THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas

Grace Gilchrist Knie, Circuit Court Judge

Appellate Case No. 2018-001665
Case No. 2016-CP-42-2478

Betty Jean Perkins, Respondent,

v.

South Carolina Department of Transportation, Appellant.

INITIAL BRIEF OF RESPONDENT

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STATEMENT OF THE CASE

This matter arises from an action brought by Respondent Ms. Betty Jean Perkins against Appellant South Carolina Department of Transportation ("SCDOT") that was filed in the Spartanburg County Court of Common Pleas on October 7, 2013.

On March 1, 2012, Ms. Perkins was driving southbound on Interstate I-85 through Spartanburg County. Ms. Perkins heard a loud noise she thought was tire failure. Her vehicle became immobilized and unexpectedly came to rest in the far-left lane of I-85. While stranded inside her vehicle in the left lane, Ms. Perkins called her son-in-law and law enforcement for assistance. Then, she exited her vehicle to seek shelter on the opposite shoulder as she was instructed by the dispatcher. While walking along the concrete barrier in the center median to get around her vehicle, Ms. Perkins stepped into a hole, causing her to fall and injure herself. The hole was later identified as part of a drainage culvert.

This matter was tried non-jury by consent of the parties before the Honorable Judge Grace Gilchrist Knie on February 12, 2018. The trial lasted one day and included the testimony of three witnesses; SCDOT District Maintenance Engineer Michael Holden, SCDOT Engineer G. Robert Bedenbaugh, and Ms. Betty Jean Perkins. On February 15, 2018, Judge Knie entered a verdict in favor of the Plaintiff, Betty Jean Perkins, for damages of $93,362.97. The verdict form indicated that SCDOT was negligent and that Ms. Perkins was not negligent in causing her injury. Accordingly, 100% of the fault was allocated to SCDOT and 0% was allocated to Ms. Perkins. On April 19, 2018, Judge Knie accompanied her verdict form with a formal order that specifically discussed her findings of fact and conclusions of law as required by Rule 52(a), SCRCP.

On April 30, 2018, SCDOT filed post-trial motions which were thoroughly briefed by the parties. Those motions were heard by Judge Knie on July 20, 2018, and on August 10, 2018,

Judge Knie issued an order denying the motions. Following such denial, SCDOT moved yet again for reconsideration of the post-trial motions and once again, the parties thoroughly briefed the issues. Judge Knie filed an order denying those motions on September 28, 2018. During the pendency of those final motions, SCDOT timely filed a Notice of Appeal on September 10, 2018.

STATEMENT OF THE FACTS

On March 1, 2012, Respondent Betty Jean Perkins was driving southbound on Interstate I-85 on the return leg of a trip after visiting family in Eden, North Carolina. Shortly after 9 p.m., Ms. Perkins was driving a 1991 Lincoln Town Car in the far-left lane of travel when "all of a sudden [she] heard, -- it sounded like a gunshot. It was like, pow." (Tr. 82:25 to 83:2). After the loud noise, the "car stopped dead in the road." (Tr 83:6). Due to the car stalling out, the vehicle came to rest in the far-left lane, and Ms. Perkins was not able to crank the car to move it out of its resting location in the highway. (Tr. 83:9-22). Ms. Perkins repeatedly tried to restart the vehicle. She also called her son-in-law, the owner of the vehicle, to see if he could determine what was wrong. (Tr. 84:2-7). Finally, in desperation, Ms. Perkins called 911 and was instructed, "Ma'am, get out of that vehicle . . . get out and get to your far right as far as you can away from traffic." (Tr. 84:11-12). Heeding the advice of the 911 dispatcher, Ms. Perkins exited her vehicle. Outside her vehicle, she was confronted by the dangerous environment of Interstate I-85. (Tr. 84:17-85:4). It was well past dark and she was barraged by approaching headlights of other vehicles.

Ms. Perkins walked over to and along the concrete median barrier in order to escape the traffic in the lane of travel in which her vehicle was stalled. (Tr. 86:20-22). While walking alongside the barrier, towards the rear of her vehicle, Ms. Perkins' "right foot just went down in a hole." (Tr. 86:10-11). Ms. Perkins has a size 10 shoe and her foot was able to go down into the hole. (Tr. 88:19). As a result of her foot going into the hole, Ms. Perkins fell forward and was injured. Stranded on the ground after the fall, good Samaritans pulled up behind her vehicle, got Ms. Perkins to her feet, loaded her into their truck, and escorted her to the safety of the right shoulder. (Tr. 87:13-15). Those same Samaritans returned to her vehicle, tried to start it, and

eventually used their own truck to ram the immobilized vehicle over to the right side of the interstate. (Tr. 89:7-21).

Following this incident, the vehicle was towed from the interstate using chains to a nearby Waffle House parking lot, and then towed using a trailer back to Smyrna, GA. (Tr. 95:13 to 94:18). The vehicle remained inoperable until one day, Ms. Perkins was assisting her boyfriend in trying to get the vehicle to crank again. During those efforts, they were informed of an emergency fuel pump reset button located in the trunk of the vehicle. Once they pressed the reset button, fuel returned to the engine and the vehicle cranked up. (Tr. 98:5-23). At that point in time, Ms. Perkins and her boyfriend made the obvious conclusion that this switch must have been engaged during the incident which resulted in no fuel going to the engine, and thus, no cranking of the engine. (Tr. 98:5-25).

In April of 2012, Ms. Perkins underwent arthroscopic surgery to repair the meniscus in her right knee. (Tr. 104:16-24). Notwithstanding this surgery, Ms. Perkins' right knee issues continued to bother her. (Tr. 104:25 – 105:1). Ms. Perkins endured these right knee issues for nearly two and a half years. (Tr. P. Ex. 1, p. 4). In anticipation of further extensive knee operations, Ms. Perkins relocated to North Carolina to be closer to her family. (Tr. 107:8-10). In July of 2014, Ms. Perkins underwent a total right knee replacement. (Tr. 111:10-13). As a part of the recommended post-surgical rehabilitation, Ms. Perkins received in-patient skilled nursing care, out-patient skilled nursing care, extensive physical therapy, and continuous pain management. (Tr. 112:21 – 113:25).

