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.

REPLY BRIEF

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REPLY ARGUMENT

Respondents rely on three arguments in asking the Court to affirm summary judgment but none support the circuit court's order. Pilot Travel Centers, LLC ("Pilot") and Speedway, LLC ("Speedway") insist they can have no duty because the South Carolina Department of Transportation ("SCDOT") has statutory highway authority. However, under South Carolina Supreme Court precedent, landowners abutting a highway are equally liable with the state for dangers they helped create. Pilot/Speedway also argue the Court should ignore documentary evidence linking them to the decision to alter the existing median plan in a way that was more dangerous but more conducive to Pilot/Speedway's business. Yet, this evidence is admissible under our evidence rules and directly rebut the deposition testimony on which Pilot/Speedway rely. Finally, Pilot/Speedway and SCDOT point a finger toward the driver whose vehicle struck the Wrights (Daniel Sena), holding up Sena as the sole bad actor. But, regardless of Sena, the Wrights' evidence shows a proper median and driveways likely would have prevented the collision.

Nothing prevents Respondents from pursuing their three defenses at trial but nothing in South Carolina law supports summary judgment on these bases either. There is evidence showing Pilot/Speedway contributed to the median and driveway errors, evidence median and driveway conditions violated industry standards, and evidence these conditions were a proximate cause of the collision. The circuit court improperly dismissed this evidence along with the material factual disputes they create and summary judgment should have been denied.

1. Correspondence Documenting SCDOT-Speedway Negotiations over Median Selection is Competent Evidence of Respondents' Negligence.

At the hearing, the parties presented the circuit court competing accounts of the process for selecting a flush, painted median on the highway fronting Pilot Travel Center instead of a raised,

non-transversable median. While the parties agree an original plan for the highway included a raised median, they dispute who was responsible for altering the plan. The circuit court wrongly chose a side in this debate by discarding pertinent evidence supporting the Wright's claims and, as a result, deciding a factual dispute that must be resolved by a jury.

All three Respondents argue an SCDOT engineer (Leland Colvin) made the change of his own accord while merging two highway improvement projects into one. Pilot and Speedway disclaim any role in the process but offer no additional evidence to support their conclusion. Pilot's only witness has "no idea" how the median selection was made (R. p. 629, lines 11-22), and Speedway offered no additional witnesses to support its summary judgment motion. In contrast, the Wrights argue existing plans for a raised median were revised following an exchange of letters and phone calls between a SCDOT District Right-of-Way Manager and a Speedway employee. The Wrights' argument is no more a "theory" (Speedway Br. at 6, 8) than Respondents' as it is supported by a letter documenting the exchange and confirming a "negotiated median removal" which meant "the unmountable median has been eliminated from the plan." (R. p. 675).

Ultimately, a factfinder must determine how a flush median replaced plans for a raised one. However, on summary judgment, the key question for the circuit court was only whether there was a "genuine" dispute regarding the median. Rule 56(c), SCRCP. The competing evidence creates a genuine dispute, and the circuit court erred by relying on Respondents' evidence while dismissing the Wrights' evidence in a single footnote. On appeal, Respondents incorrectly and belatedly argue the Wrights' evidence was properly excluded because it would be inadmissible at trial. These arguments, which were not presented to the circuit court, should be rejected because they are at odds with the South Carolina Rules of Evidence.

Respondents never challenged the letter's admissibility on hearsay or authenticity grounds before the circuit court. At best, Pilot made passing reference to hearsay at the summary judgment hearings. (R. p. 156, line 20). Pilot's brief is the first inkling of a challenge to the letter's authenticity. (Pilot Br. at 10). While Respondents are not barred from raising as proposed additional sustaining grounds arguments omitted below, they are disfavored. I'on, LLC v. Town of Mt. Pleasant, 338 S.C. 406, 421, 526 S.E.2d 716, 724 (2000) ("the respondent may raise an additional sustaining ground that was not even presented to the lower court, but the appellate court is likely to ignore it"). Notably, when raised in their briefs, Pilot and Speedway make no real attempt to support these arguments. They cite no cases or even the evidence rules governing hearsay and authentication and their arguments are effectively unpreserved. In the Matter of the Care and Treatment of McCracken, 346 S.C. 87, 551 S.E.2d 235 (2001) (explaining an issue is deemed abandoned if the argument in the brief is not supported by authority or is only conclusory).

Even on the merits the evidentiary challenges must be rejected because, by definition, the letter's contents are not hearsay. Rule 801(c), SCRE defines hearsay generally to include a statement by an out-of-court declarant offered at trial for the truth of the matter asserted. However, Rule 801(d)(2), SCRE specifically excludes from that definition admissions of a party-opponent. The exclusion of out-of-court statements does not apply when the statement offered against a party is its own statement, "a statement by a person authorized by the party to make a statement concerning the subject," or "a statement by the party's agent or servant concerning a matter within the scope of the agency or employment, made during the existence of the relationship." Rule 801(d)(2)(A), (C), (D), SCRE.

