

The State of South Carolina
In the Court of Appeals

Appeal from Aiken County
Court of Common Pleas
The Honorable Doyet A. Early, III Circuit Court Judge
The Honorable Clifton Newman, Circuit Court Judge

Civil Action No.: 2011-CP-02-00868

RECEIVED

MAR 28 2014

SC Court of Appeals

Paige Weeks Johnson, as Personal Representative
of the Estate of Christie Lane Valenzuela,

Respondent,

versus

Sam English Grading, Inc.,

Appellant.

Record On Appeal
Volume IV of IV (p.1261 -1420)

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**Paige Weeks Johnson, as Personal Representative
of the Estate of Christie Lane Valenzuela versus Sam English Grading, Inc.,**

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State of Ohio,)
) SS:
County of Licking,)

I, Linda D. Riffle, Registered Diplomate Reporter, Certified Realtime Reporter and Notary Public in and for the State of Ohio, hereby certify that the foregoing is a true and accurate transcript of the deposition testimony, taken under oath on the date hereinbefore set forth, of Clifford A. Merritt.

I further certify that I am neither attorney or counsel for, nor related to or employed by any of the parties to the action in which the deposition was taken; and further that I am not a relative or employee of any attorney or counsel employed in this case, nor am I financially interested in the action; and further that I am not, nor is the court reporting firm with which I am affiliated, under a contract as defined in Ohio Rule 28(D).



Free & Co.

Linda D. Riffle,
Registered Diplomate
Reporter, Certified
Realtime Reporter and
Notary Public in and for
the State of Ohio

My Commission Expires: July 26, 2016

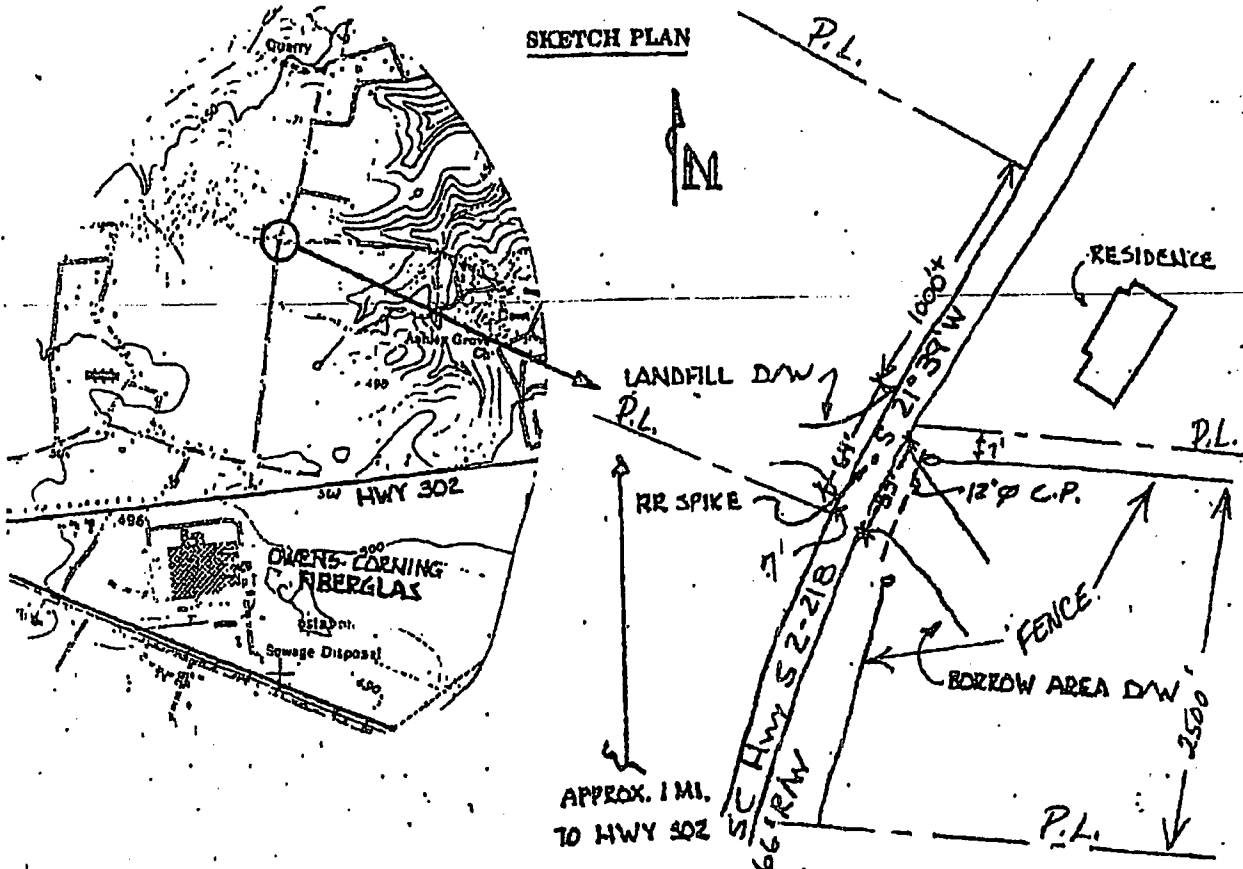
Application for Encroachment Permit

Date 9/27/84

Name of Applicant:
Owens-Corning Fiberglas Corp.
P.O. Box 499
Aiken, S.C. 29801

County Aiken
Route
Road State Highway S-2-218

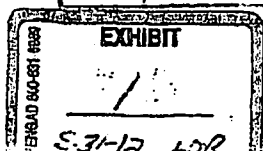
The undersigned applicant hereby applies to the South Carolina Department of Highways and Public Transportation for permit for encroachment on State Highway Right-of-Way as shown by sketch plan below.



The permittee shall be responsible at any time in the future for any and all damages to Hwy. facilities that occurs as a direct result of this installation.

Date received by Res. Maint. Engr. or Maint. Supt.
Date forwarded by Res. Maint. Engr. or Maint. Supt.
Date received by Dist. Engr.
Date forwarded by Dist. Engr.

Signed: *William Holguin*
Applicant *Owens-Corning Fiberglas* Date *10-2-84*
Recommended: *M. Smith*
Dist. Engr. *M. Smith* Date *10-12-84*
Res. Maint. Engr. *M. Smith*



RECEIVED
ENGR. DIST. #1
OCT 1 8 1984

RECEIVED
ENGR. DIST. #1
OCT 1 8 1984

Owens-Corning Fiberglas is applying for an Encroachment Permit for crossing State Hwy. 8-2-218 with heavy earth moving equipment. Earth will be moved between the Owens-Corning properties on each side of the road. The crossing will be used only during daylight hours. During the hours of crossing 1000 feet north and 1000 feet south of the crossing, a temporary truck crossing sign will be placed along the roadway. "Flagman 500' ahead" signs will be placed 500 feet north and south of the crossing. The signs will be removed when the crossing is not in use. A flagman will be located at the crossing to maintain traffic flow and safety during the hours of operation. Use of the crossing will be limited during hours of peak roadway traffic.

~~The roadway will be maintained during the period of earth moving by the applicant. After the completion of the earth moving, Owens-Corning Fiberglas will replace the roadway with a reinforced concrete section and aprons for the two (2) driveways shown on the sketch. The Encroachment Permit is requested to be of indefinite life due to our need to move earth across the road with heavy equipment periodically.~~

Oct. 15, 1984

SOUTH CAROLINA
DEPARTMENT OF HIGHWAYS
AND PUBLIC TRANSPORTATION
COLUMBIA
FORM 638 Rev. 11-77

ENCROACHMENT PERMIT

No. A-52883

To
Owens-Corning Fiberglas Corp.
P.O. Box 499
Aiken, South Carolina 29801

County Aiken
Route S-2-218
Road

In compliance with your request and pursuant to statutory authority and subject to all the provisions, terms, conditions, and restrictions written herein, including General Provisions contained on the other side of this sheet, YOU ARE HEREBY AUTHORIZED AND PERMITTED TO:

Periodically haul fill material across Road S-2-218 as shown on application dated September 27, 1984, a copy of which is attached hereto and made a part of this permit.

SPECIAL PROVISIONS

(In case of conflict between Special Provisions and General Provisions, Special Provisions shall govern.)

There shall be no excavation of soil nearer than two feet of any public utility line or appurtenant facility except with the consent of the owner thereof, or except upon special permission of this Department after an opportunity to be heard is given the owner of such line or appurtenant facility.

All excavated material shall be placed on the side of the trench away from the traveled roadway.

Where pavement is cut in the traveled way of this road or route, the work shall be done in clear weather when traffic is lightest. There shall be no trench left open in the traveled way during rush hour traffic or during the hours of darkness.

Special Provision:

Permit may be terminated by either party by 10 day notice.

This permit shall not become operative until a written acceptance of same by permittee shall have been received by this Department and further shall become null and void unless the work contemplated herein shall have been completed prior to XXXXXXXX

SOUTH CAROLINA DEPARTMENT
OF HIGHWAYS AND PUBLIC TRANSPORTATION

By James C. Snyder
☒ State Highway Engineer.
☐ District Engineer.

I (We) accept the permit herein granted and agree to comply with all the provisions, terms, conditions, and restrictions set out herein. I (We) do hereby agree, and bind my (our) heirs, successors and assigns, to assume any and all liability this Department might otherwise have in connection with accidents or injuries to persons, or damage to property, including the highway, that may be caused by the construction, maintenance, use moving or removing of the encroachment contemplated herein and agree to indemnify this Department for any liability incurred or injury or damage sustained by reason of the past, present, or future existence of said encroachment.

Date 10/27/84

Signed Paul M. Vasil

GENERAL PROVISIONS

1. NOTICE PRIOR TO STARTING WORK: Before starting the work contemplated herein within the limits of the highway right of way, the Department's Maintenance Superintendent in the county in which the work is under way. sufficiently in advance so that he may be present while the work is under way.

2. PERMIT SUBJECT TO INSPECTION: This permit shall be kept at the site of the work at all times while said work is under way and must be shown to any representative of the Department or law enforcement officer on demand.

3. PROTECTION OF HIGHWAY TRAFFIC: Adequate provisions shall be made for the protection of the highway traffic at all times. Necessary detours, barricades, warning signs and watchmen shall be provided by and at the expense of the permittee. The permittee shall be responsible for the safety of the highway traffic and shall be liable for any damage to property or persons caused by the work or the equipment used thereon. The permittee shall be responsible for the safety of the highway traffic and shall be liable for any damage to property or persons caused by the work or the equipment used thereon.

4. STANDARDS OF CONSTRUCTION: All work shall conform to recognized standards of construction and shall be performed in a workmanlike manner. Adequate provisions shall be made for maintaining the proper drainage of the highway. All work shall be subject to the supervision and satisfaction of the Department.

5. FUTURE MOVING OF ENCROACHMENT: If, in the opinion of the State Highway Engineer, it should ever become necessary to move or remove the encroachment, or any part thereof, contemplated herein, on account of change in location of the highway, widening of the highway, or for any other sufficient reason, such moving or removing shall be done on demand of the Department at the expense of the permittee.

6. RESTORATION OF HIGHWAY FACILITIES UPON MOVING OR REMOVING OF ENCROACHMENT: If, and when, the encroachment contemplated herein shall be moved or removed, either on the demand of the Department or at the option of the permittee, the highway and facilities shall immediately be restored to their original condition at the expense of the permittee.

7. COSTS: All work in connection with the construction, maintenance, moving or removing of the encroachment contemplated herein shall be done by and at the expense of the permittee.

8. PERMITTEE: The word "Permittee" used herein shall mean the name of the person, firm, or corporation to whom this permit is addressed, his heirs, assigns, successors and assigns.

9. PERMISSION OF ABUTTING PROPERTY OWNERS: It is distinctly understood that this permit does not in any wise grant or release any rights lawfully possessed by the abutting property owners. Any such rights necessary shall be secured from said abutting property owners by the permittee.

10. PIPES, CONDUITS, ETC.: Service and other small diameter pipes shall be located, driven, or otherwise forced underneath the pavement on any surface road without disturbing said pavement. No pavement shall be cut unless specifically authorized herein.

(a) No excavation shall be made deeper than three feet to the right of the pavement on any hard surfaced road unless specifically authorized herein.

(b) Trenches and all trenches or tunnels within the limits of the highway right of way shall be backfilled, and maintained until final settlement has taken place.

(c) The section of pipe, of service and other small pipes, under the highway pavement and within a distance of two (2) feet on either side shall be continuous and without joints.

(d) Unless specifically authorized herein all pipes and conduits under the highway shall be placed at approximately right angles to the center line of the highway and at least two (2) feet below the surface of the highway.

(e) Pipes and utilities paralleling the highway shall be located at a distance beyond the edge of the highway surfacing and at a depth as specifically stipulated herein.

11. DRIVEWAYS AND APPROACHES: The existing crown of the highway shall be continued to the outside shoulder line of the highway.

(a) If the driveway or approach is of concrete pavement the pavement shall be constructed at least 6" thick, and of a mix not heavier than 1-2-4. There shall be a bituminous expansion joint, not less than 1/4" in thickness, placed between the highway paving and the paving of the approach for the full depth of the former and the full width of the latter.

12. RAILROAD TRACKS: The rails of railroad tracks crossing the highway at grade shall conform to the grade of the highway.

(a) The provisions of Sections 58-15-2110, 58-15-2120, 58-15-2130 and 58-15-2140 of the 1976 Code of Laws for South Carolina as amended regarding the construction and maintenance of railroad and highway grade crossings shall be complied with in all respects.

(b) Unless specifically authorized herein, all engines, trains or cars operating over the tracks across the highway at grade shall be brought to a complete stop immediately before crossing the highway and before proceeding across the highway.

(c) Flagmen carrying a red flag by day and a lantern by night shall be stationed on each side of the train to warn approaching highway traffic. Should the permittee fail to consistently operate the railroad in accordance with this section after having received written notice from the Highway Department of such failure, this permit shall automatically become null and void insofar as the continuance of the railroad is concerned.

(d) The railroad track contemplated herein and its appurtenances shall be completely removed from the highway right of way within 60 days if, when, and after operations across the highway on the railroad shall have been abandoned, and the highway repaved in at least as good condition as the adjacent sections of the highway may be at the time of abandonment of said operations. The cost of same shall be borne by the permittee.

13. For the purpose of this permit the word "Department" shall mean, "The South Carolina Department of Highways and Public Transportation."

White copy to be kept by Permittee. Blue copy to be executed by Permittee and returned to this Department, Columbia, S. C. Pink copy for files of District Engineer, Salmon copy for files of Maintenance Superintendent.



File under
Contract in

Valenzuela
File -
TXS 8

NORTHWEST BERM TO ELEVATION 515

AIKEN, SOUTH CAROLINA

MAY 2009

Prepared by: J.D. Zaleha
Date: May 2009

Approved by: C.A. Merritt
Project WBS: 00004074.4.1.3

**OWENS CORNING SALES, LLC
CONSTRUCTION CONTRACT
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Bid Form.....	OC-14539-G	01/09	3
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Required Labor Data.....	OC-14539-F	01/09	1
General Terms and Conditions of the Contract.....	OC-14539-B	01/09	23
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Supplemental Conditions for the Site	OC014539-E	01/09	5
National Material Agreements.....	OC-14539-I	01/09	2
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BULLETIN (Procedure and Sample Form).....	01130	01/09	2
<u>PART 2 - SAFETY</u>			
Contractor's Hazardous Materials.....	01113	09/93	1
Information on Owner's Hazardous Materials - Attachment M.....	01113M	04/91	1
Contractor's Hazardous Materials Submittal - Attachment P.....	01113P	04/91	1
Safety Requirements.....	01115	06/99	10
(Attachments 1 and 2 will be submitted during construction)			
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• Hot Work Permit.....	OC-11090-R3		1
<u>PART 3 - QUALITY</u>			
Quality Control Addendum.....	01114	09/92	6
Contractor's Quality Control Plan - Attachment "Q".....	01114Q	12/92	1
<u>PART 4 - PROJECT SPECIFIC</u>			
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**OWENS CORNING SALES, LLC
CONSTRUCTION CONTRACT
TABLE OF CONTENTS**

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Substitution Procedure	01700	04/09	1
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Supplemental Conditions for the Site

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8.	REGULATIONS FOR THE CONTRACTOR'S EMPLOYEES	3



Supplemental Conditions for the Site

ARTICLE 1 - GENERAL

- 1.1 **RELATIONSHIP TO GENERAL TERMS OF THE CONTRACT:** Supplemental Conditions shall not be construed as modifying nor as invalidating any of the articles, paragraphs, subparagraphs, nor clauses of the General Terms and Conditions of the Contract.
- 1.2 **APPLICATION:** Under the terms and conditions of these Supplement Conditions the word "Contractor" shall mean contractor and subcontractor(s), employees, their agents, and visitors.

ARTICLE 2 - SITE

- 2.1 **LOCATION:** The site is located at the Owens Corning Aiken plant landfill approximately ¼ mile north of the Owens Corning plant on the west side of Redds Branch Church Road.
- 2.2 **ACCESS:** During the course of the work, the Contractor shall have access to the Job site: Monday – Friday 7:00 A.M. to 5:00 P.M., holidays excluded.

ARTICLE 3 - ROAD ACCESS

- 3.1 **ACCESS:** Landfill main entrance gate ¼ mile north of Highway 78 on the west side of Redds Branch Church Road.
- 3.2 **ACCESS RESTRICTIONS:** Limitations on the use of site access roads on the Owner's property may be established by the Owner's Representative. The Contractor's employees shall only use the site access road(s) designated for their specific use. The Contractor shall be responsible for all delays resulting from the improper use of site access roads by its employees, agents, invitees or permittees.

ARTICLE 4 - RAILROAD ACCESS

- 4.1 **APPLICABILITY:** This article is
 _____ Applicable X Not applicable; no service available to Contractor.
- 4.2 **SERVICING RAILROAD COMPANY:**
- 4.3 **USE PROCEDURE:** If service is available at least _____ days before use, contact _____
 _____ whose telephone number is (_____) _____ to obtain permission and arrange for use of the railroad siding(s).

ARTICLE 5 - MATERIAL AND EQUIPMENT RECEIVING AND STORAGE

- 5.1 **STORAGE AND/OR RECEIVING AREA LOCATION(S):** Areas at the landfill will be designated by the Owner's representative, Liana Edenfield, 803.643.2668.

ARTICLE 5 - MATERIAL AND EQUIPMENT RECEIVING AND STORAGE - Continued

- 5.2 MATERIAL DELIVERIES:** All material and equipment purchased by the Contractor shall be delivered to the Contractor using the construction site access road and entry gate(s) designated by the Owner's Representative. The designated access road(s) and entry gate(s) will be clearly posted for easy identification. When making a delivery, the driver shall enter the construction site in accordance with Vehicle Control and Visitor Control requirements (See Articles 8.4 and 8.5). The conduct and safety of the driver on the construction site will be the responsibility of the contractor receiving materials.
- 5.3 MATERIAL REMOVAL:**
- 5.3.1 GENERAL:** Vehicles used to remove materials from the construction site shall use the access road(s) and gate(s) designated for material deliveries to the Contractor or as otherwise designated by Owner's Representative. All vehicles removing materials from the construction site may be subject to a security search.
- 5.3.2 MATERIAL REMOVAL PASS:** Each shipment, transfer, or removal of materials, equipment, or tools from the construction site, excluding common carriers making deliveries - regardless of ownership - shall have the prior approval of Owner's Representative on an OC MATERIAL REMOVAL PASS. Vehicle drivers shall enter the construction site in accordance with Vehicle Control and Visitor Control requirements (See Articles 8.4 and 8.5). Each vehicle driver shall surrender a signed OC MATERIAL REMOVAL PASS to the Owner's Security Officer before being permitted to leave the construction site.

ARTICLE 6 - THE CONTRACTOR'S TEMPORARY OFFICES AND FACILITIES

- 6.1 LOCATIONS:** An area at the landfill will be designated by the Owner's representative, Liana Edenfield, 803.643.2888.

ARTICLE 7 - TEMPORARY UTILITIES AND SERVICES

- 7.1 UTILITY CONNECTIONS:** No utility connection shall be made in an existing facility of the Owner without prior approval by the Owner's Representative.
- 7.2 CONTRACTOR PROVIDED UTILITIES AND SERVICES:** Unless otherwise expressly indicated below, the Contractor shall provide, maintain, and remove any and all temporary utilities or services required for performance of the Work or for the convenience of the Contractor or its subcontractor personnel. For temporary utilities and services provided by the Owner, the Contractor shall provide all connections from the Owner's supply point to point(s) of use.
- 7.3 OWNER-FURNISHED TEMPORARY UTILITIES AND SERVICES:** (Unless otherwise indicated, at no charge to the Contractor.)

☒ None	☐ Potable Water	☐ Temporary Toilets
☐ Electric Power:	☐ Compressed Air at _____ PSIG	☐ Waste Disposal Service
☐ 480 Volts, 3 Phase, 60 Hz.	☐ Telephone Service	☐ Temporary Shop Facilities
☐ 208 Volts, 3 Phase, 60Hz.	☐ Temporary Heat	☐ Security Service
☐ 240 Volts, 1 Phase, 60 Hz.	☐ Temporary Lighting	
☐ 120 Volts, 1 Phase, 60 Hz.		

ARTICLE 8 - REGULATIONS FOR THE CONTRACTOR'S EMPLOYEES**8.1 PARKING AREAS FOR THE CONTRACTOR'S EMPLOYEES' PERSONAL VEHICLES**

- 8.1.1 LOCATIONS:** Parking is available at the landfill. Should access to the main plant be required, use the plant employee parking lot on the north side of the plant.
- 8.1.2 RESTRICTIONS:** The Contractor's employees shall park their personal vehicles only in those areas designated for their use. Repeated violations of parking restrictions shall result in having the vehicle towed away at the vehicle owner's expense.

8.2 ENTRY/EXIT GATE(S):

- 8.2.1 LOCATION(S):** The landfill main entrance gate $\frac{3}{4}$ mile north of Highway 78 on the west side of Redds Branch Church Road.
- 8.2.2 RESTRICTIONS:** The Contractor's employees shall enter and exit the construction site only through the gate(s) posted for their use.

8.3 VEHICLE CONTROL

- 8.3.1 GENERAL:** Only those vehicles of the Contractor required for the performance of work shall be permitted on the construction site. Vehicles shall be restricted to the access road(s) and immediate work area when present on the Owner's property. Vehicles shall be operated within established speed limits.

- 8.3.2 VEHICLE PASSES:** The following requirements shall be:

_____ Applicable: X Not Applicable:

Vehicles shall not be permitted on the construction site without an OC Vehicle Pass obtained from the Owner's Security Officer. Vehicle Passes shall be attached to the vehicles so as to be visible at all times. Vehicle Passes shall be returned to the Owner's Security Officer when vehicles are no longer required on the construction site.

Access of authorized vehicles to the construction site shall be permitted only through the gate(s) designated for vehicle access. All vehicles entering or exiting the construction site and vehicle drivers and passengers shall be logged in and out by the Owner's Security Officer. All vehicles may be subject to a security search at the time of entry to or departure from the construction site.

8.4 VISITOR CONTROL

- 8.4.1 GENERAL:** Only authorized visitors of the Contractor shall enter the construction site using the construction site access road(s) and entry gate(s) specifically designated for visitors.

While on the construction site, visitors shall be regarded as the invited guests of the Contractor requesting the visitors' access to the site. The conduct and safety of visitors and the safety of visitors' vehicles (when applicable) shall be entirely the responsibility of the Contractor.

ARTICLE 8 - REGULATIONS FOR THE CONTRACTOR'S EMPLOYEES - continued

Visitors shall wear hard hats (and other Personnel Protective Equipment where applicable) at all times while on the construction site.

- 8.4.2 OC VISITOR'S PASS:** When arriving at the construction site, visitors shall stop at the entry gate and log in with the Owner's Security Officer controlling the gate. Visitors shall identify themselves and indicate the purpose of the visit. After confirming the Contractor wishes to admit visitors on the construction site, the Owner's Security Officer will issue a Visitor's Pass to each visitor, will provide directions, and will allow visitors on the site. The Owner may require the Contractor to provide an escort. Unless expressly authorized by the Owner's Representative, visitors shall not be permitted to bring their vehicles on to the construction site.

When the construction site visit is complete, visitors shall log out and surrender their Visitors' Passes to the Owner's Security Officer before being allowed to exit the construction site. Visitors shall exit through the same gate through which they entered. Visitors' vehicles may be subject to a security search upon entering and exiting the construction site.

- 8.5 THE CONTRACTOR'S EMPLOYEE I.D. BADGES:** These requirements shall be:

☒ Applicable:

☐ Not Applicable:

The Contractor shall provide each of its employees with an Identification (I.D.) badge. The Contractor shall ensure that each of its employees shall wear an I.D. badge visible at all times while entering, leaving, or present on the Owner's construction site. The badge shall clearly indicate the Contractor's name and badge number. The Contractor shall submit a weekly list of its employees' names and assigned badge numbers to the Owner's Construction Manager. Employees of the Contractor unable to produce an I.D. badge shall enter and exit the construction site in accordance with Visitor Control requirements (see Article 8.4). New employees of the Contractor shall enter and exit the construction site in accordance with Visitor Control requirements until the employees are assigned I.D. badges.

- 8.6 THE OWNER'S BREAK AND EATING AREAS:** Use shall be:

☐ Permitted

☒ Not Permitted

LOCATION:

- 8.7 THE OWNER'S PERMANENT TOILET FACILITIES:** Use shall be:

☐ Permitted

☒ Not Permitted

LOCATION:

- 8.8 SECURITY INSPECTIONS:** Containers, lunch boxes, bags, or other parcels carried on to or out of the construction site by the Contractor's employees may be subject to a security search.

ARTICLE 8 - REGULATIONS FOR THE CONTRACTOR'S EMPLOYEES - continued

- 8.9 GENERAL SITE RULES:** The Contractor shall ensure that its employees shall observe these standards of personal conduct while working on the Owner's construction projects.
- 8.9.1 TOBACCO:** Tobacco is prohibited in all areas of the plant not specifically designated as Tobacco Areas. The Tobacco area(s) designated for use by the Contractor will be identified by the Owner's Representative.
- 8.9.2 ALCOHOL AND DRUGS:** Alcoholic beverages or illegal drugs are prohibited on the Owner's property.
- 8.9.3 MEDICATION LIMITATIONS:** The Contractor's employees currently taking medication prescribed by a physician shall report work limitations imposed by its use to their supervisors.
- 8.9.4 WEAPONS:** Weapons are prohibited on the Owner's property.
- 8.9.5 PROHIBITED ACTIVITIES:** Fighting, gambling, stealing, soliciting, and horseplay shall not be permitted on the Owner's property. Portable radios, tape decks, television sets, and like equipment shall not be brought into the construction site.
- 8.9.6 RESTRICTED AREAS:** All areas specifically posted as "RESTRICTED AREA" or "AUTHORIZED PERSONNEL ONLY" shall be off-limits to the Contractor's employees. The Contractor's employees shall not be permitted in the Owner's buildings, facilities, nor on any other part of the premises unless their presence is expressly required for performance of the Work.
- 8.9.7 PLANT EMERGENCIES:** The Contractor's employees shall obey all of the Owner's plant emergency alarms and procedures.
- 8.9.8 SABOTAGE:** Sabotage or other intentional destruction of materials or equipment is prohibited.
- 8.9.10 PERSONAL CELL PHONES (With or without cameras):** Cell phones are to be used only in Break Areas or Parking Lots. Company provided job related communication devices are excluded.
- 8.10 PHOTOGRAPHY:** Unless otherwise expressly stated by the Owner, in writing, photographic equipment is expressly prohibited on the construction site or any of the Owner's premises. Should the Owner's Representative, in writing, authorize photography, such photography shall be limited to requirements of the work and any other limitations subscribed by the Owner. All negatives, prints and digital images shall be the Owner's property. Neither negatives, prints nor digital images shall be copied for, reproduced for, nor exhibited to third parties without the Owner's express written permission.
- 8.11 NEWS MEDIA RELEASES:** The Contractor shall refer all requests for information by the news media concerning specific incidents or general activity on the Owner's construction site to the Owner's Representative. Film crews or other members of the news media are not allowed on the construction site without the express written permission of the Owner's Representative.
- 8.12 SERVICE INTERRUPTIONS:** Any accidental interruption of lines, services, or equipment in service or any irregularities observed must immediately be reported to the Owner's Representative so that corrective action can be implemented.



bid form

TO: Owens Corning Sales, LLC
2790 Columbus Road, Route 16
Granville, Ohio 43023-1200

Inquiry no. AIK-515

FROM: _____

ATTN.: Clifford A. Merritt

We hereby submit our Bid for the Project entitled:

**NORTHWEST BERM TO ELEVATION 515
MAY 2009
AIKEN, SOUTH CAROLINA**

complete and ready for use on the Owner's property.

1. Having carefully examined plans, drawings, specifications, General Terms and Conditions of the Contract, Owner's List of Supplied Equipment, Supplemental Conditions, Safety Requirements, Owner's instructions to Bidders, written alterations, requests for clarification's and interpretations thereof by Owner, (hereinafter collectively the "Bid Package") and having examined the site of the proposed Project, we hereby propose to furnish labor, supervision, materials, equipment, appliances and other means of construction, (hereinafter the "Work") as such Work is required by the Bid Package for the firm fixed price of

_____ (\$ _____) (The firm fixed price shall include all Federal, State Local taxes applicable as required by the tax instructions, if any, in the Bid Package).

To the extent applicable, also submitted herewith are Material and Labor Price Breakout Documents, Requested Alternate Bids, Unsolicited Alternate Bids, Labor Rates for Extra Work, Sheets, Labor Data Sheets, and Maximum Unit Prices for Additions and Deletions to the Work, listed as pages _____ thru pages _____, attached.

2. We agree that if awarded a contract for the Work:

- 2.1 We will do any Changes which may be ordered by the Owner pursuant to the provisions of Article 18 of the General Terms and Conditions of the Contract. The following are Contractor's percentages of mark-up of costs as defined in Article 21 of the General Terms and Conditions of the Contract:

CONTRACTOR:

Overhead and Profit applied to Contractor field labor	_____	% Overhead & Profit
Overhead and Profit applied to materials furnished by Contractor	_____	% Overhead & Profit
Overhead and Profit applied to equipment rental	_____	% Overhead & Profit
(Rental Rates based on _____)	_____	
Contractor Mark-up on subcontractor's work	_____	% Overhead & Profit
Include copy of rates for Contractor-owned equipment		

ITEM NO. 3 - ADDENDA

Addendum No. _____ Dated: _____ Addendum No. _____ Dated: _____
 Addendum No. _____ Dated: _____ Addendum No. _____ Dated: _____
 Addendum No. _____ Dated: _____ Addendum No. _____ Dated: _____

4. We propose _____ as Contractor's Representative.

Resume is attached. Contractor's Representative has the authority to:

- () Hire, fire and discipline employees () Stop the work for Safety Issues
 () Accept extra work or reductions in work () Negotiate schedule changes

5. We propose to use the following firms as subcontractors:

COMPANY NAME	EMR	OSHA TRIR	TYPE OF WORK	DOLLAR AMT.
_____	_____	_____	_____	_____
_____	_____	_____	_____	_____
_____	_____	_____	_____	_____
_____	_____	_____	_____	_____
_____	_____	_____	_____	_____
_____	_____	_____	_____	_____
_____	_____	_____	_____	_____

DATE: _____

NAME OF BIDDER: _____

BY: _____

TITLE: _____

OFFICE NUMBER: () _____ MOBILE NUMBER () _____

FAX NUMBER: () _____

EMAIL ADDRESS: _____

BUSINESS ADDRESS: _____

Comments: _____

1. Required Cost Breakdown - Firm Price

- 1.1 General: Attachment "A" cost breakdown is required to support the Contractor's proposal and is used for the Owner's cost control and accounting purposes. Attachment "A" will also be used in conjunction with Article 27 of the General Terms and Conditions as it relates to issuance of payments. Payments will be based upon progress on the Attachment "A" breakout and must be approved by the Owner's Construction Manager.

