THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM BERKELEY COUNTY
Court of Common Pleas

Roger M. Young, Sr., Circuit Court Judge
Kristi Lea Harrington, Circuit Court Judge

Appellate Case No. 2017-001563

Cynthia Wright and Richard Wright,. . . . . *Appellants*,

v.

South Carolina Department of Transportation, Pilot Travel Centers, LLC, Speedway LLC, Ashley Land Surveying, Inc., f/k/a Ashley Engineering & Consulting, Inc., and Munlake Contractors, Inc.,

RECEIVED
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SC Court of Appeals

Of whom

South Carolina Department of Transportation, Pilot Travel Centers, LLC, Speedway LLC, and Ashley Land Surveying, Inc., f/k/a Ashley Engineering & Consulting, Inc. . . . .*Respondents.*

INITIAL BRIEF OF RESPONDENT PILOT TRAVEL CENTERS, LLC

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STATEMENT OF ISSUES ON APPEAL

I. WHETHER THE CIRCUIT COURT ERRED IN GRANTING SUMMARY JUDGMENT TO RESPONDENT PILOT TRAVEL CENTERS, LLC.

STATEMENT OF THE CASE

On March 31, 2014, Appellants filed a negligence and loss of consortium action against Pilot Travel Centers, LLC ("Pilot") and the South Carolina Department of Transportation ("SCDOT") arising from a motor vehicle accident that occurred on Highway U.S. 17A (the "Highway") in front of a Pilot Travel Center gas station ("Pilot Travel Center") owned by Pilot. The accident involved an intoxicated driver traveling in the opposite direction of the Appellants on the Highway who drove his truck into the Appellants' motorcycle while attempting to make a left hand turn into one of the Pilot Travel Center's entrances. Appellants subsequently filed a separate action arising from the accident against Speedway LLC[1] ("Speedway"), Ashley Land Surveying, Inc.[2] ("Ashley"), and Munlake Contractors, Inc.[3] The two actions were consolidated.

Appellants allege that the accident would not have occurred had there been a solid raised median in the Highway preventing motorists from making a left-hand turn onto Pilot's premises, and that the absence of such a median created a dangerous condition on the Highway. Appellants also contend that the location and design of Pilot's driveway created a dangerous condition on the Highway.

Pilot filed a Motion for Summary Judgment on May 12, 2016, based on the grounds that Appellants failed to present evidence sufficient to raise a genuine issue of material fact that Pilot owed them any duty or breached any duty owed, or, that any alleged negligent act or omission on the part of Pilot proximately caused Appellants' injuries. After a hearing on April 10, 2017, the

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[1] Speedway is the successor in interest to Speedway SuperAmerica, LLC, which owned the gas station located on the subject real property prior to Pilot acquiring this property in September 2001.

[2] Ashley Land Surveying, Inc. is an engineering firm Pilot retained to assist with obtaining an encroachment permit from SCDOT as part of Pilot's construction of the Pilot Travel Center.

[3] Munlake Contractors, Inc. was the general contractor of the Pilot Travel Center.

Honorable Roger M. Young, Sr. entered an order on May 4, 2017, granting summary judgment to Pilot. Judge Young held that Pilot did not owe Appellants any duty to support their negligence claims. Appellants filed a timely Motion to Alter or Amend Judgment pursuant to Rule 52, SCRCP and Rule 59, SCRCP, alleging that the Court erred in finding Pilot did not owe them a duty and arguing that genuine issues of fact remained concerning Pilot's breach of a duty and on the issue of proximate cause. Appellants' Motion to Alter or Amend Judgment was denied on June 8, 2017.

SCDOT, Speedway and Ashley filed their own motions for summary judgment in May and June 2017. These motions were heard by the Honorable Kristi Lea Harrington and, ultimately, granted. Appellants served a timely Notice of Appeal on July 19, 2017.

STATEMENT OF THE FACTS

This action arises from a motor vehicle accident that occurred on October 6, 2012, while Appellants were traveling North on the Highway in front of a Pilot Travel Center owned by Pilot. Appellant Richard Wright was driving the motorcycle, and his wife, Cynthia Wright, was riding as a passenger. The Appellants were traveling in the left lane when a pick-up truck traveling in the opposite direction stopped in the median with its left blinker on and suddenly turned left into the side of Appellants' motorcycle while attempting to turn into the driveway to the McDonald's restaurant attached to the Pilot Travel Center. The pick-up truck was driven by Daniel Sena (Sena), who was under the influence of alcohol and cocaine.[4]

Appellants contend that the accident would not have occurred had there been a raised, non-transversable median in the Highway that prevented motorists traveling southbound from making a left-hand turn onto Pilot's premises. Appellants also allege the location of Pilot's driveway on

[4] Sena admitted in his deposition that he was under the influence of alcohol and cocaine, (Daniel Sena Dep., May 6, 2015, at 122:20-24), and pled guilty to two counts of felony DUI, (Sena Dep. at 89:7-21).

the Highway caused the accident. Sena testified that the accident was his fault and that Pilot was not to blame for his actions that night. (Sena Dep. 108-09). According to Sena, the fact that there was no solid raised median in the Highway does not negate the fact that it was his actions that led to the collision with Appellants' motorcycle. (Sena Dep. 118-19). Sena testified that his failure to yield "was just bad judgment." (Sena Dep. 106).

I. History of the Pilot Travel Center

Pilot constructed the subject Pilot Travel Center in or around 2002 after acquiring the real property and existing gas station from Defendant Speedway, LLC in or around September 2001. (Bill Mulligan Aff. ¶¶ 5, 9). The existing gas station had three driveways with access to the Highway, and there was no raised non-transversable median in the Highway preventing left turns into the existing gas station from the southbound lane. (Bill Mulligan Aff. ¶ 7).

In order to construct the driveways to the Pilot Travel Center, Pilot had to submit an application to the South Carolina Department of Transportation (SCDOT) for an encroachment permit. (Bill Mulligan Aff. ¶ 8). SCDOT had to approve the design and location of the driveways to Pilot's property before issuing Pilot the encroachment permit.[5] In May 2002, Pilot submitted an application to SCDOT for an encroachment permit, seeking approval of the location and design of its proposed driveways. (Bill Mulligan Aff. ¶ 8). SCDOT approved Pilot's application and issued Pilot an encroachment permit to construct the driveways to the Pilot Travel Center. *Id.*

II. History of Highway U.S. 17A and the Median

At no point since the original construction of the Highway has there ever been a raised, non-transversable median in the portion of the Highway where this accident occurred. (Rule

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[5] Although the original gas station on the property had driveways allowing for ingress and egress directly from the highway, the driveways to the property were relocated as part of Pilot's rebuild. (Bill Mulligan Dep., July 14, 2016, at 10:11-18)

30(b)(6), SCRCP, Dep. of SCDOT, Leland Colvin Jr., March 13, 2017, at 256:7-21). Rather, the median in front of Pilot's property has always been a painted flush median, which allows motorists traveling in either direction to make left turns into the businesses abutting this portion of the Highway (on both sides). (Colvin Dep. 255-56).

In the late 1990s and early 2000s, SCDOT engaged in two separate highway projects that modified the portion of the Highway in front of the Pilot Travel Center. The first project was widening the section of the Highway directly in front of the Pilot Travel Center (the "Widening Project"), and the second project involved reconstructing the intersection of I-26 and the Highway that was adjacent to the Pilot Travel Center (the "Interchange Project"). (Colvin Dep. 50:18-51:23). These projects were initiated by SCDOT, not Pilot. (Colvin Dep. 51:1-5). The design plans for the Widening Project were prepared internally by SCDOT staff in 1998. (Colvin Dep. 51:24 – 52:15). SCDOT hired an outside firm to design the Interchange Project, and the plans for this project were prepared in 1999. (Colvin Dep. 253:13-16, 260:7-11). Importantly, the scope of the Interchange Project did not concern the portion of the Highway where the Appellants' accident occurred. Rather, the Interchange Project involved reconstructing the intersection adjacent to the Pilot Travel Center and the portion of the Highway on the opposite side of the intersection. (*See* Colvin Dep. 51:6-51:23).