This provision codified a long-standing court practice of admitting a party's admissions as evidence. Llewellyn v. Atl. Greyhound Corp., 204 S.C. 156, 28 S.E.2d 673, 676 (1944) ("The

voluntary declarations or omissions of a party to a civil suit against his interest are clearly receivable in evidence"); Cox v. Buck, 34 S.C.L. 367 (1849) ("parties to a suit are bound by admissions, against their interest, respecting the subject of the action"). An admission of a party-opponent can be made through an oral or written statement and the rule applies in equal measure to the State as it does to private parties. Cornwell v. Plummer, 265 S.C. 587, 220 S.E.2d 879 (1975) (finding party's entries in tax return were admissible as statement of party-opponent); Bunch v. Cobb, 273 S.C. 445, 452, 257 S.E.2d 225, 228 (1979) (admitting highway commissioner's prior oral statements over hearsay objection as an admission of a party-opponent). Here, the letter is an exchange between SCDOT District Right-of-Way Manager Tommy W. Smoak and Robert G. Greiwe, whom Speedway acknowledges as its employee. (R. p. 675); Speedway Br. at 9 ("from a SCDOT official **to a Speedway employee** . . .") (emphasis added).

Moreover, the letter's statements concern a highway improvement project lying squarely within Smoak and Greiwe's duties as SCDOT and Speedway employees. See S.C. Dep't of Revenue v. Meenaxi, Inc., 417 S.C. 639, 656, 790 S.E.2d 792, 800-01 (Ct. App. 2016) (finding store clerk's statement concerning the store's video poker machines were within scope of employment for hearsay purposes). Therefore, the letter's statements by SCDOT and Speedway's employee and authorized representatives are admissible against these parties pursuant to Rule 801(d)(2)(C) and (D). Respondents' passing references to hearsay also fail to acknowledge hearsay exceptions applicable to the letter including the present sense impression exception in Rule 803(1), SCRCP. Greiwe's notes were "verification" of a very recent phone call with Smoak that provided a step-by-step description of the call's contents.

Similarly, Pilot offers no support for its suggestion that the letter should be excluded as inauthentic. The Wrights can admit the letter by providing evidence sufficient to support a finding

that the letter is what they claim. Rule 901(a), SCRE. The Rule 901 burden "is not high" and requires only a foundation on which a jury could "reasonably find that the evidence is authentic." Deep Keel, LLC v. Atlantic Private Equity Grp., LLC, 413 S.C. 58, 64, 778 S.E.2d 607, 610 (Ct. App. 2015) (quoting U.S. v. Hassan, 742 F.3d 104, 133 (4th Cir. 2014)). Rule 901 does not require "direct proof" and may be shown by circumstantial evidence. Winburn v. Minn. Mut. Life Ins. Co., 261 S.C. 568, 576-77, 201 S.E.2d 372, 376 (1973). Moreover, multiple factors demonstrate the negotiations letter is authentic. Since the letter is on SCDOT letterhead, the Rules state that it is self-authenticating. Rule 902(7), SCRE (stating that documents are authentic if they contain "inscriptions, signs, tags, or labels purporting to have been affixed in the course of business and indicat[e] ownership, control, or origin"); see also JKT Co., Inc. v. Hardwick, 274 S.C. 413, 420, 265 S.E.2d 510, 513 (1980) (finding letter appearing on company letterhead was authentic); Alexander v. Caresource, 576 F.3d 551, 561 (6th Cir. 2009) (finding a document on company letterhead was self-authenticating under FRE 902). In addition, the letter was signed by Smoak who identified himself as an SCDOT manager. Greiwe, the letter's recipient, is also identified as Speedway's agent and Speedway acknowledges Greiwe was its employee. Speedway Br. at 9. These factors as a whole meet Rule 901's low barrier to admission.

More broadly, Respondents' insistence that the Court brush aside this crucial evidence shows their disregard for the summary judgment standard. Pilot and SCDOT both argue Colvin's testimony "establishes" there were no median negotiations involving the gas station owners. (Pilot Br. at 9-10; SCDOT Br. at 14). Speedway argues any suggestion of gas station owner involvement is "unsubstantiated." (Speedway Br. at 8). These conclusions require the Court to far exceed the proper summary judgment analysis by either excluding competing documentary evidence or by making a credibility determination in choosing one party's deposition testimony over an

opponent's contrary evidence. Neither proposal is proper at the summary judgment stage. See Appellants' Br. at 14-15.[1]

