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 and Consulting, Inc., and Munlake Contractors, Inc.

Of Whom

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

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STATEMENT OF THE ISSUES ON APPEAL

1. Whether the circuit court erred in finding Respondents owed no duty for the dangerous median and driveways they planned, approved, and constructed.
2. Whether Respondents' breached their duties in the ways in which the dangerous median and driveways were planned, approved, constructed, and allowed to remain uncorrected.
3. Whether the circuit court erred in finding no question of fact on proximate cause despite evidence the collision injuring the Wrights would not have occurred had the median and driveways complied with governing safety standards.
4. Whether the circuit court erred in granting SCDOT summary judgment on its South Carolina Tort Claims Act defenses.

STATEMENT OF THE CASE

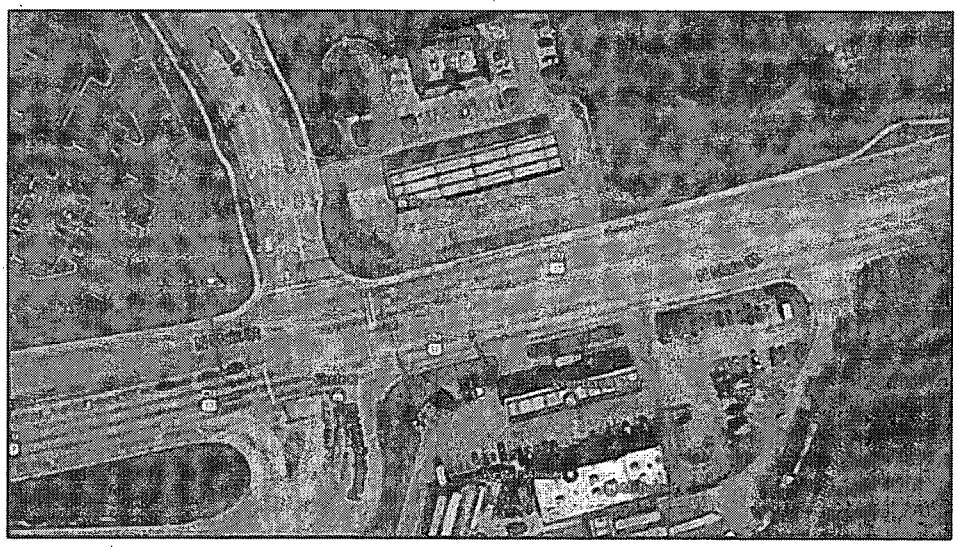
Appellants Cynthia and Richard Wright filed and served an action against the South Carolina Department of Transportation ("SCDOT"), Pilot Travel Centers, LLC ("Pilot"), and C & A Unlimited, Inc. for negligence and loss of consortium in the Berkeley County Court of Common Pleas on March 28, 2014. (R. pp. 18-31) The Complaint was amended May 1, 2014, and C & A Unlimited, Inc. was later dismissed by stipulation. (R. pp. 32-47) The Wrights filed and served a separate action against Marathon Petroleum Company, LP f/k/a Marathon Ashland Petroleum, LLC, Ashley Land Surveying, Inc. f/k/a Ashley Engineering & Surveying, Inc./Ashley Engineering & Consulting, Inc. ("Ashley") and Munlake Contractors, Inc. for negligence and loss of consortium in the Dorchester County Court of Common Pleas on October 1, 2015. (R. pp. 51-66) This Complaint was amended on March 10, 2016, to substitute Respondent Speedway, LLC ("Speedway") as a party for Marathon Petroleum Company, LP f/k/a Marathon Ashland Petroleum, LLC. (R. pp. 67-82) Munlake Contractors, Inc. failed to answer the Complaint and an order of default was entered against it. (R. p. 1). The actions were later consolidated in Berkeley County.

Pilot moved for summary judgment on May 6, 2016 and its motion was heard by the Honorable Roger M. Young, Sr. on April 10, 2017. (R. pp. 164-81). In an order received May 4, 2017, the circuit court granted Pilot's motion finding Pilot owed the Wrights no duty to support their negligence claims. (R. p. 11). The Wrights filed a timely motion under Rule 59(e), SCRCP on May 9. 2017, which was denied in an order for which the Wrights received written notice on July 14, 2017. (R. pp. 16-17). SCDOT, Ashley, and Speedway filed motions for summary judgment in May-June 2017. (R. pp. 244-593). The Honorable Kristi Lea Harrington held a hearing on these motions on June 6, 2017, and granted summary judgment in an order received on June

26, 2017. The order cited both a lack of duty and evidence of proximate cause to support claims against Ashley and Speedway. (R. p. 13). The order cited the South Carolina Tort Claims Act ("SCTCA") as the basis for granting summary judgment in SCDOT's favor. The Wrights filed and served a timely Notice of Appeal on July 19, 2017.

STATEMENT OF THE FACTS

Cynthia and Richard Wright suffered severe injuries after being thrown from their motorcycle in a collision on Highway 17 in Summerville, South Carolina on October 6, 2012. (r. p. 74 ¶¶ 27, 30). At this location, Highway 17 is a multilane surface road in a heavily traveled area near a "very busy" intersection and within a few hundred feet of an Interstate 26 interchange. W. Mulligan Dep. (R. p. 628, lines 2-3; 636, lines 18-19; 642 at 113, lines 8-9). At the time of the collision, the Wrights were traveling past Pilot Travel Center, a gas station and convenience store which also houses a McDonald's restaurant. A competing gas station and convenience store is located directly across the street.



Respondents Pilot and Speedway were part of a joint venture in 2001 that set out to redesign an existing gas station on the property to create a Pilot Travel Center. (R. p. 646 ¶¶ 5-6). During that process, Pilot and Speedway planned driveways to connect their premises to Highway 17 and,

through their construction agent Ashley, submitted an "encroachment permit" to SCDOT to facilitate the driveways' construction. (R. p. 647 ¶ 8; 653). Pilot, Speedway, and Ashley's design included three driveways to serve passenger vehicles and commercial trucks. In violation of its own rules, SCDOT approved the plan to construct one or more of these driveways in an area that was unreasonably close to an adjacent intersection. (R. p. 656 at 11, line 23 – p. 12, line 4; 669 at 169, lines 15-22; 670 at 173, lines 11-16). SCDOT also approved the plan despite the fact that the driveways were not the required distance from each other. (R. p. 657 at 30, lines 23-25).

Pilot and Speedway also learned SCDOT had a plan in place to install a raised, non-transversable median across the center of Highway 17 and running nearly the full length of Pilot Travel Center. (R. p. 675). A non-transversable median is specifically intended to increase safety for highway motorists by limiting left turns at locations that are either very busy or perilously close to an existing intersection. (R. p. 630, lines 6-7; 666 at 101, lines 9-25). Pilot and Speedway worried that the planned non-transversable median could harm its business by making it harder for potential customers to make a left turn in to its parking lot. (R. p. 633, lines 10-23). Accordingly, they discussed the issue with SCDOT and eventually "negotiated" a resolution that would remove the proposed non-transversable median and replace it with a flush, painted median. (R. p. 675).

As the Wrights rode along Highway 17 on October 6, 2012, a vehicle driven by Daniel Sena attempted a left turn across the painted median to which SCDOT improperly acceded and into one of the driveways SCDOT should not have approved. (R. p. 74 ¶ 29; 677). Mr. Sena did not see the Wrights and struck their motorcycle during his turn. According to Mr. Sena, if a non-transversable median had been installed in front of Pilot Travel Center, then it "could have prevented my accident and a lot more accidents and any more to come." (R. p. 644 at 119, lines 2-4.)

STANDARD OF REVIEW

To grant a motion for summary judgment, the circuit court must find that there is no genuine issue as to any material fact. Rule 56(c), SCRCP. The judge is not to weigh the evidence but rather to determine if there is a genuine issue for trial. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249 (1986). For claims where the preponderance of evidence burden applies, "the non-moving party is only required to submit a mere scintilla of evidence in order to withstand a motion for summary judgment." Hancock v. Mid-South Mgmt. Co., 381 S.C. 326, 330, 673 S.E.2d 801, 803 (2009). In determining whether any triable issues of fact exist, the evidence and all reasonable inferences must be viewed in the light most favorable to the party opposing summary judgment. Summer v. Carpenter, 328 S.C. 36, 492 S.E.2d 55 (1997); Pye v. Aycock, 325 S.C. 426, 480 S.E.2d 455 (Ct. App. 1997). Summary judgment is not appropriate where further inquiry into the facts of the case is desirable to clarify the application of the law. Brockbank v. Best Capital Corp., 341 S.C. 372, 534 S.E.2d 688 (2000). An appellate court "applies the same standard used by the [circuit] court" when reviewing a summary judgment order. Epstein v. Coastal Timber Co., 393 S.C. 276, 281, 711 S.E.2d 912, 915 (2011).