According to SCDOT, the design plans for the Widening Project never included the installation of a raised median in front of the Pilot Travel Center. (Colvin Dep. 253:17-254:3). The original design plans for the Interchange Project, which were prepared by an outside firm, did show a raised median in front of the Pilot Travel Center. (Colvin Dep. 254:21-255:2). However, SCDOT testified that the inclusion of the raised median in the original design plans for the Interchange Project was simply a "placeholder" until SCDOT ultimately merged its Widening

Project plans with the Interchange Project plans.[6] (Colvin Dep. 254:21-255:10, 257:6-14). There was never an expectation that there was going to be a raised median in front of the Pilot Travel Center as part of the Widening Project.[7] (Colvin Dep. 260:16-21). Leland Colvin, the SCDOT program manager who oversaw the Widening Project and Interchange Project, (Colvin Dep. 9:23-10:2), testified that he was the one who made the decision to not add a raised median to the portion of the Highway in front of the Pilot Travel Center, and that this decision was made when the plans were prepared in 1998 (Colvin Dep. 283:20-284:8). According to Mr. Colvin, the decision to keep the painted flush median was made in conformance with SCDOT's Highway Design Manual, which SCDOT considers "the Bible" for designing highways in the state. (Colvin Dep. 254:4-20). He also testified that the installation of a raised median as part of the Widening Project would have been in contravention of the standards set forth in the SCDOT Highway Design Manual. *Id.*

[6] Leland Colvin was the SCDOT program manager for the Widening Project and Interchange Project. (Colvin Dep. 9:23-10:2). He served as one of SCDOT's 30(b)(6) deponents and testified that the "construction joint" for the two projects—i.e. the point on the Highway where the two projects met one another—occurred at the intersection of Farmington Road and the Highway. (Colvin Dep. 98:5-7). This construction joint was before the area where the accident occurred and was where the Interchange Project plans depicted a raised median. (*See* Hearing Transcript 13; Pilot's Mem. in. Supp. of Summ. J., Ex. B).

[7] Appellants claim numerous times throughout their Brief that the SCDOT design plans for the Widening Project initially called for a raised non-transversable median (*E.g.*, Appellants' Brief 3, 6, 13-14, 20). This repeated allegation is, at best, misleading. There is no admissible evidence in the record to indicate that SCDOT ever intended to use a non-transversable median to prevent left turns into Pilot's property. For example, on page 20 of Appellants' Brief, Appellants cite to the deposition testimony of Leland Colvin as support for the proposition that the original design called for the inclusion of a raised, non-transversable median. However, the testimony to which Appellants cites does not support this claim. To the contrary, the testimony cited concerns the design plan for the Interchange Project, not the Widening Project. (*See* Colvin Dep. 86:14-15). Mr. Colvin repeatedly stated that the plans for the Widening Project never contained a raised, non-transversable median, and that to the extent a raised non-transversable median was depicted on the plans for the completely separate Interchange Project, this median was simply a "placeholder". (*E.g.* Colvin Dep. 257, 262) Moreover, Appellants' citations to Mr. Leland's testimony to support the proposition on page 20 of their Brief that Pilot "raised concerns about the planned non-transversable median," is also a misrepresentation of Mr. Colvin's testimony. The testimony cited, which was subject to multiple objections, refers to Marathon Ashland, not Pilot. (*See* Colvin Dep. 80-81). Mr. Colvin testified that he did not recall ever speaking with anyone from Pilot regarding his decision to install a flush median, and there was no negotiation with Pilot regarding the median. (Colvin Dep. 99-100, 261:17-26).

Appellants filed the present negligence action against Respondents arising from their accident. Appellants allege that Pilot owed the driving public a duty to construct its driveway "in such a way as to prevent the existence of hazardous road conditions [on the Highway]" and was negligent for failing to construct and maintain its driveway "to prevent . . . [Appellants] from being stricken by other motorist[s] attempting to turn left across traffic . . .." (Compl. ¶¶ 38, 41(a)). Appellants also claim that Pilot is responsible for SCDOT's decision to utilize a painted flush median in the Highway.[8]

STANDARD OF REVIEW

"An appellate court reviews a grant of summary judgment under the same standard applied by the trial court pursuant to Rule 56, SCRCP." *Lanham v. Blue Cross & Blue Shield of S. Carolina, Inc.*, 349 S.C. 356, 361, 563 S.E.2d 331, 333 (2002). "Summary judgment is appropriate where it is clear there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law." *Brooks v. Northwood Little League, Inc.*, 327 S.C. 400, 403, 489 S.E.2d 647, 648 (Ct. App. 1997)(citing Rule 56(c), SCRCP). While the appellate court should review the evidence and inferences to be derived therefrom in a light most favorable to the non-moving party, *Lanham*, at 362, 563 S.E.2d at 333, summary judgment should be upheld where the evidence is susceptible of only one reasonable interpretation, *see Brooks*, at 403, 489 S.E.2d at 648 (citing *Clyburn v. Sumter County Sch. Dist. No. 17,* 317 S.C. 50, 52, 451 S.E.2d 885, 887–88 (1994)).

[8] At the time of the accident, there was a Hess gas station located directly across from the Pilot Travel Center. The entrances to the Hess gas station allowed motorists traveling northbound on the Highway to make left-hand turns onto its premises. (Colvin Dep. 278-279).

ARGUMENT

In order to prevail at trial, Appellants must establish that (1) Pilot owed them a duty; (2) Pilot breached that duty by a negligent act or omission; (3) and that Appellants' damages were proximately caused by this breach. *Hubbard v. Taylor*, 339 S.C. 582, 588, 529 S.E.2d 549, 552 (Ct. App. 2000). As will be discussed below, Appellants have failed to create a genuine issue of material fact regarding these essential elements of their claims.

I. THE TRIAL COURT PROPERLY HELD THAT PILOT TRAVEL CENTERS, LLC DID NOT OWE THE APPELLANTS A DUTY OF CARE.

Pilot did not owe Appellants any duty of care as alleged in the Complaint, and therefore, the trial court properly granted Pilot summary judgment. *See Hurst v. E. Coast Hockey League, Inc.*, 371 S.C. 33, 37, 637 S.E.2d 560, 562 (2006) ("The court must determine, as a matter of law, whether the law recognizes a particular duty. If there is no duty, then the defendant in a negligence action is entitled to a judgment as a matter of law.").

Appellants allege that Pilot owed them a duty of care to prevent them from getting in a motor vehicle accident in the Highway in front of its property. However, the Supreme Court of South Carolina has refused to recognize such a broad duty. *See Skinner v. S. Carolina Dep't of Transp.*, 383 S.C. 520, 524-25, 681 S.E.2d 871, 874 (2009) (noting that there is no general common law duty of care owed to travelers "on the part of an owner of property abutting a highway who neither possesses nor controls the highway."). To the contrary, a property owner whose land abuts a highway only owes a duty to travelers for highway conditions where the property owner "has undertaken an activity that creates an artificial condition on the highway which is dangerous to

travelers."[9] *Id.* As the trial court correctly held, the Appellants "cannot establish that Pilot engaged in an activity that created a dangerous artificial condition on the highway." (Order 5).

Here, Appellants allege that the dangerous condition that caused their accident was the painted flush median in the Highway that allowed Sena to make a legal left hand turn onto Pilot's premises. Appellants also contend that the location of the driveway on Pilot's property (that Sena was attempting to turn into at the time of the accident) created a dangerous condition on the Highway. However, neither the painted flush median or the location of Pilot's driveway impose a duty on the part of Pilot to prevent the Appellants' motorcycle from being hit by an intoxicated driver on the Highway.

A. Pilot Owed No Duty to Appellants Concerning the Median

Even if one assumes the painted flush median on the Highway in front of Pilot's property was dangerous to motorists, which is adamantly denied, Appellants have failed to establish that Pilot engaged in any activity that created the painted flush median. It is undisputed that a painted flush median has existed at this location long before the Pilot Travel Center was built on Pilot's property. (*E.g.*, Bill Mulligan Aff. ¶ 7). In fact, the pre-existing gas station at this location had three driveways with access to the Highway and motorists were able to make left hand turns into the property.[10] *Id.* Moreover, SCDOT testified that it made the decision to leave the painted flush median in place as part of the Widening Project and that this decision was made at the time the Widening Project plans were prepared in 1998. (Colvin Dep. 283:20-284:8). Therefore, SCDOT's

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[9] Examples of artificial conditions created by a property owner include spilling material on a roadway, emitting smoke that drifts over the highway, or creating traffic jams on the highway due to plant shift changes. *Skinner*, at 525, 681 S.E.2d at 874.

[10] There was also a gas station on the opposite side of the highway prior to the Widening Project that had driveways that allowed motorists traveling northbound on the highway to make left turns into the property. (Colvin Dep. 278-279).

testimony establishes that the decision to keep the existing painted flush median in the Highway was made prior to Pilot acquiring the subject property in September 2001. (Colvin Dep. 283:20-284:8; *see* Bill Mulligan Aff. ¶ 5). There is no evidence in the record that any decision regarding the type of median to place in this section of the Highway occurred after Pilot acquired the subject property. The timeline of events itself makes it impossible for the Appellants to establish Pilot was responsible for the absence of a raised non-transversable median in the section of the Highway in front of its property.

