THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM SPARTANBURG COUNTY
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.

BRIEF OF APPELLANT

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STATEMENT OF THE CASE

This is an appeal from a negligence action brought by the Respondent Betty Jean Perkins against the Appellant South Carolina Department of Transportation ("SCDOT") pursuant to the South Carolina Tort Claims Act, S.C. Code Ann. § 15-78-10, *et seq*.

This civil action arises from an accident that occurred on March 1, 2012, when Perkins had a left rear tire blow out while driving on Interstate-85 in Spartanburg County. Perkins stopped her vehicle partially in the left lane of travel near the concrete median barrier. The shoulder along the concrete median barrier is not wide enough for a vehicle. That shoulder is for water drainage and not for a motorist to stop or take refuge. The shoulder includes a catch basin immediately adjacent to the concrete median barrier. Perkins alleges that she left her vehicle and stepped onto a catch basin. Perkins claims her foot became stuck in the opening of catch basin, which caused her to fall and sustain injury.

On October 7, 2013, Perkins filed a Complaint alleging a cause of action for negligence against SCDOT. After the completion of discovery, the parties consented to a non-jury trial. The case was tried as a bench trial before Circuit Court Judge Grace Gilchrist Knie on February 12, 2018. On February 15, 2018, Judge Knie electronically filed a "Verdict Form" finding in favor of Betty Jean Perkins and awarding $93,362.97 in actual damages. (R. 12-13). The "Verdict

Form" also stated that SCDOT was negligent in proximately causing the "collision" but found no comparative negligence for Perkins. (R. 12-13). Later, on April 19, 2018, Judge Knie issued an order that includes a discussion of the facts and legal issues but which did not specifically state the findings of fact and conclusions of law as required by Rule 52(a), SCRCP. (R. 1-5).

On April 30, 2018, the Appellant SCDOT filed a Motion for Judgment as a Matter of Law and/or Involuntary Nonsuit, Motion to Alter or Amend Judgment and/or Motion for Reconsideration, and Motion for New Trial. (R. 21-24). Those post-trial motions were heard by Judge Knie on July 20, 2018. On August 10, 2018, she issued an Order Denying Defendant's Post-Trial Motions which summarily denied SCDOT's post-trial motions but included no factual or legal analysis of any of the issues and defenses argued at length by the parties at the hearing and in written submissions. (R. 6-8). SCDOT thereafter filed a Motion to Alter or Amend Order pursuant to both Rule 52(b) and Rule 59(e). (R. 70-72). That motion was also summarily denied by Judge Knie. (R. 9-11).

The Appellant SCDOT has filed a timely appeal to this Court from each of the orders issued by Judge Knie and challenging the judgment entered in favor of Betty Jean Perkins.

STATEMENT OF FACTS

The Respondent Betty Jean Perkins had a flat tire while driving on Interstate-85 at 9:10 p.m. on March 1, 2012. Rather than pull her vehicle off to the right shoulder of Interstate-85, she pulled her vehicle to the far left lane and stopped her vehicle along the concrete median barrier in the middle of highway. Perkins exited her vehicle and stepped onto a catch basin which is located along the concrete median barrier. Perkins claims her foot became stuck in the opening of catch basin, which caused her to fall and sustain injury. (R. 159-164).

Perkins claims that the catch basin where she fell along the Interstate-85 median was defective. SCDOT's Assistant District Maintenance Engineer, Michael Holden, searched SCDOT inspection records for all catch basins within one mile in each direction of Mile Marker 61, where Perkins' accident occurred. (R 135:16-19; 136:6-13). His search retrieved records for 27 inspections that were performed within this section of Interstate-85 between June 10, 2010 and July 24, 2013. (R. 136:24 to 137:7). Ten of these 27 inspections occurred between June 10, 2010 and the date of the accident on March 1, 2012. (R. 137:8-23). Each of these inspections covered roadway drainage, drain culverts, and catch basins, including the catch basin where Perkins fell. (R. 136:6-13). An initial inspection was also performed at the time construction was completed and the roadway was

turned over by the contractor to the state, to confirm that the roadway was built according to specification tolerances. (R. 139:7 to 140:17).

