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| STATE OF SOUTH CAROLINA | ) | IN THE COURT OF COMMON PLEAS |
| | ) | THE FIFTEENTH JUDICIAL CIRCUIT |
| COUNTY OF HORRY | ) | |
| | ) | C/A No: 2022-CP-26-02569 |
| Mary Ann Severino, | ) | |
| | ) | **PLAINTIFF'S RETURN TO MOTION AND MEMORANDUM IN OPPOSITION TO HORRY COUNTY SOLID WASTE AUTHORITY'S MOTION FOR SUMMARY JUDGMENT** |
| Plaintiff, | ) | |
| | ) | |
| v. | ) | |
| | ) | |
| Horry County Solid Waste Authority and Horry County, | ) | |
| | ) | |
| Defendants. | ) | |

COMES NOW THE PLAINTIFF, Mary Ann Severino, by and through her undersigned attorneys, making their Return to Horry County Solid Waste Authority's Motion for Summary Judgment and setting forth her Memorandum of facts and law in opposition to said Motion.

## PROCEDURAL HISTORY

Plaintiff filed the instant action with the filing of the Summons and Complaint on April 26, 2022. Plaintiff filed an Amended Complaint on June 24, 2022. Plaintiff properly commenced this action as situated with the personal service of the Amended Summons, Amended Complaint, and discovery requests upon both above-named Defendants.

Horry County Solid Waste Authority ("SWA") filed the instant Motion on December 16, 2024.

## STATEMENT OF OPERATIVE FACTS

There is no dispute that on August 28, 2020, Plaintiff fell and was injured at the Horry County Solid Waste Authority Convenience Center located at 4146 Highway 701 North, Conway, South Carolina.

Horry County owns the property at 4146 Highway 701 North but the Convenience Center at the location is fully operated by the Horry County Solid Waste Authority.

Plaintiff alleges that on August 28, 2020, while in the process of emptying yard waste into the yard waste bin, she encountered a change in level at the transition of the concrete pad and dirt/gravel area between the concrete pads. Plaintiff alleges that the area where she fell is routinely utilized by patrons of the Convenience Center and that the spaces between the concrete pads not maintained in a manner creates a level walking surface. Additionally, Plaintiff alleges that the SWA failed to properly maintain the area where she fell, failed to discover and remedy the dangerous condition, knew or should have known of the dangerous condition, and failed to warn of the condition. (Compl. ¶ 16).

Plaintiff sustained injuries from her fall at the Convenience Center on August 28, 2020. Immediately after the fall, Plaintiff received emergency transportation to a nearby hospital courtesy of Horry County Fire Rescue. Plaintiff fractured her wrist and her hip in the fall. The hip fracture resulted in surgical repair and a multi-day hospital stay. Plaintiff has incurred just under $100,000 in medical expenses directly related to the injuries sustained on August 28, 2020.

## SUMMARY JUDGMENT STANDARD

The Court is doubtlessly aware of the summary judgment standard. As a brief refresher, in determining whether any triable issues of fact exist, the evidence and all inferences which can be reasonably drawn from the evidence must be viewed in the light most favorable to the nonmoving party. *See generally* City of Columbia v. ACLU, 323 S.C. 384, 475 S.E.2d 747 (1996). "[S]ince it is a drastic remedy, summary judgment should be cautiously invoked to ensure that a litigant is not improperly deprived of a trial on disputed



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factual issues." Helena Chem. Co. v. Allianz Underwriters Ins. Co., 357 S.C. 631, 644, 594 S.E.2d 455, 462 (2004)

Even where there is no dispute as to evidentiary facts, the Court should not grant summary judgment where there is a dispute as to conclusions that may be drawn from the facts. Baugus v. Wessinger, 303 S.C. 412, 401 S.E.2d 169 (1991). Summary judgment should be denied if more than one inference can be drawn from the evidence. Miller v. City of Camden, 329 S.C. 310, 315, 494 S.E.2d 813, 815 (1997).

All ambiguities, conclusions, and inferences arising from the evidence must be construed most strongly against the movant. Tupper v. Dorchester Cnty., 326 S.C. 318, 325, 487 S.E.2d 187, 191 (1997). In determining whether any triable issues of fact exist, the evidence and all reasonable inferences therefrom must be viewed in the light most favorable to the non-moving party. Osborne v. Adams, 346 S.C. 4, 7, 550 S.E.2d 319, 321 (2001). At the Summary Judgment stage, the Court does not try the disputed issues but only decides whether such issues exist. Hammond v. Scott, 268 S.C. 137, 232 S.E.2d 336 (1977). If triable issues exist, those issues must go to the jury. Rothrock v. Copeland, 305 S.C. 402, 405, 409 S.E.2d 366, 367 (1991).