ARGUMENT

The Wrights were catastrophically injured in a motor vehicle collision that never should have happened. Daniel Sena was listed at the at-fault driver but the collision was also directly attributable to a series of poor decisions by the parties that constructed the highway on which he was traveling and the owner of property he was attempting to access. Pilot[1] did not own the highway adjoining its gas station/convenience store but played an integral role in determining how it would function. SCDOT effectively delegated a portion of its roadwork authority to Pilot and together Respondents swapped out a planned raised median in favor of a markedly less safe painted median and went forward with a plan for driveways that were effectively within a bustling intersection adjacent to an interstate off-ramp. Collisions were not just foreseeable, they became an unfortunate trend Respondents did nothing to address.

Having taken such a prominent role in shaping this stretch of highway, Pilot should not be allowed to hide behind SCDOT to avoid liability for dangers Pilot helped create. Nor should SCDOT be allowed to use the SCTCA as a shield when SCDOT violated its own standards by letting the median and driveway plans go forward. Admittedly, SCDOT offers an alternative explanation for how this roadway became so dangerous for motorists like the Wrights. But, SCDOT officials' self-interested denial of collaborations with Pilot should not have ended the

[1] Pilot Travel Centers, LLC and Speedway, LLC, were part of a joint venture for the gas station property at issue in this case. (Speedway Br. at 2 n. 2). Speedway was the brand name of an entity known as Marathon Ashland Petroleum, LLC that was also an active participant in designing and negotiating the gas station's driveways and the type of median across Highway 17 directly in front of the gas station. As parties to a joint venture, South Carolina partnership law applies to these entities. Tiger, Inc. v. Fisher Agro, Inc., 301 S.C. 229, 238, 391 S.E.2d 538, 543 (1989) (citing Polikoff v. Levy, 270 N.E.2d 540, 546 (Ill. App. 1971)). Individual partners are liable for partnership debts. Mansour v. Massey, 287 S.C. 176, 336 S.E.2d 15 (1985). Therefore, Pilot and Speedway are one and the same for purposes of the Wrights' claims. For brevity, this brief uses "Pilot" to reference both Respondents Pilot Travel Centers, LLC and Speedway, LLC unless otherwise noted.

Wrights' case when they offered documentary evidence showing Pilot "negotiated" the raised median right out of SCDOT's original plan. The most concerning part of the circuit court's orders is how they depart from basic summary judgment principles by choosing Respondents' version of events over the Wrights' and by dismissing as "speculation" a crucial record documenting the original plan for this roadway including how SCDOT allowed Pilot to change it. In sum, South Carolina law recognizes legal duties for parties in Respondents' position and a jury must resolve the parties' factual disputes over whether those duties were breached and whether those breaches caused the Wrights' losses.

I. The Circuit Court Erred in Finding Respondents Owed No Duty to the Wrights.

A. Pilot and Speedway's Duty

The circuit court ruled Pilot and Speedway had no duty because the median across Highway 17 was SCDOT's decision as part of its exclusive authority over highways, and they had no duty for the dangerous driveways because SCDOT issued a permit for them. These rulings violate basic summary judgment principles by ignoring evidence showing Pilot in fact chose the dangerous median. Moreover, the rulings err by construing SCDOT's authority over highways as providing immunity for private entities with whom SCDOT chooses to share its highway activities. Finally, the circuit court should be reversed because, by relying on SCDOT's mistakenly-issued permit to excuse Pilot's dangerous driveway plan, the ruling absolves Pilot of responsibility for driveways it knew or should have known to be against state safety standards.

Pilot altered both the entrances to its premises and a traffic control device on an abutting highway during the redesign of its gas station and convenience center. Specifically, Pilot "negotiated" for the "removal" of a planned raised median intended to limit left turns into Pilot's station and designed driveway entrances to the station that were both too close together and

improperly lying within the functional area of the intersection. (R. p. 675). Pilot's admitted goal was to make its location a more convenient and attractive option than neighboring gas stations. (R. p. 633, lines 10-23). However, Pilot's design specifications and construction choices created a foreseeable danger to motorists traveling through the already cramped intersection. Since Pilot's conduct violated established South Carolina common law standards and SCDOT regulations, Pilot breached a legal duty to the Wrights and is liable for their losses.

South Carolina law establishes that the owner of land adjacent to a highway may face liability when its conduct unreasonably creates danger for highway travelers. According to the Supreme Court's ruling in Skinner v. South Carolina Department of Transportation, 383 S.C. 520, 524, 681 S.E.2d 871, 873 (2009), South Carolina common law imposes liability "where an individual or business has undertaken an activity that creates an artificial condition on the highway which is dangerous to travelers." Moreover, when a property owner's conduct creates a foreseeable danger to others, the owner must mitigate or eliminate that risk even if otherwise under no duty to act. Faile v. S.C. Dep't of Juvenile Justice, 350 S.C. 315, 334 n. 8, 566 S.E.2d 536, 546 n. 8 (2002) (citing Restatement (Second) of Torts § 321). Additionally, long-standing common law rules hold that a highway's neighbor may not conduct activities on its own premises that unreasonably endanger motorists traveling on the highway. Skinner, 383 S.C. at 525, 681 S.E.2d at 874 (collecting cases from other jurisdictions imposing liability where "the conduct of the landowner's business has created an artificial condition on the highway").[2] Finally, the SCDOT Access and

[2] This same rule is recognized by the Restatement (Second) of Torts § 364 which reads as follows:

> A possessor of land is subject to liability to others outside of the land for physical harm caused by a structure or other artificial condition on the land, which the possessor realizes or should realize will involve an unreasonable risk of such harm if (a) the possessor created the condition, or (b) the condition is created by a third person with the possessor's consent or acquiescence while the land is in his possession, or (c) the condition is created by a third

Roadside Management Standards ("ARMS Manual") impose specific rules on the location of driveways the violation of which may serve as a basis for civil liability. Id. at 523, 681 S.E.2d at 873 (identifying ARMS manual as potential duty source but finding its regulations inapplicable to defendant before it).

At its core, Skinner stands for the proposition that property owners like Pilot must use reasonable care when creating an "artificial condition" on their property[3] or on the adjoining

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person without the possessor's consent or acquiescence, but reasonable care is not taken to make the condition safe after the possessor knows or should know of it.

[3] Skinner is consistent with rulings from a number of other jurisdictions permitting liability on property owner for condition on the owner's property that contributes to the injury of motorists on an adjoining highway. Keith v. Beard, 464 S.E.2d 633, 637 (Ga. App. 1995); see also Rosengren v. City of Seattle, 205 P.3d 909, 913 (Wash. App. 2009) ("a person in possession of land may owe a duty to others outside the land on the abutting sidewalk"); Walsh v. Avalon Aviation, Inc., 118 F. Supp. 2d 675, 677 (D. Md. 2000) ("an owner of property abutting on a highway is under an obligation to use reasonable care not to endanger travelers on the highway by objects so located on his premises that they are likely to cause injury"); Donavan v. Jones, 658 So.2d 755, 764 (La. App. 1995) ("an owner of property abutting a highway . . . may be liable for causing or contributing to a defective or dangerous condition in the area, despite the fact that a public authority is charged with maintaining the highway"); Lawson v. B Four Corp., 888 S.W.2d 31, 34 (Tex. App. 1994) ("an owner or occupier of premises abutting a highway has a duty to exercise reasonable care to avoid endangering the safety of persons using the highway as a means of travel"); Zens v. Chicago, Milwaukee, St. Paul & Pac. R. Co., 386 N.W.2d 475, 479 (S.D. 1986) ("if an abutting landowner creates a hazard or defect in a public roadway or appurtenant thereto, which could foreseeably cause or contribute to injuries sustained by those using the public highway, or reasonably straying therefrom, the abutting landowner can be liable for such injuries"); Schulz v. Quintana, 576 P.2d 855, 856 (Utah 1978) ("Once a highway has been established there is an obligation upon the occupiers of abutting land to use ordinary care to see that the passage way is reasonably safe for travel"); De Ark v. Nashville Stone Setting Corp., 279 S.W.2d 518, 521 (Tenn. App. 1955) (quoting 25 Am. Jur. Highways § 530 at 811) ("The general rule is that one who creates or maintains, on premises adjacent to a highway, a condition of such character that danger therefrom to persons lawfully using the highway may or should, in the exercise of ordinary care, be foreseen or apprehended is under a duty of exercising reasonable care"); Concho Constr. Co. v. Okla. Natural Gas Co., 201 F.2d 673, 674-75 (10th Cir. 1953) ("the owner of land abutting a public highway owes a duty to keep it from being a source of danger to the public or to travelers upon and lawful users of the highway"); Mays v. Gamarnick, 93 N.E.2d 236, 237 (Mass. 1950) (owner of land abutting highway "must exercise reasonable care to maintain his premises in a proper and safe condition so as not to cause injury to the public traveling on the way").