Notwithstanding the above timeline, Appellants argue that Pilot is responsible for the absence of a non-transversable median in the Highway because it "negotiated" with SCDOT to remove a non-transversable median from the Widening Project plans.[11] As evidence of this, Appellants rely solely on unauthenticated handwritten notes on a letter dated August 28, 2000, from an SCDOT official to a representative of Marathon Ashland Petroleum, LLC. As an initial matter, this letter and the handwritten notes are hearsay, and thus, inadmissible for purposes of challenging Pilot's motion for summary judgment. *See Hall v. Fedor*, 349 S.C. 169, 175-76, 561 S.E.2d 654, 657 (Ct. App. 2002) ("materials used to support or refute a motion for summary judgment must be those which would be admissible in evidence."); *Hansen v. DHL Labs., Inc.*, 316 S.C. 505, 510, 450 S.E.2d 624, 627 (Ct. App. 1994), *aff'd*, 319 S.C. 79, 459 S.E.2d 850 (1995) ("A genuine issue of fact ... can be created only by evidence which would be admissible at trial."). However, even if this document and the notes thereon were admissible, they do not evidence any "negotiation" between Pilot and SCDOT for several reasons. First, there is no evidence that the

[11] SCDOT testified that the Widening Project plans never called for a non-transversable median in the Highway in front of the Pilot Travel Center. (*E.g.*, Colvin Dep. 260:16-24, 262:19-24). Therefore, it is a misrepresentation to state that such a median was ever removed from the Widening Project plans. (*See* Colvin Dep. 256:22-257:5).

individual who allegedly wrote these notes was an employee or agent of Pilot.[12] In fact, Pilot did not even acquire the subject property until September 2001. (Bill Mulligan Aff. ¶ 5). Second, SCDOT testified that the decision to keep a painted flush median in front of the Pilot Travel Center was made in 1998, which is two years prior to the date of the letter on which the notes are written.[13] (*See* Pls. Mem. in Opp. To Pilot's Mot. For Summ. J., Ex. 9). Finally, SCDOT testified that it did not "negotiate" the removal of any median and that there was never any expectation that a non-transversable median would be placed in front of the Pilot. (Colvin Dep. 254). Therefore, to the extent Appellants rely on this inadmissible letter to create an issue of fact as to whether Pilot owed them a duty, such reliance is misplaced;[14] and Appellants cannot survive summary judgment based upon the argument that a jury could disbelieve the testimony of Mr. Colvin that no negotiations took place between Pilot and SCDOT concerning the median. *See Hoard v. Roper Hosp., Inc.*, 387

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[12] Appellants argue that Pilot is liable for the actions of Speedway because Pilot was a joint venture with Speedway. (*See* Appellants Brief 5, at n. 1). However, even if the joint venture somehow imputes liability on Pilot for Speedway's actions, which is denied, there is no legal basis to hold that Pilot is responsible for actions performed by employees of Speedway prior to the joint venture. According to Bill Mulligan, the joint venture was formed in 2001. (Mulligan Dep. 23:11-15, Ex. 1 to Pls. Mem. in Opp. Def. S.C. Dept. of Transp.'s Mot. for Summ J.).

[13] Even if for arguendo, the decision to use a flush median was made around the alleged date of the handwritten notes contained on the letter from SCDOT to the prior owner of the property, this date is still a year prior to Pilot acquiring the property. (*See id.*; Pls.' Mem. in Opp. to Pilot's Mot. for Summ. J., Ex. 9).

[14] Appellants attack the trial court's Order for citing a non-precedential proposition of law when it dismissed Appellants' argument that this SCDOT letter is evidence that Pilot "negotiated" the removal of a raised, non-transversable median. (Appellants' Brief 13-16). However, the proposition of law cited by the trial court—that a plaintiff must present evidence that amounts to more than mere speculation to survive summary judgment— has been cited by the South Carolina Court of Appeals. *See King v. Miller*, No. 2017-UP-325, 2017 S.C. App. Unpub. LEXIS 356, at *2 (Ct. App. Aug. 2, 2017) (*citing Harris Teeter, Inc. v. Moore & Van Allen, PLLC*, 390 S.C. 275, 299, 701 S.E.2d 742, 754 (2010). This proposition of law is also consistent with other court decisions. *See, e.g., Jackson v. Bermuda Sands, Inc.*, 383 S.C. 11, 17-18, 677 S.E.2d 612, 616 (Ct. App. 2009) (affirming summary judgment for defendant where plaintiff's assertions of liability were speculative and based upon conjecture). Moreover, Appellants misinterpret the trial court's Order as to the "speculation and conjecture" the trial court was referring to. The trial court was not referring to the letter specifically, but rather, to Appellants' counsel's "speculation that Pilot may have negotiated with SCDOT regarding the median as part of SCDOT's right-of-way acquisition of a portion of Pilot's property during the Interchange Project." (Order, at n. 7; *see* Hearing Transcript 37:19–38:4, 40:11–41:17, 46:1–24).

S.C. 539, 549, 694 S.E.2d 1, 6 (2010) ("One may not . . . avoid summary judgment by asserting that a jury may disbelieve uncontradicted evidence. . . . A plaintiff cannot create a genuine issue of material fact with the argument that the jury does not have to believe a witness.").

Additionally, the notion that Pilot is somehow responsible for "the 'removal' of a planned raised median" or that Pilot "chose the dangerous median," as Appellants allege in their Brief, (Appellants' Brief 6), not only belies the evidence in the record, it contravenes well-settled case law holding that the decision as to whether a raised median should be installed on a highway falls within the exclusive authority of SCDOT. *See Giannini v. S. Carolina Dep't of Transp.*, 378 S.C. 573, n. 1 (2008) (recognizing SCDOT has initial discretion to place median barriers on a highway); S.C. Code Ann. § 57-3-110 (1) ("The Department of Transportation shall . . .[have the power and duty to] lay out, build and maintain public highways and bridges, including the exclusive authority to establish design criteria, construction specifications, and standards required to construct and maintain highways and bridges."). This decision-making authority arises from SCDOT's police power and duty to plan, maintain, and operate the state's highway system. *See Brashier v. S. Carolina Dep't of Transp.*, 327 S.C. 179, 190-91, 490 S.E.2d 8, 14 (1997) *overruled on other grounds by I'On, L.L.C. v. Town of Mt. Pleasant*, 338 S.C. 406, 526 S.E.2d 716 (2000) (recognizing SCDOT's police power and duty to plan, maintain and operate the state highway system); *S. Carolina State Highway Dep't v. Wilson*, 254 S.C. 360, 365-66, 175 S.E.2d 391, 394 (1970) (noting that "the clear weight of authority from other jurisdictions is . . . that the construction of a median . . . is an exercise of the police power"); *S. Carolina State Highway Dep't v. Carodale Associates*, 268 S.C. 556, 561, 235 S.E.2d 127, 129 (1977) ("Re-routing and diversion of traffic are police power regulations.").

Simply put, SCDOT has ultimate control over the design and construction of highways and the placement of traffic control structures such as non-transversable medians. *See* S.C. Code Ann. § 57-3-110 (3) ("The Department of Transportation shall . . . [have the power and duty to] cause the state highways to be marked with appropriate directions for travel and *regulate the travel and traffic along such highways*, subject to the laws of the State[.] (emphasis added)). One need only review South Carolina's takings jurisprudence to recognize that a business owner whose land abuts a state highway cannot usurp the authority of SCDOT to construct a solid median on a that highway. *See e.g., Hilton Head Auto., LLC v. S. Carolina Dep't of Transp.*, 394 S.C. 27, 32, 714 S.E.2d 308, 311 (2011) (business owner not entitled to just compensation where SCDOT closed a median crossover on the highway that prevented customers from continuing to make an immediate left turn onto business premises); *Hardin v. S. Carolina Dep't of Transp.*, 371 S.C. 598, 641 S.E.2d 437 (2007) (SCDOT's decision to close a median crossover did not disturb business owner's property rights because business still had access to and from the public road system); *S. Carolina State Highway Dep't v. Carodale Associates,* 268 S.C. 556, 561, 235 S.E.2d 127, 129 (1977) ("[a] landowner has no property right in the continuation or maintenance of the flow of traffic past its property. Traffic on the highway, to which they have access, is subject to the same police power regulations as every other member of the traveling public.").

