shoes. A specific 6 particular sneaker that they instructed me to get. 7 Q All right. And then was that something you were 8 supposed to wear all the time. Or just wear when 9 you came to see them? 10 A All the time is what she requested. Or the most of 11 the time is what she requested. 12 Q All right. But you didn't do that, you didn't wear 13 them all the time? 14 A After I got them. 15 Q Well, I'm looking at -- the reason I asked you that 16 - I was looking at something here that -- and maybe 17 this is -- obviously, it was early on, but I had 18 seen something about reminding patient to bring her 19 tennis shoes next visit. And after that time, did 20 you, in fact, wear your tennis shoes when you were 21 there for your treatment and physical therapy? 22 A If I had purchased them by then. Because those 23 sneakers were rather costly. And my income is 24 rather limited. So when I got them, I began to 25 wear them.
54 1 time period you told me. Let me ask you -- and 2 this shows the initial evaluation being 12/31/08. 3 Did they perform any type of treatment on you for 4 anything other than your right ankle? 5 A No. 6 Q All right. Did you tell them about injuring your 7 right knee as well as your ankle? 8 A Yes. 9 Q By the time you went there, had your knee improved 10 to the point where you did not need to get any 11 treatment with the knee? 12 A Well, when I mentioned to the therapist, she said 13 that she had to go strictly with the orders that 14 she was given. And the orders were for my ankle. 15 But she did say that she understood why my knee 16 would have been hurting based on what I said to 17 her. 18 Q All right. Based on how you told her -- 19 A Exactly. 20 Q -- how the incident had occurred? At the time this 21 incident occurred -- while I'm thinking about it -- 22 what type shoes were you wearing? 23 A Flats. 24 Q And what clothing -- what type clothing? 25 A Normally, I wear pants.	56 1 Q What type of shoes did they tell you to wear? 2 A They wanted me to wear -- I think they're New 3 Balance 160's -- 140's or something to that effect. 4 Q And were you supposed to wear them when you came to 5 the physical therapy treatments? 6 A I was - they wanted me to wear them throughout the 7 day. 8 Q All right. I understand that. But particularly, 9 you were supposed to wear them there to the -- 10 A After I purchased them. Yes. 11 Q All right. And you were supposed to wear them all 12 the time whether you were at school, or at home, or 13 wherever? 14 A That's what they recommended. Yes. 15 Q All right. And is that what you generally did? 16 A After I purchased them. 17 Q Okay. And how did the physical therapy treatments 18 go as far as your ankle? And how did your ankle go 19 in connection with the physical therapy? 20 A Well, it would sometimes be a little more tender 21 after the therapy because they worked on 22 strengthening. And sometimes it was a little more 23 than I wanted to do, but it's what they suggested. 24 Q Did they prescribe any type of treatment, or 25 exercise, or anything that you did at home, or were

57 1 supposed to do at home? 2 A Yes. 3 Q All right. What -- what was that? 4 A They gave me bands to work on mobility with 5 extended rubber bands. 6 Q Uh-huh. 7 A That were different in color. I think it was -- 8 the color was indicative of the strength or the 9 tense -- tension in the straps. 10 Q And how did you work with them? What did they -- 11 that do? 12 A I was instructed to lie on my back, put my leg out 13 forward, take the bands on either side and I was to 14 motion to the left, to the right, bring it towards 15 me, flexibility for mobility away from me as well. 16 Q Did the -- the bands that you were using -- you say 17 you would lie on your back, the bands would be 18 extended around your foot? 19 A Yes. The bottom of my foot. 20 Q And you would then move your foot -- 21 A Right. 22 Q -- around, correct? 23 A Right. 24 Q All right. I just want to make sure that I 25 understood that. And do they do the same type	59 1 doing what she requested. I -- there as well as at 2 home. So I guess it was just a matter of time. 3 But it did as well as to be expected. 4 Q All right. Did any time during the time that you 5 were receiving treatment there, did you have any 6 falls or anything that -- that may have caused more 7 problems with your ankle or foot? 8 A There was an incident at school where this little 9 girl was upset and she threw a chair near me. And 10 my principal just had me to go have my foot looked 11 at to make sure I was okay. But nothing happened 12 to it. 13 Q All right. I saw -- I see something here on 14 January 29th, the subjective part is what you were 15 telling. It says, "I was so much better before I 16 had a child throw a child chair. Child and hit me 17 in the foot right where the break was. It started 18 swelling again." 19 A It was hurting. But I -- the child threw the 20 chair; I reacted. 21 Q Okay. Did -- the chair didn't hit you? 22 A I don't think -- it did, kind of, bounce and touch 23 my foot, but it didn't really -- it didn't really 24 do damage to me. 25 Q What is your understanding of what the injury to
58 1 thing for you when you were there at the physical 2 therapy? Did they use the bands? 3 A Among other things. Yes. 4 Q All right. What other type treatment did you 5 receive during that time? 6 A I did some on a tread -- treadmill, some on a 7 bicycle, a stationary bicycle type thing. There 8 was a ball that I stood on that -- where my ankle 9 would go from side to side and back and forth. 10 There was -- it was a half of a ball. I think they 11 had a wooden piece or something, a plastic piece 12 around it, so that I could get the balance. I did 13 the beams where I stood on the balance holding it 14 and some without. 15 Q All right. During the time you were getting the 16 physical therapy -- I know you said they told you 17 to wear the tennis shoes all the time. Did you 18 occasionally wear heels for certain things? 19 A To church. Yes. 20 Q Okay. I'm just curious if you wore the tennis 21 shoes all the time or not. 22 A No. 23 Q During the course of your physical therapy 24 treatment, how did -- how did your ankle progress? 25 A Well, as well as to be expected. I mean, I was	60 1 your ankle actually was? 2 A I was told it was either a hairline fracture or a 3 severe sprain. 4 Q All right. Did you ever have any doctor, physical 5 therapist, anybody confirm one way or another 6 whether you had sustained any fracture, actual 7 fracture. Or whether it was just a bad strain? 8 A I don't recall actually how they worded it. 9 Q All right. Did you generally -- were you generally 10 able to make it to your appointed physical therapy 11 treatments? 12 A I made it when I could. Because based on the -- 13 strictly by virtue of what I do at school, I was 14 not always able to make it on time. And because 15 the appointments are in time slots, if I was late, 16 sometimes they would work me in. 17 Q And sometimes did you have to miss -- 18 A Sometimes. 19 Q -- the treatment? All right. At the time, or by 20 the time they finished treating you there for the 21 physical therapy, how -- what was your impression 22 of how the therapy had done for you? 23 A I thought they had done well. 24 Q At the time you were discharged, were you feeling 25 comfortable enough to say, well, I think it's time.

61 1 I know they probably told you when -- when, all 2 right, you don't need to come back anymore. But 3 did you feel comfortable with that? Or did you 4 feel like, Well, darn I need to keep going for 5 awhile. 6 A I trusted their judgment. And I went with their 7 instructions they told me to continue to do. 8 Q What did, in fact, they instruct you to do after 9 you were discharged, or at the discharge visit? 10 A She suggested, of course, that I wear the sneakers 11 as much as possible. She suggested that when I am 12 stepping to -- as she phrased it, "up with the 13 good, down with the bad." And I continued to do 14 that. Which means in stepping to go up to the 15 pressure on my foot, my good foot going up. And 16 when I was coming down, to use my bad foot. Which 17 I continue to do. And to continue the exercises 18 that they give me at home because the straps that I 19 used at physical therapy, they gave me to take 20 home. And she also said that if I got to the point 21 where I thought I -- we needed to come back, to let 22 them know. 23 Q All right. The last visit that I see was February 24 the 26th of 2009. Not quite there yet, but about 25 11 months after this. Have you returned to McLeod	63 1 they examined you, checked you, and referred you to 2 physical therapy. And that was the only time that 3 you went to see Dr. Allen? 4 A Yes. 5 Q All right. Do you have any doctor visits, or 6 hospital visits scheduled now to be checked, your 7 ankle or knee? 8 A No. 9 Q All right. Tell me today -- and I don't mean right 10 this morning at whatever time -- it's probably 11 afternoon. No, it's still morning. At this time, 12 are you -- but last week, last -- within the last 13 month, are you having any problems with your right 14 knee that you relate to anything to do with this 15 incident? 16 A It hurts on occasion. 17 Q Like what? Like when? What occasion? 18 A Sometimes if I'm riding -- if I'm sitting too long 19 it hurts. It's -- yeah, it hurts. Especially if 20 I'm not driving. Well, just sitting in that one 21 steady position. 22 Q And we were talking about your knee? 23 A Uh-huh. 24 Q All right. What about your right ankle, are you 25 having any problems with your right ankle?
62 1 Physical Therapy since this date of February 26th 2 for any further treatment? 3 A I have not. 4 Q Have you been treated by any doctor, nurse, anybody 5 else for any discomfort, pain, swelling, anything 6 with your right ankle since you were discharged by 7 the physical therapy? 8 A I have not. 9 Q All right. What about your knee? Has any -- 10 A No. 11 Q -- treatment made? My understanding of looking at 12 the -- the records is the McLeod Orthopaedic 13 treatment or visit, it was just that one visit 14 there. 15 A That one session or visit. 16 Q All right. You didn't go back after you were 17 discharged by McLeod Health -- 18 A No. 19 Q -- for the physical therapy? 20 A No. I was not. But I think she extended it. 21 Maybe that's why the dates were different. Because 22 I think after the first session was over, she 23 extended it for another couple of weeks. 24 Q Okay. But as far as the McLeod Orthopaedic 25 Associates, you went on December the 16th where	64 1 A It hurts on occasion. 2 Q Anything in particular that you notice that causes 3 it to -- to be painful? 4 A Stairwells in particular. 5 Q Your home has stairwells? 6 A No. But the school where I work does. 7 Q All right. Well, I was going to ask you that next. 8 Thank you. And when you go to school now, what 9 type shoes do you generally wear? 10 A I try to wear my sneakers. And I don't wear them 11 every day, but I wear them often. 12 Q Have any problem with -- with that? Feel 13 uncomfortable wearing your sneakers? 14 A They're a bit clunky, cumbersome. So I'm looking 15 at a new -- well, they're kind of clunky. They're 16 unattractive, maybe I should say that. 17 Q Are they like what I think of as sneakers, running 18 shoes, walking shoes, that kind of thing in 19 appearance? 20 A I -- maybe they would be considered walking shoes. 21 Definitely not running shoes. 22 Q Okay. 23 A Because the soles are extremely stiff. And that's 24 what she wanted for me. 25 Q All right.

65 1 A So I would not consider them running shoes. 2 Q Are you wearing those today? 3 A No. 4 Q Okay. Because I was just going to look down and 5 see. 6 A No. 7 Q All right. You're wearing -- 8 A Flats. 9 Q -- flats with some type of heel. 10 A Yeah. 11 Q You call them flats. I'd say some type of heel, an 12 inch or so heel? 13 A Uh-huh. 14 Q Do you wear -- and it was a broad heel, correct? 15 A Right. 16 Q Do you wear what I generally think about is heels 17 like tall, you know, thin -- thin heeled shoes on 18 occasion? 19 A When I go to church. 20 Q Okay. Did you lose any time, or miss any time from 21 your work on account of the injuries you sustained 22 in this incident? 23 A Maybe a couple of days. 24 Q What would that equate to in money or wages? 25 A I have no clue.	67 1 courses? 2 A Yes. 3 Q And now you're taking one course and that meets two 4 nights a week? 5 A Yes. All evening courses meet two nights a week 6 regardless if you're taking one or two. 7 Q Right. I guess two's all you can get in at night 8 course, right? 9 A Well, sometimes they'll let you -- they have 10 evening courses -- or Wednesday courses. I'm 11 sorry. They have class that meet all day from 5:00 12 until 10:30 on Wednesdays sometimes. 13 Q All right. With the two days, that was all you 14 could -- 15 A Right. 16 Q -- get in -- 17 A Right. 18 Q -- with the hours that you need? 19 A Right. 20 Q All right. Let me speak with Ms. Skipper just a 21 second. Because she usually thinks of things that 22 I missed that I need to ask. If you'll give me 23 just one second. She's probably got a list of 24 things that I need to ask. 25
66 1 Q All right. Did you miss time -- or have you missed 2 time from your school as a result of the injuries? 3 A No. 4 Q Are you still going two nights a week? 5 A Yes. 6 Q That's -- is that your plan to go two nights a week 7 -- 8 A That's the evening students. 9 Q -- until you finish your course? 10 A For evening students. Yes. 11 Q Okay. That is the evening school hours and times? 12 A Yes. 13 Q And you take one course on those two days, or you 14 take different courses? 15 A This term I'm taking one course. Because that's 16 all I need. I'm close to graduation. That term, I 17 was taking two classes. Which they start at 5:30, 18 from 5:30 to 8:00 -- to 7:50. The next class 19 starts from 8:05 until 10:30. 20 Q So back at the time this incident occurred, you 21 were going to class from 5:30 until 10:30? 22 A 10:15. 23 Q 10:15? 24 A 10:15. Without a break, it's 10:15. 25 Q All right. And that's because you were taking two	68 1 (Off the Record) 2 MR. WOODS: I think I've just got just a couple of 3 more. 4 5 Q I know that your bills are something like \$7,326. 6 At the time of this incident, did you have any type 7 of health care insurance to pay for your bills or 8 assist you with the bills? 9 A Yes. 10 Q Was that through your school? 11 A Yes. 12 Q And do you recall who that was? 13 A Blue Cross. 14 Q Okay. Blue Cross. And did Blue Cross pay most of 15 the bills? 16 A I'm not sure. 17 Q All right. Have you paid -- had to pay money out- 18 of-pocket for some of the treatment? 19 A Some. I think I may have just paid for my 20 prescriptions, if there were any. But I have not 21 paid the doctors yet. 22 Q Okay. But you think there will be some -- some 23 portion of the bills that would not have been 24 covered by Blue Cross that you may have to pay? 25 A I would imagine.

69 1 Q Okay. Let me ask you the other thing that I had 2 intended to ask you about. I got recently, a 3 couple of weeks ago now, from your attorney some 4 additional photographs that he had sent me. Some 5 of them appear to be taken in the nighttime. And I 6 was going to ask you, are these photographs that 7 you have taken that you gave him? 8 A Probably. 9 Q Let me show you the ones that appear to be -- I'd 10 say taken at nighttime, because they're pretty 11 dark. 12 A Right. 13 Q There's, I think, two per page, six photographs. 14 Were those photographs that you took? 15 A They appear to be. 16 Q Do you recall approximately when it was that you 17 took those? 18 A Well, it would have to be on a Monday or Thursday 19 evening. Because I wouldn't be in -- I mean, be in 20 Hartsville at night other than that. 21 Q Well, I'm curious about an approximate date. And I 22 probably could check back -- 23 A I don't know when it was. 24 Q -- to see when it was that work was being done. 25 But it was -- these were taken during the time the	71 1 But I want to make sure that I understood. Now, 2 these four in the daylight, they were taken all on 3 the same day? 4 A Yes. 5 Q Okay. And the nighttime ones were taken during the 6 time construction was going on, is that correct? 7 A Yes. 8 Q And what is the significance of these photographs 9 from your standpoint? You sent them -- gave them 10 to your attorney. You took the pictures. 11 Obviously, there was something about it that you 12 decided I want to take a picture of -- of the work. 13 What was the -- your purpose in taking these 14 pictures? 15 A My purpose in taking all of the pictures was to 16 show them -- share them with my attorney because 17 everyone was denying ownership of the property. 18 And if everyone denied ownership of the property, 19 and work was being done, it belonged to someone. 20 Q Okay. Is there anything about this page of 21 photographs here that you feel are significant 22 other than the fact that somebody's doing work 23 there? 24 A That was my purpose of taking the picture, the fact 25 that someone was working on the area.
70 1 new sidewalk, that paving area was being done? 2 A Yes. 3 Q Okay. And there's some here in the daytime 4 photographs -- well, there's one more sheet here of 5 the nighttime photographs. I take it all of these 6 were taken by you? 7 A Probably. 8 Q Okay. I got them from your -- I promise you, I got 9 them from your attorney. I hadn't taken any 10 nighttime photographs of it, and haven't gotten any 11 from anyone else other than your attorney. Then 12 I've got four photographs, two per page here, of 13 daytime photographs showing the new sidewalk area, 14 correct? 15 A Uh-huh. Yes. 16 Q Were these nighttime photographs all taken, like, 17 the same night, or these were taken at more of 18 different times? 19 A Probably on the same evening. 20 Q Okay. Were these photographs, the daylight ones, 21 those four taken the same date as the night ones, 22 or not? 23 A It can't be. Because this is not done and that's 24 complete. So no. 25 Q Okay. I just want to make sure. I can see that.	72 1 Q All right. I'll show you -- I think all of these 2 are different. Anything in these photographs that 3 your take was of significance other than the fact 4 that work was going on? 5 A Nothing, other than the fact that work was going 6 on. 7 Q Okay. How about these? 8 A The same. 9 Q Same thing. And you can tell -- at least I notice 10 in this, it appears that the forms are -- are there 11 for where the concrete was poured. Is that what's 12 shown there? It looked like wooden -- 13 A As far as I can tell. 14 Q All right. And it looks like a stob or something 15 there, and the caution tape. You could see that -- 16 A Yes. 17 Q -- well when you came up, that they were working on 18 it? 19 A Yes. 20 Q All right. Didn't have any falls or anything 21 during this time? 22 A I did not. 23 Q And I take it you didn't walk right through there 24 while they were working on it? 25 A I didn't.

73 1 Q All right. Anything I see in these last two, I see 2 a cone. One of those traffic cones. It looks like 3 it's been run over or something, mashed flat. 4 Anything that you were taking that for any 5 particular purpose? 6 A Not the cone. Nothing in that particular picture. 7 Everything is just to show that they were doing 8 work on the corner. 9 Q All right. Did you ever determine who it was that 10 was performing the work there by asking anybody? 11 A Not personally. No. 12 Q Did you ever see anyone there -- I know you saw 13 these photographs in the nighttime ones. And then 14 the daytime ones at times where I don't see any 15 workers around. Did you ever seen workers there 16 actually performing work -- 17 A No. 18 Q -- on -- on this? All right. So to date, do you 19 know who it was that -- that built this new 20 concrete area? 21 A I do not. 22 Q Now, my understanding of the area from going there, 23 this is the same stop sign here that we've looked 24 at in the photographs you took on that -- well, 25 Friday, I guess. After you reported it on	75 1 Q Have you noticed vehicles cutting this corner and 2 coming over -- and I'm -- I'm just -- I wasn't 3 there, so I don't know. I'm taking that's what 4 happened to the cone there. But have you noticed 5 any -- any evidence of vehicles cutting that 6 corner? 7 A I've not. No. 8 Q Okay. Anything of significance that I need to know 9 about these four daytime photographs other than the 10 fact that you are showing that now it's been paved 11 over there? 12 A That was my purpose. That's it. 13 Q Based upon the fact that there's still some caution 14 tape there. And I see it looks like some stobs 15 there in the ground, or stakes in the ground, it 16 looks like they probably were not quite complete 17 with this. Is that your take on it? 18 A I don't know. 19 Q Have you taken any later photographs than these? 20 A No. 21 Q And do you recall approximately the -- the 22 approximate date these daytime photographs were 23 taken? 24 A I do not. 25 Q Okay. All right.
74 1 Thursday, correct? 2 A Correct. 3 Q And it's the same pole? 4 A I'm relatively sure it is. 5 Q Okay. I mean, it looks a little different because 6 it's paved over now, correct? 7 A The ground area. Yes. 8 Q All right. And in looking at -- at this first 9 photograph -- well, I see it on three of them. It 10 looks like a cone likely another cone that's mashed 11 over there. 12 A I don't know if that's another one or the same. 13 Q All right. Do you know how close in time it was 14 between these nighttime pictures being taken and 15 the daytime ones? 16 A I do not. 17 Q Since the -- this area has been re-paved, or has 18 been paved on that very corner, do you follow that 19 route to your classes so that you now walk on that 20 area? 21 A On occasion. 22 Q Have you noticed anything about the area now that 23 has indicated to you that it looks like a danger or 24 a problem? 25 A I've not noticed anything.	76 1 2 MR. WOODS: I think that's all the questions I have 3 for you. Thank you very much for your time 4 today. I -- Mr. Miller may have something for 5 you. I doubt it. 6 MR. MILLER: Nothing. 7 8 Q Let me ask you one other thing. I'm sorry. I see 9 you brought with you a -- a little booklet. And I 10 meant to ask you about it earlier. Is that 11 something that you brought to tell me about, or 12 that you thought I might ask you about? 13 A No. 14 Q Have you kept a diary? 15 A No. 16 Q I see something that says, it looks like, planning 17 calendar. 18 A They give those to everybody at school. 19 Q All right. 20 A There are hundreds of them in the building. 21 Q All right. Did you -- have you noted on this 22 calendar that you got there with you anything about 23 when the dates of these -- 24 A No. 25 Q -- photographs or took pictures, nothing like that?

77 1 A No. Would you like to look? 2 Q No. I'm just asking. I don't care about looking 3 at it. I'm just asking if it's something -- I saw 4 you brought it. I didn't know if it was something 5 that you brought it with the intention of maybe I 6 may ask you about dates. 7 A Huh-uh. I brought it because I have the address 8 written down in here. 9 Q All right. 10 A For the -- because the only thing I know about 11 Hartsville, is where Coker is. 12 Q Okay. 13 A So I had the date with me and the address. 14 Q All right. 15 A And I wanted to make sure I had it with me. 16 Q That's fine. Well, I saw you brought it. I didn't 17 want to -- you to go out and you say he didn't even 18 ask me about the things I had written here. 19 20 MR. WOODS: Thank you very much. I appreciate it. 21 ----- 22 (Whereupon, at 11:39 a.m., the deposition 23 in the above-entitled matter was 24 concluded.) 25	79 State of South Carolina)) CERTIFICATE County of Lexington Be it known that the foregoing Deposition of ALBERTA MAJOR was taken by Robin Spaniel; That I was then and there a notary public in and for the State of South Carolina-at-Large; That by virtue thereof I was duly authorized to administer an oath; That the witness was by me first duly sworn to testify the truth, the whole truth, and nothing but the truth, concerning the matter in controversy aforesaid; The foregoing transcript represents a true, accurate and complete transcription of the testimony so given at the time and place aforesaid to the best of my skill and ability; That I am not related to nor an employee of any of the parties hereto, nor a relative or employee of any attorney or counsel employed by the parties hereto, nor interested in the outcome of this action. Witness my hand and seal 6 DAY OF FEBRUARY, 2010 Robin Spaniel Notary Public for South Carolina My Commission Expires: June 2, 2015 This transcript may contain quoted material. Such material is reproduced as read or quoted by the speaker.
78 1 [Errata page to be attached] 2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23 24 25	



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State of South Carolina) County of Darlington) In the Court of Common Pleas Alberta Major,) C/A No: 09-CP-16-0514 Plaintiff(s),) vs.) Deposition City of Hartsville,) of Defendant(s),) BURKE HOFFMAN Deposition of BURKE HOFFMAN, taken before Robin Spaniel, Verbatim Court Reporter and Notary Public in and for the State of South Carolina, commencing at the hour of 10:47 a.m., Tuesday, January 19, 2010, at the Town Hall, Hartsville, South Carolina. Reported by: Robin Spaniel	1 STIPULATIONS 2 This deposition is being taken pursuant to the 3 South Carolina Rules of Civil Procedure. 4 5 The reading and signing of this deposition is 6 waived by the deponent and counsel for the 7 respective parties. 8 9 (Whereupon, Exhibit No. 1, consisting of 10 1 page, was pre-marked for 11 identification.) 12 13 Whereupon, 14 BURKE HOFFMAN, being duly sworn and cautioned 15 to speak the truth, the whole truth, and 16 nothing but the truth, testified and deposed 17 as follows: 18 Court Reporter: State your full name for the 19 record, please. 20 Witness: Burke Hoffman 21 22 DIRECT EXAMINATION 23 BY MR. MILLER: 24 Q Corporal Hoffman, my name is Michael Miller. I 25 represent Alberta Major in this lawsuit. Have you
APPEARANCES For the Plaintiff(s): Michael T. Miller, Esquire Wukela Law Firm PO Box 13057 Florence, South Carolina 29504 For the Defendant(s): William B. Woods, Esquire Woods Law Firm, LLC 127 Library Hill Lane, Suite C Lexington, South Carolina 29071 Also Present: Sharon Skipper INDEX Stipulations 3 Direct Examination by Mr. Miller 3 Cross Examination by Mr. Woods 27 Certificate 35 EXHIBITS Exhibit No. 1: Incident Report (1 pg)	1 ever had your deposition taken before? 2 A No. 3 Q Okay. There's a couple of ground rules that apply 4 to every deposition. I'll go over those briefly 5 before we get started. 6 A Uh-huh. 7 Q First of all, it's important, because the court 8 reporter is making a transcription of this 9 deposition, it's important that if I ask any yes or 10 no questions that you answer with a word, a yes or 11 no as opposed to a murmur or a head nod. Because 12 obviously that doesn't translate well to paper. 13 A That's correct. 14 Q And just in general, you're doing a good job, but 15 just in general speak clearly and loudly so she can 16 hear you. If you have any questions about what I 17 ask, please direct those to me so I can rephrase or 18 - sometimes my questions get a little convoluted 19 that I don't even know what I'm asking. So if you 20 would just ask me to clarify, I'll be happy to do 21 that. And we'll go ahead and get started. Please 22 indicate your current address, Mr. Hoffman? 23 A [REDACTED] Hartsville, South Carolina 24 29550. 25 Q Now, are you married?

5 1 A Married. 2 Q And what's your wife's name? 3 A Wendy. 4 Q And what does she do? 5 A She -- security. 6 Q How long have you lived at that address? 7 A Ever since 1991. 8 Q Are you originally from Hartsville? 9 A From Hartsville. 10 Q Do you have any kids? 11 A Three. 12 Q And what are their names? 13 A [REDACTED] 14 Q And their ages? 15 A Twenty-two, 21, and 15. 16 Q Are any of them married? 17 A No. 18 Q Who is your current employer? 19 A Coker College. Well, let me rephrase that. I work 20 at Coker College, but I work for AlliedBarton 21 Security. 22 Q AlliedBarton Security? 23 A Yes. 24 Q And what is AlliedBarton? 25 A It's a security firm.	7 1 Q Is she stationed at Coker College as well? 2 A No, sir. 3 Q Where is she stationed? 4 A She's at Dixie Cup in Darlington. She does not 5 work with Allied. 6 Q Okay. What's the extent of your education? 7 A Of mine? 8 Q Yes, sir. 9 A Twelfth grade. I have some courses in college. 10 Q Where did you graduate high school? 11 A McBee. 12 Q Had -- what sort of -- do you have -- you say you 13 have some college courses? Do those pertain to 14 security? 15 A Well, I took -- mostly when I worked at -- well, I 16 worked at Roller Bearing for 29 years. 17 Q Okay. 18 A And we did, did some college courses there. 19 Q Okay. What did you do at Roller Bearing? 20 A I was a QC Technician. 21 Q And what did that entail? 22 A It -- that's -- inspect parts, read blueprints, you 23 know, and, you know, fix gauges and stuff. 24 Q Okay. Was there an overlap between working there 25 and working as a security guard?
6 1 Q And I assume that they're not specific just to 2 Coker College? 3 A They just all over the United States. 4 Q Okay. Okay. So they're nationwide? 5 A Nationwide. 6 Q Okay. How long have you worked for AlliedBarton? 7 A A little over two years. 8 Q Two years? 9 A Yeah. 10 Q And how long have you been stationed at Coker 11 College? 12 A Right at six. 13 Q So who did you work for before AlliedBarton? 14 A Securitas. 15 Q Securitas? Again, stationed at Coker College? 16 A Coker College, yes. 17 Q How long did you work for Securitas? 18 A Well, off and on part-time 25 years, off and on, 19 over the years. 20 Q Okay. Where were you stationed before Coker? 21 A Coker, I was at Darlington County Detention Center. 22 Q So you've been in security for a good long time? 23 A That's correct. 24 Q And your wife as well? 25 A That's right.	8 1 A Yeah. It was overlap. If I understand overlap 2 right. That I was working at Roller Bearing and 3 doing security part-time over the years. 4 Q That's -- that's what I was asking. 5 A Yeah. 6 Q If you did both at any time? 7 A Yeah. 8 Q How long did you do both? 9 A Right at about 25 years. 10 Q Okay. In 2008, were you still working at Rolling 11 Bearing? 12 A In 2008? 13 Q Yes, sir. 14 A No, I was at Coker. 15 Q Full time? 16 A Full time. 17 Q What sort of training have you been given over the 18 years either with Securitas or AlliedBarton with 19 regard to being a security guard? 20 A Well, basically just courses at the AlliedBarton 21 has given me. You know, and Securitas sent me to 22 training, going to Columbia, you know. 23 Q How many other security guards are detailed at 24 Coker College? 25 A There's six others out in the field.

9 1 Q How many are on duty at any one time? 2 A Most of the time it's two. 3 Q Two? 4 A Two per shift. 5 Q How large is that campus? Do you have any idea? 6 A About 30 acres. 7 Q Okay. Okay. Excuse me. Okay. Let's get into the specifics of why we're today. You've got in front of you what's marked as Plaintiff's Exhibit No. 1 which is an incident report. 10 A That's correct. 11 Q Did you prepare this report? 12 A Yes, I did. 13 Q And when did you prepare this report? 14 A On 12/4 of 08. 15 Q And tell me what happened on 12/4 of 08? 16 A I was patrolling the Byerly Parking Lot. And as I was patrolling, Ms. Alberta motioned for security to come. I was on the next line over. And I come and I asked her what was going on. And -- and she said, she told me she had stepped into a hole. 18 Q Okay. Did she indicate whether that had happened on the day she talked to you, or if it happened a couple of days prior? 19 A Well, she -- she did not say. But I assumed that	11 1 you know, that I've known our own land, it didn't appear to me that it was -- was on Coker. 2 Q Okay. 3 A I patrol that area every day that I work. 4 Q Okay. Do you have some sort of vehicle that you do that with? 5 A We have a golf cart. 6 Q What time of day was this that she -- that you talked to Ms. Major? 7 A It was around -- around about 4:30. 8 Q Okay. Did she take you to the incident -- location of the incident? 9 A Yes, she did. 10 Q Okay. And what did you observe? 11 A I observed it. It was just like a -- like a rut with leaves covered it. 12 Q Okay. How big was this rut, or I think the word hole was used, or depression. How big was this? 13 A You talking about wide, deep or what? 14 Q Both. 15 A It was basically about like that (indicating) and maybe about half your hand. 16 Q Okay. And when you indicated like this, can you give an approximation in inches on how wide it was? 17 A That -- that was a long time ago. I was -- the
10 1 she -- it happened at that particular time. 2 Q She didn't mention to you this happened before this date? 3 A No, she did not. 4 Q After she told you about the incident, what -- then what happened next? 5 A I advised her -- I asked her -- I asked her was she, you know, how was she doing, and I advised her that I didn't think that, that it was on Coker property. That she needed to, you know, if she was hurt, she needed to, you know, go to the doctor. And she also needed to call HPD, which is Hartsville Police Department. 8 Q What led you to the conclusion that that was not Coker's property? 9 A Because it was -- it was off the Byerly lot that I patrol. And I wouldn't patrol anybody -- anything that was not property of Coker College. 11 Q So the Byerly Lot was on campus, was property of Coker College? 12 A That's correct. 13 Q But this was not something that you were instructed to patrol, the area where the incident happened and that's why you felt that this wasn't Coker's land? 14 A Well, it was more level to the road. And knowing,	12 1 best I can remember is was about like that (indicating). 2 Q Well, I'd say about a foot. Is that fair? Or less than a foot? 3 A It's according to how big your foot is. 4 Q Well, 12 inches is a foot. 5 A It was about 12. 6 Q Okay. You indicated in your report, that the hole was between the sidewalk and the actual road on East Carolina near the Coker Avenue stop sign. Is that your recollection of where the hole was located? 7 A That's correct. 8 Q Okay. And you said there was -- there was leaves near the hole. 9 A Yeah. 10 Q To what extent was the hole concealed? 11 A What you talking about, as far as the leaves? 12 Q Well, to what extent could you not see the hole? 13 A Well, you could see the outer, the outer part, and with the leaves, it just, you know, it just, you know, the leaves were laying on top. 14 Q Okay. Was the -- 15 A The rut. 16 Q -- was it completely filled in with holes -- I mean

13 1 with leaves? 2 A Not -- not the outer rim, it wouldn't. You know, 3 you could tell -- you could tell where the leaves 4 had laid. You could tell there was a little, you 5 know, like a rut -- like a little rim. 6 Q Uh-huh. I'm just trying to get an idea how many -- 7 You said there was leaves in the hole and around 8 the area. I'm just trying to get an idea how much 9 -- the extent of the accumulation of leaves, can 10 you help me with that? 11 A It -- I couldn't -- I didn't go down and count the 12 leaves, but it didn't, it didn't look to be that 13 many. 14 Q Not that many? 15 A Uh-huh. 16 Q Was there enough leaves to hide the hole? 17 A Not all the way, huh-uh. 18 Q Okay. Was there grass growing in the hole? 19 A I can't -- I can't recollect that. You know, all I 20 seen was just -- just, you know, just a little rim. 21 I can say when it was not on Coker property, I 22 didn't pay, you know, a whole lot of great, you 23 know, detail other than what I've told you. 24 Q I understand. Did you observe Ms. Major? Did she 25 appear to be injured?	15 1 A They said that they would -- she would follow-up 2 with Ms. Alberta to see if she went to the doctor. 3 And that was -- that's the last I heard of it. 4 Q And you -- you didn't call Hartsville Police 5 Department yourself, you just trusted that she 6 would? 7 A That's correct. 8 Q Okay. Who is Captain Lubtkin? 9 A Lubtkin. 10 Q Lubtkin. 11 A That's my supervisor. 12 Q Okay. And Ron Reck? 13 A He was the Vice President at the time. He's no 14 longer with the college. 15 Q Okay. So somebody else in administration? 16 A Yeap. 17 Q Okay. There's a mention on here -- and it's a 18 report of an email. Have you read that email? 19 A Email? You talking about from Ginger Freeman? 20 Q Yes, sir. 21 A No, I did not. 22 Q Okay. Now, just to clarify, the reason you 23 instructed Ms. Major to contact the Hartsville 24 Police Department is because you thought that the 25 city owned that land and not the -- the college?
14 1 A I did see her with a slight limp. Yes. 2 Q And what did y'all do next? After you observed the 3 hole, after you told her to go see a doctor, what 4 happened next? 5 A And I made sure that, you know, that she was -- she 6 was okay. And she told me, best I can recollect, 7 that she had to, you know -- you know, get on to 8 class. And that she would -- she would call -- she 9 would call HPD. And I had to leave to go to other 10 calls. 11 Q To your knowledge, was the Hartsville Police 12 Department called? 13 A Best I recollect, I don't -- because I didn't 14 really follow-up on it other than -- I did -- I did 15 go to and report this to Ginger, you know, Freeman. 16 You know, when I left there. 17 Q Who is Ginger Freeman? 18 A She's -- she's the secretary of Steve Terry, he's 19 the Vice President of Students and Enrollment. 20 Q Okay. So an employee in administration at Coker 21 College? 22 A Right. That's correct. 23 Q You informed them of the incident? 24 A Right. 25 Q And what did they tell you?	16 1 A That's correct. 2 Q Okay. I do have a couple of more things. I've got 3 a couple of pictures I'll need your help with 4 actually. 5 6 MR. MILLER: And Bill, these are the same ones that 7 you were going through in Ms. Major's 8 deposition. 9 MR. WOODS: Okay. 10 MR. MILLER: These color photos. 11 MR. WOODS: All right. 12 13 Q Look at those photos if you would for me, sir. 14 Those are two pictures taken -- and I'll represent 15 to you that those pictures were taken on December 16 5th. Does that look to be the location of the hole 17 that Ms. Major fell? 18 A It looks -- appears to me it does. 19 Q Okay. Is that hole still present? 20 A No. 21 Q Why not? 22 A They have put cement there. 23 Q Who did that? 24 A You talking about the cement? 25 Q The cement or it looks like -- I've got pictures.