Finally, Respondents argue summary judgment was proper even if the letter had been considered. However, this argument ignores multiple factual disputes the letter creates on the case's core issues. For example, Respondents' primary argument is that Colvin alone chose a flush median but the letter shows the decision was the product of discussions between SCDOT and Speedway during which a Speedway employee garnered "approv[al]" for a flush median from a SCDOT Right-of-Way Manager. Respondents also cite Colvin's testimony to argue the median was selected in 1998 before Pilot or Speedway ever became involved with the property. However, the letter's date show median selection was still being decided until at least September 2000. Finally, Respondents repeatedly refer to Colvin's testimony indicating initial plans were merely a "placeholder" and argue a raised median was never seriously considered for the disputed stretch of highway. (R. p. 401 at 257:2-10). This too is contradicted by the letter which demonstrates, absent SCDOT-Speedway "negotiations," a raised median never would have been "eliminated from the plan." (R. p. 675).

In sum, Respondents should not be permitted to pursue admissibility challenges to competent evidence they failed to raise to the circuit court. If this Court exercises its discretion to consider these arguments, they should be rejected because they were effectively abandoned, the

[1] Pilot's slight variation on this argument is a citation to Hoard v. Roper Hospital, Inc., 387 S.C. 539, 694 S.E.2d 1 (2010). However, Hoard says only summary judgment opposition may not be exclusively grounded in arguing a jury could choose to disbelieve "uncontradicted evidence." Id. at 549, 694 S.E.2d at 6. Colvin's testimony on the median selection process is not uncontradicted. A letter on SCDOT letterhead documenting negotiations between a SCDOT official and a Speedway employee indicates Colvin's account of the median selection process is untrue. In other words, the Wrights opposed summary judgment not by baldly accusing Colvin of falsehoods but by pointing to documentary evidence contradicting his testimony. Neither Hoard nor any citation in Respondents' briefs support summary judgment under these circumstances.

letter is not hearsay, and it bears sufficient indications of authenticity to be admitted in evidence. While Respondents have offered contrasting evidence regarding the median, this evidence only creates material factual disputes a jury must resolve.

2. SCDOT's Statutory Duties do not Absolve Pilot or Speedway for Harms Caused by Hazards They Helped Create.

Beyond their misguided evidentiary objections, Pilot and Speedway's primary defense is that they can have no liability for the median or driveway errors because the median crosses and the driveways abut a State-maintained highway. Respondents devote their briefs to citing statutes identifying SCDOT's highway maintenance responsibilities. But, these citations do not demand the conclusion Pilot and Speedway offer. The briefs never take the additional step of explaining how SCDOT's duties absolve Pilot and Speedway.

As a result, Pilot and Speedway's argument makes an analytical leap unsupported by South Carolina law. Under the South Carolina Tort Claims Act ("the SCTCA"), liability for collaborative errors by a governmental entity and private party is not a one-or-the-other proposition. The SCTCA imposes a special verdict requirement while expressly recognizing a state agency and private party may be joint tortfeasors. S.C. Code Ann. § 15-78-100(c). This Court previously rejected Pilot/Speedway's argument that a defendant's statutory duty relieves codefendants from liability. See Shaw v. City of Charleston, 351 S.C. 32, 43, 567 S.E.2d 530, 535-36 (Ct. App. 2002) (citing Epps v. U.S., 862 F. Supp. 1460, 1464 (D.S.C. 1994) ("Legal duty of municipality to maintain sidewalk does not absolve landowner with abutting property from similar duty to traveling public"). In Epps, South Carolina's federal district court found that a city's duty to maintain its sidewalks "does not . . . necessarily absolve" post office owner for sidewalk safety issues. 862 F. Supp. at 1464.

In reaching this decision, the Epps court relied on the South Carolina Supreme Court which previously held that "a municipality and an abutting landowner or occupier may be joined as defendants in an action for injuries resulting from defects in a sidewalk or highway . . ." Hollifield v. Keller, 238 S.C. 584, 121 S.E.2d 213, 216-17 (1961) (*overruled on other grounds by* McCall v. Batson, 285 S.C. 243, 329 S.E.2d 741, 744 (1985)). Epps also cited the Fourth Circuit which held that "the fact that a duty is imposed upon public officials to maintain the safety of a street or highway does not necessarily absolve an abutting owner from duty." Chambers v. Whelen, 44 F.2d 340, 341 (4th Cir. 1930). Significantly, South Carolina is not alone in recognizing joint tortfeasors even when the state owes a statutorily-imposed duty. See Appellants' Br. at 12 (citing Kraus v. Hy-Vee, Inc., 147 S.W.3d 907, 921 (Mo. App. 2004); Donavan v. Jones, 658 So.2d 755, 764 (La. App. 1995)).