highway and may face liability when an artificial condition of their creation contributes to a passing motorist's injury. 383 S.C. at 524-25, 681 S.E.2d at 873-74. While Skinner does not define the term, "artificial condition" has been defined elsewhere to include both improperly designed or constructed driveways as well as an insufficient median. When used to describe a landowner's duty to highway motorists, "artificial condition" includes any "structure erected upon land" as well as "changes in the surface by excavation and filling." Restatement (Second) of Torts § 363 cmt. b. In fact, the only non-artificial (i.e. natural conditions) are those for which "the condition of the land has not been changed by any act of a human being." Id. A median, whether raised or painted, is not a naturally occurring phenomenon but rather a change in the surface of the roadway that lies squarely within the definition of an "artificial condition." The same is true of a driveway linking private property to the highway. A driveway is a structure erected upon land and has been specifically recognized as an artificial condition for landowner liability purposes. Keith v. Beard, 464 S.E.2d 633, 637 (Ga. App. 1995).

As the Supreme Court recognized in Faile, South Carolina common law also holds a party responsible for the foreseeable danger caused by harms the party created. 350 S.C. at 334, 566 S.E.2d at 546. Faile held that when a party's conduct creates danger for others, the party may be required to take affirmative steps to protect foreseeable victims. Specifically, Faile adopted a Restatement provision that reads in full:

> If the actor does an act, and subsequently realizes or should realize that it has created an unreasonable risk of causing physical harm to another, he is under a duty to exercise reasonable care to prevent the risk from taking effect.

Id. at 334 n. 8, 566 S.E.2d at 546 n. 8 (citing Restatement (Second) of Torts § 321). Accordingly, Pilot had a duty to ensure that its median alteration and driveway construction did not unreasonably endanger motorists on the highway and also had a duty to take affirmative action to mitigate the

danger once it became apparent through repeated collisions in the intersection. See also 65th Center, Inc. v. Copeland, 825 S.W.2d 574, 577 (Ark. 1992) (when owner of property adjoining highway creates condition that renders travel on highway unsafe, then owner "has a duty to take reasonable precautions to guard against the danger and to protect travelers from that danger"). Even if the Court were to find Pilot had no common law duty to make changes to Highway 17, Pilot undertook to do so by successfully negotiating for the planned non-transversable median's removal. Having voluntarily undertaken this task, Pilot had an affirmative duty going forward since Pilot's conduct "increased the risk" of harm to motorists. Restatement (Second) of Torts § 323.[4]

Skinner appears to recognizes the ARMS Manual as a source for a legal duty related to a private landowner's construction project that connects to a state highway. 383 S.C. at 523, 681 S.E.2d at 873. Skinner declined to impose a duty based on the ARMS Manual in the case before it but only because the manual's provisions did not apply to the defendant, a party who was not covered by the manual's "encroachment permit" provisions. Id.; see also Madison v. Babcock Center, 371 S.C. 123, 135, 638 S.E.2d 650, 656 (2006) (noting, in general, the role of "the common law, statutes, regulations, or [a state agency's] policies and guidelines" in determining a party's duty). The reconstruction project Pilot undertook in this case is covered by ARMS Manual requirements including those related to encroachment permits. As acknowledged by Pilot's Vice President for Development, Pilot submitted an encroachment permit for the project, and Pilot acknowledges the importance of industry standards including ARMS Manual requirements governing driveways and medians. (R. p. 627, lines 17-25; 635-39). Accordingly, ARMS Manual

[4] South Carolina recognizes Section 323 and has applied its principles in many different contexts. See e.g., Sherer v. James, 290 S.C. 404, 408, 351 S.E.2d 148, 150 (1986); Crowley v. Spivey, 285 S.C. 397, 406, 329 S.E.2d 774, 780 (Ct. App. 1985)).

standards state a duty and define the parameter of the duty Pilot was required to meet during the design and construction of its new facility.

In granting Pilot summary judgment, the circuit court cited SCDOT's statutory duty for the state's highways as an independently sufficient basis for finding Pilot had no responsibility for median selection. (R. pp. 7-8). This finding overlooks that SCDOT often chooses to carry out its highway construction authority through or in conjunction with a private entity or individual. When SCDOT so chooses and the resulting highway project exposes motorists to danger, liability accrues to SCDOT *and/or* the private entity. E.g. Dorrell v. S.C. Dep't of Transp., 361 S.C. 312, 316, 605 S.E.2d 12, 13-14 (2004) (noting SCDOT settlement and contractor liability for motor vehicle accident allegedly caused by contractor's negligent paving of state roadway); Citizens & Southern Nat'l Bank of S.C. v. Dickerson, Inc., 370 F.2d 692 (4th Cir. 1966) (affirming verdict against private company that widened road under contract with South Carolina State Highway Department).

Similarly, in Skinner, the court held that, even with SCDOT's expansive authority over state highways, "a contractor performing highway alterations owes a duty to travelers" for dangerous highway conditions it created. 383 S.C. at 524-25, 681 S.E.2d at 874. Skinner further held that adjoining landowners generally do not owe the same duty but only because they typically lack both "possess[ion]" and "control[]" over the highway. Id. While Pilot had no contract with SCDOT, there is no legal or practical reason for refusing to apply the duty recognized in Skinner in this case if SCDOT chose to delegate median selection to Pilot or to collaborate with Pilot on that decision. As discussed below, the Wrights presented evidence supporting the conclusion that Pilot was granted and actually exercised significant "control" over the median selection process

and, therefore, stands in a starkly different position than the passive adjoining property owner absolved in Skinner.

As these South Carolina precedents demonstrate, the key question is not the amount of statutory authority SCDOT has been granted over highways. See also Kraus v. Hy-Vee, Inc., 147 S.W.3d 907, 921 (Mo. App. 2004) ("That the government has a non-delegable duty to maintain the road does not preclude liability as to others who have assumed such a duty as well"); Donavan v. Jones, 658 So.2d 755, 764 (La. App. 1995) ("an owner of property abutting a highway . . . may be liable for causing or contributing to a defective or dangerous condition in the area, despite the fact that a public authority is charged with maintaining the highway"). Instead, this case turns on whether Pilot participated in the median selection process and, as a result, created a dangerous condition on the highway. Even the case law cited in the circuit court's order shows Pilot can face liability if a jury finds Pilot successfully negotiated for the replacement of a planned raised median. (R. pp. 8-9) (citing Allen v. Mellinger, 625 A.2d 1326 (Pa. Commw. 1993)). Allen held that an adjoining landowner owed no duty related to a dangerous highway condition by relying on a Restatement provision that bars liability for all adjoining landowners *except* those that create a dangerous highway condition. Id. at 1328 (quoting Restatement (Second) of Torts § 349) (eliminating liability only for adjoining landowner for highway danger "not created by him"). The very next Restatement section recognizes adjoining landowners may be liable for any highway dangers they had a personal role in creating.[5] Perhaps recognizing this distinction, Allen went on

[5] Restatement (Second) of Torts § 350 reads in full:

> A possessor of land over which there is a public highway is subject to liability for physical harm caused to travelers thereon by a failure to exercise reasonable care in creating or maintaining in reasonably safe condition any structure or other artificial condition created or maintained in the highway by him or for his sole benefit subsequent to its dedication.

to distinguish a prior Pennsylvania precedent where an adjoining property owner was charged with a legal duty to motorists because the property owner "actually erected" the offending traffic control device and "thereby creat[ed] the dangerous condition." 625 A.2d at 1329 and n. 7 (citing Colangelo v. Penn Hills Ctr., Inc., 292 A.2d 490 (Pa. Super. 1972)). Allen never suggests immunity for adjoining property owners that actively participate in creating dangerous highway conditions.[6]

This case is much more similar to Swieckowski v. City of Fort Collins, 923 P.2d 208 (Colo. App. 1995), where a government entity entered an agreement allowing an adjoining property owner to design and construct a portion of the highway along with its curbs, gutters, and sidewalks. Even though it was a public highway subject to government standards, the property owner owed a duty of care to motorists because the property owner was invited to participate in the highway's construction and was personally involved in creating the highway features that led to a bicyclist's fall and injuries. Id. at 213. Swieckowski further demonstrates the widely-held principle that, while passive property owners near a highway face no liability, a duty arises "when an adjacent landowner acts affirmatively to create a dangerous condition" on the highway while working alongside or with the permission of the highway's owner. Id.