17 1 Maybe this picture will clarify. It's a little 2 more like dirt to me. I don't know if it's cement 3 or dirt. 4 A Oh, you talking about at the present now? 5 Q In the picture. 6 A Oh, in the picture. Okay. 7 Q Yes, sir. 8 A That's dirt. 9 Q Dirt in the hole? 10 A Dirt in the rut. 11 Q In the rut. So that's it's filled in? 12 A That's what it looks like to me. 13 Q Okay. Do you know who filled it in? 14 A I assume that -- that Coker maintenance did it. 15 Q I'm showing you two pictures of an EzGo cart. Is 16 that similar to a Coker College vehicle? 17 A That's not the one that I drive. That's the one 18 that's similar to what maintenance drives for Coker 19 College. 20 Q Okay. And there's a picture in here of a gentleman 21 with a shovel who appears to be doing something. 22 I'm not sure if he's filling it or what. Doing 23 something related to that hole. Do you know who 24 that gentleman is? 25 A I don't know him personally. I have seen him	19 1 A Right. 2 Q Yeah. Okay. That's all we have. 3 A We have to keep things confidential. 4 Q I understand. Okay. Okay. Actually, I'm going to 5 have you look at a couple of more things in these 6 pictures. That's, again, the pictures of the 7 gentleman with the shovel. And here's some larger 8 pictures of, kind of from a little further away of 9 the hole in the area, and I'm observing leaves in 10 all four of those pictures on the ground. Do you 11 as well? 12 A Yeah. I see leaves. 13 Q Does that, to your recollection, I understand this 14 was a long time ago, to your recollection is that 15 about the amount of leaves that were on the ground 16 at this time. Or do you think somebody had raked 17 or blown the leaves away? 18 A Where there are two different pictures, it's 19 showing two different things is what I see. It 20 looks like they're scattered here, and it look like 21 that they -- mostly to the highway here. 22 Q Okay. 23 A But it was just basically scattered where I can 24 remember. 25 Q Scattered leaves?
18 1 around, you know, on campus because he usually -- 2 he's usually come and gone before I get there. 3 Q Is he an employee of the school? 4 A Well, I guess he is. I don't know if he still is 5 or not. Because like I say, I don't -- I don't -- 6 I don't recognize -- I hadn't seen him lately. 7 Q Well, at the time, this was taken in December of 8 2008. 9 A Yes, he was. 10 Q Working in maintenance? 11 A Working in maintenance, yeah. 12 Q Okay. Well, why, if this land was owned by the 13 city, was Coker College filling in the hole? 14 A That I couldn't tell you. 15 Q Have you ever talked to anybody in maintenance 16 about this hole? 17 A No. 18 Q Have you talked to anybody else in the 19 administration about this hole? 20 A Other than -- other than Ginger Freeman that day 21 the incident happened. 22 Q So you've not talked to anybody else about this 23 incident since December 4th? 24 A Not -- no. Huh-uh. 25 Q Okay. Not at least since the lawsuit's been filed?	20 1 A Yeah. 2 Q Okay. But does that look to be the -- the 3 approximate amount of leaves on the ground. There 4 wasn't a huge pile or there wasn't a large 5 accumulation of leaves to your recollection? 6 A Not that I remember. No. 7 Q Okay. Is there area normally leaves or is this 8 area normally grass before they paved over it? 9 A It's mostly grass. 10 Q Okay. All right. Very good. Thank you. Now, you 11 indicated to me that they have subsequently paved 12 over this corner. 13 A Yes. 14 Q Do you know when they -- when that occurred? 15 A That I don't. I did not keep up with. I seen 16 construction going on there. And naturally I 17 didn't -- wouldn't go in the construction, you 18 know, area where the tape and everything. But I 19 couldn't say give you a specific time and date. 20 Q Can you give me a month, a season. Can you just 21 give me some ballpark idea of when that occurred? 22 A It's -- the best I can remember -- give or take 23 three months -- three or four months ago. 24 Q Okay. So late fall early winter? 25 A Probably -- probably early fall.

21 1 Q Early fall? 2 A Yeah. 3 Q Okay. All right. Do you know of any other 4 instances where a pedestrian has gotten hurt at 5 that corner? 6 A No, sir. I don't. 7 Q Had you ever seen that rut -- you called in your 8 report, you called it a hole, had you ever seen 9 that before Ms. Major brought it to your attention? 10 A No. 11 Q Is that -- now, you, again, you indicated that that 12 wasn't part of your normal route, that corner. 13 Because you stayed in the lot, the Byerly lot? 14 A Well, mostly I stay around -- I try to cover the 15 whole lot in -- in -- in, you know -- you know, at 16 the corner, you know, too, but you don't -- you 17 don't look at that -- at that corner every day, you 18 know what I'm saying? You suppose to watch the 19 cars that's in the -- that's in the lot. 20 Q Okay. Did you drive directly by that corner every 21 day on your route? 22 A Mostly every day. Yes. 23 Q Okay. 24 A But saying looking at it every day, you know, I 25 can't say I looked at it every day.	23 1 power pole been moved prior to this incident? 2 A Not that I'm aware of. I've never known it to be 3 moved. 4 Q Do you know who -- who maintains that pole? 5 A I just assume Progress Energy. 6 Q Why do you make that assumption? 7 A Because it's a -- looks like -- it's a light pole. 8 And most of the light poles around there belong to 9 Progress Energy. 10 Q Okay. Thank you. What time are you on duty at 11 Coker College? What's your shift? 12 A Four to twelve. 13 Q 4:00 PM? 14 A 4:00 PM to midnight. 15 Q To Midnight. And was it that -- were it those same 16 hours in December of 2008? 17 A That's correct. 18 Q Okay. Have you spoken to Ms. Major subsequent to 19 this report about this incident? 20 A Clarify that. 21 Q Have you spoken to Ms. Major about this incident? 22 A No, I have not. 23 Q If you'll give me just a second. Let me consult 24 with my client. 25 MR. MILLER: We'll go off the record to see if she
22 1 Q Okay. Do you have any idea based on your 2 observations of, again either of the rut or the 3 hole, what might have caused it? 4 A I do know from observations from over the years, 5 that cars, they come -- and not only when I'm in 6 the parking lot, but when I'm on campus looking 7 back towards that way, that cars come and cut that 8 corner. And cut it, you know, a lot of times it -- 9 they just roll, and don't come to a complete stop. 10 And they, you know, they go on. 11 Q When you say, they cut the corner, what do you mean 12 by that? 13 A Well, they come up, and they look that way, and -- 14 and they cut real sharp, you know, to the right. 15 Q And drive on the grass? 16 A Yeah. 17 Q Okay. Again, in these pictures, there appears to 18 be a power line, or a light pole, or something. 19 A Yeah. 20 Q Power pole. Is that your recollection? 21 A That's a power pole. 22 Q To your knowledge, had any work been done to that 23 power pole prior to this incident? 24 A Not as I know of. 25 Q To your knowledge or to your observations, had that	24 1 has any more questions we're going to ask. 2 And then we're just about done. 3 MR. HOFFMAN: Okay. 4 (Off the Record) 5 6 Q Mr. Hoffman, did Ms. Major ask you for a copy of 7 this report at any time? 8 A I can't recollect if she did or if she didn't. 9 Q Okay. As a general matter, if -- 10 A But we don't -- we don't usually give copies of 11 that. Because I -- I'm not authorized to give 12 anybody a copy of a -- of the -- of our report. 13 Q And why is that? 14 A That's -- that's what my company advises me not to. 15 Q Okay. So you're instructed not to give out 16 reports? 17 A Right. They have to go through the proper 18 procedures of, you know, obtaining them. Whatever 19 it may be. 20 Q So if she wanted to get it, she could -- who would 21 she contact? 22 A She would have to contact the college. You know, 23 and it would be left up to them where they ... 24 Q Okay. Now, just briefly, we're almost finished, 25 but just briefly, you have an eight hour shift?

25 1 A That's correct. 2 Q And you work five days a week? 3 A That's right. 4 Q Can you give me a brief rundown of, of your average 5 day from when you get there at four, what does your 6 day entail or your evening entail, your workday? 7 A Well, most of the time, it's patrol of the outside 8 campus and the inside campus as well. But on 9 school nights that -- we're instructed to patrol 10 the campus as evening students come in, you know, 11 and patrol the parking lot, and be seen. You know, 12 and, you know, and look for anything, any 13 activities. 14 Q When you say "patrol," are you driving around, are 15 you walking around, are you stationary? 16 A We -- we -- well, patrol means patrol. That means 17 to walk around or either ride the golf cart. 18 Q Okay. Is most of your eight hour shift spent 19 patrolling? 20 A I say -- I say at least -- at least 90 percent of 21 the time. Yes. 22 Q Okay. And what's the other 10 percent? 23 A Well, mostly answering -- answering calls, filling 24 out paperwork. 25 Q Okay. All right. So when you're out patrolling,	27 1 Q Okay. As part of your route, do you go to the 2 Byerly lot every time? 3 A Huh-uh. 4 Q Every day on your route? 5 A Well, I go every day, but it's different times. 6 Q Okay. 7 8 MR. MILLER: Okay. That's all I have. 9 MR. WOODS: Let's see. I may have a couple of 10 questions. But I don't think much -- I won't 11 take up too much more of your time. 12 ----- 13 CROSS EXAMINATION 14 BY MR. WOODS: 15 Q On the date that you were contacted by Ms. Major 16 and told about the incident, I think you said that 17 you don't recall her telling you on that occasion 18 that, that the incident had actually happened some 19 other time? 20 A That's correct. 21 Q All right. Did you, at the time you filled out 22 your report, did you think it was -- that it had 23 occurred sometime earlier that -- that afternoon? 24 A I thought it had happened shortly after -- shortly 25 before I came up. Because the way -- because I
26 1 you're either on your golf cart -- 2 A Or either on foot. 3 Q -- on foot? 4 A Yeah. 5 Q Just making a presence and observing what's 6 happening? 7 A Yeah. 8 Q Okay. In addition to the Byerly lot, are there 9 other parking lots that you patrol? 10 A That's correct. You know, like the tennis lot, the 11 Second Street lot, the -- we have the main parking 12 lot where the new library is at. 13 Q Okay. 14 A Yeah. There's several other parking lots. 15 Q When you do a patrol, do you -- is there, like, a 16 specific route that you do, kind of, a lap you do 17 around campus. Or do you just, kind of, go 18 haphazardly from building to building? 19 A You go in random. We don't go in the same route 20 the whole time. 21 Q Okay. So you will randomly go from location to 22 location? 23 A That's correct. We also have -- we cover some, 24 like, a car, when we have to respond to an off 25 campus, you know, alarm.	28 1 thought, you know, she was -- she was eager to get 2 my attention and everything. 3 Q Okay. And you've described the area that Ms. Major 4 pointed out to where she fell is like a rut, is 5 that right? 6 A That's correct. 7 Q And you say there may be a -- when you did your 8 hand like this, was it a half a hand, was that what 9 you were showing? 10 A About a half a hand. 11 Q All right. And then about 12 inches, I think -- 12 A Yeah. 13 Q -- was what was said about in width. Did the area 14 that -- that she pointed to you, did it appear to 15 be something that somebody had recently been 16 digging there or anything? 17 A Huh-uh. 18 A You talked about the fact that you had -- when you 19 were asked about what you thought you had -- might 20 have caused it, that -- let me find it -- you had 21 seen vehicles or cars cut the corner and actually 22 drive up on the direct grass cutting that corner, 23 is that right? 24 A That's correct. 25 Q Have you ever noticed any large trucks that have

29 1 cut the corner and had to go up or did go up on the 2 grass to do that? 3 A Yes. I've seen -- I've seen -- I've seen it in the 4 past, and I've seen it this week. They try to cut 5 that corner to turn to the right because they get 6 lost trying to get to Sunoco. 7 Q Okay. Even though -- When you say that, you 8 referring to a big truck? 9 A A big 18-wheeler. 10 Q Okay. And is there -- I think there's a median out 11 there in the, in the road. Just -- just across the 12 street, there's some type of paved median? 13 A It's go the -- it's got the cement around, you 14 know, and it -- 15 Q All right. 16 A You -- you got the road -- I think the road goes 17 out. And when you make a left turn, then you got 18 that little median, you know, beyond there. 19 Q All right. Well, I've got a picture here that 20 y'all have seen. I think he showed you this bottom 21 photograph before. If someone is coming, making 22 this right turn here, say with a big truck, is it 23 difficult to go out and make that turn because of 24 that median that's there? 25 A Yeah. Because I've had to -- I seen them having to	31 1 A Yes. 2 Q After -- even after it's been paved? 3 A You also can see tire tracks on that cement, 4 pavement. 5 Q Okay. Is it your understanding, and I take it from 6 your testimony, that this area where it's been 7 paved here and where Ms. Major pointed out that she 8 had fallen, is not property owned by Coker College? 9 A That is correct. 10 Q All right. And you've testified that you didn't 11 specifically patrol this area because of that fact, 12 is that right? 13 A That's correct. 14 Q But in your -- In the course of going around the 15 campus, doing your patrolling, and coming up here 16 to Byerly, which I believe this black car shown 17 here, my recollection, if you drive on up a little 18 way, and you'd take a right to go into the Byerly 19 lot? 20 A Yes. That's correct. You talking about going up 21 the street -- 22 Q Yeah. The way this black car -- 23 A -- on Carolina? 24 Q Yeah. The way that black car is facing. 25 A Yes.
30 1 back up. 2 Q Okay. And you mentioned something about you had 3 recently seen that occur also with a vehicle 4 cutting the corner -- 5 A Yes. 6 Q -- short? And that's even after it's been paved 7 there? 8 A Yeah. 9 Q All right. There's some photographs here that were 10 recently sent to me by Plaintiff's attorney showing 11 -- and these are the same four that we looked at 12 earlier -- is this the same area? Can you tell by 13 looking at this, is this the same area, the same 14 pole that was shown in the earlier photographs that 15 had the dirt beside it? 16 A That's correct. 17 Q All right. And I asked Ms. Major about it. I see 18 in -- in these photographs, at least three of them, 19 you can see it, it appears to be a cone that's 20 knocked over for some reason, squashed down. You 21 see that? 22 A That's correct. I see it. 23 Q And have you noticed that -- some evidence that 24 people who have cut that corner? And you said, I 25 think you said, you saw somebody doing it?	32 1 Q You'd go up a ways and turn into it. 2 A To the right. 3 Q So the Byerly lot is off to the right in this 4 photograph? 5 A That's correct. 6 Q And in the course of your patrolling the campus and 7 going to the Byerly lot, and from the Byerly lot, 8 do you have occasion to come by this corner? 9 A You talking about Coker Avenue? 10 Q Yes. That is Coker? 11 A Coker -- Coker, yeah. 12 Q Is the side street that comes in, that's Coker? 13 A Yeah. I've -- I've come through there when I was 14 coming from the other direction because Coker owns 15 the old legal building. And I would cut -- because 16 I have to go to the Habitat -- the buildings 17 behind, you know, Byerly lot. And I would cut -- 18 go through that Coker Avenue to get to the Habitat 19 and the medical office which Coker owns. 20 Q Okay. 21 A I went from that side. And when it was under 22 construction, I, you know, that's mostly what I, 23 you know, did. And I -- I try to stay off the 24 streets as much as possible, you know. 25 Q All right. With the golf carts?

33

1 A Yeah.
2 Q And during the time before this was paved and
3 before Ms. Major reported to you that she had
4 fallen there, had you ever known of anyone to fall
5 or heard any reports of someone falling in that
6 area?
7 A No, sir.
8 Q Had you ever noticed in your trips around this
9 area, anything about that area that, even though it
10 wasn't something that you patrolled, that you
11 thought looked like it was dangerous or some --
12 some problem with it?
13 A I didn't see anything that, you know, out of the
14 ordinary. The, you know ...
15 Q All right. You talked about the -- or were shown
16 some of these photographs that -- the color
17 photographs showing some leaves there in the area.
18 And this is after some dirt was put there in that
19 area. Based on your recollection, was the -- and I
20 think you testified. I want to make sure. -- that
21 the appearance, as far as the leaves, looked about
22 the same as they did as you recall it that day when
23 you were there with Ms. Major?
24 A It was about the same. Like I said, it was a year
25 ago, and, you know ...

34

1 Q I understand. It's been awhile. All right.
2
3 MR. WOODS: I think that's all the questions I
4 have. Thank you very much. Anything else?
5 MR. MILLER: That's it.
6
7 (Whereupon, at 11:47 a.m., the deposition
8 in the above-entitled matter was
9 concluded.)
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State of South Carolina)
) CERTIFICATE
County of Lexington
Be it known that the foregoing Deposition of
BURKE HOFFMAN was taken by Robin Spaniel;

That I was then and there a notary public in
and for the State of South Carolina-at-Large;
That by virtue thereof I was duly authorized
to administer an oath;

That the witness was by me first duly sworn to
testify the truth, the whole truth, and nothing but the
truth, concerning the matter in controversy aforesaid;

The foregoing transcript represents a true,
accurate and complete transcription of the testimony so
given at the time and place aforesaid to the best of my
skill and ability;
That I am not related to nor an employee of
any of the parties hereto, nor a relative or employee of
any attorney or counsel employed by the parties hereto,
nor interested in the outcome of this action.

Witness my hand and seal 6 DAY OF FEBRUARY,
2010  Robin L. Spaniel
Notary Public for South Carolina
My Commission Expires: June 2, 2015

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370 S.C. 436, *; 635 S.E.2d 631, **;
2006 S.C. LEXIS 303, ***

Judy Vaughan, Appellant, v. Town of Lyman, Respondent.

Opinion No. 26210

SUPREME COURT OF SOUTH CAROLINA

370 S.C. 436; 635 S.E.2d 631; 2006 S.C. LEXIS 303

April 18, 2006, Heard
September 25, 2006, Filed

PRIOR HISTORY: [***1]

Appeal from Spartanburg County. J. Derham Cole, Circuit Court Judge.

DISPOSITION: AFFIRMED IN PART; REVERSED IN PART.

CASE SUMMARY

PROCEDURAL POSTURE: Appellant pedestrian sued respondent town, alleging its negligent failure to maintain a sidewalk caused her injury. The Spartanburg County Circuit Court (South Carolina) granted the town summary judgment on grounds that it did not own the sidewalk at issue and that S.C. Code Ann. § 5-27-120 (1976) did not create a duty for the town to keep the sidewalks within its jurisdiction in good repair. The pedestrian appealed.

OVERVIEW: The pedestrian tripped on a sidewalk that had been broken by overgrown tree roots. The high court held that while § 5-27-120 defined the duty to the public of a town to maintain its streets (under S.C. Code Ann. § 56-5-480, "street" included the sidewalk), the public duty rule precluded a private right of action based solely on S.C. Code Ann. § 5-27-120. However, the pedestrian's evidence created fact issues concerning the town's common law duty. Though the street at issue was owned by a county and maintained by the South Carolina Highway Department, evidence that the town removed trees near and filled potholes in the street created a fact issue as to whether it exercised any control over the street. Whether the town voluntarily maintained the sidewalk, thereby incurring a duty which it otherwise would not have had, was a mixed question of law and fact that had to be resolved by the fact finder. As the sidewalk's defect was not caused by a third party, and the town's mayor knew about it for at least 10 years, the exception to the waiver of immunity provided in S.C. Code Ann. § 15-78-60(15) of South Carolina Tort Claims Act, S.C. Code Ann. § 15-78-10 et seq. (2005), did not apply.

OUTCOME: The appellate court affirmed the grant of summary judgment based on statutory duty. It reversed the grant of summary judgment on the issues of common law duty and voluntary undertaking and remanded for further proceedings.

CORE TERMS: street, sidewalk, summary judgment, common law duty, municipality's, repair, tort claim, undertook, right of action, governmental entity, highway, bridge, entity, public duty, public ways, additionally, municipal, genuine, duty to act, duty to maintain, state highways, sovereign immunity, undertake, ownership, immunity, owed, general public, reasonable time, safe condition, constructive notice

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[Civil Procedure](#) > [Summary Judgment](#) > [Standards](#) > [General Overview](#)

HN1: In reviewing the grant of summary judgment, the appellate court applies the same standard that governs the trial court under S.C. R. Civ. P. 56: summary judgment is proper when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. On appeal, all ambiguities, conclusions, and inferences arising in and from the evidence must be viewed in a light most favorable to the non-moving party. [More Like This Headnote](#) | [Shepardize: Restrict By Headnote](#)

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HN2: See S.C. Code Ann. § 5-27-120 (1976).

[Torts](#) > [Negligence](#) > [Duty](#) > [Affirmative Duty to Act](#) > [General Overview](#)

HN3: Generally, the common law does not impose any duty to act. However, an affirmative duty to act may be created by statute, contract, status, property interest, or some other special circumstance. [More Like This Headnote](#)

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HN4: Although a statute may impose a duty to act upon a public official, the official may also be immune from a private right of action under the public duty rule. This rule holds that public officials are generally not liable to individuals for their negligence in discharging public duties as the duty is owed to the public at large rather than anyone individually. The public duty rule's general principle of non-liability, however, is not absolute. Under the well established "special duty" exception, a public official may be held liable to an individual for the breach of a statutory duty when: (1) an essential purpose of the statute is to protect against a particular kind of harm; (2) the statute, either directly or indirectly, imposes on a specific public officer a duty to guard against or not cause that harm; (3) the class of persons the statute intends to protect is identifiable before the fact; (4) the plaintiff is a person within the protected class; (5) the public officer knows or has reason to know the likelihood of harm to members of the class if he fails to do his duty; and (6) the officer is given sufficient authority to act in the circumstances or he undertakes to act in the exercise of his office. [More Like This Headnote](#) | [Shepardize: Restrict By Headnote](#)

[Torts > Negligence > Duty > Affirmative Duty to Act > Special Relationships > Government Officials](#)
HN5 The public duty rule is a rule of statutory construction which aids the court in determining whether the legislature intended to create a private right of action for a statute's breach. It is a negative defense which denies the existence of a duty of care owed to the individual. The public duty rule should not be confused with the affirmative defense of immunity. Therefore, the dispositive issue is not whether a statute creates a duty, but rather whether the statute was intended to provide an individual a private right of action thereunder. [More Like This Headnote](#) | [Shepardize: Restrict By Headnote](#)

[Governments > Local Governments > Duties & Powers](#)

[Governments > Public Improvements > Bridges & Roads](#)

[Torts > Negligence > Duty > Affirmative Duty to Act > Special Relationships > Government Officials](#)

[Torts > Public Entity Liability > Liability > State Tort Claims Acts > General Overview](#)

HN6 The South Carolina Supreme Court acknowledges the duty of a municipality to maintain its streets; however, it no longer observes the statutory basis for a private right of action. Instead, liability is imposed through the waiver provisions of the South Carolina Tort Claims Act, S.C. Code Ann. § 15-78-10 et seq. (2005). [More Like This Headnote](#) | [Shepardize: Restrict By Headnote](#)

[Governments > Local Governments > Duties & Powers](#)

[Governments > Public Improvements > Bridges & Roads](#)

[Torts > Negligence > Duty > Affirmative Duty to Act > Special Relationships > Government Officials](#)

HN7 The South Carolina Supreme Court finds that S.C. Code Ann. § 5-27-120 (1976) does not have an identifiable class of persons intended to be protected by the statute beyond the classification of the general public. The intention of § 5-27-120 to protect the general public is insufficient to amount to an "identifiable class" as required to find a "special duty." Therefore, the supreme court holds that while § 5-27-120 clearly defines the duty to the general public of a municipality to maintain its streets, the public duty rule precludes a private right of action based solely on § 5-27-120. [More Like This Headnote](#) | [Shepardize: Restrict By Headnote](#)

[Governments > Local Governments > Duties & Powers](#)

[Governments > Public Improvements > Bridges & Roads](#)

[Torts > Negligence > Duty > Affirmative Duty to Act > Special Relationships > Government Officials](#)

HN8 The general rule in the United States is that municipalities which have full and complete control over the streets and highways within their corporate limits are liable in damages for injuries sustained in consequence of their failure to use reasonable care to keep them in a reasonably safe condition for public travel. Additionally, the South Carolina Supreme Court has interpreted this duty to extend, not only to those streets, ways, and bridges owned and maintained by the municipality, but also to those under the control of the municipality. [More Like This Headnote](#)

[Governments > Public Improvements > Bridges & Roads](#)

HN9 Under S.C. Code Ann. § 56-5-480, the definition of "street" includes the sidewalk. [More Like This Headnote](#) | [Shepardize: Restrict By Headnote](#)

[Governments > Local Governments > Duties & Powers](#)

[Governments > Public Improvements > Bridges & Roads](#)

[Governments > State & Territorial Governments > Property](#)

HN10 S.C. Code Ann. § 57-5-140 (2005) states that ownership of a highway by the State of South Carolina shall not prevent a municipality from undertaking any improvements or performing any maintenance work on state highways in addition to what the South Carolina Highway Department is able to undertake. [More Like This Headnote](#) | [Shepardize: Restrict By Headnote](#)

[Torts > Public Entity Liability > Liability > State Tort Claims Acts > General Overview](#)

HN11 The South Carolina Tort Claims Act, S.C. Code Ann. § 15-78-10 et seq. (2005), provides that the State of South Carolina, an agency, a political subdivision, and a governmental entity are liable for their torts in the same manner and to the same extent as a private individual under like circumstances, subject to the limitations upon liability and damages, and exemptions from liability and damages contained herein. S.C. Code Ann. § 15-78-40. Balancing the interests of the State against the interests of a tort victim, the general assembly, in S.C. Code Ann. § 15-78-60, has provided 31 exceptions whereby the State is exempted from liability. [More Like This Headnote](#)

[Governments > Public Improvements > Bridges & Roads](#)

[Torts > Public Entity Liability > Liability > State Tort Claims Acts > Exclusions From Liability](#)

HN12 Governmental entities responsible for maintaining highways, roads, streets, causeways, bridges, or other public ways are not liable for loss arising out of a defect or a condition in, on, under, or overhanging a highway, road, street, causeway, bridge, or other public way caused by a third party unless the defect or condition is not corrected by the particular governmental entity responsible for the maintenance within a reasonable time after actual or constructive notice. S.C. Code Ann. § 15-78-60(15) (2005). This exception does not place any limitation on a municipality's liability for failing to maintain the streets, ways and bridges within its control. [More Like This Headnote](#)

[Civil Procedure > Trials > Jury Trials > Province of Court & Jury](#)

[Torts > Negligence > Duty > Affirmative Duty to Act > Voluntary Assumption of Duty](#)

HN13 While there is generally no duty to act under the common law, a duty to use due care may arise where an act is voluntarily undertaken. The question of whether such a duty arises in a given case may depend on the existence of particular facts. Where there are factual issues regarding whether the defendant was in fact a volunteer, the existence of a duty becomes a mixed question of law and fact to be resolved by the fact finder. [More Like This Headnote](#)

[Civil Procedure > Summary Judgment > Standards > Need for Trial](#)

[Governments > Public Improvements > Bridges & Roads](#)

HN14 In the context of a motion for summary judgment, where the issue is whether a municipality voluntarily undertook the duty to maintain the municipality's streets and sidewalks, the issue is a mixed question of law and fact which should be

resolved by the fact finder. [More Like This Headnote](#) | [Shepardize: Restrict By Headnote](#)

[Civil Procedure > Appeals > Standards of Review > General Overview](#)

HN15 An appellate court need not address additional issues if it is not necessary to the resolution of the case. [More Like This Headnote](#)

COUNSEL: [Matthew W. Christian](#), of Christian, Moorehead & Davis, of Greenville, for Appellant.

[William McBee Smith](#), of Smith & Haskell Law Firm, of Spartanburg, for Respondent.

JUDGES: CHIEF JUSTICE TOAL, MOORE, WALLER and BURNETT, JJ., concur. PLEICONES, J., concurring in a separate opinion.

OPINION BY: TOAL

OPINION

[*439] [633] CHIEF JUSTICE TOAL:** Judy Vaughan (Vaughan) brought an action against the Town of Lyman (Lyman) alleging it was negligent in failing to maintain the sidewalks located within its jurisdiction causing her injury. Lyman made a motion for summary judgment, which the trial court granted. Vaughan appealed the trial court's order. This Court certified the appeal for review from the court of appeals pursuant to Rule 204(b), SCACR. We affirm in part, reverse in part, and remand for trial.

FACTUAL / PROCEDURAL BACKGROUND

In October of 1999 Vaughan tripped on the Lawrence Street sidewalk in Lyman, which had become broken over time by **[*440]** overgrown tree roots. As a result of the fall, **[**2]** Vaughan injured her hands, right knee, back, and spine. In November of 1999, Vaughan filed a claim against Lyman. Vaughan filed this suit in September of 2002.

Lyman argues that it is not responsible for Vaughan's injuries because it does not own, control, or maintain the sidewalk where the injury occurred. Lyman made a motion for summary judgment and the trial court granted Lyman's motion. Vaughan appealed and raises the following issues for this Court's review:

- I. Did the lower court err in finding that S.C. Code Ann. § 5-27-120 (1976) did not create a duty for Lyman to keep the sidewalks within the town in good repair?
- II. Did the lower court err in finding that no common law duty exists for Lyman to maintain the sidewalk?
- III. Did the lower court err in finding that Lyman did not owe a duty to Vaughan based on Lyman's voluntary undertaking of the repair and maintenance of the streets and sidewalks within the town?
- IV. Did the lower court err in excluding certain material from the record on appeal?

STANDARD OF REVIEW

HN1 In reviewing the grant of summary judgment, this Court applies the same standard that governs the trial **[**3]** court under Rule 56: summary judgment is proper when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. South Carolina [**634] Elec. & Gas Co. v. Town of Awendaw, 359 S.C. 29, 34, 596 S.E.2d 482, 485 (2004) (quoting Osborne v. Adams, 346 S.C. 4, 7, 550 S.E.2d 319, 321 (2001)). On appeal, all ambiguities, conclusions, and inferences arising in and from the evidence must be viewed in a light most favorable to the non-moving party. *Id.*

LAW / ANALYSIS

I. Statutory duty

Vaughan argues the trial court erred in finding that **[*441]** S.C. Code Ann. § 5-27-120¹ did not create a duty for Lyman to keep the sidewalks within the town in good repair. We disagree.

FOOTNOTES

¹ The South Carolina Code provides:

HN2 The city or town council of any city or town of over one thousand inhabitants shall keep in good repair all the streets, ways and bridges within the limits of the city or town and for such purpose it is invested with all the powers, rights and privileges within the limits of such city or town that are given to the governing bodies of the several counties of this State as to the public roads.

S.C. Code Ann. § 5-27-120 (1976).

[4]** **HN3** Generally, the common law does not impose any duty to act. Miller v. City of Camden, 329 S.C. 310, 314, 494 S.E.2d 813, 815 (1997). However, an affirmative duty to act may be created by statute, contract, status, property interest, or some other special circumstance. Jensen v. Anderson County Dep't of Soc. Serv., 304 S.C. 195, 199, 403 S.E.2d 615, 617 (1991).

^{HNS} Although a statute may impose a duty to act upon a public official, the official may also be immune from a private right of action under the public duty rule. "This rule holds that public officials are generally not liable to individuals for their negligence in discharging public duties as the duty is owed to the public at large rather than anyone individually." *Steinke v. South Carolina Dep't of Labor, Licensing, and Regulation*, 336 S.C. 373, 388, 520 S.E.2d 142, 149 (1999).

The public duty rule's general principle of non-liability, however, is not absolute. Under the well established "special duty" exception, a public official may be held liable to an individual for the breach of a statutory duty when:

- (1) an essential purpose of the statute is to protect against [***5] a particular kind of harm;
- (2) the statute, either directly or indirectly, imposes on a specific public officer a duty to guard against or not cause that harm;
- (3) the class of persons the statute intends to protect is identifiable before the fact;
- (4) the plaintiff is a person within the protected class;
- [*442] (5) the public officer knows or has reason to know the likelihood of harm to members of the class if he fails to do his duty; and
- (6) the officer is given sufficient authority to act in the circumstances or he undertakes to act in the exercise of his office.

Jensen, 304 S.C. at 200, 403 S.E.2d at 617.

^{HNS} The public duty rule is a rule of statutory construction which aids the court in determining whether the legislature intended to create a private right of action for a statute's breach. *Arthurs v. Aiken County*, 346 S.C. 97, 104, 551 S.E.2d 579, 582 (2001). It is a negative defense which denies the existence of a duty of care owed to the individual. *Id.* The public duty rule should not be confused with the affirmative defense of immunity. *Id.* Therefore, the dispositive issue is not whether § 5-27-120 creates [***6] a duty, but rather whether the statute was intended to provide an individual a private right of action thereunder.

Our Court has long recognized that a municipality has a duty to maintain its streets. *Morris v. Mills*, 121 S.C. 200, 113 S.E. 632, 634 (1922). However, prior to the abolition of sovereign immunity, the liability of a municipality for the breach of the duty was grounded in a waiver statute. See S.C. Code Ann. § 5-7-70 (1976) repealed by Act No. 463, 1986 S.C. Acts 3001; S.C. Code Ann. § 47-36 (1962); S.C. Code Ann. § 7345 (1942); [***635] S.C. Code Ann. § 1972 (1912); 21 St. at Large 91 (1892 Act No. 40). This waiver statute created the private right of action under which an individual could pursue a tort claim against a municipality for breach of the duty. The waiver statute served as a companion statute to the previous versions of § 5-27-120. After this Court abolished sovereign immunity, the legislature repealed the waiver statute and enacted the South Carolina Tort Claims Act, Act No. 463, 1986 S.C. Acts 3001. ^{HNS} This Court continues to acknowledge the duty of a municipality to maintain its streets; however, we no longer observe the statutory basis [***7] for a private right of action. Instead, liability is now imposed through the waiver provisions of the Tort Claims Act. See S.C. Code Ann. §§ 15-78-10, et seq. (2005).

[*443] In the instant case, Vaughan argues that the town of Lyman owes a "special duty" under § 5-27-120. The terms of the statute clearly define a duty owed to the general public. However, Vaughan has failed to demonstrate that the statute meets the requirements of a "special duty" as outlined above ^{HNS}. We find that the statute does not have an identifiable class of persons intended to be protected by the statute beyond the classification of the general public. The intention of the statute to protect the general public is insufficient to amount to an "identifiable class" as required to find a "special duty."

Therefore, we hold that while § 5-27-120 clearly defines the duty to the general public of a municipality to maintain its streets, the public duty rule precludes a private right of action based solely on this statute. Accordingly, the lower court did not err in granting summary judgment to Lyman on the statutory cause of action because § 5-27-120 does not create a "special duty" upon [***8] which an individual may base a tort action against a municipality.

II. Common Law Duty

Vaughan argues the trial court erred in finding that no common law duty existed for Lyman to maintain the sidewalk on Lawrence Street. We agree.

Generally, the common law does not impose any duty to act. *Miller*, 329 S.C. at 314, 494 S.E.2d at 815. However, this Court has acknowledged that ^{HNS} "[t]he general rule in this country is that municipalities which have full and complete control over the streets and highways within their corporate limits are liable in damages for injuries sustained in consequence of their failure to use reasonable care to keep them in a reasonably safe condition for public travel." *Terrell v. City of Orangeburg*, 176 S.C. 518, 518-19, 180 S.E. 670, 672 (1935) (emphasis added) overruled on other grounds by *McCall v. Batson*, 285 S.C. 243, 329 S.E.2d 741 (1985) (abrogating sovereign immunity). Additionally, this Court has interpreted this duty to extend, not only to those streets, ways, and bridges owned and maintained by the municipality, but also to those under the control of the municipality. ² *Dolan*, 233 S.C. 1 at 4, 103 S.E.2d 328 at 330; [***9] *Terrell*, 176 S.C. at 519, 180 S.E. at 672.

FOOTNOTES

² Both parties concede that ^{HNS} under S.C. Code Ann. § 56-5-480, the definition of street includes the sidewalk.

[*444] The lower court found that Lyman did not owe a duty to Vaughan because Lyman did not own, maintain, or control the sidewalk where the incident occurred. The court based its conclusion on the affidavit of Robert Fogel and exhibits submitted by Lyman with its motion for summary judgment. The affidavit explains that Lawrence Street is owned by Spartanburg County and that the State Highway Department maintains the street. The exhibits include deeds showing the transfer of Lawrence Street to Spartanburg County, as well as photographs of the signs on Lawrence Street indicating its designation as part of the State Highway System.

In opposition to Lyman's motion, Vaughan relied on the deposition testimony of Robert Fogel, Lynda Hurteau, and Robert Phillips to show that Lyman exercised at least some control over Lawrence Street. [***10] Vaughan asserts that Lyman assumed general maintenance of the streets and sidewalks by removing trees and filling potholes. Vaughan also [***636] alleges that Lyman exercised control over the streets by fielding citizen complaints about the streets and sidewalks. Additionally, Vaughan asserts that the town minutes contain several references to affirmative actions by Lyman to correct the problems related to the town's sidewalks.

We find that there is a genuine issue of fact regarding whether Lyman exercised any control over the streets in the town, specifically Lawrence Street. Although the record contains evidence tending to show ownership belonging to Spartanburg County, that evidence is not dispositive in this case. Both Lyman and the lower court ignore the fact that ownership and maintenance of the sidewalk by another entity does not prevent Lyman from also maintaining or controlling the same sidewalk. See S.C. Code Ann. § 57-5-140 (2005)^{HN10} (stating that ownership of a highway by the state "shall not prevent a municipality from undertaking any improvements or performing any maintenance work on state highways in addition to what the department is able to undertake"). [***11] Therefore, when the evidence is viewed in a light most favorable to Vaughan, more than one inference may be drawn. Accordingly, we find that the lower court erred in granting summary judgment to Lyman regarding Lyman's common law duty to maintain the sidewalk on Lawrence Street.