The Court must deny a Motion for Summary judgment if more than one inference can be drawn from the evidence. Koester v. Carolina Rental Center, Inc., 313 S.C. 490, 443 S.E.2d 392 (1994).

**ARGUMENT**

SWA sets forth its rationale for an award of summary judgment through the utilization of circuitous reasoning and conclusory arguments. SWA's first purported grounds for summary judgment rely on misguided applications of the South Carolina Tort Claims Act,



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specifically, § 15-78-60 (4), (5), (8), (10), and (13). SWA submits no facts or evidence of any kind in support of these affirmative defenses. Rather, SWA attempts to support its tenuous legal position with wholly conclusory arguments.

SWA's next stated ground for summary judgment is an unsupported and conclusory statement parroting Rule 12(b)(6), SCRCP, simply alleging "Plaintiff's claim fails to state a cause of action against Defendant upon which relief can be granted."

Next, relying upon Creech v. SC Wildlife, 328 S.C. 24, 30, 491 S.E.2d 571, 574 (1997), SWA claims the alleged dangerous condition "was open and obvious such that Plaintiff as a public invitee should have been able to protect herself."

Interestingly, while simultaneously arguing that the dangerous condition which caused Plaintiff's fall was open and obvious, SWA argues that there is "no evidence" that Defendant had notice of the condition. Lastly, SWA argues that even if the defect was not "open and obvious" there is no evidence that Defendant had notice of the condition. As outlined below, in responses to subsequent Requests for Admission, SWA takes the position that no defect exists.

In light of the following, material issues of fact abound for the jury in this case and SWA's misguided positions must necessarily fail as a matter of law.

## I. NO EXCEPTION TO THE TORT CLAIMS ACT APPLIES.

When a defendant interposes an affirmative defense, he becomes the actor in the suit as to that matter, and the burden of proof rests upon him to establish his affirmative defense. Lorick & Lowrance v. Julius H. Walker & Co., 153 S.C. 309, 318, 150 S.E. 789, 792 (1929). The burden of establishing a limitation upon liability or an exception to the waiver of immunity under the Tort Claims Act is upon the governmental entity asserting it as an affirmative



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defense. Steinke v. S.C. Dep't of Labor, Licensing, & Regulation, 336 S.C. 373, 393, 520 S.E.2d 142, 152 (1999).

SWA asserts that it is entitled to immunity through five exceptions to the Tort Claims Act's limited waiver of sovereign immunity, namely S.C. Code Ann. §§ 15-78-60 (4), (5), (8), (10), and (13). As set out below, SWA cannot make the requisite showing that these affirmative defenses apply to the facts of this case[1].

### A. SWA's Liability Rests Upon South Carolina Common Law

SWA first theorizes it is immune from liability in this action based upon S.C. Code Ann. § 15-78-60(4) which provides "[t]he governmental entity is not liable for a loss resulting from … 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."

The Plaintiff is the "master of the claim." Caterpillar, Inc. v. Williams, 482 U.S. 386, 392, 107 S. Ct. 2425, 2429 (1987). The words "law," "charter," "provision," "ordinance," "resolution," "rule," "regulation," or "policy" do not appear in her Complaint. Rather, Plaintiff alleges SWA is liable because it: a) failed to maintain the subject premises in a safe condition; b) failed to discover the hazard; c) failed to remedy the hazard; d) it failed to warn guests and invitees of a dangerous condition; and e) alternatively, created the hazard. (Compl. ¶¶ 9 and 15).

[1] SWA has not pled that it was entitled to immunity per S.C. Code Ann. §§ 15-78-60(8), (10), and (13). Accordingly, it has waived those defenses. *See Varn v. S.C. Dep't of Highways & Pub. Transp.*, 311 S.C. 349, 354, 428 S.E.2d 895, 899 (Ct. App. 1993) (Where a government agency did not plead discretionary immunity, finding "[t]he [government agency] did not plead these defenses in its amended answer. Consequently, they are waived"). Although SWA has clearly waived these defenses by virtue of its failure to raise them, Plaintiff will address them *arguendo*.



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Plaintiff quite clearly stakes out a common law premises liability claim and believes SWA should be liable because they breached their longstanding common law duties to exercise ordinary care. Accordingly, considering that Plaintiff has made no mention of SWA's policies and procedures, coupled with the reality that Plaintiff has not asserted any related failure as grounds for liability, it is clear that this exception to the waiver of government immunity is not applicable.