Thus, there is no way to rule on Pilot's potential liability without determining whether Pilot was an active participant in the median selection process. The parties make very different arguments and present competing evidence on this crucial issue. The Wrights argue Pilot and SCDOT negotiated over the traffic control devices near Pilot's station and settled on a plan to replace a planned raised median with a painted median more conducive to Pilot's business

[6] See also 40 C.J.S. *Highways* § 254 (1991) (stating that a private landowner may be liable for a dangerous highway condition when the landowner has been "granted the right to construct or improve a public highway on proper authorization from the responsible public authority").

interests. Pilot counters by citing testimony from SCDOT's project manager Leland Colvin who denied any negotiations and claimed SCDOT alone chose a painted median for the area.[7]

The circuit court's order chose Pilot's argument over the Wrights', dismissing the Wrights' claim in a single footnote as relying exclusively on "speculation and conjecture." (R. p. 7 and n. 7) (citing Harris Teeter, Inc. v. Moore & Van Allen, PLLC, 390 S.C. 275, 299, 701 S.E.2d 742, 754 (2010)). However, the Wrights' supported their argument with a letter outlining a written discussion between Pilot and a SCDOT manager which, by its plain language, documents a "negotiated median removal" with SCDOT agreeing "the unmountable median has been eliminated from the plan" in favor of a "painted median only." (R. p. 675). Pilot points to Mr. Colvin's testimony, offering an alternative explanation by directly denying the negotiations recorded in the letter and by claiming a raised median had been chosen before the letter was ever drafted.

Presented with this conflicting evidence, the circuit court should have denied summary judgment. David v. McLeod Reg'l Med. Ctr., 367 S.C. 242, 250, 626 S.E.2d 1, 5 (2006) ("A court considering summary judgment neither makes factual determinations nor considers the merits of competing evidence"). The circuit court mistakenly relied on Mr. Colvin's testimony to the point of making it dispositive when that testimony actually demonstrates why summary judgment is not appropriate here. SCDOT's opposition to the letter's unambiguous language does not eliminate factual disputes, it creates them and those disputes preclude summary judgment. Montgomery v.

[7] Pilot also argues the letter documenting negotiations over the median cannot support a claim against Pilot because the letter was a communication between SCDOT and Marathon Ashland Petroleum LLC. (R. p. 675). However, according to Pilot's own representations, Pilot and Marathon Ashland Petroleum LLC were the same for purposes of this Pilot Travel Center. See (R. p. 649) (a letter from Pilot's project manager identifying Pilot as "a combination of Marathon Ashland Petroleum, LLC and Pilot Corporation").

CSX Transp., Inc., 376 S.C. 37, 54, 656 S.E.2d 20, 29 (2008) (finding the parties' dispute over evidence in record "simply establishes that summary judgment is not appropriate"). Moreover, SCDOT's denial of the letter's contents is entirely self-interested. Acknowledging the median was a concession to a business-minded neighbor rather than strictly a safety and efficiency decision further supports the Wrights' claim not only against Pilot but also against SCDOT itself. In other words, the circuit court dismissed out of hand a crucial piece of evidence because an individual with a personal interest in the litigation disputed its contents in a deposition. Dismissing a lawsuit under these circumstances was a significant departure from South Carolina summary judgment principles. A jury should decide whether Mr. Colvin's after-the-fact denials are sufficient to overcome the written record created contemporaneously with the relevant construction project.

The circuit court's reliance on Harris Teeter is also misplaced for several reasons. First, the circuit court cited Harris Teeter's non-precedential concurring/dissenting opinion signed by only one justice. (Order at 6 n. 7) (citing Harris Teeter, 390 S.C. at 299, 701 S.E.2d at 754 (Hearn J. concurring in part, dissenting in part)). Second, the language cited in the circuit court's order does not support Pilot's position as it argued the evidence in question was not speculation and conjecture but rather was sufficient to defeat a summary judgment motion. Harris Teeter, 390 S.C. at 302, 701 S.E.2d at 756. Third, Harris Teeter rejected as speculative proposed expert affidavits in a legal malpractice case. 390 S.C. at 290, 701 S.E.2d at 750. Expert affidavits are subject to evidentiary standards that do not apply to documentary evidence like the letter the circuit court ignored here. Id. (citing "admissibility standard for experts in professional negligence cases" as basis for rejecting affidavits). Expert testimony is different from other forms of evidence because it allows a person without personal knowledge of key events to offer conclusions rather than direct observations on crucial issues.

An expert cannot offer conclusions without first proving he has the requisite qualifications to make his testimony reliable. Rule 702, SCRE. The proposed experts in Harris Teeter attempted to offer conclusions on the legal acumen of an attorney without proving they were familiar with the applicable standard of care and without limiting their causation testimony to opinions held to a reasonable degree of certainty. 390 S.C. at 290, 701 S.E.2d at 750 (refusing to consider affidavit where proposed expert admitted his testimony was "speculation"). It was for these reasons that the affidavits and their opinions were rejected as conjecture and speculation. See also McKnight v. S.C. Dep't of Corr., 385 S.C. 380, 389-90, 684 S.E.2d 566, 570-71 (Ct. App. 2009) (rejecting speculative expert affidavit that could not meet causation standard for medical negligence claims). Here, however, the letter in question offers no opinions and there is no reason to write it off as speculation. In fact, it is the Wrights' argument that relies on the letter's plain language and Pilot's position that would require a factfinder to go beyond the letter's unambiguous statements in search of a more Respondent-friendly explanation for the dangerous median selection.

Therefore, the circuit court erred in finding Pilot owed no legal duty to the Wrights. While SCDOT has statutory authority over state highway, it chose to share that authority with Pilot, which must be accountable for the dangerous conditions it helped create. Respondents' disagreement with evidence of SCDOT-Pilot negotiations over the highway does not invalidate that evidence and cannot meet Respondents' burden to obtain summary judgment.

B. Ashley's Duty

For similar reasons, Ashley owed the Wrights a duty of reasonable care related to the Pilot Travel Center driveways. Pilot owned the land and initiated the project where the dangerous driveways were approved, but Ashley was the entity responsible for all relevant compliance issues. Ashley submitted an encroachment permit application that proposed driveways at Pilot Travel

Center that Ashley and Pilot knew or should have known were both too close together and in the functional area of the adjacent intersection. (R. p. 651). The permit was submitted by Pilot "c/o Ashley Engineering & Consultants, Inc." and Pilot is responsible for Ashley's conduct as much as it would be for its own employees. R & G Constr., Inc. v. Lowcountry Reg'l Transp. Auth., 343 S.C. 424, 432, 540 S.E.2d 113, 117 (Ct. App. 2000) (finding principal is bound by act of agent). Since the Wrights allege negligence claims, Ashley is also liable even though it represented itself as Pilot's agent. See Thomas v. Delta Enters., Inc., 302 S.C. 351, 396 S.E.2d 122 (Ct. App. 1990) (citing Lawlor v. Scheper, 232 S.C. 94, 101 S.E.3d 269, 271 (1957) (while an agent with a disclosed principal is not liable for contract claims, the agent is responsible in tort for its misconduct).

