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.

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.

RECEIVED
MAY 07 2018
SC Court of Appeals

RESPONDENT SPEEDWAY LLC'S BRIEF

J. Bennett Crites, III
Mary B. Ramsay
SHUMAKER, LOOP & KENDRICK, LLP
PO Box 22207
Charleston, SC 29413
bcrites@slk-law.com
mramsay@slk-law.com

TABLE OF CONTENTS

Table of Authorities iii

Counter-Statement of Issues on Appeal vi

Statement of the Case 1

Statement of the Facts 2

Standard of Review 4

Arguments

I. The Circuit Court Properly Held That Speedway Owed No Duty 6

A. SCDOT has exclusive ownership, control, maintenance, and authority over the Highway 7

B. Speedway did not create a dangerous artificial condition on the Highway 8

1. The subject median was not created by Speedway.................... .. 8

2. Properly permitted driveways are not dangerous artificial condition on the Highway 11

C. Speedway owed no duty to the Appellants to keep the Highway in a safe condition or to warn Appellants of any alleged dangerous condition on the Highway.. 12

II. There Is No Issue Of Material Fact That Speedway Breached Any Alleged Duty Owed To Appellants.. 14

A. No raised median has ever been present on the Highway in front of the Pilot.. 14

B. No raised median was ever contemplated or included in SCDOT's design plans for the Widening Project in front of the Pilot.................. 14

C. No evidence has been presented of Speedway's involvement with the store driveways.. 17

D. No evidence has been presented of Speedway's notice of substantially similar accidents in front of the Pilot.. 17

III. The Circuit Court Properly Held That Speedway Was Not The Proximate Cause of Appellants' Injuries 18

Conclusion 20

TABLE OF AUTHORITIES

Case Law

South Carolina

Adamson v. Richland County School District One, 332 S.C. 121, 503 S.E.2d 752 (Ct.App.1998)........ 4

Bishop v. S.C. Department of Mental Health, 331 S.C. 79, 502 S.E.2d 78 (1998) ... 6, 18

Brockbank v. Best Capital Corp., 341 S.C. 372, 534 S.E. 2d 688 (2000) 4

Doe v. Batson, 345 S.C. 316, 548 S.E.2d 854 (2001) 7

Dorrell v. S.C. Department of Transportation, 361 S.C. 312, 605 S.E. 2d 12 (2004).. 10

Driggers v. City of Florence, 190 S.C. 309, 2 S.E.2d 790 (1939) 18

Ford v. S.C. Department of Transportation, 328 S.C. 481, 492 S E 2d 811 (Ct. App. 1997) 13

George v. Fabri, 345 S.C. 440, 452, 548 S.E.2d 868, 874 (2001) 5

Giannini v. S.C. Department of Transportation, 378 S.C. 573, 664 S.E. 2d 450 (2008) 7, 10

Hancock v. Mid–South Management Co., 381 S.C. 326, 673 S.E.2d 801 (2009) 5

Harris Teeter, Inc. v. Moore & Van Allen, PLLC, 390 S.C. 275, 701 S.E.2d 742 (2010) 5, 9

Hughes v. Children's Clinic, P.A., 269 S.C. 389, 237 S.E.2d 753 (1977) 18

Hurst v E. Coast Hockey League, Inc., 371 S.C. 33, 637 S.E.2d 560 (2006) 7

Kennedy v. Carter, 249 S.C. 168, 153 S.E.2d 312 (1967) 18

Messier v. Adicks, 251 S.C. 268, 161 S.E.2d 845, 846 (1968) 20

Miller v. City of Camden, 329 S.C. 310, 494 S.E.2d 813 (1997) 14

Parks v. Characters Night Club, 345 S.C. 484, 548 S.E.2d 605 (Ct. App. 2001) 6

Priest v. Brown, 302 S.C. 405, 396 S.E.2d 638 (Ct. App. 1990) 5

Regions Bank v. Schmauch, 354 S.C. 648, 582 S.E.2d 432 (Ct.App.2003) 18

Sabb v. South Carolina State University, 350 S.C. 416, 567 S.E.2d 231 (2002) 6

Sauner v. Public Service Authority of South Carolina, 354 S.C. 397, 581 S.E.2d 161(2003) 4

Simmons v. Tuomey Regional Medical Center, 341 S.C. 32, 533 S.E.2d 312 (2000) 7

Skinner v. S.C. Department of Transportation, 383 S.C. 520, 681 S.E.2d 871 (2009) 6, 8, 11, 14

South Carolina State Highway Department v. Carodale Assocs., 268 S.C. 556, 235 S.E.2d 127 (1977) 7

South Carolina State Highway Department v. Wilson, 254 S.C. 360, 175 S.E.2d 391 (1970) 7

Washington v. Lexington County Jail, 337 S.C. 400, 523 S.E.2d 204 (Ct. App. 1999). 7

Woody v. South Carolina Power Co., 202 S.C. 73, 24 S.E.2d 121 (1943) 19

Young v. Tide Craft, Inc., 270 S.C. 453, 456, 242 S.E.2d 671, 676 (1978) 18, 19

Other Jurisdictions

Allen v. Mellinger, 625 A.2d 1326 (Pa. Commw. 1993) 12, 13

Berry v. Atlantic Coast Line R.R. Co., 273 F.2d 572 (4th Cir. 1960) 19

Citizens & South National Bank of South Carolina v. Dickerson, Inc., 370 F.2d 692 (4th Cir. 1996) 10