The Contractor is also requested to provide labor rates for Time and Material (T&M) work which may be authorized during the course of the contract. Article 21 of the General Terms and Conditions defines Time and Material work.

Failure to comply with and provide the requested information as follows may result in a "Non-Bid". It is also noted that this cost breakout is not intended for use as a work scope for the contract.

2. BID BREAKDOWN: This section lists the required bid breakdown.

		Labor hours	Labor \$	Material \$	Total \$
2.1	SITE PREPARATION	_____	_____	_____	_____
2.2	GEOGRID	_____	_____	_____	_____
2.3	COMPACTED BERM	_____	_____	_____	_____
2.4	LANDSCAPING	_____	_____	_____	_____
	CONTRACT TOTAL	_____	_____	_____	_____

rev	date	revision description	prepared by	approved by
-		original issue		
B	02/24/2009	Added subtotals in rate structure sheet	M.P.Day	Stds & Specs
engineering specification				project file key 00004074.4.1.3
				specification number 00201



ATTACHMENT "A" REQUIREMENTS
BID BREAKDOWN
NORTHWEST BERM TO ELEVATION 515
AIKEN, SOUTH CAROLINA

3. UNIT COST - Provide the following for item additions/deductions:

<u>Item</u>	<u>Unit</u>	<u>Unit Cost</u>
GEOGRID	square foot (S.F.)	\$ _____
COMPACTED BERM	cubic yard (C.Y.)	\$ _____
LANDSCAPING	acre (Ac.)	\$ _____

Rate structure sheet follows.

RATE STRUCTURE SHEET

Craft: _____

	<u>Apprentice</u>	<u>Journeyman</u>	<u>Foreman</u>	<u>Other (specify)</u>
Base Rate	_____	_____	_____	_____
Taxes and Insurance	_____	_____	_____	_____
Fringes	_____	_____	_____	_____
Cost to Contractor (subtotal)	_____	_____	_____	_____
Small Tool Allowance	_____	_____	_____	_____
Overhead & Profit	_____	_____	_____	_____
Straight-Time Rate (total)	=====	=====	=====	=====
Base Rate	_____	_____	_____	_____
Taxes and Insurance	_____	_____	_____	_____
Fringes	_____	_____	_____	_____
Cost to Contractor (subtotal)	_____	_____	_____	_____
Small Tool Allowance	_____	_____	_____	_____
Overhead & Profit	_____	_____	_____	_____
Time & One-Half Rate (total)	=====	=====	=====	=====
Base Rate	_____	_____	_____	_____
Taxes and Insurance	_____	_____	_____	_____
Fringes	_____	_____	_____	_____
Cost to Contractor (subtotal)	_____	_____	_____	_____
Small Tool Allowance	_____	_____	_____	_____
Overhead & Profit	_____	_____	_____	_____
Double-Time Rate (total)	=====	=====	=====	=====

Note: The rates entered above shall be in accordance with OC-14539-B, General Terms and Conditions of the Contract, Article 21.

Below is a list of the hazardous materials the Owner anticipates the Contractor's employees may expect to encounter while performing work at the Owner's facility. Those materials identified by a checkmark will definitely be encountered by the Contractor's personnel in performance of the Work.

In addition to the hazardous materials listed below, the Contractor's employees may encounter other hazardous materials while on the Owner's property. A complete listing of all hazardous materials on the Owner's property, with accompanying Material Safety Data Sheets (MSDS's), is available for inspection at the Owner's facility on request.

[illegible]

Additional pages (check one) ☒ no ☐ yes, there are _____ additional pages attached.

rcv	date	revision description	prepared by	approved by
-	04/25/91	original issue	Safety Comm.	

engineering specification

INFORMATION ON OWNER'S HAZARDOUS MATERIALS -- ATTACHMENT "M"

NORTHWEST BERM TO ELEVATION 515

project file key
00004074.4.1.3

specification number
01113M



page 1 of 1

ARTICLE 1 - OWNER'S POLICY

1. The Owner's policy requires that quality standards shall be rigorously enforced for workmanship, materials, and equipment to be installed on this project. Owner's quality assurance and approval actions shall in no way relieve the Contractor of responsibility for sound design, workmanship, materials and equipment and quality control as required by these provisions and the drawings and specifications.

ARTICLE 2 - CONTRACTOR'S QUALITY CONTROL PROGRAM (CQCP)

2. The Contractor shall establish a Quality Control Program as required by the General Terms and Conditions of the Contract (OC-14539-B), Article No. 15 Quality Control. The CQCP shall be a means of controlling the quality of workmanship, equipment, and materials to assure compliance with the engineering drawings and specifications. The Contractor shall furnish the Quality Control Program in three (3) copies as indicated by (X) below:

Clifford A. Merritt
Owens Corning S&T Center
2790 Columbus Road, Route 16
Granville, Ohio 43023-1200

(X) SUBMIT WITH INITIAL BID

() SUBMIT WITHIN ____ DAYS AFTER AWARD OF CONTRACT OR
OWNER'S NOTICE TO PROCEED

- 2.1 GENERAL REQUIREMENTS: The Contractor's Quality Control Program shall include, but is not limited to, the following:

2.1.1 Purpose and scope of the Quality Control Program, to include how it relates to the particular project.

2.1.2 An organization chart, to include lines of authority and responsibility and names of key contractor personnel responsible for quality.

2.1.3 Names and qualifications of the Contractor's Field Quality Representative. The QC Representative shall have authority to report quality problems directly to the Contractor's Project Manager and to the Owner. The QC Representative shall have authority to direct removal and replacement of defective work.

rev	date	revision description	prepared by	approved by
-		original issue		
B	09/17/92	engineering specification	QA/QC Team	QA/QC Team
				project file key 00004074.4.1.3
				specification number 01114

**QUALITY CONTROL ADDENDUM**

NORTHWEST BERM TO ELEVATION 515
AIKEN, SOUTH CAROLINA

- 2.1.4 Listing of all outside organizations performing quality functions, such as testing laboratories and consultants.
- 2.1.5 Submittal procedures and a list of submittals required by the contract.
- 2.1.6 Specific technical procedures as required in Section 2.2 of this specification.
- 2.2 **TECHNICAL QUALITY CONTROL PROGRAM REQUIREMENTS:** The following technical procedures marked (X) shall be included in the quality control program to be submitted by the contractor:
- (X) 2.2.1 **CONSTRUCTION SURVEYING:** Establishment of common vertical and horizontal controls, equipment, equipment calibration, closures and monuments.
- () 2.2.2 **DEMOLITION:** Delineation of demolition areas. Marking items for salvage. Verifying items are safe for removal. Documenting location/condition of salvage items. Precautions for fire, other hazard prevention.
- (X) 2.2.3 **EARTHWORK:** Extending horizontal and vertical control, material control, material compaction, compaction equipment and compaction testing.
- () 2.2.4 **STABILIZATION AND PAVING:** Extending horizontal and vertical control. Material controls. Compaction methods, equipment and testing of subgrades, subbases, bases and wearing courses. Supplier inspections, hot and cold weather operations.
- () 2.2.5 **CONCRETE:** Extending horizontal and vertical control, especially in locating anchor bolts and preventing their movement during concrete placement. Designing/checking falsework and formwork. Removing formwork (time, strength before removal). Hot weather operations. Cold weather operations. Inspecting concrete and suppliers.
- () 2.2.6 **STEEL:** Extending vertical and horizontal control. Bolt tightening (calibrating tools, verifying inspection). Welding (welder qualification, weld inspection, material control). Installing and inspecting anchor bolts, shims, wedges, plates, grouting, alignment, plumb, and bolt hole enlargement. Protective coating.
- () 2.2.7 **DUCTWORK:** Extending horizontal and vertical control, material control, handling and storage, installation of ductwork, joints sealants and hangers.
- () 2.2.8 **ROOFING AND SHEETMETAL:** Material control, equipment, material handling and storage, penetrations, cold weather procedures.

- () 2.2.9 **WELDING:** Welder qualification/records. Control of welding materials. Preheat and post weld heat treatment. Non-destructive testing to include liquid penetrant, magnet particle and hardness tests as required. Welding filler storage.
- () 2.2.10 **PIPE ERECTION:** Extending vertical and horizontal control. Pressure testing (documenting equipment checks/test results). Control of welding (see 2.2.7).
- () 2.2.11 **MECHANICAL:** Calibrating alignment and leveling instruments. Preparing equipment foundations. Leveling equipment. Aligning, to include couplings, belt drives and chain drives. Grouting: Manufacturer's specific procedures; forming, preparing grout, mixing, testing. Temperature for mixing and curing. Tightening nuts. Lubricating. Flushing. Protection.
- () 2.2.12 **TANKS AND PRESSURE VESSELS:** Control of welding (see 2.2.9), installation and inspection of alignment, plumb, horizontal and vertical joinings, protective coatings, testing.
- () 2.2.13 **INSULATION:** Installing and protecting:

Building Insulation Pipe Insulation Equipment Insulation Duct Insulation
- () 2.2.14 **SPRINKLER SYSTEMS:** Extending horizontal and vertical control, material control and storage, welding (if applicable), flushing and pressure testing.
- () 2.2.15 **INSTRUMENTATION:** Maintaining and documenting adequacy of calibration equipment. Quality control of instrument installation. Instrument loop quality checks. Protecting instruments and loops.
- () 2.2.16 **ELECTRICAL:** Storage and handling of major equipment and materials. Special lifting and setting requirements. Installation of wire, cable, panels, boxes (pulling, tagging terminations). Grounding. Testing: wire and cable; insulation, continuity, phasing, identification; air circuit breaker tests, grounding, hi-pot.

2.3 **TEST REPORTS:** Contractor shall submit test results to Owner's Representative within 24 hours of completion. In the event quality requirements are not met, the Owner shall be notified immediately.

2.4 **CERTIFICATIONS:** The Contractor's Quality Control Representative shall certify that all submittals comply with the contract, that inspection and test reports are correct, and that materials or equipment supplied will be of the same quality as that identified in the submittal or test.

- 2.5 DAILY ACTIVITIES AND LABOR REPORT:** The Contractor shall maintain a Daily Activities and Labor Report which will include the information shown on Form 00B. Form 00C (Contractor Field Quality Notice) shall be completed and furnished whenever applicable.
- 2.6 QA/QC MEETINGS:** The Contractor's QC Representative shall attend QA/QC meetings held by the Owner's Representative. These meetings will address project QC activities such as:
- 2.6.1** Observed problems and actions to correct same.
 - 2.6.2** Review QC inspections, tests and schedules.
 - 2.6.3** Discussion of Owner's requirements.
 - 2.6.4** Review of the Contractor's Quality Control Program.
- 2.7 FORMS:** The following Quality Control reports and logs marked (x) are required for this construction project, samples of these forms are attached. Where a Contractor has quality control forms with the same information, these forms may be substituted with the Owner's approval.

REQUIRED FORMS	QC FORM NUMBER	DESCRIPTION
()	00A	Utility Data
()	00B	Contractor Daily Activities and Labor Report
()	00C	Contractor Field Quality Notice
()	00E	Receipt, Handling & Storage of Materials & Equipment
()	01A	Vertical Control Survey Notes
()	01B	Horizontal Control Survey Notes
()	02A	Salvage Report
()	03A	Quality Control Material Testing Requirements
()	04A	Subgrade and Subbase QC Report
()	04B	Flexible and Stabilized Base QC Report
()	04C	Wearing Course or Pavement QC Report
()	05A	Concrete Proportioning Report (ACI 301)
()	05B	Concrete Testing Report
()	05C	Batch Plant Inspection Report
()	05D	Concrete Placement Report
()	06A	Structural Steel Final Inspection-Turnover Report
()	06B	Final Inspection-Turnover Report:
()	06C	Final Inspection-Turnover Report:

REQUIRED FORMS	QC FORM NUMBER	DESCRIPTION
()	07A	Installation of Galvanized Steel, Stainless Steel, and Fiberglass Ductboard Ductwork
()	07B	Installation of Process Ductwork
()	08A	Quality Control Inspection Checklist for Bituminous Built- up Roofing
()	08B	Installation of Flashing and Sheet Metal
()	09D	QW-484 Record of Welder or Welding Operator Qualification Test
()	09G	QW-482 Suggested Format for Field Welding Procedure Specification (WPS)
()	10A	Pressure Test Inspection Report
()	11B	Equipment Alignment
()	11C	Equipment Alignment
()	12A	Field Erected Vessels and Tanks:
()	12B	Field Erected Vessels and Tanks: Test Diagram
()	12C	Prefabricated Vessel Final Inspection and Turnover Report
()	13A	Building Insulation Report
()	13B	Pipe Insulation Report
()	13C	Insulation Report
()	15A	Instrument Schedule Quality Checking
()	15B	Instrumentation Checklist
()	15C	Instrument Calibration Record
()	16B	Testing of Cable and Wire
()	16E	Grounding
()	16F	Terminations
()	16G	High Potential and Meggar Tests
()	16H	Ground Test
()	16I	Air Circuit Breaker Test

3. ARTICLE 3 - CQCP ACCEPTANCE

- 3.1 Owner's Representative will accept or reject the Contractor's CQCP within 5 working days upon receipt. Should the Owner reject the CQCP, commencement of work shall not be permitted until a revised CQCP has been accepted.

4. ARTICLE 4 - PRE-CONSTRUCTION QA/QC MEETING

- 4.1 Before commencement of work, the Contractor's Project Manager, Field Superintendent, and Field QC Representative shall attend a QA/QC meeting held by the Owner's Representative. The purpose of this meeting is to insure a mutual understanding of the QA/QC program details and to create an awareness of the expected quality for the project.

5. ARTICLE 5 - OWNER'S QUALITY ORGANIZATION

- 5.1 Contractor's Field Quality Control Representative shall contact the appropriate Owner's Field Representative concerning all quality control issues and documentation. An organizational chart indicating the Owner's Field Quality Representatives and their authority is included, see "Attachment A" of this section.

6. ARTICLE 6 - QUALITY ASSURANCE AUDITS AND TRACKING

- 6.1 The Owner reserves the right to conduct Quality Assurance Audits, tests, and inspections to confirm that the Contractor's Quality Assurance and Quality Control responsibilities are being properly discharged.
- 6.2 The Owner's Quality Assurance Audits, tests and inspections shall not relieve the Contractor of its responsibility for Quality Control, and shall not be construed as limiting in any manner the Contractor's obligation to undertake any action which may be necessary or required to establish and maintain Quality Control of the work and equipment at the jobsite.
- 6.3 Contractor's overall Quality Control program will be weighed with other factors in Owner's evaluation of Contractor's work performance. Such evaluation may effect Contractor's eligibility to bid on future work.

End of Section

1. GENERAL

- 1.1 This specification presents a summary in broad outline of the work to be performed in this Contract. It is provided for general reference only. Refer to the specifications and drawings for quantities and detailed requirements of the work.

2. SITE PREPARATION

- 2.1 Remove all grass, sod, topsoil, and debris over the area designated to construct the berm. Stockpile removed material away from the construction site in an Owner designated area. Level-up and scarify the area designated to receive the geogrid.
- 2.2 Owner will supply surveying services for construction layout.

3. GEOGRID INSTALLATION

- 3.1 Install geogrid in accordance with the manufacturer's recommendations under the berm to be constructed.

4. BERM CONSTRUCTION

- 4.1 Construct the berm with re-compacted soils obtained from an Owner's borrow area.
- 4.2 Owner will supply soil compaction testing services.

5. LANDSCAPING

- 5.1 Includes final grading, fertilizing, seeding, and mulching of the constructed berm out slopes and other areas outside of the area to be landfilled that were disturbed during construction.

END OF SECTION

rev	date	revision description	prepared by	approved by
-	04/14/09	original issue	J.D. Zaleha	C.A. Merriitt
engineering specification			project file key	
SUMMARY OF WORK			00004074.4.1.3	
			specification number	
NORTHWEST BERM TO ELEVATION 515			01200	
AIKEN, SOUTH CAROLINA				



1. **GENERAL:** This section lists all the materials and equipment, if any, which Owner will furnish to Contractor:

- ☐ None
- ☐ Owner-furnished materials and equipment are as follows: n/a
- ☒ Owner-furnished services are as follows:

1.1 Surveying services for berm construction.

1.2 Soil testing services for berm construction.

rev	date	revision description	prepared by	approved by
-	04/14/09	original issue	J.D. Zaleha	C.A. Merritt



engineering specification

LIST OF OWNER FURNISHED MATERIAL AND EQUIPMENT

NORTHWEST BERM TO ELEVATION 515
AIKEN, SOUTH CAROLINA

project file key
00004074.4.1.3
specification number
01300

page 1 of 1

1. **GENERAL:** This section lists all drawings, including reference drawings, which Owner will furnish to Contractor:

☐ None.

X List of contract drawings is as follows:

DRAWING TITLE	NUMBER
Northwest Berm to El. 515	M23764

rev	date	revision description	prepared by	approved by
-	04/14/09	original issue	J.D. Zaleha	C.A. Merritt



engineering specification

LIST OF CONTRACT DRAWINGS

NORTHWEST BERM TO ELEVATION 515
AIKEN, SOUTH CAROLINA

project file key
00004074.4.1.3
specification number
01400

page 1 of 1

1. GENERAL

- 1.1 Work shall commence within two (2) weeks after issuance of the contract for this work. Sufficient manpower, material, and equipment will be on site by this date to begin the contract work.
- 1.2 The Contractor shall be substantially completed with the work within ten (10) weeks from the date of contract issuance.

END OF SECTION

rev	date	revision description	prepared by	approved by
-	04/14/09	Original issue	J.D. Zaleha	C.A. Merritt
engineering specification				
 PROJECT SCHEDULE NORTHWEST BERM TO ELEVATION 515 AIKEN, SOUTH CAROLINA			project file key	
				00004074.4.1.3
			specification number	
				01500

page 1 of 1

1. **DEFINITION:** Submittals to the Owner are of two different forms, technical submittals and construction submittals.

- 1.1 **TECHNICAL SUBMITTALS:** Are specifications, drawings, manufacturer's literature or technical data, samples, and any and all other documents or items presented by Contractor to the Owner's Design Manager, to aid the Owner in his evaluation and approval of materials or equipment required by the contract specifications or drawings.
- 1.2 **CONSTRUCTION SUBMITTALS:** Are Contractor's daily reports, safety reports, contractor Q.A. and Q.C. reports and any and all other documents submitted to the Owner's Construction Site Representative, for his approval and to aid in his evaluation of the Contractor's performance.

2. **APPLICABILITY:** For this Contract, submittals;

- ☒ are required as indicated below.
- ☐ are required as indicated below except when otherwise indicated by specifications or drawings.

3. **RECIPIENTS:** Unless otherwise indicated, send submittals to:

3.1 **TECHNICAL SUBMITTALS**

Name: Clifford A. Merritt

Firm: Owens Corning

Address: 2790 Columbus Road, St. Rt. 16

Granville, Ohio 43023

Telephone No.: 740-321-5702

Fax No.: 740-321-4702

3.2 **CONSTRUCTION SUBMITTALS**

Name: Liana Edenfield

rev	date	revision description	prepared by	approved by
-	04/02/84	original issue	J. Toth	F. Duda
B	12/31/92	Format Change	Stds & Specs	Stds & Specs
engineering specification				project file key
 SUBMITTALS PROCEDURE NORTHWEST BERM TO ELEVATION 515 AIKEN, SOUTH CAROLINA				00004074.4.1.3
				specification number
				01600

Firm: Owens Corning Mat Plant

Address: 2648 Wagener Road

Aiken, SC 29801

Telephone No.: 803-643-2668

Fax No.: 803-643-0216

4. QUANTITY AND CONTENT

Unless otherwise indicated by specifications or drawings, send indicated quantities of each of the following indicated documents or items for each submittal:

4.1 TECHNICAL SUBMITTALS

- ☐ - Specifications
- ☐ - Survey drawings: prints: 3 copies
- ☐ - Manufacturer's literature or technical data
- ☐ - Samples: _____ copies
- ☐ - _____
- ☐ - _____
- ☐ - _____
- ☐ - _____

4.2 CONSTRUCTION SUBMITTALS: The Contractor Daily Report is a means of written job-site communication from Contractor to Owner consolidating various submittals required of the Contractor.

4.2.1 PROCEDURE: The Owner's Representative shall provide forms to the Contractor for the Contractor's use throughout the contract duration. The report is to be filled out daily by the Contractor's on-site supervisor and returned to the Owner's Representative daily.

Depending on the nature of the job (magnitude, scope, duration, etc.), the Owner's Representative may elect not to use certain sections, but may still require pertinent information daily.

END OF SECTION

1. **DEFINITION: SUBSTITUTIONS** are defined as replacements for materials or equipment specified herein or indicated by drawings where such replacements do not affect design concept.
2. **APPLICABILITY:** Contractor is permitted and encouraged to propose substitutions if, in Contractor's best judgment, substitutions would reduce initial costs, or reduce operating cost, or improve project timing. Contractor shall not propose substitutions for materials or equipment defined herein by specifications or by drawing notes which include the term "NO SUBSTITUTIONS".
3. **PRELIMINARY REVIEW - PROCEDURE:** Prepare a list and descriptions of proposed substitutions in writing. Include the following information in the description of each proposed substitution:
 - 3.1 **ITEM(S):** Identify both the materials or equipment of the proposed substitution and the specified or indicated materials or equipment which the substitution would replace.
 - 3.2 **PURPOSE:** Briefly state why the substitution should be considered by Owner.
 - 3.3 **JUSTIFICATION:** Present comparisons between the proposed substitution and the specified or indicated materials or equipment for each of the following topics:
 - 3.3.1 **INITIAL COSTS**
 - 3.3.2 **OPERATING COSTS**
4. **APPROVAL:** Contact the following for substitution approval:

Name: Clifford A. Merritt

Firm: Owens Corning

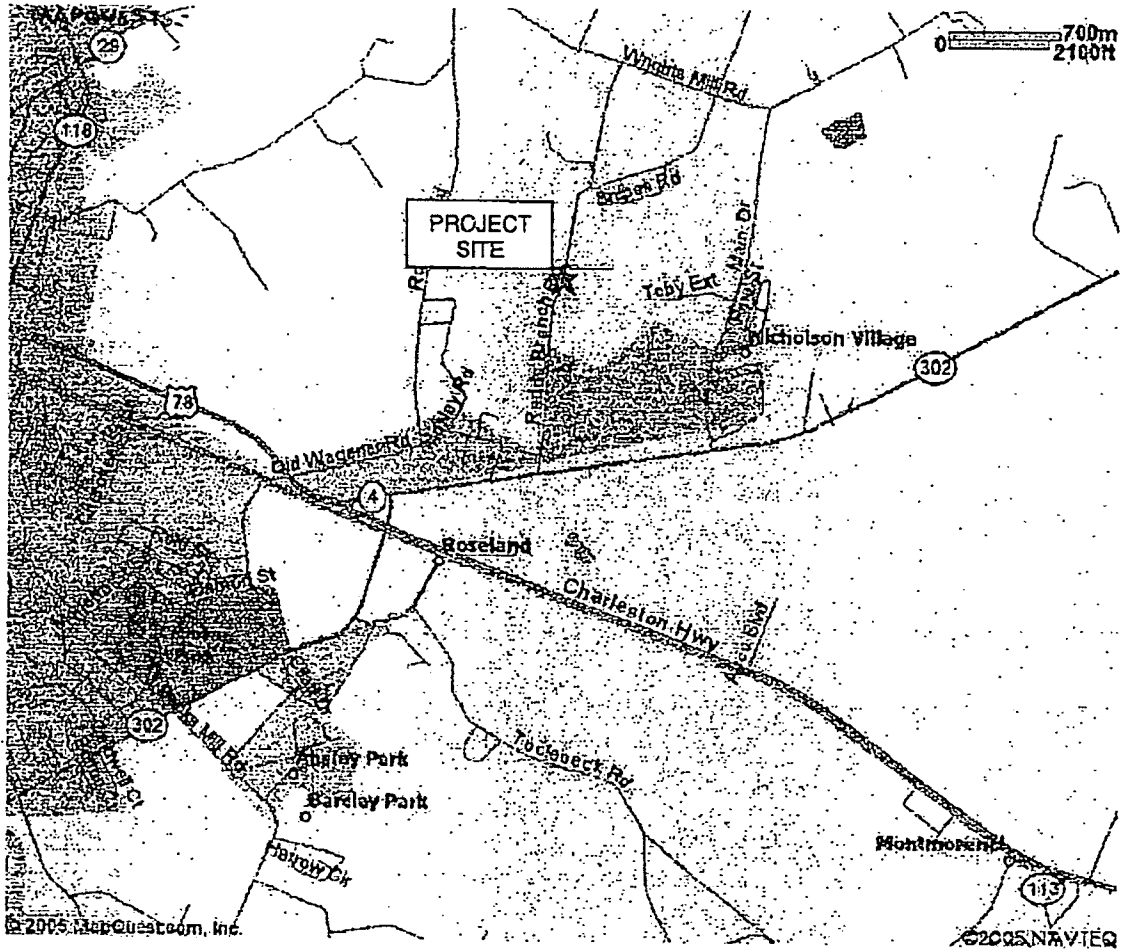
Address: 2790 Columbus Road, St. Rt. 16

Granville, Ohio 43023

Telephone No.: 740-321-5702

Fax No.: 740-321-4702

rev	date	revision description	prepared by	approved by
-				
B	12/31/92	Format Change	Stds & Specs	Stds & Specs
engineering specification				project file key
 SUBSTITUTIONS PROCEDURE NORTHWEST BERM TO ELEVATION 515 AIKEN, SOUTH CAROLINA				00004074.4.1.3
				specification number
				01700



rev	date	revision description	prepared by	approved by
-	04/14/09	original issue	J.D. Zalcha	C.A. Merritt
engineering specification				
PROJECT LOCATION MAP NORTHWEST BERM TO ELEVATION 515 AIKEN, SOUTH CAROLINA			project file key	
			00004074.4.1.3	
			specification number	
			01800	



1. GENERAL

1.1 **PURPOSE:** This specification defines the minimum requirements for establishing grades, lines, and levels for civil and structural work.

2. **EQUIPMENT:** Equipment must include, but is not limited to, the following:

2.1 **DISTANCE MEASURING, BASE LINES AND STRUCTURAL WORK:** Steel tapes, the length of which shall not exceed 200 feet. Subdivisions shall be in inches or tenths of a foot. Tapes shall be compared with a U.S. Bureau of Standards certified tape. Certification shall be within 60 days of commencement of project. Woven tapes are not allowed.

2.2 **DISTANCE MEASURING, CIVIL WORK:** Steel tapes or woven metallic or woven fiberglass tapes. Steel tapes shall not exceed 200 feet in length. Woven metallic or woven fiberglass tapes shall not exceed 100 feet in length. Woven cloth tapes may be used for rough grading.

2.3 **MEASUREMENT OF HORIZONTAL AND VERTICAL ANGLES AND SETTING POINTS IN LINE**

2.3.1 **BASE LINES AND MONUMENT SETTING:** Micrometer or digitized Theodolite with not less than 20X telescope magnification. Horizontal vernier micrometer or scale division not greater than 20 seconds. Vertical vernier micrometer or scale division not greater than 20 seconds. Plate level vial sensitivity shall be 40 seconds or less per millimeters.

2.3.2 **STRUCTURAL AND CIVIL LAYOUT:** Micrometer or digitized Theodolite as listed in 2.3.1 or vernier transit or scale-reading Theodolite. Vernier transit or scale reading Theodolite shall have not less than 18X telescope magnification. Horizontal vernier micrometer or scale division not greater than one minute and Vertical vernier micrometer or scale division not greater than one minute. Plate level vial sensitivity shall be 120 seconds or less per 2 millimeters. Telescope vial sensitivity shall be 60 seconds or less per 2 millimeters.

2.4 **MEASUREMENT OF ELEVATION DIFFERENCES**

rev	date	revision description	prepared by	approved by
-	02/25/86	original issue	T. F. Lane	M. P. Day
D	12/31/92	Format Change and reaffirmed engineering specification	Stds & Specs	Fac. Team
				project file key 00004074.4.1.3
				specification number 02005



GRADES, LINES, AND LEVELS

NORTHWEST BERM TO ELEVATION 515
AIKEN, SOUTH CAROLINA

- 07/12/2011 00:10 PM
- 00000000
- 2.4.1 **BASE BENCH MARKS:** Level rod with vernier target. Rod graduations to be in feet/decimals. Level to be tilting precise model with not less than 32X telescope magnification. Tilting precise level telescope vial sensitivity shall be 30 seconds or less per 2 millimeters.
 - 2.4.2 **STRUCTURAL LEVELING:** Level rod with target. Rod graduations shall be in feet/inches or feet/decimals. Level to be tilting precise as listed in 2.4.1 or automatic. Automatic telescope magnification to be not less than 28X. Automatic level compensator range to be plus/minus 16 minutes maximum.
 - 2.4.3 **CIVIL LEVELING:** Level rod as listed in 2.4.2 Levels to be listed in 2.4.2 or dumpy. Dumpy level telescope magnification to be not less than 33X. Dumpy level telescope vial sensitivity to be 40 seconds or less per 2 millimeters.

3. EXECUTION

- 3.1 **PROCEDURE:** Establish bench marks, base lines, monuments and structural and civil layout, using methods conforming to situation requirements. Permanent bench marks and base line monuments as shown on Owner's site drawings shall be Owner provided brass stamped plugs installed by Contractor, set in not less than 6 inch round by 36 inch deep concrete cylinders.
- 3.2 **ORDER OF ACCURACY**
 - 3.2.1 Base line traverse closure - equal to or less than 1/5000
 - 3.2.2 Bench mark error of closure in feet divided by the square root of the distance in miles - equal to or less than 0.050.
 - 3.2.3 **STRUCTURAL STEEL LAYOUT LEVELING:** Not to exceed plus/minus 1/8 inch in 100 feet. Total difference on column line or transverse lines not to exceed plus/minus 5/8 inch.

END OF SECTION

1. GENERAL

- 1.1 **PURPOSE:** This specification defines the material and procedure requirements for earthwork.
- 1.2 **EXCLUSIONS:** This specification does not govern earthwork for underground piping and utilities.
- 1.3 **SITE INFORMATION:** Copies of soil exploration report(s) may be available upon request. Contractor assumes full responsibility for interpreting soil data and for the conclusions drawn from the information furnished.
- 1.4 **INSPECTION AND TESTING:** Make available to the Owner during construction areas of excavation and fill.

2. MATERIALS

- 2.1 **ENGINEERED FILL:** ASTM D1241 - MATERIALS FOR SOIL-AGGREGATE SUBBASE, BASE AND SURFACE COURSES Gradation C (AASHTO M147).

Sieve Designation	Percentage by Weight Passing Square Mesh Sieves
1 inch (25 mm)	100
3/8 inch (9.5 mm)	50-85
No. 4 (4.75 mm)	35-65
No. 10 (2.00 mm)	25-50
No. 40 (0.425 mm)	15-30
No. 200 (0.075 mm)	5-15

- 2.2 **POROUS FILL:** Fine gravel and coarse sand, 95 to 100 percent by weight passing 1/2 inch sieve and 0 to 5 percent by weight passing No. 10 sieve.
- 2.3 **EARTH FILL:** On-site excavated material, free from organics and free from stones larger than 6 inches in diameter.

rev	date	revision description	prepared by	approved by
-	01/27/81	original issue	T. H. Richards	R. L. Hood
F	6/15/95	Revised 3.3.5, 3.5.3, 3.7.1 and 3.8.1	G.M. Ziegler	Specification Team

engineering specification	project file key
EARTHWORK	00004074.4.1.3
NORTHWEST BERM TO ELEVATION 515	specification number
AIKEN, SOUTH CAROLINA	02200



- 2.3.1 **BORROW MATERIAL:** This item applies to on or off-site borrow material for "Earth Fill". On-site borrow may be used only if permitted by the drawings, or section 01200, Summary of Work. Submit test results for borrow materials for Owner's Engineer's approval. Imported material shall be equal to or better than on-site material "Earth Fill". Tests shall include:

ASTM D422 PARTICLE SIZE ANALYSIS OF SOILS (SIEVE ANALYSIS ONLY)

ASTM D698 MOISTURE DENSITY RELATION OF SOILS (STANDARD PROCTOR)

ASTM D4318 TEST METHOD FOR LIQUID LIMIT, PLASTIC LIMIT, AND PLASTICITY INDEX OF SOILS

- 2.4 **TOPSOIL:** On-site soil presently supporting vegetation and having more than 10 percent organic content. Topsoil shall be free of plants and their roots, stones, subsoil, and other undesirable material.