Ultimately, Epps found that, for an abutting landowner to be liable for a customer's fall on the sidewalk, the facts must show the abutting landowner help create the hazard or that the hazard was "legally traceable" to the landowner. 862 F. Supp. at 1467. This case satisfies the Epps standard because the Wrights presented evidence to show the median selection and driveway errors were traceable to SCDOT and Pilot/Speedway. Thus, Pilot/Speedway's two duty arguments must be rejected. Their efforts to exclude correspondence regarding the median are at odds with the rules of evidence. Pilot/Speedway's further argument that they can have no liability even if the correspondence is admitted is at odds with South Carolina substantive law. If a jury finds the median selection was changed from a safe raised median to a dangerous flush one at the urging of Pilot/Speedway during a negotiation session, then the negligence is legally traceable to SCDOT *and* Pilot/Speedway regardless of SCDOT's statutory duty for the highways.

3. SCDOT is not Entitled to Immunity under S.C. Code Ann. § 15-78-60(15).

SCDOT's immunity claim under the SCTCA should be considered only in light of the protections provided by Section 15-78-60(15). SCDOT makes a cursory reference to eight provisions within Section 15-78-60 (SCDOT Br. at 10) but only attempts to apply subsection 15. SCTCA immunity provisions are affirmative defenses. Frazier v. Badger, 361 S.C. 94, 101, 603 S.E.2d 587, 590 (2004). SCDOT would bear the burden of proof at trial for any immunity provision and may not obtain summary judgment on those it has made no effort to prove. Id. (citing Tanner v. Florence City-County Bldg. Comm'n, 333 S.C. 549, 552, 511 S.E.2d 369, 371 (Ct. App. 1999)).

The Wrights allege claims against SCDOT for median selection, approval of Pilot's driveway plan, and failure to alter the highway following the early 2000s projects and before the Wrights' October 2012 incident. SCDOT's immunity claim should be rejected because SCDOT bears the burden to prove immunity and the Wrights presented evidence showing SCDOT breached nondiscretionary duties by violating mandatory industry standards.

a. Median Selection

SCDOT is not entitled to immunity for the Wrights' two median-related claims. The Wrights allege SCDOT negligently selected a painted, flush median rather than a raised, unmountable one and negligently failed to correct hazards created by the painted median despite notice of the dangers. (R. p. 36 ¶¶ 19, 22-23). Two portions of Section 15-78-60(15) should be considered for SCDOT's immunity defense to these claims. SCDOT is immune from liability for "failure . . . to initially place" a median but only "when the failure is the result of a discretionary act." Id.; Wooten v. S.C. Dep't of Transp., 333 S.C. 464, 468, 511 S.E.2d 355, 357 (1999) (finding that discretionary immunity language was proper portion of Section 15-78-60(15) for initial placement decision rather than blanket design immunity). For claims based on median issues after

initial placement, SCDOT is immune for a raised median's absence unless the issue is not corrected "within a reasonable time after actual or constructive notice." S.C. Code Ann. § 15-78-60(15).

SCDOT presents two arguments in support of immunity for its initial decision to install a painted median rather than a raised one. First, SCDOT contends the painted median posed no hazard to motorists along the highway. SCDOT Br. at 12. Second, SCDOT argues that, regardless of any hazard the painted median posed, SCDOT's decision to install it rather than a raised median was a product of "engineering judgment" protected by discretionary immunity. SCDOT Br. at 19. Contrary to SCDOT's first argument, the Wrights presented evidence that a raised median was appropriate for this portion of the highway and its absence posed hazards for motorists. SCDOT attempted to distinguish previous cases rejecting Section 15-78-60(15) immunity claims by arguing the Wrights failed to present evidence that the median selection violated any "mandates or engineering principles." SCDOT Br. at 18. The record does not support this conclusion.

Bypassing a raised median for a painted one was inconsistent with SCDOT's Access and Roadside Management Standards Manual ("ARMS Manual"). The ARMS Manual states that a raised median to create a divided highway "provides for safer, more efficient traffic movement by reducing accidents involving left-turn access maneuvers as well as head-on collisions." (R. p. 713). All median selection decisions for analogous divided highways must be made with the understanding that highways "operate at higher levels of safety with a minimum of median crossovers" and "[a]dditional crossovers create more conflicts and can lead to higher accident experience." (R. p. 724). "Crossovers," i.e. areas designed for motorists to cross the median of a divided highway, are generally prohibited for "access points" including the driveway near where the Wrights' incident occurred. (R. p. 708, 713. When median crossovers are permitted at driveways, they "shall be limited by" criteria specified in the ARMS Manual including traffic

volume requirements and sight distance restrictions. (R. p. 724). The same criteria require that, before a median crossover is permitted at a driveway, SCDOT must consider and determine "[t]he operation of the highway, other accesses, or crossovers will not be adversely affected." Id. SCDOT violated these requirements by foregoing a raised median based not on independent safety considerations but negotiations with a neighboring property owner.