The trial court correctly recognized that SCDOT ultimately has the exclusive authority and control over the Highway, and that Pilot, as one of the property owners abutting the Highway, did not have a duty to maintain, repair or warn travelers of potentially dangerous conditions on the Highway over which it has no control.[15] (Order 7). As the trial court determined, the facts of the

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[15] Recognizing that SCDOT has exclusive authority and control over the Highway, the Court also correctly held that even if Appellants could show some form of "negotiation" between Pilot and SCDOT concerning what type of

present case are very similar to those in *Allen v. Mellinger,* 156 Pa. Cmwlth. 113, 625 A.2d 1326 (1993). In *Allen*, the plaintiffs attempted to make a left hand turn from the highway into the defendants' business premises when their vehicle was hit by a truck traveling in the opposite direction. *Allen*, at 115. Relying on Restatement (Second) of Torts §349[16], the *Allen* Court held that the business owners owed no duty to the plaintiffs to maintain the highway in a safe condition. According to the *Allen* Court, the Commonwealth owns the highway and "has the exclusive duty for the maintenance and repair of state highways." *Allen*, at 118. The court further rejected the plaintiffs' argument that the business owners' failure to erect signs, paint lines or place curbing or barricades in the store's parking lot to indicate to customers the safest place to enter the parking lot created a dangerous condition. *Allen*, at 119, n. 1.

Like the business owner in *Allen*, Pilot did not create a dangerous condition on the Highway. Even if the absence of a raised median was a dangerous condition, it was a condition on the Highway created by SCDOT. Medians are part of the highway[17] and subject to the control and authority of SCDOT; and the decision to install a painted median as opposed to a solid raised median on the Highway was within the exclusive province of SCDOT as the governmental agency

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median to install in the Highway as part of SCDOT's Widening Project, any such negotiation does "not impose a duty on the part of Pilot to the Plaintiffs." (Order 6).

[16] According to § 349,

> A possessor of land over which there is a public highway or private right of way is not subject to liability for physical harm caused to travelers upon the highway or persons lawfully using the way by his failure to exercise reasonable care
>
> (a) to maintain the highway or way in safe condition for their use, or
>
> (b) to warn them of dangerous conditions in the way which, although not created by him, are known to him and which they neither know nor are likely to discover.

[17] S.C. Code 57-3-120 defines "highway" as including "the entire area within the right-of-way" and "all other facilities commonly considered component parts of highways."

charged with the duty to design, maintain and operate the State's highways. SCDOT, not Pilot, has the duty to maintain medians. SCDOT, not Pilot, has the "duty to use reasonable care to keep streets and highways within its control in a reasonably safe condition for public travel." *Ford v. S. Carolina Dep't of Transp.*, 328 S.C. 481, 487, 492 S.E.2d 811, 814 (Ct. App. 1997). Thus, Pilot, as one of the landowners abutting the Highway, has no duty (or authority) to maintain, repair, or warn others of potentially dangerous conditions on the Highway over which it has no control.[18]

Appellants argue that *Allen* actually supports a finding of a duty on the part of Pilot because "Allen never suggests immunity for adjoining property owners that actively participate in creating dangerous highway conditions." (Appellants' Brief 13). It is unclear what Appellants mean by the phrase "actively participates;" however, Appellants cite to *Swieckowski by Swieckowski v. City of Fort Collins*, 923 P.2d 208, 211 (Colo. App. 1995) in support of establishing Pilot owed them a duty. *Swieckowski* is inapposite to the present case as it involved a situation where the abutting property owner actually designed and constructed the road, sidewalk and bicycle path at issue pursuant to a development agreement with the city. *Id.* at 211. Here, there was no such agreement between Pilot and SCDOT to design and construct the portion of the Highway where the accident occurred. There is also no evidence that Pilot was an "active participant" in the design or construction of widening the Highway in front of its property. To the contrary, the Widening Project was initiated, designed and constructed solely by SCDOT. The fact that Pilot may have benefited by SCDOT's design decisions with respect to the Widening Project does not mean Pilot was responsible for, or owed Appellants a duty in relation to, said decisions.

[18] SCDOT acknowledged during its Rule 30(b)(6) depositions that it owns and has control of the Highway, that it has the responsibility of maintaining highways in a safe condition and that it has the duty to investigate and determine whether changes need to be made to the highway. (Colvin Dep. 213, 269).

B. Pilot Owed No Duty to Appellants Concerning the Driveway

Appellants' argument that Pilot created a dangerous condition on the Highway by virtue of constructing a driveway to the property that was accessible by motorists traveling southbound on the Highway lacks merit. *See Skinner v. S. Carolina Dep't of Transp.*, 383 S.C. 520, 526 (evidence that it was motorists' utilization of the property owner's driveway that led to alleged dangerous condition on the highway was insufficient to establish business owner "created" a defect on the highway and did not create a duty on the part of the property owner). First, as the trial court correctly held, "having a driveway on the highway, in and of itself, is not an artificial condition as contemplated by South Carolina case law." (Order 9; *see also* Hearing Transcript 46:6-10). In arguing that the driveway was a dangerous condition on the Highway, Appellants misinterpret the South Carolina Supreme Court's decision in *Skinner*. The *Skinner* Court held that a property owner whose land abuts a highway only owes a duty to travelers for highway conditions where the property owner "has undertaken an *activity* that creates an artificial condition on the highway which is dangerous to travelers." *Skinner,* at 524, 681 S.E.2d at 873 (Emphasis added). Appellants focus on the phrase "artificial condition" but overlook the Court's reference to an "activity" undertaken by the property owner. The imposition of liability contemplated by *Skinner* is for artificial conditions resulting from business activity. This is evident from the types of artificial conditions cited by the *Skinner* Court as potentially imposing liability on a property owner: spilling material on a roadway, emitting smoke that drifts over the highway, or creating traffic jams on the highway due to plant shift changes. *Skinner*, at 525, 681 S.E.2d at 874. The *Skinner* decision does not contemplate that simply having a driveway with access to a highway creates a duty on the part of the property owner to prevent accidents that occur entirely on the highway.[19] *Cf. Rosas v.*

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[19] In their Brief, Appellants cite to *Keith v. Beard*, 219 Ga. App. 190, 464 S.E.2d 633 (1995) as evidence that a driveway can be considered an artificial condition. However, *Keith* is distinguishable from the facts of the case at

O'Donoghue, No. 03-5071, 2005 U.S. Dist. LEXIS 17165, at *19 (E.D. Pa. Aug. 17, 2005) *aff'd by Bradley v. O'Donoghue*, 216 F. App'x 150, 152 (3d Cir. 2007) (holding a business owner was not liable to a pedestrian who was hit by a motorist after the pedestrian entered the intersection from the business's driveway, and noting that the claim that the business's driveway was an artificially dangerous condition was a "dubious" one.)

Estes v. Peels, No. E1999-00582-COA-R3-CV, 2000 Tenn. App. LEXIS 641 (Ct. App. Sep. 21, 2000) is also instructive with respect to whether a business's driveway can serve as the basis for imposing liability on a property owner. In *Estes*, the plaintiff was injured on the public highway when a vehicle exiting a manufacturing plant abutting the highway failed to yield to the plaintiff's right of way. *Id.* At *2. The plaintiff sued the owner of the manufacturing plant, alleging that the driveway was inadequate and caused drivers to unsafely enter the public highway. *Id.* The *Estes* court held that the property owner owed no duty to protect a plaintiff from an accident that occurred off its premises. *Id.* at *22. The court found significant the fact that the plaintiff did not enter onto the abutting landowner's property, nor did she come into contact with any condition on the property. *See id.* at *18. The court further held that the decision of the motorist exiting the

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hand. First, unlike here, the driveway in *Keith* was not approved and permitted by the state's department of transportation. Second, *Keith* concerned a situation where the at-fault driver hit a motorist on the highway while pulling out of the unpermitted driveway. The plaintiff/motorist sued the property owner, alleging that the "driveway had insufficient sight distance and created a situation of poor visibility for traffic attempting to exit safely onto [the highway]." *Id.* at 635. The property owner also admitted that he knew about the alleged sight distance problem regarding the driveway prior to the accident. *Id.* Based upon the specific facts of the case, the *Keith* Court held that a driveway could be considered an artificial condition "in certain circumstances." *Id.* at 637. Importantly, unlike in *Keith*, the driveway at issue in this case was approved and permitted by SCDOT. Moreover, there is no evidence in the record that the driveway created a sight distance problem. To the contrary, Sena indicated that his failure to yield "was just bad judgment." Moreover, Richard Wright, who was driving the Appellants' motorcycle, indicated in his deposition that he saw Sena's truck prior to the accident, and that he made the decision not to slow down as he did not want to give Sena the impression that he was letting the truck turn. (Richard Wright Dep., August 11, 2015, at 70:4–13; Hearing Transcript 43:3-8).