3. EXECUTION

3.1 GENERAL

- 3.1.1 **SITE DRAINAGE:** Provide as required to prevent flooding of the jobsite and to perform construction.

- 3.1.2 **EROSION PROTECTION:** Earthwork shall be conducted in a manner which will prevent or minimize soil erosion and resulting sedimentation. Provide temporary soil erosion control to prevent sedimentation from entering open ditches.

3.2 STRIPPING AND STOCKPILING TOPSOIL

- 3.2.1 **STRIPPING:** Remove grass, sod, decayed vegetation, and other unsuitable material from the areas to be graded.

- 3.2.2 **CLEARING AND GRUBBING:** The removal of trees, shrubs, plants, and other aboveground vegetation shall be kept to a minimum. Obtain approval of Owner's Representative prior to the removal of trees larger than 4 inches in diameter. Excavate stumps, roots, and other on-ground and below ground vegetation. Fill depressions resulting from grubbing operations with earth fill and compact to make the surface conform to existing grade.

- 3.2.3 **STOCKPILING:** Remove topsoil from areas of excavation and fill. Stockpile topsoil in an area approved by Owner's Representative. Topsoil shall be stored separately from other excavated materials.

3.3 ROUGH GRADING

- 3.3.1 **COMPACTION:** Place fill materials in horizontal layers no more than eight inches thick. Compact each layer to an average density no less than 100 percent of the ASTM D698 maximum dry density (Standard Proctor dry density).
- 3.3.2 **ELEVATIONS:** Provide fills to final elevations indicated by drawings.
- 3.3.3 **FROZEN FILL:** Fill material shall not be placed on frozen surfaces. Frozen fill material shall not be placed.
- 3.3.4 **ENGINEERED FILL:** Place engineered fill below buildings. Engineered fill shall extend past the perimeter of buildings equal to the depth of foundations at that point.
- 3.3.5 **POROUS FILL:** Provide a 6 inch thick layer of porous fill under concrete floor slabs. Provide 18 inches of porous fill behind retaining walls the full height of the wall.
- 3.3.6 **EARTH FILL:** Unless otherwise indicated, fill shall be earth fill.

3.4 EXCAVATION

- 3.4.1 **GENERAL:** Excavate for building substructure and site structures. Trim excavation bottoms to required lines and grades to allow placement of concrete on undisturbed soil. Excavations shall be wide enough to permit placing and removal of forms, inspection of work, and installation of other work.
- 3.4.2 **FROST:** Protect trenches and bottom of excavation from freezing.
- 3.4.3 **SHORING:** Unless otherwise specified, Contractor shall be responsible for the method of shoring.
- 3.4.4 **DEWATERING:** Unless otherwise specified, Contractor shall be responsible for the method of dewatering.
- 3.4.5 **OVER-EXCAVATION:** Correct bottom over-excavation by placing lean concrete to specified line and grade across full trench width according to specification 03310 - CONCRETE.

3.5 BACKFILLING

- 3.5.1 **COMPACTION:** Place fill materials in horizontal layers no more than eight inches thick. Compact each layer to an average density no less than 100 percent of the ASTM D698 maximum dry density (Standard Proctor maximum dry density).

3.5.2 **FROZEN BACKFILL:** Backfill material shall not be placed on frozen surfaces. Frozen backfill shall not be placed.

3.5.3 **BACKFILL MATERIALS:** Engineered fill around buildings, site structures and below areas to be paved. Earth fill unless otherwise indicated.

3.5.4 **CONCRETE PROTECTION:** Do not backfill against concrete until at least three days after concrete placement.

3.6 **FINISH GRADING**

3.6.1 **ELEVATIONS:** The final elevations shall be measured at the top of topsoil, roads, and parking lots. The final elevations shall be not more than 0.10 foot above or below the indicated elevations.

3.6.2 **GRADING:** Grade excavated and filled areas, including transition areas, to provide positive drainage and uniform transition to adjacent areas. Grade areas adjacent to building walls and other structures to slope down and away for proper drainage.

3.6.3 **PLACING TOPSOIL:** Loosen subgrade surface and spread topsoil to a minimum depth of four inches after compaction. Lightly compact and grade the topsoil to the indicated elevations. The finish surface shall be smooth, compacted, and free from irregular surface changes.

3.7 **DISPOSAL OF SURPLUS MATERIAL**

3.7.1 **FILL:** Surplus fill not required for backfilling or filling shall be disposed of off Owner's premises. Contractor is to assume in his bid, unless otherwise instructed, that the material is not hazardous. Contractor shall notify the Owner's Representative if the material has any odor, discoloration or other indication of contamination prior to removal.

3.7.2 **EXCAVATED DEBRIS:** Debris shall be disposed of off Owner's premises.

3.8 **COMPACTION TESTING:** Compaction testing, and retesting as required to verify all areas of grading and backfilling meet the specified requirements, is the Contractor's responsibility.

3.8.1 **TESTING LABORATORY:** An experienced, qualified, independent testing laboratory shall be employed by the contractor to do the required testing. The Owner's Representative has the right to accept or reject the laboratory selected by the Contractor.

- 3.8.2 **FREQUENCY:** As a minimum, tests shall be performed as scheduled below:

<u>APPLICATION</u>	<u>FREQUENCY</u>
Trenches Over 50 Feet in length	Every 2 foot lift at 50 foot intervals
Trenches 50 Feet in Length or Less	Every 2 foot lift
Shallow Fills	One for every 2,500 square feet per lift
Deep Fills (Six Feet Deep or Over)	One for every 5,000 square feet per foot of depth. For the last foot of depth, one per every 2,500 square feet per lift

- 3.8.3 **TEST IDENTIFICATION:** Code each test with date, sequential number of test and location. Locations shall be grid-oriented to column lines or survey reference (e.g. N260, W340 or C 1/2, 12 2/3).

- 3.8.4 **OWNER WITNESS:** The Contractor is to coordinate the testing with the Owner's Representative so the Owner's Representative can witness the testing and accept the test locations.

END OF SECTION

1. GENERAL

- 1.1 **SCOPE:** This specification defines the establishment of perennial vegetation on disturbed areas by planting seed. This work requires final grading, lime, and fertilizer application, seed planting, mulching, and initial maintenance activities.
- 1.2 **PURPOSE:** To permanently stabilize the disturbed areas, reducing erosion and sedimentation, and to improve the appearance of the area.

2. MATERIALS AND EQUIPMENT

2.1 GENERAL

- 2.1.1 **TYPES AND AMOUNTS:** The types and amounts of landscaping materials presented in this Article are minimum recommendations.
- 2.1.2 **QUALITY:** The quality of landscaping materials presented in this Article shall be that of local, commonly used agricultural grade.

2.2 LIME

- 2.2.1 **TYPE:** Ground agricultural limestone
- 2.2.2 **AMOUNT:** The soil shall be amended as required to reach a pH suitable for seed growth.

2.3 FERTILIZER

- 2.3.1 **TYPE:** Nitrogen(N), phosphorus (P), and potassium (K). Sulfur (S) may be specified if deficient at the project location.
- 2.3.2 **AMOUNT:** The minimum percentage mixture rate of N-P-K is 10-10-10, spread at a minimum application rate of 1,000 pounds per acre as shown on the project drawings or recommended by detailed soil analysis.

rev	date	revision description	prepared by	approved by
-	8/22/00	original issue	J.D. Zalcha	C.A. Merrin
engineering specification				
 LANDSCAPING: PERMANENT SEEDING NORTHWEST BERM TO ELEVATION 500 AIKEN, SOUTH CAROLINA			project file key	
			00004074.4.1.3	
			specification number	
			2801	

2.4 SEED

2.4.1 TYPE: A mixture of permanent grasses and legumes indigenous to the area, adaptable to the soil in which it is planted and appropriate for the time of year when planting occurs. The required seed mixture is specified on the project drawings.

2.4.2 AMOUNT: Follow the application rate specified on the project drawings. If not specified, follow the recommendations of a local agronomic official.

2.5 MULCH

2.5.1 TYPE: Small grain straw or hay, unless otherwise specified.

2.5.2 AMOUNT:

a) STRAW: 2.0 tons / acre (448 kg / 1,000 m²)

3. EXECUTION

3.1 TIMING: Permanent seeding shall be conducted only during the appropriate times for such activities. A temporary seeding of annual grasses will otherwise be specified if the time of year is not ideal for a permanent seeding. Refer to the project drawings for a time schedule. Dormant seedings will only be permitted with the consent of the Owner.

3.2 SITE PREPARATION

3.2.1 FINAL GRADING: Shape the final surface to prevent water ponding and abrupt changes in grade. Areas of compacted soil shall be broken up sufficiently to allow for good plant root penetration. Final graded surfaces shall not be left in hard, smooth condition.

3.2.2 SURFACE DEBRIS: Remove all undesirable debris, such as large roots, stumps, branches and rocks larger than 3 inches (80 mm) in diameter, from the final graded surface and dispose of the debris in an Owner approved location.

3.3 LIME AND FERTILIZER APPLICATION

3.3.1 SPREADING: Lime and fertilizer shall be spread evenly over the final graded surface with equipment designed for such use.

3.3.2 **INCORPORATION:** Incorporate the lime and fertilizer into the soil to a maximum depth of 4 inches (100 mm) with a disk harrow, springtooth harrow, or other suitable agricultural equipment. This operation shall be conducted parallel with the contour wherever possible.

3.4 SEED PLANTING

3.4.1 **APPLICATION:** Seed shall be spread evenly over the prepared surface with equipment designed for such use. Seeding can be done by hand, machine or hydraulic jet. This operation shall be conducted parallel with the contour wherever possible.

3.4.2 **BROADCAST SEEDING:** Seed applied by broadcasting on the soil surface must be incorporated into the soil and average depth of $\frac{1}{4}$ to $\frac{1}{2}$ inch (6 to 13 mm) and firmed lightly with a roller or tamper.

3.4.3 **DRILLS:** Wherever possible, mechanical equipment designed specifically for planting the type of seed shall be used. Seed drills, cultipackers, etc. shall place the seed in the soil to an average depth of $\frac{1}{4}$ to $\frac{1}{2}$ (6 to 13 mm).

3.4.4 **HYDROSEEDING:** Hydraulic seeding and mulching shall only be used for inaccessible areas such as steep slopes. Owner approval must be obtained to use this method.

3.5 MULCH APPLICATION

3.5.1 **SPREADING:** Mulch shall be spread evenly over the planted area either by mechanical means (straw blower) or by hand. The applied mulch shall just cover the soil surface with no densely matted areas.

3.5.2 **ANCHORING:** Mulch shall be anchored to the soil by:

- a) **MECHANICAL MEANS** (crimping, disking, punching, etc.)
- b) **NETTING** (only if specified on the project drawings)
- c) **TACKIFIER** (sprayed on fiber binder, only if specified on the project drawings)

3.6 MAINTENANCE

3.6.1 **IRRIGATION:** In abnormally hot and dry seasons or on adverse sites the Owner will require that the Contractor irrigate the recently planted area with adequate, fresh water until the seedlings are firmly established.

3.6.2 **REPAIRS:** The Contractor on a regular basis, shall inspect all planted areas especially after a rainfall event, for failures due to inadequate seed germination, erosion, sedimentation, etc. The Contractor is required to repair all failures until the planting becomes established, a period of time that can last as long as, but will not exceed six months.

END OF SECTION

SUBCONTRACTORS:

Overhead and Profit applied by subcontractor to field labor _____ % Overhead & Profit
 Overhead and Profit applied by subcontractor to materials furnished _____ % Overhead & Profit
 Overhead and Profit applied to Equipment Rental _____ % Overhead & Profit
 (Rental Rates based on _____)
 Include copy of rates for Subcontractor-owned equipment

2.2 We will complete the Work:

() Within _____ consecutive calendar days, including Saturdays, Sundays and Holidays, in accordance with the attached schedule, measured from the date of receipt of the Owner's Purchase Order.

() Within the time set forth in the Owner's schedule contained in the Bid Package.

We can commence the Work within _____ consecutive calendar days from receipt of the Owner's Purchase Order. We acknowledge and agree that the Owner has the right to delay the scheduled starting date providing the completion date is adjusted accordingly. We further agree that no Work shall commence until the Owner issues its Purchase Order.

3. We hereby acknowledge receipt of the following pamphlets, booklets, plans, drawings, specifications, terms and conditions and other relevant documents, including the addenda thereto, pertaining to this Project:

ITEM NO. 1 - DRAWING NUMBERS

() per specification 01400, List of Contract Drawings

() Other (specify)

ITEM NO. 2 - SPECIFICATIONS

() per Bid Package Table of Contents

() Other, list below

Specification number	Specification Title	Revision	Date	pages

addendum no. 1

project title
and location:

Northwest Berm to Elevation 515, Aiken, SC

contract no.
and title:

(General Contract)

inquiry number

n/a

date

05/22/09

project file no.

00004074.4.1.3

This addendum is issued to all bidders prior to award of Contract. This addendum forms a part of the Bid Documents. This addendum modifies the Bid Documents as indicated below. Acknowledge receipt of this addendum on the proposal form, page 3, item no. 3. Incorporate this addendum in the bid.

The following comments and additions are made to the contract documents issued for bid and dated May 2009:

1. The Contractors' proposal is due Friday May 29, 2009 instead of Thursday as written in the proposal invitation letter.
2. The Contractor shall have access to the project site Monday through Friday 7:00 a.m. to 6:00 p.m. to perform the work required to complete this project.
3. Trees and other vegetation will have to be removed downslope from the new berm to blend it into the existing slope. The Contractor shall place all site preparation debris in the southwest quadrant of the landfill area. Refer to Note 1 on Owner's drawing M23764 as well.
4. The Contractor must maintain dust control on all access roads between the borrow area and the landfill at all times. The Contractor will provide a flagman; maintain road crossing signs and other road crossing safety measures to comply with Owner's South Carolina Highway Department Encroachment Permit. A copy of the permit will be supplied by the Owner.
5. The Contractor is to remove soil for the berm construction from "Cut 7" and part of "Cut 8" as shown on Owner's drawing entitled Borrow Plan and Details, number M20019, included with this addendum. Trees and other vegetation will have to be removed. The Contractor shall place all site preparation debris off to side onto areas where soil has been previously removed. The Contractor is to landscape (grade and seed) his used portion of the borrow area when finished. This will add approximately 1.5 acres to the landscaping requirement.



sheet 1 of 1

To: Owens Corning

From: Owens Corning

Fax: Owens Corning

KOFAX at: FEB-21-2012-16:20 Doc: 734 Page: 001



OWENS CORNING SALES, LLC

PURCHASE ORDER 84504116315

(Please use the purchase order number in all correspondence)

Vendor number: 143564
 BAM ENGLISH GRADING INC
 3801 WAGNER RD
 AIKEN SC 29805
 USA

Invoice to:
 Owens Corning Sales, LLC
 P.O. BOX 280307
 East Hartford CT 06129

Deliver to:
 Aiken Composites Plant
 2646 Wagner Road
 AIKEN SC 29801
 USA

Document date : 22Jan2012
 Last changed : 09Feb2012
 Contact name : Deborah Logan
 Phone number : 803-643-4491

Payment terms
 Net 60 Days
 Currency USD

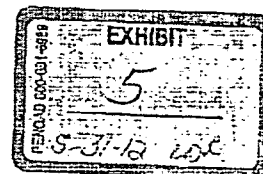
Item Code	Material	Description	Delivery Date	Order Qty	UoM	Net Price	Per	Amount
00010		2012 Aiken landfill Operation	31Dec2012	258,000.000	EA	1.00	1	258,000.00
		Freight Cost Arrangement		Delivered				
		Terms						
		THIS ITEM IS NOT TO BE TAXED ON SUPPLIER'S INVOICE						
00020		Aiken Land Application of Bicides	31Dec2012	162,432.000	EA	1.00	1	162,432.00
		Freight Cost Arrangement		Delivered				
		Terms						
		THIS ITEM IS NOT TO BE TAXED ON SUPPLIER'S INVOICE						
Total net value excluding tax								420,432.00

THIS PURCHASE ORDER CONSTITUTES BUYER'S OFFER TO SELLER, AND BECOMES A BINDING CONTRACT ON THE TERMS PREVIOUSLY PROVIDED TO SELLER, WHEN ACCEPTED BY SELLER EITHER BY ACKNOWLEDGEMENT OR THE COMMENCEMENT OF PERFORMANCE HEREOF. NO REVISION OF BUYER'S TERMS AND CONDITIONS SHALL BE VALID UNLESS IN WRITING AND SIGNED BY AN AUTHORIZED REPRESENTATIVE OF BUYER; AND NO CONDITION STATED BY SELLER IN ACCEPTING OR ACKNOWLEDGING THIS ORDER SHALL BE BINDING UPON BUYER IF INCONSISTENT WITH OR IN ADDITION TO THE TERMS HEREIN, UNLESS EXPRESSLY ACCEPTED IN WRITING BY BUYER. BUYER'S PURCHASE ORDER TERMS AND CONDITIONS ARE ALSO AVAILABLE ON THE INTERNET AT www.OwensCorning.net/supplier. SELECT THE TERMS AND CONDITIONS CATEGORY AND SELECT THE APPROPRIATE TERMS AND CONDITIONS FILE FOR YOUR COUNTRY.

P.O. for Owens Corning Composite Materials, LLC

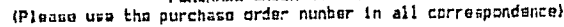
This is the end of the purchase order.

1



001309

NOFAX# at: FEB-21-2012-16:27 Doc: 724 Page: 001



Payment terms
Net 75 Days
Currency USD

Thank you,
Nicholas Heffler
Aiken Plant Sourcing Leader
EO3-643-2667

To: OwensCorning

From: Owens Corning

Fax: Owens Corning

KOPAX# at: FEB-21-2012-16:27 Doc: 724 Page: 002

OWENS CORNING SALES, LLC

PURCHASE ORDER 04503926543

(Please use the purchase order number in all correspondence)

Item Code	Material	Description	Delivery Date	Order Qty	UoM	Net Price	Per	Amount
nicholas.hailer@owenscorning.com								
00010			31Jan2012	272,000.000	EA	1.00	1	272,000.00
		Aiken Landfill Operation (bid AIK-DFB)						
		Freight Cost Arrangement		Delivered				
		Terms						
		Cost Breakdown:						
		Year 2010 - \$21,500/month = \$158,000 annual total						
		Year 2011 - \$21,500/month = \$258,000 annual total						
		Year 2012 - \$21,500/month = \$258,000 annual total						
		Year 2013 - \$21,500/month = \$258,000 annual total						
		Year 2014 - \$21,500/month = \$258,000 annual total						
		THIS ITEM IS NOT TO BE TAXED ON SUPPLIER'S INVOICE						
00020			31Jan2012	162,432.000	EA	1.00	1	162,432.00
		Aiken Land Application of Biosolids (bid						
		Freight Cost Arrangement		Delivered				
		Terms						
		Cost Breakdown:						
		Year 2010 - \$13,536/month = \$162,432 annual total						
		Year 2011 - \$13,536/month = \$162,432 annual total						
		Year 2012 - \$13,536/month = \$162,432 annual total						
		Year 2013 - \$13,536/month = \$162,432 annual total						
		Year 2014 - \$13,536/month = \$162,432 annual total						
		4/4/11 Pam Kaza. PD						
		for 2011. Send invoices to Joe Didia for approval						
		THIS ITEM IS NOT TO BE TAXED ON SUPPLIER'S INVOICE						
Total net value excluding tax								434,432.00

THIS PURCHASE ORDER CONSTITUTES BUYER'S OFFER TO SELLER, AND BECOMES A BINDING CONTRACT ON THE TERMS PREVIOUSLY PROVIDED TO SELLER, WHEN ACCEPTED BY SELLER EITHER BY ACKNOWLEDGEMENT OR THE COMMENCEMENT OF PERFORMANCE HEREOF. NO REVISION OF BUYER'S TERMS AND CONDITIONS SHALL BE VALID UNLESS IN WRITING AND SIGNED BY AN AUTHORIZED REPRESENTATIVE OF BUYER, AND NO CONDITION STATED BY SELLER IN ACCEPTING OR ACKNOWLEDGING THIS ORDER SHALL BE BINDING UPON BUYER IF INCONSISTENT WITH OR IN ADDITION TO THE TERMS HEREIN, UNLESS EXPRESSLY ACCEPTED IN WRITING BY BUYER. BUYER'S PURCHASE ORDER TERMS AND CONDITIONS ARE ALSO AVAILABLE ON THE INTERNET AT www.Owenscorning.net/supplier. SELECT THE TERMS AND CONDITIONS CATEGORY AND SELECT THE APPROPRIATE TERMS AND CONDITIONS FILE FOR YOUR COUNTRY.

P.O. for Owens Corning Composite Materials, LLC

This is the end of the purchase order.

To: Owens Corning

From: Owens Corning

Fax: Owens Corning

KOFAX at: FEB-21-2012-14:26 Doc: 702 Page: 001



OWENS CORNING SALES, LLC

PURCHASE ORDER #4503684074

(Please use this purchase order number in all correspondence)

Vendor number: 143564
BAM ENGLISH GRADING INC
3801 WAGENER RD
AIKEN SC 29805
USA

Invoice to:
Owens Corning Sales, LLC
P.O. BOX 280507
East Hartford CT 06128

Deliver to:
Aiken Composites Plant
2548 Wagener Road
AIKEN SC 29801
USA

Document date : 04/09/2010
Last changed : 06/13/2011
Contact name : Deborah Logue
Phone number : 803-643-2669

Payment terms
Net 75 Days
Currency USD

*****SERVICE PO***** *****SERVICE PO*****
Do not invoice for sales tax; sales tax will be self assessed. tax
exempt certification will be supplied upon request. Please confirm
price and delivery date through the supplier portal or via fax to
419-325-9933.

This is a service purchase order. If you are not on the supplier
portal, invoice must be sent to the following address:
Owens Corning Sales, LLC
PO Box 281129
East Hartford, CT 06128

Please reference the PO number on your invoice. Failure on your part
to follow the above instructions will delay your invoice payment.

Thank you,
Nicholas Haller
Aiken Plant Sourcing Leader
803-643-2569

OWENS CORNING SALES, LLC

PURCHASE ORDER #4803684074

(Please use the purchase order number in all correspondence)

Item Code	Material	Description	Delivery Date	Order Qty	UoM	Net Price	Per	Amount
nicholas.heller@owenscorning.com								
00010		Aiken Landfill Operation (bid ATK-GPB)	31Dec2011	258,000.000	EA	1.00	1	258,000.00
		Freight Cost Arrangement		Delivered				
		Terms						
		Cost Breakdown:						
		Year 2010 - \$21,500/month = \$258,000 annual total						
		Year 2011 - \$21,500/month = \$258,000 annual total						
		Year 2012 - \$21,500/month = \$258,000 annual total						
		Year 2013 - \$21,500/month = \$258,000 annual total						
		Year 2014 - \$21,500/month = \$258,000 annual total						
		THIS ITEM IS NOT TO BE TAXED ON SUPPLIER'S INVOICE						
00020		Aiken Land Application of Biosolids (bid	31Dec2011	162,432.000	EA	1.00	1	162,432.00
		Freight Cost Arrangement		Delivered				
		Terms						
		Cost Breakdown:						
		Year 2010 - \$13,536/month = \$162,432 annual total						
		Year 2011 - \$13,536/month = \$162,432 annual total						
		Year 2012 - \$13,536/month = \$162,432 annual total						
		Year 2013 - \$13,536/month = \$162,432 annual total						
		Year 2014 - \$13,536/month = \$162,432 annual total						
		THIS ITEM IS NOT TO BE TAXED ON SUPPLIER'S INVOICE						
00030		Additional dike in 3,6,7 sludge field	28Feb2011	1.000	EA	11,050.00	1	11,050.00
		Freight Cost Arrangement		Delivered				
		Terms						
		THIS ITEM IS NOT TO BE TAXED ON SUPPLIER'S INVOICE						
Total net value excluding tax								431,482.00

To:OwensCorning

From:Owens Corning

Fax:Owens Corning

KOFAX® at: FEB-21-2012-16:26 Doc:702 Page:003

OWENS CORNING SALES, LLC

PURCHASE ORDER 84503684074

(Please use the purchase order number in all correspondence)

Item Code	Material	Description	Delivery Date	Order Qty	UoM	Net Price	Per	Amount
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THIS PURCHASE ORDER CONSTITUTES BUYER'S OFFER TO SELLER, AND BECOMES A BINDING CONTRACT ON THE TERMS PREVIOUSLY PROVIDED TO SELLER, WHEN ACCEPTED BY SELLER EITHER BY ACKNOWLEDGEMENT OR THE COMMENCEMENT OF PERFORMANCE HEREOF. NO REVISION OF BUYER'S TERMS AND CONDITIONS SHALL BE VALID UNLESS IN WRITING AND SIGNED BY AN AUTHORIZED REPRESENTATIVE OF BUYER, AND NO CONDITION STATED BY SELLER IN ACCEPTING OR ACKNOWLEDGING THIS ORDER SHALL BE BINDING UPON BUYER IF INCONSISTENT WITH OR IN ADDITION TO THE TERMS HEREIN, UNLESS EXPRESSLY ACCEPTED IN WRITING BY BUYER. BUYER'S PURCHASE ORDER TERMS AND CONDITIONS ARE ALSO AVAILABLE ON THE INTERNET AT www.Owenscorning.net/supplier. SELECT THE TERMS AND CONDITIONS CATEGORY AND SELECT THE APPROPRIATE TERMS AND CONDITIONS FILE FOR YOUR COUNTRY.

P.O. for Owens Corning Composite Materials, LLC

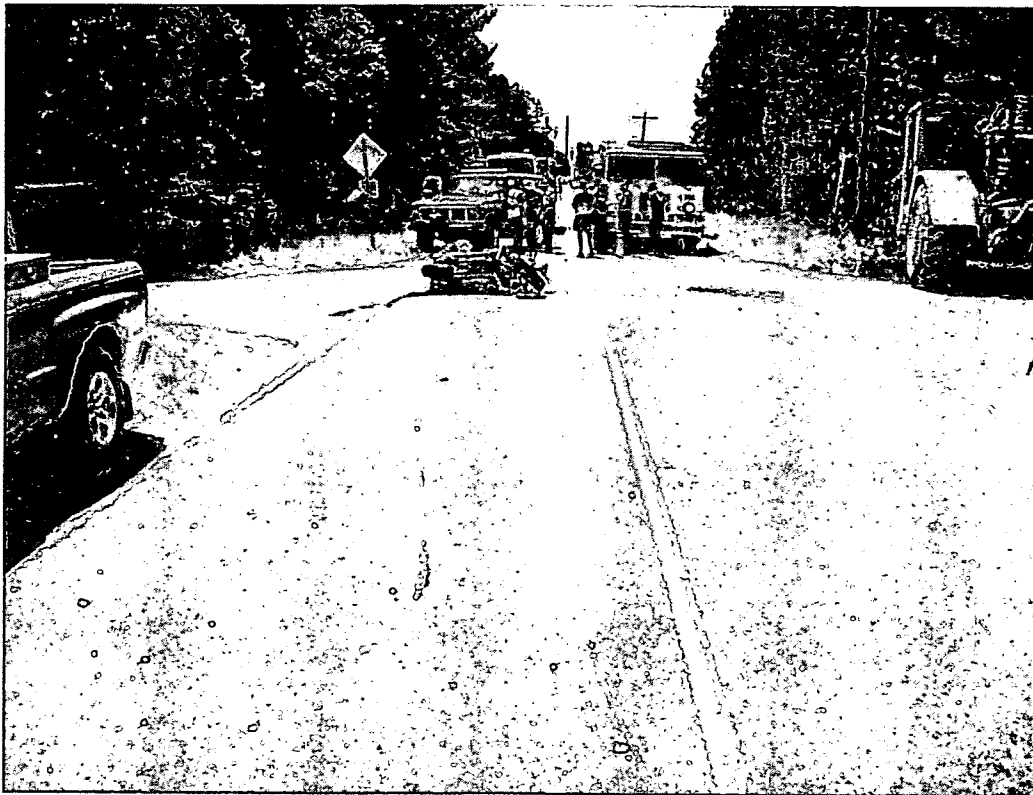
This is the end of the purchase order.

Plaintiff's Exhibit 12

Photograph of the scene.

This is looking in the direction of travel of the motorcycle at the point where the motorcycle came to rest in the oncoming lane.

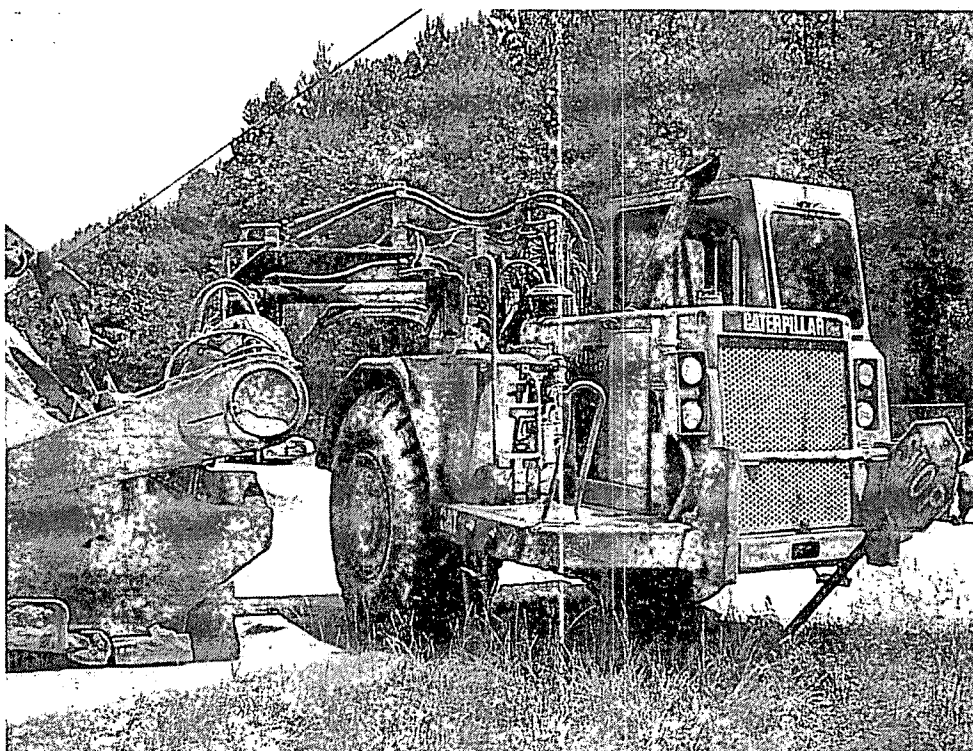
On the left is the private Owens Corning road to the borrow pit. The spotter was in that drive. On the right is the other part of the Owens Corning private road. The pan is in the position in which it came to rest in the Owens Corning private road.