Ms. Perkins argued and presented evidence at trial that the Defendant has an ongoing duty to ensure the safety of the entire traveling public and other users of the State's highways. The scope of this responsibility extends beyond the paved surfaces and includes the entire right-of-way.

SCDOT breached this duty and was liable for the hazard presented by the hole in the ground created by the excessive overflow gap between the drainage culvert and the concrete center median into which Ms. Perkins fell. Ms. Perkins presented evidence establishing the existence of this hazard through the testimony of the SCDOT witnesses, the pictures, and the design plans for that stretch of I-85.

At trial, SCDOT's Preconstruction Support Engineer, George R. Bedenbaugh, Jr., and Assistant District Maintenance Engineer, Michael Holden, were questioned at length about the intended and foreseeable use of this stretch of I-85 by the traveling public. Mr. Bedenbaugh acknowledged that the duty of SCDOT extends to the entire right-of-way, and that it is foreseeable and anticipated that motorists may deviate from the lanes of traffic. (Tr. 29:10-15). When asked specifically about the foreseeability of stranded motorists using the inside shoulder on which this incident occurred, Mr. Bedenbaugh reluctantly acknowledged the obvious that, "[i]t's not – it's not unforeseeable, but that's a very risky scenario." (Tr. 32:13-14). And then more specifically when asked a hypothetical question utilizing the identical facts of the present case:

> Q. Okay. So you're stalled out, come to rest, you're in that far left lane, wouldn't it seem reasonable to get over on that concrete median?
>
> A. You could. It's just – it's not designed for that. That's not a parameter that we design for on an interstate like this.
>
> Q. Can't it be anticipated or foreseeable that somebody's going to utilize the safety of that concrete barrier, that shoulder rather than sitting in the lane of traffic still?
>
> A. Well, yes, the design parameters of this road, you would be partially in the lane even if you chose to use some of the left shoulder. You would be blocking the travel lane.

(Tr. 34:11 – 35:4).

When Michael Holden was asked about the foreseeability of the use of this center median in a similar scenario, he provided the following testimony:

> Q. Okay, so people are going to use that drain, drive on it, whatever, walk on it? They're going to drive – they're going to be out there in that lane, correct?
>
> A. I'm not going to say that they're going to be. They could be.
>
> Q. They could be? Okay.
>
> A. Yeah.
>
> Q. They could be out there. It's foreseeable that a car will pull off in that shoulder?
>
> A. They shouldn't, but they could. I mean, it's very unsafe. You know, there's not really enough room to pull a car to the left.

(Tr. 67: 9-20). And more specifically:

> Q. Okay. What if the right wasn't an option because traffic's whizzing by going 70, 75 miles an hour, horns were honking, people are cursing out the windows at you because you're a stranded motorist and you're in their way and they're trying to get wherever they're going? Where would you go?
>
> A. If your – if your car was absolutely stalled out and you had no other options you would, you know, pull to the – probably, yeah, you would pull to the median or get as much off as you can, but you're not going to be totally off the road. You're still in – you're still in the left lane.
>
> Q. Okay. But you as an individual, you get out of the line of traffic and you'd get up out of the – out of traffic and out of the way of everybody, right?
>
> A. Um-hum (affirmative).

(Tr. 68: 8-22).

After discussing the foreseeability of the incident, the witnesses were questioned specifically about the hazardous condition itself. While examining the picture of the hole in the ground that is

created by the excessive overflow gap between the drainage basin and the concrete barrier, Mr. Bedenbaugh testified:

> Q. --- above-hand picture right there. If the concrete lip around the grate is six inches, and the gap between the metal grate and the concrete barrier is supposed to be six inches, how wide is the gap in the picture?
>
> A. Oh, I can't speculate. I mean, I can tell that there's room in there, but I don't know the exact dimension.
>
> ----
>
> Q. Is that cement, or asphalt, some kind of paving material between the concrete?
>
> A. I mean, it's hard to say. It looks like concrete that covered up with some sort of debris, ---
>
> Q. Um-hum (affirmative).
>
> A. --- but it's difficult to say.
>
> Q. Well, let's look at some of the other pictures. Some of them may be zoomed in a little bit better. How about that?
>
> A. Yep, for sure.

(Tr. 44: 7 to 45:5).

When given the simple opportunity to describe the large hole in the ground created by the obvious non-conformity to the plans, Mr. Bedenbaugh simply evaded the question by acknowledging the overflow gap, but qualifying it with the explanation that there are construction tolerances and those tolerances are made with engineering discretion. (Tr. 45:17-25, 47:5-13). Mr. Bedenbaugh did acknowledge that a three-inch gap between the concrete basin and concrete barrier would not be acceptable and that an increase in the distance between the concrete edge of the drainage grate and the concrete barrier would correspondingly result in a wider drainage void, i.e. hole in the ground. (Tr. 46:23 – 47:47). This testimony by Mr. Bedenbaugh in conjunction with

observations from photos clearly identify the presence of material in the area between the concrete edge of the drainage grate and the concrete barrier which according to the plans should be flush against each other. The void between the concrete edge of the drainage grate and the concrete barrier created a dangerous condition. (*See* pictures of scene, Tr. P. Ex. 5. The pictures, design drawings, and the appropriate inferences from Mr. Bedenbaugh's testimony established that there is a dangerous hole where Ms. Perkins fell.

