

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

Case No.: 2016-CP-08-334
Appellate Case No.: 2017-001563

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SC Court of Appeals

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., Defendants,

Of whom 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. are the Respondents.

RESPONDENT SOUTH CAROLINA DEPARTMENT OF
TRANSPORTATION'S FINAL BRIEF

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STATEMENT OF ISSUE ON APPEAL

- I. THE CIRCUIT COURT PROPERLY GRANTED RESPONDENT SCDOT'S MOTION FOR SUMMARY JUDGMENT PURSUANT TO THE SOUTH CAROLINA TORT CLAIMS ACT, S.C. CODE ANN. 15-78-60 ET AL.**

STATEMENT OF THE CASE

This appeal stems from a motorcycle/ motor vehicle collision that occurred on October 6, 2012, while the Appellants were traveling North on Highway U.S. 17A in Summerville, SC. Appellant Richard Wright was driving the motorcycle and his wife, Appellant Cynthia Wright was riding as a passenger. The accident occurred when the driver of a pick-up truck traveling southbound on U.S. 17A failed to yield to oncoming traffic and attempted to turn left into a Pilot Travel Center. The Plaintiffs' motorcycle struck the side of the pick-up truck causing the Plaintiffs' injuries. The police determined that the driver of the pick-up truck had a blood alcohol level of .12 and also had cocaine in his system.

Following the accident, on March 28, 2014, Appellants filed suit against the South Carolina Department of Transportation, ("SCDOT"), Pilot Travel Centers, (Pilot), and C&A Unlimited.¹ The Appellants filed a separate action on February 9, 2016, against Marathon Petroleum Company, LP, f/k/a Marathon Ashland Petroleum, LLC, Ashley Land Surveying, Inc., f/k/a/ Ashley Engineering & Surveying, Inc., and Mulake Constructors. These two cases have since been consolidated.

On May 6, 2017, Pilot filed a motion for summary judgment. On May 4, 2017, the Honorable Roger M. Young issued an order granting Pilot's motion for summary judgment on the basis that Pilot did not owe a duty to Appellants.

On May 2, 3, and 9, 2017, Speedway, SCDOT and Ashley Land Surveying, respectively, filed motions for summary judgment. Following a hearing, the Honorable Kristi L. Harrington granted the motions. On the Form 4 Order issued June 17, 2017, Judge Harrington held that the South Carolina Tort Claims Act barred Appellants' suit against SCDOT. With regard to

¹ C&A Unlimited, Inc., was dismissed by stipulation on May, 2014.

Speedway and Ashley Land Surveying, Judge Harrington held there was no duty or proximate cause. This appeal followed.

STATEMENT OF THE FACTS

As stated above, this case stems from a motorcycle/motor vehicle accident that occurred on October 6, 2012, in Summerville, South Carolina. Appellants were traveling North on Highway U.S. 17 A on a motorcycle. Appellant Richard Wright was driving and his wife, Appellant Cynthia Wright was a passenger. The accident occurred when a pick-up truck that had been traveling in the southbound lane of U.S. 17A failed to yield to oncoming traffic and attempted to turn left into the Pilot Travel Center. The Appellants' motorcycle struck the side of the pick-up truck causing Appellants' injuries. The police determined that at the time of the accident, the driver of the pick-up truck had a blood alcohol level of .12 and had cocaine in his system.

The driver of the pick-up truck was Daniel Sena, (hereinafter "Sena"). Mr. Sena testified that he intended to make a left-hand turn into the Pilot Travel Center to pick up McDonald's for dinner. (R. p. 263, lines 10-13). Mr. Sena testified that ten (10) to fifteen (15) minutes before the accident, he had just gotten home from work and changed his clothes. He then proceeded to drink two beers and did cocaine. (R. p. 276, line 3 - p. 277, line 9).

Mr. Sena stated that he was extremely familiar with the intersection where the accident occurred and that he had driven the route for many years of his life. (R. p. 264, line 14 - p. 265, line 8). According to Mr. Sena, he was at a full stop in the median waiting to make the left-hand turn. He waited for two vehicles to pass when he began to make the left turn.² (R. p. 266, lines 6-18). Mr. Sena stated that after starting the turn, he saw the Appellant's motorcycle and slammed on his breaks, but could not avoid the collision. (R. p. 267, line 12 - p. 268, line 4).