Holden found one report dated August 24, 2010 (which was 19 months before Perkins' accident) that stated that the lid to the catch basin was off and had to be moved back in place. (R. 147:20 to 148:19). The catch basins along the Interstate-85 median are a Type 15 Catch Basin with two heavy iron grates weighing a total of 230 pounds. (R. 130:4-7). Holden found no other report of any work having to be done for the catch basin in question or for any other catch basin in the area around the scene of Perkins' accident. (R. 151:16-22).

Holden also testified about a photograph of the catch basin in question that he took shortly after Perkins' accident. (R. 152:23 to 153:1). He was asked whether he saw "anything about that photograph there that would require SCDOT maintenance to fix," and he answered "no." (R. 152:2-5). He further testified that he is not aware of any document or evidence possessed by SCDOT that would indicate there is any error or defect with the catch basin in question. (R. 152:13-15).

Holden was also asked whether a gap between the concrete edge of the catch basin box and the concrete median was wider than the design plans specified. (R. 153:2-14; 154:19-22). He replied that he did not know, but he testified that the gap was not a defect. (R. 154:13-14; 155:2-4). Holden specifically denied that the

photograph of the catch basis indicated any defect that needed to be repaired. He explained that a structural defect would be "if it is broken, if it was – there was debris in front of it, if it's not draining properly, you know, say, it's stopped up and, you know, water's not going down, from a maintenance standpoint, that is a defect." (R. 136: 21-25).

SCDOT's Preconstruction Support Engineer, G. Robert Bedenbaugh, examined the plans to the Type 15 Catch Basin and that section of roadway along Interstate-85. (R. 105:7-8; 115:6-11). He noted that these plans are used uniformly across the state. (R. 117:1-3). Bedenbaugh has been a design engineer for about 23 years. (R. 129:12-15). He testified that the plans show gaps in the grates (3.5 inches wide), and a distance of six inches from the edge of the metal grate to the concrete barrier. (R. 120:8-24). He was questioned about the photograph of the catch basin on which Perkins fell, and he testified that he could not speculate as to how wide the gap is in the photograph. (R. 121:7-11). He indicated that "[i]t's just hard to say with the angle of the photograph." (R. 123:20). When asked based on the photographs whether the catch basin was constructed to the precise design specifications, Bedenbaugh stated: "Without dimensions on the photograph it's very difficult to say that." (R. 127:22-23).

Robert Bedenbaugh directly addressed the issue of whether the photographs of the catch basin where Perkins fell show any defect. He testified as follows:

Q. When you looked at the pictures that Plaintiff showed you of the storm grate, from your experience did you see any design defect or defect in the storm catch basin?

A. No. It looks reasonable for what that device is supposed to be.

Q. And would you expect DOT maintenance to make any alterations to what you see in those photographs?

A. Not unless a specific problem was pointed out.

(R. 129:16-23).

The Type 15 Catch Basin was designed to allow maximum drainage on the interstate. (R. 126:10-12). The catch basin in question is located in the narrow shoulder adjacent to the concrete median barrier that is not wide enough for a vehicle to park so that it is completely out of the adjacent travel lane. (R. 143:2-8; 144:16-20; 145:17-18). That area is designed for the sole purpose of drainage, not for vehicles or pedestrian travel. (R. 111:11-16; 112:14-22; 128:24 to 129:2; 143:7-8). Bedenbaugh testified that Interstate-85 is a controlled access highway for purposes of S.C. Code Ann. § 56-5-2530, which generally prohibits stopping a vehicle on such a highway. (R. 128:16 to 129:2).

Michael Holden also testified that motorists should not pull over into the far left shoulder because "there's not really enough room to pull a car to the left." (R. 144:18-20). Similarly, Robert Bedenbaugh testified that the left shoulder is "not wide enough for refuge" because a vehicle there would be partially blocking the far

left lane of travel. (R. 108:8; 109:7-9). Bedenbaugh explained that the outside (right) shoulder would be typically used for a motorist to take refuge. (R. 108:19-20; 109:13-14).

STANDARD OF REVIEW

The standard of appellate review for an action at law on appeal of a case tried without a jury provides that the appellate court will not disturb the judge's findings of fact unless found to be without evidence which reasonably supports the judge's findings. *Townes Associates, Ltd. v. City of Greenville*, 266 S.C. 81, 221 S.E.2d 773, 775 (1976).