driveway to pull out in front of the plaintiff was not attributable to any condition on the landowner's property. *Id.* at *19. Rather, the at-fault motorist "simply failed to yield to oncoming vehicles, in violation of [the motorist's] statutory duty." *Id.* The court held "there [was] nothing dangerous about the defendant's parking lot absent the failure of a driver to obey traffic laws and yield to oncoming traffic." *Id.* Moreover, according to the court, even if the conduct of the at-fault motorist was foreseeable, the landowner owed no duty "to prevent a driver from pulling out on a highway without yielding to oncoming traffic." *Id.* at *21. The *Estes* Court explained that imposing such a duty on the landowner would be an onerous burden, noting that the landowner "could not, without governmental approval, install lights or signs upon the highway to control traffic exiting its facility." *Id.* Additionally, the court emphasized that the landowner could not have prevented the plaintiff's injuries as the landowner "had no control over the instrumentality that caused [the plaintiff's injuries]; it could not prevent [the at-fault motorist] from failing to yield to oncoming traffic...." *Id.*[20]

Like the plaintiff in *Estes*, here, Appellants seek to impose liability on Pilot by arguing that Pilot's driveway itself was a dangerous artificial condition on the Highway. However, just like in *Estes*, there is nothing dangerous about Pilot's driveway absent the failure of Sena to obey traffic laws and yield to oncoming traffic. In fact, the only danger Appellants seem to allege concerning the location of the driveway is that traffic on the Highway was able to turn into the driveway from

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[20] Other courts have similarly held that a property owner does not owe a duty for accidents that occur off of the property owner's property. *See, e.g., Chouinard v. N.H. Speedway*, 829 F. Supp. 495, 503 (D.N.H. 1993) (holding that a property owner does not owe a duty to control traffic on the public way adjacent to its business or to guard against the negligent acts of third party tortfeasors on the public way over which the property owner has no control.); *Holter v. Sheyenne*, 480 N.W.2d 736, 738 (N.D. 1992) ("The key factor to finding that a property owner owes no duty to an injured party is that the owner has no control over the property where the injury occurred or the instrumentality causing the injury); *Ziemba v. Mierzwa*, 142 Ill. 2d 42, 52-53, 566 N.E.2d 1365, 1369 (1991) (holding property owner owed no duty to plaintiff who was hit by driver exiting property owner's driveway because it was not reasonably foreseeable "that a driver would exit his driveway without first ascertaining whether any traffic was approaching . . ..").

both directions.[21] However, the ability to turn into the driveway from either direction depends entirely on what traffic signals and/or traffic control devices are in the Highway—a responsibility that is exclusively SCDOT's.

Additionally, Appellants' argument that SCDOT's ARMS Manual serves as the basis of a legal duty is unavailing. In *Skinner*, the court rejected the plaintiffs' argument that SCDOT's ARMS manual was the source of a legal duty owed by an abutting property owner to motorists on a highway. Specifically, the *Skinner* Court determined that the ARMS manual's regulations concerning the need for an encroachment permit were not applicable because the property owner "did not need to seek such a permit" and "[SCDOT] did not exercise its authority and require them to obtain one." *Id.* at 523. To the extent *Skinner* suggests the ARMS manual could be a source of a duty, the situation the case seems to contemplate is where a property owner that is required to obtain an encroachment permit does not do so. *See id.* Here, Pilot did obtain an encroachment permit from SCDOT for the subject driveway, which was approved by SCDOT.

Moreover, SCDOT has the ultimate decision-making authority with respect to the placement and design of driveways. (*See* Colvin Dep. 274-76). According to SCDOT, driveway locations are part of the design of the highway. (Colvin Dep. 169:23–170:8). In order to construct or reconstruct a private driveway with access to a highway, a property owner must first obtain an encroachment permit from SCDOT. S.C. Code Ann. 57-5-1080; (Colvin Dep. 274). As part of the

[21] Appellants allege that Pilot's driveways were within the "functional area" of the intersection as evidence that Pilot's driveways were dangerous. Even if this was evidence that the placement of Pilot's driveways was dangerous, which Pilot adamantly denies, Appellants have provided zero evidence that the driveway Sena was attempting to enter on the date of the accident was within the functional area of the intersection. (*See* discussion *infra* Section II(B)). Appellants' own experts only go as far as saying the driveway is "too close to the functional area of the intersection." (Aff. of John Mark Teague, P.E. CPM at ¶ 9, Ex. 11 to Pls.' Mem. in Opp. to Summ. J.; Aff. of Richard M. Balgowan, P.E., P.P., CPWM, CPM at ¶ 9, Ex. 12 to Pls.' Mem. in Opp. to Summ. J.).

permitting process, SCDOT reviews the permittees' design plans to ensure compliance with SCDOT regulations and standards concerning the design and location of driveways. (Colvin Dep. 274-76). SCDOT also reviews a permittee's encroachment application to ensure driveways do not create any safety concerns or impede efficient traffic operations. (Colvin Dep. 48-50; ACCESS AND ROADSIDE MANAGEMENT STANDARDS, October 1996, at 5, Pilot's Mem. in Supp. of Summ. J., Ex. E). SCDOT "may deny any request for any permit for any driveway . . . which in [its] judgment . . . may create a hazard to the traveling public." S.C. Code Ann. 57-5-1090. Even after driveways are constructed, SCDOT has the authority to require "driveways be narrowed, widened, or removed in order to correct safety and operational problems." (ACCESS AND ROADSIDE MANAGEMENT STANDARDS, October 1996, at 6, Pilot's Mem. in Supp. of Summ. J., Ex. E). Thus, Pilot could not have constructed the driveways to its property unless SCDOT deemed them to comply with SCDOT's design standards and determined that they were safe for the public. Moreover, had the driveways been deemed unsafe to the public at any time over the nine (9) years between the completion of Pilot's gas station and the Appellants' accident, SCDOT had the authority to require Pilot to change them.

SCDOT had the ultimate decision-making authority with respect to the placement and design of Pilot's driveway, and there is no evidence that the driveway was constructed in contravention to the encroachment permit granted by SCDOT. Moreover, SCDOT, not Pilot, is responsible for maintaining rights of way. *See Skinner*, at 523 (noting that the ARMS manual also did not impose a duty on the property owner because it imposes responsibility for maintaining rights-of-way on SCDOT). Finally, SCDOT testified that the design guidelines in the ARMS manual do not represent hard-and-fast rules, but rather, are "suggestions" that the department will take into consideration when exercising its independent engineering judgment when evaluating

encroachment permits. (Rule 30(b)(6), SCRCP, Dep. of SCDOT, Robert Clark, March 13, 2017, at 17-18, 20, SCDOT's Mem. in Supp. of Mot. for Summ. J., Ex. C.). Therefore, the ARMS manual is not a source of any duty on the part of Pilot.

To the extent that Plaintiffs maintain that Pilot can be held liable for their injuries because Pilot had notice of the danger posed by motorists making left-hand turns onto its property[22] and failed to take any remedial action, no such affirmative duty on the part of Pilot existed. "An affirmative legal duty exists only if created by statute, contract, relationship, status, property interest, or some other special circumstance." *Rayfield v. S. Carolina Dep't of Corr.*, 297 S.C. 95, 100, 374 S.E.2d 910, 913 (Ct. App. 1988). Plaintiffs cannot establish any source of a duty such that Pilot had an obligation to affirmatively act.[23] Having notice of other accidents that had occurred on the Highway does not give rise to a duty to warn. *See Restatement (Second) of Torts* § 349 (landowner owes no duty to warn travelers of dangerous conditions in the highway which, although not created by him, are known to him). Moreover, foreseeability of an injury alone does

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[22] Appellants allege Pilot was on notice of the danger its driveways posed to motorists by virtue of prior motor vehicle accidents that allegedly occurred in and around the entrance to Pilot's property. Notwithstanding the fact that Appellants have failed to put forth any evidence that Pilot was on notice of these accidents, Appellants have failed to submit any admissible evidence establishing that these accidents were in any way caused by Pilot's driveway or the painted flush median. Appellants submitted a collision report to the trial court as an exhibit to their memorandum in opposition to Pilot's motion for summary judgment, alleging that the collision report was proof that more than 254 accidents occurred in the portion of the Highway in front of the Pilot Travel Center. However, there is no evidence in the record to establish that any of these accidents occurred as a result of the flush median or the location of the subject driveway. (*See* Hearing Transcript 21:1–22:1).