Colonial Motor Freightline, Inc. v. Nance, 216 Va. 552, 221 S.E.2d 132, 137 (1976)... 20

Estes v. Peels, No. E1999-00582-COA-R3-CV, 2000 Tenn. App. LEXIS 641 (Ct. App. Sep. 21, 2000) 11, 12

Keith v. Beard, 464 S.E.2d 633(Ga. App. 1995) 11

Swieckowski v. City of Fort Collins, 923 P.2d 208 (Colo. App. 1995) 10

Statutes and Court Rules

S.C. Code Ann. § 57-3-110(1) 6, 7

S.C. Code Ann. § 57-3-110(3) 7

S.C. Code Ann. § 57-5-1090 12

Rule 56(c), SCRCP 4

Secondary Sources

Restatement (Second) of Torts §349 13

COUNTER-STATEMENT OF ISSUES ON APPEAL

1. **Whether The Circuit Court Properly Held That Speedway Owed No Duty To The Appellants To Prevent The Subject Accident From Occurring On A Public Highway Owned And Maintained By SCDOT.**

2. **Whether The Circuit Court Properly Held That There Was No Issue Of Material Fact That Speedway Breached Any Alleged Duty Owed To Appellants.**

3. **Whether The Circuit Court Properly Held That Speedway Was Not The Proximate Cause Of Appellants' Injuries That Occurred On A Public Highway.**

STATEMENT OF THE CASE

Appellants Cynthia and Richard Wright ("Appellants") filed lawsuits on March 28, 2014 (R. pp. 18-31) and October 8, 2015 (R. pp. 48-66), which were later consolidated in Berkeley County, alleging negligence and loss of consortium against South Carolina Department of Transportation ("SCDOT"), Pilot Travel Centers, LLC ("Pilot"), Speedway LLC[1] ("Speedway"), and Ashley Land Surveying, Inc. f/k/a Ashley Engineering & Surveying, Inc./Ashley Engineering & Consulting, Inc. ("Ashley").

Appellants' allegations revolve around an October 6, 2012 motor vehicle accident involving an intoxicated driver not a party to the lawsuits. Appellants contend that the accident would not have occurred had there been a solid raised median in the highway preventing motorists from making a left-hand turn from Highway 17A into the Pilot Travel Center, and that the absence of such a median created a dangerous condition on the highway. Appellants also contend that the location and design of the Pilot Travel Center's driveways created a dangerous condition on the highway.

Pilot moved for summary judgment on May 6, 2016 (R. pp. 164-167), and its motion was heard by the Honorable Roger M. Young, Sr. on April 10, 2017. In an order filed May 4, 2017 (R. pp. 2-12), Judge Young granted Pilot's motion finding Pilot owed the Appellants no duty to support their negligence claims. Appellants' timely filed a motion under Rule 59(e), SCRCP (R. pp. 925-929) that was denied by order dated June 8, 2017 (R. pp. 16-17).

SCDOT, Speedway (R. pp. 313-316), and Ashley filed similar motions for summary judgment in May and June of 2017. The Honorable Kristi Lea Harrington heard these motions on June 26, 2017, and granted summary judgment finding Speedway and Ashley had no duty to

[1] Appellants' original complaint named Marathon Petroleum Company, LP f/k/a Marathon Ashland Petroleum, LLC as a party, but an amended complaint filed March 10, 2016, substituted Speedway, LLC. (R. pp. 69-82).

Appellants and there was no evidence of proximate cause (R. pp. 13-15). The order cited the South Carolina Tort Claims Act ("SCTCA") as the basis for granting summary judgment in SCDOT's favor (R. pp. 13-15). Appellants filed and served a timely Notice of Appeal on July 19, 2017.

STATEMENT OF THE FACTS

On October 6, 2012, Appellants were injured in a motor vehicle accident while traveling on their motorcycle in the left lane of Highway U.S. 17A ("Highway") in Summerville, South Carolina. The accident occurred when the intoxicated driver of a pick-up truck traveling in the opposite direction pulled into the median and attempted to make a legal left-hand turn into one of the driveways of the Pilot Travel Center. The pick-up truck struck the Appellants' motorcycle in the left lane of the Highway (R. pp. 186-187; 193). At the time of the accident, the driver of the pick-up truck had a blood alcohol level above the legal limit and was under the influence of cocaine (R. p. 193).

The subject accident occurred in the left lane of the Highway in front of the Pilot Travel Center, which abuts the Highway. Pilot constructed the Pilot Travel Center in or around August 2002 after acquiring the real property and existing gas station on or about September 1, 2001. (R. pp. 166-167). The existing gas station, which was owned by Speedway SuperAmerica, LLC[2], already had three driveways with access to the Highway. It is undisputed that there was no solid raised median in the Highway preventing left turns into the existing gas station. (R. p. 400 at 256, lines7-10) (R. p. 166 ¶ 7). Moreover there has never been a solid raised median in this section of the Highway. Instead, the median in front of Pilot's property has always been a

[2] Respondents Pilot and Speedway were part of a joint venture that set out to redesign an existing gas station on the property to create the Pilot Travel Center.

painted flush median allowing motorists on both sides of the Highway to make left turns into abutting businesses. (R. p. 400 at 256 lines 7-21).