STANDARD OF REVIEW

This negligence action was tried as a bench trial before the Honorable Judge Grace Gilchrist Knie. "An action in tort for damages is an action at law." *Longshore v. Saber Sec. Servs., Inc.*, 365 S.C. 554, 619 S.E.2d 5, 9 (Ct. App. 2005) (*citing Culler v. Blue Ridge Elec. Coop. Inc.*, 309 S.C. 243, 422 S.E.2d 91, 93 (1992)). Accordingly, this negligence action is an action at law, tried without a jury, and the judge's findings will not be disturbed unless they are without evidentiary support. *Townes Assoc. Ltd. v. City of Greenville*, 266 S.C. 81, 221 S.E.2d 773, 775-76 (1976). The Judge's findings are equivalent to those of a jury in an action at law. *Id.*

In this appeal, Defendant SCDOT argues that the Court did not make findings in its final order consistent with Rule 52(a), SCRCP, and that the trial court erred in denying their Rule 41(b), SCRCP motion for involuntary non-suit.

The trial judge's order will not be reversed for failing to make specific findings of fact on the record for each factor of a cause of action. *Dixon v. Besco Engineering, Inc.*, 320 S.C. 174, 463 S.E.2d 636, 640 (Ct. App. 1995); *see Noisette v. Ismail*, 304 S.C. 56, 403 S.E.2d 122 (1991) (requirement that trial court without a jury find the facts specially and state separately its conclusions of law under Rule 52(a), SCRCP, is directory; noncompliance alone does not invalidate the judgment as long as the trial court substantially complies with Rule 52(a) and adequately states the basis for the result it reaches). When an appellate court is reviewing a trial court's finding, the appellate court should not vacate the trial court's judgment for lack of an explicit or specific factual finding. *Treatment and Care of Luckabaugh*, 351 S.C. 122, 568 S.E.2d 338, 342 (2002). This standard of review was thoroughly considered and analyzed in *Luckabaugh* by the South Carolina Supreme Court:

> We do not require a lower court to set out findings on all the myriad factual questions arising in a particular case. *See Golf City, Inc. v. Wilson Sporting Goods, Co., Inc.*, 555 F.2d 426 (5th Cir. 1977). But the findings must be sufficient to allow this Court, sitting in its appellate capacity, to ensure the law is faithfully executed below. The absence of factual findings makes our task of reviewing the court order impossible because "the reasons underlying the decision [are] left to speculation." *Kiawah Property Owners Group v. Public Serv. Com'n of South Carolina*, 338 S.C. at 96, 525 S.E.2d at 866 (*quoting Able Communications, Inc. v. S.C. Public Serv. Comm'n*, 290 S.C. 409, 411, 351 S.E.2d 151, 152 (1986)). To leave the chore of sorting through the record to review contradictory testimony taxes the judicial system and is unfair to the litigants as well as the lower court to whose factual determinations we give deference. *See Welsh Co. of California v. Strolee of California, Inc.*, 290 F.2d 509 (9th Cir.1961).

Id. Thus, the first question for an appellate court is to determine whether the trial court provided factual basis for its findings in the order. If there is not a factual basis for the findings, then the appellate court's review is limited to reviewing the record and determining whether there is any evidence that reasonably supports the challenged findings of the trial judge. *Ducworth v. Neely*, 319 S.C. 158, 459 S.E.2d 896, 900 (Ct. App. 1995).

Although the motion for involuntary lawsuit was made by defense counsel during the trial as a motion for direct verdict, this motion was denied by the trial court after deliberation. (Tr.161:15-17). In deciding whether to grant or deny a motion for nonsuit, the trial court must view the evidence and all reasonable inferences in the light most favorable to the plaintiff. *Bullard v. Ehrhardt*, 283 S.C. 557, 324 S.E.2d 61, 62 (1984).

On appeal, a denial of a motion for non-suit is treated as the same as a denial of a motion for directed verdict. In ruling on a motion for directed verdict, the trial court is required to view the evidence and the inferences that reasonably can be drawn therefrom in the light most favorable to the party opposing the motion and to deny the motion where either the evidence yields more than one inference or its inference is in doubt. *Creech v. South Carolina Wildlife & Marine Res. Dep't.*, 328 S.C. 24, 29, 491 S.E.2d 571, 573 (1997). An appellate court can only reverse the trial court when there is no evidence to support the ruling below. *Id.*

ARGUMENT

I. THE TRIAL COURT CORRECTLY DENIED AN INVOLUNTARY NON-SUIT AND JUDGMENT BASED ON THE PRESENCE OF A DEFECTIVE OR HAZARDOUS CONDITION AT THE SCENE OF THIS INCIDENT.

The Trial Court properly denied Defendant's motion for a non-suit because the testimony and evidence indicated there was a hazardous condition created or maintained by the defendant at the scene of this incident.

SCDOT is an entity that is subject to South Carolina Tort Claims Act, S.C. Code Ann. 15-78-10, et. al., and may be held liable on a general negligence theory of liability. Under a negligence theory, SCDOT can be held liable if it knew, or in the exercise of reasonable care should have known, that a hazardous condition existed. *Marsh v. South Carolina Dep't of Highways and Pub. Transp.*, 298 S.C. 420, 380 S.E.2d 867, 868 (Ct. App. 1989). This liability arises from the SCDOT's duty to use reasonable care to keep streets and highways within its control in a reasonably safe condition for public travel. *Inabinett v. State Highway Dep't*, 196 S.C. 117, 12 S.E.2d 848, 851 (1941). Accordingly, SCDOT has a duty to discover and eliminate unreasonable hazards for the safety of the traveling public. SCDOT has a duty to ensure that the traveling public does not confront a condition or hazard that may endanger it. *Gianni v. S.C. Dep't. of Transp.*, 378 S.C. 573, 664 S.E.2d 450, 453-54 (2008). In applying this precedent in conjunction with the Tort Claims Act, the S.C. Supreme Court has held that SCDOT may be liable for "failure to take corrective action subsequent to notice of a defect." *Id.*

Defendant's argument is essentially that the Court could not have found that the large hole in the ground created by an excessively wide overflow gap was a hazardous condition based on the evidence. However, the Court did find that the "gap presents a hazard to the traveling public," i.e. that the hole is large enough for someone to step into it as Ms. Perkins did. The

Court provided multiple factual bases for this finding and in the context of this specific appellate challenge by the Defendant, all inferences must be taken in a light most favorable to the Plaintiff.