² Contrary to Sena's testimony, video of the accident shows that Mr. Sena did not come to a stop in the median. (R. p. 245).

Following the accident, instead of calling 911 or getting out of his vehicle to assist the injured Appellants, Mr. Sena fled the scene. Mr. Sena testified that he was “scared” because he had cocaine in his system, had been drinking alcohol and was driving even though his driver’s license had been suspended for a previous DUI arrest. (R. pp. 271, line 4 - p. 272, line 16.). Fortunately, there was a group of undercover police officers preparing for a meth raid who witnessed the accident. (R. p. 272, lines 18-22). The officers followed Sena and apprehended him. (R. p. 272, lines 22-23).

Mr. Sena was taken into custody where it was determined that his blood alcohol level was .12 and that he had cocaine in his system. Mr. Sena ultimately pled guilty to two counts of felony DUI, leaving the scene of an accident with great bodily injury and possession of cocaine. (R. p. 273, lines 9-21).

Mr. Sena does not blame SCDOT, Pilot or anyone else for the accident and takes full responsibility for the accident. (R. p. 277, line 21 - p. 278, line 4). Mr. Sena admits that it was his duty to ensure that there was no oncoming traffic before taking the left-turn and that he is the sole cause of the Appellants’ injuries. (R. pp. 269, lines 8-18; p. 274, lines 4-7).

Despite the fact that the accident was caused by an impaired driver who 10 to 15 minutes before the accident was drinking beer and doing cocaine, and who admits his actions were the cause of Appellants’ injuries, Appellants contend that the accident would not have occurred had the SCDOT designed and built a raised concrete median as part of the US 17A improvement projects that were completed in 2002 and 2003, that would have prevented motorists from making left-hand turns into the Pilot Travel Center. Appellants further contend that the location and design of Pilot’s entrances caused the Appellants’ accident.

As the basis of Appellants' allegations is the design of the highway in front of the Pilot Travel Center, some background regarding the location of the accident and the immediate vicinity is necessary.

The area where the accident occurred underwent two SCDOT projects during the late 1990s and early 2000s. SCDOT widened the intersection of U.S. 17A in front of the Pilot Travel Center ("the Widening Project"), and reconstructed the intersection at the exit from I-26 at Farmington Road as you head toward Summerville ("the Interchange Project"). The Widening Project was completed on June 17, 2002 and the Interchange Project was completed on November 1, 2003. (R. p. 294, lines 7-9).

Before either of the SCDOT projects began, there was an existing gas station in the location of the current Pilot Travel Center. The existing gas station had driveways with access to U.S. 17A, and there was no raised concrete median preventing left turns into the existing gas station. (R. p. 299, lines 1-10) In fact, there has never been a raised median preventing left hand turns into that location. (R. p. 299, lines 11-15). In 2001, Pilot acquired the existing gas station, redeveloped the property, and constructed the current Pilot Travel Center. (R. pp. 168 – 243)

Leland Colvin is currently the Deputy Secretary of Engineering for SCDOT, and at the time was the project manager for both the Interchange Project and the Widening Project. (R. p. 281, line 23 - p. 282, line 9). Mr. Colvin testified that SCDOT designed the plans for the Widening Project, but used an outside firm to design the plans for the Interchange Project. (R. p. 296, line 2 - p. 297, line 16).

Mr. Colvin stated that the design plans for the Widening Project did not nor did they ever, include a raised median in front of the Pilot Travel Center. (R. p. 297, line 23 - p. 298, line 3). In fact, Mr. Colvin stated that a raised median was never considered for the location because it

would not have been compliant with the SCDOT Highway Design Manual. (R. p. 297, line 23 - p. 298, line 16) Mr. Colvin testified that the SCDOT Highway Design Manual is "the Bible" for design projects in the State of South Carolina. (R. p. 298, lines 17-20).