Around the time the Pilot Travel Center was being built, the SCDOT was in the process of widening the section of the Highway in front of the Pilot Travel Center (the "Widening Project"). SCDOT was also reconstructing the Interstate 26 interchange intersection adjacent to the existing gas station (the "Interchange Project"). The Widening Project and Interchange Project were adjacent but unrelated projects completed on June 17, 2002 and November 1, 2003, respectively. SCDOT designed the plans for the Widening Project, but it used an outside firm to design the plans for the Interchange Project.

According to the uncontroverted testimony of SCDOT, the design plans for the Widening Project never included a raised median. (R. p. 400 at 253 line 23 – at 254 line16; R. p. 401 lines 2-5; R. p. 401 at 260 lines 16-24).[3] The decision to not install a raised median in front of the Pilot Travel Center was made by Leland Colvin, Jr., who was the Program Manager for the Widening Project. (R. p. 400 at 255 lines 11-18). This decision was made when the Widening Project design plans were prepared, finalized and date stamped in 1998. (R. p. 401 at. 260 lines1-6). SCDOT testified that Mr. Colvin's decision to use a painted flush median, rather than a raised median, was made in conformance with SCDOT's Highway Design Manual. (R. p. 402 at 262 line 19 – at 263 line 22). According to SCDOT, installing a raised median as part of the Widening Project would have been in contravention to the standards set forth in the SCDOT's

---

[3] SCDOT testified that the initial design plans for the Interchange Project, which were prepared by an outside engineering firm, depicted a raised median in front of the Pilot Travel Center. However, the Interchange Project did not concern work performed to this section of U.S. 17A. As stated above, SCDOT performed work to this section of U.S. 17A as part of the Widening Project. According to SCDOT, the presence of the raised median in the first iteration of the unrelated Interchange Project's design plans was simply a placeholder, representing the location of the Highway in which the design plans for both projects would eventually be merged. (R. p. 401 at 257 lines 6-14).

Highway Design Manual, which SCDOT considers "the Bible" for its design projects. (R. p. 400 at 254 lines 13-16).

As part of the construction of the Pilot Travel Center, Pilot redesigned the driveways into the Center and submitted an application for an encroachment permit to SCDOT on or about May 13, 2002. SCDOT had to approve the design and location of the driveways to the Pilot Travel Center before issuing the encroachment permit. According to SCDOT, it conducts an independent analysis when evaluating whether to approve an encroachment permit to ensure that the proposed driveway(s) conforms to SCDOT's regulations and standards. (R. p. 405 at 275 lines 5-24). SCDOT also considers highway safety and how the access to private property affects traffic and the general operation of the highway system. SCDOT testified that it has the ultimate authority to approve encroachment permits and never compromises the public's safety to accommodate a property owner's interests when evaluating such permits. (R. p. 406 at 277 lines 16-21). SCDOT ultimately approved the encroachment permit application and issued a permit to Pilot to construct the driveways to the Pilot Travel Center.

STANDARD OF REVIEW

On appeal from the grant of a summary judgment motion, the Court of Appeals applies the same standard as that required for the circuit court under Rule 56(c), SCRCP. Brockbank v. Best Capital Corp., 341 S .C. 372, 379, 534 S.E.2d 688, 692 (2000). Summary judgment is proper when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Rule 56(c), SCRCP; Adamson v. Richland Cnty. Sch. Dist. One, 332 S.C. 121, 124, 503 S.E.2d 752, 753 (Ct.App.1998). "To determine if any genuine issues of fact exist, the evidence and all reasonable inferences must be viewed in the light most favorable to the [nonmoving] party." Sauner v. Pub. Serv. Auth. of S.C., 354 S.C. 397, 404, 581 S.E.2d

161, 165 (2003). Further, "in cases applying the preponderance of the evidence burden of proof, the [nonmoving] 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., Inc., 381 S.C. 326, 330, 673 S.E.2d 801, 803 (2009).

"The purpose of summary judgment is to expedite disposition of cases [that] do not require the services of a fact finder." George v. Fabri, 345 S.C. 440, 452, 548 S.E.2d 868, 874 (2001). "Summary judgment is appropriate in those cases in which plain, palpable and undisputable facts exist on which reasonable minds cannot differ." Priest v. Brown, 302 S.C. 405, 408, 396 S.E.2d 638, 639 (Ct.App.1990). "It is not sufficient that one create an inference [that] is not reasonable or an issue of fact that is not genuine." Id. "To survive summary judgment, the evidence presented must amount to more than mere speculation and conjecture." Harris Teeter, Inc. v. Moore & Van Allen, PLLC, 390 S.C. 275, 299, 701 S.E.2d 742, 754 (2010).

ARGUMENTS

Appellants were injured in a motor vehicle accident on the public Highway when an intoxicated driver, making a legal left hand turn, failed to maintain the proper look out and collided with their motorcycle. Despite the admitted liability of the at-fault, intoxicated driver (R. p. 277 line 21 – p. 278 line 4), Appellants claim SCDOT, the owner of that public Highway, and Speedway, a former owner of property that abuts that public Highway, are responsible for their injuries as a result of the (1) alleged negligent construction of the Highway and driveways accessing the Highway and (2) removal from the design plans of a raised median in front of the Pilot. However, and as discussed supra, there has never been a raised median in front of the Pilot

on the Highway preventing left turns into and out of the store. Furthermore, there was never a raised median drawn into the Widening project's design plans.