First, the trial court discussed that there is evidence from both the testimony and photographs that there is a wider and larger than normal hole on the surface of the roadway because the concrete drainage basin and concrete center median are not flush together. (Order, p. 3). During the trial, testimony was offered by SCDOT employee Mr. Bedenbaugh that the concrete edge of the drainage basin and the concrete median barrier are supposed to be flush against each other with the exception of the emergency overflow gap. (Tr. 42:21 to 43:5). In fact, those two concrete structures are supposed to touch on either side of the overflow gap. (Tr. 43:4-5). But in examining the pictures, Mr. Bedenbaugh acknowledged the clear observation that on either side of the overflow gap, "it's got some concrete material [he] can see right here between this concrete and that concrete." (Tr. 45:9-11). Mr. Bedenbaugh also acknowledged that the presence of this material indicates that the overflow gap between the edge of the concrete drainage basin and the concrete median barrier could be wider than the specifications in the plans. (Tr. 47:9-13). This testimonial evidence provided by an SCDOT employee is certainly probative of the fact that the overflow gap is wider than intended because either side of the gap is not touching.

SCDOT has argued that Ms. Perkins offered "no evidence of any measurements taken of those components as built." (Appellant Brief, p. 12) In fact, Defendant argues that Ms. Perkins can only speculate as to the dimensions and measurements of the components of this drainage structure. *Id.* However, the record unequivocally reveals that this is inaccurate. Ms. Perkins submitted into evidence design plans for "SCDOT Standard Drawing No. 719-9." (Plaintiff Tr. Ex. 2). The testimony of Mr. Bedenbaugh confirmed that this is the "construction detail for a

catch basin type 15." (Tr. 39:20-21). He further indicated that this is the standardized plans for use across the State and that it was also the type of catch basin in question in this case. (Tr. 40:1-3, 40:13-16). This point was secondarily confirmed by SCDOT employee Michael Holden. (Tr. 56:23-24). Closer examination of those design plan's notes reveal that the cast iron or steel grate and frame are to be standardized dimensions so that they can be interchangeable. (Plaintiff Tr. Ex. 2). The notes also provide that concrete catch basin walls are to be a standard six inches thick. In short, these plans provide numerous definitive measurements. The trial court appropriately relied on these measurements not just for their exact values, but also in support of the reasonable inferences that could be drawn from them.

When reviewing the pictures in conjunction with the design plans, the court made reasonable inferences as to the width of the overflow gap in question. Examination of the photographs in evidence reveal that the width of the extra material on either side of the overflow, between the edge of the concrete drainage basin and the concrete median barrier, is similar in size to the width of the forty-five degree overflow gap or the flat concrete portion between the forty-five degree overflow and the grate frame, both of which have a cross-section of three inches. Another comparison reveals that the overflow gap is much wider than the width of the openings in the grate itself, which are a standardized measurement of three and a half inches by nine and a quarter inches. Ms. Perkins herself testified that her foot went down in the hole and that she wears a size ten shoe. (Tr. 86:23-25, 87:19 to 88:22). One of her shoes was removed from her foot and displayed to the trial court for examination and reference of size. (Tr. 88). In sum, the Court had multiple references for scale and for making the reasonable inference that this gap constitutes a hazard.

Nonetheless, SCDOT makes the erroneous circuitous argument that because Ms. Perkins did not provide a ruler for scale in the photos, the pictures themselves must be inaccurate and therefore, any reliance on these photos would be speculative. SCDOT goes so far as to say that for any reliance to be made upon the photos, Plaintiff was required to have submitted the testimony of a photogrammetrist, an expert in deriving measurements from images. This contention is without merit. The trial court was sitting as the finder of fact and had the opportunity to consider the angle, perspective, and dimensions of the photographs in the court's decision. A role that most trial courts employ on a daily basis. The trial court understood the limitations of what can and cannot be inferred from the photos submitted into evidence. Ironically, SCDOT employee Mr. Holden provided his own photograph of the drainage culvert and one could easily argue that the width of the gap in that photograph appears even wider than in the photographs provided by Ms. Perkins. (Tr. P. Ex. 7; Tr. D. Ex. 4). After reviewing all the photographs and design specifications that were submitted into evidence, the trial court made the finding that "this particular gap is drastically wider than the analogous opening within the drainage grate itself." (Order, p. 3). This conclusion and finding by the trial court demonstrates the trial court's thorough review of the evidence.

The trial court was the ultimate factfinder in this trial. The Court capably reviewed all the evidence, including the photographs, design plans, and testimony to reach its findings. The trial court made multiple findings of the hazardous nature of this gap that were clearly supported by the facts and evidence in the record.

II. THE TRIAL COURT CORRECTLY DENIED AN INVOLUNTARY NON-SUIT AND JUDGMENT ON THE BASIS THAT MS. PERKINS' ACCIDENT WAS REASONABLY FORESEEABLE IN FACT AND IN LAW.

The trial court properly found that SCDOT's negligence was the proximate cause of Ms. Perkins' injuries. "Proximate cause requires proof of both causation in fact and legal cause, which is proved by establishing foreseeability." *Bray v. Marathon Corp.*, 356 S.C. 111, 588 S.E.2d 93, 95 (2003). Causation in fact is proved by establishing the plaintiff's injury would not have occurred 'but for' the defendant's negligence. In this instance, it seems indisputable that Ms. Perkins would not have fallen but for the hole that she stepped into and therefore, the causation in fact is not being challenged by SCDOT.