As previously stated, the design plans for the Interchange Project were prepared by an outside design firm. The Interchange plans showed a raised median in front of the Pilot Travel Center as a "placeholder" for how the project to the east of Farmington Road would accept traffic. (R. p. 299, line 22 - p. 300, line 13). Mr. Colvin explained that as the program manager for these two projects, he had to look at them "in totality" and marry the two plans together. (R. p. 288, lines 6-24). When the plans were "married" to show how the projects would come together, the Interchange Plans showing the raised median in front of the Pilot were corrected to accurately reflect the Highway Design Manual. (R. p. 87, lines 14-24). Again, Mr. Colvin testified numerous times that there has never been a raised median preventing left-hand turns at the portion of U.S. 17A in front of the Travel Center nor was a raised median ever considered because doing so would have violated the SCDOT Highway Design Manual. (R. p. 298, lines 17-20).

With regard to the driveways which provide ingress and egress to the Pilot Travel Center, Mr. Colvin stated that there were three existing driveways providing ingress and egress to the property before Pilot redeveloped the property to construct the Travel Center. (R. p. 299, lines 1-6). In order to construct the driveways to the Travel Center, Pilot had to submit an encroachment permit application to SCDOT. Mr. Colvin testified that SCDOT has to approve encroachments on to the DOT right-of-way and that when reviewing an encroachment permit application, SCDOT considers safety and how the access to the private property affects traffic and the general operation of the highway. (R. p. 285, lines 16-19).

Robert Clark, a District 6 Engineering Administrator with the SCDOT, testified that when SCDOT employees review an encroachment permit for access to the roadway, they use their engineering judgment which consists of reviewing the traffic in the area, the type of development, and the operations at the particular intersection. This includes analyzing traffic backups, the amount of storage and types of turning maneuvers. (R. p. 305, lines 3-20) SCDOT also uses its manuals and design criteria. (R. p. 306, line 8 - p. 307, line 6). Mr. Clark testified that it is impossible for all encroachments to be in exact conformance with the design manuals. He explained,

If we lived in the Midwest or lived in Phoenix where everything's laid out in a grid and, as cities grow, they're always growing in a grid and every block is the same, and as you grow out, you have the opportunity to have a clean slate, you can do that.

When you have properties that have been cut up for 3 or 400 years and you've got redevelopment going on on those properties, you don't have a clean slate, but you're trying to do the best you can to create an efficient, effective, and safe interface with the road system.

(R. p. 309, line 13 - p. 310, line 2).

Mr. Clark testified that the ARMS manual is just one of several different sources or resources that SCDOT uses when evaluating an encroachment permit for access to the roadway:

We use information in our ARMS manual, we use information relating to the SCDOT, we use design criteria. So, there's a lot of inputs and a lot of different sources or resources you can go to. For instance, depending on speed or the signal controlled intersection, you have got to have a certain amount of sight distances to the actual signal ahead in order to see it, process it and react to it. [S]o . . . each intersection is reviewed, the information that's being asked for in an encroachment permit is reviewed, and then we use a lot of resources and . . . engineering judgment to say, okay, this look like it is in substantial conformity with – with what our rules are.

(R. p. 306, line 16 - p. 307, line 6).

When specifically asked regarding the distances between driveways and the requirements in the ARMS manual and whether these were considered at the time, the encroachment permit was issued to Pilot, Mr. Clark reiterated,

Distances in the manual in place at the time were probably considered. But again, **these are suggestions**. And you have to look at the site that you've got and what the – what the traffic is doing at the site, how it's circulating on the site, and bring all of those factors together to make that determination.

(R. p. 308, lines 11-20)

The testimony and evidence in this case establish that SCDOT is entitled to immunity pursuant to the South Carolina Tort Claims Act. There is no evidence that the flush median was designed improperly or that the encroachment permit was improperly approved. Moreover, there is no evidence that the median and the driveway locations were hazardous conditions of which the SCDOT had notice.

Accordingly, the circuit court properly granted SCDOT summary judgment based on the South Carolina Tort Claims Act § 15-78-60 et seq and the order should be affirmed.