### B. SWA is Not Entitled to "Discretionary Immunity."

SWA next claims it is entitled Summary Judgment by operation of S.C. Code Ann. § 15-78-60(5) which provides "[t]he governmental entity is not liable for a loss resulting from … 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."

The government entity bears the burden of establishing discretionary immunity as an affirmative defense. Summer v. Carpenter, 328 S.C. 36, 46, 492 S.E.2d 55, 60 (1997). "Mere room for discretion on the part of the entity is not sufficient to invoke the discretionary immunity provision." Sabb v. S.C. State Univ., 350 S.C. 416, 428, 567 S.E.2d 231, 237 (2002). "Discretionary immunity is contingent on proof the government entity, faced with alternatives, actually weighed competing considerations and made a conscious choice using accepted professional standards." Wooten ex rel. Wooten v. South Carolina Dep't of Transp., 333 S.C. 464, 511 S.E.2d 355 (1999).

Here, SWA has not presented any evidence that it weighed competing alternatives with regard to the incident site. In fact, SWA admits that it did not weigh competing alternatives.



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6. Admit that Solid Waste Authority did not weigh competing alternatives regarding the repair of the alleged defect that caused Plaintiff's injury.

**RESPONSE: Denied, since Defendant Solid Waste Authority does not agree that any defect existed and therefore could not weigh competing interests as contemplated by this Request.**

Simply, SWA has taken the position that it could not, and therefore did not, weigh competing alternatives as Wooten would require.

Considering SWA, by its own admission, made no conscious choice regarding the condition at issue in Plaintiff's Complaint nor did it weigh competing considerations. Accordingly, SWA is not entitled to discretionary immunity as a matter of law.

### C. The "Snow or Ice" Exception Does Not Apply.

SWA next claims it is entitled Summary Judgment by operation of S.C. Code Ann. § 15-78-60(8) which provides "[t]he governmental entity is not liable for a loss resulting from … snow or ice conditions or temporary or natural conditions on any public way or other public place due to weather conditions unless the snow or ice thereon is affirmatively caused by a negligent act of the employee."

SWA has not presented any evidence that the condition at issue is the result of snow, ice, or temporary or natural conditions due to weather.

### D. The Natural Conditions Exception Does Not Apply.

SWA next claims it is entitled to Summary Judgment by operation of S.C. Code Ann. § 15-78-60(10) which provides:

> "[t]he governmental entity is not liable for a loss resulting from … natural conditions of unimproved property of the governmental entity, **unless the defect or condition causing a loss is not corrected by the particular governmental entity responsible for the property within a reasonable time after actual or constructive notice of the defect or condition**." (emphasis added).

Constructive notice is a legal inference, which substitutes for actual notice. Strother v. Lexington Cnty. Recreation Comm'n, 332 S.C. 54, 504 S.E.2d 117 (1998). Where there is evidence that "there were numerous [governmental] personnel within the area of the defect who could have seen and reported the problem…," the question of constructive notice is one for the jury. Fickling v. City of Charleston, 372 S.C. 597, 609-10, 643 S.E.2d 110, 116-17 (Ct. App. 2007) (Finding a question of fact existed where numerous government employees happened by the incident site daily).

Here, Plaintiff will present evidence at trial that the premises at issue in her Complaint were hazardous. (*See* Bryan Durig Report; **Ex. A**). SWA denies that the condition was a hazard.

5. Admit that the Solid Waste Authority did not need approval from Horry County to repair or remedy the alleged defect prior to Plaintiff's injury.

**RESPONSE: Defendant Solid Waste Authority admits that it had the ability to fix certain issues without any input from Horry County but denied that the alleged defect existed.**

Although this polar disagreement is, in itself, a material dispute of fact that requires submission of the case to a jury, there is ample evidence within the record confirming that numerous SWA employees frequent the incident site on a daily basis.



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| | |
|---|---|
| 5 | Q. Do you look for unlevel surfaces? |
| 6 | A. Yes. If it's a place like a truck |
| 7 | driver comes in and gets a can and he makes it -- |
| 8 | where it's switching out one and putting one down, |
| 9 | like, on the ground or something and it makes a |
| 10 | rut, as along as he gets out of the way, I take a |
| 11 | shovel and try to level it back out. |
| 12 | Q. So part of your inspection process is, |
| 13 | if you find a rut, you're supposed to level that |
| 14 | out? |
| 15 | A. Yes, sir. |

- *30(b)(6) Deposition Testimony*

| | |
|---|---|
| 15 | Q. And so if you got there in the morning |
| 16 | or if an employee gets there in the morning and |
| 17 | starts that first inspection and there's a rut, it |
| 18 | should be fixed by the end of the day? |
| 19 | A. No. It should be fixed right then. |
| 20 | Q. Immediately? |
| 21 | A. Yeah, just as soon as you can get to |
| 22 | it. |