On the other hand, legal cause turns on the issue of foreseeability. An injury is foreseeable if it is the natural and probable consequence of a breach of duty. *Schmidt v. Courtney*, 357 S.C. 310, 592 S.E.2d 326, 335 (Ct. App. 2003). Foreseeability is not determined from hindsight, but rather from the defendant's perspective at the time of the alleged breach. *Parks v. Characters Night Club*, 345 S.C. 484, 548 S.E.2d 605, 609 (Ct. App. 2001). Furthermore, legal cause is ordinarily a question of fact for the factfinder. Only when the evidence is susceptible to only one inference does it become a matter of law for the court. *Oliver v. South Carolina Dep't. of Highways & Pub. Transp.*, 309 S.C. 313, 422 S.E.2d 128, 131 (1992).

In *Oliver*, the Highway Department presented the argument that its negligence was too remote to constitute the legal cause of Mr. Oliver's injuries. *Id.* The Supreme Court was not persuaded by the Highway Department's arguments. *Id.* In that case, Oliver was traveling down a roadway on a motorcycle when another driver traveling in the opposite direction abruptly changed lanes in front of him. *Id.* Oliver collided with the front of that other vehicle's fender. *Id.* Oliver maintained his position on the motorcycle but left the roadway and then collided with a Lincoln Town Car that was extending out over a sidewalk at a used car dealership. *Id.* Oliver

argued that if the Highway Department had not been negligent in failing to keep the right-of-way clear, then the Lincoln Town Car would have been further back in the lot and the collision would have been less severe. *Id.* Just as SCDOT is arguing in the present appeal, the Highway Department claimed that this was an extraordinary event and simply not foreseeable. *Id.* In dismissing those arguments, the Supreme Court relied on the following reasoning:

> [I]t is enough that it should have contemplated the probable happening of some accident of this kind, involving bodily injury to others which ought to have been guarded against; ***and the doer of the act cannot shelter himself behind the defense that the actual consequence was one that rarely follows from that particular act.*** He may be held liable for anything which, after the injury is complete, appears to have been a natural and probable consequence of his act or omission.

Id. at 131. (*citing Tobias v. Carolina Power & Light Co.*, 190 S.C. 181, 2 S.E.2d 686, 688 (1939) (emphasis added). The above quotation refutes the arguments offered by SCDOT that Ms. Perkins' accident was "unpredictable or that which could not be expected to happen," (Appellant Brief, p.18) because in reality, Ms. Perkins' accident was not that extraordinary. The unfortunate reality is that collisions and mechanical malfunctions occur frequently on interstates. In fact, SCDOT's witness, Mr. Bedenbaugh, acknowledged this and he also acknowledged that the roadside environment comes into play in a significant percentage of accidents. (Tr. 37:1 to 38:5). Mr. Bedenbaugh further acknowledged that in designing and maintaining the roadway, it is anticipated that motorists will have emergencies and will have to avail themselves of the shoulders. (Tr. 38:2-5). It is foreseeable that distressed motorists and passengers, persons, first responders, ***SCDOT workers***, contractors, good Samaritans, may have to seek the refuge and safety of either shoulder of the highway. For example, this same scenario could have easily

occurred if a Police officer had pulled up behind Ms. Perkins' broken-down vehicle and then the officer walked up to Ms. Perkins to offer assistance; or perhaps one of SCDOT's own personnel has to remove a piece of tire debris from the roadway and so they traverse the three lanes, grab the debris, and then wait in the center median for an opportunity to return to the opposite shoulder. These are foreseeable examples and first responders, state employees, and other individuals performing these essential functions could also be injured when stepping into this hole on the interstate. For obvious safety reasons, pedestrian traffic is not allowed in this particular area, but to claim that it is not foreseeable is not correct.

SCDOT argues that there is "no reasonable expectation for motorists to stop their vehicles in the center median of an interstate which was not designed for such." (Appellant Brief, p. 19). *Oliver* is once again instructive. In *Oliver*, the Highway Department argued that the sidewalk was intended for pedestrian traffic and thus the only legal causation for injuries due to an obstructed sidewalk could be to pedestrians, not vehicular traffic. *Oliver*, 422 S.E.2d at 131. The Supreme Court was not persuaded and found that testimony by the Highway Department's own witness acknowledged that hazards existed beyond the scope of the intended users of the sidewalk and those hazards included unexpected obstructions to vehicular traffic. *Id.* SCDOT argues that this area was not intended or designed for pedestrian traffic and therefore, pedestrian injuries are not expected or foreseeable. (Appellant Brief, p. 19-20). But an unmarked, unguarded hole in the ground poses a trip hazard to anyone traversing in that area. SCDOT's own witness Michael Holden acknowledged that this scenario was neither unexpected, nor highly extraordinary as argued by SCDOT:

> Q. Okay. So people are going to use that drain, drive on it, whatever, walk on it? They're going to drive – they're going to be out there in that lane, correct?

A. I'm not going to say that they're going to be. They could be.

Q. They could be? Okay.

A. Yeah.

Q. They could be out there. It's foreseeable that a car will pull off in that shoulder?

A. They shouldn't, but they could. I mean, it's very unsafe. You know, there's not really enough room to pull a car to the left.

(Tr. 67: 9-20). During examination, Michael Holden was asked what he would do if confronted with a situation in which his vehicle stalled out in the far left lane of the interstate to which he responded:

A. If you're – if your car was absolutely stalled out and you had no other options you would, you know, pull to the – probably, yeah, you would pull to the median or get as much off as you can, but you're not going to be totally off the road. You're still in – you're still in the left lane.

Q. Okay. But you as an individual, you get out of the line of traffic and you'd get up out of the – out of the traffic and out of the way of everybody, right?

A. Um-hum (affirmative)

Q. As quick as you can because you don't want to get hit by a car whizzing by at 70 miles an hour, right?

A. Right. I'm doing the best I can to make it to the right side is what I'm going to do.

(Tr. 68:14 to 69:1). Not surprisingly, this is exactly what Ms. Perkins did:

A. . . . So I said, well, let me get off and call 911. So I called. I told the dispatcher that I was stranded in the middle of the interstate. She said, well, ma'am, get out of that vehicle. She said, get out and get to your far right as far as you can away from traffic.