Under South Carolina law, SCDOT has the exclusive ownership, control, maintenance, and authority over public highways. S.C. Code Ann. § 57-3-110(1). Additionally, South Carolina law is very clear regarding the extremely limited circumstances in which a property owner has a duty to motorists for conditions on a public highway, none of which are present in this case. See Skinner v. South Carolina Dep't of Transp., 383 S.C. 520, 524-25, 681 S.E.2d 871, 874 (2009). As a matter of law, Speedway, the former owner of property next to the public Highway where the accident occurred, does not owe a duty to Appellants. Id.

In an attempt to create some sort of duty, Appellants theorize that Speedway "negotiated" a change to SCDOT's design plans for the Highway, alleging Speedway convinced SCDOT to abandon its plan for a nontransversable raised median in favor of keeping the existing more business-friendly, painted flush median. Appellants argue that because of these theoretical negotiations, Speedway actively participated in the creation of the median and therefore had a duty to ensure the median and the driveways did not unreasonably endanger motorists on the Highway, as well as a duty to take affirmative action to mitigate the danger once it became apparent. Appellants' theory is just that – a theory, unsupported by South Carolina law and the testimony in this case.

I. The Circuit Court Properly Held That Speedway Owed No Duty To The Appellants To Prevent The Subject Accident From Occurring On A Public Highway Owned And Maintained By SCDOT.

In any negligence action, the threshold issue is whether the defendant owed a duty to the plaintiff. See Sabb v. South Carolina State Univ., 350 S.C. 416, 567 S.E.2d 231 (2002); Bishop v. South Carolina Dept. of Mental Health, 331 S.C. 79, 502 S.E.2d 78 (1998); Parks v.

Characters Night Club, 345 S.C. 484, 548 S.E.2d 605 (Ct.App.2001). The existence of a duty owed is a question of law for the courts. Doe v. Batson, 345 S.C. 316, 548 S.E.2d 854 (2001); Washington v. Lexington County Jail, 337 S.C. 400, 523 S.E.2d 204 (Ct.App.1999). In a negligence action, if no duty exists, the defendant is entitled to judgment as a matter of law. See Hurst v E. Coast Hockey League, Inc., 371 S.C. 33, 37, 637 S.E.2d 560, 562 (2006); Simmons v. Tuomey Reg'l Med. Ctr., 341 S.C. 32, 533 S.E.2d 312 (2000).

A. SCDOT has exclusive ownership, control, maintenance, and authority over the Highway, the subject median, and the placement and design of driveways with access to the Highway.

It in undisputed that under South Carolina law SCDOT has the exclusive ownership, control, maintenance, and authority over public highways. S.C. Code Ann. § 57-3-110(1) ("The Department of Transportation shall [have the power and duty to] lay out, build and maintain public highways . . . including the exclusive authority to establish design criteria, construction specifications, and standards required to construct and maintain highways…"); S.C. Code Ann. § 57-3-110(3) ("The Department of Transportation shall… [have the power and duty to] cause the state highways to be marked with appropriate directions for travel and regulate the travel and traffic along such highways, subject to the laws of the State[.]". This exclusive authority includes the discretionary placement of medians. See Giannini v. S. Carolina Dept. of Transp., 378 S.C. 573 n.1 (2008) (recognizing SCDOT has initial discretion to place median barriers on a highway). This decision-making authority arises from SCDOT's police power and duty to plan, maintain, and operate the state's highway system. See South Carolina State Highway Dept v. Wilson, 254 S.C. 360, 365-66, 175 S.E.2d 391, 394 (1970) (noting that "the clear weight of authority from other jurisdictions is ... that the construction of a median ... is an exercise of the police power"); South Carolina State Highway Dept v. Carodale Assocs., 268

S.C. 556, 561, 235 S.E.2d 127, 129 (1977) ("Re-routing and diversion of traffic are police power regulations.").

In fact, SCDOT admits it has the final and ultimate decision on all public highways as well as any encroachment of driveways leading to those highways. (R. p. 405 at 274 lines 2-6).

Despite SCDOT's exclusive authority, Appellants contend that Speedway owed a duty to Appellants because Speedway created dangerous artificial conditions on the Highway by 1) allegedly negotiating the removal of a SCDOT-planned nontransversable raised median, and 2) the negligent designing and constructing Pilot Travel Center's driveways.

B. Speedway did not create a dangerous artificial condition on the highway.

Under South Carolina law, a property owner whose land abuts a highway ***only*** owes a duty to motorists for highway conditions where the property owner "undertak[es] an activity that creates an artificial condition on the highway which is dangerous to travelers." Skinner v. South Carolina Dept. of Transp., 383 S.C. 520, 524-25, 681 S.E.2d 871, 874 (2009). (emphasis added).

1. The subject median was not created by Speedway.

Appellants argue that the painted flush median in the Highway in front of the Pilot Travel Center was a dangerous condition on the Highway because it enabled motorists to make a left hand turn onto the premises. While they do not dispute that SCDOT had the final decision making authority, Appellants contend that Speedway "created" the condition by "participating in the median selection process" and is therefore liable for the "dangerous artificial condition." (Appellants' Final Brief at pg. 12).