[*445] Lyman contends that even if Lyman has a duty to maintain its streets, ways, and bridges in a safe condition, Lyman nonetheless has immunity under the South Carolina Tort Claims Act (Tort Claims Act).

^{HN11} The Tort Claims Act provides that "the State, an agency, a political subdivision, and a governmental entity are liable for their torts in the same manner and to the same extent as a private individual under like circumstances, subject to the limitations upon liability and damages, and exemptions from liability and damages contained herein." S.C. Code Ann. § 15-78-40 (2005). Balancing the interests of the state against the interests of a tort victim, the General Assembly, in S.C. Code Ann. § 15-78-60, provided thirty-one exceptions whereby the state was exempted from liability. There is only one exception to the waiver of immunity contained in the Tort Claims [***12] Act regarding street maintenance. The exception provides that a governmental entity is not liable for a loss resulting from:

absence, condition, or malfunction of any sign, signal, warning device, illumination device, guardrail, or median barrier unless the absence, condition, or malfunction is not corrected by the governmental entity responsible for its maintenance within a reasonable time after actual or constructive notice. Governmental entities are not liable for the removal or destruction of signs, signals, warning devices, guardrails, or median barriers by third parties except on failure of the political subdivision to correct them within a reasonable time after actual or constructive notice. Nothing in this item gives rise to liability arising from a failure of any governmental entity to initially place any of the above signs, signals, warning devices, guardrails, or median barriers when the failure is the result of a discretionary act of the governmental entity. The signs, signals, warning devices, guardrails, or median barriers referred to in this item are those used in connection with hazards normally connected with the use of public ways and do not apply to the duty [***13] to warn of special conditions such as excavations, dredging, or public way construction. Governmental entities are not liable for the design of highways and other public ways. Governmental entities are not liable for loss on public ways under construction when the entity is protected by an [*446] indemnity bond. ^{HN12} Governmental entities responsible for maintaining highways, roads, streets, causeways, bridges, or other public ways are not liable for loss arising out of a defect or a condition in, on, under, or overhanging a highway, road, street, causeway, bridge, or other public way caused by a third party unless the defect or condition is not corrected by the particular governmental entity responsible for the maintenance within a reasonable time after actual or constructive notice.

S.C. Code Ann. § 15-78-60(15) (2005) (emphasis added).

[***637] Lyman's reliance on this exception is misplaced. This exception does not place any limitation on a municipality's liability for failing to maintain the streets, ways and bridges within its control. Further, an essential phrase in the exception is "caused by a third party." Because the defect in the sidewalk was not caused [***14] by a third party, the exception provided by the Tort Claims Act does not apply here. However, even if the defect in the sidewalk was caused by a third party, Lyman ignores the final words of the exception which read, "unless the defect or condition is not corrected by the particular governmental entity responsible for the maintenance within a reasonable time after actual or constructive notice." Lyman's Mayor, Robert Fogel, testified to knowledge of the defect for at least ten years. Therefore, the exception to the waiver of immunity provided in § 15-78-60(15) does not provide immunity to Lyman in this case.

III. Voluntary Undertaking

Vaughan argues the trial court erred in finding that Lyman did not owe a duty to Vaughan based on Lyman's voluntary undertaking of the repair and maintenance of both Lawrence Street and other streets within the town. We agree.

^{HN13} While there is generally no duty to act under the common law, a duty to use due care may arise where an act is voluntarily undertaken. Russell v. City of Columbia, 305 S.C. 86, 89, 406 S.E.2d 338, 339 (1991). "The question of whether such a duty arises in a given case may depend on the existence of particular [***15] facts. Where there are factual issues regarding whether the defendant was in fact a volunteer, the existence of a duty becomes a mixed question of law and fact to be [***447] resolved by the fact finder." Miller, 329 S.C. at 314, 494 S.E.2d at 815. Additionally, "nothing prevents a municipality from undertaking any improvements or performing any maintenance work on state highways in addition to what the department is able to undertake. . . ." S.C. Code Ann. § 57-5-140 (2005).

Our court of appeals has addressed a similar issue in Bryant v. City of North Charleston, 304 S.C. 123, 403 S.E.2d 159 (1991). In that case, Bryant sued the city alleging she was injured when she fell into a hole on the sidewalk. The court affirmed the jury verdict in favor of Bryant finding that North Charleston owed her a duty because the city voluntarily undertook the maintenance of the area. Id. at 127, 403 S.E.2d at 161. The court based this holding on the fact that the city placed a barricade at the site of the accident, and additionally considered the testimony of the Superintendent of Public Works that he periodically inspected the [***16] streets and sidewalks, and that his office often managed the complaints about the sidewalks despite his claim that the streets were state maintained. Id. The court looked at all of the evidence in finding that the city assumed the duty of maintaining the street in a safe condition. Id.

In this case, the lower court found that there was no evidence that Lyman ever voluntarily undertook to repair, control, or maintain the sidewalk on Lawrence Street. This finding was primarily based on evidence of ownership of Lawrence Street by Spartanburg County and the State's authority over the street as a result of including it in the State Highway System.

Vaughan presented contrary evidence, including references to sidewalk maintenance in the town minutes and town ordinances regulating the sidewalks. Vaughan also presented deposition testimony showing that Lyman was aware of the hazardous condition of Lawrence Street for a substantial period of time without reporting the condition to any other authority, had previously handled complaints from town residents about the sidewalks, and removed hazardous tree roots disrupting the sidewalks.

We hold that this issue was inappropriately decided [***17] on summary judgment. There is a genuine issue of fact [***448] regarding whether Lyman undertook the duty of maintaining city streets, even though all city streets were not owned by Lyman. The lower court's reliance on factual allegations of ownership is not determinative of whether [***638] Lyman voluntarily undertook the duty to maintain the town's streets and sidewalks. Instead, ^{HN14}the factual issues regarding whether the defendant did in fact voluntarily undertake the maintenance of the town's sidewalks, including Lawrence Street, is a mixed question of law and fact which should be resolved by the fact finder. Additionally, the evidence is susceptible to more than one reasonable inference, and therefore should be submitted to the jury. Quesinberry v. Rouppasonq, 331 S.C. 589, 594, 503 S.E.2d 717, 720 (1998).

Accordingly, the lower court erred in granting Lyman summary judgment on the issue of whether Lyman voluntarily undertook the maintenance and control of the town's streets and sidewalks, including Lawrence Street.

IV. Record on Appeal

Vaughan argues the trial court erred in determining the materials to be included in the Record on Appeal. Because we reverse the lower court's [***18] grant of summary judgment and remand the case for trial, we decline to address this issue. See ION, LLC v. Town of Mount Pleasant, 338 S.C. 406, 423, 526 S.E.2d 716, 725 (2000) (holding that ^{HN15}the court need not address additional issues if it is not necessary to the resolution of the case).

CONCLUSION

For the foregoing reasons, the lower court did not err in granting summary judgment to Lyman regarding statutory duty. However, the lower court erred in granting summary judgment to Lyman on the issue of common law duty because there is a genuine issue of fact regarding whether Lyman exercised control over the Lawrence Street sidewalk. Additionally, the lower court erred in granting Lyman summary judgment on the issue of voluntary undertaking because there is a genuine issue of material fact concerning whether Lyman [***449] voluntarily undertook to maintain the streets within its jurisdiction. Accordingly, we affirm in part, reverse in part, and remand for further proceedings.

MOORE, WALLER and BURNETT, JJ., concur. PLEICONES, J., concurring in a separate opinion.

CONCUR BY: PLEICONES

CONCUR

JUSTICE PLEICONES: The circuit court granted the Town of Lyman summary [***19] judgment in this action brought by Appellant Vaughan in which she alleged the town negligently maintained a sidewalk located within the municipality's boundaries. As explained below, I concur in the majority's decision to reverse and remand, but write separately to explain how I reach this conclusion.

"A plaintiff alleging negligence on the part of a governmental actor or entity may rely either upon a duty created by statute or one founded on the common law." Arthurs v. Aiken County, 346 S.C. 97, 103, 551 S.E.2d 579, 582 (2001). As explained below, I would find only a common law duty.

In 1892 the General Assembly passed an act titled "An act providing for a right of action against a municipal corporation for damage sustained by reason of defects in the repair of streets, sidewalks and bridges within the limits of said municipal corporation." 21 St. at Large 91 (1892 Act. No. 40). This act, effectively waived municipal sovereign immunity.³

FOOTNOTES

³ See Reeves v. City of Easley, 167 S.C. 231, 166 S.E. 120 (1932); see also Jackson v. City of Columbia, 174 S.C. 208, 177 S.E. 158 (1934).

[***20] Although the Court never undertook to specifically define the common law duty owed by a town to travelers on its sidewalks, it cited with approval to this statement:

The general rule in this country is that municipalities which have full and complete control over the streets and highways within their corporate limits are liable in damages for injuries sustained in consequence of their failure to use reasonable care to keep them in a reasonably safe condition for public travel. 13 R. C. L. 310.

[***450] [***639] Heath v. Town of Darlington, 175 S.C. 27, 29, 177 S.E. 894 (1934).

The Heath Court was careful to note that, "of course, the statute law of each state controls the matter," thereby emphasizing that municipal liability for sidewalk defects was governed by the waiver statute.

This waiver statute was recodified several times, last appearing as S.C. Code Ann. § 57-5-1810 (1976). Section 57-5-1810 was repealed by the 1986 Act⁴ which created the South Carolina Tort Claims Act. S.C. Code Ann. §§ 15-78-10 *et seq.* (2005 and Supp. 2005). The Tort Claims Act (TCA) does not create liability but rather removes the bar of sovereign [***21] immunity to the extent permitted by the Act. Arthurs v. Aiken County, *supra*.

FOOTNOTES

4 1986 Act No. 463.

Heath acknowledged a municipal common law duty, breach of which gave rise to liability only by virtue of the waiver status. In my opinion, the enactment of the TCA and the concomitant repeal of the waiver statute effectively restored liability for a municipality's breach of its duty to use reasonable care to keep streets and highways within its corporate limits, over which it has full and complete control, in a reasonably safe condition for public travel. I therefore agree with the majority to the extent it holds that summary judgment was improperly granted to Lyman on the common law duty theory as there are genuine issues of material fact whether Lyman exercised a sufficient degree of control over the Lawrence Street sidewalk to give rise to this common law duty. If such a duty is found, then the circuit court must consider Lyman's TCA defenses.

In addition, the majority holds that summary judgment is inappropriate because there is some evidence that Lyman voluntarily undertook to repair and maintain streets and sidewalks within the town's municipal boundaries, and was aware that the Lawrence Street sidewalk was in disrepair. I agree with the trial court that there is simply no evidence in this record that the town had ever undertaken any repairs or maintenance of the Lawrence Street sidewalk. There is, however, some evidence that town employees repaired a sidewalk [*451] on Groce Street using materials supplied by the Department of Transportation. Assuming the town volunteered to undertake repairs on Groce Street, this one time act did not impose upon Lyman an obligation to volunteer to fix other sidewalks and streets. Rather, the decision to volunteer merely obligated the town to use due care in performing the Groce Street repairs. *Miller v. Town of Camden*, 329 S.C. 310, 494 S.E.2d 813 (1997); see also *Bryant v. City of North Charleston*, 304 S.C. 123, 403 S.E.2d 159 (Ct. App. 1991) ("and the evidence that the City placed the barricade at the site of the accident, is evidence that the City assumed the duty to maintain the sidewalk in question"). [*23] I would therefore affirm the grant of summary judgment to Lyman on the voluntary undertaking theory.

I would reverse the circuit court order granting Lyman summary judgment because I would find that there is a material question of fact whether Lyman breached a common law duty to Vaughan. In light of this disposition, I find it unnecessary to address Vaughan's contention that the appellate record was wrongly settled. Since this issue is raised by the appellant as a ground for reversal, and not by the respondent as an additional ground upon which the circuit court can be affirmed, *I'On LLC v. Town of Mt. Pleasant*, 338 S.C. 406, 526 S.E.2d 716 (2000), is inapposite. Accordingly, while I agree with the majority's conclusion that it is unnecessary to address this appellate issue, I base my decision on the general proposition that an appellate court need not address issues not necessary to its decision. E.g., *Futch v. McAllister Towing of Georgetown, Inc.*, 335 S.C. 598, 518 S.E.2d 591 (1999).

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STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
) FOURTH JUDICIAL CIRCUIT
COUNTY OF DARLINGTON) CIVIL ACTION NO. 09-CP-16-0514

Alberta Major,)
) Plaintiff,)
))
) -vs-) DEPOSITION OF:
))
City of Hartsville,) OFFICER MICHAEL SANCHEZ
))
) Defendant.)
))

Deposition of OFFICER MICHAEL SANCHEZ taken
before Laura W. Little, Verbatim Reporter and Notary Public
in and for the State of South Carolina, at the Hartsville
Town Hall, 133 West Carolina Avenue, 2nd Floor Conference
Room, Hartsville, South Carolina, commencing at 10:05 a.m.
on the 7th day of April, 2010.

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In Attendance:

Alberta Major
Sherron Skipper

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Court Reporter's Note:			
— Indicates Interruption; Indicates Incomplete Phrases or Sentences.			
		1 there's any questions that I ask that you don't	
		2 understand or you don't quite gather what I'm	
		3 trying to ask or I run on and go on and on and on	
		4 and you don't really understand what I'm, what I'm	
		5 asking, please direct those at me. I will be happy	
		6 to clarify. I don't want you answering any	
		7 questions you don't understand.	
		8 A. Right.	
		9 Q. Because it's important, if your testimony is going	
		10 to be taken that it's important that you understand	
		11 all of the questions. I'm not -- again, I'm not	
		12 here to trick you. I just want to know what	
		13 happened.	
		14 A. Sure.	
		15 Q. You're a witness in this matter and that you saw	
		16 the hole, you saw Ms. Major, and that's why we're	
		17 taking your testimony. Your attorney may object or	
		18 the attorney for the City may object during the	
		19 course of the deposition, but you still need to	
		20 answer the question unless he tells you not to	
		21 answer. Is that fair enough?	
		22 A. That's fine.	
		23 Q. Okay. You stated your name. Who is your current	
		24 employer, Officer Sanchez?	
		25 A. Hartsville Police Department.	
STIPULATIONS		Page 3	Page 6
Prior to the giving of any testimony by the witness, it was expressly stipulated and agreed between the parties to this action, through their respective counsel, that:		1 Q. How long have you been employed by the Hartsville	
By Notice and/or Consent, said deposition is being taken in accordance with Section 42-3-160, Code of Laws of South Carolina 1976, and Rule 30 of the South Carolina Rules of Civil Procedure, which shall control the taking of said deposition and its use thereof;		2 Police Department?	
Said deposition shall be taken for the purpose of discovery and/or for use as evidence in the above entitled action, or for both purposes;		3 A. Three-and-a-half years.	
That all objections would be reserved until the time of the hearing except as to the form of the question;		4 Q. And what did you do before that?	
Reading and signing of the transcript of testimony by the witness was waived.		5 A. I was with the Army National Guard.	
		6 Q. And what sort of work did you do with the National	
		7 Guard?	
		8 A. I was with military intelligence, aiding in border	
		9 interdiction.	
		10 Q. Were you deployed?	
		11 A. Yes, partially.	
		12 Q. And where were you deployed?	
		13 A. North -- northern border on Washington near the	
		14 Canadian border.	
		15 Q. Okay.	
		16 A. And also on the southern border in Arizona.	
		17 Q. Okay.	
		18 MR. WOODS: That was deployed.	
		19 MR. MILLER: That's my kind of deployment.	
		20 Q. Okay. How long were you with the National Guard?	
		21 A. Six years.	
		22 Q. Okay. And how old are you?	
		23 A. How old? 27.	
		24 Q. 27. Okay. So that puts us it looks like to high	
		25 school maybe?	
OFFICER MICHAEL SANCHEZ,		Page 4	Page 7
after being first duly sworn to tell the truth, was deposed and testified as follows:		1 A. Right, seventeen is when I started.	
DIRECT EXAMINATION BY MR. MILLER:		2 Q. Okay. And then where -- where did you go to high	
Q. Officer Sanchez, my name is Michael Miller. I represent Alberta Major in this lawsuit she has filed against the City of Hartsville for injuries she sustained in a fall that occurred in December of 2008. Before we get started, have you ever had your deposition taken before?		3 school?	
A. No, sir.		4 A. Stratford High School in Goose Creek, South	
Q. Okay. Well, there are a few ground rules that apply to all depositions I would like to go over before we get going. First of all, Ms. Little here is going to make a transcript of this, of this deposition, and there are certain things that don't translate well to paper.		5 Carolina.	
A. Right.		6 Q. I assume Goose Creek, that area is where you're	
Q. So it's important that you answer all questions, you know, verbally, clearly so that she understands them but especially it's important for yes or no questions that you answer with the word yes or no as opposed to simply a head nod or uh-huh, --		7 from?	
A. Right.		8 A. Uh-huh.	
Q. -- 'cause obviously that doesn't translate. If		9 Q. Do you have any family in -- well, are you -- first	
		10 of all, are you married?	
		11 A. Yes, sir.	
		12 Q. And what's your wife's name?	
		13 A. Mary.	
		14 Q. Mary Sanchez?	
		15 A. Yes, sir.	
		16 Q. Do y'all have any kids?	
		17 A. None between us. She's got some from her previous	
		18 marriage.	
		19 Q. Okay. Are any of those over eighteen?	
		20 A. No.	
		21 Q. Besides your wife, do you have any other family in	
		22 Darlington County?	
		23 A. No.	
		24 Q. Okay. What is your position at the Hartsville	
		25 Police Department?	

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1 A. I'm a corporal.
2 Q. Okay. How many officers are there with the, with
3 the force?
4 A. I think it's approximately forty or so, give or
5 take.
6 Q. Forty. That's a pretty good size. Forgive me for
7 my ignorance, where is corporal on the hierarchy?
8 A. It would be just below sergeant, above patrolman.
9 Q. Okay.
10 A. It's a kind of like a mid-level management on the
11 patrol level.
12 Q. Okay.
13 A. Basically, it's a supervisory role right under
14 sergeant.
15 Q. Okay. So there's -- there's people below you?
16 A. Right.
17 Q. While you're on patrol?
18 A. Yes.
19 Q. Okay. Who is your supervisor?
20 A. It's Sergeant Tenyonde Richardson.
21 Q. Can you spell Tenyonde?
22 A. T-E-N-Y-O-N-D-E.
23 Q. I was never going to get that.
24 A. No, very few people do. We just call him T.
25 Q. Yeah, I don't blame you. Okay. Out of curiosity,

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1 what would be above sergeant?
2 A. Lieutenant.
3 Q. Okay. What are your day to day activities like
4 with the police department?
5 A. Well, we answer calls, regulate traffic by doing
6 enforcement with traffic. During days, we monitor
7 school zones and help with crossing guards and
8 generally try to enforce any, any crimes or
9 anything, look for drug activity and any serious
10 crimes of that nature.
11 Q. Okay. And do you have set hours that you work or
12 is it kind of like an on-call, you know, how does
13 that work?
14 A. Yes, we work twelve hours a day on a schedule of
15 two off, two on, three off, two on, and so on.
16 Q. Okay. So y'all work two days for twelve hours, and
17 then you'll have two days off?
18 A. Right.
19 Q. And then -- okay.
20 MR. MILLER: I think that is my client coming
21 up.
22 (REPORTER'S NOTE: Ms. Major enters room.)
23 Q. All right. Okay. And do you have a partner that
24 is in your car with you?
25 A. No, sir.

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1 Q. Okay. Now, we're here today for an incident that
2 occurred, as I said, let me get the exact date,
3 December 1st, 2008. What is your recollection of
4 this situation, what happened?
5 A. Do you want a total summary or?
6 Q. Not, not -- only a summary of what you observed,
7 only as far as your involvement was concerned.
8 A. Well, on that date, it was late in the afternoon
9 about probably 5:00 or 6:00 o'clock in the
10 afternoon. I was called to a complaint at that
11 corner of Coker and Carolina --
12 Q. Yeah.
13 A. -- reference to an injury that had occurred at that
14 corner.
15 Q. Yeah.
16 A. I spoke with Ms. Major in reference to the injuries
17 sustained and she indicated that it had taken
18 place, I believe it was three days prior to the
19 date I was actually called out there and had
20 indicated that she had hurt herself while trying to
21 cross a street at what she indicated was a hole on
22 the corner. I had her point to me this, this
23 location and basically just gathered the basic
24 layout of what, where -- where she was, where she
25 crossed, where the actual incident had taken place

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1 and what time it took place and documented as such.
2 Q. Okay. And I see you prepared a report?
3 A. Right.
4 Q. Which I have a copy here?
5 A. Uh-huh.
6 MR. MILLER: Let's go ahead and mark that. It
7 is being marked as Plaintiff's Exhibit 1.
8 INCIDENT REPORT, CONSISTING OF FOUR (4) PAGES,
9 MARKED FOR IDENTIFICATION AS PLAINTIFF'S EXHIBIT
10 NUMBER ONE(1).
11 MR. MILLER: And, Bill, this is the same
12 report. I don't have a -- I just had them make me
13 one copy.
14 MR. WOODS: I got it. I got a copy.
15 MR. MILLER: You've got this?
16 MR. WOODS: Thank you.
17 MR. MILLER: Okay. Good.
18 Q. If you would look at that, does that look -- do you
19 recognize this document, sir?
20 A. Yes, sir.
21 Q. And what is it?
22 A. This is a standard Incident Report done by
23 Hartsville Police Department.
24 Q. Okay. And was this prepared by you?
25 A. Yes, sir.

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1 Q. Did you actually type this on there or did you get
2 somebody else to type it?
3 A. Yes, I did physically type this.
4 Q. Okay. And it appears as you said that this was a
5 few days after the actual alleged incident?
6 A. Right. It was reported to me on the 4th and she
7 indicated it happened on the 1st.
8 Q. What time of day were you dispatched?
9 A. According to this report, it says dispatched at
10 16:46, 4:30ish or 4:46 rather, and so I would have
11 -- and I would have arrived at 17:03.
12 Q. Okay. Which is about 5:00 o'clock?
13 A. Right.
14 Q. Do you recall if it was still light out at that
15 time?
16 A. It was starting to fade. It was right at that
17 twilight hour where it's -- of course, it's winter,
18 so the hours are a little different.
19 Q. Yeah.
20 A. So it was starting to get dark.
21 Q. Could you still see the area okay?
22 A. Yeah, I could still see the terrain features and
23 all that.
24 Q. Is there a street light on that corner?
25 A. I, I can't recollect if there is.

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1 Q. Okay. That's fine. That's fine. Do you know why
2 there was a delay in contacting the police
3 department about this matter?
4 A. I do not know why at all.
5 Q. She never explained that to you?
6 A. The only thing that -- when I asked why there was a
7 delay was that somebody could be held accountable
8 was what I was basically told.
9 Q. Had she informed you that she had been in contact
10 with Coker College officials, --
11 A. Yes.
12 Q. -- security officials? Okay. What's your
13 recollection of their handling of this matter?
14 A. I don't know how they handled it at all.
15 Q. Okay.
16 A. Other than they referred it to us.
17 Q. Okay. So you knew that they had been apprised of
18 this before y'all?
19 A. I was informed by Ms. Major that they were -- that
20 she had already spoken to them and that they
21 referred her to us at that time.
22 Q. They had told her to contact the police department?
23 A. Right.
24 Q. Okay. To your understanding, does that in part
25 explain the delay in contacting y'all?

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1 A. That explained at least the delay within the hour
2 and from what I understand, she had just spoken to
3 them, so that didn't really explain why there was a
4 three day delay.
5 Q. Okay. Do you know where Ms. Major lives?
6 A. According to the address she gave me on scene was
7 1219 Waverly Avenue.
8 Q. It says here Hartsville with a question mark. What
9 is the nature of that question mark?
10 A. I'm not sure.
11 MS. MAJOR: I may have done that questioning--
12 MR. MILLER: You can't talk.
13 MR. WOODS: Yeah, I don't have a question mark
14 on my copy.
15 MR. MILLER: Okay.
16 MR. WOODS: And so I don't think that --
17 MR. MILLER: Okay.
18 MR. WOODS: And I got this from my client, so
19 I think that --
20 MR. MILLER: Okay. All right.
21 MR. WOODS: -- if it's got a question mark,
22 that's something that --
23 MR. MILLER: It looks like something --
24 MR. WOODS: -- someone has written on.
25 MR. MILLER: It looks like it was something

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1 that an alteration that was made to it.
2 MR. WOODS: Yeah.
3 Q. Okay.
4 A. I, I think all this script as far as I -- as far as
5 our standard reporting, there is no script on it.
6 Q. Okay.
7 MR. MILLER: Well, how about -- how about for
8 purpose -- can he look at your copy for purposes of
9 this deposition?
10 MR. WOODS: Yeah. Yeah, that was just going
11 to --
12 MR. MILLER: I don't -- I don't want him to
13 look at an altered copy.
14 MR. WOODS: Let me borrow this one and maybe
15 what we need to do -- I didn't look at this until
16 you told me. Yeah, I see we got some, some other
17 writing on it.
18 MR. MILLER: Yeah.
19 MR. WOODS: I'd like to --
20 MR. MILLER: Well, let's have this be --
21 MR. WOODS: Let's make another copy of this
22 one, the original real one without the writing and
23 substitute it --
24 MR. MILLER: I'd prefer that, as well.
25 MR. WOODS: -- as Plaintiff's No. 1.

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1 MR. MILLER: Yeah. And this, this was a copy
2 that was provided to me not from the original
3 source, and so there does appear to be some, some
4 alterations made to it.
5 Q. But let's reference the original from here on out.
6 A. All right.
7 Q. And I apologize for referencing those question
8 marks. Did my client inform you that she was a
9 resident of Florence?
10 A. Yes, she did.
11 Q. Okay. Did she tell you how often she comes to
12 Hartsville?
13 A. I believe at the time she had told me she comes at
14 least twice a week for class.
15 Q. Okay. Do you know where she attends class?
16 A. Generally, at Coker College is what I understood.
17 Q. Okay. And it says here that she informed you that
18 she was walking on the -- walking to the corner and
19 it says that she told you she stepped in a deep
20 hole in the grass?
21 A. That's correct.
22 Q. Is that correct?
23 A. Uh-huh.
24 Q. And she states she was injured as a result of that?
25 A. That's correct.

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1 Q. Okay. It also indicates that you observed the
2 hole?
3 A. Yes, I did. I observed it.
4 Q. What is your recollection based on your memory of
5 observing that situation as well as any refreshment
6 that this provides of the setting there at that
7 corner in terms of the distance of the hole or the
8 depression, anything of that nature?
9 A. You want a description of it, is that --
10 Q. Yeah, I just -- you know, there is a little bit of
11 confusion of what actually was there, and so just
12 another set of eyes that actually saw it, I would
13 just like to have your thoughts.
14 A. On that corner, and I think I state in the report,
15 it was about a foot away from that pole and --
16 Q. Okay. A power -- excuse me, a power pole?
17 A. Right, a power pole. And there was a sidewalk and
18 it was about a foot away from that sidewalk and it
19 appeared to be some kind of a relief, a concave
20 depression in the road or in the, in the dirt there
21 with grass growing in it and very sparse leaf
22 coverage around it.
23 Q. Okay.
24 A. And, I mean, that is the best way I could describe
25 it, as almost like a concave shape, a little bit of

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1 depression in that corner.
2 Q. Okay. Was it -- what was the shape of the -- and
3 again, I'm trying to think of a good word to use
4 for it. Let's -- let's call it a depression, would
5 that be -- is that fair?
6 A. That would -- that would be fair to call it that.
7 Q. I, I don't want to make any allegations by
8 referring to it as a hole, but let's call it a
9 depression. What was the general shape of the
10 depression?
11 A. I believe it would almost -- and I'm trying to
12 really describe it correctly, but it would almost
13 be about maybe eight to twelve inches long.
14 Q. Okay.
15 A. Maybe six inches wide.
16 Q. Okay.
17 A. And it was concave in shape. It was maybe an inch,
18 inch-and-a-half in depth.
19 Q. Well, if you were to -- if you were to draw the
20 hole looking from the top down or I'm sorry, the
21 depression, would it be more ovalular or would it
22 be circular?
23 A. A little -- almost oval-like.
24 Q. Yeah.
25 A. Kind of -- yeah, about an oval.

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1 Q. Kind of a fat oval?
2 A. A fat oval, yeah.
3 Q. Okay. Now, I'm going to really test the limits of
4 your memory on this one. And you say -- so when
5 you describe it as more of an oval than a circle,
6 that implies that there were two ends that were
7 slightly more narrow than the rest of it?
8 A. In essence, yeah.
9 Q. That's how -- I guess how you would describe an
10 oval?
11 A. Uh-huh.
12 Q. You know, there's two narrow ends and then, I
13 guess, two more broad ends?
14 A. Right.
15 Q. Do you recall -- and you say that's your
16 recollection of the shape of the --
17 A. Uh-huh.
18 Q. -- of the depression? Do you recall where on the
19 corner -- well, do you recall the situation of the,
20 of the depression at the corner with regard to
21 those two narrow ends?
22 A. As far as what direction it was facing?
23 Q. That's exactly right. If you were to draw a line
24 from one narrow end to the other, what, what would
25 they -- what would that line be pointing to?

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1 A. It would almost indicate that it was pointing
2 almost at maybe a thirty degree angle if you were
3 to address it off of -- I'm trying to give you a
4 good bearing. You've got the corner that, that
5 forms a ninety degree angle.
6 Q. Okay.
7 A. It would almost cut that at a, at about a thirty.
8 Q. Okay. All right. So what you're telling me,
9 though, is it sounds like one narrow end would be
10 facing Coker?
11 A. One narrow end would be almost facing east,
12 northeast.
13 Q. Okay.
14 A. And the other one facing south, almost southwest.
15 Q. Okay. Okay. Good. That's what I was looking for.
16 Do you have any knowledge of how the hole was
17 created or the -- I'm sorry, I keep using the wrong
18 word, the depression was created?
19 A. Do I have knowledge of how it was created?
20 Q. Yes.
21 A. No.
22 Q. You indicated on your report that, and it says,
23 "Appeared to possibly be the former location of an
24 old power pole." Is that, is that an accurate
25 reading of your report?

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1 A. Yes, that is accurately what's on the report.
2 Q. What, what led you to come to that conclusion?
3 A. Part of that was what, what the Complainant had
4 actually told me. She had alleged that it possibly
5 it could have been where they had moved a pole of
6 some sort or a sign.
7 Q. Okay.
8 A. And looking at it, I thought well that could
9 possibly have been where a pole had been many years
10 ago and had been filled in and the dirt had finally
11 settled in and caused a depression. Just based to
12 it's proximity to another pole.
13 Q. Uh-huh.
14 A. At that time, that was based on what I could figure
15 out as far as a possible reason for why it exists.
16 Q. Were you -- do you have any knowledge of a pole
17 being relocated or moved at that corner?
18 A. No, not within the time frame I was working there.
19 Q. Okay. All right. So if there was a power pole
20 that was moved either, one, you didn't know about
21 it or, two, it was before you started working?
22 A. Yes, that's correct.
23 Q. Okay. Do you have any other thoughts on how the
24 hole -- how the depression was created?
25 A. Other than traffic, that's the only thing I could

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1 think of.
2 Q. Explain traffic, what you mean by that?
3 A. Vehicles often cross over sidewalks and corners and
4 we find this happening throughout the City a lot
5 where people cut corners and it could have been
6 something generated from just constant wear and
7 tear. I know I've observed many a vehicle travel
8 through a corner like that and go over it. That
9 could be a possibility.
10 Q. So you're saying a vehicle when they're turning
11 that corner, they drove up on the grass?
12 A. Yes.
13 Q. Possibly?
14 A. Uh-huh.
15 Q. Have you observed a vehicle do that at that corner?
16 A. Yes.
17 Q. You have?
18 A. Uh-huh.
19 Q. Have you observed other consequences of that
20 behavior with regard to that corner, meaning have
21 you seen other depressions be created, have you
22 seen ruts in the grass, have you seen anything else
23 that has been -- any damage that's been caused to
24 that corner? It's my understanding now it's been
25 paved?

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1 A. Right.
2 Q. But before it was paved?
3 A. I've never seen anything conclusive that would
4 caused any, any danger and certainly nothing that's
5 called my attention.
6 Q. Okay. How often in the course of your work day
7 would you observe that corner?
8 A. On a normal work day, dozens of times.
9 Q. Okay.
10 A. I drive through that section constantly, especially
11 in the morning and afternoon sessions around when
12 school gets out.
13 Q. Okay.
14 A. And I've been working -- I worked that specific
15 section for two years straight.
16 Q. Okay. Now, when you're saying you're, you're
17 observing that corner, what kind of things are you
18 looking out for? You mentioned earlier, you know,
19 drug activity and that sort of thing. What other
20 types of things are you, are you watching out for?
21 A. Well, especially in that area, I've actually sat
22 near that corner to actually watch people run that
23 stop sign, so I know I've watched for traffic
24 violations there.
25 Q. Okay. Okay. And I guess what I'm getting at is it

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1 sounds like you do more observing human behavior
2 than you do --
3 A. Right.
4 Q. -- and correct me if I'm wrong, than you do
5 observing terrain?
6 A. Yes. That, that would be accurate.
7 Q. Because if you're looking at the ground the whole
8 time, you're not watching the people?
9 A. Well, in a stop sign violation, you would have to
10 watch that leading edge of that roadway to be able
11 to determine whether they actually ran that stop
12 sign or not. You have to determine whether they
13 actually crossed the point of where the stop sign
14 is --
15 Q. Yeah.
16 A. -- prior to stopping, so I would have -- in some
17 cases you have to use some terrain to mark a
18 location but sometimes you don't. It just depends
19 on what kind of case you're working.
20 Q. But in that context, you're still looking at a
21 marking on the road?
22 A. Generally, yes.
23 Q. Okay. You'd mentioned school crossings. Now,
24 based on the impression from my client, it sounds
25 like that's a common crossway for Coker College

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1 students, is that what you were referring to or
2 were referring to a younger age?
3 A. There's other school crossings, but I've, I've long
4 policed that section due to the nature of Coker
5 College kids going across --
6 Q. Okay.
7 A. -- and there being -- it being a 25 mile per hour
8 zone and people do not have any regard for that
9 speed limit.
10 Q. So speeding is a problem?
11 A. Speeding is a huge problem right there.
12 Q. Okay. On Carolina?
13 A. On Carolina.
14 Q. Yeah. Heading into town or heading out of town?
15 A. Both.
16 Q. If you were to -- if I was to take a right out of
17 here onto Carolina, you know, and head that
18 direction, --
19 A. Okay.
20 Q. -- you know, towards Coker, where does that
21 ultimately take me?
22 A. That will take you past 5th Street on past 4th.
23 You will pass the intersection in question. You
24 will then pass 2nd Street, 1st Street, the railroad
25 tracks and beyond.

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1 Q. And what's -- I mean, ultimately, if I took it,
2 where would it go, to Darlington?
3 A. Essentially it would. It would go in the direction
4 of Darlington depending on which roads you take
5 from there.
6 Q. Okay.
7 A. But it is going east so it would eventually butt
8 into Darlington side at some point in time, 52 or
9 one of the other highways.
10 Q. Okay. When you observed my client on this day, the
11 December 4th, 2008, what sort of condition did she
12 seem to be in?
13 A. Other than favoring the indicated injured leg, I, I
14 didn't see any other health concerns.
15 Q. But she did appear to have an injured leg?
16 A. From what she could tell me, it, it seemed to be
17 injured, especially if she was favoring it.
18 Q. Did you observe her walking with a slight limp of
19 any sort?
20 A. Right, and that's basically what I'm -- and when I
21 say favor, she was limping on that leg in essence.
22 Q. Okay. But so you observed that, not just she told
23 you about it?
24 A. Right.
25 Q. Okay. Now, what was your ultimate recommendation

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1 to Ms. Major with regard to this matter?
2 A. I advised her that she needed to speak to the
3 Magistrate since it was basically a civil case and
4 in our procedure, we deal with criminal charges and
5 this wouldn't be of criminal nature, it would be a
6 civil matter, so I indicated to her she needed to
7 seek basically the local magistrate and see about
8 filing charges if she sought to receive any kind of
9 remedies to the situation.
10 Q. Okay. It says at the very top, "Incident Type:
11 Personal Injury on Private Property." Is it -- was
12 it your understanding at the time this is private
13 property?
14 A. At the time I, I was under the impression that this
15 was still part of Coker College's parking lot.
16 Q. Okay.
17 A. I was -- I really couldn't determine at the time.
18 Q. Okay. Do you still police that corner?
19 A. Yes.
20 Q. And it's my understanding now that they have paved
21 over that corner?
22 A. Yes, they have.
23 Q. Such as there is no grass? Is there -- is it a
24 still a problem with folks driving up on that
25 corner?