Q. And that was your intention, was to get – cross all lanes of traffic over to the right-hand shoulder, correct?

A. Yes.

(Tr. 84:8-15). Michael Holden's testimony and Ms. Perkins' actions were in agreement. First, exit the vehicle, then try to escape the danger zone of the interstate, and then seek out shelter on the opposite shoulder. Importantly, in order to reach the other shoulder, those efforts should not be impeded by a hole in the ground posing as a trip hazard. Analyzing this issue within the context of foreseeability, such actions would clearly occur within reason and within the "ordinary and normal course of events" as opposed to falling "within the category of the unusual or extraordinary." *Nelson v. Piggly Wiggly, Inc.*, 390 S.C. 382, 701 S.E.2d 776, 782 (Ct. App. 2010). Consistent with this reasoning, the trial court properly ruled in its order that "roadside safety is an integral component of maintaining a safe highway for the traveling public and that hazards within such roadside should be eliminated." (Order, p. 3). The Court established this legal causation by stating that "it is reasonably foreseeable that the traveling public and other individuals may avail themselves of this lane." *Id.* Further, the Court correctly stated that its finding "is based on the evidence and the testimony provided by the SCDOT employees." *Id.* Foreseeability is to be judged from the perspective of the defendant at the time of the negligent act, not after the injury occurred. *Parks*, 548 S.E.2d at 609. The Court has properly found Ms. Perkins' injury to be foreseeable.

SCDOT described this center median lane as a roadway drain. (Tr. 66:4-8). The lane's intended purpose is to provide maximum removal of water and yet contrary to SCDOT's argument that an area's expected use also limits its foreseeability, SCDOT still "anticipates – that a car might drive over it." (Tr. 66:24). SCDOT properly employs precautionary measures within this really wide "drain" just in case a motor vehicle drives over it. Examples of these precautionary measures include the design parameters of the culvert and a drainage grate as a

barrier. These measures ensure that any vehicle traversing this portion of the ground will not "drive down in [the drainage culvert]." (Tr. 66:25). SCDOT's own real-world practice conflicts with the argument that they are postulating in this case that SCDOT is not responsible for anything beyond the intended or expected use of an area. Analogously, if SCDOT is willing to recognize the hazard that an open hole in the ground poses to vehicular traffic traveling in an area intended for drainage, SCDOT should also recognize trip hazards to the unsuspecting individual who may have to traverse the area. Ms. Perkins agrees with SCDOT that a motorist is not supposed to stop their vehicle in this center median. (Appellant Brief, p.19). But unfortunately, incidents happen on the interstate beyond the control of the traveling public. For example, a motorist is not supposed to deviate from their lane of travel without properly signaling, and yet, SCDOT employs all sorts of precautions for motorists that may unexpectedly leave their lane of travel, i.e. guardrails, goring areas, soft shoulders, crash attenuators, etc.

Legal causation and foreseeability are further established by SCDOT's responsibility to "ensure the safety of the traveling public," (Tr. 29:1-4), as well as SCDOT's own internal Engineering Directive Memorandum # 8 that specifically provides for inspections on interstates to "detect deficiencies that could pose a hazard to motorists or ***pedestrians***, thus creating a risk for the Department." (emphasis added). The trial court properly found that this is not an unreasonable request and that such hazards should be eliminated.

III. THE TRIAL COURT CORRECTLY RULED THAT RESPONDENT IS NOT COMPARTIVELY NEGLIGENT.

Comparative negligence is the law in South Carolina. *Nelson v. Concrete Supply Co.*, 303 S.C. 243, 399 S.E.2d 783, 784 (1991). The plaintiff may recover damages when his or her negligence is not greater than that of the defendant. The plaintiff's damages, however, are reduced in

proportion to the amount of his or her negligence. *Id.* If the defendant is going to assert the affirmative defense of comparative negligence, then the burden of proof is on the defendant and not on the party making the negligence claim to disprove it. *Ross v. Paddy*, 340 S.C. 428, 532 S.E.2d 612, 616 (Ct. App. 2000).

As an initial matter, SCDOT did not provide any evidence, testimony, report, document or photograph that substantiates any negligent acts by Ms. Perkins. SCDOT continues to erroneously claim, without any evidence at all, that Ms. Perkins "stopped her car illegally." (Appellant Brief, p. 22). The record is completely void of any evidence to indicate that Ms. Perkins intentionally caused her vehicle to "stop" on the interstate. The record is simply void of any evidence that supports this proposition. In SCDOT's cross-examination of Ms. Perkins, the issue was raised and addressed:

> Q. Okay. So those are two officers and paramedics did not report anything about your car stalling out, but they both reported you having a flat tire, correct?
>
> A. Yes, because they could see the flat tire. And the car was already there when they – on the side of the road. But also they did not report that my trunk was smashed in from them trying to get it off the road either.

(Tr. 142:15 to 143:13). This is the only reference in the entire transcript of the trial that remotely indicated that Ms. Perkins experienced a tire failure.

Ms. Perkins' testimony is the only testimony as to what happened on that day and it specifically refutes SCDOT's allegations:

> A. I was traveling southbound back to Atlanta, and I was over in the fast lane. And I was just driving and all of a sudden I heard – it sounded like a gunshot. It was like, pow.
>
> Q. Um-hum (affirmative).

A. And the car kind of went like this. And I'm holding to the steering wheel. I was looking back, traffic, people were swerving by, and the car just stopped dead in the road.