To support this proposition, Appellants rely exclusively on their unsubstantiated ***theory*** that SCDOT planned to install a nontransversable raised median, but that Speedway negotiated with SCDOT to ensure a more business-friendly, painted flush median was installed instead.

However, the uncontroverted testimony shows there was no "negotiation" of the median and that there was never an expectation that there was going to be a raised median installed in front of the Pilot Travel Center. (R. p. 400 at 253 line 23 – at 254 line 16). In fact, installing a nontransversable raised median in that location would be in contravention to SCDOT's own Highway Design Manual. Id.

There is only one single reference to a negotiation in the entire record, contained in handwritten notes ("Note") at the bottom of a letter dated August 28, 2000, from a SCDOT official to a Speedway employee, which is inadmissible hearsay. Appellants' reliance on a single reference in a Note written after the date SCDOT testified that the decision to use the painted flush median had already been made is not enough to create a genuine issue of material fact to survive summary judgment.[4]

The SCDOT unequivocally testified that the SCDOT never planned to change the existing median by installing a nontransversable raised median, and even doing so would

---

[4] As the Circuit Court noted, these handwritten notes do not evidence that Speedway negotiated with SCDOT regarding the type of median to be used in the portion of the Highway in front of the Pilot Travel Center. First, this particular letter is dated after the date by which SCDOT testified it made the decision to use a painted flush median on the Highway instead of a raised median. Second, SCDOT testified that there was never a "negotiation" of the median, and that there was never an expectation that there was going to be a raised median installed in front of the Pilot Travel Center.

Additionally, while Appellants have speculated that Speedway may have negotiated with SCDOT regarding the median as part of SCDOT's right-of-way acquisition of a portion of the property during the Interchange Project, a *quid pro quo* where Speedway essentially gave away property in exchange for the alleged negotiated removal of the raised median, documents produced in discovery show the SCDOT paid Speedway an amount more than the appraisal amount for the right-of-way.

Appellant cannot provide any evidence such a negotiation occurred beyond pure speculation, which is insufficient to survive summary judgment. Harris Teeter Inc. v. Moore & Van Allen, PLLC, 390 S.C. 275, 299, 701 S.E.2d 742, 754 (2010) ("To survive summary judgment, the evidence presented must amount to more than mere speculation and conjecture.").

violate its own guidelines. If there has never a plan to install a nontransversable raised median, then there was never a reason for Speedway to negotiate an alternative.

However, even if Speedway did negotiate with SCDOT concerning the median, which there is no evidence of and which is adamantly denied, ultimately, the decision as to whether a raised median should be installed on the Highway falls within the exclusive authority of SCDOT, which owns and controls the Highway. Simply stated, an adjacent landowner cannot be held liable for SCDOT's decisions. See Giannini v. S. Carolina Dept. of Transp., 378 S.C. 573 n.1 (2008). The Circuit Court ruled this statutory duty was an independently sufficient basis for finding Speedway had no responsibility for the median.

Appellants argue that SCDOT's choice to carry out its highway construction authority in conjunction with a private entity – again through alleged median negotiations with Speedway - creates liability for both SCDOT and the private entity if the project exposes motorists to danger. However, the case law relied on by Appellants to support of this claim all involve contractors that actually performed work on the highway. See Dorrell v. S.C. Dep't of Transp., 361 S.C. 312, 316, 605 S.E.2d 12, 13-14(2004) (involving contractor's negligent paving of state road); Citizens & South Nat'l Bank of S.C. v. Dickerson, Inc., 370 F.2d 692 (4th Cir. 1996) (involving private company that widened road under SCDOT contract); Swieckowski v. City of Fort Collins, 923 P.2d 208 (Colo. App. 1995) (involving a property owner that designed and constructed a portion of the highway). Here there is no allegation that Speedway actually performed any work or construction on the SCDOT highway, and therefore simply no basis to establish liability on the part of Speedway.

2. Properly permitted driveways are not dangerous artificial condition on the highway.

Relying on case law from other jurisdictions, Appellants argue that a driveway linking private property to the Highway is an artificial condition for landowner liability purposes. See Keith v. Beard, 464 S.E.2d 633, 637 (Ga. App. 1995). However, Keith is distinguishable from this case because it involved a landowner who constructed a driveway ***without*** obtaining the proper permits required by the Georgia Code of Public Transportation. In this case, it is undisputed that the driveways at the Pilot Travel Center were permitted by SCDOT.

Under South Carolina law, evidence that it was a motorists' use of the property owner's driveway that led to alleged dangerous condition is insufficient to establish a business owner "created" a defect on the highway. See Skinner at 525. In Skinner, the South Carolina Supreme Court noted that the types of artificial conditions on the highway that would impose potential liability on a property owner include hazards that result from the conduct of the property owner's business, such as material spilled on the road or smoke emitted from a plant that drifts over the highway. Id. Appellant has not asserted any such artificial conditions in this case.