SCDOT, as well as Pilot, dismiss the ARMS Manual in total arguing its provisions are aspirational, voluntary, or even impossible to follow. (SCDOT Br. at 20-21; Pilot Br. at 20-21). However, the ARMS Manual contains "standards" and thus itself refutes the notion that its provisions are suggestions only. Colvin, SCDOT's project manager, agreed ARMS Manual provisions are industry safety standards and, with some exceptions, these provisions are mandatory. (R. p. 346 at 40, lines 8-16; 348 at 45, lines 4-10). Specifically presented with the opportunity to relegate ARMS Manual provisions to "suggestion" status, Colvin refused and labeled the provisions "guidelines to be followed." (R. p. 347 at 44, lines 16-24). Moreover, what Respondents now calls "suggestions," the South Carolina Supreme Court calls "regulations." Skinner v. S.C. Dep't of Transp., 383 S.C. 520, 523, 681 S.E.2d 871, 873 (2009).

Despite SCDOT's assertion that there is no evidence of "engineering principle[]" violations (SCDOT Br. at 18), the Wrights presented two experts who surveyed highway engineering standards and specified violations during the median selection process. For example, the Wrights offered an affidavit from certified engineer John Teague who reviewed SCDOT's conduct using the ARMS Manual and other highway requirements including standards created by the American Association of State Highway and Transportation Officials ("AASHTO")[2] and the Manual on Uniform Traffic Control Devices ("MUTCD"). (R. pp. 683-84 ¶ 7). Based on these standards, the

[2] SCDOT used AASHTO standards to create the ARMS Manual. (R. p. 346 at 40, lines 21-23).

"proper" approach to SCDOT's early 2000s highway projects required "measures to prevent traffic cross over opposite bound lanes to access the facility." (R. p. 684 ¶ 9). Installing a raised median in front of Pilot Travel Center "would have significantly reduced the risk of harm." (R. p. 686 ¶ 13). The Wrights' second expert, certified highway engineer Richard Balgowan, testified SCDOT's median selection constituted "the creation of an unmitigated ingress and egress point off a busy highway" which "generated hazardous conditions and contributed to the injuries" suffered by the Wrights. (R. p. 690 ¶ 2; 694 ¶ 14). SCDOT should have taken "measures to prevent unsafe entry" to Pilot Travel Center but instead "ignored industry standards." (R. p. 694-95 ¶¶ 16, 17); Elledge v. Richland/Lexington Sch. Dist. 5, 352 S.C. 179, 189, 573 S.E.2d 789, 794 (2002) ("One of the main purposes of industry standard evidence is to provide support for an expert's opinion on what the applicable standard of care is").

SCDOT's second argument is that its median selection is protected by Section 15-78-60(15)'s discretionary immunity. However, discretionary immunity only applies to actions taken after the state weighs competing considerations and uses "acceptable professional standards appropriate to resolve the issue." Pike v. S.C. Dep't of Transp., 343 S.C. 224, 230, 540 S.E.2d 87, 90 (2000) (citing Foster v. S.C. Dep't of Highways & Pub. Transp., 306 S.C. 519, 525, 413 S.E.2d 31, 35 (1992)). SCDOT cites Colvin's testimony suggesting he used engineering judgment to select the median and summarily concludes discretionary immunity applies. Pike rejected SCDOT's attempt to use discretionary immunity in this way. Since discretionary immunity is an affirmative defense, SCDOT bears a burden of production and a burden of persuasion. Id. at 231-32, 540 S.E.2d at 91. To obtain summary judgment on discretionary immunity, it is not enough to offer "some evidence" the alleged error was a discretionary act. Id. at 227, 540 S.E.2d at 88-89.

SCDOT must meet the additional burden of proving there are no genuine issues on the immunity's applicability and that SCDOT is entitled to judgment as a matter of law. That standard is not met when a plaintiff offers expert testimony concluding SCDOT's conduct was not discretionary because it violated accepted professional standards. Id. at 228-29, 540 S.E.2d at 89-90 (denying SCDOT's immunity claim based on expert testimony that failure to remove dangerous roadway sign "was a violation of accepted engineering practices"). The Supreme Court reached a similar result in Wooten where even SCDOT's expert testimony failed to demonstrate regulatory compliance and left a jury question on discretionary immunity. 333 S.C. at 469, 511 S.E.2d at 358; see also Clark v. S.C. Dep't of Public Safety, 353 S.C. 291, 305, 578 S.E.2d 16, 23 (Ct. App. 2002) (*aff'd* 608 S.E.2d 573 (2005)) (affirming denial of directed verdict based on discretionary immunity where parties offered competing expert testimony as to whether government actor's decision properly considered accepted professional standards).