C. SCDOT's Duty

SCDOT has extensive duties for South Carolina roadways including that portion of Highway 17 in Berkeley County where the Wrights were injured. SCDOT expressly acknowledged these duties in the testimony of their designated corporate representative Leland Colvin. Mr. Colvin, who also served as program manager for multiple projects on Highway 17, testified that SCDOT has a duty to maintain the highway in a safe condition. (R. p. 390 at 213, lines 14-17). SCDOT also has an affirmative obligation to monitor highways to determine whether their physical state or traffic conditions have created dangerous circumstances for motorists. (R. p. 346, lines 16-20; 390 at 213, lines 22-25). If the department knows or should know of dangerous highway conditions, SCDOT has a duty to undertake any reasonable changes available to make the highway reasonably safe. (R. p. 390 at 213, lines 14-21). When performing these changes and in all other highway-related activities, SCDOT must follow industry safety standards including the

ARMS Manual. (R. p. 344 at 31, lines 9-13; 346 at 40, lines 8-16; 697-778). In light of SCDOT's admissions, the Wrights have properly demonstrated a legal duty owed by SCDOT.

II. Respondents Breached their Duties Regarding Pilot Travel Center's Driveways and the Median on the Adjacent Highway.

Pilot (and Ashley) planned, designed, and constructed a Pilot Travel Center to maximize a customer base by making customers' entry and exit to the facility as convenient as possible. However, to further this goal, Pilot and Ashley made strategic decisions about access to the Center that rendered the adjoining highway more dangerous both for its customers and all other motorists passing through. SCDOT was a full participant in this negligent conduct by effectively delegating a portion of its highway authority to Pilot and by approving plans SCDOT knew or should have known were in violation of industry standards. In sum, Respondents' breaches of duty fall in three general categories: (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; (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.

First, Respondents were negligent in their joint action of replacing a planned raised median with a painted median across Highway 17 at the precise spot where the Wrights' were ultimately injured. Highway 17 abuts the Pilot Travel Center a few hundred feet from where the highway meets Interstate 26 and presents a very busy intersection. (R. p. 642 at 113, lines 8-9) ("That's a very busy intersection"); 628, lines 2-3; 636, lines 18-19 (acknowledging intersection is "heavily traveled" and "high volume"); 673 at 229, lines 1-5 (agreeing this was a high accident rate intersection in 2013). At approximately the same time Pilot began designing and constructing Pilot

Travel Center, SCDOT had multiple projects underway to improve this heavily-traveled roadway. (R. p. 663 at 50-51). According to renderings and the testimony of SCDOT's Deputy Secretary for Engineering, 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 frontage. (R. p. 665 at 86, lines 14-15) ("at one point in time, the interchange plans showed a raised median"); 665 at 88, lines 16-24 (stating that raised median was in intersection project's "original design"). The planned median would have a beneficial effect on traffic flow by restricting the areas from which motorists could turn left into Pilot Travel Center. (R. p. 666 at 101, lines 9-25; 630, lines 6-7). More importantly, the proposed non-transversable median was a safety matter. (R. p. 668 at 141, lines 8-10 ("A nontraversable median cuts down on the number of conflict points compared to a flush painted median").

While the non-transversable median would have a net positive effect on traffic in the area, it would have a decidedly negative impact on the number of cars that patronize Pilot Travel Center. After all, for motorists travelling south on Highway 17, it would be far more convenient to turn right into Pilot's competitor station than to be forced further down the highway before finally turning left toward Pilot Travel Center. (R. p. 633, lines 10-23) (acknowledging strong competition for customers by stating "if it's hard to get in and out . . . they won't come because there's so many other choices"); 667 at 113, lines 1-4 (noting raised median was undesirable to property owner because it would "change . . . access to the premises"). Recognizing this potential threat to its profitability, Pilot took efforts to alter the proposed median design. See (R. pp. 693-94 ¶ 13) ("a monetary incentive is the only reason behind the removal of the concrete barrier in this case").

SCDOT was an equal participant in altering the original plan for a raised median across Highway 17 at Pilot's request. SCDOT's duty in maintaining highways and in approving

driveways that connect to highways require SCDOT to prioritize safety. SCDOT acknowledges a property owner's profit-driven preference for more expansive physical access to its premises cannot take precedence over motorist safety. (R p. 346 at 39, lines 3-7; 390 at 213, lines 11-17). 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 frontage. (R. p. 358 at 86, lines 14-15). Through meetings and correspondence with SCDOT officials during the encroachment permit process, Pilot conveyed their preferred design both for driveways linking their premises to Highway 17 and for the highway itself. (R. p. 356 at 80, line 16 – 81, line 5). Specifically, Pilot raised concerns about the planned non-transversable median. Id. SCDOT considered these concerns and the two sides reached a "negotiated" resolution. (R. p. 675). The primary result of that negotiation was a change in the design of the median fronting Pilot's property. At Pilot's behest[8], SCDOT:

> Approved to have painted median only from far western curb cut to stop bar (stop light). In other words, **the unmountable median has been eliminated from the plan**.

Id. (emphasis added).

Through this negotiation, Pilot effectively replaced a non-transversable median with one far more conducive to Pilot's business interest. Unfortunately, what benefited Pilot's business made Highway 17 far less safe for motorists like the Wrights. According to SCDOT, non-

[8] The Wrights acknowledge SCDOT asserts the change in median design was unrelated to its discussions with Pilot. (R. p. 358 at 88, lines 12-15). However, Mr. Colvin's statement cannot be considered the definitive word on the median selection process because he acknowledges Pilot and SCDOT discussed options for the median but he did not know the substance of that discussion. Mr. Colvin acknowledged the median type was part of discussions when SCDOT acquired the right-of-way needed to expand Highway 17, (R. p. 357 at 81). Pilot's VP of Development testified that he was unaware of whether there were earlier plans for a raised median. (R. p. 629, lines 11-22). In light of this testimony and the documentary evidence of a "negotiated" resolution regarding the median and the parties' differing accounts, this issue presents a question of fact that a jury must resolve.

transversable medians have the effect of a 35 percent reduction in traffic collisions. (R. p. 371 at 139, lines 1-9). The benefit of raised medians is evident from SCDOT regulations. (R. p. 724) (stating that "[d]ivided highways operate at higher levels of safety with a minimum of median crossovers" because "[a]dditional crossovers create more conflicts and can lead to higher accident experience"). The Wrights have also produced expert testimony further establishing that it was unreasonable under the circumstances to replace the planned non-transversable median with a flush painted median.

The first expert, John Mark Teague, is a civil engineer with extensive expertise in the field of intersection safety. (R. pp. 682-83 ¶¶ 2-3). Mr. Teague concluded that a non-transversable median at this location "would have significantly reduced the risk of harm" to motorists like the Wrights. (R. p. 686 ¶ 13). Additionally, Mr. Teague found that the absence of a non-transversable median rendered the intersection "unsafe." (R. p. 684-85 ¶ 9). The Wrights also presented an expert affidavit from Richard M. Balgowan, a civil engineer specializing in municipal and highway engineering. Mr. Balgowan stated that Pilot "owe[d] a duty to design a premises that utilizes reasonably safe ingress and egress so potential customers and persons on highways adjacent to a company's facility will not be needlessly placed in a risk of harm." (R. p. 691 ¶ 5). By negotiating to have the proposed non-transversable median removed from SCDOT's existing plans, Pilot did "the exact opposite" of what its duty required. (R. p. 694 ¶ 14). As both experts concluded, Pilot created an artificial condition by altering the proposed median design and, as such, breached its duty owed to Highway 17 motorists. (R. pp. 685-86 ¶¶ 11, 13, 15; 693-94 ¶¶ 11, 13, 14). By creating this artificial condition that led to the Wrights' injuries, Respondents breached their duties under South Carolina law and are liable for the Wrights' foreseeable injuries.

Second, Respondents breached their legal duties regarding the driveways leading to Pilot Travel Center. (R. pp. 684-85 ¶ 9). Pilot admits driveway placement affects motorist safety on an adjoining highway and poorly designed driveways are "detrimental to safety" on the highway. (R. p. 637, lines 8-11). As Mr. Colvin acknowledged, SCDOT must follow industry safety standards when considering the addition of driveways because "driveways have long been recognized as a major source of conflict for traffic on public highways." (R. p. 344 at 31 lines 9-13; 348 at 46, lines 20-25). The ARMS Manual is an essential component of the governing standards for driveway design and placement. (R. p. 346 at 40, lines 8-16).[9] The ARMS Manual contains specific requirements and limitations on where a driveway may be placed and, in the case of multiple driveways, how far each must be from each other. In general, ARMS requires all roadway access points including driveways to be located "as far from roadway intersections . . . as possible." (R. p. 716). Moreover, every driveway "shall be located at a point which provides optimum sight distance along the roadway." (R. p. 715 § 3A-3). The ARMS Manual includes a table outlining the acceptable minimum distances between driveways and states in clear terms that "[n]o access point shall be located within the radius of intersecting roadways." (R. p. 715 § Table 3-2, 716 § 3A-4). These statements are not mere suggestions or recommendations; they are mandatory rules. L. Colvin Dep. (R. p. 348 at 45, lines 20-25).