Additionally, in the case of Estes v. Peels, No. E1999-00582-COA-R3-CV, 2000 Tenn. App. LEXIS 641 (Ct. App. Sep. 21, 2000), that Court held that a property owner owed no duty to protect a plaintiff from an accident that occurred off its premises. In Estes plaintiff was injured on a public highway when a vehicle exiting a manufacturing plant abutting the highway failed to yield to the plaintiff's right of way. As the court discussed, significant was the fact that accident occurred in the highway, plaintiff did not come into any contact with a condition on the premises of the manufacturing plant, and the proximate cause of the accident was the at-fault motorist's failure to yield the right of way to oncoming traffic. Succinctly stated, the at-fault motorist

"simply failed to yield to oncoming vehicles, in violation of [the motorist's] statutory duty." "[T]here [was] nothing dangerous about the defendant's parking lot absent the failure of a driver to obey traffic laws and yield to oncoming traffic." According to the court, even if the conduct of the at-fault motorist was foreseeable, the landowner owed no duty "to prevent a driver from pulling out on a highway without yielding to oncoming traffic." Id. at *21.

Finally, SCDOT has the ultimate decision-making authority with respect to the placement and design of driveways with access to a highway. SCDOT testified that, in order to construct the entrances and exits to the property from the Highway, encroachment permits were required. (R. p. 405 at 274 lines 14-20). As part of the permitting process, SCDOT reviews the design and location of the driveways and conducts an independent evaluation to ensure conformance with SCDOT rules and regulations. (R. p. 405 at 275 lines 10-15). SCDOT also reviews a permittee's encroachment application to ensure driveways do not create any safety concerns or impede efficient traffic operations. SCDOT "may deny any request for any permit for any driveway ... which in [its] judgment ... may create a hazard to the traveling public." S.C. Code Ann. § 57-5-1090. Thus, Pilot could not have constructed the driveways to its property unless SCDOT deemed them to comply with SCDOT's design standards and determined that they were safe for the public.

C. Speedway owed no duty to the Appellants to keep the Highway in a safe condition or to warn Appellants of any alleged dangerous condition on the Highway.

Appellants have failed to present any authority establishing that Speedway, as one of the property owners abutting the Highway, has a duty to maintain, repair, or warn travelers of potentially dangerous conditions on the Highway over which it has no control.

As the Circuit Court pointed out, the facts of this case are nearly identical to those in Allen v. Mellinger, 156 Pa. Commw. 113, 625 A.2d 1326 (1993). In that case, the plaintiffs

attempted to make a left turn from the highway into the defendants' business premises when their vehicle was hit by a truck traveling in the opposite direction. Id. at 115. Relying on Restatement (Second) of Torts §349[5], the Allen Court held that the business owners owed no duty to the plaintiffs to maintain the highway in a safe condition or to warn them of any alleged dangerous condition on the highway. Id. at 118-119. In fact, the Commonwealth owns the highway and "has the exclusive duty for the maintenance and repair of state highways." Allen at 118. The court further rejected the plaintiffs' argument that the business owners' failure to erect signs, paint lines or place curbing or barricades in the store's parking lot to indicate to customers the safest place to enter the parking lot created a dangerous condition. Allen at 119 n.1, 625 A.2d at 1329 n.1 (1993).

Like the business owners in Allen, here, Speedway owed no duty to the Appellants to keep the Highway in a safe condition or to warn Appellants of any alleged dangerous condition on the Highway. Medians are part of the Highway subject to the exclusive control and authority of SCDOT. The decision to install a painted flush median on the subject Highway was within the exclusive province of SCDOT as the governmental agency charged with the duty to design, maintain and operate the State's highways. SCDOT, not Speedway, has the duty to maintain medians. SCDOT, not Speedway, has the "duty to use reasonable care to keep streets and highways within its control in a reasonably safe condition for public travel." Ford v. South Carolina Dept. of Transp., 328 S.C. 481, 487, 492 S E 2d 811, 814 (Ct. App. 1997).

---

[5] According to § 349:
A possessor of land over which there is a public highway or private right of way is not subject to liability for physical harm caused to travelers upon the highway or persons lawfully using the way by his failure to exercise reasonable care
(a) to maintain the highway or way in safe condition for their use, or
(b) to warn them of dangerous conditions in the way which, although not created by him, are known to him and which they neither know nor are likely to discover.

Thus, Speedway, as one of the landowners abutting U.S. 17A, has no duty (or authority) to maintain, repair, or warn others of potentially dangerous conditions on the Highway over which it has no control.] See Skinner v. South Carolina Dept. of Transp., 383 S.C. 520, 524-25, 681 S.E.2d 871, 874 (2009) (noting that while "a contractor performing highway alterations owes a duty to travelers, … [there is] no analogous duty on the part of an owner of property abutting a highway who neither possesses nor controls the highway."); Miller v. City of Camden 329 S.C. 310, 314, 494 S.E.2d 813, 815 (1997) ("one who has no control [over property] owes no duty.").

Because Appellants cannot establish that Speedway owed them any duty as a landowner abutting the portion of the Highway where they were injured, Speedway is entitled to judgment as a matter of law.

II. There Is No Issue Of Material Fact That Speedway Breached Any Alleged Duty Owed To Appellants.

Assuming arguendo that Speedway owed Appellants a duty, which is strenuously denied, the fact remains that there is no evidence that Speedway breached any duty to Appellants.