"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." *Parks v. Characters Night Club*, 345 S.C. 484, 548 S.E.2d 605, 608 (Ct. App. 2001). "If there is no relevant competent evidence reasonably tending to establish the material elements of the plaintiff's case, a motion for nonsuit must be granted." *Id.*

ARGUMENTS

I. The trial court erred in denying an involuntary nonsuit and judgment as a matter of law to the South Carolina Department of Transportation based upon the absence of any competent evidence of a defective or hazardous condition posed by the catch basin in the center median of Interstate-85.

The trial court concluded that the catch basin in the center median of Interstate-85 was defective because "it does not match the design indicated on the plans." (R. 3). The trial court noted "the presence of a large gap between the concrete drainage basin and the concrete center median" which the court concluded is "a deviation from the design plans." (R. 3). The record, however, does not include any competent evidence to support those findings and conclusions, and judgment should have been entered for the Appellant SCDOT.[1]

In its order, the trial court determined "this particular gap is drastically wider than the analogous openings within the drainage grate itself" and that the "gap presents a hazard to the traveling public." (R. 3). This finding is purely

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[1] The Respondent Perkins did not allege or present evidence of a design defect. At any rate, SCDOT cannot be held liable for a defective design. The South Carolina Tort Claims Act expressly states that "[g]overnmental entities are not liable for the design of highways and other public ways." S.C. Code Ann. § 15-78-60(15). *See also*, *Summer v. Carpenter*, 328 S.C. 36, 492 S.E.2d 55, 58 (1997) ("As for negligent design, the Act provides absolute governmental immunity from liability for loss resulting from the design of highways and other public ways. S.C. Code Ann. § 15-78-60(15). Therefore, even if the Highway Department was on notice the design of the intersection was dangerous, the Highway Department was immune from suit for negligent design"). In addition, Perkins did not present any expert testimony to show that the design was defective.

speculative and not based on competent evidence in the record. Specifically, the Respondent Betty Perkins presented no measurements to establish any deviations from the design specifications. Perkins presented as Plaintiff's Trial Exhibit #5 a series of photographs taken by "R. Dixon" on May 28, 2014, which includes photographs of the catch basin taken from various angles, perspectives, and distances. (R. 293-307). Perkins did not present, however, any measurements of the portions of the catch basin, including the "gap" which the trial court deemed to be a "hazard." Dixon was available at trial to testify, but he was inexplicably not called and apparently was dismissed by Perkins' counsel before the start of her case-in-chief. *See*, R. 103:23-24 ("I'm going to go ahead and let Mr. Dixon exit the court").

In addition to not presenting any measurements that Dixon could have taken while at the scene, Perkins presented no photographs displaying a ruler or other measuring device to provide the specific measurements of the various openings and other portions of the catch basin. Remarkably, Perkins' theory of liability is premised on the failure of the catch basin to be constructed to the *precise* dimensions reflected in the design specifications; *yet, absolutely no competent evidence was submitted as to the as-built dimensions*. The trial court, as the fact finder, was left to guess and speculate -- which is precisely what the court did.

In effect, the trial court erred by making a finding that the opening or "gap" was not constructed to its design specifications *based solely on photographs*. The trial court failed to consider that a photograph is a two-dimensional representation of a three-dimensional object, and as a result, the angle, perspective, and distance from which a photograph is taken impacts the ability to accurately measure what appears on the photograph. In her post-trial brief, Perkins asserts that the grate, frame and beam of the catch basin "present scales with which the Court may infer approximate measures." (R. 52). The obvious fallacy in that argument is that the trial court was never provided the actual measurements of those components. The trial court could only speculate that those components, including the "openings within the drainage grate itself," were constructed precisely as the design specifications state. Moreover, the trial court was offered no evidence of any measurements taken of those components as built. Therefore, the "scales" suggested by Perkins do not exist.