ARGUMENT

Standard of Review

On review of a grant of summary judgment, the Appellate Court applies the same standard that governs the trial court, namely, summary judgment is properly granted when “there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” Rule 56, SCRPC; *Hawkins v. City of Greenville*, 358 S.C. 280, 594 S.E.2d 557 (Ct. App. 2004). “In determining whether any triable issues of fact exists, the evidence and all inferences which can be reasonably drawn there from must be viewed in the light most favorable to the nonmoving party. *Id.*”

The South Carolina Tort Claims Act – Generally

As stated in *Hawkins v. City of Greenville*, supra, the Tort Claims Act governs all tort claims against governmental entities. It is the exclusive civil remedy for any tort committed by a governmental entity or its employees or agents. S.C. Code Ann. § 15-78-20(b). However, while the Tort Claims Act makes governmental entities liable for their torts, a Plaintiff must present evidence of the governmental entity’s duty to act in order to recover under the Act, and any potential liability is subject to certain limitations and exemptions as provide in the Act. S.C. Code Ann. 15-78-40.

Section 15-78-60 sets out forty “exceptions” to this waiver of sovereign immunity which significantly limit the tort liability of governmental entities, and those limitations and exemptions must be liberally construed in favor of limiting liability of the State. S.C. Code Ann. § 15-78-20(f). The circuit court’s Form 4 Order did not specify which section of § 15-78-60, she relied upon, however, potentially applicable sections cited in SCDOT’s memorandum in support of its motion for summary judgment include:

The governmental entity is not liable for a loss resulting from:

- (1) legislative, judicial or quasi-judicial action or inaction
- (2) administrative action or inaction of a legislative, judicial, or quasi-judicial in nature:
- (3) execution, enforcement, or implementation of the orders of any court or execution, enforcement, or lawful implementation of any process;
- (4) adoption, enforcement, or compliance with any law or failure to adopt or enforce any law, whether valid or invalid, including, but not limited to, any charter, provision, ordinance, resolution, rule, regulation, or written policies:
- (5) the exercise of discretion or judgment by the governmental entity or employee or the performance or failure to perform any act or service which is in the discretion or judgment of the governmental entity or employee;

...

- (9) entry upon any property where the entry is expressly or impliedly authorized by law;

...

- (13) regulatory inspection powers or functions, including failure to make an inspection, or making an inadequate or negligent inspection, of any property to determine whether the property complies with or violates any law, regulation, code, or ordinance or contains a hazard to health or safety;

...

- (15) absence, condition or malfunction of any sign, signal, warning device, illumination device, guardrail, or median barrier unless the absence, condition or malfunction is not corrected by the governmental entity responsible for its maintenance within a reasonable time after actual or constructive notice. Governmental entities are not liable for the removal or destruction of signs, signals, warning devices, guardrails, or median barriers by third parties except on failure of the political subdivision to correct them within a reasonable time after actual or constructive notice. Nothing in this item gives rise to liability arising from a failure of

any governmental entity to initially place any of the above signs, signals, warning devices, guardrails, or median barriers when the failure is the result of a discretionary act of the governmental entity. The signs, signals barriers referred to in the item are those used in connection with hazards normally connected with the use of public ways and do not apply to the duty to warn of special conditions such as excavations, dredging, or public way construction. Governmental entities are not liable for the design of highways and other public ways. Governmental entities are not liable for loss on public ways under construction when the entity is protected by an indemnity bond. Governmental entities responsible for maintaining highways, roads, streets, causeways, bridges, or other public ways are not liable for loss arising from a defect or a condition in, on, under, or overhanging a highway, road, street, causeway, bridge, or other public way caused by a third party unless the defect or condition is not corrected by the particular governmental entity responsible for the maintenance within a reasonable time after actual or constructive notice.

As written, the South Carolina Tort Claims Act, specifically provides immunity to governmental entities with regard to any loss caused by the absence of a median or lack of a median in the initial design or any loss arising from a defect or condition on any public way unless, after notice, the defect is not corrected within a reasonable amount of time. S.C. Code 15-78-60(15). Discretionary immunity, based on the sections also cited above is contingent on proof the governmental entity, faced with alternatives, actually weighed competing considerations and made a conscious choice using accepted professional standards. *Wooten v. South Carolina DOT*, 333 S.C. 464, 511 S.E.2d 355, 357 (Sup. Ct. 1999).

In the present case, the Appellants did not present any evidence that the flush median was designed improperly or that the flush median was a hazardous condition of which SCDOT had notice. Likewise, the Appellants failed to present any evidence that the encroachment permit allowing construction of the Pilot Travel Center driveways was improperly approved or that the driveways were hazardous, let alone, notice of such. Accordingly, the circuit court correctly held that the claims against SCDOT were barred by the South Carolina Tort Claims Act.