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1 A. I, I haven't seen anybody lately. Of course, I
2 don't work traffic as in-depth as I did back then.
3 Q. Okay. And that's as a result of your promotion?
4 A. Yes.
5 Q. Okay.
6 A. It's a supervisory position, so I work on different
7 things and work a broader area at this point.
8 Q. Okay.
9 A. But, it's my understanding that it still occurs.
10 Q. Okay. To your knowledge, has anybody else been
11 injured at that corner as a result of any sort of
12 fall?
13 A. Never, never been reported to anybody that I know
14 of.
15 Q. What about any other similar situation of somebody
16 stepping in a hole?
17 A. On that corner?
18 Q. Well, at any corner in downtown?
19 A. No, I have never been reported any kind of injury
20 at a, at a corner like that.
21 Q. Okay. Did you contact anyone about the depression
22 in terms of having it filled in or anything like
23 that after this?
24 A. No, I did not.
25 Q. Okay. Do you know if it was filled in?

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1 A. From what I understand, it was.
2 Q. Do you know who did that?
3 A. No clue.
4 Q. Just out of curiosity why -- if my client came to
5 you alleging that she stepped in this depression
6 and injured herself, why didn't you feel the need
7 to insure that that condition was, was made safer?
8 A. Normally, what we do is we report it. Our patrol
9 lieutenant reviews these claims, and I was also --
10 I had also already informed my chain-of-command.
11 That's the normal procedure we would go with a
12 situation like that.
13 Q. Uh-huh.
14 A. Since we have no way of actually fixing the problem
15 ourselves right at that moment, --
16 Q. Yeah.
17 A. -- we would normally just report it so that
18 somebody can come and do it the next day or
19 whenever.
20 Q. If someone was to be directed to correct the
21 situation, would that have been you or would that
22 be somebody else at the police department?
23 A. To correct the situation?
24 Q. Yeah. Say fill in the depression?
25 A. That would have not been anybody at the police

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1 department. It's not our job to fill in holes or
2 depressions --
3 Q. Well, I guess what I'm saying is --
4 A. -- or anything.
5 Q. Well, who would -- who would do that?
6 A. I believe that there's city maintenance crews that
7 actually handle all that.
8 Q. Who would have been the one to contact city
9 maintenance about that; would it have been you or
10 would it have been somebody else at the police
11 department?
12 A. I believe that would have been handled by, by our
13 staff.
14 Q. Okay. I'm just trying to get an idea. You said
15 that you submitted this report and it was handed to
16 your superiors and then at that point, it's, it's
17 their decision to pursue this matter or what to do
18 with it?
19 A. Right.
20 Q. And I'm just trying to figure out if it was -- if
21 it should have been your responsibility to call the
22 maintenance folks or if it was their -- it was
23 their call, your superiors' call to do that?
24 A. If it would have presented an immediate threat
25 causing tons of people to be injured and so on, we

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1 would have definitely blocked it all off and we
2 would have done something right then, but
3 considering that at the time what I observed didn't
4 perceive an immediate threat to anybody, we didn't
5 do any mass mobilization of any, any assets. We
6 notified as procedure would imply and we would have
7 waited for them to do something about it which
8 typically would have happened the next day and
9 especially at the end of the day when nobody is
10 actually on call to handle that --
11 Q. Yeah.
12 A. -- unless it was a massive emergency like a sink
13 hole in the middle of the road --
14 Q. Yeah.
15 A. -- or something.
16 Q. Did you make any efforts to mark the area or
17 highlight it or, you know, put a cone there so
18 nobody didn't -- somebody else didn't come and step
19 in it or anything like that?
20 A. No, I didn't have anything to my disposal to do
21 that at the time.
22 Q. Okay. Is that a heavily used crosswalk?
23 A. It's -- a lot of the kids use the actual middle of
24 the road, they don't even use the crosswalk.
25 Q. Yeah.

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1 A. So, it's -- when I, when I see people crossing,
2 they probably cross all day in varied individual
3 groups, one or two an hour.
4 Q. Okay. But it's being used?
5 A. It's being used.
6 Q. And yet, you still didn't feel a need to highlight
7 that particular area?
8 A. Not, not at 6:00 o'clock at night.
9 Q. But it wasn't done the next day either to your
10 knowledge?
11 A. I wouldn't know what was done the next day.
12 Q. Okay. And you said you didn't know when it was
13 filled in?
14 A. No.
15 Q. Did my client advise you approximately what time of
16 day this incident occurred on December 1st?
17 A. Yes, she advised it happened about the same time
18 she reported it about between 4:30 and about 7:00
19 o'clock when she normally attends class.
20 Q. Excuse me for a second, let me speak to my client.
21 A. Okay.
22 (OFF-THE-RECORD BREAK)
23 DIRECT EXAMINATION BY MR. MILLER CONTINUES:
24 Q. Officer Sanchez, a couple of more questions about
25 this, this depression. You indicated to me that

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1 you thought it was about two inches deep?
2 A. About so, maybe.
3 MR. WOODS: Object.
4 Q. Can you repeat that, I'm sorry?
5 A. About so.
6 Q. Well, why in your report did you describe it as a
7 deep hole?
8 A. That is -- I was referring as to the way she
9 described it to me.
10 Q. But it -- but you saw it?
11 A. Right.
12 Q. So if she's describing it one way but you observed
13 it a different way, you would write it down the way
14 it was described to you?
15 A. Right. I wanted to capture the exact way she, she
16 was -- what she was telling me at the time.
17 Q. Do you agree with the characterization of it as a
18 deep hole?
19 A. No, I do not.
20 Q. Did you or do you presently dispute that my client
21 was injured at that hole?
22 A. I don't dispute she was injured, I dispute that it
23 was a hole.
24 Q. What do you mean by that?
25 A. I, I don't think that it was quite the

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1 classification that it was made out to be.
2 Injuries may have been sustained. To what degree,
3 I cannot -- that's not my field of expertise.
4 Q. Okay. So you don't dispute that she potentially
5 stepped in it and injured herself?
6 A. Yeah, there is always the possibility for injury in
7 any case.
8 Q. Okay. Well, what about in this case?
9 A. In this case, yes.
10 Q. You don't dispute that?
11 A. I, I don't dispute that any injury could have
12 occurred.
13 Q. Well, that's -- I'm not saying could have. I'm
14 saying do you dispute that it did occur?
15 A. Do I -- I don't think I understand the question.
16 Q. All right. Fair enough. Do you dispute that my
17 client stepped in that hole and injured herself?
18 A. I'm trying to understand what -- do I dispute that
19 she stepped in the hole and injured herself is
20 exactly what you wanted as a whole?
21 Q. Yeah. Regardless of our disagreements about the
22 characterization of the hole or the depression?
23 A. Right.
24 Q. She told you she stepped in a hole and injured
25 herself and do you dispute that?

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1 A. Based on my opinion or based on what she told me?
2 Q. Based on your observations, based on your expertise
3 as a police officer, based on your experience
4 dealing with complainants?
5 A. Based on what I observed and what she told me, I
6 don't believe that an injury could have occurred
7 from that hole.
8 Q. And why is that?
9 A. Because it wasn't a hole, it was more of a
10 depression. The average -- the average person
11 walking through such a hole, depression or hole,
12 however you want to describe it, would not have
13 really sustained a major injury as alleged. It
14 doesn't -- but again, that's opinion, that's not
15 fact. I can't attest to whether an injury had
16 occurred.
17 Q. Do you know if any alterations were made to the
18 depression prior to your observation of it?
19 A. No. I think if any alterations were made, she
20 would have indicated so.
21 Q. But she did not?
22 A. No, she did not.
23 Q. Do you have reason to dispute that she was, in
24 fact, injured, suffered an injury at all or do you
25 just dispute that an injury was caused by this

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1 particular situation?
2 A. I, I would dispute that any injury would have sus -
3 - been sustained from that. I cannot dispute that
4 she received an injury.
5 Q. Okay. Have you talked about this case with anybody
6 else in the police department?
7 A. No, I have not.
8 Q. Or anybody else in the City?
9 A. Other than my supervisor who had to read the report
10 and all that, I haven't discussed it.
11 Q. And you weren't contacted by Coker College?
12 A. No, I have not been contacted by them.
13 Q. That's all I have. Thank you, sir.
14 A. All right.
15 CROSS EXAMINATION BY MR. WOODS:
16 Q. Officer Sanchez, I have just a couple of questions,
17 please, sir, I think. I'll try to make it just a
18 couple. And I can't recall specifically, you may
19 have addressed this, but did Ms. Major tell you why
20 she had waited three days to report this incident
21 to the Coker College and to the City?
22 A. She -- I don't recall that she explained why she
23 waited so long other than when I asked her why she
24 waited so long to seek medical attention 'cause my
25 biggest concern was if it was a serious injury, why

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1 aren't we going to the hospital right now? Was
2 that -- she explained that she wanted somebody to
3 cover the cost of the medical treatment first.
4 Q. Okay. You were asked about the characterization of
5 the hole and you were asked about why you had put
6 deep hole. I want to ask you in looking at your
7 report, the Plaintiff's Exhibit No. 1, about three
8 lines down -- well, it is on the third line down.
9 It says, "The Complainant, Alberta Major, stated
10 that she was walking from her car to the street
11 corner, and was about to cross the street to go to
12 class, when she stepped in a deep hole in the grass
13 just at the corner of the intersection." Now, are
14 you -- was that what she told you?
15 A. Yes. That's -- that is a direct quote from her.
16 Q. And is that the only place in your report that you
17 used that language deep hole?
18 A. As far as I can see, that's the only place I've
19 ever used deep hole.
20 Q. All right. Did you observe anything about the area
21 that was pointed out to you by Ms. Major that gave
22 you any indication that any recent digging of a
23 hole had occurred in that area?
24 A. No, not at all.
25 Q. Did the depression that you say you saw there, did

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1 it appear to be actually a dug hole at all?
 2 A. No.
 3 Q. On that date when you observed this condition, did
 4 you believe that it was a condition which called
 5 for any immediate action to be taken?
 6 A. No, I didn't. I did not.
 7 Q. All right. And at the time when you were there,
 8 when you went out to investigate this, did you
 9 believe that, in fact, that was on private
 10 property?
 11 A. Yes, I did.
 12 Q. All right. I know your report ends on page 2 with
 13 the words "nothing further." Is that the end of
 14 your report?
 15 A. That would be the end of my part.
 16 Q. All right. It's not on the -- on this copy that
 17 was initially marked. But on the copy that I have
 18 and I'm going to show it to Plaintiff's Counsel,
 19 because maybe he doesn't have that copy, I don't
 20 know why, 'cause I think that's the only one I
 21 have, there is an additional supplement.
 22 MR. MILLER: Yeah, I don't have this.
 23 MR. WOODS: You should -- you should have
 24 gotten that, but I can make you a -- get you a copy
 25 made.

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1 MR. MILLER: Yeah, that would be great. Well,
 2 can we do two, 'cause we will have one marked as
 3 exhibit?
 4 MR. WOODS: Yeah. Okay. I'll take this cover
 5 sheet that was sent to Trudy Stephenson off of it,
 6 'cause that's not a part of the report, and I'll
 7 leave the photographs 'cause it says "incident
 8 images."
 9 (OFF-THE-RECORD BRIEFLY)
 10 MR. MILLER: I'd like this marked as 1.
 11 CROSS EXAMINATION BY MR. WOODS CONTINUES:
 12 Q. Officer, if you would look at -- excuse me, Officer
 13 Sanchez, let's take the original, I want you to
 14 look at it.
 15 A. All right.
 16 Q. The document now which has been substituted as
 17 Plaintiff's Exhibit No. 1 and turn over to page two
 18 of that after the section that ends with "Nothing
 19 further" that you indicated was the last thing you
 20 put on the report, is there a supplement on this
 21 report?
 22 A. Yes, sir, there is.
 23 Q. And does it indicate who made the supplement?
 24 A. Yes, it does.
 25 Q. And who is that?

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1 A. That's Brian Rudick.
 2 Q. And who is Brian Rudick?
 3 A. He at the time was a patrol lieutenant.
 4 Q. Okay. And what's the date of this supplement?
 5 A. This is December 5th of 2008.
 6 Q. All right. And what -- have you ever seen this
 7 supplement before?
 8 A. Yes, I have.
 9 Q. Okay. And based upon the comments there, what
 10 action do you believe was taken after you turned in
 11 your report to your supervisor?
 12 A. They then went out to that location and
 13 photographed it and attached those photographs to
 14 the report.
 15 Q. Is there an indication in the report whether any
 16 changes had been made in the location between the
 17 time you had been there and the time that someone
 18 went back out to take the photographs?
 19 A. It states in here that somebody moved dirt from,
 20 from near the incident location making it
 21 impossible to see the alleged hole.
 22 Q. Okay. And there are photographs or copies of
 23 photographs on the last page of this, is that
 24 right?
 25 A. Yes.

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1 Q. And do you know who took the photographs?
 2 A. Yes, that would have been Lieutenant Brian Rudick.
 3 Q. The person who added the supplement?
 4 A. Right.
 5 Q. Okay. Based upon this supplement and the
 6 photographs, does it appear that, in fact, the City
 7 of Hartsville Police Department did take some
 8 further action after you turned in your report to
 9 examine or observe this location?
 10 A. Yes. Considering this was the next morning after I
 11 had reported it, it would have seemed that they did
 12 as procedure would indicate and go out and try to
 13 see if they could assess and handle the situation.
 14 Q. Okay. You were asked a question earlier and I want
 15 you to refer to the first page of the report. You
 16 were asked if Ms. Major had told you what time of
 17 day it was when the injury actually occurred. Do
 18 you indicate that on the report?
 19 A. Yes, about five lines down from the top, you've got
 20 an incident date which states December 1st, 2008.
 21 The time frame being 16:30 which will be 4:30 in
 22 civilian time to 17:00 which will be 5:00 o'clock.
 23 Q. All right. Now, is that the date -- is that the
 24 date that you had put in as the time up there that
 25 you were advised this incident had occurred?

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1 A. That, that is the time that she indicated it
 2 happened, the time and date she indicated.
 3 Q. All right. And is that also recorded on line two
 4 of your narrative?
 5 A. Yes, it is.
 6 Q. Okay. And that's -- there it says "to complain of
 7 injury that happened on 12/01/2008 at about 4:30 to
 8 5:00 p.m.," is that right?
 9 A. Yes, that's correct.
 10 Q. All right. And that's what Ms. Major told you?
 11 A. Yes.
 12 Q. And do you have any way at all of knowing whether
 13 or not since this was three days after that date of
 14 knowing whether or not the injury complained of by
 15 Ms. Major that evening and what you observed of her
 16 favoring her leg, do you have any way of knowing
 17 whether that occurred in the incident she described
 18 to you or not?
 19 A. I have no way of knowing.
 20 Q. Did you ever -- and I think you answered, did you
 21 ever talk with anyone from Coker College about the
 22 incident at all?
 23 A. No, I never have.
 24 Q. Okay. And at the time you advised, according to
 25 the report advised the Plaintiff that this was a

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1 civil matter and she should take it up at the local
 2 Magistrate's offices, did you believe at that time
 3 that this incident had occurred on private property
 4 or property owned by Coker College?
 5 A. Yes, I did.
 6 Q. And based upon her comments to you at the scene
 7 three days after this incident, did it appear that
 8 she was wanting to have someone to pay for medical
 9 treatment that she might receive?
 10 A. Yes.
 11 Q. All right. Is that the reason you referred her to
 12 the Magistrate?
 13 A. Yes, I did.
 14 Q. That's all the questions I have. Thank you.
 15 Please answer any further questions Plaintiff's
 16 Counsel may have.
 17 REDIRECT EXAMINATION BY MR. MILLER:
 18 Q. Just a couple more, Officer Sanchez. We were just
 19 talking earlier about the characterization of this
 20 condition, whether it was a hole or it was a
 21 depression. It's my recollection of your testimony
 22 that you didn't really necessarily agree with the
 23 characterization of it as a hole but more of as a,
 24 you said, a concave ovalular depression?
 25 A. Uh-huh.

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1 Q. Of approximately two inches in depth?
 2 A. Uh-huh.
 3 Q. We talked about this statement on the report that
 4 it was a deep hole and you told me that was my
 5 client's words?
 6 A. Right.
 7 Q. It says, third line from the bottom on your report,
 8 it says "I observed the hole."
 9 A. Uh-huh.
 10 Q. And then again it says, "The hole was a couple of
 11 feet from the roadway." So, twice in this report,
 12 did you not refer to this, this condition as a
 13 hole?
 14 A. Right.
 15 Q. And that was based on your observation and not
 16 reports from my client?
 17 A. Right. In the, in the text, the structure that I
 18 worded this sentence, it was to indicate as we
 19 would indicate a subject like Ms. Major. We
 20 wouldn't refer to her as whatever. I would, would
 21 then perceive her as "the person." She would just
 22 be Ms. Major, 'cause that's what she has reported
 23 herself as being. In this case, it was reported as
 24 a hole, so I would continue to state so that there
 25 would be no loss in context later as to what we

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1 were referring to as the hole. If I later
 2 referenced it as a depression, I felt that it would
 3 -- we would lose track of what we were talking
 4 about in the report.
 5 Q. Now, if you were -- if a complainant says -- makes
 6 as a general matter, if they indicate something to
 7 you which you don't believe to be true or something
 8 that you disagree with, --
 9 A. Uh-huh.
 10 Q. -- is that a belief that you would put in your
 11 report?
 12 A. No, I would not put that belief in that report.
 13 Q. If they told you they observed something and you
 14 observed it and it was -- and you disagree with
 15 their characterization, you wouldn't indicate that
 16 in your report?
 17 A. I would not.
 18 Q. You would simply go by what they told you?
 19 A. Right.
 20 Q. And why is that?
 21 A. Because I don't want to throw in my own opinions
 22 into a situation that is based on the facts of what
 23 they told me.
 24 Q. But if, if what they're telling you is their
 25 opinion and you're looking at it, the facts of it

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1 based on your own observations, how is that not
 2 relevant?
 3 A. At the time, what I was trying to do was document
 4 the fact of what she wanted to report. In this
 5 case being a civil matter, my purpose here is not
 6 to document whether, whether the incident had
 7 necessarily occurred, but what she was reporting to
 8 me so that it would at least be on paper that we
 9 had that discussion, not so much as trying to
 10 capture the moment itself.
 11 Q. All right. That's all I have.
 12 MR. WOODS: I've got nothing further. Thank
 13 you very much.
 14 MR. MILLER: Officer Sanchez, I appreciate it.
 15 (THERE BEING NO FURTHER QUESTIONS, DEPOSITION
 16 CONCLUDED AT 11:00 A.M.)

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STATE OF SOUTH CAROLINA)
 COUNTY OF DARLINGTON)

CERTIFICATE

I, Laura W. Little, Verbatim Reporter and
 Notary Public in and for the State of South Carolina,
 certify that I did have Officer Michael Sanchez appear
 before me at 10:05 a.m. on the 7th day of April, 2010 at
 the offices of Hartsville Town Hall, 133 West Carolina
 Avenue, 2nd Floor Conference Room, Hartsville, South
 Carolina; that the witness was duly sworn and cautioned
 to tell the truth, the whole truth, and nothing but the
 truth; that the foregoing pages constitute a true and
 accurate transcript of his testimony given at that time
 and place.

I certify that I am not of counsel or kin to
 any of the parties, nor am I interested in any manner in
 its outcome.

IN WITNESS WHEREOF I have hereunto set my hand
 and seal this the 27th day of April, 2010.

Laura W. Little, Verbatim Reporter
 Notary Public, State of South Carolina
 My Commission Expires September 21, 2015

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
COUNTY OF DARLINGTON) FOURTH JUDICIAL CIRCUIT
CIVIL ACTION NO. 09-CP-16-0514

Alberta Major,)
Plaintiff,)
-vs-)
City of Hartsville,)
Defendant.)

DEPOSITION OF:
PHILLIP A. GARDNER

Deposition of PHILLIP A. GARDNER taken before
Laura W. Little, Verbatim Reporter and Notary Public in and
for the State of South Carolina, at the Hartsville Town
Hall, 133 West Carolina Avenue, 2nd Floor Conference Room,
Hartsville, South Carolina, commencing at 10:05 a.m. on the
18th day of March, 2010.

APPEARANCES OF COUNSEL:

For the Plaintiff:
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Wukela Law Firm
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In Attendance:
Sherron Skipper

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Court Reporter's Note:

-- Indicates Interruption; Indicates Incomplete Phrases or Sentences.

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1 you don't understand.
2 A. Uh-huh.
3 Q. Okay. It's important for purposes of the Court
4 Reporter that you answer verbally and clearly,
5 particularly for yes and no questions that you
6 answer with a yes or a no, as opposed to a head nod
7 or an uh-huh, just because obviously those things
8 don't translate well to paper and a written
9 transcript is going to be created from this
10 deposition. Please don't start answering until I
11 finish asking the question, and I'll try to do the
12 same for you and, again, this is all for her
13 benefit. It's real tough to read something where
14 people are talking over each other.
15 A. Uh-huh.
16 Q. And other than that, if you need to take a break,
17 just let me know, we'll be happy to take a break.
18 I don't think this is going to take very long but.
19 A. Okay.
20 Q. All right. Well good. We'll just jump into it.
21 Mr. Gardner, can you please state with whom you are
22 employed?
23 A. I'm employed with the City of Hartsville.
24 Q. In what capacity?
25 A. I'm the Director of Parks and Leisure Services.

STIPULATIONS

Prior to the giving of any testimony by the witness, it was expressly stipulated and agreed between the parties to this action, through their respective counsel, that:

By Notice and/or Consent, said deposition is being taken in accordance with Section 42-3-160, Code of Laws of South Carolina 1976, and Rule 30 of the South Carolina Rules of Civil Procedure, which shall control the taking of said deposition and its use thereof;

Said deposition shall be taken for the purpose of discovery and/or for use as evidence in the above entitled action, or for both purposes;

That all objections would be reserved until the time of the hearing except as to the form of the question;

Reading and signing of the transcript of testimony by the witness was waived.

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1 Q. And what does that entail?
2 A. It's easier for -- well, never mind, I was going to
3 make a joke. I'm over the development and the care
4 of sports facilities, parks, playgrounds and under
5 my umbrella is streets and grounds which is the
6 landscaping and the beautification of our area
7 streets and so forth.
8 Q. All right. Obviously, you honed in on streets and
9 grounds, because that's the location of the
10 incident at issue in this case.
11 A. Uh-huh.
12 Q. To what extent is the maintenance? You said --
13 mentioned beautification. Is maintenance of --
14 obviously, not the streets themselves, but, you
15 know, the sidewalks, the grounds surrounding the
16 streets, is that under your purview as well?
17 A. No, sir. The areas that are under ours is the
18 grassed areas between the curbs and the sidewalks.
19 Q. Okay. Well, once you get to the sidewalk, it's
20 some -- it's somebody else's?
21 A. Yes. Uh-huh.
22 Q. And who would be in charge of the sidewalk part?
23 A. That is the Public Works Department.
24 Q. The Public Works Department. But, I think you're
25 telling me that from the sidewalk to the road where

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1 PHILLIP A. GARDNER,
2 after being first duly sworn to tell the truth, was
3 deposed and testified as follows:
4 DIRECT EXAMINATION BY MR. MILLER:
5 Q. Mr. Gardner, my name is Michael Miller. We just
6 met a second ago. I represent Alberta Major in
7 this lawsuit that has been filed on her behalf
8 against the City of Hartsville. Before we get
9 started, have you ever had your deposition taken
10 before?
11 A. Yes, sir.
12 Q. Okay. Well, good. So you're probably familiar
13 with how this is going to go and the ground rules.
14 Nevertheless, just for purposes of a refresher,
15 I'll let you know it's kind of a -- again, kind of
16 the ground rules for a deposition. One is if I ask
17 a question that you don't understand, please direct
18 any questions you have to me --
19 A. Uh-huh.
20 Q. -- regarding my questions as opposed to your
21 attorney or anyone else. If I get convoluted or
22 long-winded or anything of that nature which,
23 believe me, is very likely to occur, please just
24 ask me to rephrase the question or reask it. The
25 last thing I want you to do is answer a question

1 there's grass, a strip of grass in there, that
2 little strip is your territory?
3 A. Yes.
4 Q. All right. I never knew that.
5 A. We cut it and edge it.
6 Q. Okay. So what happens when a limb falls on both
7 the sidewalk and the grass, what happens then?
8 A. Well, it usually takes -- we usually take care of
9 it.
10 Q. It's not a big bureaucratic mess about who has to
11 clean it up?
12 A. No. No. If it's big enough, both, both groups
13 come to the rescue.
14 Q. Okay. All right. Very good. You were -- you've
15 been brought here as our 30(b)(6) deposition and we
16 asked for an individual with the knowledge of the
17 maintenance of City grounds including any digging
18 that would have occurred on said grounds. Would
19 you be the person that would be able to answer
20 those questions?
21 A. Yes.
22 Q. Okay. Very good. How long have you been with the
23 City of Hartsville?
24 A. Almost eight years.
25 Q. Have you always been employed as Director of Park

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1 and Leisure Services?
2 A. With the City, yes, I have.
3 Q. And where did you work prior?
4 A. I was with the City of Florence and the County of
5 Florence.
6 Q. Okay. What jobs did you have in Florence?
7 A. I was the Director of Freedom Florence Recreation
8 Complex.
9 Q. Okay. That's a nice facility out there.
10 A. It is.
11 Q. And how long were you Director of Freedom Florence?
12 A. Thirteen years.
13 Q. Okay. And where are you from?
14 A. Hartsville.
15 Q. Hartsville?
16 A. Uh-huh.
17 Q. And how old are you?
18 A. Fifty-seven.
19 Q. Are you married?
20 A. Yes, I am.
21 Q. And what's your wife's name?
22 A. Terry.
23 Q. With an I or a Y?
24 A. Y.
25 Q. Do you have any children?

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1 A. No, we don't.
2 Q. Do you have any family in Darlington County with
3 the last name other than Gardner?
4 A. No.
5 Q. Okay. And the reason I ask is for the jury.
6 A. Okay.
7 Q. All right. Where does your wife work? Is she
8 employed?
9 A. She is no longer employed.
10 Q. Okay. And where was she employed previously?
11 A. Chesterfield County School District.
12 Q. All right. What is the extent of your knowledge
13 regarding this incident?
14 A. Just, just what I have been told through my
15 supervisors with the grounds crew.
16 Q. Which is what?
17 A. That they work that area once every three to five
18 weeks and that -- and I asked them directly about
19 anything of interest and there was nothing of
20 interest in the area.
21 Q. Well, what have you been told about my Plaintiff's
22 -- well, my client's accident?
23 A. All I've -- what I have heard is that she stepped
24 in a hole.
25 Q. Okay.

Page 10

1 A. And we -- you know, there was no hole. There is no
2 hold there, period.
3 Q. Okay.
4 A. And did not know of anything until after, you know,
5 your client started this action.
6 Q. Okay. Well, that was going to be my next question.
7 When was the first that you heard about all of
8 this?
9 A. Yeah, it was -- it was well after the fact and we,
10 we responded and there was -- there's nothing
11 there. That was Stephen. I'm sure he's --
12 Q. Let's see. The Complaint was filed July 15th,
13 2009. Did you hear about this incident before that
14 or was that the first time you heard about it in
15 July of last year?
16 A. I think that's about the time we heard about it,
17 yes.
18 Q. Okay. Were you -- you were never told by the
19 Hartsville Police Department that something had
20 happened?
21 A. No.
22 Q. Okay. So you think sometime in the summer of last
23 year is when you first heard about it?
24 A. Sounds about right.
25 Q. And an investigation to a certain degree was

Page 11

1 conducted?
2 A. Well, we went and looked at the area.
3 Q. And what was the condition of the area when you
4 observed it at that time?
5 A. It appeared that trucks and cars were cutting the
6 corner short and there were just, just tire marks
7 there.
8 Q. Okay. Did you personally go with them that day?
9 A. Uh-huh.
10 Q. And this is --
11 A. Yeah. Yes.
12 Q. Okay. Thank you. And this is the corner of -- I
13 may have this. Let me see here. Well, goodness.
14 Corner of Coker and Carolina, I believe?
15 A. Coker and East Carolina, yes, sir.
16 Q. Does that sound correct to you?
17 A. Uh-huh.
18 Q. Okay.
19 A. Yes, sir.
20 Q. You talking about from Hartsville?
21 A. Uh-huh.
22 Q. All right. Okay. Let's fast-forward a little bit.
23 What's the condition of that corner now and what
24 I'm asking is has it changed since December of
25 2008?

Page 12

1 A. Yes. The sidewalk was continued down to the, to
2 the street by the Public Works Department.
3 Q. Public Works did that?
4 A. Yes.
5 Q. Okay. What involvement did you have in making the
6 decision to do that, if any?
7 A. None.
8 Q. None. Okay. Did you give any recommendations that
9 you had observed people cutting that corner or
10 anything of that nature?
11 A. No.
12 Q. Okay. That was something entirely they made on
13 their own, the decision?
14 A. Yes.
15 Q. I've looked at that corner, and it looks like they
16 kind of almost paved the corner itself. Is that an
17 accurate description?
18 A. Yes.
19 Q. Okay. Do you know when that occurred, when that
20 paving occurred?
21 A. I don't remember.
22 Q. Was it after you looked at that corner last summer?
23 A. Yes.
24 Q. Okay. All right. So when you looked at it last
25 summer, it was in substantially the same condition

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1 it was in when my client fell in December of 2008?
2 A. Yes.
3 Q. Okay. You said you observed tire marks?
4 A. Yes.
5 Q. Where were those tire marks located?
6 A. Going across the -- it was caused by the right rear
7 wheels going across the curb to try to make that
8 turn because it is a medium road. It's a tight
9 turn.
10 Q. Okay. Now, you say curb, is there a curb there on
11 the corner?
12 A. Yes.
13 Q. There is?
14 A. Uh-huh.
15 Q. Okay. All right. We fast forwarded a second.
16 Now, let's rewind and go back. How many -- how
17 reports directly to you? Well, well, -- okay. I'm
18 going to strike that. Let me -- do you have a
19 staff?
20 A. I do.
21 Q. Okay. How many folks are on your staff?
22 A. On that particular staff, there are eight.
23 Q. There's eight people?
24 A. Yes.
25 Q. That are under you?

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1 A. Yes.
2 Q. In the Parks and Leisure Services Department?
3 A. Right.
4 Q. Okay. And what are the various jobs of those eight
5 individuals?
6 A. Good gosh, the various jobs are maintaining the
7 rights-of-ways of all of the city streets.
8 Q. Okay.
9 A. All five square miles.
10 Q. Uh-huh.
11 A. Edging the sidewalks on the main thoroughfares
12 coming into the -- the main arteries coming into
13 town.
14 Q. Uh-huh.
15 A. Maintaining the welcome signs. Doing the
16 landscaping up and down on the major corridors.
17 Maintaining all of the City's parks, which there
18 are six of them, including the now the new Vista.
19 They cut and maintain that, also.
20 Q. Okay.
21 A. So, they're, they're cutting grass, they're
22 landscaping and I think one day there, they were
23 asked to come move a desk at City Hall. So
24 anything and everything.
25 Q. Okay. Are all of those eight individuals, are they

Page 15

1 all -- do they all have the same job title? I
2 mean, what I'm asking is are they all equals or is
3 there -- some people do different things or do you
4 understand what I'm asking?
5 A. There, there is a level in that, in that group, --
6 Q. Uh-huh.
7 A. -- but they all do the same tasks.
8 Q. Okay.
9 A. They all work together.
10 Q. Okay. It sounds like none of those are really desk
11 jobs, most of those are kind of out?
12 A. They're hands-on definitely.
13 Q. Hands-on. Okay. In December of 2008, what kind of
14 work would your staff or crew or whatever be doing
15 to these rights-of-ways and what kind of tasks are
16 they performing when, you know, the leaves aren't -
17 - I mean, when the grass isn't growing, there's not
18 a whole lot of that sort of landscaping to do?
19 A. Well, what they're doing is they're keeping it
20 beautiful by removing the leaves, cleaning out the
21 medians and which aides with the City as far as the
22 leaves going down into the storm water.
23 Q. Uh-huh.
24 A. So, we're, we're trying to stay ahead of that, not
25 further creating anymore problems.

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1 Q. Okay.
2 A. So we pick a section and we knock that section out
3 and then we'll go to another one, and we'll knock
4 that section out.
5 Q. All right. Well, how often would your crew make it
6 to, let's say, a particular intersection?
7 A. I would say three to five weeks.
8 Q. Okay.
9 A. Every three to five weeks.
10 Q. Okay. And that would -- that's typical during the
11 winter, as well?
12 A. Yes.
13 Q. Okay. And I assume that's three to five weeks
14 unless there's some sort of circumstance that
15 requires them to address something?
16 A. Correct. Exactly.
17 Q. Okay. If a tree fell, they're not going to wait
18 three to five weeks to go deal with it?
19 A. If a tree falls, we all, we all respond.
20 Q. Okay. Very good.
21 MR. MILLER: Let's do this as I.
22 DAILY LOG SHEET MARKED FOR IDENTIFICATION AS
23 PLAINTIFF'S EXHIBIT NUMBER ONE(1).
24 Q. I have here a document that was provided to me by
25 the City's lawyer right before we started here,

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1 which is being marked as Plaintiff's Exhibit 1. If
2 I could have you take a look at that. Describe for
3 me what this document is, please?
4 A. This is basically a diary that Streets and Grounds
5 keeps as to what they have accomplished and it
6 basically kind of sets up some form of a schedule
7 that they adhere to.
8 Q. Okay. Who fills this out?
9 A. This is done by one of the supervisors. His name
10 is Arnold Floyd.
11 Q. Okay. And this includes the day of the incident at
12 issue in this case, December 1st, 2008, correct?
13 A. Yes.
14 Q. Tell me some of the sort of the activities that
15 are, that are occurring this week based on this
16 log?
17 A. December 1st, we blew off streets and parking lots,
18 which that is a standard every Monday and Friday is
19 they do the downtown.
20 Q. Okay.
21 A. And that's -- and they pick up all of the trash and
22 they clean the garbage cans from all of the parks.
23 We've got Pride, Burry, Lawton and Centennial.
24 Moved a desk from the Complex to the shop. Pull
25 plants out of pots for repotting and started

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1 cleaning the Pavilion which is Lawton Park for an
2 upcoming event on that day.
3 Q. Okay.
4 A. Safety meetings. Public Works asked for a -- they
5 were short a driver, so we sent one of our workers
6 over to aide them, our CDL drivers. Did just
7 various tasks around town.
8 Q. Okay. And I'll stop you. And it looks like they
9 kind of do a lot of the same tasks?
10 A. They do. They do.
11 Q. From day to day?
12 A. They do. It's basically clean up trash, --
13 Q. Yeah.
14 A. -- parks, leaves.
15 Q. Yeah, I see a lot of -- I see a lot of clean up
16 trash and blowing leaves?
17 A. Yeah.
18 Q. Based on my review of this week, two intersections
19 or rather one intersection is mentioned. Is that
20 in -- were they referring to -- I see it on the 2nd
21 and on the 3rd there for the East Carolina and
22 Centers?
23 A. Yes.
24 Q. Are they referring to the streets themselves or is
25 that an intersection they're referring to?

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1 A. That's the streets themselves. That's East
2 Carolina from where it becomes East Carolina all
3 the way to the end of the City limits.
4 Q. Okay. And what about Centers?
5 A. Centers, the divided road starts at Fourth Street
6 and ends at First and that's what they call in the
7 Centers.
8 Q. Oh, okay. That's not the name of a road?
9 A. No.
10 Q. Oh, okay.
11 A. Now, Centers is the landscape area that we created
12 down, down the middles.
13 Q. Down the median?
14 A. Down the medians.
15 Q. Okay. All right. Very good. So they're just
16 doing -- they're cleaning up the Main Street
17 downtown?
18 A. Yeah.
19 Q. Okay. All right. Now, again, forgive me for my
20 ignorance of Hartsville's layout, when they refer
21 to East Carolina in this regard, --
22 A. Uh-huh.
23 Q. -- is that encompassing the intersection of
24 Carolina and Coker?
25 A. Yes.