- *30(b)(6) Deposition Testimony*

[*remainder intentionally left blank*]

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| | |
|---|---|
| 14 | Q. All right. With the concrete pads and |
| 15 | the dirt there, are you trained to make the dirt |
| 16 | level with the concrete pad? |
| 17 | A. Well, you make sure there's no holes |
| 18 | for nobody to trip in. Everything -- you try to |
| 19 | make it where everybody can walk there and nobody |
| 20 | has nothing to trip on or nothing to make them |
| 21 | fall. |
| 22 | Q. And if you find something -- |
| 23 | A. You correct it right then, if you can. |

- *30(b)(6) Deposition Testimony*

SWA clearly testifies that it should "make sure there's not **holes** for nobody to trip in." Plaintiff's testimony is that is exactly what caused her to fall – a hole.

| | |
|---|---|
| 2 | A. Describe the hole I fell in. I don't even |
| 3 | want to think about it, that's how upset I get. Maybe |
| 4 | the hole was maybe this wide. The depth, I do not |
| 5 | know. I did -- I was in the middle of a broken hip so |
| 6 | I don't know how deep it was, but it was a hole. And |
| 7 | it was like that wide, whatever that is. And my arm |
| 8 | was not -- never near the hole and I -- my arm hit. |

- *Plaintiff's Deposition Testimony*

In light of SWA's testimony, several things are clear. First, vehicles frequently create ruts around the incident site. Second, SWA's designees have testified that they know to look for those unlevel areas and eliminate them. Third, SWA looks for those unlevel areas because

they know such areas are tripping hazards. Finally, Plaintiff's expert, Bryan Durig, has submitted a report concluding that the incident site was a hazard because of a dangerous change in level. In summation, there are material disputes of fact whether SWA should have known about the hazardous condition of the incident site.

Here, as in Fickling, there is direct evidence from SWA that its employees and designees are frequently in the vicinity of the incident site. SWA's designees have testified that they are looking for conditions such as the one that is the subject of this action and Dr. Durig's conclusions; they do so because such conditions can foreseeably hurt public invitees. Accordingly, as in Fickling, material questions of fact abound for the jury's consideration on the issue of notice.

### E. SWA Does Not Make Regulatory Inspections.

SWA next claims it is entitled to Summary Judgment by operation of S.C. Code Ann. § 15-78-60(13) which provides:

> "[t]he governmental entity is not liable for a loss resulting from … **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." (Emphasis added).

The inspections contemplated are inspections performed by regulatory agencies that are tasked with the responsibility of inspecting various properties to issue permits. See Steinke v. S.C. Dep't of Labor, Licensing, & Regulation, 336 S.C. 373, 396, 520 S.E.2d 142, 154 (1999) (Finding a government agency liable for inspections despite the assertion of "inspection powers exception").

Here, it is clear that any inspections at issue are not regulatory in nature as contemplated by the Act. Further, Plaintiff is not alleging that SWA's inspections are to blame.



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The clear allegations of the Complaint, as above, set out a common law premises liability claim for failure to maintain the property, discover and remedy defects, and failure to warn of defects.

Considering Plaintiff does not complain of inspections, and any inspections would not have been regulatory in nature, the Court should deny SWA's instant Motion as it pertains to S.C. Code Ann. § 15-78-60(13).

## II. OPEN AND OBVIOUS

SWA's position as to the open and obvious allegation relies solely upon Creech. However, a fair reading of Creech indicates that it supports Plaintiff's position rather than granting summary judgment to SWA.

Creech involves a Plaintiff who fell off a public dock which had a railing erected only on one side of the dock. The Plaintiff stumbled and fell approximately ten (10) feet off the dock on the side of the dock lacking any form of railing. In Creech, the Defendants argued that the lack of a railing on one side was an "obvious condition that an invitee should notice and that Creech made an informed decision about whether to stay on the dock even though it has a rail on only one side." Id. at 31. Our Supreme Court rejected the Defendants' position in Creech relying upon Callander v. Charleston Doughnut Corp., 305 S.C. 123, 406 S.E.2d 361 (1991), which held that "[t]he traditional 'no duty to warn of the obvious' rule has been modified in many jurisdictions to hold that an owner is liable for injuries to an invitee, despite an open and obvious defect, ***if the owner should anticipate that the invitee will nevertheless encounter the condition, or that the invitee is likely to be distracted***." *Citing generally* 62 Am.Jur.2d Premises Liability § 146–157; 62A Am.Jur.2d, Premises Liability § 504; Annotation 35 A.L.R.3rd 230, § 4(a); Guidry v. Continental Oil Co., 640 F.2d 523 (5th



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Cir.1981); Williams v. Boise Cascade Corp., 507 A.2d 576 (ME 1986); Shaffer v. Mays, 140 Ill.App.3d 779, 95 Ill.Dec. 83, 489 N.E.2d 35 (1986); Tribe v. Shell Oil Co., Inc., 133 Ariz. 517, 652 P.2d 1040 (1982); Southern Railway Co. v. ADM Milling Co., 58 N.C.App. 667, 294 S.E.2d 750 (1982) (Emphasis added).