I. SUMMARY JUDGMENT AS TO APPELLANT'S CLAIMS AGAINST SCDOT WAS PROPER AS THE SOUTH CAROLINA TORT CLAIMS ACT BARS THE SUIT.

The Appellants' argument with regard to SCDOT is three-fold, the first turning on the allegation that the flush median in front of the Pilot Travel Center was improperly designed during the Widening and Interchange Projects. Even though the installation of a raised median would have been in violation of the South Carolina Highway Design manual, Appellants contend that during the Widening Project, SCDOT should have installed a raised median in front of the Pilot that would act to prevent left-hand turns into the Travel Center. Second, Appellants contend that SCDOT should have been on notice that the flush median was a hazardous condition. Appellants cite to no evidence of notice, instead, relying on an inadmissible traffic study that was conducted a year after the Appellants' accident and the fact the area in general is a "highly traveled." Finally, the Appellants contend that SCDOT improperly approved Pilot's encroachment permit for the Travel Center's driveways in that it ignored safety considerations regarding the driveways placement and that the driveways' location is a hazardous condition of which SCDOT had notice. Each allegation is addressed in turn below.

South Carolina Code Ann. § 15-78-60(15), specifically provides design immunity to the SCDOT, "Governmental entities are not liable for the design of highways and other public ways." *Wooten*, supra. When addressing the design immunity contained in this section, the South Carolina Supreme Court has focused on whether the SCDOT had notice of a hazardous condition and did not take action to correct such condition within a reasonable time.

In *Wooten*, a twelve-year old was hit by a car while attempting to cross a multi-lane roadway. Her mother brought suit alleging that SCDOT was negligent for failing to install a traffic light that would allow adequate time for a pedestrian to cross, for failing to provide

pedestrian walk signals and for failing to warn pedestrians of the hazardous nature of the intersection.

In determining whether the design immunity provision of 15-78-60(15), was applicable the Court cited to the testimony of an SCDOT engineer. Although the engineer testified that SCDOT had no complaints regarding pedestrians at the intersection, the Court focused on the portion of his testimony admitting that the crosswalk at the intersection in question violated several mandatory regulations regarding pedestrian safety and that the intersection was hazardous for pedestrians. The court stated,

No pedestrian count was done at this intersection, however, and Garrett admitted the intersection was dangerous for pedestrians.

Because the traffic signal is traffic-actuated, the crossing time allowed a pedestrian varies. The minimum time allowed is eight seconds to cross the width of the road which is 112 feet. This crossing time would therefore require a crossing speed of fourteen feet per second. Garrett testified a reasonable crossing speed is four feet per second and the median is not designed for pedestrians to wait in the middle of the road.

Further, Garrett testified DOT guidelines *mandate* that pedestrian signals and detectors be installed when there is not adequate time to cross even when such signals are not otherwise warranted because of the amount of pedestrian traffic. The guidelines specify that pedestrians should be assured sufficient time to cross the roadway at an intersection controlled by traffic lights.

Id. at 469, 511 S.E.2d at 357-358 (emphasis in the original).

Installation of a Flush Median

In the present case, Appellants argue that SCDOT improperly “altered existing plans for a raised median across Highway 17 in favor of a less safe painted median more conducive to Pilot’s business.” (Appellants’ Initial Brief, p.18) First off all, the testimony of Leland Colvin of SCDOT establishes that Pilot was not involved in the decision to install a flush median. (R. p.

222, line 7 – p. 223, line 1 and R. p. 402) Second, Appellants do not site to any mandatory regulations that SCDOT allegedly violated by installing a flush mediation.

Contrary to the facts in *Wooten*, in this case, the testimony of Leland Colvin, the Deputy Secretary of Engineering for SCDOT and the project manager for both the Interchange Project and the Widening Project of 17A, establishes that a raised median was never intended as part of the Widening project in front of the Pilot. Rather the Interchange Project, which was designed by an outside professional, used the raised median in their plans and Colvin had to “marry” the Interchange and Widening plans together. Mr. Colvin testified as follows:

Q: Nor was [the raised median] ever removed from the design plans for the 17A widening project right in front of the Pilot Travel Center, correct?