Fundamental among these rules is the express prohibition on driveways within the "functional area" of an intersection. Yet, two different SCDOT representatives testified that the Pilot Travel Center plan SCDOT approved violates this rule. SCDOT investigator Robert Clark

[9] Mr. Colvin also testified the ARMS Manual is an industry safety standards, its provisions are mandatory (except for limited exceptions) and that, in general, its requirements are "to be followed" when approving driveways connected to state highways. (R. p. 346 at 40, lines 4-16; 347 at 44, line 24; 345 at 45, lines 5-8).

testified that at least one of Pilot's driveways was in the functional area of the intersection. (R. p. 656 at 11, line 23 – 12, line 4). SCDOT Mr. Colvin agreed that one of Pilot Travel Center's driveways was in the functional area of the intersection and another was on the borderline. (R. p. 379 at 169, lines 15-22; 380 at 173, lines 11-16). Another fundamental ARMS Manual rule requires a certain minimum distance between driveways that varies based on the adjoining highway's speed limit. (R. p. 715 § Table 3-2). The portion of Highway 17 where the Wrights were injured has a 45 miles-per-hour speed limit, and as a result, Pilot Travel Center's driveways were required to be spaced at least 250 feet apart. Id.; R. p. 657 at 30, lines 16-22. Mr. Clark agreed Pilot Travel Center's driveways did not meet this standard. (R. p. 657 at 30, lines 23-25). This failure is crucial because the ARMS driveway spacing requirements Respondents breached are safety considerations. (R. p. 657 at 31, lines 1-10). This testimony from SCDOT's corporate representative establishes that SCDOT breached its legal duty by approving driveways and made the intersection more dangerous for motorists. The Wrights' experts also found that Pilot/Ashley's driveway design and construction made the intersection unsafe. (R. pp. 684-85 ¶ 9; 692-93 ¶ 9). Each expert found the driveways were too close to the functional area of the intersection and Pilot/Ashley had a duty to take some affirmative action to prevent left turns in this dangerous area.

Third, Pilot and SCDOT failed to properly respond to dangerous conditions they created through the median and driveway errors. Despite acknowledging its affirmative duty to monitor highways for dangerous conditions (R. p. 390 at 213, lines 22-25), SCDOT failed to take reasonable steps to determine the safety of the intersection where the Wrights were injured. For example, while annual safety analyses are typical for high traffic intersections, SCDOT did not conduct a single safety analysis of the subject intersection in the 10-year period (2003-2013) after the highway was widened and its capacity greatly increased. (R. p. 390 at 215, line 25 – 216, line

15. This failure is especially unreasonable given that all parties associated with this case agree the subject intersection was a heavily-traveled roadway at the time of the Wrights' injuries. R. p. 628, lines 2-3; 636, lines 18-19 (acknowledging intersection is "heavily traveled" and "high volume"); 394 at 229, lines 1-5) (agreeing this was a high accident rate intersection in 2013); 642 at 113, lines 8-9 (at-fault driver acknowledging "[t]hat's a very busy intersection").

When a safety analysis was finally conducted in 2013, it revealed an alarming number of collisions at the intersection involving left turns to and from the Pilot Travel Center. Over a period of four years from 2010 to 2013 (including the time of the Wrights' collision in 2012), there were 17 left turn collisions in this single intersection. (R. p. 391 at 219, lines 12-15). This finding (4.25 collisions/year) was evidence that something needed to be done to improve safety at this dangerous intersection. (R. p. 392 at 221, lines 18-25; 223, lines 13-25) (describing collision rate as "concern[ing]" and agreeing these numbers "mean something needs to change"). As a result of this belated safety analysis, SCDOT has planned for a "countermeasure" to make left turns safer in this intersection. (R. p. 392 at 224, lines 19-22). While it chose to address the situation with something other than a raised median, SCDOT acknowledged a raised median would have effectively addressed the spate of left turn accidents that have infected this intersection since the highway was widened. (R. p. 392 at 224, lines 3-6).

Moreover, the data is even more concerning than SCDOT acknowledges. SCDOT's safety analysis covers only 2010-2013. When the parameters are extended back to 2003 when Highway 17 was widened and Pilot Travel Center was completed, accident reports reveal well over 200 collisions in the immediate vicinity of the intersection where the Wrights were injured. (R. pp. 781-812). This information was readily available to SCDOT before the Wrights' collision as Plaintiffs' counsel acquired the reports from the South Carolina Department of Public Safety

("DPS"), the precise agency from which SCDOT collects collision data when planning and conducting safety analyses. (R. p. 384 at 229, line 20 – 230, line 8) (stating that SCDOT's traffic safety office "use the DPS accident information").

In sum, the Wrights presented substantial evidence Respondents breached their duties both in how the intersection was planned and constructed as well as the way in which it was allowed to remain unaltered over the years as the collisions continued to pile up. Respondents acknowledge a raised median effectively prevents left turns like the one that caused the collision in this case, and the Wrights' experts concluded there was no safety-based reason to ever remove a raised median from this intersection's plans. Moreover, SCDOT acknowledges some of Pilot Travel Center's driveways violated the ARMS Manual by being too close together and in the functional area of a busy intersection. Finally, Respondents did nothing to address the situation even though readily available collisions reports demonstrated the growing danger.

III. Respondents' Negligence was a Proximate Cause of the Wrights' Damages Notwithstanding the Intervening Act of a Third Party.

Respondents' misconduct was a proximate cause of the collision leading to the Wrights' injuries. SCDOT's conduct was a cause-in-fact of the collision because the collision would not have happened at an intersection with the traffic control devices and reasonably safe driveways required by industry standard. Under South Carolina law, any negligence or even criminal conduct by Mr. Sena does not absolve Respondents from liability. Additionally, Respondents' conduct was a proximate cause of the Wrights' injuries because, as innocent motorists, they are precisely the type of people Respondents should have foreseen as possible victims of their misconduct.

Proximate causation is an essential element of any negligence cause of action. Burnett v. Family Kingdom, Inc., 387 S.C. 183, 191, 691 S.E.2d 170, 175 (Ct. App. 2010). This element requires proof of both "causation in fact and legal cause." Small v. Pioneer Mach., Inc., 329 S.C.

448, 463, 494 S.E.2d 835, 842 (Ct. App. 1987) (citing Hurd v. Williamsburg County, 363 S.C. 421, 428, 611 S.E.2d 488, 492 (2005)). Causation in fact is established by proof that the injury "would not have occurred but for the defendant's negligence." Cody P. v. Bank of Am., N.A., 395 S.C. 611, 620, 720 S.E.2d 473, 478 (Ct. App. 2011) (citing Mellen v. Lane, 377 S.C. 267, 278, 659 S.E.2d 236, 245 (Ct. App. 2008)). Legal cause is established by determining foreseeability, a factor which focuses on "whether the injury is the natural and probable consequence of the alleged negligent act." Id. Since it often requires factual determinations, proximate cause is generally a question for the jury. Cooke v. Allstate Mgmt. Corp., 741 F. Supp. 1205, 1214 (D.S.C. 1990); see also Ballou v. Sigma Nu Gen. Fraternity, 291 S.C. 140, 147, 352 S.E.2d 488, 493 (Ct. App. 1986) ("Only in rare or exceptional cases may the question of proximate cause be decided as a matter of law"). Summary judgment on proximate cause is inappropriate where the plaintiff has produced "some evidence." Cooke, 741 F. Supp. at 1214.

Where a negligence claim alleges an injury directly caused by the intervening act of a third party, a "special case" is presented. Cody P., 395 S.C. at 620, 720 S.E.2d at 478. In those special cases, the test becomes whether a third party criminal act was foreseeable to the defendant. The finder of fact must determine whether "the injury at the hand of the intervening party was within the general range of consequences which any reasonable person might foresee as a natural and probable consequence of the negligent act." Shepard v. S.C. Dep't of Corr., 299 S.C. 370, 375, 375 S.E.2d 37, 37 (Ct. App. 1989). The Wrights need not prove the "particular chain of events" was foreseeable but only that the injury the criminal inflicted was "within the general range of consequences which any reasonable person might foresee." Cody P., 395 S.C. at 621, 720 S.E.2d at 478 (citing Shepard 299 S.C. at 375, 385 S.E.2d at 38).