A. No raised median has ever been present on the Highway in front of the Pilot.

At no point in time since the original construction of Highway U.S. 17A has a raised, nontransversible median been present on the Highway in front of the Pilot where the Accident occurred. (R. p. 400 at 256 lines 7-21). Rather, the median in front of Pilot's property has always been a painted flush median.

B. No raised median was ever contemplated or included in SCDOT's design plans for the Widening Project in front of the Pilot.

What is clear from the record based on the testimony of Leland Colvin is that SCDOT's design plans for the Widening Project never included a raised median. SCDOT testified that it

never contemplated or intended there to be a raised, nontransversable median in this portion of the highway, because to have done so would have been in contravention of its design manual. What was required, and what has been present since the original construction of Highway 17A in this area, was a painted flush median.

In an effort to argue a raised median was called for in front of the Pilot, Appellants point to the design plans for the Interstate 26 Interchange Project. This Interchange project was going on around the same time as the Widening project. The Interchange project's design plans were created by an outside engineering firm. While on one drawing for the Interchange project there was a raised median drawn in on the plans in front of the Pilot, Colvin's testimony was that this median was not applicable and inconsequential to the design plans for the Widening project. Colvin testified that the reason this was so was again because the depiction of a raised median on the Interchange project's plans was simply a "placeholder" on the Interchange project until SCDOT could merge its Widening Project with the Interchange Project. Colvin described this as simply "due diligence" on the part of the outside engineering firm. (R. p. 358 at 86 line 13 - at 87 line 24; R. p. 360 at 96 line 5- R. p. 361 at 97 line 2).

There is no admissible evidence to create a material issue of fact that the Widening Project's plans ever included a raised median in front of the Pilot. While Appellants allege that Speedway negotiated with SCDOT to ensure that the median in front of the Pilot Travel Center was not raised, there is no admissible evidence to substantiate this conjecture. Instead, Appellants point to the inadmissible hearsay of the Note purportedly dated August 28, 2000, discussed supra, to support this alleged negotiation, which the SCDOT testified did not occur. Regardless, the design plans for the Widening Project were date stamped December 1998 with no raised median. Thus the decision had already been made well before August 2000 that there

would not be a raised median or unmountable median in front of the Pilot. (R. p. 401 at 260 line 1 – R. p. 402 at 262 line 5).

Additionally, and in a continued effort to substantiate some negotiation for removal of the median, or *quid pro quo*, by the property owners parties in this case, Appellants argued at the motion for summary judgment hearing on June 6, 2017 that a necessary piece of discovery was information related to the appraised value of a portion of Speedway's property subject to SCDOT's right of way acquisition efforts. Appellants hypothesized that if the property appraised for more than what it was ultimately sold for to the SCDOT by Speedway, then this would arguably be evidence of a negotiation for the removal of a raised mediation from the design plans was part of a negotiation.

In response to Appellants' request that information be provided and that the record be supplemented, during the time that Judge Harrington still had the motions for summary judgment under advisement, and prior to any ruling being issued, Speedway produced the requested appraisal documents and information in its possession. What those documents showed was that the property for the right-of-way acquisition appraised for $21,000.00. However, the property was ultimately sold to SCDOT by Speedway for $50,000.00. (R. pp. 492-514).

Simply stated, the appraisal documents set the record clear that there was no negotiation by Speedway. There is no admissible evidence that Speedway altered SCDOT's design plans, caused to be removed a raised median from the Widening Project's design plans, or negotiated the removal of a raised median that never existed to begin with, and thus no breach of this alleged duty. Regardless, however, the ultimate decision in this regard would have still rested with and been made by the SCDOT, not Speedway.

C. No evidence has been presented of Speedway's involvement with the store driveways.

What has been testified to by Bill Mulligan of Pilot, both at his deposition and in his affidavit, was that Pilot was the entity that applied for the encroachment permit for the driveways leading to its store. (R. p. 167 ¶ 8). No evidence has been submitted to establish Speedway's involvement in this process. Nevertheless, the accident did not occur in the driveway - it occurred on the Highway owned and maintained by SCDOT. Speedway would submit that the driveway had nothing to do with the accident, aside from the fact that an intoxicated driver failed to yield the right of way to the Appellants as he was making a legal left turn from the Highway. Furthermore, and as thoroughly discussed in Pilot's brief, SCDOT approved the driveways as per the encroachment permit submitted by Pilot and in accordance with SCDOT's design criteria. For these reasons there can be no breach of any duty by Speedway in this regard.

D. No evidence has been presented of Speedway's notice of substantially similar accidents in front of the Pilot.

Appellants have generally alleged that Speedway was on notice of accidents occurring on the Highway in front of the Pilot. However, there is no admissible evidence which creates a material issue of fact to substantiate the allegation that Speedway was on notice of any of these accidents, much less accidents substantially similar to the accident in question.

Furthermore, and as previously discussed, any accidents occurring in front of the Pilot were on a Highway owned and maintained by SCDOT. As SCDOT is the entity with the statutory duty and authority to design, construct and maintain the Highway, any changes would have to be initiated by it.