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1 Q. Okay.
2 A. Yeah.
3 Q. All right. So East Carolina extends that far down?
4 A. Yes, it does.
5 Q. Okay. So based on this, based on this log, it
6 appears that they specifically mentioned working on
7 Carolinas, on Carolina Street on the 2nd and 3rd?
8 A. Uh-huh.
9 Q. Which means they would have gone by that
10 intersection both of those days; correct?
11 A. Correct.
12 Q. Okay. And do you have the log for other weeks
13 available?
14 A. Not --
15 Q. Not today, but --
16 A. Not today.
17 Q. But if I were to request those, would you have
18 those available?
19 A. Yes.
20 Q. Okay. And it also looks like they put up Christmas
21 lights Wednesday the 3rd, does that sound correct?
22 A. They do a lot of things.
23 Q. Okay. And they look like they stay busy. All
24 right, Good. Well, I appreciate you providing this
25 to us. The power poles in town, who is in charge

Page 21

1 of those?
2 A. The power company.
3 Q. Which is what?
4 A. Progress Energy.
5 Q. Do they have an easement? How does that work? I
6 have no personal knowledge about how that works.
7 A. I'm sure they have an easement, yes.
8 Q. Over that little piece of property where the pole
9 is?
10 A. Uh-huh.
11 Q. Okay. Now, another questions for which you have to
12 forgive my ignorance. is there a difference
13 downtown between telephone poles and power poles or
14 are they all used for both things or explain that?
15 A. They're basically the same thing.
16 Q. Okay. So you can't walk downtown and look at a
17 pole and say that's a power pole, that's a
18 telephone pole?
19 A. No, they're -- the power is on top and then the
20 telephone and cable are the lower cables.
21 Q. Okay. So they're used for both?
22 A. Yes.
23 Q. Okay. But Progress Energy maintains those poles?
24 A. Yes.
25 Q. Okay. If they were to move a pole, would they tell

Page 22

1 you?
2 A. Not necessarily.
3 Q. What if they were to move a pole and in the course
4 of that moving, they went outside the scope of
5 their easement? Do you see what I -- do you seem
6 what I'm asking?
7 A. Yes. it wouldn't matter.
8 Q. What do you mean it wouldn't matter?
9 A. Progress Energy, they -- the way I understand it
10 and I'm just -- just my own information is if they
11 move a pole, they can do basically whatever, put it
12 wherever they want to as long as it's not in the
13 middle of the street.
14 Q. Okay. They have a lot of leeway with where they
15 put the poles, is that right?
16 A. I would assume so, yes.
17 Q. Okay. They play a pretty important function?
18 A. Yes, they do.
19 Q. Okay. Would Public Works be notified if they were
20 moving a pole?
21 A. I, I can't answer that.
22 Q. Okay. Do you have any knowledge as to whether a
23 telephone pole was moved at the corner of Carolina
24 and Coker in 2008?
25 A. I have no knowledge of it, no.

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1 Q. Okay. Is there anybody -- is there an employee of
2 the City who would if it happened?
3 A. I'm sure someone would have seen Progress Energy
4 there moving a pole.
5 Q. Okay. But would it have been a matter of observing
6 it rather than being notified?
7 A. Exactly.
8 Q. Okay. And do you -- and so it sounds like what
9 you're telling me is that the only people who would
10 know for a fact if something happened would be
11 Progress Energy?
12 A. Correct.
13 Q. Okay. I've got some pictures here, and I don't
14 think all of them are necessary.
15 PHOTOGRAPHS MARKED FOR IDENTIFICATION AS
16 PLAINTIFF'S EXHIBIT NUMBER TWO(2).
17 MR. MILLER: Bill, this is the one I want to
18 talk about right now.
19 MR. WOODS: Okay.
20 Q. And here, why don't I do this. There's two pictures
21 on this page which is marked Plaintiff's Exhibit 2.
22 I'm going to label one A and I'm going to label one
23 B, just so again when we're looking at the
24 transcript months from now, we know which picture
25 we're referring to. Looking at picture A on

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1 Plaintiff's Exhibit 2, is that the intersection of
2 Carolina and Coker?
3 A. It appears to be.
4 Q. Okay. First of all, how does that intersection
5 look different or that corner look different today
6 than how it did then?
7 A. Well, now, this part of the sidewalk continues to
8 the street.
9 Q. And you're referring to the sidewalk that is kind
10 of on the right side of the picture?
11 A. It appears to be yes, sir.
12 Q. Okay. And it continues all the way to the street.
13 Do you know how it addresses that telephone pole
14 that's there or that power pole?
15 A. I'm trying to remember how it does.
16 Q. 'Cause it looks like if you were to extend it, it
17 would run into it based on that picture?
18 A. I think that it runs this side of the pole and goes
19 to the street. I'm not, I'm not exactly sure.
20 Q. Okay. That's fine. That's fine. We can go out
21 and look at it if we need to.
22 A. Yeah.
23 MR. WOODS: We got these.
24 MR. MILLER: Okay.
25 MR. WOODS: That's a better view.

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1 MR. MILLER: Can I see it just for a second?
2 Q. All right. Your lawyer handed me a picture that
3 looks like is of the new paving and it looks like
4 they paved the entire thing?
5 A. Yeah, they did.
6 Q. Okay. That's fine. Is there a curb on that
7 corner?
8 A. A very small one, but yes, there's a curb.
9 Q. There is a curb?
10 A. Uh-huh.
11 Q. Okay.
12 PHOTOGRAPHS MARKED FOR IDENTIFICATION AS
13 PLAINTIFF'S EXHIBIT NUMBER THREE(3).
14 Q. Once again, we'll do the A and the B. This is
15 Plaintiff's Exhibit 3.
16 A. Okay.
17 Q. Mr. Gardner, looking at those pictures, there is a
18 gentleman in both of those pictures?
19 A. Uh-huh.
20 Q. Do you recognize that gentleman?
21 A. No. Don't know him.
22 Q. Okay. And I didn't ask this before, but this grass
23 and this corner, this is under your jurisdiction,
24 correct?
25 A. Uh-huh. Yes, sir.

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1 Q. Okay. If I was to tell you he was an employee of
2 Coker College, does that -- well, let me back up.
3 Let me strike that. To what extent does Coker
4 College have the authority to do stuff, make
5 changes to improve the lands under your
6 jurisdiction?
7 A. They're not supposed to do that.
8 Q. Do they?
9 A. No.
10 Q. Okay.
11 A. Not, not -- not often. They have -- they have
12 shared areas that we also maintain and we work
13 together. If they want to do something special,
14 we'll allow them to do that.
15 Q. Okay.
16 A. But no, it's -- typically, it's left up to us.
17 Q. Okay. How close in proximity is this corner to
18 Coker College and their grounds?
19 A. It's straight across the street.
20 Q. Across the street. Can you see Coker College,
21 their facilities, in either of these pictures?
22 A. Yes.
23 Q. In both of them?
24 A. Yes.
25 Q. And that's these buildings across the street?

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1 A. Uh-huh.
2 Q. Okay. And what about on this side of the street?
3 It's my -- it's my understanding, and correct me if
4 I'm wrong, but there's a -- is there a parking lot
5 over here?
6 A. There's a parking lot that is Coker College's.
7 Q. Okay. Which would be -- is that the -- would that
8 be the south side of the street?
9 A. That would be the south side of the street.
10 Q. Okay. And those buildings that we're looking at
11 would be on the north side of the street?
12 A. Correct.
13 Q. The north side of Carolina?
14 A. The north side of Carolina.
15 Q. Okay. So there is a parking lot, there's a strip
16 of grass, there's a sidewalk, and then there's
17 Carolina and then there is buildings, is that
18 correct?
19 A. Uh-huh.
20 Q. And Coker is in charge of the buildings and the
21 parking lot?
22 A. Correct.
23 Q. But the grass and the sidewalk is under the City?
24 A. Yes.
25 Q. Okay. Would you be surprised to learn that was an

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1 employee of Coker College?
2 A. No, not at all.
3 Q. Why is that?
4 A. Based on, based on the movement or -- once I found
5 out about this, this had already been taken care of
6 by Coker College.
7 Q. What do you mean this had already been taken care
8 of by Coker College?
9 A. My understanding is that this gentleman was sent
10 out to put dirt into the depressions made by
11 vehicles.
12 Q. Okay. And to the extent a problem existed, he was
13 instructed to fix it?
14 A. That is my understanding.
15 Q. Okay.
16 A. But there is -- and all he did was throw some sand
17 in there.
18 Q. And you can see in these pictures he's got a shovel
19 in his hand. Does that appear to be what he's
20 doing in those pictures?
21 A. He's just spreading out dirt.
22 MR. MILLER: Let's do that one next, Laura.
23 PHOTOGRAPHS MARKED FOR IDENTIFICATION AS
24 PLAINTIFF'S EXHIBIT NUMBER FOUR(4).
25 Q. Okay. Looking back at Plaintiff's Exhibit 2,

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1 picture A, --
2 A. Yes.
3 Q. -- do you see any tire tracks in that picture on
4 that corner?
5 A. I can't, because of the pile of dirt that is on it.
6 Q. Okay. What about, and this is Plaintiff's Exhibit
7 4? Again, I'll do the A and the B. Looking at
8 either A or B, and these are a couple of pictures
9 that appear to be taken after dirt was laid on this
10 corner, do you see tire tracks in these pictures?
11 A. Yes.
12 Q. And what are those tire tracks over?
13 A. They're over the right-of-way.
14 Q. Okay. Do you see evidence of tires and cars
15 driving other than on the sand that was -- the dirt
16 that was put down?
17 A. Actually, I can see some right here and some right
18 here.
19 Q. You're looking at picture A?
20 A. Yes, I am.
21 Q. In the bottom left corner?
22 A. Uh-huh.
23 Q. And describe for me that evidence?
24 A. It's just -- it appears that there has been some
25 type of a rutting is taking place there.

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1 Q. Okay. Would that -- would that rutting that you're
2 describing be consistent with any tracks that you
3 see on the dirt, on the ground?
4 A. Could be, yes, sir.
5 Q. Okay. The tracks that appear to be running
6 straight into the telephone pole?
7 A. Yes.
8 Q. Okay. To your knowledge, did a car run into that
9 telephone pole?
10 A. No. To my knowledge it didn't.
11 Q. Okay. What is the approximate width of those two
12 based on these pictures? And picture B shows a
13 little better the tire tracks that's over the dirt.
14 Would you -- would you -- looking at these
15 pictures, would you say the tire tracks in A and B
16 are the same tire tracks over the dirt?
17 A. Yes.
18 Q. Okay. Does that look to be to you the distance
19 between those, the width of those tire tracks, does
20 that seem to be the width of a car's tires?
21 A. No, sir.
22 Q. Does that look to be the width of a golf cart?
23 A. It appears to be a golf cart.
24 PHOTOGRAPHS MARKED FOR IDENTIFICATION AS
25 PLAINTIFF'S EXHIBIT NUMBER FIVE(5).

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1 Q. Okay. This is Plaintiff's 5. What is in those
2 pictures?
3 A. A E-Z Go golf cart.
4 Q. Is that a City vehicle?
5 A. No, sir.
6 Q. Do you know who owns that vehicle?
7 A. Coker College.
8 Q. Coker College. And what tells you that?
9 A. I've seen the maintenance crews on it.
10 Q. Okay. That's a similar vehicle that the
11 maintenance crew uses?
12 A. Yes.
13 Q. Okay. Very good.
14 PHOTOGRAPHS MARKED FOR IDENTIFICATION AS
15 PLAINTIFF'S EXHIBIT NUMBER SIX(6).
16 Q. One more time. I think I got one more picture and
17 then we'll be done with the pictures. All right,
18 and this is Plaintiff's 6, A and B. Looking at A,
19 other than tracks over the dirt that was laid, do
20 you see any evidence of cars cutting that corner
21 and driving across that corner?
22 A. If you'll follow the edge right here, you can see
23 where it's just been worn, worn out by vehicles.
24 Q. And you're looking at where the grass meets the
25 pavement?

1 A. Yes.
2 Q. Okay. On what would appear to be the Coker Street
3 side?
4 A. Yes.
5 Q. And is that what this road is coming in right here?
6 A. This is Coker.
7 Q. Yeah.
8 A. And this is Carolina.
9 Q. Okay.
10 A. And you can see where this is -- and if this were
11 not there, you would probably see more evidence of
12 it on up toward the pole.
13 Q. Okay. And is this from vehicles taking a right
14 onto Carolina?
15 A. It is.
16 Q. Okay. And this is a problem that you've dealt with
17 before up in this corner?
18 A. We have -- have observed vehicles making that turn
19 for years.
20 Q. Okay.
21 A. Trucks especially can't make that turn without
22 taking -- almost taking that pole out.
23 Q. Okay. Has it caused depressions before?
24 A. Yes.
25 Q. Okay.

1 A. But never a hole.
2 Q. Okay. How would you describe the difference
3 between a hole and a depression?
4 A. Well, a depression is just what it is, it's a
5 depression. A hole is something that earth is
6 removed from and replaced.
7 Q. Okay. That's a good definition. So a depression,
8 and I'm clarifying because you used the word
9 depression in your definition of the word.
10 depression. So a depression you would say is kind
11 of like a rut or rather pushed down?
12 A. It's, it's a displacement.
13 Q. Okay.
14 A. It's a depression. It creates a swell.
15 Q. Okay. As opposed to actually removing dirt?
16 A. Right.
17 Q. Which is what you're defining as a hole?
18 A. As you would call it digging a hole, yes, sir.
19 Q. Okay. All right. And the reason I'm asking, I'm
20 being so particular about this is not to be
21 difficult, but it's -- I want to be sure that the
22 terms you're using, I know what -- how you're
23 defining those terms in your mind when you use
24 those terms. Is that fair enough?
25 A. That's fair.

1 Q. Okay. Now, you were careful to distinguish between
2 knowledge that a depression -- that depressions had
3 been created on this corner by vehicles but that
4 never a hole. Why were you so careful in making
5 that distinction and I guess my question is what
6 knowledge did you have or what leads you to believe
7 there was a hole there?
8 A. Nothing led me to believe there was a hole there.
9 Q. Okay.
10 A. I was just stating it for the record that if there
11 were -- had been a hole there, we would have taken
12 care of it.
13 Q. Okay. You say that over the years y'all have
14 observed vehicles and when you said trucks, you
15 talking about tractor-trailers?
16 A. Yes.
17 Q. They're taking -- they take that turn and it can be
18 difficult for tractor-trailers to make that sharp
19 of turn?
20 A. It's a really hard turn for them.
21 Q. That they often drive up on the grass?
22 A. Yes.
23 Q. And that's something y'all have had to deal with
24 before?
25 A. Yes.

1 Q. How has your department addressed that issue in the
2 past?
3 A. They've gone back and they have put sand or clay
4 back in the area, but it was -- it was a fruitless
5 effort because a few days later, it's, you know,
6 right back in the same condition so after two or
7 three attempts, they just kept an eye on that area
8 to make sure that it did not create, you know, some
9 sort of a, you know, problem at a later time.
10 Q. Okay. Do you know if your staff did any work on
11 this corner the week prior to this incident?
12 A. I couldn't tell you. I'd have to go back and find
13 the records.
14 Q. Look at the log?
15 A. Uh-huh.
16 Q. Okay. And that's why I was asking earlier. I'm
17 interested in seeing the week or two before this
18 incident to see if they were at this corner?
19 A. Right. Well, the week before was Thanksgiving, so
20 the last time we would have or could have been
21 there would be Wednesday before Thanksgiving,
22 'cause we didn't work Thursday or Friday.
23 Q. Okay.
24 A. And Monday, we were in the downtown, so.
25 Q. And Monday is when this thing happened, so. Okay.

1 Has the paving fixed the problem?
2 A. I'm sure. It's going to -- from what, what we have
3 seen, they're tire tracks now over the concrete.
4 Q. Yeah.
5 A. And if they continue to do that, I'm sure that
6 concrete is going to eventually give up and
7 crumble.
8 Q. Okay. I think I'm about done. Give me one more
9 second if you would. Have you spoken to an Officer
10 Michael Sanchez about this incident?
11 A. I have not.
12 Q. Have you spoken with a Corporal Bert Hoffman?
13 A. No.
14 Q. Have you ever met my client, Alberta Major?
15 A. No.
16 Q. Have there been any other claims or lawsuits filed
17 against the City for incidences of people falling
18 on grounds that fall under your jurisdiction?
19 A. Not that I'm aware of.
20 Q. Okay. That's all I have. Thank you.
21 A. Okay.
22 CROSS EXAMINATION BY MR. WOODS:
23 Q. I've got just a few follow-up questions. Mr.
24 Gardner, are you aware of whether or not when the
25 sidewalk was put in at this intersection whether

1 there were other sidewalk or was other sidewalk
2 work done along that same period of time by the
3 group that does that?
4 A. I'm not -- I couldn't say.
5 Q. Okay.
6 A. I, I really don't know.
7 Q. Was there any discussion with you prior to that
8 sidewalk work being done, anybody discuss it with
9 you, that they were wanted to do that?
10 A. No. Uh-huh, no.
11 Q. You were asked about how many people were on your
12 staff and you talked about the crew that was out
13 there doing this work or the type work that's
14 reflected there on Plaintiff's Exhibit No. 1 and I
15 think you said there were eight people on your
16 staff?
17 A. That is correct. Yes, sir.
18 Q. Now, are those -- is that the number of people that
19 is on the grounds crew that goes and blows the
20 leaves and does that?
21 A. That's not -- that's not my entire staff but that's
22 the staff that does that type work.
23 Q. All right. Do you also have a staff that takes
24 care of the recreation center?
25 A. Yes, sir.

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- 1 Q. And how many people do you have in that?
 2 A. I have five people in that.
 3 Q. When you said that eight people were on your staff,
 4 were you referring only to the street --
 5 A. I was.
 6 Q. -- maintenance and blowing the leaves and picking
 7 up --
 8 A. Correct.
 9 Q. -- trash, that kind of thing?
 10 A. Yeah, my entire staff is thirteen people.
 11 Q. Okay.
 12 A. And twenty-four part-time people or twenty-eight
 13 part-time people.
 14 Q. And on the staff that does this particular work
 15 that you've talked about there in Plaintiff's
 16 Exhibit No. 1, you said there were different
 17 levels, and then you spoke of a supervisor. How
 18 many supervisors are there in that group of eight?
 19 A. There are two supervisors, and then there is a
 20 supervisor above them, so there's actually three
 21 supervisors in that group.
 22 Q. Okay. And do all of those folks go out and
 23 participate in getting the leaves up?
 24 A. Yes.
 25 Q. And cutting the grass when necessary?

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- 1 A. Yes. Yes.
 2 Q. You were asked about how often your crew would get
 3 to certain areas and my recollection is that you
 4 said every three to five weeks, was that --
 5 A. Yes.
 6 Q. Was that your response?
 7 A. Yeah. It's three to five weeks unless there is a
 8 problem in the area or we're pushed back by
 9 weather.
 10 Q. All right. What about the street say like right
 11 out in front of the building where we are now and
 12 the immediate downtown area, is that still three to
 13 five weeks?
 14 A. No, that's twice a week. That's every Mondays and
 15 Fridays.
 16 Q. All right. In the area where this incident
 17 allegedly occurred is out of what you consider the
 18 immediate downtown?
 19 A. Yes, sir.
 20 Q. You were asked about the Plaintiff's Exhibit No. 1
 21 that has an indication -- well, tell me what it
 22 says on Tuesday the 2nd that has to do with
 23 Carolina?
 24 A. That appears just to be a notation of what they
 25 were going to try to accomplish that day, because

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- 1 they refer to it again on Wednesday is where they
 2 blew those leaves on East Carolina and all the
 3 Centers.
 4 Q. Would you -- let me refer you to where the
 5 narrative there for Tuesday the 2nd, down at the
 6 bottom line of that. Can you tell -- tell us what
 7 that says?
 8 A. Blew leaves on 5th Street, 5th and 4th and Laurens
 9 to Carolina. Gee-whiz, I'm not real sure what that
 10 says.
 11 Q. All right. And you're trying to read that next
 12 word?
 13 A. Yeah.
 14 Q. And what does the last word say?
 15 A. "It started." "It started." Okay. "It started
 16 East Carolina and Centers." That's what that is.
 17 That reads -- reads that way.
 18 Q. All right. And you were asked a question that
 19 based upon the fact that Carolina is mentioned on
 20 both the 2nd and the 3rd, did that mean that these
 21 folks would have been by that same intersection on
 22 both those days?
 23 A. Yes, sir.
 24 Q. Based upon your reading of this, do you have an
 25 opinion as to whether or not, in fact, by what's

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- 1 reflected on these records whether or not they
 2 would have, in fact, been working at that same
 3 intersection on both days?
 4 A. The same intersection?
 5 Q. Yeah.
 6 A. I, I wouldn't -- I wouldn't know, but they will be
 7 in the same area for both those days.
 8 Q. All right. When -- there on the 2nd it says,
 9 "Started East Carolina and Center."
 10 A. Uh-huh.
 11 Q. Well, do you have any idea yourself as to where
 12 they might have started on East Carolina when they
 13 start that work?
 14 A. Typically, they start at the 4th Street and work
 15 their way toward 1st Street which is going east.
 16 Q. All right. And depending upon what time of day
 17 they started that, would they have necessarily
 18 gotten to East Carolina and Coker that day?
 19 A. Probably not. If they were doing leaves, they
 20 probably took it probably a block at a time.
 21 There's a, there's a lot of leaves to be moved
 22 about down that street between the sidewalks and
 23 the, and the medians on both sides, so I don't -- I
 24 would think they would have gotten to it for sure
 25 on Wednesday.

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- 1 Q. All right. You were asked about the power pole
 2 there at the corner and you were shown several
 3 photographs that showed the pole. Let me ask you
 4 if looking at the top photograph in Plaintiff's No.
 5 6, is that the pole there at this area?
 6 A. Yes, sir.
 7 Q. Based upon your observations of that pole, does it
 8 appear to be an old pole or a new pole?
 9 A. It appears to be a very old pole.
 10 Q. And did you look at that pole physically when you
 11 went to the area after you learned about this
 12 incident?
 13 A. I noticed that the pole was there. I can't say
 14 that I observed or actually examined the pole.
 15 Q. All right. But whether you examined it or not, did
 16 you consider or form any opinion at that time when
 17 you were there physically on the site whether it
 18 was a new pole or an old pole?
 19 A. Just based on knowledge, I know that pole has been
 20 there for quite a while.
 21 Q. All right. Would there have been any reason for
 22 anyone in your department to have dug any holes in
 23 this area there where that pole is and the area in
 24 between that and the street?
 25 A. No, sir.

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- 1 Q. If, in fact, your crew had noticed that a tractor-
 2 trailer had cut that corner and left a deep groove
 3 or rut there, would they have done anything to
 4 address that?
 5 A. Yes, they would have.
 6 Q. What would they have done?
 7 A. They would have gone in and back-filled it and
 8 tamped it tight and observed the area to make sure
 9 that it was packed well and did not wash out or
 10 settle.
 11 Q. Would that -- do you believe that if that had been
 12 the case that they would have reflected it in a
 13 notation such as what we see in Plaintiff's No. 1?
 14 A. They would have.
 15 Q. Okay. All right. That may be all of the questions
 16 I have, but let me take a look at one of those
 17 photographs. Who is the individual in charge of
 18 the, I'm going to say, Department of Public Service
 19 that would have paved the sidewalk?
 20 A. Well, he's, he's no -- he's no longer with the City
 21 now.
 22 Q. Okay. But is it Department of Public Works or what
 23 is the department that --
 24 A. Public Works.
 25 Q. Public Works. And to your knowledge, did the

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1 person with Public Works who made the decision to
2 put this sidewalk and looked like handicap ramp --
3 A. Uh-huh.
4 Q. -- even know about this incident that we're here
5 about today?
6 A. No.
7 Q. I think that's all the questions I have. Thank you
8 very much.
9 A. Yes, sir.
10 MR. WOODS: Any further?
11 MR. MILLER: Nothing else. All right, Mr.
12 Gardner, I appreciate it.
13 (THERE BEING NO FURTHER QUESTIONS, DEPOSITION
14 CONCLUDED AT 11:00 A.M.)

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STATE OF SOUTH CAROLINA)
COUNTY OF DARLINGTON)

CERTIFICATE

I, Laura W. Little, Verbatim Reporter and
Notary Public in and for the State of South Carolina,
certify that the foregoing deposition of Phillip A.
Gardner was taken before me at 10:05 a.m. on the 18th
day of March, 2010 at the offices of Hartsville Town
Hall, 133 West Carolina Avenue, 2nd Floor Conference
Room, Hartsville, South Carolina; that the witness was
duly sworn and cautioned to tell the truth, the whole
truth, and nothing but the truth; that the foregoing
pages constitute a true and accurate transcript of his
testimony given at that time and place.

I certify that I am not of counsel or kin to
any of the parties, nor am I interested in any manner in
its outcome.

IN WITNESS WHEREOF I have hereunto set my hand
and seal this the 27th day of March, 2010.

Laura W. Little, Verbatim Reporter
Notary Public, State of South Carolina
My Commission Expires September 21, 2015

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Deposition of Phillip A. Gardner

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STATE OF SOUTH CAROLINA

COUNTY OF DARLINGTON

Alberta Major,

Plaintiff,

vs.

City of Hartsville,

Defendant.

IN THE COURT OF COMMON PLEAS

FOURTH JUDICIAL CIRCUIT

Civil Action No.: 2009-CP-16-514

FILED CERTIFIED COPY,
CLERK OF COURT/RMC
DARLINGTON COUNTY, S.C.

PLAINTIFF'S SUPPLEMENTED
MEMORANDUM IN OPPOSITION
TO DEFENDANT'S MOTION FOR
SUMMARY JUDGMENT

TO: THE DEFENDANT ABOVE-NAMED AND THEIR ATTORNEY, WILLIAM B. WOODS, ESQUIRE:

The Plaintiff, Alberta Major, by and through the undersigned counsel hereby offers the following in opposition to Defendant's Motion for Summary Judgment. This memorandum has been supplemented, at the leave of Honorable Paul M. Burch, to allow for the inclusion of deposition testimony not available when originally filed.

I. BACKGROUND

This matter arises out of a fall that occurred on December 1, 2008 when the Plaintiff fell due to a depression that existed in the small patch of grass at the corner of East Carolina and Coker Avenues in Hartsville, South Carolina.

At the time the Plaintiff, a resident of Florence, was taking evening classes at Coker College. Dep. of Alberta Major, p. 11, l. 11-16, attached as Exhibit 1. On the day in question, she parked in the Coker College Byerly parking lot, on the southeast corner of East Carolina and Coker Avenues. Id. at p. 20, l. 20. The Plaintiff estimates that it was sometime between 4:15 pm and 4:45 pm. Id. at p. 26, l. 10 – p. 27, l. 1. She states that she got out of her car and walked up to the East Carolina Avenue sidewalk, where she took a left and continued to follow the sidewalk

to the intersection of East Carolina and Coker Avenues. Id. at p. 21, l. 8-11. Immediately before the sidewalks from both East Carolina and Coker Avenues reach the corner and intersect, they end, leaving a small patch of grass at the corner. See Exhibit 2. Id. at p. 28, l. 19 – p. 29, l. 4; p. 31, l. 3-10. The Plaintiff, desiring to cross East Carolina Avenue at the intersection was forced to walk on this patch of grass because there was no sidewalk at this corner at the time. Id. at p. 31, l. 3-10; p. 32, l. 16 – p. 33, l. 2. In the process of doing so she stepped in a depression that existed at that location. Id. As stated by the Plaintiff at her deposition:

I stopped at the corner and as I checked for traffic, no one was coming. So I made a step to step across the street. My foot slipped down into a hole, and my knee, kind of, buckled to the right. But I was able to—because cars had started coming at that point. I was able to compose myself and I, kind of, hobbled on across the street. Id. at p. 21, l. 11-18.

The Plaintiff returned to Hartsville on Thursday December 4, 2008 for her next regularly scheduled class. Id. at p. 37, l. 3-5. At this time she reported the incident to Coker College officials, who sent security officer Burke Hoffman to investigate. Id. at p. 38, l. 6 – p. 39, l. 11. Mr. Hoffman advised the Plaintiff that the property upon which the incident occurred was owned by the City of Hartsville, not Coker College. Dep. of Burke Hoffman, p. 10, l. 5-13, attached as Exhibit 3. Mr. Hoffman recommended that the Plaintiff contact the city. Id. Shortly thereafter, the Plaintiff called the Hartsville Police Department and Officer Michael Sanchez arrived at the intersection to investigate the incident. Dep. of Albert Major, p. 41, l. 11 – p. 42, l. 2.

As a result of this incident, the Plaintiff sustained a right ankle sprain and has received treatment from McLeod Regional Medical Center, McLeod Orthopaedic Associates, and McLeod Physical Therapy. Id. at p. 59, l. 25 – p. 60, l. 3.

A Summons and Complaint for this action was filed on July 15, 2009, alleging premises liability. Counsel for the Defendant submitted an Answer on September 3, 2009.

II. SUMMARY JUDGMENT STANDARD

South Carolina Rule of Civil Procedure 56(c) states that summary judgment should only be granted when “there is no genuine issue as to any material fact” and when “the moving party is entitled to a judgment as a matter of law.” See Glover v. County of Charleston, 606 S.E.2d 773, 775; 361 S.C. 634, 638 (2004). “In determining whether any triable issues of fact exist for summary judgment purposes, the evidence and all inferences which can be reasonably drawn from the evidence must be viewed in the light most favorable to the nonmoving party.” Id. (emphasis added). Summary judgment should not be granted when “further inquiry into the facts of the case is desirable to clarify the application of the law.” Gadson v. Hembree, 613 S.E.2d 533, 535; 364 S.C. 316, 320 (2005). In addition, summary judgment is improper “even when there is no dispute as to the evidentiary facts, if there is a dispute as to the conclusions to be drawn therefrom.” Laurens Emergency Med. Specialists v. M.S. Bailey & Sons Bankers, 355 S.C. 104, 108-109, 584 S.E.2d 375, 377 (2003). Above all, courts must remember that summary judgment is a “drastic remedy which should be cautiously invoked so that a litigant is not improperly deprived of a trial on disputed factual issues.” Madison ex rel. Bryant v. Babcock Ctr., Inc., 638 S.E.2d 650, 655; 371 S.C. 123, 134 (2006).

III. ARGUMENT

A. SUMMARY JUDGMENT SHOULD BE DENIED DUE TO THE EXISTENCE OF GENUINE ISSUES OF MATERIAL FACT AS TO THE DEFENDANT’S LIABILITY REQUIRING RESOLUTION OF A JURY.

Summary judgment in this case should be denied because issues of material fact exist as to the Defendant’s liability, specifically whether the Defendant received adequate notice of the condition that caused the Plaintiff’s injuries. The Plaintiff argues, and intends to show, that the

testimony in this case supports this assertion and supports the position that the Defendant received adequate notice of the condition pursuant to South Carolina law.

1. The proper notice inquiry to apply to this case is whether the Defendant received constructive notice of the condition that caused the Plaintiff's injuries.

In its motion, the Defendant argues that "no genuine issue as to any material fact exists to the liability of Defendant City of Hartsville which was not placed on notice as required under the S.C. Tort Claims Act [S.C. Code § 15-78-10 et seq.]." (Defendant's Notice of Motion and Motion for Summary Judgment on Behalf of Defendant City of Hartsville). As this Court is well aware, the South Carolina Tort Claims Act ("Tort Claims Act") defines the limits under which a plaintiff can pursue a civil action against a governmental entity within the State of South Carolina. Section 15-78-60 provides forty (40) exceptions to the waiver of immunity provided by the Tort Claims Act. However, pursuant to § 15-78-40 if none of these exceptions apply, then governmental entities are "liable for their torts in the same manner and to the same extent as a private individual under like circumstances."

In this case, the common law imposes a duty on landowners to maintain their premises in a reasonably safe condition. See Hughes v. Children's Clinic, P.A., 269 S.C. 389, 397, 237 S.E.2d 753, 756 (1977). This rule requires a showing of actual or constructive notice on the part of the premises-owner of the condition that caused the plaintiff's injuries in order for the plaintiff to prevail. See Gilliland v. Pierce Motor Co., 235 S.C. 268, 274, 111 S.E.2d 521, 523-24 (1959).

Being that this case is one against a governmental entity, it necessary to consult the Tort Claims Act to determine whether this statute alters the common law rule. Indeed, there are two (2) possible provisions that could possibly relate to the case at bar, however as will be evident, only one of them can be properly applied.

The first of these provisions is found at § 15-78-60(15), which states in relevant part:

Governmental entities responsible for maintaining highways, roads, streets, causeways, bridges, or other public ways are not liable for loss arising out of a defect or a condition in, on, under, or overhanging a highway, road, street, causeway, bridge, or other public way caused by a third party unless the defect or condition is not corrected by the particular governmental entity responsible for the maintenance within a reasonable time after actual or constructive notice. (emphasis added)

It is the Plaintiff's position, as will be argued below, that this is the only applicable provision of the Tort Claims Act in this case.

The other possible provision, which the Plaintiff anticipates the Defendant will argue should apply, is found at § 15-78-60(16), and states in its entirety that governmental entities are not responsible for losses that result from:

maintenance, security, or supervision of any public property, intended or permitted to be used as a park, playground, or open area for recreational purposes, unless the defect or condition causing a loss is not corrected by the particular governmental entity responsible for maintenance, security, or supervision within a reasonable time after actual notice of the defect or condition. (emphasis added)

There are two main differences between these provisions: 1) the type of premises to which the provisions apply, and 2) the notice standards required. Subsection (15) applies to highways, roads, streets, causeways, bridges, or other public ways, and requires a showing of either actual or constructive notice of the condition that causes the injury. In contrast, subsection (16) applies to public property "intended or permitted to be used as a park, playground, or open area for recreational purposes," and requires a showing of actual notice of the condition that caused the plaintiff's injury.

It is the Plaintiff's position that subsection (15) is the only provision that can be applied to this case because the land upon which the Plaintiff was injured is a public way, tantamount to

a sidewalk, by virtue of its location and use by the general public. In contrast, the Plaintiff argues that this small patch of land is not a park, playground, or recreational area.

In Vaughn v. Town of Lyman, 370 S.C. 436, 635 S.E.2d 631 (2006), attached as Exhibit 4, the South Carolina Supreme Court addressed several issues very similar to the case at bar, including which standard should apply in an action against a governmental entity for injuries sustained on a town sidewalk. Vaughn involved an action for personal injuries that the plaintiff sustained when she fell as a result of a broken sidewalk in the Town of Lyman, South Carolina. The plaintiff sued under a statutory and common law theory of negligence.¹ With regard to the common law theory, the Court stated that “municipalities which have full and complete control over the streets and highways within their corporate limits are liable in damages for injuries sustained in consequence of their failure to use reasonable care to keep them in a reasonably safe condition.” Vaughn, 370 S.C. at 443, 635 S.E.2d at 635. Importantly, the Court stated that pursuant to South Carolina law, a sidewalk is included in the definition of a street. Id., see also Fickling v. City of Charleston, 372 S.C. 597, 604, 643 S.E.2d 110, 114 (Ct.App. 2007) (“The South Carolina Code defines a ‘sidewalk’ as a portion of a street.”).

The defendant, Town of Lyman, argued that the Tort Claims Act precludes an imposition of liability in that case. In this regard, the Court stated “[t]here is only one exception to the waiver of immunity contained in the Tort Claims Act regarding street maintenance,” which they cite as § 15-78-60(15). 370 S.C. at 445, 635 S.E.2d at 636. This is the provision highlighted above pertaining to highways, roads, streets, causeways, bridges, or other public ways, and which requires a showing of either actual or constructive notice of the condition that causes the plaintiff’s injuries. Based on the finding that this was the only provision of the Tort Claims Act

¹ The statutory cause of action was based on S.C. Code § 5-27-120, which requires municipalities to “keep in good repair all the streets, ways and bridges within the limits of the city or town.” The Court rejected this theory, finding that this statute did not create a private right of action.

that applied to injuries occurring on municipality's sidewalks, the Court then applied a constructive notice standard and reversed the lower court's granting of summary judgment to the defendant. Id.

The holding of Vaughn was affirmed in the case Fickling v. City of Charleston, 372 S.C. 597, 643 S.E.2d 110 (Ct.App. 2007), which also involved a plaintiff who suffered injuries as a result of a poorly maintained sidewalk, specifically by stepping in a hole in the sidewalk. Fickling, like Vaughn, also imposed a standard of constructive notice of the condition that caused the plaintiff's injuries, and ultimately reversed the lower court's granting of directed verdict in favor of the municipality. 372 S.C. at 609-10, 643 S.E.2d at 116-17. Together, these cases unequivocally establish that in actions involving injuries sustained as a result of conditions existing on municipal sidewalks, the plaintiff need only prove that the municipality had constructive notice of the condition.