In short, while discretionary immunity includes "the right to be wrong," the immunity's application is not a summary judgment issue where there is competing evidence as to whether SCDOT followed industry standards. Giannini v. S.C. Dep't of Transp., 378 S.C. 573, 581 n. 1, 664 S.E.2d 450, 454 n. 1 (2008). As discussed above, the Wrights' experts both testified SCDOT's median selection violated mandatory state and industry standards. SCDOT countered with Colvin's statements but no supporting expert testimony despite the fact that SCDOT bears the burden on this issue. This is the type of factual dispute that routinely goes to a jury and, since the applicability of discretionary immunity is an "inherently factual" question, this case should be no exception. Pike, 343 S.C. at 232, 540 S.E.2d at 91.

b. Driveways

SCDOT is also not entitled to SCTCA immunity for the Wrights' claim related to the driveways linking Highway 17 to Pilot Travel Center. Similar to the median issue, the Wrights presented evidence showing the driveways SCDOT approved violated SCDOT's own rules and industry standards. Even its own witnesses acknowledge issues with the driveway plan. Most importantly, SCDOT bases its defense on an immunity provision that does not apply to driveways or the approval of a driveway plan.

SCDOT has chosen to pursue immunity only under Section 15-78-60(15), a section that does not cover driveways. Section 15-78-60(15) limits its coverage to "any sign, signal, warning device, illumination device, guardrail, or median barrier." Driveways are not included in the statute's exclusive list, and SCDOT never explains how this section can apply to driveways. The section also provides no protection for the process by which SCDOT reviews proposed driveway plans submitted by private parties whose property adjoins a state highway. There is a SCTCA immunity provision related to permits (S.C. Code Ann. § 15-78-60(12)) but SCDOT has not chosen to actively litigate that provision. In fact, subsection 12 is not even included in the laundry list of SCTCA provisions cited in passing in SCDOT's brief. See SCDOT Br. at 11-12.

Even if the Court were to consider SCTCA immunity for permit rulings, that provision includes a gross negligence exception. S.C. Code Ann. § 15-78-60(12) (granting immunity for decisions related to state's permitting power "except when the power or function is exercised in a grossly negligent manner"). The Wrights' presented evidence showing SCDOT's approval of Pilot/Speedway's driveway plan was grossly negligent including evidence SCDOT violated its own policies and regulations. See Appellants' Br. at 30-31 (collecting cases where state agency policy was recognized as evidence of gross negligence). The ARMS Manual contains an entire

chapter on "Points of Access" with many different requirements for driveways. (R. pp. 714-30). Generally speaking, all driveways "should be located to avoid undue interference with or hazard to traffic on the highway" and "as far from roadway intersections . . . as feasible and practical." (R. pp. 715-16). More specifically, when determining driveway locations relative to an intersection, SCDOT (and the property owner seeking a permit) must consult "minimum driveway location standards" the ARMS Manual calls "requirements." (R. p. 716 § C-2). The same standards are mandatory for driveways which, like Pilot Travel Center's, are in the vicinity of interstate exit ramps. (R. pp. 716-17) ("Points of access in the vicinity of freeway or expressway ramps shall comply with the requirements" imposed by the ARMS Manual").

The driveway plan Pilot/Speedway submitted to SCDOT when seeking an encroachment permit did not comply with the ARMS Manual requirements. SCDOT acknowledges the proposed driveways were not spaced at least 250 feet apart as the ARMS Manual required for a highway with a 45 mile-per-hour speed limit. (R. p. 715; 657 at 30, lines 23-25). SCDOT also acknowledges one or more of the driveway were in the functional area of the adjacent intersection. (R. p. 656 at 11, line 23 – 12, line 4; 379 at 169, lines 15-22; 380 at 173, lines 11-16. In addition to the ARMS Manual violations, the Wrights' expert testimony presented evidence of gross negligence. Mr. Balgowan found the driveway plan Pilot/Speedway submitted and SCDOT approved was unsafe because "the driveways are too close to the functional area of the adjoining intersection." (R. p. 675). By proposing (Pilot/Speedway) and approving (SCDOT) this plan, Respondents violated numerous industry safety standards including those promulgated in the MUTCD, the Institute of Traffic Engineers Intersection Design Guidelines Manual, a National Cooperative Highway Research Program Report, and the Federal Highway Administration's Access Management in the Vicinity of Intersections Manual.

In sum, SCDOT is not entitled to summary judgment on the Wrights' driveway-related claims because Section 15-78-60(15) does not pertain to driveways and SCDOT has not pursued any other immunity provision applicable to the claims. Even if the Court were to consider immunity under other SCTCA provisions, the Wrights presented expert testimony and industry standard violations showing SCDOT acted with gross negligence when approving the dangerous driveway plan that contributed to the Wrights' injuries.

c. Failure to Correct Hazard After Notice

Finally, SCDOT argues it is entitled to immunity under Section 15-78-60(15) for its alleged failure to correct hazards on the highway abutting Pilot Travel Center because SCDOT lacked notice of the hazards. The Court should reject this argument because the Wrights present the same types of evidence of notice previously cited to reject SCTCA immunity claims.