001315

Plaintiff's Exhibit 15

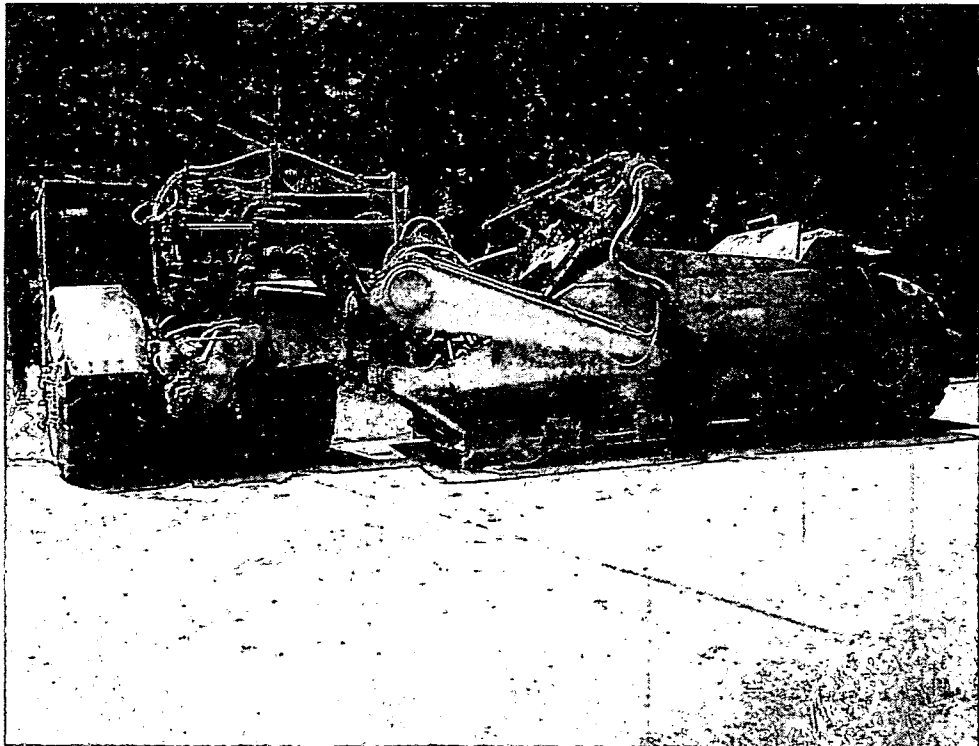
Photograph of pan stopped at and on the stop sign
Sam English Grading put on the Owens Corning road.



001316

Plaintiff's Exhibit 16

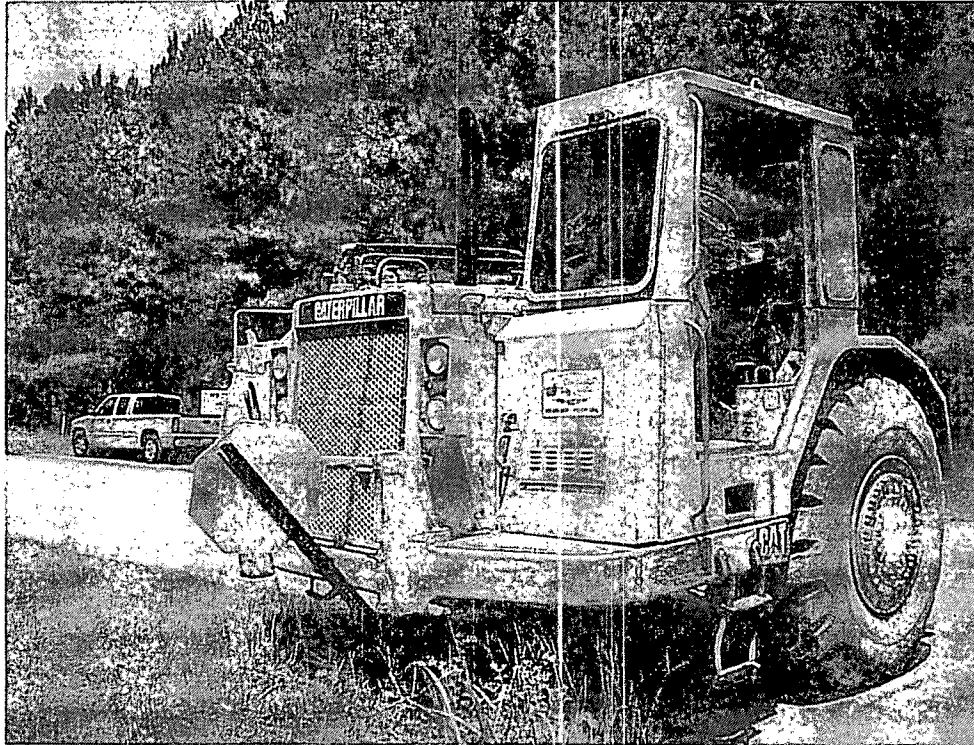
Photograph of pan stopped and articulated on the
Owens Corning road.



001317

Plaintiff's Exhibit 17

Photograph of pan stopped at and on the Owens
Corning stop sign.



001318

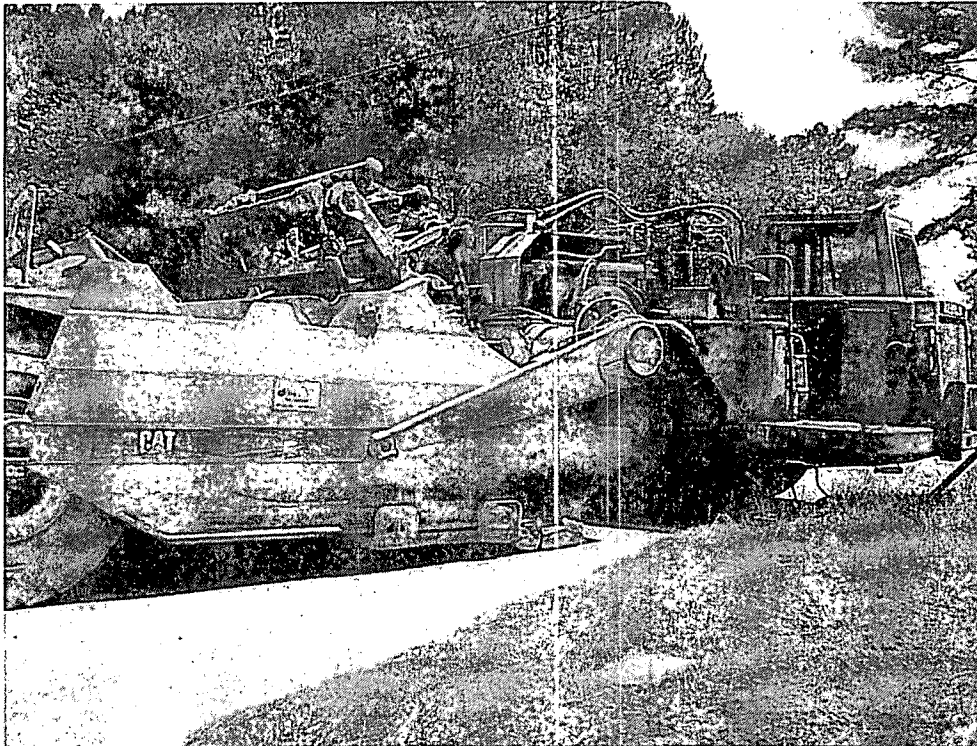
Plaintiff's Exhibit 18

Cab of pan on the Owens Corning stop sign.



Plaintiff's Exhibit 23

Photo of the pan



Plaintiff's Exhibit 30

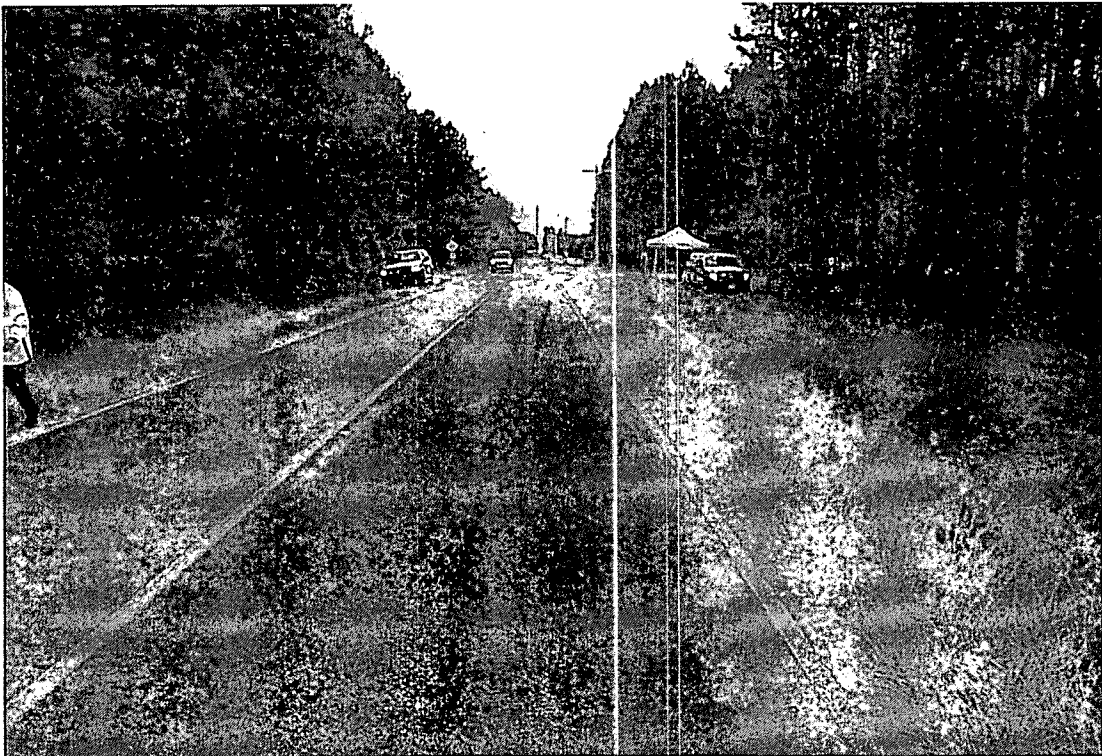
Photo of Redd's Branch Rd from the curve looking toward the accident scene as approached by the motorcycle.



001321

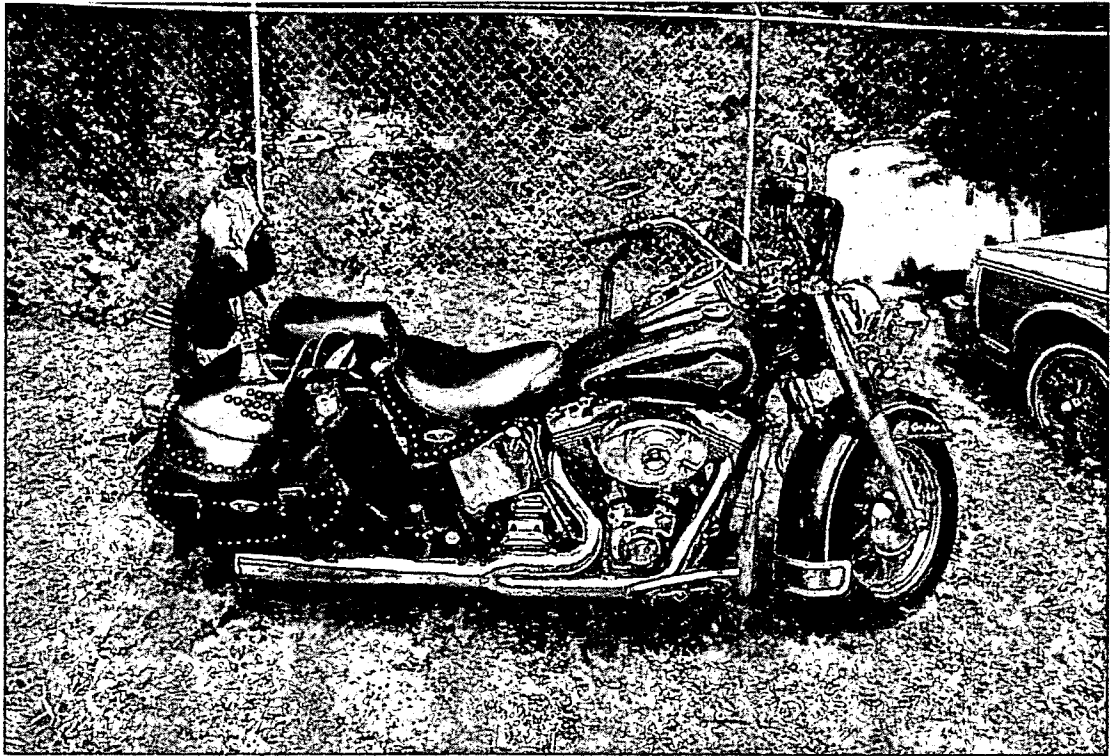
Plaintiff's Exhibit 39

Photo approaching the scene as the motorcycle was. Some skid marks are visible. The law enforcement vehicles are near the Owens Corning crossing. On the right beyond the tent are vehicles that can be seen through the pine trees that are approaching the highway as the pan was approaching.



Plaintiff's Exhibit 85

Photograph of the Plaintiff's motorcycle



001323

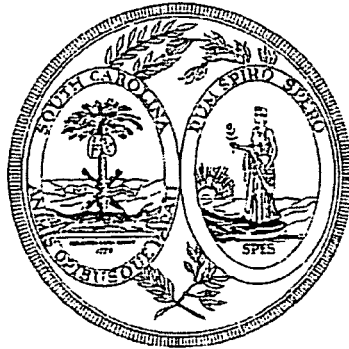
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The purpose is to point out one more photograph exhibit that is numerically placed overby itself, sandwiched between two manuals and is easily unnoticed.

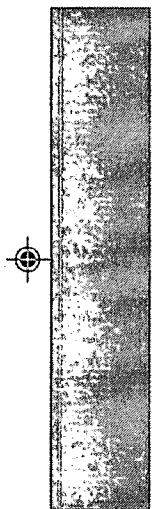
This photo is Defendant's 17 on page 1346.

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South Carolina Driver's Manual



South Carolina Department of Motor Vehicles



2



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DISCLAIMER:

The state motor vehicle laws that are mentioned in this book are not reproduced in their entirety and the wording is not identical. Due to possible legislative changes in federal and state law and SCDMV Policy, the information in this manual may not always be current. SCDMV will make every effort to incorporate any changes as soon as possible.

For more information, please visit our website at:
www.scdmvonline.com

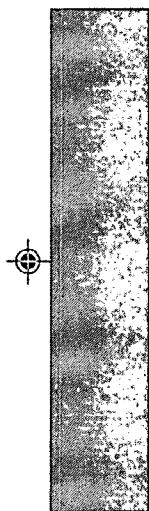


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NOTE: Each section of this manual is color coded for easy reference. Color bars can be found above the page number on each page.

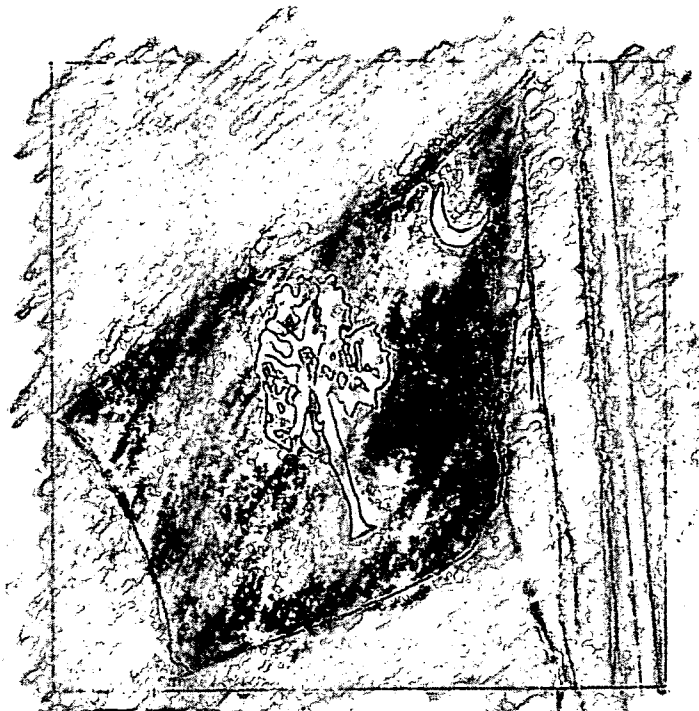
☐ Introduction To Driver's License	LIGHT BLUE
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6



Introduction To Driver's License



7

The Rules of The Road

This book is your guide to good driving. It explains the rules of the road and what the law expects of you as a driver.

The purpose is to help you learn traffic-control devices, signs and pavement markings, which you must know before you get on the highway.

Classes of Licenses

SC issues licenses as proof that you've been examined and are qualified to operate a particular type of vehicle. The class license you will need is based on the gross vehicle weight rating (GVWR) or gross vehicle weight (GVW).

Commercial Licenses

- **Class A:** Any combination of vehicles with a GVWR of 26,001 or more pounds provided the GVWR of the vehicle(s) being towed is in excess of 10,000 pounds.
- **Class B:** Any single vehicle with a GVWR of 26,001 or more pounds, or any such vehicle towing a vehicle not in excess of 10,000 pounds GVWR.
- **Class C:** Any single vehicle, or combination of vehicles, that does not meet the definitions of Class A or B, but either is designed to transport 16 or more passengers, including the driver, or is placarded for hazardous materials.

Non-Commercial Licenses

- **Class D:** Allows you to drive non-commercial passenger vehicles, such as cars and trucks, which do not exceed 26,000 pounds gross vehicle weight. With a Class D driver's license, you may also operate a three-wheel vehicle (excluding a two-wheel motorcycle with a side car).
- **Class E:** Allows you to operate non-commercial, single unit vehicles that exceed 26,000 pounds gross vehicle weight. Examples of Class E vehicles include trucks and motor homes. With a Class E driver's license, you may also operate a three-wheel vehicle (excluding a two-wheel motorcycle with a side car).
- **Class F:** Allows you to drive non-commercial, combination vehicles that exceed 26,000 pounds gross vehicle weight. Examples of Class F vehicles include trucks and motor homes with a towed trailer or vehicle. With a Class F driver's license,

- you may also operate a three-wheel vehicle (excluding a two-wheel motorcycle with a side car).
- **Class M:** Allows you to operate a two-wheel motorcycle, a two-wheel motorcycle with a detachable side car, or a three-wheel vehicle.
 - **Class G:** Allows you to operate a moped. If you have a valid driver's license or permit in any of the other four classifications, you will not be required to obtain a license to drive a moped. (Minimum age 14)

Each qualified driver will have only one driver's license, endorsed for one or more of the classifications. It is illegal to have more than one valid driver's license. If you drive a motorcycle and another type of vehicle, your license will be endorsed for two classifications, after completion of driving tests for both types of vehicles. A moped Class G license requires a vision and knowledge test only.

When driving you must have a valid driver's license, vehicle registration and valid insurance card in your possession for the class of vehicle you are operating. If you do not, you may be subject to a fine.

Identification Cards

Identification cards are issued to residents who are at least five years of age. For United States citizens, the card expires five years after the issue date. For non-United States citizens, the card expires at the end of the applicant's authorized period of stay in the United States or the expiration date on the employment authorization document. The same documentation used when obtaining a first-time driver's license or beginner's permit is required when obtaining a first time I.D. card.

Beginner's Permit

To apply for a beginner's permit, you must be at least 15 years of age or older. You must provide a birth certificate, social security card or its equivalent, proof of residency, and must pass the vision and knowledge tests. If you are under 18 years of age, you must have a parent or legal guardian sign your application.

If you have a valid out-of-state beginner's permit, you may obtain a beginner's permit in this state. The time you held your out-of-state permit also counts toward the 180 day requirement. If your permit has expired, however, you must take the vision and knowledge tests to get a S.C. beginner's permit.

Regardless of your age, if you have never been licensed or do not have proof of past driving experience, you must hold your beginner's permit for 180 days before being eligible for a driver's license.

With a beginner's permit, you may:

- Operate a motor vehicle from 6 a.m. to midnight with a licensed driver who is at least 21 years old, who has at least one year of driving experience, and who is sitting in the front seat with you.
 - Drive motorcycles, motor scooters or light motor driven cycles from 6 a.m. to 6 p.m. (8 p.m. during daylight savings time). You may not operate a motorcycle, motor scooter or light motor driven cycle at any other time with a beginner's permit unless you are supervised by a Class M licensed parent or guardian. If you are operating a three-wheeled vehicle, the driver accompanying you must be directly behind you on a saddle-type seat or beside you on a bench type seat.
 - Your driving privileges will be suspended for six months if you receive traffic violations totaling six or more points.
- For information concerning Commercial Beginner's Permit requirements, refer to the SC Commercial Driver's License Manual.

Conditional License

To apply for a Conditional Driver's license, you must be at least 15 years of age and less than 16 years of age and have held your beginner's permit for at least 180 days. You must also bring your insurance information, your parent or guardian to sign your application, and Form PDLA that certifies you have:

- 1) Completed a driver's education course,
- 2) Had satisfactory school attendance,
- 3) Practiced driving with your parent or legal guardian for at least 40 hours, including 10 hours of driving practice at night.

Form PDLA allows you to submit all of these certifications and is available at your school and the SCDMV web site at www.scdmvonline.com. When you apply for your conditional license, you will also have to pass the vision and road test.

If you have a conditional driver's license, you may drive alone during daylight hours. In SC, daylight hours are defined as 6 a.m. to 6 p.m., or 6 a.m. to 8 p.m. during daylight savings time. You may drive after daylight hours until midnight while accompanied by a licensed driver that is at least 21 years of age or older. If you drive after midnight, you must be accompanied by a licensed parent or guardian.

With a conditional license, you cannot transport more than two passengers who are under the age of 21 unless you are accompanied by a licensed adult who is at least 21 years old. The only exception is if

you are transporting family members or students to and from school.

You may obtain full driving privileges when you are 16 if you have had your license for one year and have no traffic offenses or been involved in any at-fault accidents. Your driving privileges will be suspended for six months if you receive traffic violations totaling six or more points.

Special Restricted License

To apply for a Special Restricted Driver's license, you must be at least 16 years of age and less than 17 years of age and have held your beginner's permit for at least 180 days or have a conditional license. You must bring your insurance information and your parent or guardian to sign your application. You must also submit Form PDLA that certifies you have:

- 1) Completed a driver's education course,
- 2) Had satisfactory school attendance,
- 3) Practiced driving with your parent or legal guardian for at least 40 hours, including 10 hours of driving practice at night.

Form PDLA allows you to submit all of these certifications and is available at your school and the SCDMV web site at www.scdmvonline.com. When you apply for your special restricted license, you will also have to pass the vision and road test.

If you have a special restricted driver's license, you may drive alone during daylight hours. In SC, daylight hours are defined as 6 a.m. to 6 p.m., or 6 a.m. to 8 p.m. during daylight savings time. You may drive after daylight hours until midnight while accompanied by a licensed driver that is at least 21 years of age or older. If you drive after midnight, you must be accompanied by a licensed parent or guardian.

If the time limitations cause problems for you at your job or school, they may be waived. You must prove to the department that they interfere with your job, education or travel between home, school, vocational training or employment opportunities by submitting two statements:

1. A statement from your parent or legal guardian, and
2. A statement from your employer or school official.

Both statements must give the reason for the waiver. The waiver will not allow you to drive after midnight.

With a special restricted license, you cannot transport more than two passengers who are under the age of 21 unless you are accompanied by a licensed adult who is at least 21 years old. The only exception is if you are transporting family members or students to and from school.

You may obtain full driving privileges when you are 16 if you have had your license for one year and have no traffic offenses or been

involved in any at-fault accidents. Your driving privileges will be suspended for six months if you receive traffic violations totaling six or more points.

Regular Driver's License

If you are at least 17 years old and have held a beginner's permit for 180 days, you are eligible for a regular SC driver's license. The requirements are as follows:

- If you are under 18 years of age and have never been licensed, you must bring your parent or legal guardian with you to sign your application.
- If you are 18 years old or older, you do not need the signature of your parent or legal guardian.
- You must bring your insurance information.
- You must pass the vision and road tests.

Newcomers and Non-Residents

If you come into South Carolina from another state and establish a permanent residence, you must get a South Carolina driver's license, and also a vehicle license if you own a vehicle.

If you have a valid driver's license issued by the state from which you moved, you can use it for up to 90 days. **You may have only one valid driver's license at any time.** To obtain a SC driver's license, you must present your out-of-state driver's license, birth certificate, social security card, proof of residency and insurance information. If your name has changed from what is on your birth certificate, you must provide legal documentation of the change.

Nonresident drivers from other states, such as students and military personnel and their dependents living temporarily in South Carolina, may drive in South Carolina without obtaining a South Carolina driver's license by maintaining home state driver's license and license plates.

United States Citizens with Credentials from Other States

If you are a new resident in South Carolina and you have a valid driver's license from another state, you may obtain a South Carolina driver's license by passing the vision test and surrendering your out-of-state driver's license. If you have lost your out-of-state beginner's permit, driver's license or identification card, you must also complete an affidavit of lost permit or license along with your South Carolina application. If your out-of-state driver's license has expired by nine

months or more, you must also successfully complete the knowledge and road or skills tests. You must also provide the following documents:

1. Birth Certificate or acceptable substitute*
2. Social Security Card or acceptable substitute*
3. Proof of Residency*
4. Insurance Information

(* See Documents You Will Need section of this manual.)

The Licensing Procedure

If you have studied and practiced carefully before attempting the road test, you should have no trouble passing the test.

Contact your local SCDMV office to check the hours for examinations. To ensure you allow enough time for testing, you should try to arrive at least one hour before the office closes. SCDMV offices do not offer road tests for any type of driver license during inclement weather. For example, rainy streets can make maneuvering a vehicle more difficult for new drivers and ice on the roads can be hazardous for all drivers.

When you are ready, you must take a licensed driver with you to the place of examination, since you cannot legally drive alone. SCDMV will not furnish a vehicle for the road test.

These are the basic requirements for passing the test:

- You must see well enough to drive.
- You must be physically and mentally able to drive.
- You must understand the meaning of traffic signs, signals and pavement markings.
- Your vehicle must be in safe operating condition.
- You must know how to drive safely on streets and highways.
- You must show that you respect the rights of other drivers, bicyclists, pedestrians, motorcyclists or others who share the roads.
- Knowledge and/or skill tests may be taken only once a day or at the return time set by the examiner.

Medical Conditions

Should you have a medical condition that could possibly affect your driving ability, SCDMV may require medical reports prior to renewing or issuing a driver's license or permit.



License Expiration

If you are a United States citizen and you visit a SCDMV field office to obtain an original or renewal license, you will receive a ten-year license unless you are over 65 years of age or under 17 years of age. Persons who are 65 years of age or older or under 17 years of age will be issued a five year license. If you apply for a renewal license online, you will be issued a five-year license.

United States Citizens



If you have a driver's license issued for a period of five years, your license is good until your birthday five years from the year it was issued. If you have a ten-year license, your license is good until your birthday ten years from the year in which your license was issued. If your birthday passes and you have not renewed your license within nine months of the expiration dates, you will be required to take the knowledge and road tests again.

If it has not expired and you have not had more than five points assessed against your driving record during the preceding two years, you will be required to take only the vision test. But if you have had more than five points charged against your driving record for traffic violations in the preceding two years, you will have to take the vision test and the knowledge test.

Military Personnel

South Carolina licensed military personnel must maintain a valid license at all times. When stationed outside the state, you may renew a noncommercial license one time by mail by first obtaining proper forms from the SCDMV before the expiration date of your license. You will have to take the knowledge and road tests if your license has expired nine months or more.

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Non-United States Citizens

The expiration date of your driver's license will be determined by your authorized period of stay in the United States or the expiration dates of your employment authorization document. If your license expiration date passes and you have not renewed your license within nine months, you will have to take the knowledge and road tests again.

Documents You Will Need

To get a beginner's permit, driver's license or identification card, you must provide proper identification. The documents you will need will vary based on whether or not you are a United States citizen. Documents will not be accepted if there is evidence that they have been altered. Photocopies of documents are not accepted.

For the most up-to-date information about SCDMV requirements, please visit our website at www.scdmvonline.com or call SCDMV at (803) 896-5000.

United States Citizens

If you are a United States citizen applying for a first time beginner's permit, driver's license or identification card, you must provide original documents showing proof of your U.S. citizenship, identity, social security number, SC residency and insurance information. The documents SCDMV accepts as proof are as follows:

- **Proof of U.S. Citizenship/Identity, Name and Date of Birth**
 - Birth certificate with birth/file number and registrar's signature issued by the county or Bureau of Vital Statistics
 - Birth certificate from U.S. territory (must be translated if not in English) which includes Puerto Rico, Guam, U.S. Virgin Islands, U.S. Samoa
 - Delayed Birth Certificate (If a birth certificate was not issued at the time of birth, the applicant can apply for a birth certificate from the Bureau of Vital Statistics)
 - U.S. Passport (current or expired not more than ten years)
 - Current U.S. Passport Card
 - Original Certificate of Naturalization USCIS form (N-550 or N-570)
 - U.S. government issued Consular Report of Birth Abroad
 - Certificate of United States Citizenship (N-560 or N-561)

If your original birth certificate shows that you were not born in the United States, you must also provide an additional document from the above list. If the birth certificate is not in English, it must be translated. If your name has changed and the new name is not reflected on your identification document, you must also provide court documents, such as your marriage certificate or adoption records indicating your legal name change.



- **Proof of Social Security Number**

The name on your social security card or substitute document must match the name on your identity documents. The document you present must contain your social security number.

- Original Social Security Card
- Social Security Form SSA-1099, Survivor Benefit Form
- United States Military Photo Identification Card (active, retired or reservist military status DOD, ID, DD-214)
- Current military dependent ID card
- US Uniform Services Identification and Privilege Card (DD1173) that contains a photograph
- Letter from Social Security Administration (requires online verification)
- Medicare letter from the Social Security Administration (requires online verification)
- Medicare Card (requires online verification)
- Payroll stub with employer's name and applicant's name
- W-2 form with employer's name and address and applicant's name

- **Proof of South Carolina Residency**

To prove you are a resident of South Carolina, you must provide documentation that contains both your name and physical address. The following documents will be accepted:

- School Records must be from a SC school and for the current or prior school year.
 - Student ID
 - Report card
 - Letter or contract from Home Schooling Association
 - Official letter from individual's school or school district on school or district letterhead
 - Certified Transcript
 - Diploma from SC school (child has graduated within the last school year)
 - Out-of-state or in-state tuition bill with applicant's SC physical address
- Current Employment records (no more than 90 days old)
Records must be from a SC employer or have a SC address for the applicant on records from an out of state employer.
 - Letter on employer letterhead
 - Pay stub showing SC withholdings
 - Intent to hire on employer letterhead

- Current utility bill (no more than 90 days old)
A utility bill is a bill specific to services for your residence. Examples include electric, water, sewer and cable. Satellite and cell phone bills are not acceptable.
- SC Welfare/Social Services Card
- SC Medicaid cards
- Parolee Cards or letter from parole officer (no more than 90 days old)
- Home mortgage documents (no more than 90 days old)
- Current S.C. Weapons Permit
- County tax notice or property receipt for home or vehicle
- State or Federal Tax records
 - Income tax returns for current or prior year are acceptable including electronic tax file or W2.
 - If applicant is listed as a dependent on SC tax return presented as proof of residency, proof applies to the dependent also.
- Current Military Orders detailing active duty assignment in SC
- Current letter from Military Base with the Commander verifying duty station in SC
- SC Bank statement or a signed letter (must be on bank letterhead) showing name of applicant and SC physical address (no more than 90 days old)
- Original social security check showing name and SC physical address of applicant (no more than 90 days old)
- Insurance documentation (no more than 90 days old)
 - Letter from insurance company or agent licensed to do business in South Carolina stating the name of the applicant and indicating the SC address of the applicant
 - Insurance policy written by the insurance company or agent licensed to do business in SC, showing name of applicant and SC address
- Letter from director of a social welfare institution (homeless shelter, battered women's shelter, halfway house, group home, orphanage, etc.) stating applicant is a resident of the facility (no more than 90 days old)
- Vehicle Insurance Card (only if the SC address and applicant's name appear on card)
- Article of mail with official Post Office address change label

- **Insurance Information**

Before a license can be issued or renewed, you must provide current insurance information. You must provide the company name, policy number and telephone number of your automobile insurance company. If you or any relative in your household does not own a vehicle, you must indicate that fact on your application.

Applicants Under 18 Years of Age

If you are under 18 years of age, you must have a parent or legal guardian sign your application to accept responsibility for you. If you are an emancipated minor, you must submit proof of emancipation with a court order, marriage certificate or active military orders. Only an original document or a certified copy will be accepted.