In the instant case, the Plaintiff asserts that a constructive notice standard should apply because the land upon which the depression existed was a public way, tantamount to a sidewalk, and should not be considered recreational land. This is supported by the fact that the sidewalk ended a few yards from the intersection and that the Plaintiff had no choice but to walk on the grass if she was to cross at the intersection. This fact was acknowledged by counsel for the Defendant at the Plaintiff's deposition, who in questioning stated, "you had gotten out of your car and walked straight out to the sidewalk and walked down toward that corner, that as you got to the corner, not all the way to the very corner, the sidewalk ran out." Dep. of Alberta Major, p. 28, l. 20-24. Because the sidewalk ended immediately before the intersection, and because this was a common road crossing point for students of Coker College who, like the Plaintiff, park in the lot across East Carolina Avenue from the college, this small patch of land should be

considered as a sidewalk. Id. at p. 32, l. 20 – p. 33, l. 2. For this reason, the Plaintiff asserts that if any provision of the Tort Claims Act applies to limit liability it should only be § 15-78-60(15), which only requires a showing of constructive notice of the condition.

It is anticipated that the Defendant will attempt to argue that § 15-78-60(16) should be applied to impose an actual notice standard in this case. To this the Plaintiff argues that such an application would be grossly inappropriate because this land was not a park, playground, or recreational area. Instead it was simply a piece of grass and dirt at the intersection of two roads and two sidewalks. Plus, a review of cases which have applied subsection (16) indicate that this provision is strictly construed to only apply when the location of the injury is in fact a park, playground, or recreational area. See Strother v. Lexington County Recreation Comm'n, 332 S.C. 54; 504 S.E.2d 117 (1998) (plaintiff injured while playing softball on a softball field owned by Lexington County Recreation Commission); Richardson v. City of Columbia, 340 S.C. 515; 532 S.E.2d 10 (Ct.App. 2000) (injuries sustained at a baseball field complex owned by Richland County Recreation Commission); and Dema v. Shore Enters., 312 S.C. 528; 435 S.E.2d 875 (Ct.App. 2000) (involved injuries at a public beach, although the issue of actual notice was not addressed because liability was not found due to other preliminary issues). It also bears mentioning that the Defendant has never asserted that this patch of grass was recreational land. To read subsection (16) to include a small patch of land at an intersection would be an offensive expansion of the applicability of this provision.

Alternatively, the Plaintiff argues that if the Court finds that neither of these provisions apply, pursuant to S.C. Code § 15-78-40 the common law rule shall apply, which in this case would be a constructive notice standard. See Gilliland, 235 S.C. 268, 111 S.E.2d 521 (1959).

In light of the foregoing, the Defendant's Motion for Summary Judgment should be denied if there exists a genuine issue of material fact as to whether the Defendant had constructive notice of the depression that caused the Plaintiff's injuries. It is the Plaintiff's position that such issues of fact do indeed exist and therefore the Defendant's motion must be denied.

2. The Defendant's motion should be denied because of the existence of genuine issues of material fact concerning the Defendant's liability, in particular pertaining to the Defendant's constructive notice of the condition that injured the Plaintiff.

Having established that a constructive notice standard applies to this case, the question now becomes whether there exists evidence supporting the argument that the Defendant had constructive notice of the depression that caused the Plaintiff's injuries. The Plaintiff asserts that such evidence exists, and when viewed in a light most favorable to the Plaintiff the Defendant's motion must be denied.

First, there is a great deal of testimony in this case about the specific depression that caused the Plaintiff's injuries. As far as the Plaintiff has been informed, there are only four (4) individuals who personally viewed the depression, or hole, at issue in this case: the Plaintiff, Coker College security guard Burke Hoffman, Hartsville Police Officer Michael Sanchez, and former Coker College groundskeeper Mark Gokey. The Plaintiff testified that the depression was a hole, but did not testify as to what she thought caused the hole. Additionally, she stated that "there was grass growing all over it—or growing down in it actually. And of course, there were leaves around." Dep. of Alberta Major, p. 40, l. 17-19.

Mr. Hoffman described the depression as a "rut with leaves covered [sic] it." Dep. of Burke Hoffman, p. 11, l. 15-16. When asked what he thought caused the rut, Mr. Hoffman stated:

A: I do know from observations from over the years, that cars, they come—and not only when I'm in the parking lot, but when I'm on campus looking back towards that way, that cars come and cut that corner. And cut it, you know, a lot of times it—they just roll, and don't come to a complete stop. And they, you know, they go on.

Q: When you say, they cut the corner, what do you mean by that?

A: Well, they come up, and they look that way, and—and they cut real sharp, you know, to the right.

Q: And drive on the grass?

A: Yeah.

Id. at p. 22, l. 4-16.

Mr. Hoffman further testified that he has also seen large tractor-trailer trucks drive onto the grass when they take the right turn onto East Carolina Avenue. Id. at p. 28, l. 18 – p. 29, l. 9.

Officer Michael Sanchez, an employee of the City of Hartsville, described the condition as follows, “there was a sidewalk and it was a foot away from that sidewalk and it appeared to be some kind of a relief, a concave depression in the road or in the, in the dirt there with grass growing in it and very sparse leaf coverage around it.” Dep. of Michael Sanchez, p. 17, l. 17-22, attached as Exhibit 5. He further described it as “a little bit of depression in that corner,” which was “maybe eight to twelve inches long,” and which did not appear to be a “dug hole.” Id. at p. 17, l. 25 – p. 18, l. 1; p. 18, l. 13; p. 37, l. 25 – p. 38, l. 2. He further described the orientation of the depression as such that it appeared to be cutting the corner. Id. at p. 19, l. 18 – p. 20, l. 14.

As to how the depression was created, Officer Sanchez testified:

A: Other than traffic, that's the only thing I could think of.

Q: Explain traffic, what you mean by that?

A: Vehicles often cross over sidewalks and corners and we find this happening throughout the City a lot where people cut corners and it could have been something generated from just constant wear and tear. I know I've observed many a vehicle travel through a corner like that and go over it. That could be a possibility.

Q: So you're saying a vehicle when they're turning that corner, they drove up on the grass?

A: Yes.
Q: Possibly?
A: Uh-huh.
Q: Have you observed a vehicle do that at that corner?
A: Yes.
Id. at p. 21, l. 25 – p. 22, l. 16.

Former Coker College groundskeeper Mark Gokey filled in the depression a few days after the incident, and his description is consistent with that of a depression created by a vehicle. Mr. Gokey described it as an impression in the ground that was longer than it was wide. Dep. of Mark Gokey, p. 13, l. 9-11, p. 16, l. 3-6, attached as Exhibit 6. Specifically, he described it as a “lowering slant” that was approximately two (2) feet long, two (2) to three (3) inches deep, and facing in the direction of East Carolina Avenue. Id. at p. 13, l. 20-24, p. 14, l. 2-16.

Despite this description, Mr. Gokey testified that he did not believe that the depression was a rut, saying, “I would not say a rut, it was an impression.” Id. at p. 12, l. 20. The Defendant points to this testimony to support the position that the City lacked notice of the condition. In response, the Plaintiff asserts that Mr. Gokey’s testimony in fact serves to create a genuine issue of material fact concerning constructive notice considering that both Mr. Hoffman and Officer Sanchez testified that they believed that condition was a rut caused by an automobile. At minimum, this conflicting testimony creates a genuine issue of material fact, and therefore the Defendant’s motion should be denied.

Finally, the deposition of the City of Hartsville’s Director of Parks and Leisure Services, Phillip A. Gardner, was taken on March 18, 2010, and is attached hereto as Exhibit 7. Although Mr. Gardner did not personally observe the depression at issue in this case, he did testify of his knowledge concerning vehicles driving on the grass at that corner creating ruts. While looking at

pictures of the corner identified as Plaintiff's Exhibit 6, Mr. Gardner was asked, "do you see any evidence of cars cutting that corner and driving across that corner?" to which he replied:

A: If you'll follow the edge right here, you can see where it's just been worn, worn out by vehicles.

Q: And you're looking at where the grass meets the pavement?

A: Yes.

Q: Okay. On what would appear to be the Coker Street side?

A: Yes.

Q: And is that what this road is coming in right here?

A: This is Coker.

Q: Yeah.

A: And this is Carolina.

Q: Okay.

A: And you can see where this is—and if this were not there, you would probably see more evidence of it on up toward the pole.

Q: Okay. And is this from vehicles taking a right onto Carolina?

A: It is.

Q: Okay. And this is a problem that you've dealt with before up in this corner?

A: We have—have observed vehicles making that turn for years.

Q: Okay.

A: Trucks especially can't make that turn without taking—almost taking that pole out.

Q: Okay. Has it caused depressions before?

A: Yes.

Id. at p. 31, l. 19 – p. 32, l. 24.

Continuing, Mr. Gardner testified:

Q: Okay. You say that over the years y'all have observed vehicles and when you say trucks, you talking about tractor-trailers?

A: Yes.

Q: They're taking—they take that turn and it can be difficult for tractor-trailers to make that sharp of turn?

A: It's a really hard turn for them.

Q: That they often drive up on the grass?

A: Yes.

Q: And that's something y'all have had to deal with before?

A: Yes.

Q: How has your department addressed that issue in the past?

A: They've gone back and they have put sand or clay back in that area, but it was—it was a fruitless effort because a few days later, it's, you know, right back in the same condition so after two or three attempts, they just kept an eye on that area to make sure that it did not create, you know, some sort of a, you know, problem at a later time.

Id. at p. 34, l. 13 – p. 35, l. 9.

Along these same lines, when questioned by counsel for Defendant Mr. Gardner testified further concerning his department's established procedure for dealing with ruts and depressions caused by vehicles driving on the grass while turning at that corner, stating:

Q: If, in fact, your crew had noticed that a tractor-trailer had cut that corner and left a deep groove or rut there, would they have done anything to address that?

A: Yes, they would have.

Q: What would they have done?

A: They would have gone in and back-filled it and tamped it tight and observed the area to make sure that it was packed well and did not wash out or settle.

Id. at p. 43, l. 1 – 10.

The foregoing testimony serves to create a genuine issue of material fact as to the Defendant's liability, particularly as to whether they received constructive notice of the depression. In Fickling, the Court adopted another jurisdiction's statement of constructive notice, quoting, "[c]onstructive notice arises when a condition has existed for such a period of time that a municipality in the use of reasonable care should have discovered the condition." Fickling, 372 S.C. at 610, 643 S.E.2d at 117 (Ct.App. 2007)(citation and quotations omitted).

The Court also discussed two other South Carolina premises liability cases which:

involved conditions [that] were of such a recurrent nature that the defendants were chargeable with constructive notice on the day of the accident because they established certain patterns wherein the recurrence is of such a nature as to amount to a continual condition and this, coupled with other facts may be sufficient to create a jury issue as to constructive notice. Id. (citations and quotations omitted).

Ultimately in Fickling the Court determined that a directed verdict in favor of the municipality was erroneous considering their finding that:

[i]n the light most favorable to Fickling, there was at least some evidence that (1) there were numerous City personnel within the area of the defect who could have seen and reported the problem; (2) the condition had existed for a while; and (3) the City had an established policy in place to deal with defects in the sidewalks, and problems with the sidewalks were an expected and "recurrent" or "continual" condition of which it had notice. Id. at 609-10, 117.

The case at bar is very similar to Fickling, and similarly, summary judgment should be denied. First, two city employees, Officer Sanchez and Phillip Gardner, testified that they knew vehicles cut that corner and drove onto the grass creating ruts. Mr. Hoffman corroborated this testimony saying that he has personally observed both vehicles and tractor-trailers doing this. Second, Mr. Gardner testified that his crew routinely maintains the streetscape on East Carolina Avenue.² Third, Mr. Gardner testified that he and his crew had an established procedure for dealing with ruts and depressions created by vehicles at that corner, as excerpted above. He testified that upon learning of a rut his crew would have "gone in and back-filled it and tamped it tight and observed the area to make sure that it was packed well and did not wash out or settle." Dep. of Phillip Gardner, p. 43, l. 7-10.

Finally, Mr. Gardner, as well as Officer Sanchez and Mr. Hoffman, testified that this condition was a recurrent and continual problem, stating that "[w]e have . . . observed vehicles making that turn for years," and that these vehicles have "caused depressions before." Id. at p. 32, l. 18-23. He further testified that efforts to fill in depressions created by vehicles at that corner are futile because "a few days later, it's . . . right back in the same condition." Id. at p. 35,

² Mr. Gardner testified that his crew does maintenance and beautification on a particular intersection every three to five weeks, unless a problem arises, and that this crew was in the vicinity of the intersection at issue in this case at least twice the week of the accident. Dep. of Phillip Gardner, p. 16, l. 5-7; p. 20, l. 5-11.

l. 4-6. Officer Sanchez testified that he has personally “observed many a vehicle travel through a corner like that” and drive up on the grass. Dep. of Michael Sanchez, p. 22, l. 7-12. Mr. Hoffman testified that he has personally observed vehicles cutting that corner and drive on the grass, even stated that had observed a tractor-trailer doing this very same thing the week before his deposition. Dep. of Burke Hoffman, p. 22, l. 4-10; p. 28, l. 25 – p. 29, l. 9. And Mr. Gokey testified that although he has not personally seen vehicles cutting that corner, he did have knowledge that it occurred and has observed tire tracks on the grass at the corner. Dep of Mark Gokey, p. 16, l. 21 – p. 17, l. 4.

These facts all serve to create a genuine issue of material fact as to the Defendant’s negligence, in particular whether the City had constructive notice of the depression. The Plaintiff asserts that the City was well aware that vehicles were creating ruts at that corner due to the nature of the intersection, as well as due to the lack of a paved sidewalk at that corner. The Plaintiff asserts that whether the City had actual notice of the depression that caused the Plaintiff’s incident is irrelevant because based on previous experience with that corner, the City should have known there was a rut there. For these reasons, a jury issue exists as to the Defendant’s liability, and the Defendant’s motion should be denied.

V. CONCLUSION

In sum, the Plaintiff asserts that a constructive notice standard applies in this case because: 1) that is the common law standard for premises liability actions of this nature, and 2) if the common law is deemed to be modified by the Tort Claims Act in this case, that statute does not alter the constructive notice standard. See § 15-78-60(15). Since a constructive notice standard applies, the Plaintiff next asserts that the Defendant did indeed have constructive notice of the depression, or rut, that caused the Plaintiff’s injuries. This is evidenced by the testimony

in this case, which when viewed in a light most favorable to the Plaintiff, serves to create a genuine issue of material fact as to the Defendant's negligence. Because such factual issues exist, the services of a jury are required, and the Defendant's Motion for Summary Judgment should be denied.

Respectfully submitted,

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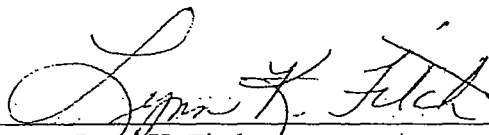
Florence, South Carolina

October 6, 2010

CERTIFICATE OF SERVICE

The undersigned, Lynn K. Fitch, of the Wukela Law Firm, hereby certifies that on the 6th of October, 2010, she placed in an envelope, first class mail, Plaintiff's Supplemented Memorandum in Opposition to Defendant's Motion for Summary Judgment in the matter of Alberta Major vs. City of Hartsville, C/A #2009-CP-16-514, and deposited the same in the United States Mail. Said envelope being addressed to the following person(s):

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Lynn K. Fitch

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SCOTT B. SUGGS
CLERK OF COURT
DARLINGTON COUNTY, S.C.

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM DARLINGTON COUNTY
Court of Common Pleas

Paul M. Burch, Circuit Court Judge

Case No. 2009-CP-16-0514

Alberta Major, ... Appellant,

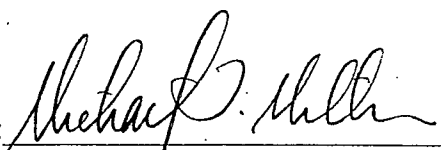
v.

City of Hartsville, ... Respondent.

CERTIFICATE OF COMPLIANCE

The undersigned certifies that the Record on Appeal complies with the Supreme Court Order of August 13, 2007, in that there are no personal data identifiers included in the Appellant's Record on Appeal, or they have been redacted where necessary.

WUKELA LAW FIRM

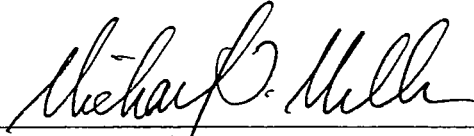
BY: 

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February 18, 2011

Certificate of Counsel

The undersigned hereby certifies that the Record on Appeal contains all material proposed to be included by any of the parties and not any other material.



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February 15, 2011.

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM DARLINGTON COUNTY
Court of Common Pleas

Paul M. Burch, Circuit Court Judge

Case No. 2009-CP-16-0514

Alberta Major, ... Appellant,

v.

City of Hartsville, ... Respondent.

FINAL BRIEF OF APPELLANT

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STATEMENT OF ISSUES ON APPEAL

1. DID THE CIRCUIT COURT ERR IN HOLDING THAT THE DEFENDANT DID NOT HAVE CONSTRUCTIVE NOTICE OF THE CONDITION THAT CAUSED THE PLAINTIFF'S INJURIES?

STATEMENT OF THE CASE

This is an appeal from Circuit Judge Paul M. Burch's grant of summary judgment in favor of the Defendant on October 12, 2010. This case arises out of injuries the Appellant sustained in a fall that occurred on December 1, 2008 when she fell due to a depression that existed at the corner of East Carolina and Coker Avenues in Hartsville, South Carolina. The Appellant filed a Summons and Complaint on July 15, 2009 alleging premises liability. The Respondent submitted an Answer on September 3, 2009 that included a general denial and allegations of comparative negligence.

After an opportunity for discovery the Respondent submitted a Motion for Summary Judgment on April 12, 2010 on the basis that "no genuine issue as to any material fact exists to the liability of Defendant City of Hartsville which was not placed on notice as required under the S.C. Tort Claims Act." (R. pp. 40-42). On September 17, 2010 the Appellant filed its memorandum in opposition to summary judgment which essentially argued that a genuine issue of material fact existed with regard to the Respondent's constructive notice of the depression that caused the Appellant's injuries. (R. pp. 43-118).

A hearing on this matter was held before Judge Burch on September 23, 2010 in Darlington, South Carolina. The parties' arguments at the hearing were substantively similar to those raised in the briefs. Following arguments, the Court took the matter under advisement to allow the parties to supplement their briefs with the deposition

testimony of the maintenance personnel that filled the depression, Mark Gokey, whose deposition had been taken the afternoon before the hearing. The Court also permitted the parties to submit proposed orders at that time.

On October 12, 2010, Judge Burch signed an Order granting summary judgment to the Respondent. This appeal ensued by the Appellant's filing of a Notice of Appeal on November 1, 2010.

FACTS

This matter arises out of a fall that occurred on December 1, 2008 in Hartsville, South Carolina. At the time the Plaintiff, a resident of Florence, was taking evening classes at Coker College in Hartsville. (R. p. 61, original p. 11, lines 11-16). On the day in question, she parked in the Coker College Byerly parking lot, on the southeast corner of East Carolina and Coker Avenues. (R. p. 63, original p. 20, line 20). The Plaintiff estimated that it was sometime between 4:15 pm and 4:45 pm. (R. p. 65, original p. 26, line 10 - p. 27, line 1). She states that got out of her car and walked up to the East Carolina Avenue sidewalk, where she took a left and continued to follow the sidewalk to the intersection of East Carolina and Coker Avenues. (R. p. 64, original p. 21, lines 8-11). Immediately before the sidewalks from both East Carolina and Coker Avenues reach the corner and intersect, they end, leaving a small patch of grass at the corner. (R. pp. 65-66, original p. 28, line 19 - p. 29, line 4; original p. 31, lines 3-10). The Plaintiff, desiring to cross East Carolina Avenue at the intersection was forced to walk on this patch of grass because there was no sidewalk at this corner at the time.¹ (R. pp. 66-67, original p. 31, lines 3-10; original p. 32, line 16 - p. 33, line 2). In the process of doing

¹ The City of Hartsville has since paved over this entire area so that there is no grass or dirt at this corner.

so she stepped in a depression that existed at that location. (R. p. 66, original p. 30, lines 13-17). As stated by the Plaintiff at her deposition:

I stopped at the corner and as I checked for traffic, no one was coming. So I made a step to step across the street. My foot slipped down into a hole, and my knee, kind of, buckled to the right. But I was able to—because cars had started coming at that point. I was able to compose myself and I, kind of, hobbled on across the street. (R. p. 64, original p. 21, lines 11-18).

The Plaintiff returned to Hartsville on Thursday December 4, 2008 for her next regularly scheduled class. (R. p. 68, original p. 37, lines 3-5). At this time she reported the incident to Coker College officials, who sent security officer Burke Hoffman to investigate. (R. p. 68, original p. 38, line 6 – p. 39, line 11). Mr. Hoffman advised the Plaintiff that the property upon which the incident occurred was owned by the City of Hartsville, not Coker College. (R. p. 82, original p. 10, lines 5-13). Mr. Hoffman recommended that the Plaintiff contact the city. (R. p. 82, original p. 10, lines 12-13). Shortly thereafter, the Plaintiff called the Hartsville Police Department and Officer Michael Sanchez arrived at the intersection to investigate the incident. (R. p. 69, original p. 41, line 11 – p. 42, line 2).

As a result of this incident, the Plaintiff sustained a right ankle sprain and has received treatment from McLeod Regional Medical Center, McLeod Orthopaedic Associates, and McLeod Physical Therapy, all in Florence, South Carolina. (R. p. 73, original p. 59, line 25 – p. 60, line 3).

ARGUMENTS

The only issue on appeal in this case is whether the Respondent had adequate notice of the condition that caused the Appellant's injuries. In her briefs, the Appellant

argued that a constructive notice standard should apply in this case pursuant to the South Carolina Tort Claims Act, S.C.Code Ann. § 15-78-60(15)(Rev. 2005).² (R. pp. 46-51).

At hearing, the Respondent conceded a constructive notice standard should apply but nevertheless argued that the Respondent did not have constructive notice of the condition. (R. p. 25, line 22 – p. 26, line 1). Agreeing with the parties, the Court ruled § 15-78-60(15) was the applicable statute, and constructive notice the appropriate standard to apply. (R. p. 3).

1. THE COURT ERRED IN HOLDING THAT THE RESPONDENT DID NOT HAVE CONSTRUCTIVE NOTICE OF THE CONDITION THAT CAUSED THE APPELLANT'S INJURIES.

In its Order, the Court held that the deposition testimony in this case did not support the conclusion that a genuine issue of material fact existed concerning the Respondent's constructive notice of the depression at issue in this case. This ruling was purportedly based on the testimony of Hartsville Police Officer Michael Sanchez, Coker College Security Officer Burke Hoffman, City of Hartsville Director of Parks and Leisure Services Phillip A. Gardner and the Appellant herself. The Appellant objects to this finding and asserts that the court erred in so holding.

First, there is a great deal of testimony in this case about the specific depression that caused the Appellant's injuries. As far as the Appellant has been informed, there are only four (4) individuals who personally viewed the depression, or hole, at issue in this case: the Appellant, Mr. Burke Hoffman, Officer Michael Sanchez, and former Coker

² This section states in relevant part:

Governmental entities responsible for maintaining highways, roads, streets, causeways, bridges, or other public ways are not liable for loss arising out of a defect or a condition in, on, under, or overhanging a highway, road, street, causeway, bridge, or other public way caused by a third party unless the defect or condition is not corrected by the particular governmental entity responsible for the maintenance within a reasonable time after actual or constructive notice.

College groundskeeper Mark Gokey. The Appellant testified that the depression was a hole, but did not testify as to what she thought caused the hole. Additionally, she stated that “there was grass growing all over it—or growing down in it actually. And of course, there were leaves around.” (R. p. 68, original p. 40, lines 17-19).

Mr. Hoffman described the depression as a “rut with leaves covered [sic] it.” (R. p. 82, original p. 11, lines 15-16). When asked what he thought caused the rut, Mr. Hoffman stated:

A: I do know from observations from over the years, that cars, they come—and not only when I’m in the parking lot, but when I’m on campus looking back towards that way, that cars come and cut that corner. And cut it, you know, a lot of times it—they just roll, and don’t come to a complete stop. And they, you know, they go on.

Q: When you say, they cut the corner, what do you mean by that?

A: Well, they come up, and they look that way, and—and they cut real sharp, you know, to the right.

Q: And drive on the grass?

A: Yeah.

(R. p. 85, original p. 22, lines 4-16).

Mr. Hoffman further testified that he has also seen large tractor-trailer trucks drive onto the grass when they take the right turn onto East Carolina Avenue. (R. p. 88, original p. 28, line 18 – p. 29, line 9).

Officer Michael Sanchez, an employee of the City of Hartsville, described the condition as follows, “there was a sidewalk and it was a foot away from that sidewalk and it appeared to be some kind of a relief, a concave depression in the road or in the, in the dirt there with grass growing in it and very sparse leaf coverage around it.” (R. p. 99, original p. 17, lines 17-22). He further described it as “a little bit of depression in that corner,” which was “maybe eight to twelve inches long,” and which did not appear to be

a “dug hole.” (R. p. 99, original p. 17, line 25 – p. 18, line 1; original p. 18, line 13; R. p. 102, original p. 37, line 25 – p. 38, line 2). He further described the orientation of the depression as such that it appeared to be cutting the corner. (R. p. 99, original p. 19, line 18 – p. 20, line 14). As to how the depression was created, Officer Sanchez testified:

- A: Other than traffic, that’s the only thing I could think of.
Q: Explain traffic, what you mean by that?
A: Vehicles often cross over sidewalks and corners and we find this happening throughout the City a lot where people cut corners and it could have been something generated from just constant wear and tear. I know I’ve observed many a vehicle travel through a corner like that and go over it. That could be a possibility.
Q: So you’re saying a vehicle when they’re turning that corner, they drove up on the grass?
A: Yes.
Q: Possibly?
A: Uh-huh.
Q: Have you observed a vehicle do that at that corner?
A: Yes.
(R. p. 100, original p. 21, line 25 – p. 22, line 16).

Former Coker College groundskeeper Mark Gokey filled in the depression a few days after the incident, and his description is consistent with that of a depression created by a vehicle. Mr. Gokey described it as an impression in the ground that was longer than it was wide. (R. p. 38, lines 9-11; p. 39, lines 3-6). Specifically, he described it as a “lowering slant” that was approximately two (2) feet long, two (2) to three (3) inches deep, and facing in the direction of East Carolina Avenue. (R. p. 38, lines 20-24, p. 129).

Despite this description, Mr. Gokey testified that he did not believe that the depression was a rut, saying, “I would not say a rut, it was an impression.” (R. p. 37, l. 20). The Respondent points to this testimony to support the position that the City lacked notice of the condition. However, the Appellant asserts that this discrepancy in testimony

actually serves to create a genuine issue of material fact concerning constructive notice considering that both Mr. Hoffman and Officer Sanchez testified that they believed the condition was a rut caused by an automobile. This conflicting testimony creates a genuine issue of material fact, and therefore the Defendant's motion should have been denied.

Finally, the testimony of the City of Hartsville's Director of Parks and Leisure Services, Phillip A. Gardner, is relevant because he is charged with the maintenance of the city streetscapes—including the corner at issue in this case. Although Mr. Gardner did not personally observe the depression, he did testify of his knowledge concerning vehicles driving on the grass at that corner creating ruts. At his deposition, Mr. Gardner was asked, "do you see any evidence of cars cutting that corner and driving across that corner?" While referencing photographs attached as exhibits to his deposition, Mr. Gardner replied:

A: If you'll follow the edge right here, you can see where it's just been worn, worn out by vehicles.

Q: And you're looking at where the grass meets the pavement?

A: Yes.

Q: Okay. On what would appear to be the Coker Street side?

A: Yes.

Q: And is that what this road is coming in right here?

A: This is Coker.

Q: Yeah.

A: And this is Carolina.

Q: Okay.

A: And you can see where this is—and if this were not there, you would probably see more evidence of it on up toward the pole.

Q: Okay. And is this from vehicles taking a right onto Carolina?

A: It is.

Q: Okay. And this is a problem that you've dealt with before up in this corner?

A: We have—have observed vehicles making that turn for years.
Q: Okay.
A: Trucks especially can't make that turn without taking—almost taking that pole out.
Q: Okay. Has it caused depressions before?
A: Yes.
(R. p. 110, original p. 31, line 19 – p. 32, line 24).

Continuing, Mr. Gardner testified:

Q: Okay. You say that over the years y'all have observed vehicles and when you say trucks, you talking about tractor-trailers?
A: Yes.
Q: They're taking—they take that turn and it can be difficult for tractor-trailers to make that sharp of turn?
A: It's a really hard turn for them.
Q: That they often drive up on the grass?
A: Yes.
Q: And that's something y'all have had to deal with before?
A: Yes.
Q: How has your department addressed that issue in the past?
A: They've gone back and they have put sand or clay back in that area, but it was—it was a fruitless effort because a few days later, it's, you know, right back in the same condition so after two or three attempts, they just kept an eye on that area to make sure that it did not create, you know, some sort of a, you know, problem at a later time.
(R. p. 111, original p. 34, line 13 – p. 35, line 9).

Along these same lines, when questioned by counsel for the Respondent, Mr. Gardner testified further concerning his department's established procedure for dealing with ruts and depressions caused by vehicles driving on the grass while turning at that corner, stating:

Q: If, in fact, your crew had noticed that a tractor-trailer had cut that corner and left a deep groove or rut there, would they have done anything to address that?
A: Yes, they would have.
Q: What would they have done?

A: They would have gone in and back-filled it and tamped it tight and observed the area to make sure that it was packed well and did not wash out or settle.
(R. p. 112, original p. 43, lines 1-10).

The foregoing testimony serves to create a genuine issue of material fact as to the Respondent's liability, particularly as to whether they received constructive notice of the depression. This Court has previously stated that "[c]onstructive notice arises when a condition has existed for such a period of time that a municipality in the use of reasonable care should have discovered the condition." Fickling v. City of Charleston, 372 S.C. 597, 610, 643 S.E.2d 110, 117 (Ct.App. 2007)(citation and quotations omitted)

Fickling is a case that involved very similar facts to the case at bar. It was a negligence action against the City of Charleston for injuries the plaintiff sustained when she fell due to a hole that existed in the sidewalk. Interestingly, in that case the city personnel posited that the hole in the sidewalk was also created by vehicles that were driving onto the sidewalk creating ruts. Id at 601 n.2, 113 n.2. At trial, the Court granted a directed verdict for the defendant on the grounds that the municipality had not received notice, actual or constructive, of the condition. The Court of Appeals reversed this ruling and remanded the case back to the Circuit Court.³

In Fickling, the Court discussed constructive notice in the context of two other South Carolina premises liability cases which:

involved conditions [that] were of such a recurrent nature that the defendants were chargeable with constructive notice on the day of the accident because they established certain patterns wherein the recurrence is of such a nature as to amount to a continual condition and this, coupled with other facts may be sufficient to create a jury

³ Although not relevant to this appeal, the plaintiff in Fickling also pursued a statutory cause of action pursuant to S.C.Code Ann. § 5-27-120 (2004). The Court of Appeals affirmed the directed verdict on this claim.

issue as to constructive notice. Id. (citations and quotations omitted).

Ultimately the Court determined that a directed verdict in favor of the municipality on the issue of constructive notice was in error considering their finding that:

[i]n the light most favorable to Fickling, there was at least some evidence that (1) there were numerous City personnel within the area of the defect who could have seen and reported the problem; (2) the condition had existed for a while; and (3) the City had an established policy in place to deal with defects in the sidewalks, and problems with the sidewalks were an expected and “recurrent” or “continual” condition of which it had notice. Id. at 609-10, 117.

The case at bar is factually very similar to Fickling, and likewise, summary judgment should have been denied. First, two city employees, Officer Sanchez and Phillip Gardner, testified that they knew vehicles cut that corner and drove onto the grass creating ruts. Mr. Hoffman corroborated this testimony saying that he has personally observed both vehicles and tractor-trailers doing this. Second, Mr. Gardner testified that his crew routinely maintains the streetscape on East Carolina Avenue.⁴ Third, Mr. Gardner testified that he and his crew had an established procedure for dealing with ruts and depressions created by vehicles at that corner, as excerpted above. He testified that upon learning of a rut his crew would have “gone in and back-filled it and tamped it tight and observed the area to make sure that it was packed well and did not wash out or settle.” (R. p. 112, original p. 43, lines 7-10).

⁴ Mr. Gardner testified that his crew does maintenance and beautification on a particular intersection every three to five weeks, unless a problem arises, and that this crew was in the vicinity of the intersection at issue in this case at least twice the week of the accident. (R. p. 108, original p. 16, lines 5-7; R. p. 109, original p. 20, lines 5-11).

Finally, Mr. Gardner, as well as Officer Sanchez and Mr. Hoffman, testified that this condition was a recurrent and continual problem, stating that “[w]e have . . . observed vehicles making that turn for years,” and that these vehicles have “caused depressions before.” (R. p. 111, original p. 32, lines 18-23). He further testified that efforts to fill in depressions created by vehicles at that corner are futile because “a few days later, it’s . . . right back in the same condition.” (R. p. 111, original p. 35, lines 4-6). Officer Sanchez testified that he has personally “observed many a vehicle travel through a corner like that” and drive up on the grass. (R. p. 100, original p. 22, lines 7-12). Mr. Hoffman testified that he has personally observed vehicles cutting that corner and drive on the grass, even stated that had observed a tractor-trailer doing this the week before his deposition. (R. p. 85, original p. 22, lines 4-10; R. pp. 86-87, original p. 28, line 25 – p. 29, line 9). And Mr. Gokey testified that although he has not personally seen vehicles cutting that corner, he did have knowledge that it occurred and has observed tire tracks on the grass at the corner. (R. p. 39, lines 21-25, p. 133).

The Appellant asserts that the foregoing serves to create a genuine issue of material fact regarding the Respondent’s constructive notice of the depression. As stated in Fickling, constructive notice arises when a condition “has existed for such a period of time that a municipality in the use of reasonable care should have discovered the condition.” 372 S.C. at 610, 643 S.E.2d at 117. In this case, the condition at issue is the unpaved corner of the intersection that was frequently subjected to vehicles driving over it creating ruts. City officials were aware of this condition but did not fully remedy it by paving the corner until after this suit was filed. Nevertheless, the Appellant asserts that the common knowledge among the witnesses in this case—including the 30(b)(6)

witness, Phillip Gardner—of the practice of vehicles cutting the corner, as well as the creation of ruts serves to create a genuine issue of material fact concerning the Respondent’s constructive notice. Rule 30(b)(6), SCRCF.

Additionally, as this Court is well aware, summary judgment is only appropriate when “there is no genuine issue as to any material fact” and when “the moving party is entitled to a judgment as a matter of law.” Rule 56, SCRCF. Recently, the South Carolina Supreme Court adopted the “scintilla of evidence” standard for summary judgment in the case of Hancock v. Mid-South Mgmt. Co., 381 S.C. 326, 330, 673 S.E.2d 801, 803 (2009). According to Hancock, all a non-moving party must establish in order to defeat a motion for summary judgment is a “mere scintilla of evidence.” Id. The Court has previously defined this term as “‘a gleam,’ ‘a glimmer,’ ‘a spark,’ ‘the least particle,’ [and] ‘the smallest trace.’” Id.; Bethea v. Floyd, 177 S.C. 521, 529, 181 S.E. 721, 724 (1935). The recent adoption of this rule clearly reflects the position of the Court that summary judgment is a “drastic remedy which should be cautiously invoked so that a litigant is not improperly deprived of a trial on disputed factual issues.” Madison ex rel. Bryant v. Babcock Ctr., Inc., 371 S.C. 123, 134, 638 S.E.2d 650, 655 (2006).

The Appellant believes that at least a scintilla of evidence exists in this case to support the position that the Respondent had constructive notice of the depression. As discussed above, the Respondent was well aware that vehicles were creating ruts at that corner, that the corner lacked a paved sidewalk, and that these ruts were a dangerous condition with the potential to cause injuries. For these reasons the court erred in granting the Respondent’s Motion for Summary Judgment.

2. THE COURT ERRED IN NARROWLY INTERPRETING THE CONSTRUCTIVE NOTICE STANDARD.

In its Order the Court largely bases its ruling on a determination that the Respondent was not aware of the depression that caused the Appellant's injuries. It is the Appellant's position that the Court, despite several references to constructive notice, in fact applied an actual notice standard in this case. This is improper and as the Appellant believes, a reversible error. Also, the Court's weight on the Appellant's lack of knowledge of the depression is misplaced considering the burden to keep its premises in a reasonable safe condition is on the Respondent, not the Appellant. Regardless, if the Appellant were to have knowledge of the depression her claim would likely fail under either a comparative negligence or open and obvious condition defense. Such would produce an inconsistent and inequitable result.

As this Court is well aware, constructive notice is a "legal inference which substitutes for actual notice." Strother v. Lexington County Recreation Comm'n, 332 S.C. 54, 64 n.6, 504 S.E.2d 117, 122 n.6 (1998). The essence of constructive notice is that the actual knowledge of the condition is "imputed to [the defendant] whose knowledge of facts is sufficient to put him on inquiry." Id. As commonly stated, the defendant should have known about the condition by virtue of certain facts known. As a result, the defendant is "presumed to have actual knowledge of the undisclosed [condition]." Id.