[23] Even if Pilot did owe Plaintiffs some duty to affirmatively act, as discussed above, Pilot did not have the authority to install a raised median or relocate the driveway on its property absent the approval of SCDOT. *See* S.C. Code Ann. 57-5-1080 (". . . it shall be unlawful for any person to open up, construct or reconstruct any private driveway . . . which is intended for use by any vehicles in entering or leaving such highway unless a permit for such driveway . . . shall have been obtained from the Department); *Estes*, at *20-21 (finding no duty owed by property owner and noting that property owner "could not, without governmental approval, install lights or signs upon the highway to control traffic exiting its facility[] [because][t]he responsibility for the placement and maintenance of traffic controls on the public way rests with the government, not a private entity . . ..").

not create a duty to act. *S. Carolina State Ports Auth. v. Booz-Allen & Hamilton, Inc.*, 289 S.C. 373, 376, 346 S.E.2d 324, 325 (1986).

Furthermore, from a public policy perspective, Appellants' attempt to impose liability on Pilot for a motor vehicle accident that occurred entirely on the highway and involved motorists—one of whom was under the influence of alcohol and cocaine—who were never even on Pilot's property, would have far-reaching implications. To hold that Pilot owes a duty to motorists like Appellants traveling passed its business property simply by virtue of having a driveway allowing for ingress from and egress to the highway would subject every property owner abutting a main thoroughfare to potential liability. This is an onerous burden for a property owner, particularly where the driveway is approved and permitted by SCDOT—the governmental entity responsible for designing our state's highway system and controlling traffic thereon. This burden is increased due to the fact that SCDOT is statutorily immune from liability for the design and location of driveways. *See S.C. Code Ann* 15-78-60(15). Property owners are therefore placed in a paradoxical position where they cannot design and construct driveways to their property without obtaining SCDOT's independent engineering judgment that the design and placement of said driveways comply with the Department's design and safety standards, but, due to the immunity granted to the Department, property owners are the ones left liable to motorists who are involved in accidents that happen to occur in front of these government-approved driveways. This burden is simply too onerous to impose a duty on property owners like Pilot. *See Estes*, at *20-21 (Ct. App. Sep. 21, 2000) (finding it would be too burdensome to impose a duty on a property owner to prevent a driver exiting its property from failing to yield to oncoming traffic); *Ziemba v. Mierzwa*, 142 Ill. 2d 42, 52-53, 566 N.E.2d 1365, 1369 (1991) (noting it would be an "intolerable burden on society" to impose a duty on a property owner to guard against an injury occurring off of his property where

the condition on his land "posed no danger to the plaintiff, absent the [at-fault driver] violating his own standard of care.").

C. The "Expert Affidavits" Submitted by Appellants are Inadmissible and Cannot Serve as the Basis for Establishing an Issue of Fact to Survive Summary Judgment

To the extent Appellants rely upon the affidavits of John Mark Teague and Richard M. Balgowan to support the existence of a duty owed by Pilot, such affidavits should be disregarded by the Court as their opinions as to the existence of a duty is inadmissible. "[O]pinion testimony, including that of an expert, which would be inadmissible if testified to at trial may not properly be set forth in an affidavit." *Baughman v. Am. Tel. & Tel. Co.*, 306 S.C. 101, 111, 410 S.E.2d 537, 543 (1991). "In general, expert testimony **on issues of law** is inadmissible." *Dawkins v. Fields*, 354 S.C. 58, 66, 580 S.E.2d 433, 437 (2003) (Emphasis in original).

Here, the testimony contained in the affidavits of Mr. Teague and Mr. Balgowan concern questions of law within the sole province of the trial court. Mr. Teague and Mr. Balgowan each attempt to offer testimony concerning the duty owed by Pilot. (*See* Aff. of John Mark Teague, P.E. CPM at ¶¶ 5-8, Pls.' Mem. in Opp. to Summ. J., Ex. 11; Aff. of Richard M. Balgowan, P.E., P.P., CPWM, CPM at ¶¶ 5-8, Pls.' Mem. in Opp. to Summ. J., Ex. 12). However, whether a duty exists and the scope of that duty are matters of law for the Court. *Miller v. City of Camden*, 317 S.C. 28, 31, 451 S.E.2d 401, 403 (Ct. App. 1994). Thus, Mr. Teague's and Mr. Balgowan's opinions on matters of law are irrelevant.

In *Dawkins*, the South Carolina Supreme Court addressed a Plaintiff's attempt to survive summary judgment based upon an expert affidavit containing primarily legal opinions:

> The Court of Appeals also concluded that the expert affidavit should have been considered by the trial court despite the fact that it contained an opinion on the ultimate issue. *Dawkins,* 345 S.C. at 31, 545 S.E.2d at 519. However, because Professor Freeman's affidavit primarily contained **legal** arguments and conclusions, we hold the trial court properly refused to consider the affidavit.

> . . . While it is true that "an opinion ... is not objectionable because it embraces an ultimate issue to be decided by the trier of fact," Rule 704, SCRE, Professor Freeman's affidavit inappropriately attempted to usurp the trial court's role in determining whether petitioners were entitled to summary judgment. *See O'Quinn v. Beach Assocs.,* 272 S.C. 95, 106-07, 249 S.E.2d 734, 739-40 (1978) (where expert testimony was offered to establish a conclusion of law, the Court held that the trial court properly excluded the testimony because that was within the exclusive province of the trial court).
>
> In general, expert testimony **on issues of law** is inadmissible. *See generally* Note, *Expert Legal Testimony,* 97 Harv.L.Rev. 797, 797 (1984); *see also Askanase v. Fatjo,* 130 F.3d 657, 673 (5th Cir.1997) (where the court disallowed a legal expert's opinion on whether corporate officers and directors breached their fiduciary duties because "[s]uch testimony is a legal opinion and inadmissible."); *United States v. Sinclair,* 74 F.3d 753, 758 n. 1 (7th Cir.1996) (commenting that Federal Rules of Evidence 702 and 704 prohibit experts from offering opinions about legal issues that will determine the outcome of a case).
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> . . .
>
> . . .. Here, Professor Freeman's affidavit reads as if it could have been respondents' oral argument to the trial court at the summary judgment hearing. Although Professor Freeman arguably offered some helpful, factual information, the overwhelming majority of the affidavit is simply legal argument as to why summary judgment should be denied. For that reason, we hold the trial court correctly refused to consider it, and the Court of Appeals erred in finding otherwise.

Dawkins, at 65-67, 580 S.E.2d at 436-37 (2003) (Emphasis in original) (internal footnote omitted).

Like the expert affidavit in *Dawkins*, the affidavits of Mr. Teague and Mr. Balgowan primarily consist of legal arguments and conclusions of law intended to usurp the trial court's role in determining whether Pilot was entitled to summary judgment. The existence of a duty and the scope of any such duty are questions of law for the court. Thus, the affidavits of Mr. Teague and Mr. Balgowan, which read as if they could have been Appellants' oral argument at the summary judgment hearing, are inadmissible and should not be considered by this Court.

In light of the foregoing, Appellants cannot establish that Pilot owed them any duty as a landowner abutting the Highway.

II. APPELLANTS HAVE FAILED TO CREATE A GENUINE ISSUE OF MATERIAL FACT THAT PILOT TRAVEL CENTERS, LLC BREACHED ANY DUTY OWED TO APPELLANTS.

While Pilot adamantly denies that it owed the Appellants any duty, even if such a duty was owed, the Appellants have failed to present any evidence to create a genuine issue of material fact that Pilot breached any duty as alleged in their Brief.

Appellants maintain that Pilot breached a duty owed to them in three general ways:

> (1) Pilot and SCDOT altered existing plans for a raised median across Highway 17 in favor of a less safe painted median more conducive to Pilot's business; (2) Pilot/Ashley pursued and SCDOT approved a plan for driveways that were too close together and too close to an adjacent intersection; and (3) Pilot and SCDOT did nothing to address the dangerous intersection they created despite readily-available evidence that the area had become a magnet for motor vehicle collisions.

(Appellants' Brief 18). The record does not contain even a scintilla of evidence to create a genuine issue of material fact that the above alleged breaches on the part of Pilot occurred.

A. There is No Evidence that Pilot Altered Existing Plans for a Raised Median in the Highway

The crux of Appellants' argument that Pilot is liable for their injuries rests upon the allegation that Pilot altered SCDOT's plans to install a raised, non-transversable median in the portion of the Highway in front of Pilot's property. However, not only is there zero evidence that Pilot was involved in the decision to keep the existing painted flush median in this portion of the Highway, the Appellants' allegation is based upon the false premise that the initial SCDOT design plans for the Widening Project ever included a raised median. To the contrary, SCDOT testified that it never intended there to be a raised, non-transversable median in this portion of the Highway. (*E.g.*, Colvin Dep. 254).