Applicants from Other Countries

All persons authorized by the U.S. Department of Justice, the U.S. Immigration and Naturalization Service, or the U.S. Department of State to live, work or study in the United States on a temporary or permanent basis will be eligible to apply for a beginner's permit, driver's license or identification card. The expiration date of your driver's license will be determined by your authorized period of stay in the United States or the expiration date of your employment authorization document.

Applications for beginner's permits, driver's licenses and identification cards for international customers are accepted at designated SCDMV offices throughout the state. To find the office location nearest you that accepts international customer applications, see our website at www.scdmvonline.com.

If you are an international customer, you must provide the following to apply for a South Carolina credential:

- Proof of identity
- Proof of birthplace
- Proof of residency
- Social Security Card or Letter from the Social Security Administration stating that the applicant is not allowed to work in the United States
- Automobile insurance information (if applying for a license)

All applicants must provide proper documentation to prove that the US Department of Justice, US Department of State or the US Citizenship and Immigration Services authorizes them to live, work or study in the United States on a temporary or permanent basis, and that they are within their current authorized period of stay. For the most up-

to-date information for SCDMV requirements, please visit our website at www.scdmvonline.com or call SCDMV at (803) 896-5000.

If you are applying for a driver's license, you must also submit a valid driver's license from your country of origin as proof of prior driving experience. If your out-of-country license has expired for more than nine months, you will have to take the knowledge and skills tests. The driver's license information must be translated into English or be accompanied by an International Driving Permit. If you cannot show proof of prior driving experience, you must first obtain a beginner's permit and hold it for 180 days before applying for a driver's license.

To renew or replace your South Carolina credential, you must submit documentation to prove your lawful status. Drivers from other countries may obtain a South Carolina driver's license without taking a test other than the vision test if South Carolina has reciprocity with their home country. Reciprocity can only provide proof of previous driving experience. Canada has reciprocity with South Carolina for both commercial and noncommercial vehicles. The following countries have reciprocity with South Carolina for noncommercial vehicles: France, Germany, American Samoa, Guam, Puerto Rico and the Virgin Islands, the Federated States of Micronesia, the Republic of the Marshall Islands and the Republic of Palau for regular driver licenses only. Mexico has reciprocity only for commercial vehicles with a CDLIS connection.

Applicants from countries without reciprocity must take the complete test. Drivers will be allowed to keep the out-of-country license but the use of the out-of-country license may result in the South Carolina license being revoked. If the out-of-country license has expired, the applicant must successfully complete the vision, knowledge, and skills tests.

Change of Address or Name

Once you have obtained your driver's license or identification card, you will want to make certain that it is kept current. SCDMV must always be notified within 10 days of any name or address changes. There are a number of reasons SCDMV may need to contact you, including matters that affect your driver's license or registration. The fact that you did not change your address and did not receive a letter will not be a valid excuse for noncompliance with requirements. You may change your address at your local field office or at www.scdmvonline.com.

To change your name, you must visit a DMV office and present proper documentation such as a marriage certificate, divorce decree or court order. You cannot change your name by mail or online.

Destroyed or Lost License

If you lose your license or it is destroyed or becomes illegible, you may get a replacement for a fee at your local SCDMV office or by visiting the SCDMV Web site at www.scdmvonline.com. Here are some things you can do to protect yourself in case your license is lost or stolen:

1. Make a record of your driver's license number and your car registration number, and keep those records in a safe place away from your wallet or wherever you keep your license and other papers. A copy of these documents could prove quite valuable should your license be lost.
2. A stolen license should be reported to the local police. However, no action is taken by SCDMV when the driver's license is reported stolen unless we have reason to suspect fraudulent use of this license. Additional documentation, which can be found in the "Documents You Will Need" section of this manual, may be required to obtain a replacement license.



If your license is lost, destroyed or damaged so that it can not be read, you must get a replacement at your local field office or online at www.scdmvonline.com.



Motor Voter Law

If you are a United States citizens and 18 years of age or older, you may register to vote when you have a driver's license issued or renewed. Your registration application will be forwarded to the registrar in your county of residence. You must present acceptable proof of your social security number.

Fraudulent Documents

Anyone who obtains a beginner's permit, driver's license or an identification card using fraudulent information will be prosecuted and the documents they were issued will be canceled.





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**The purpose is add white space to make
Defendant's exhibit 17 more convenient to locate since
it is a single page sandwiched between two manuals.**

The Defendant's photo 17 is next on page1346.

There is no page number for this intentionally blank page.

Defendant's Exhibit 17

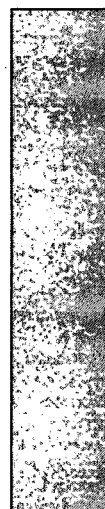
Photo of the scene looking in the direction of travel of the motorcycle. The blue tractor belonged to the spotter who assisted the pan driver. The pan is on the right edge of the photo. The white truck is in the position of the Waste Management truck driven by Eric Pruitt in the oncoming lane, preparing to turn left turn across the highway into the private road.



001346

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Motorcycles



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MOTORCYCLES

The information in this section is for two-wheeled motorcycles only. To get a permit or license for a three-wheeled motorcycle or a motorcycle with a side car, refer to the three-wheeled motorcycle handbook.

How To Get License/Permit

To get your permit you must be at least 15 years old and take a knowledge test at one of SCDMV's driver license examining offices.

Rules that cover driver permits for other vehicles also apply to you, except that you may not operate a motorcycle, motor scooter or light motor driven cycle from midnight to 6 a.m. with a beginner's permit unless you are accompanied by a Class M licensed parent or guardian. If you are 15 or 16 years of age, you must also pass a driver's education course before you apply for your motorcycle license. Courses offered by the Motorcycle Safety Foundation do not meet the driver's education requirement.

Your knowledge test consists of multiple-choice questions with three or four possible answers, only one of which is correct. You will need to study all of the material in this guide (except the section for truck drivers) in order to pass the test.

After you have had your permit at least 180 days, you may take the motorcycle skills test.

Getting to Know Your Motorcycle

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Know Your Vehicle And Its Controls

In order to become a safe operator, you must learn the location and smooth operation of the motorcycle's controls. Most two-wheel motor vehicles have standard controls located at about the same places on all models.

The accelerator is controlled with the right handgrip, the rear brake is operated with one foot, usually the right, and the opposite foot operates the gearshift. The lever on the right handlebar operates the front wheel brake. The clutch control is located on the left handlebar. This location eliminates the necessity for removing the hand from the grip. Make sure your clutch lever is at a right angle from your wrist. Having to reach up or down for a lever is not only unsafe, it is much more tiring to the operator.

How To Accelerate

A beginner who twists on a large handful of throttle and lets the clutch out too abruptly will find his speed very difficult to manage. Most motorcycles have enough power to start the back wheel spinning violently under these conditions. Practice rolling on the throttle gently and smoothly while letting out the clutch the same way. The mark of a veteran rider is his ability to ease off from a stop quietly and smoothly.

Learn To Shift Smoothly

If your motorcycle is equipped with a foot-lever type gearshift, as most motorcycles now are, smooth shifting is not difficult. It is possible to go through the gears quickly and quietly. The experienced rider can shift into a higher or lower gear at will without grating noises coming from the gearbox. Decelerate just before downshifting when approaching a traffic signal or a stop sign, and at other places where you are required to come to a stop.

Brake

Use both brakes every time you slow or stop. Using both brakes for even "normal" stops will permit you to develop the proper habit or skill of using both brakes properly in an emergency. Squeeze the front brake and press down on the rear. Grabbing at the front brake or jamming down on the rear can cause the brakes to lock, resulting in control problems.

Steering The Motorcycle

You must demonstrate proficiency in turning and handling a motorcycle before you can be licensed to operate one.

You must constantly allow for such hazards as loose sand, pebbles, mud, moisture or wet leaves on the pavement, as well as the oil slick in the middle of the travel lane. In winter allow for ice and snow. All of these factors can cause the wheels to slide from under you. Following are some safety tips for the motorcyclist:

1. Slow to a safe speed before turning.
2. Lean in the direction you wish to go, turning slightly. Handlebars will turn almost by themselves with no apparent effort on your part. Learn through practice the correct amount of lean. (A passenger should lean with the driver.)
3. Avoid dragging your feet on the roadway by keeping them on the footrests except in emergencies. A quick stab with the foot can sometimes correct a skid, but this is a tricky business and should be done with great caution.

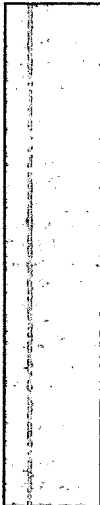


Railroad Tracks

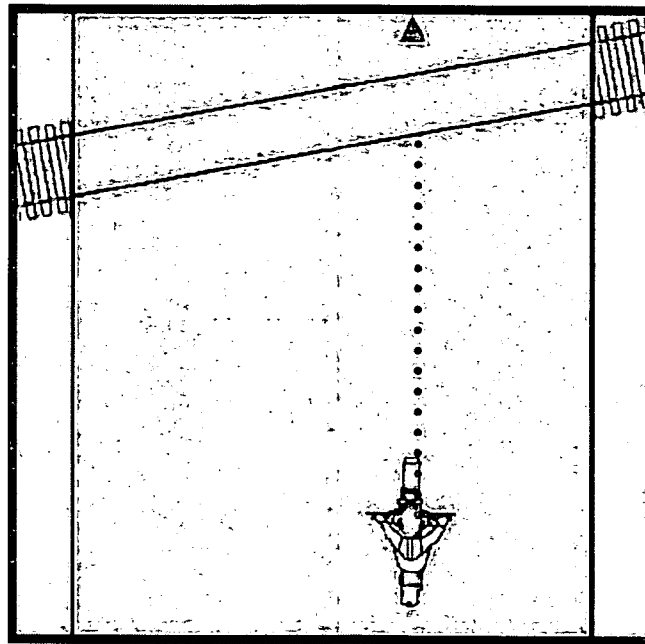
You don't have to cross railroad tracks head-on (at a 90 degree angle). Usually, it's safer to take the tracks as they come, riding straight within your lane. A motorcycle can cross tracks at an angle as sharp as 45 degrees without difficulty. Changing your course to take tracks head-on can be more dangerous than crossing at an angle, which may carry you into another lane of traffic. Slow down and check conditions carefully before crossing.

You do need to change direction, however, to cross something that runs in the same direction you are going. For example, you may wish to cross trolley tracks, ruts in the middle of the road, or pavement seams that run parallel to your course.

To cross these tracks safely, move far enough away to be able to cross them at an angle of at least 45 degrees. Then, make a quick, sharp turn across. Do not try to edge across. The tracks or a seam could catch your tires and throw you off balance.



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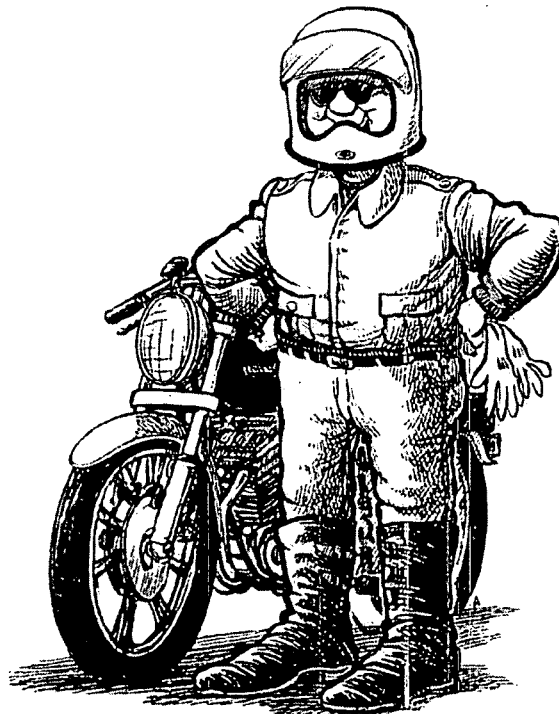


Cross tracks with caution, riding straight within your lane.

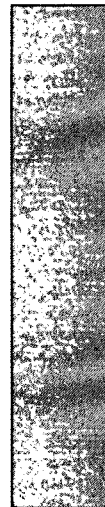
Preparing to Ride: Protective Clothing

Protective clothing is necessary for safe riding.

The smart rider wears: Clothing that covers the entire body. Heavier material furnishes the most protection. Brightly-colored materials will make it easier for other motorists to see you. A long-sleeved shirt or jersey, or a leather jacket can be protective in case of a fall. Long pants, especially heavy denim, and full finger gloves are also good protection.



When riding a cycle of any kind, dress for the occasion -- for safety and your life.



Proper Footwear

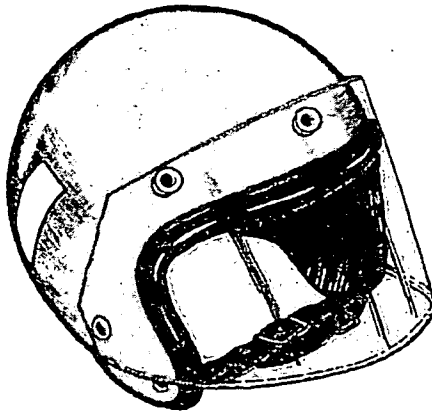
Laced up boots are best, but high-top boots or heavy shoes that support your ankles are fine. Never ride barefooted.

Riding around in light clothing and without proper shoes may look sporty, but if you have to leave the bike in a hurry there's nothing to protect you between your body and the surface on which you are traveling.

Protective Helmet

South Carolina law requires motorcycle operators and passengers under 21 years of age to wear approved motorcycle helmets at all times while they are riding a motorcycle.

Statistics prove that most motorcycle fatalities are the result of head injuries received in accidents. Properly constructed helmets provide a high degree of protection from the fractures, abrasions and other injuries which are so common to the victims of motorcycle accidents.



In South Carolina, drivers and passengers under the age of 21 are required by law to wear a helmet and eye protection while riding.

Eye Protection

State law requires operators under 21 years of age to provide themselves with some acceptable type of eye protection while riding. This may be in the form of face shields attached to helmets or goggles. Dark, off-colored protection should be worn on bright days, but should be avoided at night because the rider needs all available light to see the road ahead, and colored shields or lenses reduce the amount of light reaching the eyes.

Flying insects and dirt which are not diverted by proper eye protection devices may not only cause damage to the eyes but may also lead to temporary loss of control and thereby to accidents.

You Have Chosen A Motorcycle

You have chosen a motorcycle, either for recreation or useful transportation.

If you are just learning, choose a well-qualified instructor, preferably a mature person with several years of experience in operating a motorcycle.

Where you practice is important; it should be removed from traffic congestion and other distractions. Learn to ride on a paved surface rather than an unpaved surface.

Many learners easily master the fundamentals of riding. On the modern lightweight machines, balance is relatively simple. The bike will almost balance itself.

You should always have the proper size of motorcycle for your size and weight, recognize its limitations, and keep the cycle in good repair. Proper inspection and maintenance are important. You will enjoy the use of your motorcycle much more and in greater safety if it operates dependably.

Getting Comfortable On The Motorcycle

You must be comfortable on your motorcycle in order to operate it safely. Enjoyment of your ride is increased by having the various components of the cycle fit you.

Handlebars may be adjusted forward or back and different style handlebars permit higher or lower grip. As a general rule, short, low bars are recommended for average driving. In some cases, motorcycle saddles can be positioned differently for greater comfort and convenience in riding.

Position the gear lever where you can operate it easily with your toe. Make sure the clutch and brake levers are located on the bars in positions that are comfortable for you.

Make certain the transmission is in neutral before starting the engine. Most motorcycles have a neutral indicator on the speedometer which lights when the ignition switch is on and the cycle is in neutral. Make sure the fuel petcock is turned to the "on" position. The petcock is usually on the bottom of the gasoline tank.

Depress the kick starter as you turn on the throttle about halfway. Don't be afraid to kick, using your full body weight. Practice operating the controls while the cycle is on the stand. Do this until you become familiar with the controls, or until you automatically know where each control is. This is essential to you in preventing or avoiding accidents.

If you are trying out a strange motorcycle, don't attempt to ride it until someone has gone over the controls with you. They are generally similar on most models, but you need to know for certain. Check the brakes shortly after placing the motorcycle in motion.

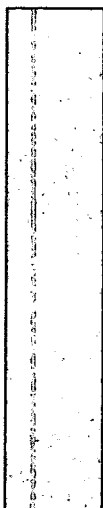


Defensive Attitudes Aid Survival

In motorcycling, as in automobile driving, you must drive defensively to keep from having an accident.

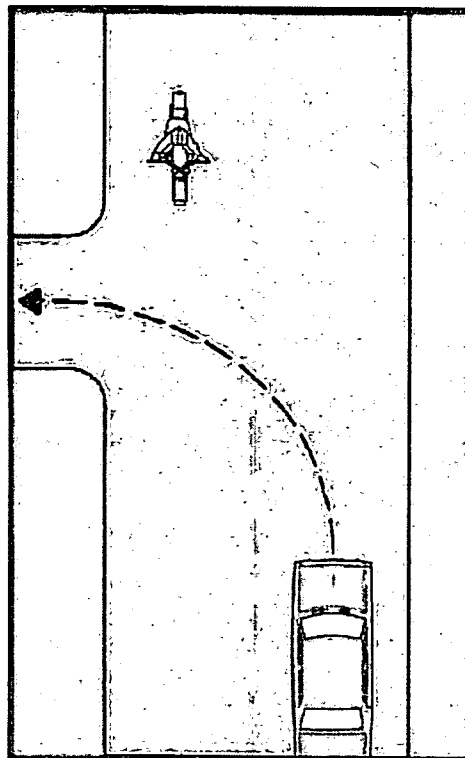
The cyclist's attitude toward driving plays a large role in his safety record. That is, developing a defensive attitude toward other traffic makes you a more alert and prepared rider.

You must never assume the other driver will give you the right-of-way. If you have any doubt about who has the right-of-way, you should always yield. Remember, a motorcycle is no match for an automobile or truck if there is a collision. Always assume that other motorists will do the unexpected.



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Do not assume other vehicles are watching for you. Be prepared to yield right-of-way when approaching vehicles, particularly at intersections and signals.



Motorcycle Safety

This manual cannot teach you how to control direction, speed, or balance. That's something you can learn only through practice. However, here are a few pointers to help you keep control and avoid accidents.

When you travel on major streets with stop signs for crossing traffic, don't assume that vehicles on those streets will stop. For your own protection, slow down and prepare to stop in case other vehicles don't.

When you are angry or upset, you are a good candidate for an accident, which the motorcyclist can never win. Never ride when you are tired or sleepy.

Seeing And Being Seen

While it's most important to keep track of what's happening ahead, you can't afford to ignore what's happening behind.

Traffic conditions can change quickly. By checking your mirrors every few seconds, you can keep track of the situation.

Knowing what's going on behind you can help you make a safe decision about how to handle trouble ahead. For instance, if you know someone is following you too closely, you may decide to avoid a problem ahead by turning away from it, rather than by trying to stop quickly and risk being hit by the tailgater.

Frequent mirror checks should be part of your normal scanning routine. Make a special point of using your mirrors in these situations:

- When you are stopped at an intersection. Watch cars coming up from behind. If the driver isn't paying attention, he could be right on top of you before he sees you.
- Anytime you plan to change lanes. Make sure no one is about to pass you.
- Anytime you slow down, it is especially important to check the driver behind you. He may not expect you to slow down, or he may be unsure about exactly where you will slow down. For example, he might see you signal a turn and think you plan to slow for a turn at a distant intersection, rather than at a nearer driveway.

Many motorcycles have rounded "convex" mirrors. These give you a wider view of the road behind you than do flat mirrors. However, they also make cars seem farther away than they really are. If you are not used to convex mirrors, get familiar with them before you ride.



Here's how: While you are stopped, pick out a parked car in your mirror. Try to form a mental image of how far away it is. Then, turn around and look at it. See how close you came. Practice with your mirrors until you become a good judge of distance. Even then, allow extra distance before you change lanes.

Head Checks

Mirrors do a pretty good job of letting you see what is behind you. But motorcycles have "blind spots" just like cars. Before you change lanes or enter a lane of traffic, make sure to make a head check: turn your head, and look at traffic to the side. This is the only way you can be sure of spotting a car just about to pass you.

On a road with several lanes, check the far lane as well as the one next to you. A driver in the distant lane may be headed for the same space you plan to take.

Body Position

To control a motorcycle well, your body must be in the proper position.

- **Seat**-Sit far enough forward so that your arms are slightly bent when you hold the handle grips. Bending your arms lets you turn the handlebars without having to stretch.
- **Hands**-Hold the handle grips firmly. This will help you keep your grip if the motorcycle bounces. Start with your right wrist down. This will help you keep from accidentally using too much throttle-especially if you need to reach for the brake suddenly.
- **Knees**-Keep your knees against the gas tank. This will help you keep your balance as the motorcycle turns.
- **Feet**-Keep your feet firmly on the foot pegs. Firm footing can help you keep your balance. Don't drag your foot along the ground. If your foot catches on something, you could lose control of the motorcycle.

Rearview Mirror

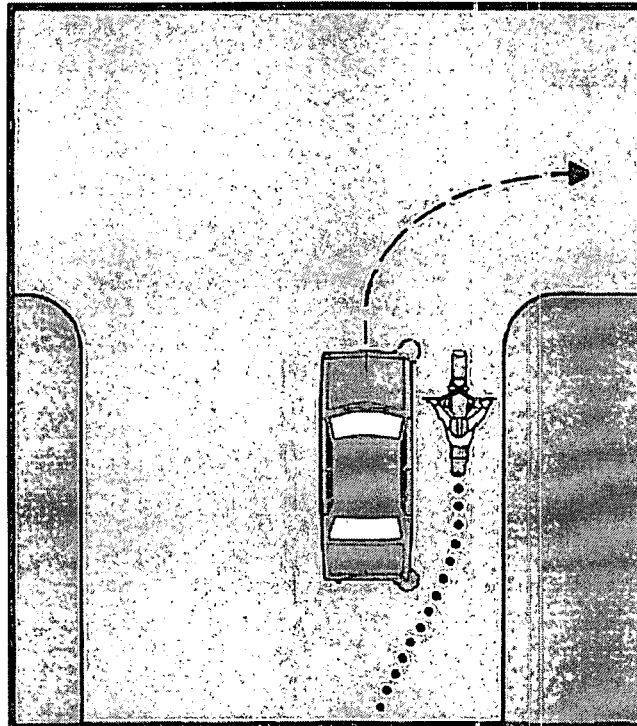
South Carolina law requires every motorcycle to be equipped with at least one rearview mirror. It is almost as important for a motorcyclist to know what is behind him as it is to know what is ahead. Since a look to the rear at the wrong time could easily contribute to an accident, the rearview mirror is the safest method of keeping tabs on what is behind you. A good practice to follow is to use the mirror often, and to verify what you see in the mirror from time to time by turning to look back when it is safe to do so.

Your Position In Highway Lane

The motorcyclist may choose whether to ride near the right edge of a two-lane highway, in the center of the lane or nearer to the center line. Generally, however, it is best to avoid the direct center of the lane because that's where oil drippings from other vehicles have coated the pavement. In the event of rain or the need for an emergency stop, the motorcycle's tires will have less traction there. Also, avoid painted lines on pavement when they are wet, as they are more slippery than when they are dry.

When following an automobile or truck, the motorcyclist's line of sight is greatly reduced if he is directly behind the vehicle ahead. By riding to the left side of the lane, he will have a better chance to avoid a rear-end collision with the vehicle if it should stop unexpectedly. Also, the leading driver will be able to see the motorcyclist in his outside rearview mirror if the motorcycle is riding to the left side of the lane.

If the vehicle immediately in front of a motorcycle rider stops suddenly, the motorcyclist should apply his brakes and steer to the right or left side. Try to stay in your lane.



Don't create your own lane. It's dangerous and it's illegal.



Use Of Headlights

State law requires that all persons operating motorcycles or motor-driven cycles on public streets and highways have the headlight of the motorcycles turned on at all times when the vehicles are in use. Automobile drivers can see a lighted headlight in an oncoming traffic lane long before they are able to recognize a motorcycle and its rider. The use of headlights also makes motorcyclists more noticeable to drivers traveling in the same direction. They are less likely to pull out into a traffic lane occupied by a motorcycle in order to pass some other vehicle.

How To Avoid Trouble

The biggest dangers facing you as a rider are (1) oncoming cars that turn left in front of you, and (2) cars on side streets that pull out into your lane. Never count on "eye contact" as a sign that a driver has seen you and will yield the right of way. All too often, a driver looks right at a motorcyclist and still fails to see him.

The only eyes you can really count on are your own. The best way to avoid trouble is to see it coming as soon as possible. Experienced riders make a practice of looking far ahead. On city streets, they scan the road from one-half to a full block ahead. On the highway, they look as far ahead as they can see clearly.

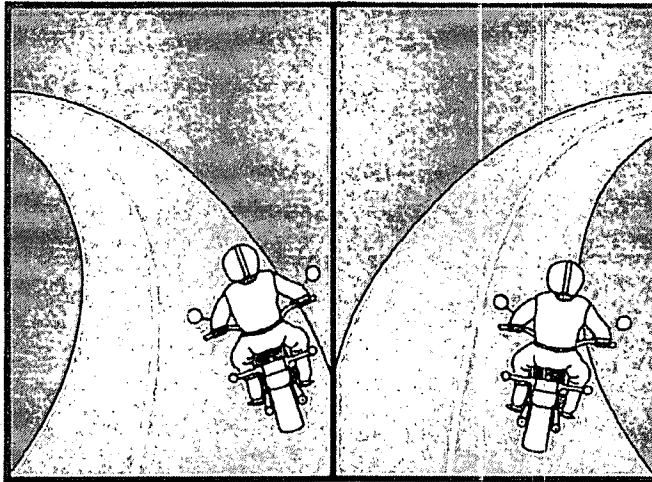
Experienced riders don't just "stare off into space." They keep track of what's happening right ahead of them as well.

By looking far as well as near, they get a complete picture of the situation ahead and leave themselves plenty of time to adjust to problems. Thus, they can spot and handle trouble without having to make a panic stop or a sudden swerve that can cause an accident. Here's what to look for while scanning the road ahead:

- **Road Conditions**-Keep checking the road surface ahead for slippery spots, bad bumps, broken pavement, loose gravel, wet leaves or objects in your path.
- **Traffic Conditions**-When there is a car directly in front of you, look over or through the car for traffic stopping or turning further down the road. Check the roadside for cars that may pull away from the curb or cut into your lane from side streets or driveways.
- **Escape Routes**-Look for open space where you can leave the road in a hurry if you have to. Scanning the road and roadside for escape spots is most important when you are riding in heavy traffic.

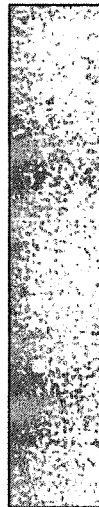
Get in a Position To See

As a motorcycle rider, you can put yourself in a position to see things that a car driver cannot see.



Moving to the right portion of your lane before a left-hand curve, and staying on that side until you come out of the curve, allows you to spot oncoming traffic. On right-hand curves, a left center position is best. This allows you to see, and be seen, better.

- **On Curves**-You can move from one portion of a lane to another to get a better view through a curve. Moving to the right portion of your lane before a lefthand curve and staying on that side until you come out of the curve lets you spot traffic coming toward you as soon as possible. On righthand curves, a left center position is best. It lets you see oncoming cars early without putting you so far left that you run the danger of being hit by a car that tries to "cut" the curve by drifting into your lane.
- **At Blind Intersections**-An intersection is anywhere a driveway, alley, or road meets another road. Blind intersections can make it hard to see danger coming from the side. If you have a stop sign, stop there first. Then edge forward and stop again, just short of where the cross-traffic lane meets your lane. From that position, you can lean your body forward and look around buildings, parked cars, or bushes to see if anything is coming. Just make sure your front wheel stays out of the cross lane of travel while you're looking.



- **At The Roadside**-Angle your motorcycle so that you can see in both directions without straining and without having any part of the cycle in the lane of travel. Angling your motorcycle so that you can get a clear view in both directions is particularly important if you plan to turn across a lane of traffic.

When Vehicles Turn Left

One of the major causes of accidents involving motorcycles is when automobiles or other vehicles turning left into a driveway, parking lot, or side street disregard an oncoming motorcycle.

You, as a motorcyclist, must be alert to avoid this situation. Watch every vehicle approaching you and look for signs the driver is turning without having seen you. Ease off the throttle and be ready to stop quickly or turn defensively if necessary. Also, watch carefully if you are attempting to pass a vehicle that may turn left and push you into opposing traffic. Watch for roadsides, driveways or other places that might require you to be especially careful.

Trouble At Stop Signs

Never take for granted that a vehicle will stop for a stop sign just because it's there. Many don't and hundreds of accidents occur every year as a result.

Don't get caught in the middle. You should always keep a safe distance between yourself and the vehicles in front of and behind you.

Try to regulate the distance between yourself and the vehicle behind you. If the vehicle following you insists on tailgating, your best bet is to pull over when it is safe to do so and let the vehicle pass.

Your vision is greatly reduced when you are following other vehicles too closely. By riding too closely to them, you may fail to see an object or condition in the road ahead, and may strike a hole or debris in the roadway as a result. You should never be closer than the distance it will take to stop if the vehicle you are following stops suddenly.

Group Riding

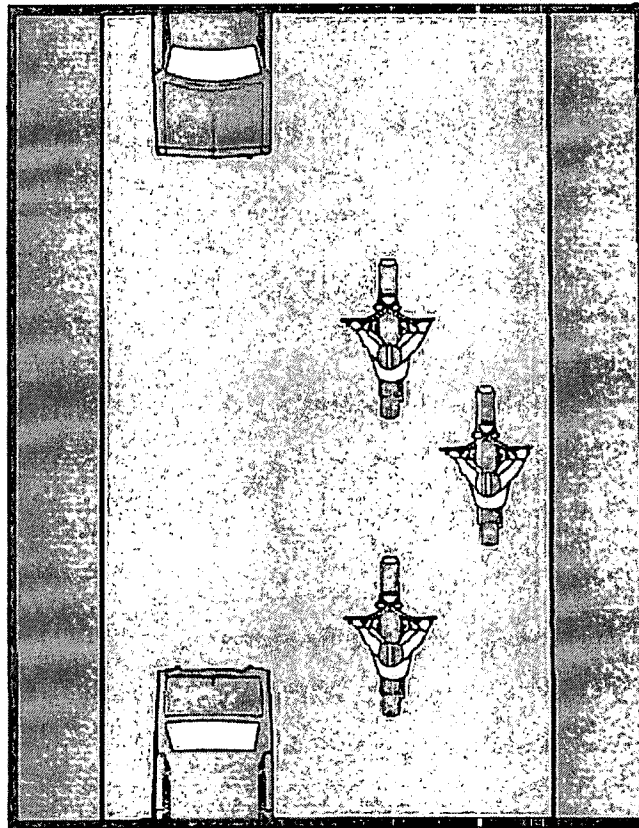
The proper formation for group motorcycle riding is a staggered pattern. This way, cyclists can be more easily seen by motorists approaching from the opposite direction.

If you are riding in a group at night, a staggered pattern lessens the chances that you will be mistaken for an automobile by approaching motorists.

Side-by-side riding should be avoided, because it reduces the space for maneuvering available to each operator. When traveling in a group in the staggered formation, each cyclist should be careful to maintain the proper following distance at all times.

Staggered Formation-Riding in a "staggered" formation is the best way to keep ranks close and yet maintain an adequate space cushion. In a staggered formation, the leader rides to the left side of the lane, while the second rider stays a little behind and rides to the right side of the lane. A third rider would take the left position. The fourth rider would be in a normal position behind the second rider. (See visual aid.) This formation keeps the group close and keeps each rider safe distance from others ahead, behind and to the sides.

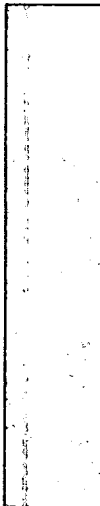
A staggered formation can be used safely on an open highway. However, it is best to move into a single-file formation when taking curves, making turns, or entering or leaving a highway.