Whether a hazard is open and obvious is a question of fact and should be left to the jury when "the evidence [is] in conflict." Freeman v. Case Corp., 118 F.3d 1011, 1014 (4th Cir. 1997).

As a threshold matter, while it is arguable that the dangerous condition should be open and obvious to the trained attendants at SWA, there is no serious argument that it should have been open and obvious to a causal customer simply seeking to empty her yard debris.

Moreover, any argument by SWA that the dangerous condition is open and obvious should be wholly disregarded given SWA's responses to Requests for Admissions in which it firmly asserts that no defect exists.

5. Admit that the Solid Waste Authority did not need approval from Horry County to repair or remedy the alleged defect prior to Plaintiff's injury.

**RESPONSE: Defendant Solid Waste Authority admits that it had the ability to fix certain issues without any input from Horry County but denied that the alleged defect existed.**

6. Admit that Solid Waste Authority did not weigh competing alternatives regarding the repair of the alleged defect that caused Plaintiff's injury.

**RESPONSE: Denied, since Defendant Solid Waste Authority does not agree that any defect existed and therefore could not weigh competing interests as contemplated by this Request.**



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In essence, SWA's kitchen sink Motion for Summary Judgments asks this Court to determine – as a matter of law – that a defect that SWA alleges never existed was simultaneously so open and obvious that Plaintiff should have discovered it and avoided it while also apparently attesting that its trained attendants could not have discovered it despite their constant inspections to the property. SWA cannot have it both ways.

Despite failing on the threshold issue of open and obvious, even if this Court were to determine the defect was open and obvious, this defense still fails under both scenarios laid out in Creech.

**A. Should SWA have Anticipated Invitees Will Encounter the Condition?**

SWA's open and obvious defense fails as a matter of law because it acknowledges through Requests for Admissions and deposition testimony that it was "actually aware" patrons would encounter the area where Plaintiff alleges she fell.

2. Admit that prior to the incident on August 28, 2020, the Solid Waste Authority's employees were actually aware that patrons of the Convenience Center walk in the area where Plaintiff alleges she fell.

**RESPONSE: Admitted.**

Further, the deposition testimony of SWA establishes it should have anticipated invitees would encounter the condition.

First, SWA's testimony is that its employees inspect the property throughout the day – every day. SWA acknowledges that part of that inspection is to make sure the dirt areas are kept level. As illustrated below, the one stated reason for that by SWA is because "that's probably where they'll (the customer) go."



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| | |
|---|---|
| 19 | Q. So when you're inspecting -- and let's |
| 20 | call it the dirt area. |
| 21 | A. Yes. |
| 22 | Q. -- is part of the inspection to find |
| 23 | areas where it might not be level? |
| 24 | A. Not level for the customer, because |
| 25 | that's probably where they'll go. |

- *30(b)(6) Deposition Testimony*

Following that line of questioning, SWA testified unequivocally that customers walk on the dirt areas of the facility.

| | |
|---|---|
| 1 | Q. You said, "that's probably where |
| 2 | they'll go." Do the customers walk on that dirt |
| 3 | area? |
| 4 | A. (Witness nods head up and down.) |
| 5 | Q. Can you say "yes" or "no"? |
| 6 | A. Yes. |

- *30(b)(6) Deposition Testimony*

When asked why site attendants would level the dirt area, SWA testified to its knowledge that customers encounter those areas and that there is a danger of customers stepping into unlevel areas and falling.