Interestingly, and based on the deposition testimony of Colvin taken on March 13, 2017, SCDOT developed a safety project to add certain countermeasures to the area. Specifically, and

as it relates to the second driveway that Daniel Sena was attempting to turn into when the accident occurred, SCDOT has designed a countermeasure to prevent left turns out of the Pilot and onto the Highway. However, SCDOT has no plans to prevent left turns from the Highway into the Pilot, which is the accident scenario we have here. (R. p. 393 at 226 line 10 – at 227 line 5).

III. The Circuit Court Properly Held That Speedway Was Not A Proximate Cause Of Appellants' Injuries That Occurred On A Public Highway.

In addition to the requirement that the Appellants prove the existence and breach of a duty, Appellants must show that Speedway's negligence was a proximate cause of their injuries. See Bishop v. South Carolina Dept. of Mental Health, 331 S.C. 79, 502 S.E.2d 78 (1998); Regions Bank v. Schmauch, 354 S.C. 648, 582 S.E.2d 432 (Ct.App.2003).

A negligent act or omission is a proximate cause of injury if, in a natural and continuous sequence of events, it produces the injury, and without it, the injury would not have occurred. Driggers v. City of Florence, 190 S.C. 309, 2 S.E.2d 790 (1939); See also Hughes v. Children's Clinic, P.A., 269 S.C. 389, 237 S.E.2d 753 (1977). An act or omission that does no more than furnish the condition or give rise to the occasion by which the injury is made possible is not the proximate cause of the injury. Driggers v. City of Florence, supra. Proximate cause is the efficient cause of the injury-the very thing which brings it about. Hughes v. Children's Clinic, P.A., supra. In addition, foreseeability of some injury from the act or omission is a prerequisite to its being the proximate cause of the particular injury complained of. Kennedy v. Carter, 249 S.C. 168, 153 S.E.2d 312 (1967). As the South Carolina Supreme Court has noted:

> While it is not necessary that the actor must have contemplated or could have anticipated the particular event which occurred, liability cannot rest on mere possibilities. The actor cannot be charged with "that which is unpredictable or that which could not be expected to happen.

Young v. Tide Craft, Inc., 270 S.C. 453, 456, 242 S.E.2d 671, 676 (1978). Furthermore, "the law requires only reasonable foresight, and when the injury complained of is not reasonably foreseeable in the exercise of due care, there is no liability." Woody v. South Carolina Power Co., 202 S.C. 73, 24 S.E.2d 121 (1943); Berry v. Atlantic Coast Line R.R. Co., 273 F.2d 572 (4th Cir. 1960) (applying South Carolina law).

As an initial matter, there is no evidence that any act or omission by Speedway was a proximate cause of Appellants' alleged injuries. Conversely, all evidence in this case demonstrates that Daniel Sena's decision to operate his vehicle under the influence of alcohol and drugs, and then fail to yield the right of way to Appellants, was the proximate cause of the accident.

Furthermore, to the extent that lack of a raised median is alleged to have been a proximate cause of the accident, which is strenuously denied, that was again a design decision that rested solely with the SCDOT as per its statutory duty and not with Speedway.

It was simply not foreseeable to Speedway that Appellants would be injured by an intoxicated driver, making a legal left hand turn, who then failed to maintain a proper look out and yield the right-of-way, thereby colliding with Appellants' motorcycle.

Appellants argue that "the collision would not have happened at an intersection with the traffic control devised and reasonably safe driveways" and that their injury was foreseeable because of the amount of traffic accidents in and around the area. This is pure speculation. In fact, it is just as likely the collision would have occurred approximately fifty yards further up the road with Sena attempting to turn left at the intersection of the Highway and Farmington Road to enter the Pilot as it was that the accident occurred where it did. Any injuries suffered by the Appellants as a result of Speedway's alleged actions were not foreseeable by Speedway.

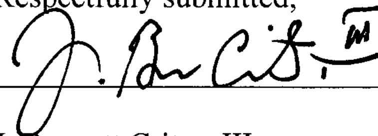
Appellants' injuries were not foreseeable because if Sena had been keeping a proper lookout, maintaining his vehicle under proper control, not operating his vehicle under the influence of alcohol and drugs, and had yielded the right of way to Appellants, the accident would not have occurred.

The burden of proof is on the Appellants to prove by a preponderance or greater weight of the evidence what caused their injuries. If the real cause of the injury is left in doubt by the evidence, the Appellants have not met this burden. If the cause of the Appellants' injuries may be just as reasonably attributed to an act for which Speedway is not liable as to one for which it is liable, Speedway is not a proximate cause for the accident. In this particular case, and aside from anything attributable to Speedway, the several probable causes for Appellants' injuries as a result of the accident have been discussed. There has been no showing that Appellants' injuries most probably resulted from a cause for which Speedway is responsible; accordingly, the Appellants have failed to carry their burden here. Messier v. Adicks, 251 S.C. 268, 161 S.E.2d 845, 846 (1968); Colonial Motor Freightline, Inc. v. Nance, 216 Va. 552, 221 S.E.2d 132, 137 (1976).

CONCLUSION

For the reasons discussed above, this Honorable Court should affirm the grant of summary judgment to Respondent Speedway LLC.

Respectfully submitted,



J. Bennett Crites, III
Mary B. Ramsay
SHUMAKER, LOOP & KENDRICK, LLP
PO Box 22207
Charleston, SC 29413
bcrites@slk-law.com
mramsay@slk-law.com

Charleston, South Carolina
May 7, 2018