The Wrights presented accident reports for over 200 motor vehicle collision in the immediate vicinity of the Wrights' incident. (R. pp. 781-812). From 2010 to 2013, SCDOT acknowledges 17 collisions involving left turns on the highway fronting Pilot Travel Center. (R. p. 391 at 219, lines 12-17). Citing Giannini, Pike, and Wooten, SCDOT argues these reports provide no evidence of notice. However, Pike held that evidence of previous accidents is "relevant to the issue of whether the DOT was negligent" in failing to make an intersection reasonably safe. 343 S.C. at 234, 540 S.E.2d at 92. SCDOT also insists the Court refuse to consider a 2013 report showing a plethora of accidents at this intersection starting in 2010. SCDOT Br. at 18-19; R. p. 780. SCDOT cites two federal statutes that bar admission of reports related to highway safety construction improvement projects under certain circumstances. See 23 U.S.C. § 409.[3] Section 409

[3] SCDOT cites a second statute in support of exclusion but omits the section number. SCDOT Br. at 19. Based on the citations in SCDOT's memorandum to the circuit court, the Wrights assume the intended reference is 23 U.S.C. § 148(h)(4).

imposes an evidentiary privilege and must be construed narrowly because privileges "impede the search for the truth." Pierce Cnty., Wash. v. Guillen, 537 U.S. 129, 144-45 (2003). By its terms, the Section 409 privilege does not extend to every highway report but is limited to those created for the specific purpose of identifying or planning a highway safety construction improvement project. Since SCDOT seeks to invoke the privilege, it bears the burden of proving all required components. Carson v. CSX Transp., Inc., 400 S.C. 221, 734 S.E.2d 148 (2012). Carson applied the privilege only because a SCDOT engineer testified the evidence in question was produced during a site visit where SCDOT followed criteria in federal regulations for obtaining federal highway funds. Id. at 233, 734 S.E.2d at 154. The privilege should not be applied here because SCDOT has offered no evidence to show the report in question meets Section 409's strict requirements.

Evidence of industry standard violations is also relevant to notice. Wooten v. S.C. Dep't of Transp., 326 S.C. 516, 525, 485 S.E.2d 119, 124 (Ct. App. 1997) (*aff'd on alternative grounds* 333 S.C. 464, 511 S.E.2d 355 (1999)) (finding constructive notice based in part on plaintiff's expert testimony that SCDOT failed to follow MUTCD). As discussed above, the Wrights' experts identified a number of industry standards SCDOT violated including MUTCD. This testimony and the readily available incident reports show SCDOT had at least constructive knowledge of the hazards posed by the painted median and improperly placed driveways. As used in Section 15-78-60(15), "constructive notice" includes "instances when a condition has existed for such a period of time that a [government entity] in the use of reasonable care should have discovered the condition." Major v. City of Hartsville, 410 S.C. 1, 763 S.E.2d 348 (2014) (citing Fickling v. City of Charleston, 372 S.C. 597, 609-10 n. 34, 643 S.E.2d 110, 117 n. 34 (Ct. App. 2007) (additional citation omitted)). Summary judgment is not appropriate where at least some evidence in the record

suggests a road condition was present for so long it should have been discovered. Major, 410 S.C. at 4, 763 S.E.2d at 350.

Lastly, SCDOT argues it would pose an impractically high burden to find constructive notice because the state highway system is large and it is impossible to monitor all its highly traveled roadways. (SCDOT Br. at 19). However, the Wrights' notice argument does not suggest an increased burden on SCDOT at all. SCDOT already conducts annual safety analyses focusing on intersections with high accident rates. (R. p. 393 at 228, lines 8-22). In 2013, a safety analysis was performed at the subject intersection because it was found to have a high accident rate. (R. p. 394 at 229, lines 1-5). The Wrights' contention is simply that SCDOT had information at its disposal to find a high accident rate (and to respond accordingly) in the years before the 2012 incident where the Wrights were injured. This is a contention Colvin could not refute. R. p. 394 at 229, lines 6-14 (stating that he was unsure whether intersection was a high accident rate area in years before 2013). At the very least, the Wrights' evidence presents a question of fact as to whether SCDOT had constructive notice and failed to act. Accordingly, SCDOT is not entitled to summary judgment on its Section 15-78-60(15) immunity defense.