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| | |
|---|---|
| 14 | Q. You go grab some extra dirt and level |
| 15 | it out? |
| 16 | A. If I have to, yes. |
| 17 | Q. And why does Horry County Solid Waste |
| 18 | want you to level all that out? |
| 19 | A. That way people can't back in there or |
| 20 | go beside the can and step into it and fall. |

- *30(b)(6) Deposition Testimony*

Moreover, when asked how customers are supposed to dump their yard debris, SWA testifies that the customers walk beside the can exactly where Plaintiff alleges she fell. SWA's testimony also indicates that the side which Plaintiff alleges she fell is unlevel by noting that the "other side may be level."

| | |
|---|---|
| 4 | Q. Okay. What if they don't have a |
| 5 | trailer? What do they generally do? |
| 6 | A. A lot of times they park in the front |
| 7 | and dump it in the front of the can, just like... |
| 8 | Q. And if they needed to walk to the back, |
| 9 | I guess, this is the area they would walk, right |
| 10 | beside that can? |
| 11 | A. Right, but, now, you have the other |
| 12 | side, too. The other side may be level. That |
| 13 | might just be this side here [indicating]. You |
| 14 | know what I'm saying? |

- *30(b)(6) Deposition Testimony*

Even more telling is the fact that SWA workers are **trained** that people use the concrete area beside the bin as a "walkway." Therefore, SWA cannot – in good faith – argue that it did not know customers would "encounter" the condition.

| | |
|---|---|
| 18 | Q. I think your testimony was that this |
| 19 | concrete walkway would be kept clean; is that |
| 20 | correct? |
| 21 | A. Yes, sir. |
| 22 | Q. Okay. And are they trained that people |
| 23 | are use that as a walkway? |
| 24 | A. Yeah, the entire area. |

- *30(b)(6) Deposition Testimony*

Given the knowledge that this area where Plaintiff fell is admittedly used as a "walkway", the walkway would be out of code. The International Property Maintenance Code, Section 302.3, states, "Sidewalks, walkways, stairs, driveways, parking spaces and similar areas shall be kept in a proper state of repair, and maintained free from hazardous conditions." (See Bryan Durig Report, ¶ C).

Considering the above response to Requests for Admissions and deposition testimony, SWA's open and obvious defense fails under Creech because it admits that it knew customers would encounter the condition.

**B. Should SWA have Anticipated Invitees Would be Distracted?**

Although the disjunctive statement of law in Creech dispenses with the open obvious rule if SWA should have anticipated invitees would encounter the condition **or** that invitees are likely to be distracted, this case satisfies both of those exceptions.



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The testimony is clear that the SWA Convenience Center where Plaintiff fell is a self-service facility. It is undisputed that Plaintiff was in the process of utilizing the yard waste bin at the time of her fall. While there may be a factual dispute about the specific details of the fall, there is no factual dispute that patrons must lift their yard debris over the edge of a tall trash can when in the process of self-service debris dumping.

```
2           Q.   So if you have a bag full of yard
3    debris, you have to go over the edge and dump it
4    in?
5           A.   Yes, sir.
```

- *30(b)(6) Deposition Testimony*

Given that SWA admits it is aware patrons will walk where the dangerous condition allegedly existed, it logically follows that these same patrons will be distracted to some degree by the yard debris in their arms as they traverse the area where Plaintiff fell. In this instance, SWA requires invitees to carry their own trash to the bin and dump it. Therefore, if it is accepted that the defect was open and obvious, patrons would still be distracted by walking with arm loads of yard debris and by attempting to lift that arm load of debris higher than chest level to dispose of it.

Testimony of Ed Ray, the attendant on duty at the time of Plaintiff's fall, demonstrates the height of the bins. Mr. Ray testified that the bin is roughly chest high to him at his height.



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| | |
|---|---|
| 10 | Q. Yes, sir, no problem. When we spoke |
| 11 | last time in the deposition and I asked you about |
| 12 | the height of that bin as you're dumping the |
| 13 | stuff over the edge, am I correct that you said |
| 14 | it's about chest high on you? |
| 15 | A. Yes, sir, that's about right. |
| 16 | Q. All right. And I think you said you |
| 17 | were about 6 foot 2? |
| 18 | A. Yes, sir. |

- *Deposition of Ed Ray*

Given that the average height of a male in this country is only 5'9" and females is 5'4", it logically follows that the average customer will be forced to lift yard debris higher than chest high to complete the dumping process required by SWA.[2] SWA further testified that if the front of the bin is full, patrons must walk toward the back and dump it in the back. This obviously requires patrons to walk toward the back of the bin while carrying debris, which unquestionably is distracting and blocks the patrons' view of the ground in front of them.

[*remainder of page intentionally left blank*]

[2] Fryar CD, et. al. Mean Body Weight, Height, Waist Circumference, and Body Mass Index Among Adults: United States, 1999-2000 Through 2015-2016; National Health Statistics Reports, No. 122, December 20, 2018.