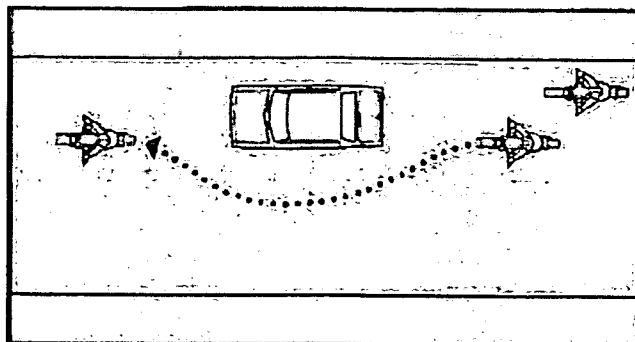
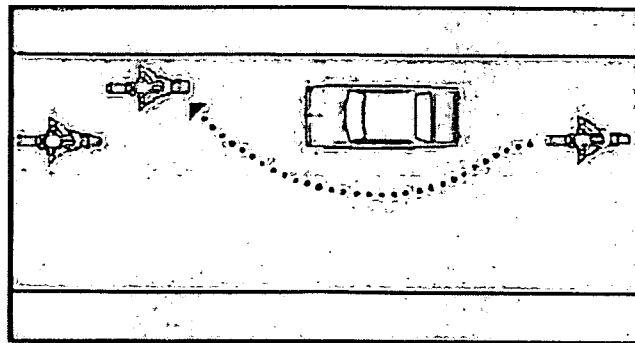
Avoid riding side-by-side. Use the staggered formation when traveling in a group.

Passing In Formation-When riders in a staggered formation want to pass, they should do it one at a time. First, the lead rider should pull out and pass when it is safe. After passing, the leader should return to the left position and keep up to passing speed until he has opened up room for the next rider. As soon as the first rider has passed safely, the second rider should move up to the left position and watch for a safe chance to pass. After passing, this rider should return to the right position and open up room for the next rider.

Some people suggest that the leader should move to the right side after passing a vehicle. This is not a good idea. By taking up a right-side lane position, the leader would encourage the second rider to pass and cut back in before a large enough cushion of space has been opened up in front of the passed vehicle. It's safer if each rider waits until there is enough room ahead of the passed vehicle to allow the rider to move into the same position held before the pass.



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Riders in staggered formation should pass one at a time.

Passengers And Cargo

Part of the fun of owning and operating a motorcycle is taking others to ride. But be certain you do it safely.

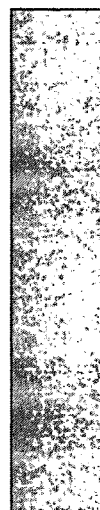
Carrying passengers or any other load alters the handling characteristics of your motorcycle. An extra burden is placed on the novice rider, and even an experienced rider still has to be more careful in this situation. If you want to carry a passenger on a motorcycle, you must make some special considerations. Be sure you have the necessary experience and know-how to carry a passenger. Your motorcycle should be designed and equipped to carry an extra rider. All packages should be strapped to the carrying rack. You may not carry any package or articles which prevent you from keeping both hands on the handlebars.

Instruct your passenger to lean with you when turning, not against you. A leaning passenger can actually steer a motorcycle. Caution the passenger not to lean except when you do; know how to compensate if your passenger leans the wrong way or at the wrong time. If under 21 years of age, your passenger must wear a helmet and face shield. Loose clothing or equipment such as shoe laces, pant legs, and scarves can become tangled in the chains or spokes, so check your passenger's clothing carefully before riding.

Never allow a passenger to ride sidesaddle. The passenger should always ride behind you and should hold firmly and securely onto your waist, hips, midsection, or the handgrips provided on some cycles. The passenger should avoid unnecessary distraction or dismounting until told to do so.

Do not carry a passenger unless the motorcycle is equipped with a saddle and foot pegs for two persons. Remind the passenger to keep his or her feet on the passenger's foot pegs at all times.

Remember to ride at slower speeds. Give yourself extra time and distance to slow down and stop.



Handling Hazards and Dangerous Surfaces

You must be constantly alert in residential areas for children and other pedestrians who may dart from between parked cars or from behind other obstacles that block your vision.

Animals, particularly dogs that like to chase motorcycles, are a hazard for you. Always be ready to act quickly if a pedestrian or animal appears in your path.

You should also be constantly alert for automobiles and trucks backing from driveways, which pose a special hazard for motorcycle riders.

Raised pavement markers placed on center lines and at other locations may be hazardous for motorcyclists if crossed at an angle or while leaning in a turn.

Handling Dangerous Surfaces

Your chance of falling increases whenever you ride across:

- Slippery surfaces.
- Uneven surfaces or obstacles.
- Railroad tracks.
- Grooves and gratings.

Motorcycles handle better when ridden on surfaces giving good traction. Surfaces that provide poor traction include:

- Wet pavement
- Gravel roads, or places where sand and gravel have collected on paved roads. (A motorcycle is more stable on pavement than it is on gravel.)
- Mud, snow, and ice.
- Lane markings and steel plates and manhole covers, especially when wet.

Handling Slippery Surfaces

There are a number of things you must do to ride safely on slippery surfaces:

- **Reduce Speed**-Slow down before you get to a slippery surface. Your motorcycle needs more distance to stop. By going slower, you can stop and turn more gradually, lessening your chances of skidding.
- **Avoid Sudden Moves**-On slippery surfaces, any sudden change in speed or direction can cause a skid. Speed up, shift gears, turn and brake as little and as smoothly as possible.
- **Use Both Brakes**-Don't be afraid to use the front brake as well as the rear brake when making a quick stop on wet pavement. The front brake is still more effective than the rear brake, even on a slippery surface. Just be careful to apply it gradually and avoid locking up the front wheel. Don't squeeze the brake lever too hard.
- **Avoid Slippery Areas**-Wet wooden surfaces or wet leaves in the fall can be slippery as a patch of ice. Avoid them when possible. If not, be sure to drive as slowly as possible and stay off the brakes to avoid skidding. Try to find the best surface available, and use it.
- **Ride in the tire tracks** left by cars.
- **Watch for oil spots** when you stop or park.
- **Stay away from the edge of the road**, particularly when making sharp turns at intersections and when getting on or off

interstates at high speeds. Dirt and gravel tend to collect among the sides of the road-especially on curves and ramps leading to and from highways

- Try to stay on the driest, least slippery part of the lane at all times. Rain dries and snow melts faster on some sections of a road than on others.

Uneven Surfaces And Obstacles

Watch for uneven surfaces such as bumps, broken pavement, potholes, or railroad tracks. If you have to ride over them, or obstacles such as a piece of tire tread or tail pipe, here's what you should do:

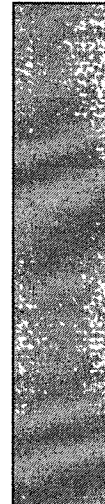
- Slow down to reduce the jolt.
- Make sure the motorcycle is straight up.
- Rise slightly off the seat with your weight on the foot pegs so you can absorb the shock with your knees and elbows.

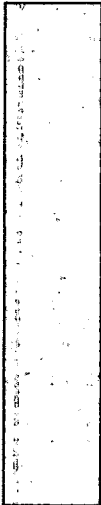
Rising off the seat will cut your chances of being thrown off the bike. However, controlling the throttle can be somewhat tricky. Practice this technique in a safe area (such as a deserted parking lot) before you try to do it on-street.

If you ride over an object on the street, it's a good idea to pull off the road and check your tires and rims for damage before going any further.

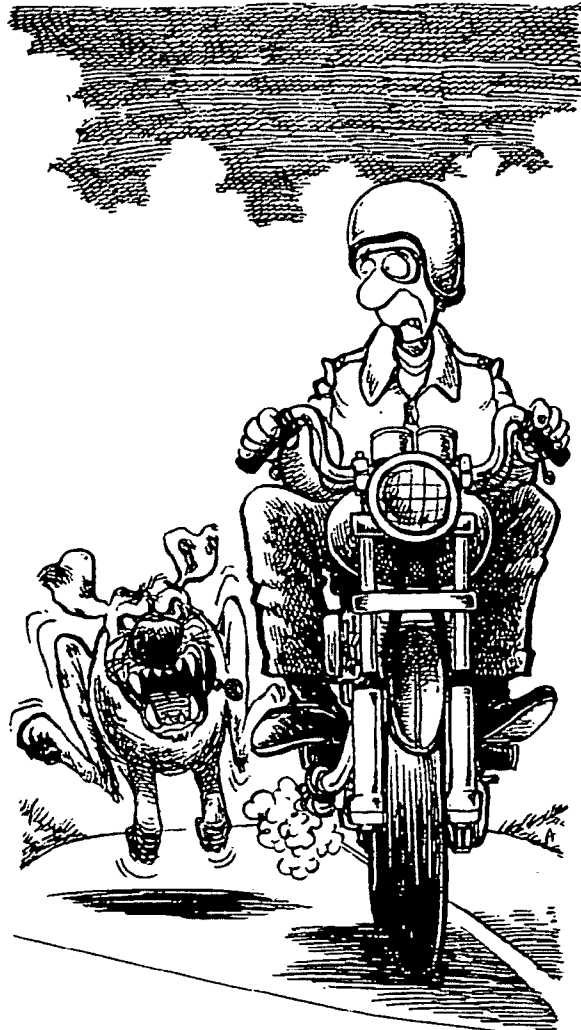
Grooves and Gratings

When you ride over rain grooves or metal bridge gratings, the motorcycle shakes. It's an uneasy, wandering feeling, but it's generally not dangerous. The best thing to do is relax, stay on course, maintain speed, and ride straight across. Some riders make the mistake of trying to cross these surfaces at an angle. This may reduce the uneasy feeling, but it also forces the rider to zigzag to stay in lane. The zigzag is far more dangerous than the wandering feeling.





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Always be ready to act quickly if a pedestrian or animal crosses your path. Be cautious for their safety...and for your own.

Motorcycling Laws and Information

The following laws apply almost entirely to motorcyclists and should be well known to every motorcycle operator.

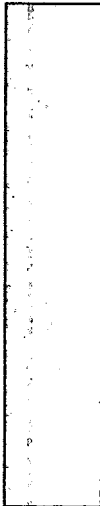
1. A person shall ride a motorcycle only while sitting astride the seat, facing forward, with one leg on each side of the motorcycle.
2. No person shall operate a motorcycle while carrying any package, bundle or other articles which prevent him from keeping both hands on the handlebars.
3. No operator shall carry any person, nor shall any person ride, in a position that will interfere with the operation and control of the motorcycle or the view of the operator.
4. No person riding a motorcycle shall attach himself or the motorcycle to any other vehicle on a roadway.
5. All motorcycles are entitled to full use of a lane and no motor vehicle shall be driven in such a manner as to deprive any motorcycle of the full use of a lane. This shall not apply to motorcycles operated two abreast in a single lane.
6. The operator of a motorcycle shall not overtake and pass in the same lane occupied by the vehicle being overtaken.
7. No person shall operate a motorcycle between lanes of traffic, or between adjacent lines or rows of vehicles. Items 6 and 7 shall not apply to police officers in the performance of their official duties.
8. Motorcycles shall not be operated more than two abreast in a single lane.
9. Any motorcycle carrying a passenger other than in a sidecar or enclosed cab shall be equipped with footrests for such passengers.
10. No person shall operate a motorcycle unless it is equipped with a rear view mirror that will afford the operator ample vision to the rear at all times.
11. Every person operating a motorcycle shall be granted all the rights and shall be subject to all of the duties applicable to the drivers of motor vehicles, except as to special regulations or other provisions of law which by their nature would not apply.
12. Any person who operates a motorcycle or motor-driven cycle on public streets or highways shall, while so engaged, have the headlights of such motorcycle or motor-driven cycle turned on and the light burning.
13. Any person under 21 years of age who operates or rides a motorcycle or motor-driven cycle must wear an approved motorcycle helmet. Such helmet must be equipped with either a neck or chin strap and be reflectorized on both sides with at least four square inches of reflectorized material, provided the helmet



- is not constructed of a reflectorized material.
14. Any person under 21 years of age who operates a motorcycle or motor-drive cycle must wear goggles or face shield affixed to a protective helmet or have a windshield affixed to the front of the cycle.
 15. If a motorcycle is five brake horsepower or less it may not be ridden on limited access highways (freeways such as the interstate highways).

Some points to remember:

1. Know your motorcycle before you begin riding. Know its controls, and make certain it is adjusted for you.
2. When learning, choose a mature, experienced rider as your instructor.
3. It takes time to become a safe, proficient rider. You will need practice, so don't try to learn everything at one time.
4. When you have a choice, avoid heavily-traveled streets.
5. Before every trip, make certain your cycle is in sound mechanical condition.
6. Know and obey all traffic laws and rules of the road.
7. Drive defensively at all times. As a motorcyclist, you must never assume you have been seen by the other motorist.
8. Watch for road hazards that are particularly dangerous to motorcyclists.
9. Keep a cool head. Never show off or ride recklessly.
10. Ride with increased caution at night and when roads are wet.
11. Always wear your protective helmet, properly fastened, and proper eye protection.
12. Laws that apply to all other motor vehicle operations apply to motorcycle operations.



Keep Your Motorcycle in Good Condition

The rider is responsible for the motorcycle being in proper working order. Have it checked regularly and know as much about your motorcycle as you possibly can. The owner's manual is the key to doing this. You should carry it with you at all times and follow the maintenance schedule it suggests.

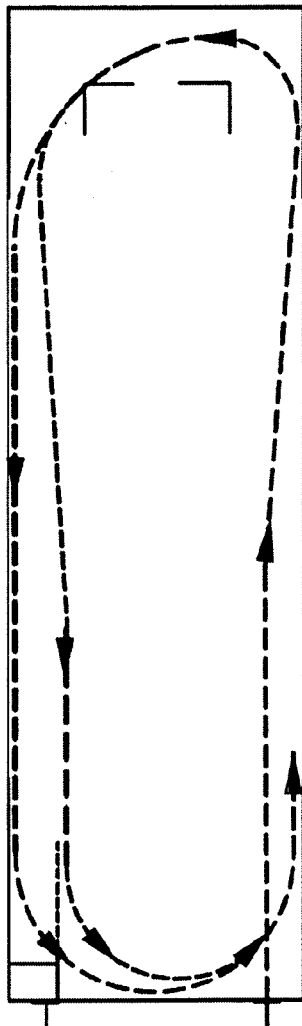
You will need a tool kit for use at home and when you are on the road. Carrying it with you may save you from walking if you have a breakdown. In your kit you should carry spare parts including spark plugs, fuses and tire repair material.

Before you ride, always check your motorcycle: brakes and steering, tires, oil and fuel levels, chains, sprockets, cables, and lights.

Your life depends on your machine. Be certain it is in the best possible condition.

Motorcycle Test

The test consists of several exercises designed to measure your ability to perform basic vehicle controls and hazard response skills. Most of the exercise involve speed of approximately 15 m.p.h. You will be scored on time and distance standards as well as path and foot violations. The test may be ended for point accumulation, falling or dropping the motorcycle, committing an unsafe act, or failure to follow directions. The following diagrams illustrate the maneuvers you will be asked to perform:



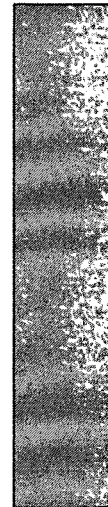
Sharp Turns and U-Turns to the Left

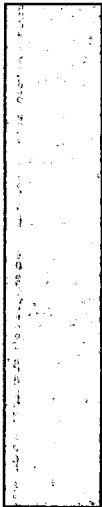
You will be asked to accelerate straight ahead and make a left sharp turn staying inside the boundaries marked by the yellow "L" lines. You must not put a foot down or cross the lines.

Once you have completed the sharp turn, continue around to the far side of the course and ride back toward the start of the course. Then, you will make a left U-Turn, staying inside the boundaries marked by the yellow solid lines or (yellow dashed entry line and solid exit line).

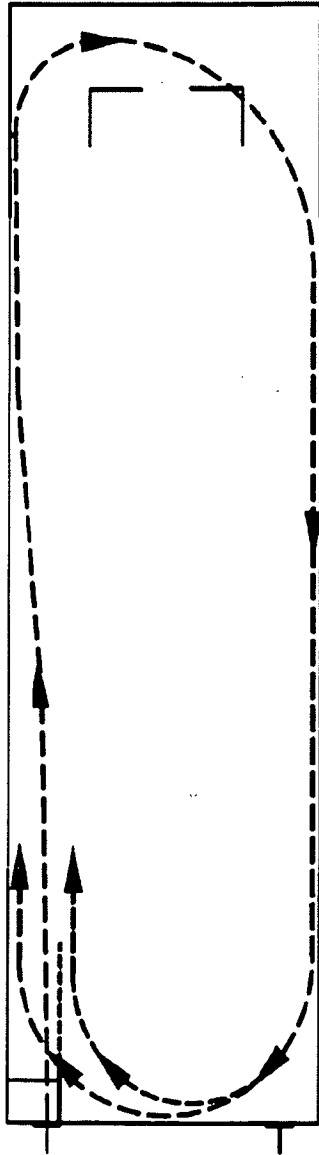
You must not put a foot down or cross the lines. Stop in a straight line after completing the U-Turn and wait for further directions.

You will lose points for putting your foot down or path violations.





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Sharp Turns and U-Turns to the Right

You will be asked to accelerate straight ahead and make a right sharp turn, staying inside the boundaries marked by the yellow "L" lines. Do not put a foot down or cross the lines.

Once you have complete the sharp turn, continue around to the far side of the course and ride back toward the start of the course. Then you will make a right U-Turn, staying inside the boundaries marked by the yellow solid lines or (yellow solid entry line and dashed exit line).

Do not put a foot down or cross the lines. Stop in a straight line after completing the U-Turn and wait for further directions.

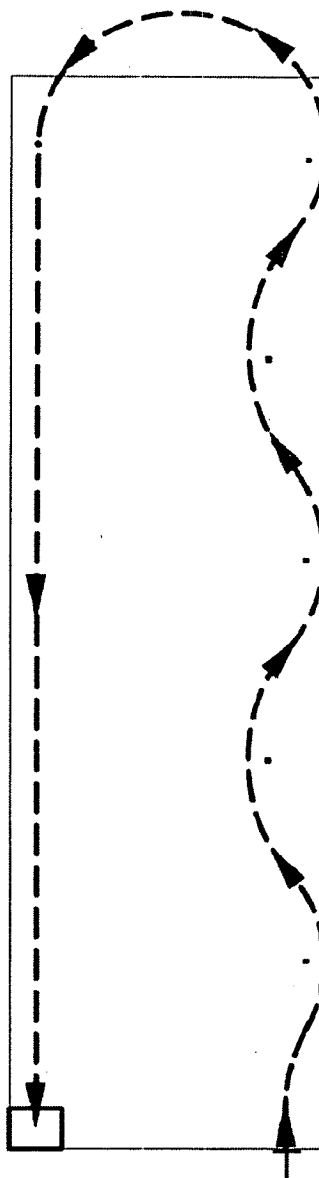
You will lose points for putting your foot down or path violations.

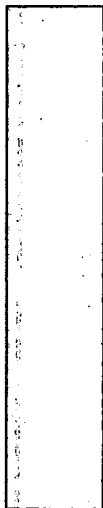
Cove Weave - Regular Stop

You will ride to the right of the first cone, to the left of the second, and so on. Weave past all five cones without touching or skipping a cone, or putting your foot down.

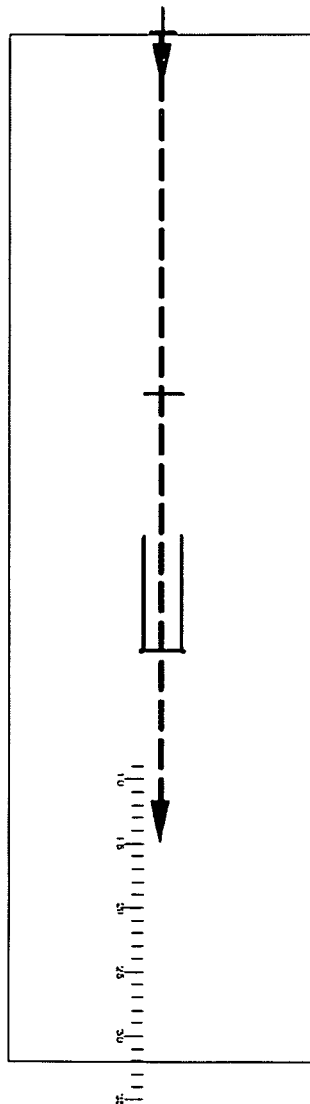
After rounding the last cone, continue around to the far side of the course. Ride down the perimeter toward the start of the course. Make a smooth, non-skidding stop with your front tire inside that white box.

Once stopped in the box, your front tire cannot be touching any painted lines. You will lose points for hitting or skipping a cone, putting a foot down, or stopping before, after, or with your front tire touching the box.





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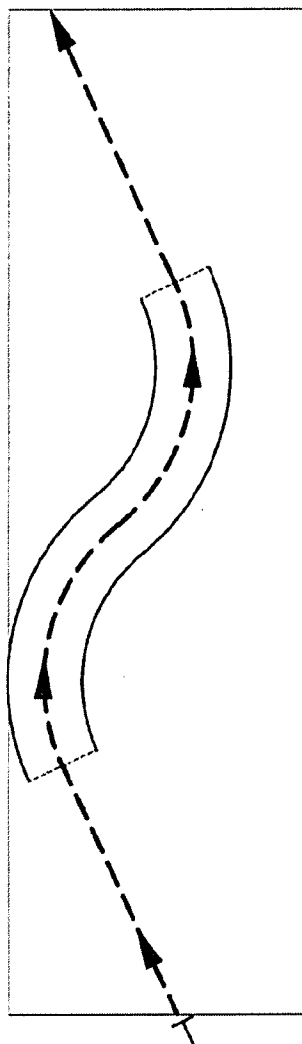
Sudden Stops

You will accelerate straight toward the braking area.

Stabilize your speed between 12-20 mph by the time you reach the first red line. Maintain a steady speed from the first red line until you reach the second red line. When your front tire passes the second red line, stop as quickly and as you safely can.

Remain stopped until instructed to move. You will not be assessed points for skidding.

You will lose points for failing to stop in a specified distance, failing to use both brakes or failing to obtain proper speed or anticipate the stop.



Cornering

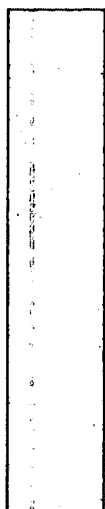
You will ride through the multiple curves marked by the white lines at a speed between 10 to 15 mph.

You must stay within the boundaries marked by the curved white lines while slightly accelerating through the curve.

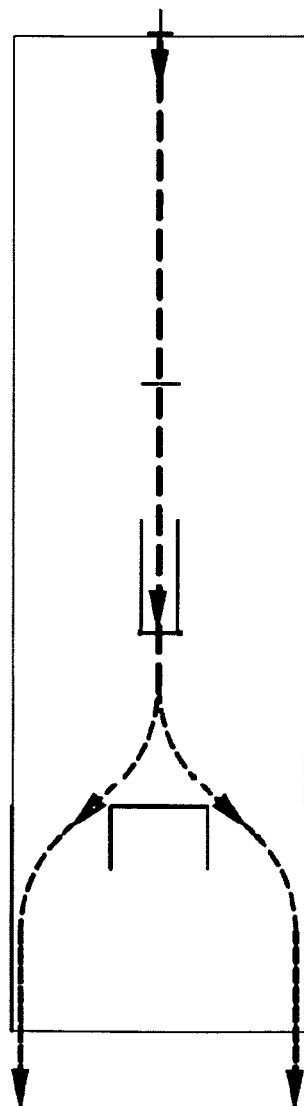
After exiting the curved lines you may slow down and then turn in either direction to return to the end of the course.

You will lose points for path violations, decelerating or failing to obtain the proper speed.





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Obstacle Avoidance

You will accelerate toward the path marked by the red lines. Stabilize your speed between 12-18 mph by the time you reach the first red line.

Maintain a steady speed from the first red line until you reach the second red line. When your front tire passes the second red line, swerve to avoid the obstacle box marked by the yellow lines.

Avoid crossing the yellow obstacle box while staying inside of the yellow sideline. Once past the sideline, stop and wait for further instructions.

You will lose points for hitting obstacle box or sideline, failure to obtain proper speed or braking during the swerve.

Motorcycle with Sidecar Skills Test

Safely operating a motorcycle with a sidecar depends largely on your knowledge and skills. The skills for a motorcycle with sidecar operation require a lot of practice. If you have just learned to handle a motorcycle with a sidecar and have very little riding experience, the most important part of learning to ride is still ahead. Before you go out on the street with other traffic, there are certain basic skills needed for your safety. To make sure you have the basic skills to ride, you will be given a riding test.

When you report for your test, it is recommended that you have:

- Protective clothing that covers your body (gloves, boots, long sturdy trousers, long sleeve shirt or jacket).
- An approved helmet and eye protection are required for operators under the age of 21.

During the on-cycle test, you will be graded on how safely you handle your motorcycle with sidecar. For example, you may be tested on:

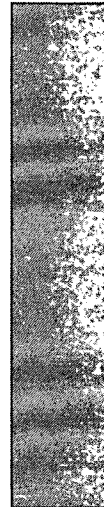
- Selecting safe speeds while going straight and turning.
- Picking the correct path and staying there.
- Making normal and quick stops.
- Making normal and quick turns.

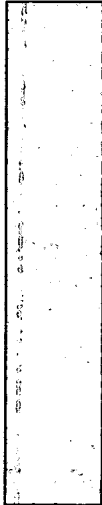
The Examiner will score you on factors related to safety, such as:

- Distance - Did you stop in the space allowed?
- Time - Did you turn fast enough to handle the situation?
- Position - Did you keep the system in the proper path?

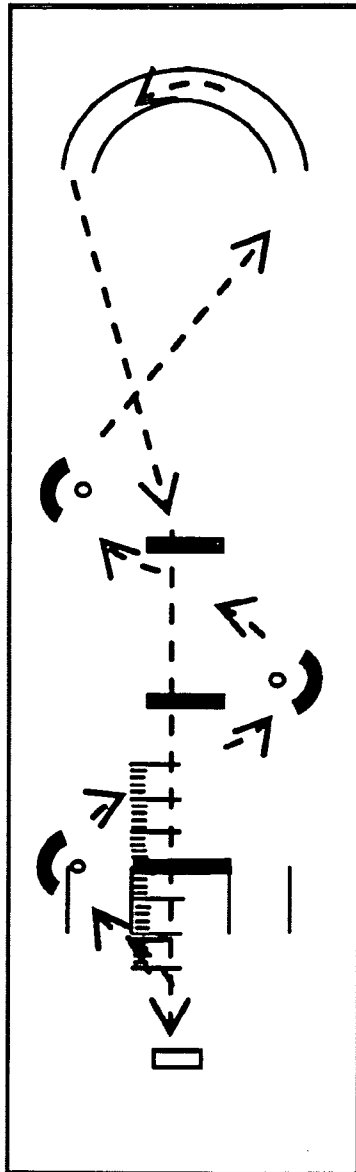
The test will end immediately if you:

- Commit an unsafe act.
- Disregard or fail to understand instructions.





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Vehicle Placement - Cone Weave and Turn

Ride to the left of the first cone, to the right of the second cone and so on. Weave past all three cones without hitting or skipping a cone. Your inside wheel must stay between the cone and curved line, not hitting or skipping any of them. After rounding the last cone make a left-hand turn through the curve marked by the lines at approximately 10 MPH. You must stay between the lines of the curve.

Points will be assessed for:

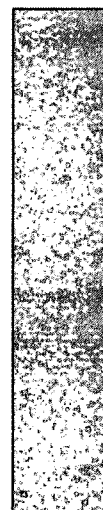
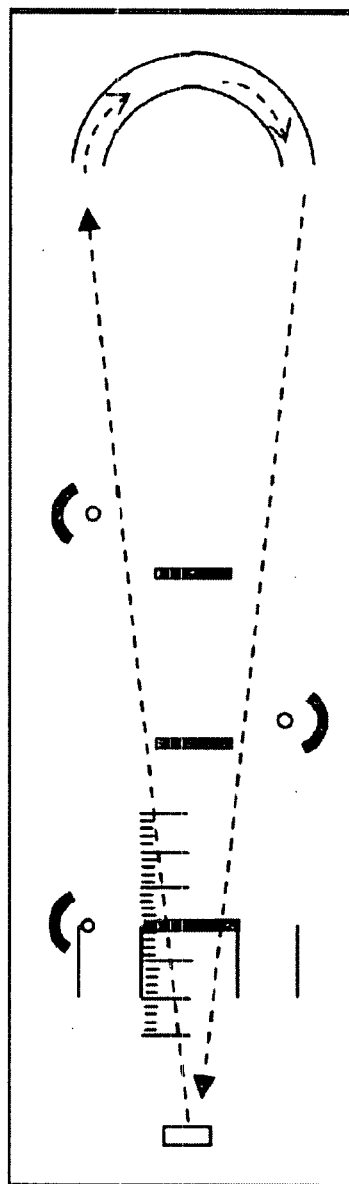
- Stalling the engine.
- Hitting or skipping a cone.
- Riding too slowly.
- Path violation, inside tire more than four feet from weave cone or any tire outside the curve boundary.

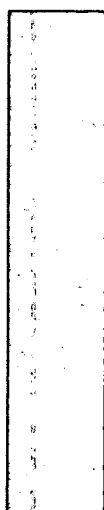
Cornering and Normal Stop

Ride toward the left of the curve quickly accelerating. Brake prior to making a right hand turn through the curve at approximately 10 MPH. You must stay between the lines and the curve. After completing the turn, ride to the end of the course and make a smooth stop without skidding the tires and with your front tire inside the box. Your front tire must not touch the painted lines. You will be timed from the time you start moving forward until you are stopped near the box.

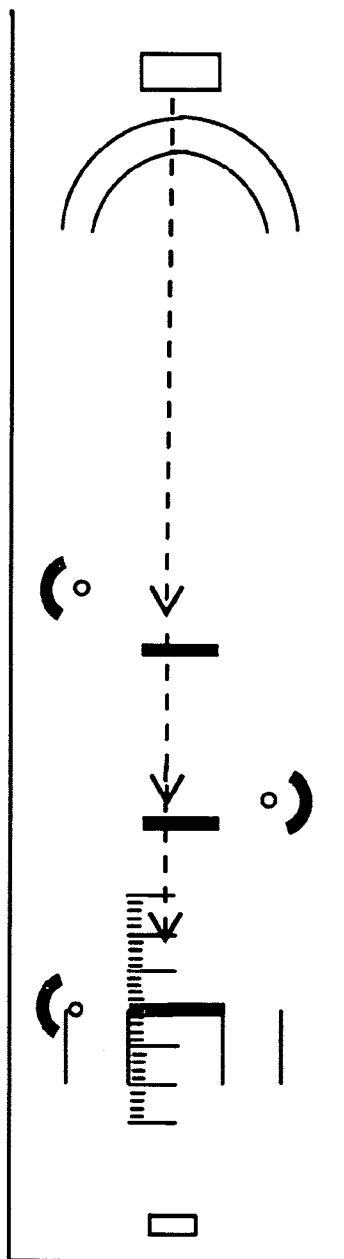
Points will be assessed for:

- Stalling the engine.
- Skidding tires.
- Stopping before, after or with your front tire touching the box.
- Riding too slowly.





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Quick Stop

Position your vehicle with your front tire on the "T" at the end of the course. On signal, accelerate straight up the path and shift into second gear. Stabilize your speed between 15 and 20 MPH by the time you reach the first line. Maintain a steady speed, when your front tire passed the second line, stop as quickly as you safely can while downshifting to the first gear. Remain stopped.