Q. The car stopped?

A. Yes.

Q. You didn't even have the opportunity to get over?

A. No.

(Tr. 82:24 – 83:10). Ms. Perkins' testimony is unequivocal. Her vehicle stalled out and she was unable to maneuver her vehicle away from the left side of the highway. She later discovered the vehicle stalled because of a loss of fuel to the engine. Her vehicle was rendered inoperable. SCDOT, without citing any authority, claims that Ms. Perkins cannot offer this explanation of engine failure without expert testimony. Ms. Perkins' testimony was her first-hand observations. Sitting as the factfinder, the trial court was able to weigh this circumstantial evidence offered by Ms. Perkins and infer a logical explanation for Ms. Perkins' vehicle's engine failure. Circumstantial evidence is proof of a chain of facts and circumstances indicating the existence of a fact. *Gastineau v. Murphy*, 323 S.C. 168, 473 S.E.2d 819, 825-26 (Ct. App. 1996), *rev'd on other grounds*, 331 S.C. 565, 503 S.E.2d 712 (1998). The trial court was able to make a logical deduction based on the information provided; that the Lincoln Town Car that Ms. Perkins was driving stalled out; that it would not restart for anyone that attempted to restart it; that it sat idle for a long period of time because it would not run; that afterwards, Ms. Perkins, along with her boyfriend, became aware of an emergency fuel valve; that after releasing the valve, the engine resumed working. The trial court inferred that the loss of fuel was due to the activation of the emergency fuel valve.

Confronted with the dire situation of being stranded on the inside portion of the interstate, Ms. Perkins did what any reasonable person would do. She called 9-1-1 and spoke with the dispatcher:

> A. . . . So I said, well, let me get off and call 911. So I called. I told the dispatcher that I was stranded in the middle of the interstate. She said, well, ma'am, get out of that vehicle. She said, get out and get to your far right as far as you can away from traffic.
>
> Q. And that was your intention, was to get – cross all lanes of traffic over to the right-hand shoulder, correct?
>
> A. Yes.

(Tr. 84:8-15). Following the instructions of the dispatcher, Ms. Perkins exited her vehicle and began to proceed towards the right, opposite shoulder, but unfortunately, she never made it because of the hard-to-see, hazardous hole in the ground that caused her injuries. As mentioned in the preceding section, Ms. Perkins took the exact same course of action the SCDOT employee Michael Holden said that he would take. (Tr. 68:14 to 69:1).

Ms. Perkins' recitation of the facts is also consistent with the report provided in SCDOT's medical examination by Dr. Gordon Early in which he clearly notes that her vehicle experienced a malfunction. His patient history notes state, "it caused a lot shaking in the car and the engine shut off while driving in the fast lanes on I-85." (Tr. P. Ex. 1, p. 3). Dr. Gordon Early's medical examination and the corresponding notes were taken on February 3, 2015, approximately three years prior to when her testimony was offered in the trial of this matter.

SCDOT has further raised that Ms. Perkins' pleadings are inconsistent with this recitation because there is no mention of an engine failure. (Appellant Brief, p. 23) First, the majority of the facts and evidence that have been discovered are also not included within the four corners of Ms. Perkins' two-page complaint, nor is there any requirement that they must be. Second, Ms. Perkins'

complaint does not contain any allegation that contradicts or invalidates any aspect of the Ms. Perkins' recollection of the incident that was provided to either Dr. Gordon Early, in her deposition, or in her testimony at trial.

Furthermore, in perpetuating this incorrect narrative that Ms. Perkins "pulled over or stopped," SCDOT has argued that Ms. Perkins violated S.C. Code Ann. § 56-5-2530(1)(i) by stopping, standing, or parking a vehicle on any controlled-access highway. She did not pull over or stop. Her vehicle malfunctioned.

Not only did SCDOT fail to carry its burden on proving comparative negligence, but in so far as the issue was raised, Ms. Perkins unequivocally refuted such inferences. The trial court properly and accurately found that Ms. Perkins was not comparatively at-fault for her injuries. The trial court's order reflects the court's consideration of these issues and appropriately dismisses them based on the evidence.

IV. THE TRIAL COURT'S RULINGS FULLY COMPLIED WITH THE REQUIREMENTS OF SCRCP RULE 52(a).

As previously mentioned above, a negligence action is an action at law, and if tried without a jury, the judge's findings will not be disturbed unless they are without evidentiary support. *Townes Assoc. Ltd. v. City of Greenville*, 266 S.C. 81, 221 S.E.2d 773, 775-76 (1976). The trial judge's findings are equivalent to those of a jury in an action at law. *Id.* Under Rule 52(a), the Court in a bench trial is required to "find the facts specially and state separately its conclusions of law thereon." Rule 52(a), SCRCP. In interpreting this rule, the S.C. Supreme Court has said that the rule is directorial in nature so "where a trial court substantially complies with Rule 52(a) and adequately states the basis for the result it reaches, **the appellate court should not vacate the trial court's judgment for lack of an explicit or specific factual finding**." *Noisette v. Ismail*, 304 S.C. 56, 403 S.E.2d 122, 124 (1991) (emphasis added). "A lower court is not required to set out findings on all the myriad factual questions arising in a particular case, but the findings must be sufficient to allow [the appellate court] . . . to ensure the law is faithfully executed below." *Mathis v. Brown & Brown of South Carolina, Inc.*, 389 S.C. 299, 698 S.E.2d 773, 784 (2010). "The trial judge's findings of fact are conclusive unless there is no evidence that reasonably support them." *Mayes v. Paxton*, 313 S.C. 109, 437 S.E.2d 66, 69 (1993).