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| | |
|---|---|
| 8 | Q. -- down? Okay. |
| 9 | And so in the yard waste, for instance, |
| 10 | if folks come up and they're the first there and |
| 11 | dump all their yard waste in the very front of the |
| 12 | bin, what do your folks tell people as far as where |
| 13 | they go to dump the rest of it after that's full? |
| 14 | A. They will ask them, you know, to put it |
| 15 | where there isn't material. |
| 16 | Q. So if the front is full, walk towards |
| 17 | the back and dump it in the back? |
| 18 | A. Yes, sir. |

- *30(b)(6) Deposition Testimony*

### III. NOTICE OF THE CONDITION

SWA argues in the alternative that “even if Plaintiff could prove that the alleged dangerous/defective condition was not open and obvious such that she should have been warned of the condition, there is no evidence the Defendant had notice of such condition.”

SWA’s motion does not provide any support or details for its definition of “notice” related to this position. However, as the Court is certainly aware, an invitee is "one who enters upon the premises of another at the express or implied invitation of the occupant, especially where he is on a matter of mutual interest or advantage." Crocker v. Barr, 409 S.E.2d 368, 371 (S.C. 1991). The duty owed to an invitee is the duty to exercise reasonable care. Sides v. Greenville Hosp. Sys., 607 S.E.2d 362, 364 (S.C. Ct. App. 2004). In addition, "[t]he landowner has a duty to warn an invitee only of latent or hidden dangers of which the landowner is on actual or constructive notice." Taylor v. United States, 2015 WL 4744542, at

*2 (D.S.C. Aug. 11, 2015) (citing Larimore v. Carolina Power & Light, 531 S.E.2d 535, 538 (S.C. Ct. App. 2000)).

"One who controls the use of property has a duty of care not to harm others by its use." Miller v. City of Camden, 329 S.C. 310, 314, 494 S.E.2d 813, 815 (1997). Similarly, "an owner or possessor can be held liable for injuries to an invitee by reason of a dangerous condition on adjacent property if it is shown that he knew or had reason to know of the danger and failed to take reasonable steps to warn or protect his customers." 18 S.C. Jur. Negligence § 48.

"When an obscured danger exists on land directly appurtenant to the land owned or occupied and is near a place where invitees enter and exit the landowner's or occupier's property, the owner or occupier owes a duty to those invitees entering and exiting to warn of the danger." 65A C.J.S. Negligence § 636.

Constructive notice is a legal inference, which substitutes for actual notice. Strother v. Lexington Cnty. Recreation Comm'n, 332 S.C. 54, 504 S.E.2d 117 (1998). "Constructive notice arises when a condition has existed for such a period of time that a municipality in the use of reasonable care should have discovered the condition." Fickling v. City of Charleston, 372 S.C. 597, 609-10 n.34, 643 S.E.2d 110, 117 n.34 (Ct. App. 2007) (quoting Jindra v. City of St. Anthony, 533 N.W.2d 641 (Minn. Ct. App. 1995)). Summary Judgment is not appropriate where there is a question of fact whether a hazard has existed "for such a period of time that respondent, in the use of reasonable care, should have discovered it." Major v. City of Hartsville, 410 S.C. 1, 4, 763 S.E.2d 348 (2014). Where there is evidence that "there were numerous personnel within the area of the defect who could have seen and reported the



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problem…," the question of constructive notice is one for the jury. Fickling v. City of Charleston, 372 S.C. 597, 609-10, 643 S.E.2d 110, 116-17 (Ct. App. 2007)

SWA has testified that its employees are required to perform inspections in the morning and continue such inspections "all day long."

```
11          Q.    All right.   So you started telling us
12    just a little bit go about how the inspections take
13    place.   Tell me -- walk me through that.
14          A.    Well, what you do is you start in the
15    morning time, and you check out the area and make
16    sure there ain't nothing in the way of each can,
17    nothing on the ground that anybody could trip over,
18    nothing spilled on the ground where they could
19    slip, and make sure the site is cleaned.
20          Q.    How often do you do those inspections?
21          A.    You did do them all day long.   You keep
22    your eye on them all day long and make sure
23    nothing's in the person's way.
```

- *30(b)(6) Deposition Testimony*

Additionally, SWA has testified that during its inspection process, its employees are to specifically look for tripping hazards and should repair unlevel surfaces.