Points will be assessed for:

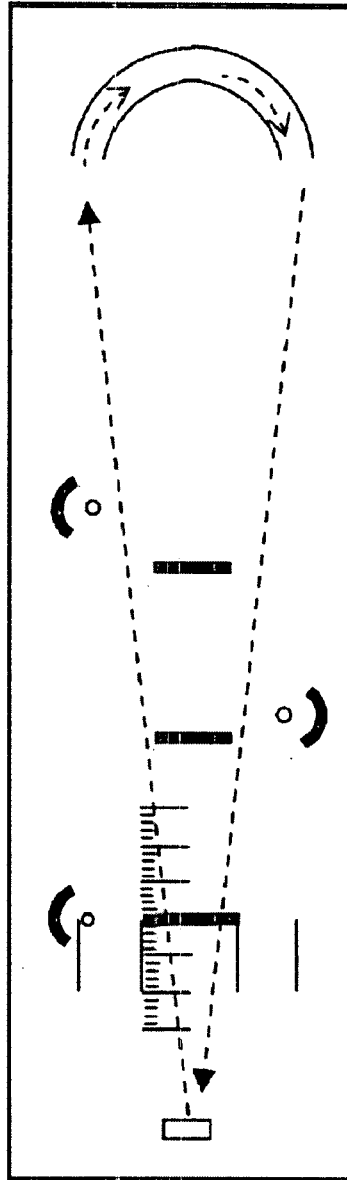
- Stalling the engine.
- Failure to stop in specified distance.
- Failure to use both brakes.
- Failure to obtain proper speed.

Obstacle Avoidance - Swerve

Position your vehicle with the front tire on the line or "T" at the other end of the course. On signal accelerate straight up this path. Stabilize your speed between 12 and 18 MPH by the time you reach the first line. Maintain a steady speed. After your front tire passes the second line swerve to the right. Avoid the obstacle line and stay inside the boundary line. Do not touch either line. Once you have passed the lines marking the box, stop and wait for further instructions.

Points will be assessed for:

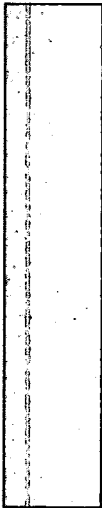
- Stalling the engine.
- Tires crossing the lines.
- Improper speed.



Generally, you will be evaluated on your ability to control the cycle, speed maneuverability, left turns, right turns, quick stops, straight line riding, posture, used of clutch, brakes and overall attention that can be observed and scored.

You can stop the test anytime you desire. You should not attempt an exercise that you do not feel you can perform. If an exercise is too difficult for you, or you cannot safely follow instructions, tell the Examiner. You will be allowed to come back another day after you have taken more time to practice.

If you motorcycle with sidecar is wider than six feet, let the Examiner know before beginning the skills test. The Examiner may need to make additional modifications to the skills test pad.



Copy of laws dealing w/
making a panic decision /
emergency situation?

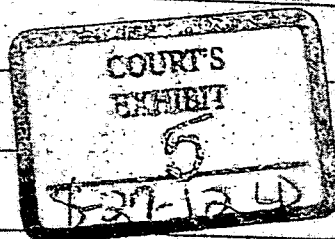
Laws dealing w/
authorized & ~~unauth~~ unauthorized
stop signs & signs on
private roads.

Officer Muschick



At what point do we
declare a hung jury?

Offie Johnson

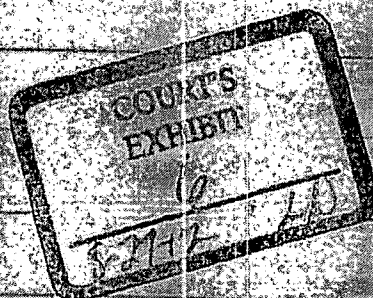


If Mr. Valenzuela is found negligent for some %, will Mr. V lose compensation totally?

Can the jury ignore %'s and assign amounts the jury feels is reasonable & justified?

Under "sudden emergency", do the common law & statutes apply (ex. duty of care)?

- look out carefully
- keep car under proper control
- you are to assume other drivers use ~~common sense~~ also comply w/ the rules of attention



PLAINTIFF'S
TRIAL EXHIBIT
8-27-12
2 LD

① On ques #7, does the adjective "grossly" modify just "negligent" or each term? (i.e. grossly willful, grossly wanton, grossly careless and grossly reckless)

② Does the defendant have to face under all conditions or just one condition? (i.e. negligent, willful, etc)

① Just negligent

COURT'S
EXHIBIT
7

② It has to be one or more of willful, wanton, or reckless

Please do not consider gross negligence just willful, wanton or reckless
D. K. Anty

STATE OF SOUTH CAROLINA

COUNTY OF AIKEN

Paige Weeks Johnson as the Personal
Representative of the Estate of Christie
Lane Valenzuela,

Plaintiff,

vs.

Sam English Grading, Inc.,

Defendant.

) IN THE COURT OF COMMON PLEAS
) SECOND JUDICIAL CIRCUIT

) C/A NO.: 2011-CP-02-00868

) MEMORANDUM IN SUPPORT OF
) DEFENDANT'S POST-TRIAL MOTIONS

This matter comes before the Court on Defendant's post-trial motions for Judgment Notwithstanding the Verdict (JNOV), or New Trial, New Trial Absolute: 1) Thirteenth Juror Doctrine, 2) Grossly Excessive Verdict, 3) Nisi-Remittitur, 4) Based Upon Errors in Evidence, and 5) Based Upon Improper Jury Charges.

Defendant also hereby moves for a reduction in the jury's actual damages award based upon the jury's finding of 35% comparative negligence on Michael Valenzuela. The jury determined that Plaintiff was not entitled to punitive damages.

Defendant also hereby moves for a set-off of the jury's actual damages award pursuant to S.C. Code Ann. § 15-38-50(1) (Supp. 2009) applying the settlement obtained by the plaintiff from the liability insurance carrier on the motorcycle involved in the accident, including the UIM carrier. Defendant understands the total amount of the settlement was \$40,000, but asks the Court to inquire of Plaintiff's for verification of the amount so the set-off is properly applied.

STATEMENT OF THE CASE

This is a wrongful death action based upon negligence filed on April 18, 2011 against Defendant Sam English Grading, Inc. (hereinafter "Defendant"). Service of the summons and

complaint was perfected upon the Defendant on August 15, 2011. Defendant timely answered denying it was at fault for this accident.

The case proceeded to trial on August 27, 2012 and, pursuant to Rule 50, *SCRCP*, Defendant made a motion for a directed verdict based upon the insufficiency of the evidence at the close of Plaintiff's case and renewed its motion at the close of Defendant's case as required under the *South Carolina Rules of Civil Procedure*. The Court denied said motions. Counsel for the Defendant objected to the jury charges of Sudden Emergency, and that the jury could consider the stop sign statute codified at S.C. Code § 56-5-2330 in considering whether the Defendant was negligent per se. Furthermore, the Court charged the jury that it was to the negligence of the Defendant's entire operation rather than just its conduct on August 7, 2009.

The Jury returned a verdict after deliberating for more than nine hours on August 31, 2012. The Jury found that Defendant was 65% negligent, Michael Valenzuela was 35% negligent and that both proximately caused the death of Christie Valenzuela. The Jury awarded \$2.9 million in actual damages and found that the actions of the Defendant were willful, wanton, and reckless. On Tuesday, September 4, 2012, the Jury returned to the Courthouse to hear arguments for the punitive damages aspect of the case since it had been bifurcated. The Jury returned a verdict that Plaintiff was not entitled to punitive damages.

The Court granted Defendant ten days to submit its post-trial motions and brief in support thereof. Defendant now submit its brief on these motions: Judgment Notwithstanding the Verdict (JNOV), New Trial, New Trial Absolute: Thirteenth Juror Doctrine, Grossly Excessive Verdict, Nisi-Remittitur, Based Upon Errors in Evidence, and Based Upon Improper Jury Charges.

FACTS PRESENTED AT TRIAL

First, Plaintiffs produced three witnesses to testify regarding the Defendant's actions in prior to August 7, 2009 of allegedly running a stop sign located on the private driveway at the Owens Corning landfill in Aiken, South Carolina and also to testify regarding never seeing a flagman or signs up to warn of the equipment crossing the road prior to August 7, 2009. Ann Johnson testified that she has lived off of Redds Branch Road for 26 years and that she has never seen a sign. She was concerned about the dangerous conditions but never told anyone about them. She knew to look for dust on the private driveway or for the gate on the other side to be open indicating that there was equipment crossing the road. She stated that two to three days prior to August 7, 2009, she was traveling down Redds Branch Rd. and after crossing the intersection at issue she looked in her rear view mirror and saw the scraper pass immediately. She stated that this scared her because if she had slowed down she would have been hit. Ms. Johnson testified that she was not on Redds Branch Rd. at the time of the subject accident and did not know the conditions existing on August 7, 2009.

Laura Boozer, the second witness Plaintiff called to testify about the conditions prior to the subject accident, testified that she has seen numerous times where the scraper did not stop at the stop sign. Ms. Boozer lives directly off of Redds Branch Rd. She stated that she did not see any signs or flagmen at the intersection prior to August 7, 2009. She testified that she works for Owens Corning and had never told anyone about the alleged dangerous condition she was testifying about. She further stated that she was not there on August 7, 2009 at the time of the accident and that she did not know what the conditions were when the accident occurred.

Next, Virginia Gunter testified. Ms. Gunter has lived off of Redds Branch Road for 63 years. She testified on dates prior to August 7, 2009, the scraper did not always stop before crossing the road, and she has had to slam on brakes in order to avoid hitting the scraper. She

testified that there were no warning signs up prior to the date of the accident. She does not recall if she saw a flagman prior to the date of the accident.

Next to testify was Jeffrey Lewis. Mr. Lewis testified that he had worked for the Defendant off and on for approximately six (6) years. He stated that he was trained how to use the scraper by Chris English. He testified that on the day of the accident there were no signs up warning of trucks crossing the road. He stated that there was a stop sign at the end of the private driveway. He testified that there was a flagman out there every day with a flag. He stated that if there was no traffic coming, the flagman would wave them across and they would not stop at the stop sign. If there was traffic coming, he stated, he would stop at the stop sign. He stated that he was always prepared to stop. Mr. Lewis testified that he would not always come to a complete stop if the flagger was present to wave him across. If there was not a flagman at the crossing, he would stop before crossing the intersection. He stated that he did not know anything about the contract with Owens Corning requiring signs or a flagman or about the encroachment permit. On August 7, 2009, he stated that he was coming up to the stop sign at a slow speed in case he had to stop. He saw Johnny Tindall about thirty (30) feet in front of him either using a flag or his hand directing him that it was clear to cross the road. Lewis stated that Tindall then waved his hand at him to stop. He hit the brakes and turned to the right to allow Michael Valenzuela to come on through the intersection. He stopped about eight (8) feet from the roadway.

Michael Valenzuela testified at trial. Mr. Valenzuela stated that he had a beginner's permit to drive motorcycles. He stated that he had been down Redds Branch Rd. about ten years prior to August 7, 2009. He testified that on August 7, 2009, he and Christie Valenzuela were driving down Redds Branch Rd. when he felt a tap on his side by Christie. He stated that he began looking to see what she was tapping him about. He stated that he saw a dust tornado and

laid on the back brake without applying any front brake. He then started skidding. Mr. Valenzuela testified that the driver of the scraper never acknowledged him so he made the decision to lay the bike down. He stated that he waited until the last minute to take any action. He testified that in his mind the scraper was traveling about 30 miles per hour. He was traveling about 40-45 miles per hour. Mr. Valenzuela stated that he did not see the flagger on the tractor or the Waste Management truck in the oncoming lane of traffic. He testified that he did not see any signs warning him of trucks crossing the road or of a flagman ahead. He also stated that there was not a flagman. Mr. Valenzuela admitted that the scraper never entered Redds Branch Rd. Mr. Valenzuela stated that he has driven motorcycles since he was a teenager. He was shown and agreed with the South Carolina Department of Motor Vehicles training manual wherein it states:

“Use both brakes every time you slow or stop. Using both brakes for even “normal” stops will permit you to develop the proper habit or skill of using both brakes properly in an emergency. Squeeze the front brake and press down on the rear. Grabbing at the front brake or jamming down on the rear can cause the brakes to lock, resulting in control problems.”

Eric Pruitt testified next. He stated that he worked for Waste Management driving a dump truck. He testified that on August 7, 2009 he witnessed Johnny Tindall instructing Jeffrey Lewis to stop the scraper. He stated that he saw the motorcycle coming down the road and the driver lay the bike down on the road. He did not recall seeing a flag in Johnny Tindall's hand. As the scraper approached, he thought it was coming into the roadway. He was not concerned about the scraper coming out in front of him. He said that the scraper never entered the roadway.

Sam Curtis English testified that Johnny Tindall's first job was to sweep the road not to flag. He was not present and did not see what happened on August 7, 2009. He never drives the

scraper across Redds Branch Rd. He has no knowledge of the terms of any contract with Owens Coming.

Judge McLaurin, formerly Trooper McLaurin, was the investigating officer at the time of the accident. He testified that he has never written a ticket for failure to stop at a stop sign on a private driveway. He testified he thought the stop sign was a private stop because it did not have the Department of Transportation stickers on it and he was informed that Chris English installed the stop sign as a safety measure. He testified this was not a construction zone that would typically require a flagman. Michael Valenzuela informed him that he knew the scraper was not going to stop so he had to lay the bike down. Judge McLaurin stated that no part of the scraper ever entered the roadway.

Plaintiff's expert, Kelly Kennett, testified that his expert findings were: 1) Michael Valenzuela was an attentive driver, 2) Michael Valenzuela reacted at the first available opportunity, 3) the driver of the scraper reacted to Johnny Tindall's telling him to stop, not the approaching motorcycle, 4) the driver of the scraper was not intending to stop and he if he had proceeded he wouldn't have stopped, 5) if the driver of the scraper had not articulated the front of the scraper to the right it would have entered the roadway. Kennet relied upon the MAIT teams raw data in making his conclusions. Kennet testified that Michael Valenzuela was 265 feet from the center of the intersection when he began to perceive the situation and react accordingly. Kennet stated that the scraper was traveling 17 miles per hour at the start of its braking. Kennet testified that the scraper is braking when Michael Valenzuela begins to make its skid marks. The scraper is at rest when the motorcycle is sliding. Kennett testified that Michael Valenzuela used rear only braking which decreases the total stopping distance. He stated that normal people do not know how the scraper works with respect to its articulated turning. He

stated that Michael Valenzuela would not have known what was going to happen with respect to how the scraper will turn and not enter the roadway. Kennet testified that a flagman was needed at this intersection. Kennet agreed that had Michael Valenzuela stayed on the motorcycles wheels this accident would have not occurred. Kennet also agreed that Christie Valenzuela was ejected from the motorcycle during the vault phase in the middle of the intersection.

Sgt. Coffin testified that during his investigation he concluded that motorcycle driver was unable to maintain control of the motorcycle. He further stated that the scraper never entered the roadway. Sgt. Coffin testified that the flagger was watching for traffic for the pan and that the flagger was visible to approaching traffic. Sgt. Coffin stated that during his questioning of Michael Valenzuela, he stated "I know I contributed to the collision."

Cliff Merritt, representative from Owens Corning, testified that the contract entered into evidence was the contract between the Defendant and Owens Corning for the project that was ongoing at the landfill at the time of the accident on August 7, 2009. He stated that the safety measures mentioned in the contract of a flagman and advance warning signs are Owens Corning safety measures are are only required when there is a concentrated effort of crossing the road and not any other time. He stated that the encroachment permit expired in 1984 and was never provided to Defendant for this project.

Plaintiff also called four witnesses, Michael Valenzuela, Michael "Mikey" Valenzuela, Jr., Amanda Washington and Renee Mack, to testify regarding the loss of Christie Valenzuela to her family, her friends and co-workers.

Chris English testified that he and his mother own Sam English Grading, Inc. English testified that he was aware of the contract with Owens Corning and its provisions. He stated that he believed that he was in compliance with the contract with Owens Corning with respect to

having a flagman at the intersection. He stated that he did not flag the public traffic but was flagging his traffic for the safety of the public. He stated that on the day of the incident there were not advanced warning signs up. He stated that there is not a reason to have a sign warning of a flagman when there was not a flagman present. Chris English testified that he directed his employees to stop at the stop sign if there was not a flagger present looking for traffic. If there was a flagger present, then his employees were still to keep a proper lookout for traffic and cross without stopping if there was no oncoming traffic. He testified that the encroachment permit referenced in the Owens Corning contract was never provided to him on this project, which expired in 1984 and was for an entirely different road. He stated that since he began working for Owens Corning in the early 1980's his company has not had any incidents such as this one. He further stated that no one at Owens Corning ever told him that his operations were not in compliance with the requested safety measures under the contract.

Johnny Tindall testified that he was sweeping road and watching for traffic. On the day of the accident, he stated that he motioned Jeffrey Lewis to come on across the intersection after looking both ways to make sure traffic was clear. He stated that when he looked again, he saw the motorcycle and motioned for Jeffrey Lewis to stop. He said that the scraper stopped without ever going into the road. He also stated that the reason for the scraper not coming to a complete stop at the intersection is due to the difficulty in getting the scraper back started again.

Joe Dawes, Defendant's motorcycle safety expert, testified that as an instructor at Midland's Technical College on motorcycle safety, the proper way to stop is to use both brakes at all times. Joe Dawes also stated that there is never a time where laying a bike down is the proper course of action. In his expert opinion, Michael Valenzuela failed to use proper braking technique by jamming on the rear brake and laying the motorcycle down.

Joc Smith, Defendant's accident reconstructionist, testified that his calculations determined that the scraper was traveling seven (7) miles per hour at the start of the skid. He stated that the scraper never entered the road and stopped 8.25 feet from the roadway. He testified that had the scraper not turned to the right it would have still stopped two (2) feet from the road. He stated that had Michael Valenzulea stayed upright on his tires, he would have stopped approximately eighty-five (85) feet from the scraper.

Turby Thomas testified that he lives on Redds Branch Rd. and that he knew to slow down because he was aware of the conditions. He has never had a problem at the intersection before.

Dana Hall testified that she also lives on Redds Branch Rd., crosses through the intersection two (2) to three (3) times per day. She stated that she has never seen the scraper cross the road without stopping.

STATEMENT OF THE LAW

A. Judgment Notwithstanding the Verdict (JNOV)

Pursuant to Rule 50, *SCRCP*, Defendant moves for judgment notwithstanding the verdict. A motion for a directed verdict is a predicate to a motion for judgment notwithstanding the verdict. *See Johnson v. Hoechst Celanese Corp*, 317 S.C. 415, 453 S.E.2d 908 (Ct. App. 1995). Defendant timely moved for a directed verdict. In deciding a JNOV motion, the trial court must view the evidence and all reasonable inferences in the light most favorable to the non-moving party. *Crossley v. State Farm Mut. Auto Ins. Co.*, 307 S.C. 354, 415 S.E.2d 393 (1992). If more than one inference can be drawn from the evidence, the trial court properly submitted the case to the jury. *Id.* However, the trial court can grant a JNOV motion even if it denied a directed

verdict motion. See *Denton v. Winn-Dixie Greenville, Inc.*, 312 S.C. 119, 439 S.E.2d 292 (Ct. App. 1993).

ANALYSIS

Plaintiff proceeded against Defendant on a wrongful death cause of action predicated upon the negligence of the Defendant. In order to prove a negligence action against Defendant, Plaintiff must show: 1) Defendant owed a duty of care to the Plaintiff; 2) Defendant breached the duty by a negligent act or omission, 3) Defendant's breach was the actual and proximate cause of Plaintiff's injury, and 4) Plaintiff suffered an injury or damages. *Dorrell v. South Carolina Dept. of Transp.*, 361 S.C. 312, 605 S.E.2d 12 (2004). The absence of any one of these elements renders the cause of action insufficient. *Rayfield v. South Carolina Dep't of Corrections*, 297 S.C. 95, 100, 374 S.E.2d 910 (Ct. App. 1988). In reviewing the evidence in the light most favorable to the non-moving party, Plaintiff has failed to prove negligence against the Defendant.

First, Plaintiff failed to establish that Defendant owed a duty to Michael and Christie Valenzuela. In order to prove negligence, the Plaintiff must show the existence of a legal duty of care owed by the defendant to the plaintiff. *Huggins v. Citibank, N.A.*, 355 S.C. 329, 332-333, 585 S.E.2d 275 (2003). The Huggins court further held that:

"In a negligence action, the court determines as a matter of law, whether the defendant owed a duty of care to the plaintiff. If there is no duty, the defendant is entitled to judgment as a matter of law. Duty is generally defined as the obligation to conform to a particular standard of conduct toward another. Duty arises from the relationship between the alleged tortfeasor and the injured party. In order for negligence liability to attach, the parties must have a relationship recognized by law as the foundation of a duty of care. In the absence of a duty to prevent an injury, foreseeability of that injury is an insufficient basis on which to rest liability. The concept of duty in tort liability will not be extended beyond reasonable limits."

Id.

Plaintiff introduced evidence of a private contract between Owens Corning and Defendant to establish a duty to the motoring public to have a flagman and/or road crossing signs present on Redds Branch Rd. The introduction of this evidence, i.e. the private contract between Defendant and Owens Corning, was in error and does not establish a duty to the motoring public. A private contract between two parties does not create a duty to a third party unless it expressly intends to do so. In the immediate case, the Owens Corning contract did not. In *Dorrell*, the Supreme Court held that "APAC's broad duty to the traveling public is established in at least two separate provisions of the contract." *Id.* The first section states that:

"the contractor shall provide all safeguards, safety devices and protective equipment and take any other needed actions as it determines... to be reasonably necessary to protect the life and health of employees on the job and the safety of the public..."

Id. The second portion from the Red Book which is a part of the contract states:

"107.09 Public Convenience and Safety. The Contractor shall at all times conduct work in such a manner as to provide for and insure the safety and convenience of the traveling public..."

Id. This case is distinguishable from *Dorrell*. In the contract in this case, unlike in *Dorrell*, there is no mention of the safety of the public. Specifically, the Owens Corning Contract states in pertinent part:

"the Contractor must maintain dust control on all access roads between the borrow area and the landfill at all times. The Contractor will provide a flagman, maintain road crossing signs and other road crossing safety measures to comply with Owner's South Carolina Highway Department Encroachment Permit. A copy of the permit will be supplied by the Owner."

As testified to by the Plaintiff's witness, Clifford Merritt, the encroachment permit expired in 1984 and was never provided to the Defendant. Additionally, the encroachment permit was for an entirely different roadway.

The Court in *Dorrell* looked at the plain language of the contract to determine the intent of the parties and did not infer intent. In this case, the Defendant and Owens Corning did not contract for signs and a flagman specifically for the safety of the traveling public. By allowing Plaintiff to introduce evidence of this contract, it is turn making the traveling public a third-party beneficiary to the contract which is clearly contrary to caselaw.

Furthermore, there is no independent legal duty to have road crossing signs regarding trucks crossing the road or flagman ahead signs or even to have a flagman at the intersection. The Court in *Dorrell* specifically held that "a tortfeasor may be liable for injury to a third party arising out of the tortfeasor's contractual relationship with another, despite the absence of privity between the tortfeasor and the third party." *Id.* However, the "tortfeasor's liability exists independently of the contract and rests upon the tortfeasor's duty to exercise due care." *Id.* (emphasis added). Plaintiff failed to introduce any evidence or testimony that it was industry standard, a regulation, a SC DOT mandate, code requirement or any other recognized authority for a company to install signs and have a flagman when large equipment crosses the road. The Plaintiff failed to establish that there was an independent duty to the traveling public to put up signs and have a flagman at the intersection and failed to establish that the private contract established any duty to the Plaintiff. Plaintiff wants the Court to ignore the fact that the applicable law and statute is whether or not Defendant failed to yield the right of way as is required when crossing the road or approaching an intersection. Plaintiff is putting the entire operation on trial rather than limiting it solely to the activities on August 7, 2009 wherein Defendant's employee, Jeffrey Lewis, drove the scraper up to the intersection and stopped before entering the roadway. The Owens Corning Contract does not impose any requirements on how the scraper is to be driven or how Defendant is to abide by the traffic laws. In *Dorrell*, APAC's

scope of work pursuant to the contract was to pave the road. *Id.* As a result of APAC's paving the road, there became a large drop off onto the shoulder which caused the Plaintiff to lose control of her vehicle. *Id.* Since the direct work under the contract caused the Plaintiff's injuries thus the contract may then be relevant to the cause of action. However, in the instant case, Defendant's scope of work was to build a berm at the Owens Corning landfill. It was during the Defendant's driving of the scraper across the road that this accident occurred not because of Defendant's scope of work. Thus, the contract with Owens Corning is not relevant evidence to prove a duty owed to the Plaintiff.

Plaintiff cited *Caldwell v. K-Mart Corp.*, 306 S.C. 27, 410 S.E.2d 21 (Ct.App. 1991) in order to prove that a Defendant's own standards, whether they be contractual or self-imposed, provided evidence of a duty. Defendant disagrees that a contract between two private parties is relevant to prove that Defendant failed to exercise due care and ultimately a duty to the Plaintiff. The *Caldwell* case dealt with shoplifting and using internal guidelines as the standard to which to hold the Defendant. A failure to comply with internal guidelines is wholly different than a failure to abide with a private contract between two parties one of which is not the Plaintiff. Certainly the Plaintiff could have elicited testimony from a construction expert or SC DOT representative to testify regarding industry standards or a standard of care to have signs up or a flagman at this intersection, if such existed, but to rely solely upon a private contract is in error and the *Caldwell* case is inapplicable to the case at bar.

Assuming *arguendo* that the private contract did create a duty to the public, i.e. Michael and Christie Valenzuela, Defendant did not breach the duty. Chris English testified and numerous other witnesses testified that at the time of the accident, Johnny Tindall was watching for traffic and flagging our equipment to stop if vehicles on Redds Branch Rd. were approaching

the intersection. The private contract specifically contemplates safety precautions contained in an expired encroachment permit that was not provided to the defendant rendering those precautions general, vague, ambiguous and, thus, invalid. However, those safety precautions would include the presence of a flagger watching for traffic and the voluntary installation of the stop sign at the end of the private driveway. Defendant clearly had these safety precautions in place, had informed its employees of how to safely cross the road and did not violate the private contract or its duty to the motoring public, i.e., to yield the right of way.

Furthermore, if there is a duty to the public created by the private contract, which Defendant strenuously submits there is not, any breach of that duty was not the proximate cause of the accident. In order to prove proximate cause, the Plaintiff must show:

“proof of both causation in fact and legal cause. Causation in fact is proved by establishing the injury would not have occurred ‘but for’ the defendant’s negligence. Legal cause is proved by establishing foreseeability. The standard by which foreseeability is determined is that of looking to the ‘natural and probable consequences’ of the complained of act.”

Trivelas v. S.C. DOT, 348 S.C. 125, 558 S.E.2d 271 (Ct.App. 2001). There are some cases by which proximate cause can be decided as a matter of law. *See generally Id.* The failure to have road crossing signs or a flagman directing the public traffic did not cause the accident. There is no evidence in the record that the presence of any of these safety precautions would have made the situation any different. The Court does not allow submission of speculative, theoretical and hypothetical views to the jury. *Wright v. Gilbert*, 227 S.C. 334, 88 S.E.2d 72 (1955). Ultimately, the proximate cause of the accident was Michael Valenzuela’s decision to lay the bike down causing the motorcycle to high-side and subsequently eject Christie Valenzuela from the motorcycle meeting her untimely death.

The Plaintiff also argued that Defendant was negligent per se for violating the stop sign statute. Specifically, Plaintiff argued that the existence of a stop sign at the end of the private driveway created a duty to the Plaintiff by the Defendant that it was statutorily mandated to stop at the stop sign. In order to show that the defendant owes him a duty of care arising from a statute, the plaintiff must show two things: (1) that the essential purpose of the statute is to protect from the kind of harm the plaintiff has suffered; and (2) that he is a member of the class of persons the statute is intended to protect. *Trivelas v. S.C. DOT*, 348 S.C. 125, 134, 558 S.E.2d 271 (Ct. App. 2001). Furthermore, the Court of Appeals held that:

“If the plaintiff makes this showing, he has proven the first element of a claim for negligence: viz., that the defendant owes him a duty of care. If he then shows that the defendant violated the statute, he has proven the second element of a negligence cause of action: viz., that the defendant, by act or omission, failed to exercise due care. This constitutes proof of negligence per se.”

Id. There was ample evidence presented that this stop sign did not have stickers indicating that the Department of Transportation authorized the stop sign and further evidence that the stop sign was installed by the Defendant itself or privately installed. The statute regarding stop signs S.C. Code § 56-5-2330 applies to stop signs authorized by the SCDOT or local authorities. The evidence is clear that neither of these entities approved this stop sign and that this statute does not impose a duty on the Defendant to stop at the stop sign. It must be noted that at the time of this accident, the Defendant's scraper did stop at the stop sign and it yielded the right of way as required by applicable South Carolina law. Furthermore, Plaintiff did not present any evidence by way of testimony or otherwise, except by Plaintiff's counsel argument which is not evidence, that Defendant had a duty to stop at the stop sign. In particular, Judge McLaurin testified that he has never written a ticket for a vehicle running a stop sign on a private driveway.

Again, assuming for arguments sake that Defendant had a duty to stop at the stop sign, Defendant did not breach this duty. A breach of the duty can be found with a showing of violation of the statute. *Id.* All of the witnesses testified that the scraper never entered the roadway and stopped 8.25 feet from the roadway. There is no evidence in the record that the Defendant breached this alleged duty. Furthermore, the Court excluded testimony by the investigating officer, Judge McLaurin or MAIT team officers to testify that the Defendant was not cited for failing to stop at a stop sign or failing to yield the right of way.

Furthermore if there was a breach of the duty to stop at the stop sign, it was not the proximate cause of this accident. There is no evidence in the record from which the jury could find that the proximate cause of this accident was the Defendant's failure to stop at the stop sign. Defendant did stop 8.25 feet from the roadway. The proximate cause of the accident was Michael Valenzuela's decision to lay the bike down causing the motorcycle to high-side and subsequently eject Christie Valenzuela from the motorcycle meeting her untimely death.

Plaintiff failed to establish that the Defendant failed to yield the right of way to the Plaintiff. South Carolina Code § 56-5-2350 states that "the driver of a vehicle about to enter or cross a roadway from any place other than another roadway shall yield the right-of-way to all vehicles approaching on the roadway to be entered or crossed." Defendant did not breach this duty as all of the witnesses agree that the scraper never entered the roadway and stopped 8.25 feet from the roadway. Failure to exercise due care, not intent, is the critical element in negligence. *Snakenberg v. Hartford Casualty Ins. Co.*, 299 S.C. 164, 173, 383 S.E.2d 2 (Ct. App. 1989). The intent of the driver of the scraper is irrelevant in determining whether or not Defendant failed to exercise due care and the fact that the scraper stopped is evidence of exercising due care and yielding the right of way to the Plaintiff.

Furthermore, Plaintiff failed to establish that Defendant was: traveling too fast for conditions, did not maintain a proper lookout, did not maintain proper control over the equipment, failed to apply the brakes, failed to operate the equipment in violation of regulations, ordinances, statutes, regulations, failed to properly train or supervise its employees, failed to have adequate policies and procedures in place to train and monitor its employees, in negligently entrusting the machinery to its employees and, any other particulars set out in Plaintiff's Complaint or Amendments to the Complaint all of which are incorporated herein by reference. Plaintiff did not present any evidence, testimony or otherwise to show or prove a duty to the motoring public of any of the above particulars. Furthermore, if the Plaintiff did establish any of these particulars, Plaintiff did not present any evidence, testimony or otherwise that would establish a breach of any of these duties, and the accident was not proximately caused by the breach of any of these alleged duties. The Defendant, finding itself on a private driveway to the landfill owed no duty to Michael or Christie Valenzuela as motorists travelling on Redds' Branch Road on August 7, 2009, except to yield the right of way before crossing Redds' Branch Road, which the evidence is uncontroverted that it did when the scrapper stopped 8.25 feet from Redds' Branch Road. Under South Carolina common law, there is no general duty to control the conduct of another. *Madison v. Babcock Center, Inc.*, 371 S.C. 123, 638 S.E.2d 650 (2006).