A: Correct.

Q: It was -- I believe you referred to it earlier as a placeholder?

A: Correct.

Q: And it was a placeholder that was put in by another design professional who was in charge of another project that was not the 17A widening project right in front of the Pilot Travel Center, correct?

A: Correct.

(R. p. 300, lines 2-14).

Mr. Colvin further testified:

When -- when -- in my job as the program manager for the project, we had to take a set of design plans that were done by a consultant, a set of design plans for the widening -- it doesn't really matter who did them -- and marry those two plans together. . . . And as part of that marrying and coming up with that final design, it was -- the final design was a flush painted median and not a raised median.

(R. p. 290, lines 14-24).

In fact, Mr. Colvin's testimony established that installing a raised median as advocated by Appellants would have been in violation of the SCDOT Highway Design Manual³:

Q: And I believe your testimony earlier was that there was never an expectation during the 17A widening project in front of the Pilot Travel Center to have a raised or a non-transversable median because to do so would have been not compliant with the South Carolina Department of Transportation Highway Design Manual; is that correct?

A: That's correct.

Q: So to have put one in in front of the Pilot would have been in contravention to your own manual, correct?

A: Correct.

Q: And I believe you referred to that manual as the bible for design projects in the state of South Carolina; is that correct?

A. Yes, sir.

(R. p. 298, line 4-20).

Appellants also argue that 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." However, Plaintiff does not offer any evidence that the flush median was a hazardous condition or that SCDOT was on notice that the flush median was hazardous.

With regard to notice, in *Pike v. SCDOT*, 343 S.C. 224, 549 S.E.2nd 87 (2000), the South Carolina Supreme Court addressed the issue in the context of S.C. Code Ann. 15-78-60(15). In *Pike*, the plaintiff's wife was killed in a car accident. Plaintiff alleged that SCDOT was negligent in failing to remove a sign from the roadway which obstructed motorists' view of

³ Appellants have argued that a raised median would have prevented Sena from turning left. However, raised medians are not "non-transversable as Emergency vehicles must be able to drive over raised medians. (R. p.292, lines 9-14).

oncoming traffic. The *Pike* Court focused on specific evidence that SCDOT had notice that there was a problem at the intersection in question.

First, the court noted that SCDOT had received several letters from citizens and politicians regarding the safety of the intersection requesting that a traffic signal be installed. *Pike* at 233, 540 S.E.2d 87, 93. In fact, one of the letters to SCDOT, prior to the Plaintiff's wife's accident had a sketch of the intersection and stated, "The newly erected Chapman High School sign and the tree limbs over the sidewalk a little farther up toward Asheville make it difficult for one to see the traffic coming from toward [sic] Asheville. Therefore crossing this intersection is a little dangerous. Removal of sign, trimming limbs and installing a traffic light might be the answer to this dangerous situation. *Pike* at 227, 540 S.E.2d 87, 89.

Second, in *Pike*, SCDOT actually sent an employee out to the intersection in response to the letter. The SCDOT employee was not an engineer, had no technical degree of any kind and was not qualified to take sight measurements. *Pike* at 227-28, 540 S.E.2d 87, 89. Despite the letters and visit, no calculations were performed by any SCDOT engineers to determine the minimum sight distance at the intersection and removing the sign was never considered. *Id.*

The court also cited to testimony that SCDOT violated accepted engineering practices for failing to remove the sign once on notice that it created sight problems as well as the failure to conduct precise sight calculations for the intersection. *Id.* at 228-29, 540, S.E.2d 87, 89-90. Accordingly, the *Pike* court held that the letters and visit by the SCDOT established notice of a hazardous condition at the intersection in question.

Again, in *Giannini v. SCDOT*, 378 S.C. 573, 664 S.E.2d 450 (2008), the South Carolina Supreme Court addressed the issue of notice in the context of S.C. Code Ann. 15-78-60 (15). In *Giannini*, a car traveling north on I-77 hydroplaned and crossed over the median and into

southbound traffic, colliding with the cars driven by the Plaintiffs. The accident occurred between the Boyden Arbor overpass and Pervical Road. *Id.* 578, 664 S.E.2d 450, 452. One person was killed and the others were seriously injured. The plaintiffs claimed that SCDOT was negligent in failing to install barriers in that location. *Id.* SCDOT raised the defense of 15-78-60(15).