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| | |
|---|---|
| 18 | Q. During that inspection process, are you |
| 19 | looking -- you mentioned things that might trip |
| 20 | folks, correct? |
| 21 | A. Uh-huh. |
| 22 | Q. Can you say "you" or "no"? |
| 23 | A. Yes. |

- *30(b)(6) Deposition Testimony*

| | |
|---|---|
| 5 | Q. Do you look for unlevel surfaces? |
| 6 | A. Yes. If it's a place like a truck |
| 7 | driver comes in and gets a can and he makes it -- |
| 8 | where it's switching out one and putting one down, |
| 9 | like, on the ground or something and it makes a |
| 10 | rut, as along as he gets out of the way, I take a |
| 11 | shovel and try to level it back out. |

- *30(b)(6) Deposition Testimony*

SWA also testified that the area where Plaintiff alleges to have fallen has a change in level of 2 to 3 inches. In fact, the change in level is so substantial that SWA may have to bring in a "load of dirt" to make it level. A hole in the dirt walking area that would require a "load of dirt" should be noticeable to the employees performing inspections, particularly when the fall occurred roughly 5 hours after the site opened and, admittedly, the employees are to be constantly inspecting the property "all day long." Surely, a hole on the property that would require a "load of dirt" to level out did not appear immediately and would have existed "for



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such a period of time that respondent, in the use of reasonable care, should have discovered it." *See* Major at 4.

| | |
|---|---|
| 2 | Q. Okay. And let me ask you about what |
| 3 | looks to be ruts back in here. Does that -- |
| 4 | A. That needs to be pushed down. |
| 5 | Q. And using this, Exhibit 4, just as an |
| 6 | example, as part of your inspection, do you make |
| 7 | sure this dirt is level with that concrete to make |
| 8 | a smooth walking surface? |
| 9 | A. I don't have no way to make that dirt |
| 10 | level. |
| 11 | Q. Okay. Explain that more to me. |
| 12 | A. You would have to have a load of dirt |
| 13 | or something to put in there to make that level, |
| 14 | and you're are talking 2 inches, 3 inches. |
| 15 | Q. Okay. So there's not enough dirt there |
| 16 | to make it level? |
| 17 | A. No. |
| 18 | Q. Okay. And you say you think it would |
| 19 | need 2, 3 inches to make it level? |
| 20 | A. That's what it looks like to me, but I |
| 21 | don't know. |

- *30(b)(6) Deposition Testimony*



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| | |
|---|---|
| 4 | Q. In the process of making sure |
| 5 | everything is good, do you inspect the area and |
| 6 | the property where the trash is dumped? |
| 7 | A. Yes, sir, I go around there with a |
| 8 | can, yes, sir. |
| 9 | Q. All right. And what do you look for |
| 10 | in those inspections? |
| 11 | A. Well, you look for stuff on the ground |
| 12 | that will trip somebody. You look for holes. |
| 13 | Whatever -- whatever that you think would hurt |
| 14 | somebody and make sure it's fixed to the best of |
| 15 | your ability. |
| 16 | Q. Okay. So we look for things that |
| 17 | could trip somebody, you said holes and anything |
| 18 | that might hurt somebody; is that right? |
| 19 | A. Yes, sir. |

- *Deposition of Ed Ray*

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Without question, it is anticipated that SWA employees will be required to fill in potential trip hazards and are provided the tools to do so.

| | |
|---|---|
| 10 | Q. Okay. All right. So were y'all |
| 11 | trained that the holes obviously would be |
| 12 | potential trip hazards? |
| 13 | A. Oh, yes, sir, the training classes |
| 14 | that were held, yeah. |
| 15 | Q. And what kind of tools, I know when I |
| 16 | talked to you earlier you mentioned a shovel last |
| 17 | time, let me say that, you mentioned a shovel and |
| 18 | a rake. Does Horry County Solid Waste provide |
| 19 | you all all the tools you may need to level |
| 20 | everything out? |
| 21 | A. We got shovels and rakes out there. I |
| 22 | don't know if Horry County furnished them or if |
| 23 | we got them out of the dumpsters, but we got |
| 24 | plenty of them. |

- *Deposition of Ed Ray*

In light of the undisputed reality that SWA owes duty of care concerning the areas from which it has derived a benefit, i.e. this particular convenience center, the Court should deny SWA's instant Motion considering the law imposes legal requirements and duties upon SWA about the incident site.

**CONCLUSION**

In light of the foregoing, several things should be clear. First, South Carolina law provides SWA owes invitees a duty of care with regard to that property. Second, SWA has



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used the incident site as its own for many years. Third, the exceptions to the Tort Claims Act's waiver of immunity are inapplicable to the facts of this premises liability case. Finally, the evidence at issue in this case is susceptible to multiple inferences whether SWA acted reasonably and whether they were on constructive notice of the hazard.

These things are susceptible to only one conclusion, that an award of Summary Judgment is inappropriate, and a jury should decide the case on its merits. Accordingly, the Court should deny SWA's instant Motion for Summary Judgment and require the submission of this case to a jury.

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