At any rate, a photograph cannot be "eye-balled" to determine accurate measurements. The reason for that is obvious – photographs are distorted based upon such concepts as perspective (or parallax) and angle. For Perkins to have used the photographs in the record to determine measurements, it was necessary to call an expert witness in the field of photogrammetry, which has been described as "an accepted technique generally used for deriving measurements from

photographs" which is "heavily published and widely used." *Aviva Sports, Inc. v. Fingerhut Direct Marketing, Inc.*, 829 F.Supp.2d 802, 829 (D. Minn. 2011). *See also, United States Fidelity & Guaranty Co. v. Soco West, Inc.*, 2010 WL 11537439, *1, n.1 (D. Mont. 2010) ("Photogrammetry is the science of taking measurements from photographs"). Photogrammetry has also been described in case law as involving the use of "the law of perspective and the measurement of objects of known size in a photograph in order to make measurements of other objects." *United States v. Johnson*, 114 F.3d 808, 811 (8th Cir. 1997). "[P]hotogrammetry is a science based on triangulation which measures an object in a space where a photograph was taken. A photogrammetrist uses the lines of sight to mathematically produce three-dimensional coordinates to determine specific characteristics like the height of an object or individual." *State v. Thornton*, 2013 WL 2636129, *3 (Ohio App. 2013). "Photogrammetry is the science of evaluating distances, angles, and measurements derived from comparison of photographs with objects of known dimensions." *Vincente v. City of Rome*, 2005 WL 6032876, *6 (N.D. Ga. 2005). "Photogrammetry [is] the science of making accurate measurements through the use of photographs. The photographs may be taken from overhead (satellites, airplanes) or from the ground and from a variety of perspectives (including from the side, from directly overhead, or from overhead at

an oblique angle)." *Pictometry Int. Corp. v. Geospan Corp.*, 2012 WL 3679208, *1 (D. Minn. 2012).

In sum, as the foregoing case law demonstrates, Perkins expected the trial court to engage in the science of photogrammetry to derive the measurements from a photograph, and that is precisely what the trial court erroneously did in concluding – based on the photographic evidence alone – that "this particular gap is drastically wider than the analogous openings within the drainage grate itself." (R. 3). Perkins, however, never presented an expert in photogrammetry, and absent the testimony of an expert in that scientific field, the trial court could not evaluate the photographic evidence as a photogrammetrist would. The trial court did not possess such expertise. Thus, in its role as a fact finder, the trial court simply could not infer measurements just from eye-balling a two-dimensional photograph, but that is precisely what occurred and that constitutes reversible error.

Consequently, it is clear and should be beyond dispute that Perkins failed to present competent evidence by which the trial court could rule by the preponderance of the evidence (rather than pure speculation) that the "gap" is wider than the design specifications provide. From a practical standpoint, this should, in fact, be clear by looking at the photographs. The angle from which the photographs were taken and the perspective of the photographs reflect that the mere eye-balling of measurements could not possibly be accurate or even provide

approximations. The section of the opening or "gap," as the trial court called it, is designed to be built with the concrete sloping downward into the box. Specifically, the beam detail shows that the top of the beam at the entry point of the "gap" is angled downward into the box. (R. 276, 277, 281). Likewise, the base of the concrete barrier is built with a 45-degree angle at its base, which forms the top of the "gap" that slopes into the box. (R. 277, 281). In effect, that sloping of the concrete, particularly when photographed from various angles affects the ability to make an accurate measurement of the size of the actual opening from the two-dimensional photograph.

As indicated above, Perkins has previously argued that the trial court "may infer approximate measures." (R. 52). However, Perkins' entire claim against SCDOT is premised on her position that the as-built "gap" or opening is wider than the design specifications so as to create a construction defect for which SCDOT should have had notice and taken corrective action. To present proof of such a deviation from the design specifications, it is necessary to present more than a mere approximation.

Furthermore, that highlights an additional criticism SCDOT has with the trial court's ruling. The trial court ruled that the "gap presents a hazard to the traveling public." (R. 3). However, the trial court never makes a finding as to the extent of the deviation from the design specifications and offers no ruling as to

what point a deviation becomes hazardous or unreasonably dangerous so as to be actionable. For instance, if the deviation is a mere inch, is that sufficient to create a hazard? How about two inches or three inches? How about half an inch? Despite being requested to do so in SCDOT's Rule 52(b) motions, the trial court never explained why the deviation it found, which was never stated with any specificity, was indeed hazardous. Clearly, there is not a strict liability standard that applies in this instance – Perkins brought a negligence claim. In other words, why would a four-inch gap be hazardous while a three-inch gap is not – particularly given the attendant circumstances where this is a catch basin adjacent to a concrete center median of an interstate highway? In fact, catch basins on municipal streets and neighborhoods throughout the State have openings in catch basins greater than three inches. Why was this opening in the median of an interstate highway a hazard? The trial court never provided that explanation. There is, however, no evidence presented that the deviation from the design specifications, if any, was indeed hazardous or unreasonably dangerous, particularly in a catch basin located in the center median of an interstate highway.