In the context of premises liability actions against municipalities, this Court has noted that:

constructive notice is . . . such notice as the law imputes from the circumstances of the case. It is the duty of municipal authorities to exercise an active vigilance over the streets, to see they are kept in a

reasonably safe condition for public travel. They cannot fold their arms and shut their eyes, and say they have no notice. Fickling, 372 S.C. at 610 n.33, 643 S.E.2d at 117 n.33, quoting Todd v. City of Troy, 61 N.Y. 506, 509 (N.Y. 1875)(emphasis added by S.C. Court of Appeals).

An essential component of constructive notice is that the defendant need not have actual knowledge of the condition in order to be presumed to have constructive notice of it. Requiring actual knowledge is instead applying an actual notice standard. See Strothers, 332 S.C. at 64 n.6, 504 S.E.2d at 122 n.6. (“Actual notice means all the facts are disclosed and there is nothing left to investigate.”). It is the Appellant’s contention that the Circuit Court incorrectly applied a constructive notice standard in this case to require actual notice.

It is well established in this case that a constructive notice standard applies pursuant to § 15-78-60(15). However, the Appellant asserts that the Circuit Court failed to properly apply this notice standard. First, the Court is quick to highlight that no testimony was presented from anyone who observed the depression prior to the Appellant’s incident. As stated in the Court’s Order:

The Defendant clearly showed through sworn deposition testimony of Office Michael Sanchez, Coker College Security Office[r] Burke Hoffman, and Hartsville Public Works Director Phil Gardner, neither the Defendant, City of Hartsville nor Coker College Security were aware of any rut, depression or defect where the Plaintiff allegedly stepped into a depression and injured herself. (R. p. 4).

The Appellant takes issue with this finding on two grounds. First, as discussed above, a constructive notice standard does not require actual knowledge of the condition that caused the injury. The Court’s reliance on the lack of testimony to this effect is ill-founded. Second, as the testimony previously discussed indicates, the witnesses listed above were aware that depressions had been created in the past at this corner, despite not

personally laying eyes on the specific depression that injured the Appellant. It is the Appellant's contention that the Respondent's knowledge of a recurrent condition that Mr. Gardner acknowledged would "create . . . some sort of a . . . problem at a later time," constitutes constructive notice of the condition at this corner. (R. p. 111, original p. 35, lines 8-9).

Second, the Court also bases its ruling on the fact that the Appellant did not testify that she had previously observed the depression prior to her incident on December 1, 2008. Although the Appellant's testimony that she had seen this depression prior to it causing her fall would be evidence of the Respondent's constructive notice, the lack of this evidence is a precarious foundation upon which to base a ruling of a lack of constructive notice. As this Court is well aware, it is the Respondent's responsibility to ensure that its premises are in a reasonably safe condition, not the Appellant's. See Fickling, 372 S.C. at 610 n.33, 643 S.E.2d at 117 n.33. By not meeting this responsibility, a municipality faces potential liability. The Respondent is at fault for not correcting this condition prior to the Appellant's incident, not the Appellant's fault for failing to prevent it by inspecting the City's streets. In fact, had the Appellant testified that she was aware of this depression prior to the incident, her claim would have likely failed under a comparative negligence defense.

The Court writes in its Order,

[n]ot only were the Defendant City of Hartsville, and Coker College, unaware of any depression, rut, defect or otherwise danger to the public, but the Plaintiff herself was unable to cite any prior experience or observation of any such rut or depression involving the subject street corner, even though she regularly crossed the street at this corner. (R. p. 5).

In addition to referencing a lack of actual notice on the part of the Respondent, the Court also placed weight in the Appellant's inability to "cite any prior experience or observation" of the condition at issue in this case. (R. p. 5). The error in this reasoning is its failure to understand that if the City had "prior experience or observation" of the condition that caused the Appellant's injuries, which the above-cited testimony demonstrates that it did, then it is irrelevant whether the Appellant had prior experience. (R. p. 5). The issue is whether the Respondent had constructive notice, not whether the Appellant did.

The Appellant contends that the Court misapplied the constructive notice standard by requiring that the Respondent have actual notice of the condition that caused the Appellant's injuries. The Appellant would concede, based on the testimony in this case, that the Respondent did not have actual notice of the depression, but fervently asserts that it did have constructive notice. As such, the Circuit Court erred in granting summary judgment in the Respondent's favor.

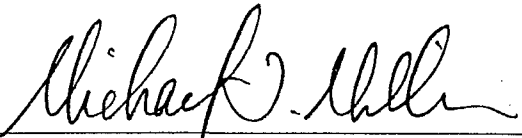
CONCLUSION

In conclusion, the Appellant's position in this case is simple. The issue in this case is whether the Respondent had constructive notice of the depression that caused the Appellant's injuries. The Appellant asserts that the evidence is ample to create a scintilla of evidence of a genuine issue of material fact regarding the Respondent's constructive notice. The Respondent was exceedingly aware that the corner at issue in this case was unpaved, that cars frequently cut the corner, and that ruts were commonly created as a result. The Respondent's 30(b)(6) witness testified that this corner was a problem that they had dealt with for years and that it was at times difficult to resolve. Only after this

lawsuit was filed did the Respondent endeavor to actually solve the problem, by paving over the corner. But in December of 2008, the corner was not paved and the Appellant stepped in a depression and sustained injuries. As a result of the foregoing, it is evident that the Respondent had constructive notice of this condition and that the Circuit Court erred in ruling otherwise. Therefore, the Appellant asks that the Circuit Court's grant of summary judgment to the Respondents be reversed and the case remanded back to the Darlington County Court of Common Pleas to proceed to trial.

Respectfully submitted,

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March 1, 2011

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM DARLINGTON COUNTY
Court of Common Pleas

Paul M. Burch, Circuit Court Judge

Case No. 2009-CP-16-0514

Alberta Major, ... Appellant,

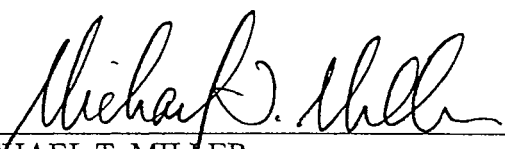
v.

City of Hartsville, ... Respondent.

CERTIFICATE OF COMPLIANCE

The undersigned certifies that the Final Brief of Appellant complies with the Supreme Court Order of August 13, 2007, in that there are no personal data identifiers included in the Appellant's Record on Appeal, or they have been redacted where necessary.

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March 1, 2011

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM DARLINGTON COUNTY
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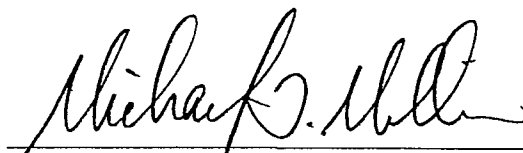
Case No. 2009-CP-16-0514

Alberta Major, ... Appellant,
v.

City of Hartsville, ... Respondent.

CERTIFICATE OF COUNSEL

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



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March 1, 2011

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM DARLINGTON COUNTY
Court of Common Pleas
Paul M. Burch, Circuit Court Judge

Case No. 2009-CP-16-0514

Alberta Major

Appellant

v.

City of Hartsville

Respondent

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SC Court of Appeals

FINAL BRIEF OF RESPONDENT

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STATEMENT OF THE ISSUE ON APPEAL

WHETHER THE TRIAL COURT PROPERLY GRANTED SUMMARY JUDGMENT IN FINDING THAT THE CITY OF HARTSVILLE WAS NOT ON NOTICE OF ANY DEFECT, RUT OR DEPRESSION AT THE STREET CORNER WHERE ALBERTA MAJOR INJURED HERSELF.

STATEMENT OF THE CASE

On Monday, December 1, 2008, the Appellant Alberta Major was walking to a class at Coker College, where she was enrolled as a student. While walking to her class from the Byerly parking lot which was directly across the street from the Coker College campus, the Appellant allegedly stepped in a depression at the corner of East Carolina Avenue and Coker Avenue, and allegedly injured her right ankle. Thereafter, on Thursday, December 4, 2008, the Appellant informed Coker College security and the Defendant City of Hartsville of the incident. Appellant subsequently sought medical care for her injuries, and then on July 15, 2009, filed a Summons and Complaint against the City of Hartsville for premises liability. Both parties exchanged discovery and conducted depositions of the Appellant as well as several City of Hartsville employees and one Coker College employee and former employee. On April 12, 2010, the City of Hartsville, filed a Motion for Summary Judgment, and a hearing on this motion was held on September 23, 2010, where the trial court heard oral arguments and received written memoranda of law from counsel for both parties. On October 23, 2010, Circuit Court Judge Paul M. Burch issued an Order granting the City of Hartsville's Motion for Summary Judgment on grounds that the City of Hartsville was not on notice, pursuant to the S.C. Tort Claims Act, of the depression in which Alberta Major injured herself. This appeal followed with Alberta Major's Notice of Appeal on November 1, 2010.

STANDARD OF REVIEW

The purpose of Summary Judgment is to expedite the disposition of cases which do not require the services of a fact finder. Shirley's Iron Works v. City of Union, 387

S.C. 389, 693 S.E.2d 1 (Ct. App. 2010). Summary Judgment is appropriate when it is clear that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. Summer v. Carpenter, 328 S.C. 36, 492 S.E.2d 238 (1997). The plain language of Rule 56, SCRCP, mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to the party's case, and on which that party will bear the burden of proof at trial. Etheredge v. Richland County School District One, 330 S.C. 447, 499 S.E.2d 238 (Ct. App. 1998). In such a situation, there can be no genuine issue as to any material fact since a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial. Id. The moving party is entitled to judgment as a matter of law because the nonmoving party has failed to make a sufficient showing on an essential element of the case. Id. When reviewing the grant of a summary judgment motion, the appellate court applies the same standard of review as the trial court under Rule 56, SCRCP. Cowburn v. Leventis, 366 S.C. 20, 619 S.E.2d 437 (Ct. App. 2005).

ARGUMENT

I. THE TRIAL COURT PROPERLY FOUND THAT THE DEFENDANT / RESPONDENT, CITY OF HARTSVILLE, WAS NOT ON NOTICE OF ANY DEFECT, RUT OR DEPRESSION AND THEREFORE SHOULD BE AFFIRMED.

A. Respondent, City of Hartsville, was not on notice of any defect, rut or depression at the location of Alberta Major's alleged injury.

The Respondent, City of Hartsville, was not on notice of any defect, rut or depression where the Appellant, Alberta Major, allegedly stepped into a rut or depression and sustained injuries at the corner of East Carolina Avenue and Coker Avenue. The South Carolina Tort Claims Act (SCTCA) is the exclusive remedy available for any tort committed by a governmental entity, its employees, or its agents. Richardson v. City of Columbia, 340 S.C. 515, 532 S.E.2d 10 (Ct. App. 2000). The SCTCA provides that "the State, an agency, a political subdivision, and a governmental entity are liable for their torts in the same manner and to the same extent as a private individual under like circumstances, subject to the limitations upon liability and damages, and exemptions from liability and damages contained herein." S.C.Code Ann. §15-78-40 (2005). Balancing the interests of the state against the interests of a tort victim, the General Assembly, in S.C.Code Ann. §15-78-60, provided thirty-one exceptions whereby the state was exempted from liability. Adkins v. Varn, 312 S.C. 188, 439 S.E.2d 822 (1993). The applicable exception to the waiver of immunity contained in the S.C. Tort Claims Act regarding street maintenance provides that a governmental entity is not liable for a loss resulting from:

absence, condition, or malfunction of any sign, signal, warning device, illumination device, guardrail, or median barrier unless the absence,

condition, or malfunction is not corrected by the governmental entity responsible for its maintenance within a reasonable time after actual or constructive notice. Governmental entities are not liable for the removal or destruction of signs, signals, warning devices, guardrails, or median barriers by third parties except on failure of the political subdivision to correct them within a reasonable time after actual or constructive notice. Nothing in this item gives rise to liability arising from a failure of any governmental entity to initially place any of the above signs, signals, warning devices, guardrails, or median barriers when the failure is the result of a discretionary act of the governmental entity. The signs, signals, warning devices, guardrails, or median barriers referred to in this item are those used in connection with hazards normally connected with the use of public ways and do not apply to the duty to warn of special conditions such as excavations, dredging, or public way construction. Governmental entities are not liable for the design of highways and other public ways. Governmental entities are not liable for loss on public ways under construction when the entity is protected by an indemnity bond. *Governmental entities responsible for maintaining highways, roads, streets, causeways, bridges, or other public ways are not liable for loss arising out of a defect or a condition in, on, under, or overhanging a highway, road, street, causeway, bridge, or other public way caused by a third party unless the defect or condition is not corrected by the particular governmental entity responsible for the maintenance within a reasonable time after actual or constructive notice.*

S.C.Code Ann. § 15-78-60(15) (2005) (emphasis added).

In order for the City of Hartsville to be liable under the SCTCA, it would have been necessary for the City to have been on “notice” of a defect at the location of Alberta Major’s accident. Neither the Hartsville Police Department nor Coker College Security were aware of any rut, depression or defect where the Appellant, Alberta Major, allegedly stepped into a depression and injured herself. Furthermore, neither were aware of any prior falls or injuries involving anyone at the subject street corner even though both the city police and college security patrolled the area around the street corner nearly every day and sometime multiple times per day.

Q: Okay. All right. Do you know of any other instances where a pedestrian has gotten hurt at that corner?

A: No, sir. I don’t.

Q: Had you ever seen a rut – you called in your report, you called it a

hole, have you ever seen that before Ms. Major brought it to your attention?

A: No.

(R. p. 85, *Deposition of Burke Hoffman, Coker College Security, Page 21, Lines 3-10*)

Q: And during the time before this was paved and before Ms. Major reported to you that she had fallen there, had you ever known of anyone to fall or heard any reports of someone falling in that area?

A: No, sir.

Q: Have you ever noticed in your trips around this area, anything about that area that, even though it wasn't something that you patrolled, that you thought looked like it was dangerous or some -- some problem with it?

A: I didn't see anything that, you know, out of the ordinary. The you know. . .

(R. p. 88, *Deposition of Burke Hoffman, Coker College Security, Page 33, Lines 2-12*)

Q: Okay. How often in the course of your work day would you observe that corner?

A: On a normal work day, dozens of times.

Q: Okay.

A: I drive through that section constantly, especially in the morning and afternoon sessions around when school gets out.

Q: Okay.

A: And I've been working -- I worked that specific section for two years straight.

(R. p. 100, *Deposition of Michael Sanchez, Hartsville Police Department, Page 23, Lines 6-15*)

Q: Okay. To your knowledge, has anybody else been injured at that corner as a result of any sort of fall?

A: Never, never been reported to anybody that I know of.

Q: What about any similar situation of somebody stepping in a hole?

A: On that corner?

Q: Well at any corner in downtown?

A: No, I have never been reported of any kind of injury at a, at corner like that.

(R. p. 101, *Deposition of Michael Sanchez, Hartsville Police Department, Page 28, Lines 10-20*)

The deposition of former Coker College employee and groundskeeper Mark A. Gokey provides further support of the City of Hartsville's contention that it lacked notice of any rut or depression. While Mr. Gokey's deposition testimony described the location where the Appellant allegedly slipped as "not a rut, it was an impression" and further described it as a "lowering slant" or "slope" (R. pp. 37-38, *Deposition of Mark Gokey Page 12 - Page 13*), at no point in Mr. Gokey's deposition did he testify as that he was aware of any prior defect at the location of, and within a reasonable time of Alberta Major's alleged injury. Mr. Gokey's lack of knowledge or notice of any prior defects at the location of the Appellant's accident was further supported by his testimony that only the work he performed at the street corner of the Alberta Major's accident, prior to her alleged injury, was mowing the lawn because he thought it was Coker College property. (R. p. 39, *Gokey Deposition, Page 16, lines 16-20*). In short, Mr. Gokey had not previously repaired the subject street corner because there were no previous repairs needed.

B. The Appellant, Alberta Major, never observed or noticed any defect, rut or depression, despite her regular visits to the site of her alleged accident.

Despite attending Coker College as a student continuously since October of 2007 (R. p. 64, *Deposition of Alberta Major, p. 23, lines 11-19*), and regularly parking in the Byerly parking lot (R. p. 65, *Id. at p. 25, lines 6 - 12*) adjacent to the street corner where she allegedly slipped and injured herself, Alberta Major never noticed any defect, rut or depression at the subject street corner in her time as a student prior to her alleged

accident.

Q: All right. And you were familiar with the fact that the sidewalk ran out?

A: Yes.

Q: All right. It doesn't run out there now, correct? It's been --

A: Correct

Q: -- paved beyond that. And on any occasion when you had walked through that way in the past, prior to this evening or this afternoon, had you ever seen a hole there that -- or something looked like a hole?

A: No.

Q: During the time when, say there weren't leaves on the -- on the ground there, hadn't noticed anything any hole or depression there?

A: No.

Q: And I take it that on the evening this happened, you didn't notice anything?

A: I did not.

(R. p. 66, *Deposition of Alberta Major*, Page 29, Line 12 - Page 30, Line 5)

Not only were the City of Hartsville and Coker College, unaware of any depression, rut, defect or otherwise danger to the public, but the Appellant herself was unable to cite any prior experience or observation of any such rut or depression involving the subject street corner, even though she regularly crossed the street at this corner. When the Appellant, Alberta Major, did inform Coker College, and thereafter the City of Hartsville, the alleged depression or rut was filled by Coker College. (R. p. 36, *Deposition of Mark Gokey*, p. 9, lines 17-22).

C. The City of Hartsville is not liable for a loss resulting from any defect that may be attributed to trucks and cars cutting the street corner.

The Appellant, Alberta Major, argued before the trial court at Summary Judgment

that the City of Hartsville was on notice of the rut, depression or defect at the street corner based upon its knowledge of cars and trucks periodically driving on the street corner curb while turning from Coker Avenue onto East Carolina Avenue. This view is flawed. The SCTCA is clear that “*governmental entities responsible for maintaining . . . streets . . . or other public ways are not liable for loss arising out of a defect or a condition in, on, under, or overhanging a . . . street, . . . or other public way caused by a third party unless the defect or condition is not corrected by the particular governmental entity responsible for the maintenance within a reasonable time after actual or constructive notice.*” S.C. Code § 15-78-60(15) (2005) (emphasis added).

It is unknown what, if any, specific third party may have caused the alleged depression where the Appellant tripped. Phil Gardner, Director of Parks and Leisure Services for the Defendant, testified that while there had been instances in the past of trucks cutting street corners and causing ruts, but never holes, these ruts were repaired by the city when reported. (R. pp. 110-111, *Deposition of Phil Gardner Pages 31-34*) He further testified that there would have been no reason for any public works employees to dig any holes at the subject street corner prior to Alberta Major’s alleged accident.

Q: All right. Would there have been any reason for anyone in your department to have dug any holes in this area there where that pole is and the area in between and the street?

A: No, sir.

Q: If, in fact, your crew had noticed that a tractor trailer had cut that corner and left a deep groove or rut there, would they have done anything to address that?

A: Yes, they would have.

Q: What would they have done?

A: They would have gone in and back-filled it and tamped it tight and observed the area to make sure that it was packed well and did not wash out or settle.

(R. p. 112, *Deposition of Phil Gardner, Page 42, Line 21 - Page 43, Line 10.*)

While Coker College Security Officer Hoffman, Hartsville Police Officer Sanchez, and Phil Garder all testified that the street corner curb of East Carolina Avenue and Coker Avenue was periodically driven over by both cars and trucks, this alone does not equate to liability or notice of the specific defect, allegedly causing the Appellants injuries, for the City of Hartsville. The deposition testimony of Officer Hoffman, Officer Sanchez, Phil Gardner, and even Alberta Major make it clear that there had been no rut, depression or defect at the street corner in the past days, weeks or months prior to the Appellant's accident. (R. pp. 64-66, 85, 88, 100-101, 110-112). Coker College Security Officer Hoffman and Hartsville Police Officer Sanchez had neither observed any rut or depression, nor received any reports concerning a rut or depression at that street corner in the past, and neither officer nor the Appellant was aware of any past incidents of people slipping or falling at that street corner. (R. pp., 64-66, 85, 88, 100-101). Hypothetically, if the City of Hartsville had known for a reasonable time prior to this incident of a defect or dangerous condition associated with the corner of East Carolina and Coker Avenues and failed to correct the problem, then the City could have been held liable. Simply put, the facts do not support such an argument here as the City was not on any notice of a rut, depression or defect that could be hazardous to any person. As such, the City of Hartsville was not on notice of any defect alleged by the Appellant and therefore was entitled to summary judgment by the trial court under the SCTCA as a matter of law.

D. Appellant's interpretation of notice is not applicable to this case, and is based upon dissimilar facts.

Appellant's reliance on Vaughan v. Town of Lyman, 370 S.C. 436, 635 S.E.2d

631 (2006), and Fickling v. City of Charleston, 372 S.C. 597, 643 S.E.2d 110 (Ct. App. 2007), at summary judgment and on this appeal respectively, are misplaced. Neither of these cases are similar to the case at hand as the Appellant asserts, and both involved clear and specific defects in sidewalks, and further involved testimony by city employees stating that they were on notice of a specific sidewalk hole prior to the Plaintiff's fall. In Fickling, the evidence presented showed that the specific sidewalk hole had existed "for a while", and that several city employees (parking enforcement officers, sanitation workers, and city police officers) passed by the sidewalk hole prior to the Plaintiff's falling and injuring herself. Fickling at 118. In Vaughan, the town mayor even testified that he had been aware of the specific sidewalk defect for ten years. Vaughn at 446. In the case at hand, the Plaintiff completely relies on testimony that cars and trucks were known to have periodically created ruts or depressions at the street corner over the years to satisfy the notice requirement under the SCTCA. In the instant case, there is no testimony from anyone, including Alberta Major, which shows any knowledge or notice of any specific rut or depression at the location of the Appellant's injuries in the days, weeks or months prior to the accident. It appears that the Appellant equates knowledge of the periodic cutting of street corners by vehicles to a "continual condition" that would put the City of Hartsville on notice at the moment a condition is created. The Appellant's argument is not reasonable, especially when weighed with the previously cited testimony that no prior complaints about this street corner had been received in the days, weeks, or months, preceding this accident, by the City, the Police Department, or Coker College Security, and that the Appellant, Alberta Major, was not aware of any problem with the street corner despite her frequent use of this very corner as a Coker College student.

While not cited in its brief, Appellant's reliance on a notice standard that was applied in both a grocery store and hospital parking lot slip and fall case, which cited evidence of clear knowledge of a specific defect, is neither appropriate nor reasonable in light of the facts of this case. (See Pinckney v. Winn Dixie Stores, Inc., 311 S.C. 1, 426 S.E.2d 327 (Ct. App. 1992) and Henderson v. St. Francis Community Hospital, 303 S.C. 177, 399 S.E.2d 767 (1990), cited in footnote 37 of Fickling.)

E. Appellant's sole reliance on the "scintilla of evidence" rule is not reasonable and without merit, based on the facts and testimony of this case.

The Appellant, Alberta Major, asserts that a scintilla of evidence exist in this case, and that based on the holding of Hancock v. Mid South Management Company, 381 S.C. 326, 673 S.E.2d 801 (2009), the trial court erred in granting summary judgment. In Hancock, the Plaintiff fell in the parking lot of the Newberry Observer newspaper building and thereafter brought a lawsuit for damages. The Defendant in that case was granted summary judgment on grounds that the defective condition in the parking lot was not a dangerous condition, and even if it were, the condition was open and obvious. Id. at 328. The Court reversed the trial court and the Court of Appeals on grounds that that the open and obvious question was still a question for the jury, and that Plaintiff's testimony, her daughter's eyewitness testimony, and the affidavit submitted by a former employee of the Defendant providing that the Defendant was aware of the condition and had received complaints from its employees about the parking lot condition, clearly showed the Defendant should have been on notice of the defect in the parking lot. In Hancock, the Plaintiff clearly had a scintilla of evidence to support her case, but in the

instant case, the Appellant's evidence does not add up to such a finding.

Hancock must also be taken with the previous case law which clearly shows the trial court ruling was proper in the instant case. While giving deference to the scintilla rule, the Supreme Court has previously held that "there is another rule which should not be overlooked, and that is that the testimony of the witness must be read and considered as a whole and that if upon such consideration there is only one reasonable conclusion that can be drawn therefrom any contrary finding would be error of law. Young v. Hyman Motors, 199.S.C.233, 19 S.E.2d 109 (1942). While South Carolina does use the "scintilla rule", our Court has also recognized a rule supplemental to the scintilla rule which is "more founded upon common sense and reason, to the effect what when only one reasonable inference, not just one inference, but one reasonable inference, can be deduced from the evidence, it becomes a question of law for the court, and not a question of fact for the jury." Id. at 113 (citing National Bank of Honea Path v. Thomas J. Barrett, Jr., & Co. et al., 173 S.C. 1, 174 S.E. 581 (1934)). While only a scintilla of evidence is necessary to defeat summary judgment, the trial court has always had the discretion to determine reasonableness of evidence before the court.

Here, the trial court was presented with the testimony of five people which clearly showed that no person, be it the Appellant Alberta Major or any other Hartsville or Coker College employee, was aware of any specific or longstanding rut or depression at the Hartsville street corner within a reasonable time prior to Alberta Major's injury. As such, the trial court properly granted summary judgment.

II. THE TRIAL COURT DID NOT ERR IN APPLYING THE CONSTRUCTIVE NOTICE STANDARD AND SHOULD BE AFFIRMED.

The trial court ruled that the Respondent City of Hartsville was not on notice, be it actual or constructive, of any specific or longstanding defect, rut or depression at the street corner where Alberta Major was injured. As the Appellant points out, [c]onstructive notice is a legal inference which substitutes for actual notice. It is notice imputed to a person whose knowledge of facts is sufficient to put him on inquiry; if these facts were pursued with due diligence, they would lead to other undisclosed facts. Therefore, this person is presumed to have actual knowledge of the undisclosed facts. Strother v. Lexington County Recreation Commission, 332 S.C. 54, 64, 504 S.E.2d. 117, 122. The issue in Strother focused on whether the Defendant had actual notice of a defective sprinkler head on a softball field. Id. at 58. The Court did however articulate the difference between actual and constructive notice, even though constructive notice was not an issue in that case because Strother focused on a separate SCTCA provision that is not at issue in this case. While City of Hartsville employee Phil Gardner testified that he was aware that vehicles had cut the street corner in the past, he did testify that the City would repair any depressions or ruts made by any vehicle. (R. p. 112, *Deposition of Phil Gardner, Page 42, Line 21 - Page 43, Line 10.*) The Appellant asserts that this knowledge alone results in the City of Hartsville being on constructive notice of the depression in which Alberta Major was injured. It is clear from all the deposition testimony that the Respondent, City of Hartsville, has not in the past, or in the present, “folded their arms and shut their eyes” and claimed they have no notice as asserted by the Appellant in her reliance on Fickling. On the contrary, there is no evidence from any testimony which can sufficiently establish constructive notice of the rut or depression in

which the Appellant was injured.

Appellant also asserts that Alberta Major's testimony stating she had not observed any rut or depression at the subject street corner should not matter in whether the City of Hartsville was on constructive notice of the alleged defect. To the contrary, Alberta Major's testimony is just as important and relevant in approaching the issue of constructive notice as any of the other four witnesses who were deposed in this case. While the Appellant's testimony alone is not conclusive, when it is weighed with the combined testimony of the four other Coker College and City of Hartsville employees the result is clear even in the light most favorable to the Appellant Alberta Major.

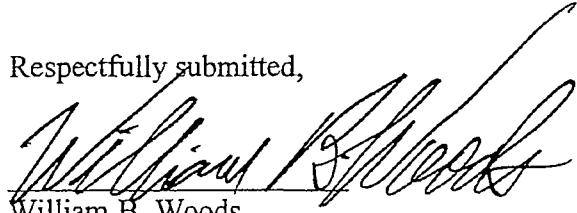
As such, the evidence presented at summary judgment was reasonable and clearly supported the trial court's conclusion that the City of Hartsville was not on constructive notice of any defect, rut, hole or depression at the location of Alberta Major's injury. Therefore, the trial court did not err in its application of the constructive notice standard and should be affirmed.

CONCLUSION

The trial court properly ruled that the Respondent, City of Hartsville, was not on notice of any defect, rut or depression at the location of the Appellant's injury, based upon the deposition testimony of five persons. Furthermore, the trial court did not err in applying the constructive notice standard to the facts and evidence of this case. Therefore, the trial court should be AFFIRMED.

(Signature on the following page)

Respectfully submitted,

A handwritten signature in black ink, appearing to read "William B. Woods", written over a horizontal line.

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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

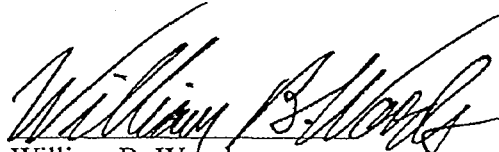
APPEAL FROM DARLINGTON COUNTY
Court of Common Pleas
Paul M. Burch, Circuit Court Judge

Case No. 2009-CP-16-0514

Alberta Major, ... Appellant,
City of Hartsville, ... Respondent.

CERTIFICATE OF COMPLIANCE

The undersigned certifies that the Final Brief of Respondent complies with the Supreme Court Order of August 13, 2007, in that there are no personal data identifiers included in the Appellants Record on Appeal, or they have been redacted where necessary.



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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM DARLINGTON COUNTY
Court of Common Pleas
Paul M. Burch, Circuit Court Judge

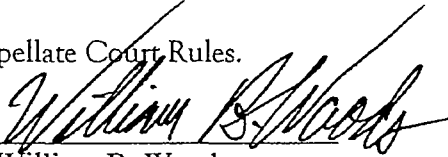
Case No. 2009-CP-16-0514

Alberta Major, ... Appellant,

City of Hartsville, ... Respondent.

RULE 211 (b) CERTIFICATION

The undersigned certifies that the Final Brief of Respondent complies with
Rule 211(b) of the South Carolina Appellate Court Rules.



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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Alberta Major, Appellant,

v.

City of Hartsville, Respondent.

Appellate Case No. 2010-176986

Appeal From Darlington County
Paul M. Burch, Circuit Court Judge

Published Opinion No. 4979
Heard March 12, 2012 – Filed June 6, 2012

AFFIRMED

Michael T. Miller, Wukela Law Firm, of Florence, for
Appellant.

William Bailey Woods, Woods Law Firm, LLC, of
Lexington, for Respondent.

FEW, C.J.: This appeal involves constructive notice under subsection 15-78-60(15) of the South Carolina Code (2005), a provision of the Tort Claims Act. The question before the court is "constructive notice of what?" More precisely stated, the issue we address is: What is the "defect or condition" of which a plaintiff must prove a governmental entity had constructive notice before the entity is subject to liability "for loss arising out of a defect or a condition in [or] on . . . a highway, road, street, . . . or other public way caused by a third party"? § 15-78-60(15). Alberta Major presented evidence the City of Hartsville had notice of circumstances it knew would eventually lead to a dangerous defect or condition,

but she presented no evidence the City had any notice of the defect or condition she alleged proximately caused her injury. We affirm the circuit court's decision to grant summary judgment to the City.

I. Facts and Procedural History

Major attended night classes at Coker College in Hartsville, South Carolina. On the afternoon of her injury, December 1, 2008, Major parked in a lot across the street from the Student Union Building, where she was going to check her mailbox before class. To reach the building, Major walked on a sidewalk that turned into a grassy area before she crossed the street at a corner. The City owns the sidewalk and grassy area. As Major walked over the grassy area to get to the street, her foot "slipped into a hole." She did not fall but "stumbled" and "hobbled on across the street." Five days later, Major went to the emergency room for ankle pain. She later saw an orthopedist and attended physical therapy for her ankle.

In July 2009, Major filed this action for damages against the City. The City filed a motion for summary judgment asserting it was not liable under the Tort Claims Act because it was not on notice of any hole. The circuit court conducted a hearing, agreed with the City's position, and granted the motion.

II. Summary Judgment Standard

Summary judgment is proper when "there is no genuine issue as to any material fact and [] the moving party is entitled to a judgment as a matter of law." Rule 56(c), SCRPC. "In determining whether any triable issue of fact exists, the evidence and all inferences which can reasonably be drawn therefrom must be viewed in the light most favorable to the nonmoving party." *Robinson v. Estate of Harris*, 388 S.C. 630, 638, 698 S.E.2d 222, 226 (2010) (internal quotation marks omitted). "On appeal from the grant of a summary judgment motion, [we apply] the same standard as that required for the circuit court." 388 S.C. at 637, 698 S.E.2d at 226.

III. "Defect or Condition" Under the Tort Claims Act

Major argues the City is liable for her injuries under subsection 15-78-60(15) of the Tort Claims Act, which provides in part:

Governmental entities responsible for maintaining
highways, roads, streets, causeways, bridges, or other

public ways are not liable for loss arising out of a defect or a condition in, on, under, or overhanging a highway, road, street, causeway, bridge, or other public way caused by a third party unless the defect or condition is not corrected by the particular governmental entity responsible for the maintenance within a reasonable time after actual or constructive notice.

S.C. Code Ann. § 15-78-60(15) (2005). The parties agree there is no evidence of actual notice. Major argues the City was on constructive notice of "the condition at issue," which she defines as "the unpaved corner of the intersection that was frequently subject to vehicles driving over it creating ruts." Her argument is based primarily on the testimony of the City Director of Parks and Leisure Services, Phillip Gardner. Gardner testified that "for years" he observed trucks cutting the corner where Major fell and that the truck tires crossing unpaved ground caused "depressions." Gardner stated when his crew noticed a depression, "they've gone back and they have put sand or clay back in the area." However, he called it "a fruitless effort because a few days later, it's . . . right back in the same condition." He testified that because of this, "they just kept an eye on that area to make sure that it did not create . . . some sort of a . . . problem at a later time."

Major also presented the testimony of Hartsville police officer Michael Sanchez,¹ who responded to the scene of Major's fall when she reported it to the City three days later. Officer Sanchez testified he observed "a little bit of a concave depression in the dirt" at the corner. When Major's counsel asked him what "thoughts" he had on "how the depression was created," Sanchez testified it could have been caused by "vehicles cross[ing] over sidewalks and corners." Sanchez explained he had seen vehicles do that at the intersection where Major fell, and "we find this happening throughout the City a lot where people cut corners and it could have been something generated from just constant wear and tear. I know I've observed many a vehicle travel through a corner like that and go over it."

The circuit court found that the allegation the City was on notice of an "unpaved corner of the intersection that was frequently subject to vehicles driving over it creating ruts" does not create a "genuine issue as to any material fact" under subsection 15-78-60(15). The court stated:

¹ Gardner and Sanchez are the only City employees whose testimony is in the record. We have not considered the testimony of any other witnesses because their knowledge cannot be imputed to the City.

[T]he alleged defect in this case involved nothing more than the periodic placement and correction of tire tracks on grass at a City of Hartsville street corner. The Court disagrees with the Plaintiff's assertion that the Defendant's knowledge of the periodic cutting of street corners was a continuous condition and finds that this did not place the Defendant on constructive notice of the actual defect, rut or depression in which the Plaintiff injured herself.

We agree with the circuit court. To prove liability under subsection 15-78-60(15), a plaintiff must prove the governmental entity was on notice of that which she alleges was the proximate cause of her injury. Here, Major alleges the proximate cause was the depression, rut, or hole. However, viewing the evidence in the light most favorable to Major, she has shown only that the City was aware of the circumstances which were likely, even certain, to cause a hole. As we will discuss later, this argument misses the significance of what a plaintiff alleges was the proximate cause of her injury.

Major argues the repetitive nature of trucks driving off the roadway at the corner and causing depressions, ruts, or holes establishes a continual condition, and therefore the City was on constructive notice that the specific condition or defect that caused Major's fall would likely develop. In support of her argument, Major cites *Fickling v. City of Charleston*, 372 S.C. 597, 643 S.E.2d 110 (Ct. App. 2007). *Fickling* is factually similar to Major's case because it involved a plaintiff who "stepped into a hole in a sidewalk and fell, sustaining injuries." 372 S.C. at 599, 643 S.E.2d at 112. However, *Fickling* does not support Major's argument because in that case we found evidence that the City of Charleston was on constructive notice of the specific "defect or condition" the plaintiff alleged caused her injuries—"a hole in a sidewalk." We stated: "In the light most favorable to Fickling, there was at least some evidence that (1) there were numerous City personnel within the area of the defect who could have seen and reported the problem; [and] (2) the condition had existed for a while." 372 S.C. at 609-10, 643 S.E.2d at 117. Specifically, we cited evidence "the hole was partially covered by leaves," 372 S.C. at 601, 643 S.E.2d at 113, a photograph showing "[l]arge cracks radiated out from [the hole]," *id.*, and the testimony of Charleston's Public Service Director that the hole "had probably been that way for a while." 372 S.C. at 610 n.34, 643 S.E.2d at 117 n.34. *Fickling*, therefore, was decided on the basis of the existence of evidence that the "condition or defect" that caused the plaintiff's

injury—the hole in the sidewalk—had existed long enough that City of Charleston personnel should have seen it and fixed it.