4. Respondents' Proximate Cause Argument Overlooks Key Evidence.

Respondents' proximate cause argument focus on two points. First, Respondents note the at-fault driver (Daniel Sena) had a role in the Wrights' collision. Second, Respondents contend the Wrights have not offered any affirmative evidence linking alleged median or driveway errors to the collision. The Court should reject both arguments because Respondents provide an incomplete and misleading account of Sena's testimony and overlook important expert testimony establishing the required causal connection.

The Wrights' do not contest Sena's role in the collision is a relevant factor for determining fault for their damages. But, Respondents go much further and argue that, because Sena may be liable for the Wrights' losses, Respondents cannot be. This assertion is not supported by fundamental South Carolina tort law. It is well-settled that there can be more than one proximate cause for a single loss. Mellen v. Lane, 377 S.C. 261, 281, 659 S.E.2d 236, 247 (Ct. App. 2008) (quoting State v. Burton, 302 S.C. 494, 496-97, 397 S.E.2d 90, 91 (1990)). Sena's conduct does not exculpate Respondents[4] where there is evidence Respondents both acted unreasonably and were a proximate cause of injury. Shepard v. S.C. Dep't of Corrections, 299 S.C. 370, 375, 385 S.E.2d 35, 37 (Ct. App. 1989) ("the fact that the negligence of a third party concurred with his own negligence to produce the harm does not relieve him of liability"). Plus, Respondents citations to Sena's deposition, designed to suggest a median would not have stopped his ill-fated turn, are not a full or accurate representation of his testimony. Sena testified that 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).

Pilot's also contends the Wrights produced no evidence to support a causal connection between the median or driveway and the collision. Pilot Br. at 31. Pilot can reach this conclusion only by implicitly asking the Court to ignore the Wrights' experts.[5] Both Mr. Teague and Mr.

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[4] Stephens v. CSX Transp., Inc., 415 S.C. 182, 204, 781 S.E.2d 534, 546 (2015), which Pilot cites in favor of its proximate cause argument does not support the circuit court's summary judgment order. See Pilot Br. at 32. Stephens held only that a trial judge may charge a jury on intervening cause where there is evidence an at-fault driver was intoxicated during the collision. Id. Such a charge may be appropriate in this trial. However, there is a significant difference between charging a jury on intervening cause and, as here, granting judgment as a matter of law on proximate cause.

[5] Earlier in its brief Pilot makes explicit its request that the Court ignore the Wrights' experts. Pilot Br. at 23-24. To the extent Pilot's argument is limited to the notion that expert testimony cannot create a legal duty, their assertion is not contested but also not implicated here. There is not a single citation to expert testimony in the duty creation section of the Wrights' initial brief. However, expert testimony is relevant to and can establish the remaining elements of a negligence cause of

Balgowan linked Respondents' conduct to the collision and the Wrights' injuries. Mr. Teague testified that a raised median "would have significantly reduced the risk of harm" to motorists like the (R. p. 686 ¶ 13). Choosing a painted median and permitting unsafe driveways created an unmitigated access point and "contributed to the injuries." Id. ¶ 15. Ultimately, if Respondents' median selection and driveways complied with regulations, then the Wrights' injuries would not have occurred. (R. p. 687 ¶ 19). Mr. Balgowan concluded both the median ("lack of measures to prevent unsafe entry into Pilot's facility") and driveways ("unsafe nature of the ingress and egress points") are causes of the Wright's damages. (R. p. 694-95 ¶ 16).

In fact, the industry standards Respondents violated are specifically designed to protect against this type of collision. The ARMS Manual requires raised medians for this sort of intersection to "reduc[e] accidents involving left-turn access maneuvers." (R. p. 713). By choosing a painted median and creating an additional crossover for this highway, Respondents "create[d] more conflicts" which the ARMS Manual links to "higher accident experience." (R. p. 724). Improperly located driveways, especially those in proximity to major intersections or interstate off-ramps, create "undue interference" or a "hazard to traffic on the highway." (R. p. 715).

Therefore, the Wrights presented sufficient evidence to present a jury question on proximate cause. While Sena's conduct may have contributed to the collision, he testified that a raised median would have prevented him from making a left turn. His testimony is reasonable given the ARMS Manual provisions identifying left-turn dangers as the express purpose for favoring a raised median for this stretch of highway. Finally, unopposed testimony from the only

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action. E.g. Vortex Sports & Entm't, Inc. v. Ware, 378 S.C. 197, 208, 662 S.E.2d 444, 450 (2008) (noting expert testimony may be used to establish breach of duty); Schmidt v. Courtney, 357 S.C. 310, 326-27, 592 S.E.2d 326, 335 (Ct. App. 2003) (noting importance of expert testimony to proximate cause).

expert witnesses offered in this case draws a straight line between median and driveway errors and the collision.

CONCLUSION

For all these reasons and those discussed in the Wrights' earlier brief, the circuit court's summary judgment order should be reversed and the case should proceed to trial.

Respectfully submitted,

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