In sum, the evidence presented by Perkins is not competent to prove the measurements of the opening or "gap" or, for that matter, any component of the catch basin. The trial court did not have competent evidence on which to base its decision that the "gap" exceeded the design specifications and constituted a

"hazard." In short, the trial court's findings and conclusions are purely speculative and cannot support the judgment entered.

II. The trial court erred in denying an involuntary nonsuit and judgment as a matter of law to the South Carolina Department of Transportation where the evidence establishes that Perkins' accident was not reasonably foreseeable within the contemplation of the law.

The trial court also erred in concluding that the Respondent Perkins proved the alleged negligence of SCDOT was a proximate cause of Perkins' injuries.

Under South Carolina law, proximate cause requires evidence of causation in fact and legal cause. *McKnight v. South Carolina Department of Corrections*, 385 S.C. 380, 684 S.E.2d 566, 569 (Ct. App. 2009). "[L]egal cause is proved by establishing foreseeability." *Id.* "Conduct is the proximate cause of an injury if that injury is within the scope of reasonably foreseeable risks of the conduct." *Mellen v. Lane*, 377 S.C. 261, 659 S.E.2d 236, 246 (Ct. App. 2008). "A plaintiff therefore proves legal cause by establishing the injury in question occurred as a natural and probable consequence of the defendant's act." *Id.*

In *Stone v. Bethea*, 251 S.C. 157, 161 S.E.2d 171 (1968), the Supreme Court explained that "[t]he law requires only reasonable foresight, and when the injury complained of is not reasonably foreseeable, in the exercise of due care, there is no liability. One is not charged with foreseeing that which is *unpredictable or that which could not be expected to happen*." 161 S.E.2d at 173. (Emphasis added).

"Foreseeability is to be judged from the perspective of the defendant at the time of the negligent act, not after the injury has occurred." *Crolley v. Hutchins*, 300 S.C. 355, 387 S.E.2d 716, 717 (Ct. App. 1989). "Where the injury complained of is not reasonably foreseeable there is no liability." *Id.*

The leading case on foreseeability is *Young v. Tide Craft, Inc.*, 270 S.C. 453, 242 S.E.2d 671 (1978), in which the Supreme Court found that a boat mechanic's repair of a steering cable by splicing was not reasonably foreseeable to the boat manufacturer. The Supreme Court explained that "[t]he standard by which foreseeability is determined is that of looking to the natural and probable consequences of the complained of act." 242 S.E.2d at 675. Importantly, "[t]he actor cannot be charged with that which is unpredictable or that which could not be expected to happen." 242 S.E.2d at 676. "In determining whether a consequence is one that is natural and probable, the actor's conduct must be viewed in the light of the attendant circumstances." *Id.* Similarly, the Supreme Court explained that "[t]he actor's conduct may only be held not to be a legal cause of harm to another where after the event and looking back from the harm to the actor's negligent conduct, it appears to the court *highly extraordinary* that it should have brought about the harm." 242 S.E.2d at 677. (Emphasis added). The Supreme Court ultimately focused on what it described as "the highly extraordinary character of [the boat mechanic's] actions" in finding the absence of foreseeability. *Id.*

Thus, in analyzing the issue of foreseeability, courts focus on whether the conduct that resulted in the accident would occur "in 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). In *Nelson*, which involved a parking lot accident, this Court found that the improper operation of the vehicle in that instance "was not a foreseeable hazard against which [defendants] were required to protect [plaintiff]." 701 S.E.2d at 782. This Court concluded that "[a]lthough not entirely unprecedented, the vehicle's acceleration and contact with [plaintiff] were unexpected and unusual." *Id.*[2]

On the issue of foreseeability, the trial court ruled only that "it is foreseeable that [the center median] will be used by the traveling public and others in variety of occasions including emergency stops." (R. 3). Notably, the trial court did not discuss (nor even cite) any case law or other authorities on the issue of foreseeability and failed to legally analyze that critical issue to this case. Instead, the trial court found foreseeability in a purely conclusory manner.