In this case, on the other hand, Major offered no evidence the City was on notice of the particular depression, rut, or hole she alleges caused her injury. Gardner testified his crew typically inspected a particular intersection every three to five weeks. Gardner did not know if any of his staff was present at the corner in the week before Major fell. He testified the City's records indicated that because Major fell on the Monday after Thanksgiving, "the last time we would have or could have been there would be Wednesday before Thanksgiving." Major's counsel conceded at oral argument that "we don't know" how long "the particular depression that caused Mrs. Major's injuries" had been there, and that it could have been created that morning. Because there was no evidentiary basis on which the jury could determine how long a depression, rut, or hole had been there, a jury would have to speculate whether City personnel should have seen it. In this situation, there was no evidence of constructive notice and summary judgment was required. *See Hanahan v. Simpson*, 326 S.C. 140, 149, 485 S.E.2d 903, 908 (1997) (stating "verdicts may not be permitted to rest upon surmise, conjecture or speculation").

Major's argument that *Fickling* is applicable to this case appears to be based on a reference this court made at the end of a footnote to the supreme court's discussion of two cases in *Wintersteen v. Food Lion, Inc.*, 344 S.C. 32, 542 S.E.2d 728 (2001). *See Fickling*, 372 S.C. at 610 n.37, 643 S.E.2d at 117 n.37. In *Wintersteen*, refuting an argument that our courts "have . . . required storekeepers to take actions to prevent or minimize the foreseeable risk of a foreign substance on the floor of its premises," the supreme court explained its holding in *Henderson v. St. Francis Community Hospital*, 303 S.C. 177, 399 S.E.2d 767 (1990) and this court's holding in *Pinckney v. Winn-Dixie Stores, Inc.*, 311 S.C. 1, 426 S.E.2d 327 (Ct. App. 1992). 344 S.C. at 36, 36 n.1, 542 S.E.2d at 730, 730 n.1. The court explained that "recurrence alone is insufficient to establish constructive notice." 344 S.C. at 37 n.1, 542 S.E.2d at 730 n.1. The court went on to explain that

there may be certain factual patterns, as in *Henderson* and *Pinckney*, wherein the recurrence is of such a nature as to amount to a continual condition, and that factor, when coupled with other evidence, such as store employees' knowledge thereof, may be sufficient to create a jury issue as to the defendant's constructive notice at the time of the accident.

Id.

For several reasons, this case does not fit the "factual patterns" of *Henderson* and *Pinckney*. First, those cases did not arise as exceptions to sovereign immunity under the Tort Claims Act. Second, in both of those cases the defendant's negligence created the circumstance which led to the recurrence of a dangerous condition that "amount[ed] to a continual condition." In *Henderson*, St. Francis Hospital ignored the advice of an architectural firm it hired to design an addition to its parking lot that it should remove numerous mature sweetgum trees because the balls they drop on the parking lot "are dangerous to pedestrians." 303 S.C. at 180, 399 S.E.2d at 768-69. Despite this advice, St. Francis "built a stairway immediately adjacent to one of the trees" and "failed to use a regular maintenance program." 303 S.C. at 180, 399 S.E.2d at 769. In *Pinckney*, the store manager "created a dangerous situation" by putting a "poinsettia display . . . on a make-shift shelf adjacent to the aisles in the store." 311 S.C. at 4, 426 S.E.2d at 329. The plaintiff presented evidence that a poinsettia leaf "secretes a 'milky substance'" when it is removed from the plant, and that "the store manager observed the poinsettia leaves falling to the floor and . . . left [them] . . . until the next periodic sweeping." *Id.*

Finally, as the supreme court stated in *Wintersteen*, the "continual condition" must be "coupled with other evidence." 344 S.C. at 36 n.1, 542 S.E.2d at 730 n.1. We do not see any "other evidence" in this record which could create a jury question on the City's liability under subsection 15-78-60(15) even if this were a "factual pattern" like *Henderson* or *Pinckney*.

Our holding is further supported by *Wintersteen*. In *Wintersteen*, the plaintiff "slipped and fell on a puddle of clear liquid" while walking near "a self-service soda fountain equipped with an ice dispenser" in a Food Lion store. 344 S.C. at 34, 542 S.E.2d at 729. *Wintersteen* admitted Food Lion had neither actual nor constructive notice of the liquid on the floor but instead argued "the storekeeper has a duty to minimize such risks and take measures to prevent the items from falling" because it is foreseeable that the ice dispenser will cause liquid to fall to the floor. 344 S.C. at 35, 542 S.E.2d at 730. Affirming this court's decision that the trial court should have directed a verdict for Food Lion, the supreme court distinguished between liability for failure to correct an existing dangerous condition and liability for failure to prevent the dangerous condition from arising in the first place.

Wintersteen does not dispute the trial court's ruling that Food Lion neither placed the substance on the floor nor had actual or constructive notice thereof. Rather, she contends that, if it is foreseeable an item will fall to the floor, then the storekeeper has a duty to minimize such risks and take measures to prevent the items from falling. Although this approach has some appeal, we decline to depart from our traditional "foreign substance" analysis. We adhere to prior precedent that a storekeeper is liable only upon a showing that it actually placed the foreign substance on the floor, or that it had actual or constructive notice thereof.

344 S.C. at 35-36, 542 S.E.2d at 730.

A similar distinction exists for liability of governmental entities under the Tort Claims Act. When a plaintiff seeks to recover for the failure to correct some existing "defect or condition," the plaintiff must prove the governmental entity had actual or constructive notice of the defect or condition alleged to have proximately caused the plaintiff's injury. *See* S.C. Code Ann. § 15-78-60(10) (2005) (requiring proof of actual or constructive notice for "loss resulting from . . . natural conditions on unimproved property"); § 15-78-60(15) (requiring the same for "loss resulting from . . . a defect or condition . . . caused by a third party"); § 15-78-60(16) (2005) (requiring the same for "loss resulting from . . . public property, intended or permitted to be used as a park, playground, or open area for recreational purposes").

However, the Tort Claims Act contains different standards for liability when a plaintiff seeks to recover for the governmental entity's failure to prevent a dangerous condition from arising. For example, the Act provides immunity from liability in design defect cases. *See* S.C. Code Ann. § 15-78-60(15) ("Governmental entities are not liable for the design of highways and other public ways."). Even though absolute design immunity is not available in all cases, the City's actions might have been subject to discretionary design immunity. *Compare Giannini v. S.C. Dep't of Transp.*, 378 S.C. 573, 580, 664 S.E.2d 450, 453 (2008) (holding absolute design immunity was not available when SCDOT was on notice of the need for median barriers) *and Wooten v. S.C. Dep't of Transp.*, 333 S.C. 464, 467-68, 511 S.E.2d 355, 357 (1999) (holding absolute design immunity was not available when SCDOT was on notice an intersection was hazardous because existing traffic signals did not allow safe pedestrian crossing) *with Wooten*, 333

S.C. at 469, 511 S.E.2d at 358 (holding discretionary immunity was a jury issue on a claim that SCDOT failed to redesign an intersection with traffic signals that allowed safe pedestrian crossing "after notice the intersection was hazardous") and *Giannini*, 378 S.C. at 590, 664 S.E.2d at 459 (Pleicones, J., dissenting) (stating "[a]lthough an entity may lose design immunity, it may still be immune from liability if it exercises discretion when faced with actual or constructive knowledge of a hazardous condition").

The distinction in *Wintersteen* and the Tort Claims Act turns on the plaintiff's allegation of proximate cause. In *Wintersteen*, the plaintiff alleged the proximate cause of her injury was Food Lion's failure to "take measures to prevent the items from falling" to the floor. 344 S.C. at 35, 542 S.E.2d at 730. The supreme court "decline[d] to depart from our traditional 'foreign substance' analysis . . . [and] adhere[d] to prior precedent that a storekeeper is liable only upon a showing . . . that it had actual or constructive notice" of the "substance on the floor." 344 S.C. at 35-36, 542 S.E.2d at 730. It is not enough, therefore, to prove the storekeeper knew the substance would eventually be on the floor and failed to take steps to prevent it. Similarly, when a plaintiff alleges a governmental entity is "liable for loss arising out of a defect or a condition . . . caused by a third party" under subsection 15-78-60(15), she must offer evidence that the governmental entity had notice of the defect or condition she alleges was the proximate cause of her injury. Major's argument that the City was on notice of trucks cutting the corner to create holes misses the distinction. Just as in *Wintersteen*, it is not enough to allege the governmental entity knew the defect or condition would eventually develop and then cause injury. This would not be an allegation that the City should have fixed the hole, but a design defect allegation that the City should have taken steps to fix the intersection where trucks cause holes. However, her complaint contains no allegation the City failed to take any step to prevent a depression, rut, or hole from developing; and, at oral argument, her counsel conceded she did not raise a design defect claim.

The dissent argues that we have applied an actual notice standard when only constructive notice is required. Our focus, however, is not the difference between actual and constructive notice. The question we address is "constructive notice of what?" The answer is that the plaintiff must prove the governmental entity was on constructive notice of the defect or condition she alleges proximately caused her injury. Major alleges the proximate cause of her injury was a hole but presented no evidence the City was on constructive notice of a hole.

IV. Conclusion

We affirm the circuit court's decision to grant summary judgment in the City's favor because we find no evidence the City was on constructive notice of the defect or condition Major alleges proximately caused her injury.

CURETON, A.J., concurs.

HUFF, J., dissents.

HUFF, J.: Respectfully, I dissent. Alberta Major brought this tort action against the City of Hartsville (City), alleging she was injured when she fell in a "hole" on City's premises. The trial court granted City summary judgment, finding City was not on notice of any defect, rut, or depression at the location of the incident. In my opinion, the majority, as well as the trial court, has effectively applied an actual notice standard to this matter, where the issue is one of constructive notice. Viewing the evidence in a light most favorable to Major, I believe she has presented sufficient evidence City had constructive notice of a defect or condition, alleged to have caused her injury, such that the granting of summary judgment to City on the basis that City had no notice was improper.

The facts are as follows: On Monday, December 1, 2008, Major, a resident of Florence, traveled to Hartsville to attend class at Coker College. Major parked her car in a school parking lot, and then proceeded to a sidewalk, walking her usual route to class. This particular sidewalk was paved to a point, but as it reached a corner where two roads intersected, the sidewalk ran out, leaving a grassy area between the sidewalk and the road. Major, intending to cross the street, stopped beside the stop sign on this corner to check for traffic. According to Major, as she "took a step out," her foot slipped into a hole, her knee buckled to the right, and she stumbled, but regained her balance. When she returned for class the following Thursday, December 4, Major reported she had injured her foot in the incident to a Coker College employee at the Student Building. The employee instructed her to report the matter to Coker College security. Major located security officer Burke Hoffman and pointed out the place where she indicated she had stepped into a hole. Hoffman informed Major the property did not belong to Coker College, and told her she needed to contact City's police department. Major then called the police, and Officer Michael Sanchez responded to the incident location. Major informed Officer Sanchez she had hurt herself on December 1 when, as she was about to cross the street, she stepped into a deep hole in the grass at the corner of the intersection. Major returned to the location the next day to take photographs of the

area, and found an individual with a golf cart who was putting dirt in the area. Major stated she sought medical treatment at the emergency room on December 6, 2008, and was thereafter seen by an orthopedist and ultimately referred to physical therapy for injury to her right ankle.

The Coker College security officer described the grassy area incident site Major showed to him as being located between the sidewalk and the road and as being "like a rut," with leaves partially covering it. When asked if he had any idea what may have caused the rut or hole, Hoffman responded:

I do know from observations from over the years, that cars, they come – and not only when I'm in the parking lot, but when I'm on campus looking back towards that way, that cars come and cut that corner. And cut it, you know, a lot of times it - - they just roll, and don't come to a complete stop. And then, you know, they go on.

Hoffman indicated the cars "cut real sharp" and drive on the grass. Hoffman also acknowledged he had seen large 18-wheeler trucks cut that corner because it is difficult for them to make a right turn there due to a median. The area of the incident has since been paved, and Hoffman indicated he had seen vehicles cutting that corner since then and noted tire tracks could be observed on the cement. Coker College employee Gokey described the area in question as an "impression" with grass growing over it, two to three inches on a slope, about two feet long and one foot wide.

Officer Sanchez described the corner incident area as being about a foot away from the sidewalk and appearing "to be some kind of a relief, a concave depression . . . in the dirt with grass growing in it and very sparse leaf coverage." He testified the depression was oval shaped, about eight to twelve inches long, six inches wide, and an inch to an inch and a half in depth. When asked if he had any thoughts on how the hole or depression was created, Officer Sanchez indicated it could have been caused by "constant wear and tear" from traffic, as he has observed vehicles cutting that corner as they turned, driving up on the grass.

Phillip Gardner, the Director of Parks and Leisure Services for City testified that Public Works was in charge of the sidewalk, but his department was in charge of the grassy strip between the sidewalk and road. Gardner was not informed of the incident until around the time Major filed her lawsuit in July, 2009. His department then went out to look at the area, and found that trucks and cars

appeared to be cutting the corner short, leaving tire marks. Gardner stated right rear wheels were going across the curb to try to make the turn because it is a tight turn. Sometime after his department observed the area, the Public Works Department continued the sidewalk down to the street, paving the corner of land. Gardner acknowledged they had "observed vehicles making that turn for years," that trucks in particular had difficulty with it and would often drive up on the grass, and it had caused depressions before. When asked how his department had addressed the issue in the past, Gardner stated:

They've gone back and they have put sand or clay back in the area, but it was - - it was a fruitless effort because a few days later, it's, you know, right back in the same condition so after two or three attempts, they just keep an eye on that area to make sure that it did not create, you know, some sort of a, you know problem at a later time.

Gardner further noted that tire tracks were currently on the paved portion, and if trucks continued to drive over the area, the concrete would eventually crumble. According to Gardner, his department worked in this area once every three to five weeks, and if his "crew had noticed that a tractor-trailer had cut that corner and left a deep groove or rut there," they would have then "gone in and back-filled it and tamped it tight and observed the area to make sure that it was packed well and did not wash out or settle."

City moved for summary judgment, asserting there was no evidence it had actual or constructive notice of any rut, hole, or defect in the property, arguing there was no evidence anyone with City was on notice of any problem at the location in the days, weeks and months prior to the incident. The trial court granted City's motion, finding City was not on notice, constructive or otherwise, of any defect, rut or depression at the location of the alleged incident. In making its ruling, the court noted that deposition testimony showed neither City nor Coker College were aware of any prior falls or injuries at the location; Major herself was unable to cite any prior experience or observation of any defect, rut, or depression in the area despite her frequent use of that street corner; there was no testimony from anyone that showed any notice, constructive or otherwise, of any specific rut or depression at the location in the days, weeks, or months prior to Major's accident; and, based on the deposition testimony of Gardner, City had corrected depressions in the past by filling and tamping the area affected such that City actively maintained its streets and street corners. The court specifically disagreed with Major's assertion that City's knowledge of the periodic cutting of street corners was a continuous

condition, and found such did not place City on constructive notice of the alleged defect, rut, or depression.

Summary judgment is appropriate when "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), SCRCF. Appellate courts apply the same standard applied by the trial court pursuant to Rule 56(c), SCRCF, when reviewing a grant of summary judgment. *Turner v. Milliman*, 392 S.C. 116, 121-22, 708 S.E.2d 766, 769 (2011). In determining whether any triable issues of fact exist, the evidence and all reasonable inferences therefrom must be viewed in the light most favorable to the non-moving party. *Id.* at 122, 708 S.E.2d at 769. When the burden of proof is by a preponderance of the evidence, a non-moving party need only present a scintilla of evidence to withstand a motion for summary judgment. *Hancock v. Mid-South Mgmt. Co.*, 381 S.C. 326, 330, 673 S.E.2d 801, 803 (2009). "Summary judgment should not be granted even when there is no dispute as to evidentiary facts if there is dispute as to the conclusion to be drawn from those facts." *Brockbank v. Best Capital Corp.*, 341 S.C. 372, 378, 534 S.E.2d 688, 692 (2000). Additionally, because summary judgment is a drastic remedy, it should be cautiously invoked to ensure a litigant is not improperly deprived of a trial on disputed factual issues. *Madison v. Babcock Center, Inc.*, 371 S.C. 123, 134, 638 S.E.2d 650, 655 (2006).

Major contends the only issue on appeal is whether City had adequate notice of the condition that caused her injuries. She concedes City did not have actual notice of the depression at the time of the incident. However, she notes that both parties acknowledge a constructive notice standard applies in this situation, and asserts the trial court erred in holding City did not have constructive notice of the condition that caused her injuries. Major points to the deposition testimony showing, whether the area was described as a depression, rut, or impression, City had knowledge that the condition was likely created by vehicles driving over the grass at that corner. Major further notes that the deposition testimony of Gardner shows his department had an established procedure for dealing with ruts and depressions caused by vehicles driving on the grass while turning at that particular corner. She argues the deposition testimony, showing City's common knowledge of the practice of vehicles cutting the corner as well as the creation of the ruts or depressions, created a genuine issue of material fact as to whether City had constructive notice of the depression. Major thus maintains that at least a scintilla of evidence exists to support the position that City had constructive notice.

Major further argues the trial court largely based its ruling on a determination that City was not aware of the depression that caused her injuries, and despite several references to constructive notice, in fact applied an actual notice standard. She notes that the trial court's reliance on her own lack of knowledge of the depression at the location is misplaced, because the burden is on City, not her, to keep the premises in a reasonably safe condition, and the issue is whether City had constructive notice, not whether she did. Major takes issue with the trial court's finding that City showed through the testimony of Sanchez, Hoffman, and Gardner that neither City, nor Coker College security, were aware of any rut, depression or defect at the location. She argues (1) constructive knowledge does not require actual knowledge and (2) deposition testimony showed these individuals were aware that depressions had been created at this corner in the past, and City's knowledge of this recurrent condition, as evidenced by Garner's testimony that his department had to keep an eye on the area to make sure it did not create some sort of problem "at a later time," constituted constructive notice of the condition at this corner.

Because I believe the evidence shows there is a genuine issue of material fact on whether City had constructive notice, I would reverse and remand.

The South Carolina Tort Claims Act (SCTCA) provides that "the State, an agency, a political subdivision, and a governmental entity are liable for their torts in the same manner and to the same extent as a private individual under like circumstances, subject to the limitations upon liability and damages, and exemptions from liability and damages, contained herein." S.C. Code Ann. § 15-78-40 (2005). Our legislature has, however, provided certain exceptions to a governmental entity's waiver of immunity. S.C. Code Ann. 15-78-60 (2005 & Supp. 2011).

The parties agree that section 15-78-60(15) of the SCTCA applies to the matter at hand. This section provides, in pertinent part, as follows:

Governmental entities responsible for maintaining highways, roads, streets, causeways, bridges, or other public ways are not liable for loss arising out of a defect or a condition in, on, under, or overhanging a highway, road, street, causeway, bridge, or other public way caused by a third party unless the defect or condition is not corrected by the particular governmental entity

responsible for the maintenance within a reasonable time after *actual or constructive notice*.

S.C. Code Ann. § 15-78-60(15) (2005) (emphasis added). Thus, City may be liable for Major's injuries only if it had "actual or constructive notice" of "a defect or a condition."

"Constructive notice and actual notice are not one and the same." *Anderson v. Buonforte*, 365 S.C. 482, 492, 617 S.E.2d 750, 755 (Ct. App. 2005). In the context of the SCTCA, "actual notice means all the facts are disclosed and there is nothing left to investigate." *Strother v. Lexington Cnty. Recreation Comm'n*, 332 S.C. 54, 65, 504 S.E.2d 117, 123 (1998). "Actual notice may be shown by direct evidence or inferred from factual circumstances." *Id.* "Notice is regarded as actual where the person sought to be charged therewith either knows of the existence of the particular facts in question or is conscious of having the means of knowing it, even though such means may not be employed by him. *Id.* at 63 n.6, 504 S.E.2d at 122 n.6. "Generally, actual notice is synonymous with knowledge." *Id.* On the other hand, in regard to constructive notice, our courts have stated as follows:

Constructive notice is a legal inference which substitutes for actual notice. It is notice imputed to a person whose knowledge of facts is sufficient to put him on inquiry; if these facts were pursued with due diligence, they would lead to other undisclosed facts. Therefore, this person is presumed to have actual knowledge of the undisclosed facts.

Id.

Here, I agree with Major that the trial court erred in granting summary judgment to City. While Major concedes City did not have actual notice of the condition of the corner at the time of her accident, viewing the evidence and reasonable inferences therefrom in a light most favorable to Major, there is a genuine issue of material fact as to whether City had constructive notice of the condition that caused Major's injuries.

There is evidence here that (1) a condition, in the form of a depression, rut or some other defect, existed on the corner where Major sustained her injury, (2) that numerous individuals, who worked for City and the local college, frequently observed vehicles being unable to properly navigate a turn at this specific

intersection, resulting in the vehicles cutting over the grassy area of this corner, and (3) both City employee Gardner, the Director of Parks and Leisure Services for City, and Officer Sanchez attributed the depression to the wear and tear from the vehicles cutting across the area. Additionally, I find of particular note the testimony of Gardner, wherein he stated his department addressed the issue in the past by putting sand or clay back in the area, but such effort seemed fruitless, as the area would be in the same condition a few days later, and after two or three attempts to remedy the matter, their solution was to keep an eye on that area to make sure that it did not create some sort of problem at a later time. I believe this testimony provides some evidence City was aware the vehicles were cutting across this particular corner causing the condition, that City attempted in the past to correct the condition, that their attempts appeared futile, and, consequently, there was a need to observe the area thereafter. Accordingly, given the evidence presented, I believe there is a genuine issue as to whether City had knowledge of facts sufficient to put it on inquiry, such that constructive notice was imputed to City. *Strother*, 332 S.C. at 63 n.6, 504 S.E.2d at 122 n.6.

I find further support for this conclusion based on our courts' consideration, in the cases of *Fickling v. City of Charleston*, 372 S.C. 597, 643 S.E.2d 110 (Ct. App. 2007) and *Wintersteen v. Food Lion, Inc.*, 344 S.C. 32, 542 S.E.2d 728 (2001), that constructive notice may be found where there is a recurring problem. In *Fickling*, the plaintiff filed a negligence action alleging she suffered injuries after she stepped into a hole in a city sidewalk. *Id.* at 600, 643 S.E.2d at 112. There, this court found conflicting evidence was presented as to whether the City of Charleston had constructive notice of the defect in the sidewalk, observing that in viewing it in a light most favorable to Fickling, there was at least some evidence that (1) there were numerous City of Charleston personnel within the area of the defect who could have seen and reported the problem; (2) the condition had existed for a while; and (3) the City of Charleston had an established policy in place to deal with defects in the sidewalks, and problems with the sidewalks were an expected and "recurrent" or "continual" condition of which it had notice. *Id.* at 610, 643 S.E.2d at 116-17. Additionally, this court noted in *Fickling* that our supreme court observed in *Wintersteen* that two prior slip-and-fall cases involved conditions of such a recurrent nature that the defendants were chargeable with constructive notice on the day of the accident, "because they established certain patterns 'wherein the recurrence is of such a nature as to amount to a continual condition' and this, coupled with other factors, 'may be sufficient to create a jury issue' as to constructive notice." *Fickling*, 372 S.C. at 610 n.37, 643 S.E.2d at 117 n.37. In *Wintersteen*, our supreme court stated as follows:

Although mere recurrence alone is insufficient to establish constructive notice, there may be certain factual patterns . . . wherein the recurrence is of such a nature as to amount to a continual condition, and that factor, when coupled with other evidence, such as store employees' knowledge thereof, may be sufficient to create a jury issue as to the defendant's constructive notice at the time of the accident.

Id. at 36 n.1, 542 S.E.2d at 730 n.1.

Thus, while mere recurrence alone is insufficient to establish constructive notice, our courts have intimated that where the recurrence is of such a nature as to amount to a continual condition, that continual condition, when coupled with other evidence such as an employee's knowledge of the recurring nature of the problem, may be sufficient to create a jury issue as to constructive notice at the time of the accident. Here, there was evidence presented that City had knowledge of the recurring problem of vehicles cutting across the corner of the land in question thereby creating a depression in the area, and that it was a recurring problem that continued even after City's attempts to ameliorate it.

By finding "Major offered no evidence the City was on notice of the particular depression, rut, or hole she alleges caused her injury," the majority is essentially employing an actual notice standard rather than one of constructive notice. In spite of the fact that City may not have been on notice in the days, weeks or months prior to Major's accident that a "particular" defect existed on the corner, such would amount only to actual notice, and I believe the evidence presented shows a genuine issue of material fact as to whether City was on constructive notice of a defect at that location. Accordingly, I would hold the trial court erred in granting City's motion for summary judgment.

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM DARLINGTON COUNTY
Court of Common Pleas

Paul M. Burch, Circuit Court Judge

Case No. 2009-CP-16-0514

Alberta Major, ... Appellant,
v.
City of Hartsville, ... Respondent.

APPELLANT'S PETITION FOR REHEARING

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843-669-5634

The Petitioner, Alberta Major, respectfully asserts that this Honorable Court has overlooked and misapprehended certain portions of her argument regarding the Respondent's constructive notice of the depression that caused her injuries and therefore the Petitioner respectfully requests that this Honorable Court rehear and reconsider its Order on the following grounds.

ARGUMENT

In its opinion dated June 6, 2012, the majority affirmed the grant of summary judgment to the Respondent, City of Hartsville, on the basis that the Respondent was not on constructive notice of the depression that caused the Petitioner's injuries. In coming to this conclusion, the majority decided that the Respondent's knowledge of circumstances which could lead to a dangerous condition—vehicles driving on the grass at an unpaved street corner causing ruts and depressions in the ground—does not rise to the level of constructive notice for the specific depression that caused the Petitioner's injuries. The majority held that the Petitioner was required to present evidence that the Respondent had notice of the specific depression that caused her fall, and the Petitioner's failure to present such evidence resulted in the affirmation of summary judgment in favor of the City. The majority rejected the Petitioner's contention that the practice of vehicles repeatedly creating ruts and depressions at this corner with the City's knowledge constitutes a continuous condition which put the Respondent on constructive notice of a defect at this particular corner.

The Petitioner respectfully disagrees with the majority's decision in this case, and humbly directs this Court to several aspects of the majority's opinion which the Petitioner asserts are in error. First, the Petitioner agrees with the dissenting opinion of Judge Huff

that in application the majority is imposing an actual notice standard rather than constructive notice as outlined in S.C.Code Ann. § 15-78-60(15)(Rev. 2005). Second, the Petitioner believes that the majority should have considered the testimony of non-City witnesses, Burke Hoffman and Mark Gokey. And third, that the majority was mistaken in determining that the condition that existed at the intersection at issue in this case was not a continuous condition as discussed in Fickling v. City of Charleston, 372 S.C. 597, 643 S.E.2d 110 (Ct.App. 2007), and other cases.

The Petitioner's foremost contention with the majority's opinion is that, like the Circuit Court, the majority is practically applying an actual notice standard rather than constructive notice, despite its assurances to the contrary. By affirming the grant of summary judgment on the basis that the Petitioner had failed to produce any evidence that the Respondent had notice of the specific depression that caused the Petitioner's injuries, the majority is holding that the Petitioner's case fails because the Respondent had no prior knowledge of the specific depression that caused her injuries. This is the very definition of actual notice. The Respondent need not have any specific knowledge of the depression that caused the Petitioner's injuries, if the facts are such that the Respondent should have reasonably known there was or could be a dangerous condition at this intersection. In a constructive notice analysis, the defendant is put on notice of a condition not because of its knowledge of the condition itself, but because of its knowledge of other facts "sufficient to put him on inquiry." Strother v. Lexington County Recreation Comm'n, 332 S.C. 54, 64 n. 6, 504 S.E.2d 117, 122 n. 6 (1998).

In this case, the Respondent should have known that there was a dangerous defect at this corner because of its knowledge of other relevant facts, most importantly that

vehicles constantly cut this corner creating ruts in the grass and that the City's chosen remedy for this condition was only briefly effective. This knowledge is amply supported by the testimony of Philip Gardner. See R. p. 111. Essentially, the Petitioner maintains that the lack of knowledge of the particular depression is not fatal to her case, but instead the Respondent's knowledge about the constant presence of ruts at this corner should have put them on notice and inquiry regarding the depression that caused the Petitioner's injury.

Secondly, the Petitioner respectfully asserts that the majority was incorrect in failing to consider the testimony of non-City witnesses, Burke Hoffman and Mark Gokey. Although the majority is correct that the knowledge of these non-City witnesses is not imputable to the Respondent, their knowledge is nevertheless relevant to support the argument that the practice of vehicle creating ruts at this corner was pervasive. In fact, this practice was so common, that individuals who have no responsibility or concern over the maintenance of these streetscapes—as opposed to Gardner—still noticed this behavior and the ruts it created. The testimony of Hoffman and Gokey serves to buttress the testimony of the City employees in establishing that this condition was constant, recurrent, and continuous and therefore the majority erred in failing to consider it.

And finally, the Petitioner asserts that the majority failed to consider all relevant factors in ruling that this condition was not continuous. As discussed in Fickling and Wintersteen v. Food Lion, Inc., 344 S.C. 32, 542 S.E.2d 728 (2001), the mere recurrence of a condition is not sufficient to establish constructive notice. However, the recurrence of a condition, combined with other factors, “may be sufficient to create a jury issue as to the defendant's constructive notice at the time of the accident.” Wintersteen, 344 S.C. at

37 n. 1, 542 S.C.2d at 730 n. 1. The majority held that there were insufficient other factors to elevate this condition from recurrent to continuous.¹ The Petitioner respectfully disagrees and directs the attention of this Court to the following other factors which she contends create a jury question on constructive notice and elevate this condition to one that is continuous: 1) the City's knowledge that depressions and ruts were constantly being created at this corner, 2) the City's established protocol and procedure for remedying these defects, 3) the City's knowledge that the effectiveness of their remedy was so fleeting as to only last a couple of days, 4) the City's acknowledgement that even after fixing a known defect at this corner that it would return to the same condition a few days later, and 5) the City's acknowledgement that the corner would eventually create a problem for someone. (R. p. 111). The Petitioner believes that the majority failed to fully consider all of these factors in ruling that the Respondent was not on constructive notice and that if these factors are appropriately considered they create at least a scintilla of evidence of the City's constructive notice sufficient to overcome summary judgment.

The majority determined that all the Petitioner could establish was that the Respondent was aware of circumstances which were likely to cause a depression, and this alone does not put the Respondent on notice. However, the Petitioner believes that this is an incomplete description of the facts of this case. For one, the Respondent was not simply aware of circumstances that were likely to cause a depression, but of circumstances which constantly produced depressions on a regular basis for an extended period of time. As Gardner testified, this was a problem they had dealt with for years and

¹ There is no indication in the majority's opinion that it disputes the recurrent nature of the existence of depressions at this street corner caused by vehicles driving on the grass and therefore the Petitioner shall not endeavor to establish this fact.

for which their remedy was so temporary as to only be effective for a few days. (R. p. 111, original p. 35, l. 3-9). This is not a case where the Petitioner is seeking liability for an isolated defect for which the Respondent was only aware could potentially occur and yet failed to prevent. This case is about a condition that existed with such frequency that the Respondent acknowledged it was a problem that was so pervasive that even after fixing it, it would return to the same condition "a few days later." Id. The Petitioner believes that this is the very essence of the continuous condition analysis and that the majority failed to consider these factors. The Petitioner contends that in light of these other factors, the existence of depressions at this corner was a continuous condition which put the Respondent on constructive notice of the depression that caused the Petitioner's injuries despite the lack of evidence of the Respondent's prior knowledge of this specific depression.

CONCLUSION

The Petitioner respectfully asks that this Court rehear and reconsider its decision in this case on the basis that it failed to fully consider the foregoing. As discussed above, at least a scintilla of evidence exists in this case that the Respondent was on constructive notice of this condition because of its continuous nature. The Respondent need not have prior specific knowledge of the particular depression that caused the Petitioner's injuries and the Petitioner believes that the majority was mistaken in requiring such. Further, the majority should have considered the testimony of Hoffman and Gokey which support the Petitioner's argument that this condition was pervasive and continuous. Had these factors been fully considered along with those discussed above, the Petitioner believes that the majority would have agreed with Judge Huff's dissent that summary judgment in

favor of the City should have been reversed on the grounds that sufficient evidence exists in this case of the Respondent's constructive notice of the depression that caused the Petitioner's injuries.

Respectfully submitted,

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June 19, 2012

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM DARLINGTON COUNTY
Court of Common Pleas

Paul M. Burch, Circuit Court Judge

Case No. 2009-CP-16-0514

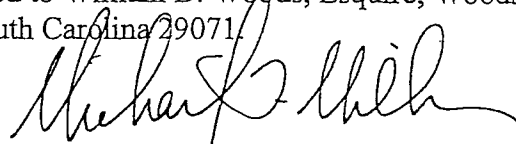
Alberta Major, ... Appellant,

v.

City of Hartsville, ... Respondent.

PROOF OF SERVICE

I certify that I have served Appellant's Petition for Rehearing upon the Respondent's attorney of record by depositing a copy of it in the United States Mail, postage prepaid, on June 19, 2012, addressed to William B. Woods, Esquire, Woods Law Firm, Post Office Box 2444, Lexington, South Carolina 29071.



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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

COPY

APPEAL FROM DARLINGTON COUNTY
Court of Common Pleas

Paul M. Burch, Circuit Court Judge

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RESPONDENT'S RETURN
TO APPELLANT'S PETITION FOR REHEARING

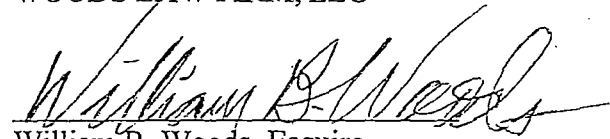
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The Respondent, City of Hartsville, respectfully responds to Appellant's Petition for Rehearing by asserting that this Honorable Court has not overlooked or misapprehended any portions of the Petitioner's argument regarding the Respondent's constructive notice of the depression that allegedly caused Petitioner's injuries, and has followed existing South Carolina case law in its ruling, and, therefore, the Respondent respectfully request that this Honorable Court deny Appellant's Petition for Rehearing.

COPY

Respectfully submitted,

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ATTORNEY FOR RESPONDENT

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June 27, 2012

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

COPY

APPEAL FROM DARLINGTON COUNTY
Court of Common Pleas

Paul M. Burch, Circuit Court Judge

Case No. 2009-CP-16-0514

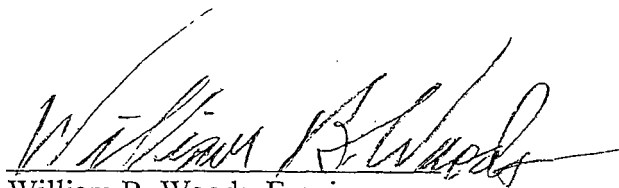
Alberta Major, ...Appellant,

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PROOF OF SERVICE

I, certify that I have served Respondent's Return to Appellant's Petition for Rehearing upon the Appellant's attorney of record by depositing a copy of it in the United States Mail, postage prepaid, on June 27, 2012, addressed to Michael T. Miller, Esquire, of Wukela Law Firm, Post Office Box 13057, Florence, South Carolina, 29504.



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The South Carolina Court of Appeals

Alberta Major, Appellant,

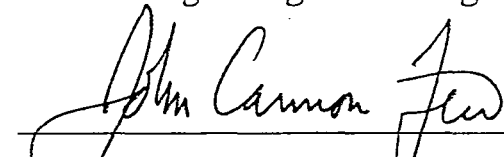
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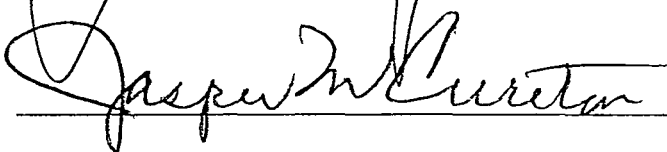
City of Hartsville, Respondent.

Appellate Case No. 2010-176986

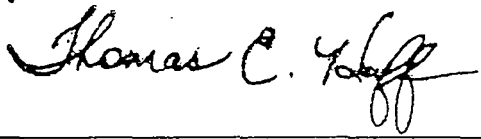
ORDER DENYING PETITION FOR REHEARING

After careful consideration of the petition for rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing. Accordingly, the petition for rehearing is denied.


C.J.


A.J.

I would vote to grant the Petition.


J.

Columbia, South Carolina

cc:

William Bailey Woods

Michael T. Miller

FILED