In the present case, the trial judge provided a detailed, five-page order outlining the court's findings and legal conclusions that SCDOT was negligent in causing Ms. Perkins' injuries. In order to obtain a verdict in this negligence action against SCDOT, Ms. Perkins had to show that SCDOT owned her a duty; that such duty was breached due to a hazardous condition; that such hazard was the proximate cause of the Ms. Perkins' injuries; and that, SCDOT had either actual or constructive notice of the hazardous condition. *See Gianni v. S.C. Dept. of Transp.*, 378 S.C. 573, 664 S.E.2d 450, 454 (2008). The trial court's order discusses each of

these elements in great detail and refutes the defenses that were raised by SCDOT. First, the trial court accurately depicted the legal framework that it was relying on for determining SCDOT was negligent. (Order, p. 2). The trial court then proceeded to discuss and find that SCDOT had a legal duty for maintaining the entire right-of-way and eliminating hazards from within it. (Order, p. 2-3). The trial court expounded on the finding of the legal duty and determined that it is legally foreseeable that the traveling public, including individuals, may use the lane where Ms. Perkins was injured. The trial court correctly found that unreasonable hazards should be eliminated from within it. (Order, p.3). Next, the trial court determined that the "gap," identified in this brief as the excessively wide overflow area, is an unreasonable hazard to the traveling public. (Order, p. 3). The trial court found numerous instances in which notice of this hazardous condition was or should have been discovered by SCDOT. (Order, p.4) SCDOT had raised the issue of comparative negligence in the trial and the trial court offered a thorough discussion on that affirmative defense as well. (Order, p.4). After considering all the substantive, legal elements, the court evaluated Ms. Perkins' injuries and determined its verdict. The trial court discussed each element of the legal framework of this case and provided detailed explanations for the court's ruling. This exercise by the trial court satisfies the requirements of Rule 52(a), SCRCP.

Nonetheless, SCDOT believes the trial court has not provided "any discussion of the merits" under Rule 52(a) of four issues identified within its brief. (Appellant Brief, p. 26) Each of these issues is actually discussed at length within the trial court's order; however, SCDOT claims they were not.

The first issue that SCDOT claims as not being fully discussed is the trial court's decision to not rely on or offer any finding based on exact measurements. This issue has been briefed

herein in Section I. The trial court had for its review pictures, design plans and testimony. By using the design plans and photographs in conjunction with the testimony, the trial court had multiple references for scale and for making the reasonable inference that this gap constitutes a hazard.

The second issue that SCDOT claims to not be fully discussed is "what made the opening as constructed 'a hazard to the traveling public'." (Appellant Brief, p. 26). This is essentially asking, what makes a hole in the ground a trip hazard? Although the trial court did not explicitly state that conclusion, it is obvious and apparent from the context of the case and the trial court's order, that the reason behind the finding that this opening is a hazard to the traveling public is because an individual's foot is able to step into the hole, just as Ms. Perkins' foot did on the date of this incident.

Third, SCDOT claims that the trial court "failed to legally analyze" the issue of foreseeability. (Appellant Brief, p. 26). On the contrary, the trial court's order discusses the legal causation issue by stating that this travel lane will be used by the traveling public and others in a variety of occasions including emergency stops. (Order, p. 3) Because it is foreseeable that individuals are availing themselves of this lane, SCDOT should correspondingly eliminate the hazards that may endanger those individuals, such as the excessive overflow gap, i.e. hole in the ground that is at issue in this case.

Lastly, SCDOT claims that the trial court was unable to infer that an engine failure caused Ms. Perkins' vehicle to be rendered inoperable. This issue was discussed at length in Section III above and those arguments are incorporated without repeating. The trial court is the factfinder and accordingly is allowed to utilize direct evidence and/or circumstantial evidence to arrive at its holdings. In this instance, the court recognized the relative agreement by the SCDOT

employee as to what a reasonable course of action would be. The trial court also recognized that Ms. Perkins was unable to maneuver her vehicle because of its engine failure. SCDOT states conclusively, but also in error, that Ms. Perkins violated S.C. Code Ann. § 56-5-2530(A)(1)(i). Ms. Perkins' vehicle stopped but she did not violate S.C. Code Ann § 56-5-2530(A)(1)(i) when the vehicle stopped because of mechanical problems.

These four issues raised by SCDOT are clearly just argumentative and neglect to consider the extensive analysis and discussion that the trial court provided in its order that was filed on April 18, 2018. The trial court appropriately re-affirmed its trial order in its subsequent post-trial rulings that were filed on August 10, 2018 and September 28, 2018.

CONCLUSION

Based on the foregoing discussion and analysis, Respondent Ms. Betty Jean Perkins respectfully requests that this Appellate Court affirm the rulings of the trial court and affirm the judgment that has been entered by the Honorable Grace Gilchrist Knie. Should this Court not be persuaded by the foregoing discussion and analysis, Respondent respectfully requests that the matter be remanded to the trial court for proceedings consistent with this Court's instructions.

Respectfully submitted,

BY: _____

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February 6, 2019

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas

Grace Gilchrist Knie, Circuit Court Judge

Appellate Case No. 2018-001665
Case No. 2016-CP-42-2478

Betty Jean Perkins, Respondent,

v.

South Carolina Department of Transportation, Appellant.

CERTIFICATE OF SERVICE

The undersigned employee of Peters, Murdaugh, Parker, Eltzroth & Detrick, PA, counsel for the Respondent Betty Jean Perkins, does hereby certify that service of the **Initial Brief of Respondent** and **Respondent's Designation of Matter to be Included in the Record on Appeal** in the above-captioned matter was made upon all counsel of record by placing copies in the United States Mail, first class postage prepaid, at the below listed addresses clearly indicated on said envelopes this the 6th day of February, 2019:

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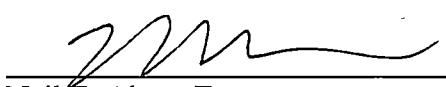

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The Honorable Jenny Abbott Kitchings
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Re: Betty Jean Perkins v. South Carolina Department of Transportation
Appellate Case Number: 2018-001665
Civil Action No.: 2016-CP-42-02478

Dear Ms. Kitchings:

Enclosed for filing please find the originals and one copy each of the **Initial Brief of Respondent** and **Respondent's Designation of Matter to be Included in the Record on Appeal** in the above referenced matter. Please file the originals and return a clocked copy of each document to me in the enclosed envelope. By copy of this letter, I am serving copies on all counsel of record.

Please do not hesitate to contact me if you should have any questions.

With kind regards, I am

Sincerely,

Neil E. Alger

NEA/jlm
Enclosures

cc: (w/ enclosures)

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