Several different types of evidence may be used to demonstrate that a defendant could reasonably foresee injuries ultimately perpetrated by an independent third party. Expert testimony may be used to establish foreseeability. An expert with knowledge of the defendant's business may testify regarding the types of harms the defendant must anticipate in its business. See Cody P., 395 S.C. at 621-22, 720 S.E.2d at 478 (considering banking expert's testimony that banks anticipate theft). Here, the Wrights' experts concluded that the median selection and driveways at Pilot Travel Center were proximate causes of the Wrights' collision. For instance, Mr. Teague found that a non-transversable median would have significantly reduced the risk of harm to motorists like the Wrights. (R. p. 686 § 13). Mr. Teague reached this conclusion because this accident occurred during a left turn into Pilot Travel Center and the non-transversable median SCDOT planned but then chose to remove would have most likely prevented that turn. SCDOT shares this opinion. (R. p. 362 at 101, lines 9-25 (stating that non-transversable median's purpose is "access control" and "is not intended to be transversed by the motoring public"); 371 at 139, lines 1-9 (agreeing that non-transversable median decrease traffic collisions by 35%).

Even Pilot's Vice President of Development admits a non-transversable median's specific purpose is to prevent the type of turns that resulted in this collision. (R. p. 630, lines 6-7 (acknowledging median's purpose would be "[t]o keep people from making a left turn"). Crucially, Mr. Sena also agrees that the absence of a non-transversable median was a crucial factor in the collision. According to Mr. Sena, a non-transversable median "could have prevented my accident and a lot more accidents and any more to come." (R. p. 644 at 119, lines 2-4). Taken as a whole the lay and expert witness testimony establishes a substantial causal connection between the absent raised median and the collision that caused the Wrights' injuries.

The same is true for the defective driveways. As this intersection has proven many times over the last fifteen years, traffic collisions are alarmingly common at Pilot Travel Center's driveways. R. p. 391 at 217, lines 16-20 (agreeing many collisions happen when motorists attempt left turns out of Pilot Travel Center's driveways); 391 at 219, lines 12-15 (noting 17 different accidents involving left turns at Pilot Travel Center over just a four-year period). As Pilot acknowledges, "inadequate driveway design creates conflicts that can be detrimental to safety" on the adjoining highway. (R. p. 637, lines 8-11). When a person attempts to enter or exit a driveway that is either too close to a major intersection or too close to another heavily-utilized driveway, he has little time to react to opposing traffic. Based on this historic accident data and their knowledge of intersection design principles, experts concluded the driveways were also a proximate cause of the Wrights' injuries. (R. p. 686 ¶ 15) (finding Pilot "created an artificial condition, which generated hazardous conditions and contributed to the injuries of the plaintiffs"). Viewing the situation as a whole, the Wrights' experts concluded that the collision most likely would not have occurred if the driveways had been properly designed, constructed, and maintained. (R. p. 687 ¶ 19).

IV. The SCTCA Does Not Protect SCDOT from Liability for the Wrights' Claims.

SCDOT also sought summary judgment based on provisions stating exceptions to the SCTCA's waiver of sovereign immunity. While its motion cites eight such provisions, SCDOT only attempted to support one in its argument to the circuit court. SCDOT should not have been granted summary judgment on its SCTCA defenses because SCDOT failed to correct the dangerous median despite actual and constructive notice that it posed harm to motorists. Similarly, SCDOT's approval of Pilot's driveway plan is not entitled to SCTCA discretionary immunity

because SCDOT ignored its own standards (i.e. ARMS Manual) indicating the proposed driveways were dangerously close to a major intersection.

The Wrights' negligence claim against SCDOT is governed by the SCTCA which holds governmental entity liable for their torts "in the same manner and to the same extent as a private individual under like circumstances" except for those limited instances where the SCTCA itself provides a different standard. S.C. Code Ann. § 15-78-40. Section 15-78-60 enumerates a variety of tortious acts and omissions for which the state refuses to waive its sovereign immunity and for which governmental entities may not face liability. SCDOT's motion alleged eight different provisions of Section 15-78-60 immunize its conduct in this case.[10] However, several of the cited provisions plainly have no relevance to the allegations in the Wrights' Complaint.[11] For the reasons described below, the remaining provisions on which SCDOT relies do not apply and SCDOT's request for immunity should have been denied.

When a governmental entity cites SCTCA immunity provisions to avoid liability, it is asserting an affirmative defense. Strange v. S.C. Dep't of Highways & Pub. Transp., 314 S.C. 427, 430, 445 S.E.2d 439, 440 (1994). SCDOT bears the burden to establish it is entitled to assert each immunity provision under these facts and the burden to prove it is entitled to summary judgment on each immunity provision. Id. The Wrights allege SCDOT's negligent conduct includes (1) improperly approving Pilot's encroachment permit application that was based on a plan that violated unambiguous highway management standards; (2) failing to identify and improve the intersection where the Wrights were injured despite substantial evidence of dangerous conditions;

[10] Specifically, SCDOT cited subsections 1-5, 7, 10, 12, 13, and 15. SCDOT's supporting memorandum also cited 15-78-60(9), but this defense was waived because SCDOT did not raise it in its answer. (R. p. 109 ¶ 33).

[11] The Wrights do not allege claims based on legislative/judicial action (subsections 1 and 2) or adoption/enforcement/or compliance with a law (4).

and (3) altering its plan for a raised median on Highway 17 as part of negotiations with Pilot. (R. pp. 23-25 ¶ 29). SCDOT first argues it is immune for any action relating to the encroachment permit pursuant to Section 15-78-60(12) which generally covers "the issuance . . . or refusal to issue . . . any permit." Since SCDOT made no effort to support this argument at the circuit court, summary judgment should be denied. Faile, 350 S.C. at 324, 566 S.E.2d at 540 ("The governmental entity claiming an exception to the waiver of immunity under the Tort Claims Act has the burden of establishing any limitation on liability"). To the extent the Court considers Section 15-78-60(12), that section expressly excludes from immunity permit-related activities performed "in a grossly negligent manner." Gross negligence is "the failure to exercise slight care." Jinks v. Richland County, 355 S.C. 341, 345, 585 S.E.2d 281, 283 (2003). Gross negligence is a "relative term" meaning "the absence of care that is necessary under the circumstances." Id. The issue of gross negligence "is a mixed question of law and fact" that should generally be resolved by a jury. Etheredge v. Richland Sch. Dist. One, 341 S.C. 307, 310, 534 S.E.2d 275, 277 (2000); Faile, 350 S.C. at 332, 566 S.E.2d at 545 (holding that gross negligence determination "best rests with the jury").

A number of factors may be considered to determine whether a defendant's conduct rises from ordinary to gross negligence. Cole v. S.C. Elec. & Gas, Inc., 335 S.C. 183, 193, 584 S.E.2d 405, 411 (Ct. App. 2003) (holding that a jury determining gross negligence may consider statutory and regulatory violations as well as "other facts and circumstances surrounding the event"). A governmental entity's violation of its only operational policies can be strong evidence of gross negligence. Proctor v. S.C. Dep't of Health & Envtl. Control, 368 S.C. 279, 297, 628 S.E.2d 496, 506 (Ct. App. 2006) (finding jury question on gross negligence where state agency's conduct was against what "was its policy to do"); Clark v. S.C. Dep't of Public Safety, 362 S.C. 377, 384-85,

608 S.E.2d 573 (2005) (holding that trial court properly submitted gross negligence to jury based in part on an expert description of department policy).

In this case, SCDOT's approval of Pilot's encroachment permit application was grossly negligent. Pilot's application was based on a driveway plan that violates clear SCDOT policy as stated in the ARMS Manual. SCDOT acknowledges the policy and admits the violation. SCDOT's corporate representative Robert Clark testified that the ARMS Manual provides that driveways may not be placed in the functional area of the intersection. Mr. Clark also acknowledged the ARMS Manual requires a minimum distance between driveways. In the same deposition, Mr. Clark acknowledges SCDOT approved a plan calling for one or more driveways within the functional area of the intersection and that the proposed driveways did not meet the minimum distance standard. 656 at 12, lines 1-4; 657 at 30, lines 10-25; 379 at 169, lines 15-22; 380 at 173, lines 11-16. In light of the policy violation and SCDOT's acknowledgments, a reasonable jury could conclude SCDOT failed to exercise slight care in issuing an encroachment permit for Pilot Travel Center.