After considering all of the evidence, the Court should have determined as a matter of law and directed a verdict that Michael Valenzuela's sole negligence was the sole proximate cause of the accident. The testimony was clear and uncontroverted that Michael Valenzuela did not properly operate the motorcycle he was driving and if he had this accident would have never occurred. Several witnesses testified that the South Carolina Department of Motor Vehicles manual states that a motorcycle driver should use both brakes at all times and particularly in

emergency situations. In addition, the motorcycle portion of the SCDMV manual itself was entered into evidence corroborating this testimony. Furthermore, Defendant's expert, Joe Smith, as well as Plaintiff's expert, Kelly Kennett, both opined that had Michael Valenzuela used proper braking, i.e. using both brakes, he would have stopped approximately eighty-five (85) feet from the intersection. Additionally, Defendant's motorcycle safety expert, Joe Dawes, opined that there is never a situation where a motorcycle should be laid down; there is always more efficient and safer evasive action that can be taken to avoid emergency situations; and that it was not proper braking technique for Michael Valenzuela to jam on the rear brake or lay the bike down, both of which will cause the motorcycle to lose control. Additionally, both Plaintiff's and Defendant's accident reconstructionist experts' agree that Christie Valenzuela came off of the motorcycle because the motorcycle was laid down and then high-sided, thus proximately causing her death. The Court should have directed a verdict for the Defendant on this basis. Assuming *arguendo* that the Defendant had some negligence, which is strenuously denied, at a minimum the Court should have found that Michael Valenzuela's liability was more than 51% thus barring any further recovery for Michael Valenzuela against the Defendant.

Lastly, Plaintiff failed to present any evidence, let alone clear and convincing evidence, for the jury to consider that Defendant's conduct was grossly negligent, willful, wanton, or reckless. Plaintiff presented witnesses to testify about Defendant's conduct prior to August 7, 2009 that Defendant's scraper ran the stop sign. However, on August 7, 2009, Defendant's scraper did not run the stop sign. It stopped and yielded the right of way. Chris English testified that he instructed his employees they could cross without coming to a complete stop only when directed by the flagger that traffic was clear. He further stated that this safety measure was to protect the public. The driver of the scraper was to keep a proper lookout, as well, for oncoming

vehicles, which he did. The Plaintiff failed to present any expert testimony regarding the proper conduct at an intersection such as this to establish that Defendant's actions violated any statute, law, code or other authoritative requirement much less that Defendant was reckless, willful, wanton, or grossly negligent. The Court does not allow submission of speculative, theoretical and hypothetical views to the jury. *Wright v. Gilbert*, 227 S.C. 334, 88 S.E.2d 72 (1955). The jury was asked to speculate on whether the Defendant's conduct was grossly negligent, willful, wanton or reckless which is not appropriate since the Plaintiff had not presented any evidence to establish that Defendant's conduct on August 7, 2009 was grossly negligent, willful, wanton or reckless. The jury's verdict form stating clearly that, "Plaintiff is **not** entitled to punitive damages" (emphasis added) further supports this argument.

For the foregoing reasons, Defendant submits that its motion for judgment notwithstanding the verdict should be granted.

B. Motion for a New Trial/New Trial Absolute

Defendant further moves for a new trial pursuant to Rule 59, *SCRCP*. Unlike a directed verdict motion, a motion for a new trial is aimed at the fairness of the verdict and not at the sufficiency of the evidence. In acting upon a motion for a new trial, a trial judge is not bound by the position taken by parties. *Porter Bros., Inc. v. Specialty Welding Co.*, 286 S.C. 39, 331 S.E.2d 783 (Ct. App. 1985). Rule 59(a)(1), *SCRCP*, states that "a new trial may be granted to all or any of the parties and on all or part of the issues in an action in which there has been a trial by jury, for any of the reasons for which rehearings have heretofore been granted in the courts of the State." A new trial motion may be made based upon errors in the evidence, jury charges or an improper verdict.

The Court of Appeals held in *Winters v. Fiddie*:

The grant or denial of a new trial motion rests within the trial court's discretion, and its decision will not be disturbed on appeal unless the court's findings are wholly unsupported by the evidence or its conclusions are controlled by error of law. *Vinson v. Hartley*, 324 S.C. 389, 405, 477 S.E.2d 715, 723 (Ct.App. 1996) (emphasis added). A trial court's authority to grant a new trial is rooted in Rule 59, *SCRCP*.

394 S.C. 629, 716 S.E.2d 316 (Ct.App. 2011). Furthermore, the Court of Appeals held that "a trial judge's order granting or denying a new trial will be upheld unless the order is 'wholly unsupported by the evidence, or the conclusion reached was controlled by an error of law.'" *Youmans v. Dept. of Transp.*, 380 S.C. 263, 670 S.E.2d 1 (Ct.App. 2008).

Defendant submits that the Court should grant a new trial absolute. Trial Courts have great discretion to grant a new trial absolute. The trial court must grant a new trial absolute if the Court finds the verdict amount to be grossly excessive so as to result from passion, caprice, prejudice, or some other influence outside the evidence. *O'Neal v. Bowles*, 314 S.C. 525, 431 S.E.2d 555 (1993). If the trial court denies a new trial motion based on the excessiveness of the verdict, the trial court must set forth its reasons in its order. *Sorin Equipment Co. v. The Firm, Inc.*, 474 S.E.2d 819 (Ct.App. 1996). The decision to grant a new trial absolute based on the excessiveness of a verdict rests in the sound discretion of the trial court and ordinarily will not be disturbed on appeal. *Becker v. Wal-Mart Stores, Inc.*, 339 S.C. 629, 529 S.E.2d 758 (Ct.App. 2000). An abuse of discretion occurs if the trial court's findings are wholly unsupported by the evidence or the conclusions reached are controlled by an error of law. *Id.* (emphasis added).

a. Thirteenth Juror Concept

The trial court may grant a new trial under the common law "thirteenth juror" doctrine, in which the trial court makes its own view of the evidence and finds that the evidence does not justify the verdict. *Pinckney v. Winn-Dixie Stores, Inc.*, 311 S.C. 1, 426 S.E.2d 327 (Ct.App.

1992). In *Worrell v. South Carolina Power Co.*, the Supreme Court of South Carolina stated that “the trial judge is the thirteenth juror, possessing the veto power to the Nth degree, and, it must be presumed, recognizes and appreciates his responsibility, and exercises the discretion vested in him with fairness and impartiality.” 186 S.C. 306, 313, 195 S.E. 635, 641 (1938). A thirteenth juror ruling is a new trial upon the facts. *Folkens v. Hunt*, 300 S.C. 251, 387 S.E.2d 265 (1990). The judge as the thirteenth juror “hangs” the jury. *Id.* A trial judge’s order granting or denying a new trial upon the facts will not be disturbed unless his decision is wholly unsupported by the evidence, or the conclusion reached was controlled by an error of law. *Id.*

b. Grossly Excessive Verdict

If the verdict is grossly excessive or inadequate so as to have resulted from passion, caprice, prejudice, or outside influences, the trial court must grant a new trial absolute. *Cock-N-Bull Steakhouse, Inc. v. General Ins. Co.*, 321 S.C. 1, 466 S.E.2d 727 (1996). The standard to be applied by the trial court appears to be one of “shocking” the conscience. *See Rush v. Blanchard*, 310 S.C. 375, 426 S.E.2d 802 (1993).

c. Nisi Remittitur

“The trial court has wide discretionary power to reduce the amount of a verdict which in his judgment is excessive.” *Becker*, 339 S.C. 629, 529 S.E.2d 758 (Ct. App. 2000). The trial court must evaluate the adequacy of the verdict in light of the evidence presented. *Id.* When the verdict indicates the jury was unduly liberal in determining damages, the trial court alone has the power to grant a new trial nisi remitter. *Id.* This decision will not be disturbed on appeal, therefore, “unless it clearly appears that the exercise of discretion was controlled by a manifest error of law.” *Id.*

d. Based Upon Errors in Evidence

The admission or exclusion of evidence is left to the sound discretion of the trial judge, who decision will be reversed on appeal absent an abuse of discretion. *State v. Kirton*, 381 S.C. 7, 671 S.E.2d 107 (Ct.App. 2008). To reverse the trial court's admission or exclusion of evidence, the moving party must show an abuse of discretion that amounts to a "manifest error of law." *Landry v. Hilton Head Property Owners Ass'n, Inc.*, 317 S.C. 200, 452 S.E.2d 619 (Ct.App. 1994). An abuse of discretion arises from an error of law or a factual conclusion that is without evidentiary support. *State v. Kirton*, 381 S.C. 7, 671 S.E.2d 107 (Ct.App. 2008).

e. Based Upon Improper Jury Charges

The trial court must charge the jury on the applicable law as found in the pleadings and supported by the evidence. *McBeth v. TNS Mills, Inc.*, 318 S.C. 388, 458 S.E.2d 52 (Ct.App. 1995). To reverse for the failure to charge a requested instruction, the refusal must have been erroneous and prejudicial. *Orders Distributing Co. v. Newsome Carpets & Wallcovering*, 308 S.C. 429, 418 S.E.2d 550 (1992). If a requested jury charge states a sound principle of law that applies to the case, and is not otherwise covered by another charge, the trial court commits error if it refuses to charge. *Burns v. South Carolina Commission for the Blind*, 323 S.C. 77, 448 S.E.2d 589 (Ct.App. 1994). This error requires a new trial. *Id.* Additionally, if general instructions to the jury do not enable the jury to fully understand the law of the case and the issues involved, a refusal to give a requested charge is reversible error. *Id.* Lastly, if the record does not present any evidence to support a true charge given by the trial court, the judgment should be reversed. *Lingos v. Charleston Doughnut Corp.*, 300 S.C. 317, 387 S.E.2d 695 (Ct.App. 1989).

ANALYSIS

Defendant submits that a new trial and/or new trial absolute should be ordered by the Court. First, the Court erred in allowing Plaintiff to introduce into evidence the contract and accompanying encroachment permit between Owens Corning and the Defendant. Defendant incorporates its arguments more fully outlined above into this motion. The contract was not relevant evidence as defined pursuant to Rules 401 and 402, *SCRCP*. The introduction of the contract does not make any fact in existence more or less probable than it would be without the evidence. This contract was not relevant in whether Defendant failed to yield the right of way to the Plaintiff on August 7, 2009. The encroachment permit expired in 1984, was not provided to the Defendant and was for a completely different project and roadway than was at issue in this case. Furthermore, the admittance of this evidence into the record violated Rule 403, *SCRCP*, and was more prejudicial to the Defendant than probative to the Plaintiff's case. This evidence was unfair to the Defendant; it confused the issue and misled the jury.

Next, the Court erred in allowing the Plaintiff to present three (3) witnesses to testify regarding the Defendant's failure to stop at the stop sign before the accident on August 7, 2009, failure to have advanced warning signs in place prior to August 7, 2009 and failure to have a flagman at the intersection prior to August 7, 2009. This evidence was not relevant pursuant to Rules 401 and 402, *SCRCP*. Additionally, the Court admitting this evidence into the record violated Rule 403, *SCRCP*, and was more prejudicial to the Defendant than probative to the Plaintiff's case. This evidence was unfair to the Defendant; it confused the issue and misled the jury. Plaintiff was attempting to show habit pursuant to Rule 406, *SCRCP*. However, in *Holcombe v. W.N. Watson Supply Co.*, the Court quoted:

"The weight of authority seems to be against admitting evidence of general conduct under proven circumstances to show conduct of the same kind under similar circumstances on a particular

occasion, when there were eyewitnesses of the occurrence. Evidence of habit is frequently rejected when offered for the purpose of showing that a person acted in accordance with such habit on a particular occasion, especially where direct evidence is or can be produced, or the act is otherwise fully proved."

171 S.C. 110, 117, 171 S.E. 604, (1933). Michael Valenzuela had not traveled this road in the past ten (10) years. He had no knowledge of the conditions before this accident. Additionally, the evidence regarding failure to stop at the stop sign is not probative as to what occurred on August 7, 2009 because the scraper did actually stop before entering the roadway as all of the evidence is uncontroverted, there were four eyewitnesses to the occurrence and the occurrence was fully proved by direct evidence. Furthermore, whether or not Defendant's employee intended to run the stop sign is irrelevant. Failure to exercise due care, not intent, is the critical element in negligence. *Snakenberg v. Hartford Casualty Ins. Co.*, 299 S.C. 164, 173, 383 S.E.2d 2 (Ct. App. 1989).

The Court erred in excluding the introduction of any evidence regarding Michael and Christie Valenzuela's failure to wear a helmet. Defendant submits that this evidence is admissible and relevant evidence under Rules 401 and 402, *SCRCP*. The plain reading of the motorcycle helmet statute, S.C. Code Ann. § 56-5-3660 does not specifically state that the failure to wear a helmet is not admissible evidence unlike the seat belt statute codified at S.C. Code Ann. §56-5-6540. Additionally, the failure to wear a helmet would also be admissible pursuant to Rule 105, *SCRCP*, as evidence of failure to mitigate the damages of either Michael Valenzuela or Christie Valenzuela, the passenger of the motorcycle. The exclusion of this evidence was in error and a new trial should be granted.

The Court further erred in excluding evidence regarding the girlfriends of Michael Valenzuela since the death of Christie Valenzuela. This evidence is relevant evidence pursuant

to Rules 401 and 402, *SCRCP*, and goes directly to the emotion damages that Michael Valenzuela was claiming in this lawsuit, including but not limited to, wounded feels, grief and sorrow, loss of companionship, deprivation of the use and comfort of the decedent. The applicable caselaw cited by the Plaintiff discusses subsequent remarriage of a statutory beneficiary and not girlfriends. This evidence was more probative than prejudicial and should have been permitted into the record. The exclusion of this evidence was in error and a new trial should be granted.

Next, the exclusion of any opinions regarding Michael Valenzuela's lack of expertise as a motorcycle operator contributing to the accident was in error. The jury returned a verdict finding that Michael Valenzuela was 35% negligent for Christie Valenzuela's death. Clearly, the jury considered the presented evidence of improper braking on the part of Michael Valenzuela to be relevant evidence in rendering its decision. See Rules 401 and 402, *SCRCP*. If the jury had been able to consider the full extent of evidence including, expert testimony of Joe Dawes or the MAIT team, regarding Michael Valenzuela's lack of expertise in operating a motorcycle the verdict may have been different. Defendant was prejudiced by the exclusion of said testimony and a new trial should be ordered.

Additionally, the Court erred in excluding testimony and opinions by the MAIT Team and the investigating officer as to whether any laws were broken and/or criminal charges brought against either of the parties. This evidence is relevant evidence pursuant to Rules 401 and 402, *SCRCP*, and is more probative than prejudicial. This evidence would have assisted the jury in rendering a more accurate verdict. It would also have assisted the jury in assessing comparative negligence and focusing on the material issue, what happened on August 7, 2009. The exclusion of this evidence was in error and a new trial should be granted.

Next, the Court erred in excluding expert testimony of Joe Dawes, Defendant's motorcycle safety expert, to fully testify as to his opinions regarding motorcycle safety and proper operation of a motorcycle, including his expert opinions on proper operating technique for maintaining proper control of a motorcycle and on proper operating technique for maintaining and keeping a proper lookout, as taught in his capacity as a certified instructor of the Motorcycle Safety Foundation (MSF) curriculum. The MSF Basic Rider Course, of which a portion of the handbook was entered into evidence, is based on years of scientific research and field experience, has been field tested and has proven to be successful in developing the entry level skills for riding in traffic. Pursuant to *Watson v. Ford Motor Co.*, 389 S.C. 434, 695 S.E2d 169 (2010), Joe Dawes is qualified to render an opinion as a motorcycle safety expert, the subject matter is one requiring specialized knowledge, his testimony and investigation is reliable evidence and, his background and educational background with respect to motorcycles expertise assists the jury in determining a fact at issue. This evidence is more probative than prejudicial. See Rule 403, *SCRCP*. It is relevant evidence and would assist the jury in determining a fact at issue is more probable than not, whether or not Michael Valenzuela was negligent in the death of Christie Valenzuela. See Rules 401 and 402, *SCRCP*. The Court did not permit Joe Dawes to testify regarding the Motorcycle Safety Foundation curriculum, did not permit entry of the MSF Basic Rider Course curriculum hand book corresponding to these opinions, and did not permit any opinions he would render based upon the MSF standard of care. This was in error. The Supreme Court of South Carolina held that "evidence of objective safety standards is generally offered in connection with expert testimony which identifies it as illustrative evidence of safety practices of rules generally prevailing in the industry, and as such it provides support for the opinion of the expert concerning the proper standard of care." *Elledge v. Richland/Lexington*

School Dist. Five, 352 S.C. 179, 573 S.E.2d 789 (2002). The State of South Carolina adopted the MSF curriculum pursuant to S.C. Code Ann. § 59-53-2020 wherein all technical colleges teaching motorcycle safety courses must use MSF curriculum or its equivalent. Joe Dawes is well-versed on MSF curriculum and uses it daily to teach his students at Midlands Technical College. The exclusion of this evidence from consideration by the jury was contrary to the caselaw. Furthermore, the exclusion of Joe Dawes opinions relying on admissible evidence, the MSF curriculum, was in error as well. A new trial should be granted based upon this ground.

The Court allowed Plaintiff to present numerous witnesses to testify regarding Christie Valenzuela's lifestyle and family relationships. This was in error pursuant to Rule 403, *SCRPC*, which states that "needless presentation of cumulative evidence" should be excluded. The jury was asked to endure several hours of presentation of the loss of Christie Valenzuela which was prejudicial since the central issues in the case was whether or not Michael Valenzuela caused the death of his wife. A new trial should be granted on this basis as well.

Additionally, the Court erred in allowing the jury to consider evidence of punitive damages. The Plaintiff failed to present evidence of Defendant's grossly negligent, willful, wanton or reckless conduct. It was clear that the jury was confused by the question at the bottom of the verdict form as the jury held Plaintiff was not entitled to any punitive damages during the bifurcated portion of the trial. Plaintiff presented witnesses to testify about Defendant's conduct prior to August 7, 2009 that Defendant's scraper ran the stop sign. However, on August 7, 2009, Defendant's scraper did not run the stop sign. It stopped and yielded the right of way. Chris English testified that he instructed his employees to cross without coming to a complete stop when directed by the flagger that there was not any oncoming traffic and that this safety measure was to protect the public. The driver of the scraper was to keep a proper lookout, as well, for

oncoming vehicles. These suggestions do not indicate willful, wanton or reckless behavior. The Plaintiff failed to present any expert testimony regarding the proper conduct at an intersection such as this to establish that Defendant's actions violated any statute, regulation, code or any other authoritative guideline to establish that Defendant was reckless on August 7, 2009. The Court does not allow submission of speculative, theoretical and hypothetical views to the jury. *Wright v. Gilbert*, 227 S.C. 334, 88 S.E.2d 72 (1955). The jury was asked to speculate on whether the Defendant's conduct was grossly negligent, willful, wanton or reckless which is not appropriate since the Plaintiff had not presented evidence to establish that Defendant's conduct on August 7, 2009 was willful, wanton or reckless.

The Court erred in submitting the following jury charges as they were not proper and/or not based upon the facts in evidence and/or were misstatements of law. The Court charged the jury the stop sign statute codified at S.C. Code § 56-5-2330. This statute applies only to South Carolina Department of Transportation authorized stop signs and Plaintiff failed to present any evidence that Defendant had a duty to comply with said statute. The Court stated that the jury could find negligence per se based upon the failure to abide by this statute. This was clearly error and a new trial should be granted.

The Court also stated in the jury charges that the jury was to consider whether the Defendant was negligent in the overall operation of its scope of work at the Owens Corning landfill. This was also an incorrect charge and statement. The jury is the finder of facts. The jury could have found that they should only consider what happened on August 7, 2009 or it could have reviewed the entire operation. By the plain reading of the charge, the Court directed the jury to consider the operation as a whole which Defendant strongly submits is not only error but a coercive directive to the jury, and a new trial should be granted.

The Court erred in charging the jury on Sudden Emergency. In most jurisdictions, the Sudden Emergency doctrine has been absorbed into the comparative negligence statute. *See Sudden Emergency*, 8 POF3d 399. The facts as presented in this case did not support a charge for sudden emergency. First and foremost, sudden emergency is a defense not a cause of action. The failure to charge it as such was error. Additionally, the emergency in this case was brought about by Michael Valenzuela's own conduct and actions which is directly contrary to when a charge on sudden emergency should be given. *See* 8 Am. Jur. POF3d 399. Michael Valenzuela testified that he began braking, improperly, and waited and waited for the driver of the scraper to acknowledge him before laying the bike down. His failure to take evasive action sooner was the cause of the emergency. *See Druckenmiller v. Cluff*, 316 Ark 517, 8732 S.W.2d 526 (1994); *also Thomas v. Stairs*, 215 Ga App 288, 450 S.E.2d 326 (1994). Under South Carolina common law, there is no general duty to control the conduct of another. *Madison v. Babcock Center, Inc.*, 371 S.C. 123, 638 S.E.2d 650 (2006). The Defendant finding himself on one roadway has no separate duty to someone on a different roadway, hence, there could be no sudden emergency created by anything that the Defendant did on the separate roadway. This was clearly error and a new trial should be granted.

Additionally, the Court erred on the Sudden Emergency charge when the jury presented a question about Sudden Emergency and the Court failed to read the entire Sudden Emergency charge instead editorializing the charge in his own words leaving out pertinent portions which was highly prejudicial to the Defendant. This was clearly error and a new trial should be granted.

The Court denied the Defendant's request to charge the law on intent with respect to negligence. Plaintiff presented several witnesses to discuss the Defendant's intent on crossing

the intersection. It was an error for the Court not to instruct the jury on the applicable case law. Defendant requested that the Court charge the jury: Failure to exercise due care, not intent, is the critical element in negligence. *Snakenberg v. Hartford Casualty Ins. Co.*, 299 S.C. 164, 173, 383 S.E.2d 2 (Ct. App. 1989). A new trial should be granted for failure to charge the jury on this instruction.

The jury sent out a note after five (5) hours of deliberations asking when the Court would declare a mistrial because they were hung. The Court subsequently charged the jury on *Allen vs. Washington* and then the Court told them in no uncertain terms that they were to reach a verdict or the Court would bring them back on Saturday, Tuesday and Wednesday to continue deliberating until they reached a verdict. The Court further instructed the jury that they were to compromise. Defendant objected immediately stating this instruction was coercive, threatening and intimidating to the jury that they must reach a verdict which is contrary to the law. A jury may hang and is not to compromise on its beliefs. If the Plaintiff has not met its burden in the case, a juror must stand firm in his or her beliefs. The Courts comments after reading the *Allen* charge were inappropriate, improper and highly prejudicial to the Defendant and a new trial should be granted on this ground alone.

The jury's verdict was improper and excessive. The jury compromised on the finding of liability and actual damages as it had originally sent out a note indicating that it was a hung jury. The actual damages award was excessive based upon the note from the jury indicating that they were hung. Additionally, the Plaintiff's evidence was deficient in proving the amount of damages found by the jury. Plaintiff presented evidence of Christic Valenzuela's income of approximately \$28,000 as a bookkeeper at J.D. Lever Elementary School. Considering her life expectancy an award of \$2.9 million dollars is excessive to compensate the statutory

beneficiaries for this loss. Plaintiff did not produce an economist to detail financially how the loss of Christie Valenzuela would affect the statutory beneficiaries directly. The great majority of Christie Valenzuela's income would have been self-consumed by her own cost of living. The Plaintiff's evidence of actual pecuniary loss was insufficient to support the jury's actual damages award.

Furthermore, the jury's finding that the Plaintiff was **not** entitled to punitive damages indicates that it was confused and did not intend to find that Defendant's conduct was grossly negligent, willful, wanton or reckless. The jury was further confused as indicated by the note it sent to the Judge asking if the jury must find one or all of the factors of "grossly negligent, willful, wanton or reckless" and the Court indicated only one, also indicating they were not to consider grossly negligent. This was in error and confusing to the jury. The Court should grant a new trial absolute on this basis as well.

Lastly, the Court should grant a new trial based upon the Court's error in denying Defendant's motion to consolidate the instant case with the case captioned, Michael Valenzuela v. Same English Grading, Inc., Chris W. English and Jeffery Dwayne Lewis, bearing C/A NO.: 10-CP-02-01002, and based upon the Court's failure to grant its Motion for Continuance based in part on the denial of the Motion to Consolidate. The Supreme Court held in *Winchester v. United Ins. Co.* that:

"The general rule applied in ordering consolidations of causes at law is that the different actions shall be pending in the same court, at the same time, between the same parties, and involving substantially the same subject-matter, issues and defenses. Such is the holding in this jurisdiction in actions at law."

231 S.C. 288, 292, 98 S.E.2d 530 (1957). The Defendant's grounds for the motion to consolidate are that these cases both stem from the same motorcycle accident that occurred on

the same date, involving the same parties, and same witnesses. The consolidation of these cases will avoid unnecessary costs and delay and is in the interests of judicial economy. Failure to consolidate the cases is highly prejudicial to the Defendants due to the costs and potential for double recovery of damages by Michael Valenzuela, particularly as to emotional damages which are not distinguishable from wrongful death damages. The fact that the Court denied Defendant's motion to consolidate, and subsequent motion for continuance based thereon, was in error and ultimately a new trial should be granted.

For the reasons more fully discussed above, a new trial or new trial absolute should be granted by the Court.

C. Reduction in Actual Damages Award

Defendant is entitled to a reduction of the jury's actual damages award pursuant to S.C. Code Ann. § 15-38-15. The jury awarded \$2.9 million dollars actual damages to the Plaintiff and found Michael Valenzuela 35% comparatively negligent. As previously stated, the jury found that Plaintiff was not entitled to punitive damages. This finding on the subsequent verdict form indicates the jury did not intend to find that Defendant's conduct was "willful, wanton or reckless," nor grossly negligent, having already been instructed not to consider gross negligence.

D. Set-off:

Finally, the Defendant is entitled to a set-off pursuant to S.C. Code Ann. § 15-38-50(1) (Supp. 2009) by applying the full dollar amount of the settlement obtained by the plaintiff from the liability insurance carrier on the motorcycle involved in the accident, including the UIM carrier, to a reduction in the jury's actual damages award. Defendant has been informed by Plaintiff's attorneys that the total amount of the settlement was \$40,000, but asks the Court to inquire of Plaintiff's for verification of the amount so the set-off is properly applied.

The South Carolina Supreme Court has made clear that a statutory set-off is a mandate, not an allowance that the benefitting party must establish. *Ellis v. Oliver*, 335 S.C. 106, 113, 515 S.E.2d 268, 272 (1999). South Carolina law states, in pertinent part,

When a release or covenant not to sue or not to enforce judgment is given in good faith to one of two or more persons liable in tort for the same injury or the same wrongful death: (1) it does not discharge any of the tortfeasors liability for the injury or wrongful death unless its terms provide, but it reduces the claim against the others to the extent of any amount stipulated by the release or the covenant, or in the amount of the consideration paid for it, whichever is greater.

S.C. Code Ann. § 15-38-50(1) (Supp. 2009).

“The trial court’s jurisdiction to set off one judgment against another is equitable in nature and should be exercised when necessary to provide justice between the parties.” *Smalls v. South Carolina Dept. of Educ.*, 339 S.C. 208, 428 S.E.2d 682 (2000). (citing *Hawkins v. Pathology Assocs. of Greenville, P.A.*, 330 S.C. 92, 498 S.E.2d 395 (Ct.App. 1998)). “A set-off is not necessarily founded upon ‘any statute or fixed rule of court, but grows out of the inherent equitable jurisdiction’ of the Court; therefore, such motions are ‘addressed to the discretion of the court – a discretion which should not be arbitrarily or capriciously exercised.’” *Id.* (citing *Rookard v. Atlanta & Charlotte Air Line Ry.*, 89 S.C. 371, 376, 71 S.E. 992 (1911)).

The *Smalls* court explained the mechanics of a set-off by stating, “A nonsettling defendant is entitled to credit for the amount paid by another defendant who settles.” *Id.* The Supreme Court explained that the reason for allowing such a credit is to prevent an injured person from obtaining a second recovery of that part of the amount of damages sustained which has already been paid him. *Id.* Accordingly, how the judge applies the statutorily mandated set-off is within the courts equitable discretion, but since it shall not be arbitrarily or capriciously exercised, the plain language of the release should be strictly applied.

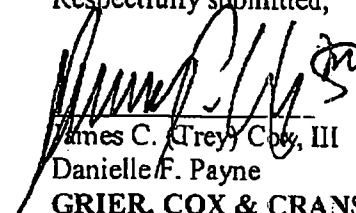
The South Carolina Court of Appeals interpreted the term "injury" broadly enough to include all damages, including those attributable to both survival and wrongful death causes of action, which result from the same negligence of the responsible parties. *Ellis v. Oliver*, 335 S.C. 106, 113, 515 S.E.2d 268, 272 (1999). However, the Court of Appeals indicated that a court may still consider the similarity between the cause of action for which the party seeks set off and the cause of action previously settled. *Id.* The reason for allowing such a credit is to prevent an injured person from obtaining a second recovery of that part of the amount of damages sustained which has already been paid to him. *Welch v. Epstein*, 342 S.C. 279, 312-13, 536 S.E.2d 408, 425 (S.C. Ct. App. 2000)(citing *Truesdale v. South Carolina Hwy. Dep't*, 264 S.C. 221, 213 S.E.2d 740 (1975)). In *Welch*, the Personal representative of deceased patient brought wrongful death and survival actions against neurosurgeon, alleging medical malpractice during post-operative care. Plaintiff settled with co-defendant for \$450,000. *Welch v. Epstein*, 342 S.C. 279, 536 S.E.2d 408 (Ct. App. 2000). The Court held that the trial judge's order complied with § 15-38-50 because there was one complete satisfaction for the injury suffered by Welch. *Id.* See *Ellis v. Oliver*, 335 S.C. 106, 515 S.E.2d 268 (Ct.App.1999)(trial court correctly reduced jury verdict for wrongful death and survival claims against doctor by \$140,000, amount of settlement with hospital, even though settlement constituted only the amount of medical bills and no evidence regarding these hospital bills was introduced in trial against doctor). The jury in *Welch* awarded \$28,535.88 on the survival claim, \$3,000,000 on the wrongful death claim and \$3,900,000 in punitive damages. *Id.* The Personal Representative previously settled with a co-defendant for \$445,00 for a survival claim and \$5,000 for a wrongful death claim. *Id.* The Trial Court reallocated the proceeds in the amount of \$28,535.88 for the survival action and \$421,464.12 in

the wrongful death action. *Id.* The Court noted that the Defendant was not a party to the settlement and was not bound by the settlement's terms. *Id.*

In determining the amount to be paid by the Defendant found liable, the jury verdict is reduced by the amount of the settlement allocated to each cause of action and then further reduced by the comparative negligence of the Plaintiff, if any. *Ellis*, 335 S.C. 106, 113, 515 S.E.2d 268, 272 : In a structured settlement, the off-set amount is limited to the actual cost that the settling defendant incurred. *Tubbs v. Bowie*, 308 S.C. 155, 160, 417 S.E.2d 550, 553 (1992) (observing that the plaintiff's acceptance of a lifetime annuity does not change the result.)

Applying the above principles to our instant case, the jury verdict of \$2,900,000 should be reduced by the settlement amount of \$40,000, resulting in a verdict of \$2,860,000. The post set-off verdict should then be further reduced by the 35% comparative negligence of Michael Valenzuela as discussed in section C of this memorandum. This would result in a reduction of the total damages to \$2,359,500.

Respectfully submitted,



James C. Grey, III
Danielle F. Payne

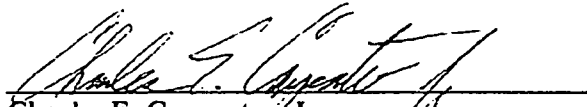
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September 14, 2012.

CERTIFICATE OF COUNSEL

The undersigned hereby certifies that this 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 5, 2014.

CERTIFICATE OF SERVICE

I, the undersigned, an employee of Carpenter Appeals and Trial Support, LLC, attorneys for Appellant, Sam English Grading, Inc., do hereby certify that I have this date served the foregoing , **Corrected Volume IV of the Record on Appeal** , by personally depositing a copy of the same in a United States Postal Service mailbox, postage prepaid, addressed to the parties indicated below:

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Dated: March 28, 2014.