The *Giannini* court held that SCDOT was on notice that a hazardous condition existed in the location where the accident occurred due to the fact that several well publicized cross-over accidents had occurred in the same location of the accident at hand. The court stated:

[T]he portion of I-77 where the accident occurred was built in 1995, and there had been several crossover accidents within two miles of this accident in which two people had been killed; the accidents had been publicized by local media. This is not a claim of defective construction but, rather, one of failure to take corrective action subsequent to notice of a defect. This case is more analogous to Wooten v. SCDOT, 333 S.C. 464, 511 S.E.2d 355 (1999).

Wooten, *Pike* and *Giannini* are all distinguishable from the case at hand. In all of these cases, the Court found SCDOT was on notice of a specific hazardous condition such as the lack of a crossing signal at the intersection in *Wooten*, the obstruction of vision created by a sign in *Pike*, and several crossover accidents in the same stretch of highway in *Giannini*. Moreover, in *Wooten* and *Pike* the court cited to violations of mandated SCDOT regulations and of accepted engineering practice.

Appellants did not present any evidence that installation of the flush median was a violation of any mandates or engineering principles. Appellants also did not present any evidence such as letters or complaints that would Act to put SCDOT on notice that the flush median was a hazard. To the extent Appellants rely on a traffic study of the area of the accident that was completed by the Department of Public Safety, these traffic studies are inadmissible

pursuant to 23 U.S.C. (h)(4) and 23 U.S. 409. Second, the traffic study was done in October of 2013, approximately a year after the Appellants' accident. Therefore, it is inapplicable to the analysis of whether SCDOT was on notice that the flush median was a hazardous condition at the time or prior to the accident at issue.

Finally, accepting Appellant's argument that SCDOT was somehow negligent in not conducting a traffic study of the area in the ten years since the completion of the Interchange and Widening Project even though the intersection is highly traveled creates an impossible standard. It simply is not possible for SCDOT to monitor and study all highly traveled intersections in the State. Moreover, Appellants do not cite to any regulation, mandate or statute requiring SCDOT to conduct traffic studies within a certain time period.

The installation of the flushed median was installed properly, and done pursuant to the South Carolina Highway Design Manual. Mr. Covlin used his engineering judgment in "marrying" the Interchange Plans and the Widening Plans. Moreover, there is no evidence that the flush median is a hazard, or that SCDOT had notice that the flush median was a hazardous condition. Accordingly, South Carolina Code Ann. § 15-70-68(15) provides immunity to SCDOT and the circuit court properly granted summary judgment.

Location of Pilot's driveways

Appellants contend that SCDOT ignored safety considerations and improperly approved the encroachment permit with regard to the location of the Travel Center's driveways. The arguments above with regard to the flush median are also applicable to the approval of the encroachment permit and location of the Travel Center driveways. Appellants cannot cite to any mandatory regulation or law that was violated by the approval of the encroachment permit nor can they cite to any evidence that the location of the driveways were a hazard, let alone, that

SCDOT was on notice of a hazard. See *Wooten, Pike and Giannini*, supra. Rather, they cite to two provisions in the ARMS manual, which the evidence establishes is but one of the several manuals and references used by SCDOT when using their engineering judgment to make decisions regarding encroachment permit approvals.

Leland Colvin of SCDOT testified that SCDOT has to approve encroachments onto the DOT right away. As part of that approval process, SCDOT considers safety and how the access to the private property affects traffic and the general operation of the highway. (R. p. 285, lines 16-19).

Robert Clark of SCDOT testified at length regarding the approval process regarding encroachment permits. According to Mr. Clark, SCDOT uses its engineering judgment which consists of reviewing the traffic in the area, the type of development and the operations at the particular intersection. This includes analyzing traffic backups, the amount of storage, and types of turning maneuvers. (R. p. 305, lines 3-23). Clark testified that SCDOT also uses its manuals and design criteria as references. (R. p. 306, line 16-p.17, line 6).