SCDOT is also not entitled to immunity under Section 15-78-60(13), which refers to "regulatory inspection powers or functions, including failure to make an inspection, or making an inadequate or negligent inspection." Again, this section was not actively pursued at the circuit court level, and SCDOT never attempted to meet its burden to obtain summary judgment on this affirmative defense. Moreover, this argument fails on the merits because a state agency's total failure to inspect or investigate an easily observable fault is grossly negligent conduct that supports SCTCA liability notwithstanding Section 15-78-60(13)'s seemingly broad scope. For example, in Bass v. S.C. Department of Social Services, 414 S.C. 558, 574, 780 S.E.2d 252, 260 (2015), the South Carolina Supreme Court found SCTCA liability was supported by evidence that the state

"failed to conduct any investigation" when it had a duty to do so. See also Proctor, 368 S.C. at 297, 628 S.E.2d at 506 (finding jury question on gross negligence where stage agency "did not perform an inspection, as it was its policy to do"). Here, SCDOT had not conducted a single safety analysis of the subject intersection for 10 years at the time the Wrights were injured. L. Colvin Dep. 215:25 – 216:15.

In light of the substantial number of collisions at this specific intersection (4.25/year and over 200 since Pilot Travel Center opened), SCDOT's failure to investigate and respond to the danger was grossly negligent. While Section 15-78-60(13) does not reference that standard, since SCDOT asserts the permit immunity provision (Section 15-78-60(12)) that contains a gross negligence standard, the same standard applies to all the SCTCA immunity provisions on which SCDOT relies. Steinke v. S.C. Dep't of Labor, Licensing & Regulation, 336 S.C. 373, 398, 520 S.E.2d 142, 155 (1999) ("when an exception containing the gross negligence standard applies, that same standard will be read into any other applicable exception"). Just as in this case, Steinke applied a gross negligence standard to the inspection immunity provision because the defendant also asserted the licensing immunity provision which includes an explicit gross negligence standard. Id. at 395-96, 520 S.E.2d at 153-54. Thus, SCDOT's total failure to inspect the subject intersection and to investigate its dangerous conditions constitute gross negligence and defeats SCDOT's immunity assertion.

SCDOT also may not rely on Section 15-78-60(15), which provides immunity for the "absence, condition, or malfunction of any sign, signal, warning device, illumination device, guardrail, or median barrier." This section covers a broad section of traffic control devices but its plain terms do not cover the allegations related to the deficient *driveways* SCDOT improperly approved. Plus, while decisions regarding medians are generally immune, SCDOT can face

liability when a defective median is not corrected "within a reasonable time after actual or constructive notice." S.C. Code Ann. § 15-78-60(15). Based on the numerous collisions reported in this area, SCDOT was on actual or constructive notice of the dangers motorists faced as a result of customers attempting left turns in to and out of Pilot Travel Center. Collision reports were readily available to the public including SCDOT's own traffic safety office. (R. p. 394 at 229, line 20 – 230, line 8). SCDOT did not act on the danger within a reasonable time as it failed to conduct any safety analyses for 10 years. (R. p. 390 at 215, line 25 – 216, line 15).

In this way, the Wrights' claim is similar to Giannini v. S.C. Department of Transportation, 378 S.C. 573, 664 S.E.2d 450 (2008), where the South Carolina Supreme Court refused to apply Section 15-78-60(15) to a claim based on SCDOT's failure to install median barriers along an interstate highway. Giannini held that, while this immunity provision immunizes median design choices[12], it does not immunize SCDOT's failure to install a more substantial barrier when events provided notice of dangerous highway conditions. 378 S.C. at 580, 664 S.E.2d at 453 ("This is not a claim of defective construction but, rather, one of failure to take corrective action subsequent to notice of a defect"); see also Wooten v. S.C. Dep't of Transp., 333 S.C. 464, 467-68, 511 S.E.2d 355, 357 (1999) (holding that design immunity is not "perpetual" and that once SCDOT has notice intersection is hazardous, it is no longer immune from liability). Giannini found that SCDOT was

[12] SCDOT is also not entitled to immunity on SCDOT's decision to alter its original plan for a raised median. Since SCDOT asserts at least one immunity provision with a gross negligence standard, that standard applies to all immunity provisions including Section 15-78-60(15)'s general protection for median design choices. Steinke, 336 S.C. at 398, 520 S.E.2d at 155. Here, there is evidence of gross negligence in that SCDOT changed its plan from a much safer raised median to a painted median during "negotiations" with Pilot Travel Center's owners who prioritized profits over highway safety. As SCDOT acknowledges, planning for a median based on business interests rather than safety is antithetical to SCDOT's core objectives. (R. p. 346 at 39, lines 3-25; 390 at 213, lines 11-13).

on notice of the need for a median based on "several" similar collisions on the interstate. 378 S.C. at 580, 664 S.E.2d at 453.

Here, the Wrights and their attorneys obtained hundreds of collision reports for incidents in the immediate vicinity of the subject intersection. SCDOT even admits left turn related collisions were occurring in this intersection at a rate of 4.25 per year at the time the Wrights were injured. This information placed SCDOT on actual or constructive notice of the need to more tightly control the areas at which left turns would be permitted in this intersection. At the very least, the collision reports and SCDOT representatives' testimony creates a question of fact for the crucial issue of notice. Wooten, 326 S.C. 516, 528, 485 S.E.2d 119, 125 (Ct. App. 1997) (*aff'd as modified* 333 S.C. 464, 467-68, 511 S.E.2d 355, 357 (1999) ("Whether there was a history of accidents which put SCDOT on notice of a potentially dangerous situation is a quintessential matter for the jury").

Finally, the Court should reject SCDOT's assertion of discretionary immunity under S.C. Code Ann. § 15-78-60(5). As with all SCTCA immunity provisions, SCDOT bears the burden of proving it is entitled to discretionary immunity. To prove discretionary immunity, SCDOT must prove that, "when faced with alternatives, it actually weighed competing considerations and made a conscious choice." Pike v. S.C. Dep't of Transp., 343 S.C. 224, 230, 540 S.E.2d 87, 90 (2000). SCDOT must also demonstrate that "in weighing the competing considerations and alternatives, it utilized acceptable professional standards appropriate to resolve the issue." Id. (citing Foster v. S.C. Dep't of Highways & Pub. Transp., 306 S.C. 519, 525, 413 S.E.2d 31, 35 (1992)). Mere room for discretion is not enough and "[i]t is not enough to say the defect was noted and a decision was made not to repair it." Id. SCDOT cannot meet this burden for its negligent failure to discover and respond to the dangerous conditions at the subject intersection. SCDOT has no explanation for the

failure to conduct proper safety analyses at this busy intersection (R. p. 390 at 216, lines 4-15) and, therefore, cannot argue this was a discretionary decision. SCDOT's approval of Pilot's deficient driveway plan is not entitled to discretionary immunity because it did not apply acceptable professional standards. Driveways located within the functional area of an intersection and spaced too closely together violated the ARMS Manual and SCDOT's decision to sanction those violations is not entitled to immunity. Pike, 343 S.C. at 230, 540 S.E.2d at 90 (limiting discretionary immunity to actions where governmental entity "utilized acceptable professional standards").

In sum, SCDOT's summary judgment motion should have been denied to the extent it relied on SCTCA immunity provisions. SCDOT bore the burden of proof for each of these affirmative defenses and failed to meet the requirements for any of them. SCDOT's conduct from the time Pilot submitted its driveway plans until the date of the Wrights' collision was grossly negligent and not protected from liability.

CONCLUSION

For all these reasons, the Wrights respectfully request the Court reverse the circuit court's order granting Respondents summary judgment. Records show Respondents wrongfully collaborated on a median across Highway 17 that facilitated Pilot's business interests at the expense of motorists like the Wrights. Additionally, Respondents planned, approved and constructed a system of driveways that violated mandatory SCDOT safety standards. Pilot and SCDOT then allowed the dangerous median and driveways to remain unchanged as collisions continued to pile up. Finally, notwithstanding the conduct of the at-fault driver, his fateful left turn would have never happened if a raised median was in place or if there was no driveway at that location for him to utilize. Ultimately, the circuit court should be reversed because it misconstrued

South Carolina law on Respondents' duties and ignored key evidence establishing Respondents' misconduct.

Respectfully submitted,

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