Appellants presented no admissible evidence to the trial court at the hearing on Pilot's motion for summary judgment to create an issue of fact as to whether SCDOT ever planned to

install a raised, non-transversable median in front of the Pilot Travel Center. The only admissible evidence concerning the use of a painted, flush median in the highway comes from the Rule 30(b)(6), SCRCP, deposition testimony of SCDOT. Leland Colvin, the SCDOT program manager who oversaw the Widening Project and Interchange Project for SCDOT, testified that SCDOT's initial design plans for the Widening Project did not contain a raised median. Moreover, Mr. Colvin testified that there was never an expectation that there was going to be a raised median installed in front of the Pilot Travel Center. (*E.g.*, Colvin Dep. 260:16-24).

Appellants rely on design plans for the separate SCDOT Interchange Project, which were created by an outside engineering firm, to argue that a raised median was initially planned to be installed in front of the Pilot Travel Center. However, as Mr. Colvin testified during SCDOT's Rule 30(b)(6) deposition, the depiction of a raised median on the initial Interchange Project plans was simply a "placeholder" on the plans until SCDOT could merge its Widening Project plans with those of the Interchange Project. (*E.g.*, Colvin Dep. 286). The scope of the Interchange Project had nothing to do with the portion of the Highway where the accident occurred, as the work associated with the Interchange Project ended at the intersection of Farmington Road and the Highway before the Pilot Travel Center. (*See* Hearing Transcript 13; Pilot's Mem. in. Supp. of Summ. J., Ex. B). The drawn raised median on the Interchange Project Plans (which were created by an outside engineering firm) concerned an area of the Highway that was outside the scope of the Interchange Project. Therefore, at best, it is misleading to argue that SCDOT's original design for widening the portion of the Highway in front of the Pilot Travel Center "called for the inclusion of a raised, non-transversable median running nearly the entire length of [the Pilot Travel Center]." (Appellants' Brief 19).[24]

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[24] Appellants cite to the testimony of Leland Colvin to support the allegation that the "original design called for the inclusion of a raised, non-transversable median running nearly the entire length of Pilot Travel Center's Highway 17

Even if Appellants could establish an issue of fact as to whether SCDOT's original design plans for widening the portion of the Highway in front of the Pilot Travel Center included a raised median, Appellants have failed to present any admissible evidence that Pilot altered SCDOT's design plans or otherwise requested that SCDOT remove a raised median from the design plans as alleged in their Brief. Appellants make the repeated assertion throughout their Brief that Pilot negotiated with SCDOT to ensure that the median in front of the Pilot Travel Center was not a raised one; however, they have presented no admissible evidence that any such negotiation took place. Instead, Appellants cite to objected testimony of Leland Colvin that does not support the allegation that any agent or employee of Pilot requested SCDOT to remove a raised median. (See Appellants' Brief 20 (citing L. Colvin Dep 80:16–81:5)). Appellants then cite to handwritten notes contained on a letter from SCDOT to the former owner of Pilot's property. However, as previously discussed, this letter, in addition to being inadmissible hearsay, does not create an issue of fact as to whether Pilot negotiated with SCDOT to remove a raised median from SCDOT's Widening Project design plans. (*See* discussion *supra* pp. 10–12). Mr. Colvin testified on behalf of SCDOT that no negotiation took place regarding SCDOT's decision to keep a flush median in the Highway instead of adding a raised median, but rather, the decision "was purely [an] engineering decision based on the Highway Design Manual." (Colvin Dep. 117:11–118:4, Speedway's Mem. in Supp. of its Mot. For Summ. J., Ex. A; Hearing Transcript 17:3–13).

Appellants admit that SCDOT denies that Pilot negotiated with the Department to remove a median. (Appellants' Brief, at n. 8). Nevertheless, Appellants argue that Mr. Colvin's testimony in this regard "cannot be considered the definitive word on the median selection process . . .." (*Id.*)

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frontage." (Appellants' Brief 19). However, the testimony to which Appellants cite concerns the design plans for the Interchange Project, not the Widening Project. (*See* Colvin Dep. 86:14-15).

However, Mr. Colvin was the Program Manager for the Widening Project and testified that he was the one who made the decision to keep the flush median in the Highway. (Colvin Dep. 99). Moreover, Mr. Colvin testified that he did not even recall having direct contact with the property owners of the property where the Pilot Travel Center was eventually built. (Colvin Dep. 100). There is no admissible evidence to rebut Mr. Colvin's testimony that the Department did not negotiate with Pilot to remove a median from SCDOT's design plans.

B. The Placement of Pilot's Driveway Did Not Breach Any Duty Pilot Owed to Appellants

Even if Pilot owed some duty to Appellants with respect to the placement of its driveway, which is adamantly denied, Appellants have failed to create an issue of fact that any such duty was breached.

Appellants allege that the driveway Sena was attempting to turn into on the date of the accident violated SCDOT's ARMS Manual. As an initial matter, Appellants' reliance on the ARMS manual is misplaced. SCDOT testified that the ARMS manual is one of several resources used by the Department when evaluating encroachment permits. (*See* Robert Clark Dep. 17:16-18:6, SCDOT's Mem. in Supp. of Mot. for Summ. J., Ex. C.). SCDOT also testified that it is impossible for all encroachments to be in exact conformance with SCDOT's various design manuals. (*See id.* at 34-35).

Moreover, the violations of the ARMS manual that Appellants allege have no relation to the accident itself. Appellants argue that the distance between the two driveways to the Pilot Travel Center on the Highway were not spaced in accordance with the ARMS manual. However, even if this were true, Appellants' do not provide any evidence that the distance between the two driveways contributed in any way to their accident. The accident did not involve a motorist exiting any of the driveways on Pilot's property. The Appellants also allege that the subject driveway was

within the "functional area" of the intersection. The "functional area" of an intersection is a "theoretical concept" that refers to the perception of motorists approaching an intersection and the area needed to allow motorists to navigate the intersection. (Robert Clark Dep. 11-13, Pls.' Mem. in Opp. To Pilot's Mot. For Summ. J., Ex. 7). SCDOT testified that the functional area of an intersection changes over time depending on traffic conditions. *Id.* Thus, it is difficult to know for sure what the functional area of the intersection was at the time Pilot's driveways were approved by SCDOT. (*See id.* at 11).

In the present case, there is no evidence that the driveway Sena was attempting to turn into on the date of the accident was within the functional area of the intersection. The Appellants seem to acknowledge this in their Brief, noting that SCDOT only testified that the driveway closest to the intersection—which is not the driveway Sena was attempting to turn into—could be considered within the functional area of the intersection. (Appellants' Brief 23; *see also* Colvin Dep. 173, Pls.' Mem. in Opp. To Pilot's Mot. for Summ J., Ex. 8). In fact, even Appellants' own experts cannot say that the subject driveway was within the functional area of the intersection. According to their affidavits, Appellants' experts only allege that Pilot's driveways "are **too close** to the functional area of the adjoining intersection." (Aff. of John Mark Teague, P.E. CPM at ¶ 9, Pls.' Mem. in Opp. To Pilot's Mot. for Summ J., Ex. 11; Aff. of Richard M. Balgowan, P.E., P.P., CPWM, CPM at ¶ 9, Pls.' Mem. in Opp. To Pilot's Mot. for Summ J., Ex. 12). Thus, setting aside the issue of whether having a driveway within the functional area of an intersection is a breach of any duty, which is adamantly denied, there is no evidence that the driveway at issue was actually within the functional area of the intersection at the time SCDOT used its independent engineering judgment and approved the placement of Pilot's driveway. (*See* Robert Clark Dep. 13:18-20, Pls.' Mem. in

Opp. To Pilot's Mot. for Summ J., Ex. 7) (noting that SCDOT uses its engineering judgment when reviewing an encroachment permit based upon the traffic conditions at the time).

The placement of Pilot's driveways were permitted and approved by SCDOT, which has the ultimate authority to designate the design and location of driveways in the right-of-way. Ultimately, it was SCDOT, not Pilot, who determined where Pilot could construct its driveways. SCDOT would not have approved the placement of Pilot's driveways if they did not comply with the Department's standards or if their placement would be unsafe to the public. (*See* Colvin Dep. 48-50, 274-76). SCDOT used its engineering judgment to determine that Pilot could construct the subject driveway to its property.