Appellants argue that location of the Travel Center driveways violated the ARMS manual. However, Mr. Clark testified that the ARMS manual is not mandatory and just one of several resources available to SCDOT when reviewing an encroachment permit:

We use information in our ARMS manual, we use information relating to the SCDOT, we use design criteria. So, there's a lot of inputs and a lot of different sources or resources you can go to. For instance, depending on speed or the signal controlled intersection, you have got to have a certain amount of sight distances to the actual signal ahead in order to see it, process it and react to it. [S]o . . . each intersection is reviewed, the information that's being asked for in an encroachment permit is reviewed, and then we use a lot of resources and . . . engineering judgment to say, okay, this look like it is in substantial conformity with – with what our rules are.

(R. p. 306, line 16 - p. 307, line 6).

When specifically asked regarding the distances between driveways and the requirements in the ARMS manual and whether these were considered at the time, the encroachment permit was issued to Pilot, Mr. Clark reiterated,

Distances in the manual in place at the time were probably considered. But again, **these are suggestions**. And you have to look at the site that you've got and what the – what the traffic is doing at the site, how it's circulating on the site, and bring all of those factors together to make that determination.

(R. p. 308, lines 11-20). Mr. Clark also explained that it is impossible for all encroachments to be in exact conformance with the design manuals:

If we lived in the Midwest or lived in Phoenix where everything's laid out in a grid and, as cities grow, they're always growing in a grid and every block is the same, and as you grow out, you have the opportunity to have a clean slate, you can do that.

When you have properties that have been cut up for 3 or 400 years and you've got redevelopment going on on those properties, you don't have a clean slate, but you're trying to do the best you can to create an efficient, effective, and safe interface with the road system.

(R. p. 309, line 13 - p. 310, line 2)⁴.

Just as there is no evidence that SCDOT improperly approved the Travel Center's encroachment permit, there is no evidence that SCDOT was on notice that the Travel Center's driveways were a hazardous condition. As discussed in the flushed median section, an inadmissible traffic study conducted a year after the Appellant's accident is insufficient to put SCDOT on notice. Likewise, the fact that a traffic study of the area was not done until 10 years after the completion of the Widening Project and the Interchange Project is not dispositive of any

⁴ Leland Colvin also testified that the manuals used by SCDOT contain regulations but each manual recognizes the difficulty of being able to comply with each provision. As such, the manuals all contain "exceptions" to allow non conformance with provisions that are impossible to satisfy. (R. p. 284, lines 4-25).

wrongdoing. Appellants do not cite to any regulation, requirement or statute that mandates SCDOT conduct traffic studies within a certain time period. Moreover, it is impossible for SCDOT to monitor and study all “heavily traveled” intersections in the state on a continual basis.

The only evidence presented established that SCDOT used its engineering judgment when evaluating and approving the encroachment permit for the Travel Center’s driveways. Moreover, the evidence established that it is simply impossible to be in compliance with all of the manuals and design criteria due to the fact that all properties do not have “a clean slate,” but rather, are limited by existing conditions when under re-development.

Accordingly, the provisions of the South Carolina Tort Claims Act, § 15-78-60 et al, namely § 15-70-68 (15), bar Appellants claims against, SCDOT and the circuit court properly granted SCDOT’s motion for summary judgment.

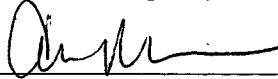
CONCLUSION

The State Tort Claims Act § 15-70-68 et al, namely 15-70-68 (15), provides immunity to SCDOT for the design and maintenance of the public ways. While the immunity is not in perpetuity, to survive summary judgment, Appellants were required to present evidence of a hazardous condition and that SCDOT failed to take corrective action after notice of the hazardous condition. Appellants have not presented evidence to support either requirement. In this case, the evidence establishes that SCDOT used its engineering judgment in both the installation of the flush median and the approval of the encroachment permit for the Travel Center’s driveways. Moreover, there is no evidence in the record that either the median or the driveway locations were hazardous conditions or that SCDOT had any notice of hazardous conditions. The Appellants’ accident was a terrible situation caused by Daniel Sena who made the decision to drive while under the influence of both cocaine and alcohol. The circuit court

properly granted SCDOT's motion for summary judgment and the order should be affirmed.

Respectfully submitted,

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