C. Appellants Cannot Establish Pilot Had Notice of Any Alleged Dangerous Condition Posed by the Median or Driveway

Appellants allege Pilot was on notice of the danger its driveways posed to motorists by virtue of prior motor vehicle accidents that allegedly occurred in and around the driveway to Pilot's property. However, Appellants have failed to put forth any evidence that Pilot was on notice of these accidents. Moreover, Appellants have failed to submit any admissible evidence establishing that these accidents were in any way caused by Pilot's driveway or the painted flush median. Appellants submitted a collision report to the trial court as an exhibit to their memorandum in opposition to Pilot's motion for summary judgment, alleging that the collision report was proof that more than 254 accidents occurred in the portion of the highway in front of the Pilot Travel Center. However, there is no evidence in the record to authenticate or explain the data in this collision report or to establish that any of these accidents occurred as a result of the flush median or the location of the subject driveway. (*See* Hearing Transcript 21:1–22:1; Pls.' Mem. in Opp. To Pilot's Mot. for Summ J., Ex. 14).

Even if Appellants could establish that Pilot was aware of accidents occurring in front of its property due to the flush median or driveway, as previously discussed, Pilot did not have the authority to make any changes to the median or its driveway. SCDOT, not Pilot, is responsible for planning, maintaining, and operating the state's highway system.

III. NO NEGLIGENT ACT OR OMISSION ON THE PART OF PILOT PROXIMATELY CAUSED APPELLANTS' INJURIES

In order to recover against Pilot, Appellants must establish Pilot's alleged negligence was the proximate cause of their injuries. *McKnight v. S. Carolina Dep't of Corr.*, 385 S.C. 380, 387, 684 S.E.2d 566, 569 (Ct. App. 2009). However, Appellants cannot establish any act or omission on the part of Pilot proximately caused their injuries.[25]

> When the cause of a plaintiff's injury may be as reasonably attributed to an act for which the defendant is not liable as to one for which he is liable, the plaintiff has failed to carry the burden of establishing the defendant's conduct proximately caused his injuries. For an intervening act to break the causal link and insulate the tortfeasor from further liability, the intervening act must be unforeseeable. Ordinarily, proximate cause is a question for the jury, but when the evidence is susceptible to only one inference, it becomes a matter of law for the court.

McKnight, at 387 (internal citations omitted).

Here, there is no evidence that any act or omission of Pilot proximately caused Appellants' accident. To the contrary, Sena himself testified that the accident was his fault and that Pilot was not to blame for his actions that night. (Sena Dep. 108-09). According to Sena, the fact that there was no solid raised median in the Highway does not negate the fact that it was his actions that led to the collision with Plaintiff's vehicle. (Sena Dep. 118-19). Sena testified that his failure to yield

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[25] Pilot argued Appellants could not establish proximate cause as a matter of law at the hearing on Pilot's Motion for Summary Judgment. (Hearing Transcript 26:9–27:21; *see also* Pilot's Mot. for Summ. J.; Pilot's Mem. in Supp. of Summ. J. 13–14). Appellants also raised the issue of proximate cause in their Motion to Alter or Amend Judgment. (Pls.' Mot. to Alter or Amend J. 3–4).

"was just bad judgment." (Sena Dep. 106). Even Appellant Cynthia Wright acknowledged that she could not say whether the presence of a raised non-transversable median would have prevented the accident. (Cynthia Wright Dep., February 26, 2015, at 69:10–13). According Cynthia Wright, she believes Sena "was determined to go to McDonald's regardless . . .." (Cynthia Wright Dep. 69:2–3). Cynthia Wright also testified that Sena bears responsibility for hitting her and her husband. (Cynthia Wright Dep. 68:17–20)

Moreover, Sena admitted that he was under the influence of alcohol and cocaine at the time of the accident. (Sena Dep. 122). Thus, even if there was some causal connection between some alleged negligent act or omission on the part of Pilot, both of which are adamantly denied, Sena's decision to drive under the influence of alcohol and cocaine and to fail to yield to oncoming traffic was an intervening act and the proximate cause of the Apellants' accident. *See Stephens v. CSX Transp., Inc.*, 415 S.C. 182, 204, 781 S.E.2d 534, 546 (2015) (noting that the fact plaintiff consumed alcohol and prescription medication prior to driving her vehicle was not reasonably foreseeable and could have served as the intervening cause of the accident); *Ziemba v. Mierzwa*, 142 Ill. 2d 42, 52-53, 566 N.E.2d 1365, 1369 (1991) (holding at-fault driver's violation of his own statutory duty by failing to yield to oncoming traffic was not reasonably foreseeable).

Moreover, as has been discussed above, to the extent Plaintiffs allege that the failure to install a raised median proximately caused the accident, such a failure cannot be attributed to Pilot. SCDOT, not Pilot, has exclusive control over the Highway and the ultimate decision as to which type of median should be placed on a highway. The same is true with respect to the location of Pilot's driveway. SCDOT has the exclusive authority to determine where Pilot could place its driveways.

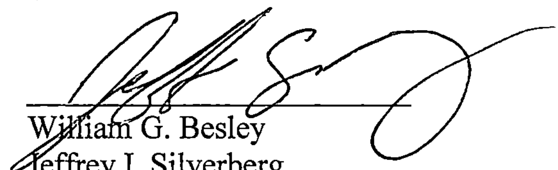
Additionally, even if Appellants could show that Pilot owed a duty to Appellants with respect to its driveway and that the driveway's location somehow breached some duty, all of which is adamantly denied, Appellants have not presented any evidence that the location of the driveway caused Sena to fail to yield to oncoming traffic. Sena, who was admittedly under the influence of alcohol and cocaine at the time of the accident, simply exercised "bad judgment" and violated his own duty of care by not yielding to the Appellants' motorcycle. (Sena Dep. 106; *see Rosas v. O'Donoghue*, 2005 U.S. Dist. LEXIS 17165, *20, 2005 WL 1993846, *aff'd*, *Bradley v. O'Donoghue*, 216 F. App'x 150 (3d Cir. 2007) (holding that the property owner's driveway was not the proximate cause of injuries sustained by a pedestrian who was hit by a motor vehicle after the pedestrian entered the intersection from the driveway)).

In light of the foregoing, Appellants cannot establish that any negligence on the part of Pilot proximately caused their injuries as a matter of law.

CONCLUSION

For the reasons discussed above, as well as for any other ground appearing on the record, Respondent Pilot Travel Centers, LLC respectfully requests this Court affirm the circuit court's grant of summary judgment.

Respectfully submitted,



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January 29, 2018.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM BERKELEY COUNTY
Court of Common Pleas

Roger M. Young, Sr., Circuit Court Judge
Kristi Lea Harrington, Circuit Court Judge

Appellate Case No. 2017-001563

Cynthia Wright and Richard Wright,. . . . . *Appellants*,

v.

South Carolina Department of Transportation, Pilot Travel Centers, LLC, Speedway LLC, Ashley Land Surveying, Inc., f/k/a Ashley Engineering & Consulting, Inc., and Munlake Contractors, Inc.,

Of whom

South Carolina Department of Transportation, Pilot Travel Centers, LLC, Speedway LLC, and Ashley Land Surveying, Inc., f/k/a Ashley Engineering & Consulting, Inc. . . . . *Respondents*.

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SC Court of Appeals

PROOF OF SERVICE

I certify that pursuant to Rule 208(a)(2), *SCACR*, I have served on Appellants and Respondents the *Initial Brief of Respondent Pilot Travel Centers, LLC* by having a copy of it deposited in the United States Mail, postage prepaid, on January 29, 2018, addressed to their attorneys of record at the following addresses:

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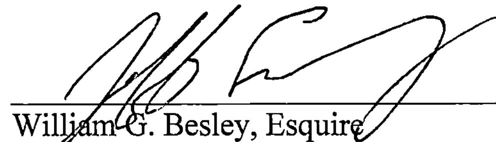

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SC Court of Appeals

VIA HAND- DELIVERY
The Honorable Jenny Abbott Kitchings
South Carolina Court of Appeals
1220 Senate Street
Columbia, South Carolina 29201

RE: Cynthia Wright and Richard Wright v. South Carolina Department of Transportation, C & A Unlimited, Inc. and Pilot Travel Centers, LLC
Appellate Case No.: 2017-001563
Our Matter No.: 372-012

Dear Ms. Kitchings:

Enclosed for filing, please find the following documents in the above-referenced matter:

1. An original and one (1) copy of the *Initial Brief of Respondent Pilot Travel Centers, LLC* and its *Proof of Service*; and
2. An original and one (1) copy of *Respondent's Designation of Matter to be Included in the Record on* Appeal and its *Proof of Service.*

Please return the clocked copies of these documents to me via our courier. By copy of this letter I am serving all counsel of record with a copy of these filings.

Please do not hesitate to contact me if you have any questions.

Sincerely,

Jeffrey I. Silverberg

JIS/grc
Enclosures
cc: Kevin B. Smith, Esquire
S. Randall Hood, Esquire
Jordan C. Calloway, Esquire
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