At any rate, that "ruling" on foreseeability is not supported by the evidence. While it may be not entirely unprecedented, there is no reasonable expectation for

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[2] Similarly, in *Crolley v. Hutchins*, 300 S.C. 355, 387 S.E.2d 716, 717 (Ct. App. 1989), this Court found as a matter of law that an attempted suicide is not an act that was reasonably foreseeable to a bartender who served drinks to an intoxicated patron.

motorists to stop their vehicles in the center median of an interstate highway which was not designed for such. Any vehicle stopped in that location cannot be removed from the left lane of traffic and poses great safety hazards to the other motorists. Thus, there is no reasonable expectation or foreseeability *within the contemplation of the law* that pedestrians would be traversing the area where the catch basin is located.

To reiterate, the Supreme Court in *Young* focused on the "unexpected," "extraordinary," and "remoteness" in looking at the foreseeability of the injury. Likewise, in *Nelson*, this Court focused on the "category of the unusual or extraordinary." *Nelson*, 701 S.E.2d at 782. In the case at bar, Perkins was injured when she stepped into an opening in a drainage catch basin in the center median of an interstate highway where a vehicle could not be safely stopped or parked. Perkins alleges that the opening or "gap" was wider than the design specifications, but there is no competent evidence as to the width of that "gap" or the degree of deviation from any design specifications. But for purposes of assessing foreseeability, the Court must determine whether it was foreseeable to SCDOT that a motorist would break down in the center median of Interstate-85 adjacent to a catch basin and step into the drainage opening and be injured. There is no evidence that such an accident has previously occurred. Indeed, that accident is so remote, so unusual, and so extraordinary that it cannot be foreseeable within the

contemplation of the law. It is no different than the remoteness of the boat mechanic in *Young* improperly splicing a boat's steering cable and the remoteness in *Nelson* of the improper operation of the grandmother's vehicle. In short, the alleged negligence on the part of SCDOT was not a proximate cause of Perkins' injury, and judgment should be entered for SCDOT as a matter of law.

III. The trial court erred in failing to find that Perkins' claim is barred or otherwise limited by her comparative negligence.

In its order, the trial court erred in concluding that the Respondent Perkins was not comparatively negligent to any degree. SCDOT contends that the sole reasonable inference which may be drawn from the evidence is that Perkins' negligence exceeded fifty percent, and as a result, she is barred from recovery as a matter of law.[3] However, in the alternative, the trial court erred in failing to find Perkins comparatively negligent to any degree. To the contrary, Perkins was not free from fault.

Pursuant to S.C. Code Ann. § 56-5-2530(1)(i), it is unlawful to stop, stand, or park a vehicle on any controlled-access highway. The undisputed evidence

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[3] In *Bloom v. Ravoira*, 339 S.C. 417, 529 S.E.2d 710 (2000), the Supreme Court explained that a circuit court may find a plaintiff's claim is barred as a matter of law "if the sole reasonable inference which may be drawn from the evidence is that the plaintiff's negligence exceeded fifty percent." 529 S.E.2d at 713. The *Bloom* Court ruled that the evidence in that case, even when viewed in a light favorable to the plaintiff, demonstrated that the plaintiff was more than fifty percent negligent. *See also*, *Hopson v. Clary*, 321 S.C. 312, 468 S.E.2d 305 (Ct. App. 1996); *Bass v. Gopal, Inc.*, 384 S.C. 38, 680 S.E.2d 917 (Ct. App. 2009).

reveals that Perkins violated this statute. *See*, *Helfrich v. Brasington Sand & Gravel Co.*, 268 S.C. 236, 233 S.E.2d 291 (1977) (affirming defense verdict against motorist who violated statute that prohibited stopping, standing, or parking a vehicle on a bridge). In this case, Perkins stopped her car illegally, got out, and walked in an area that was not designed or intended for pedestrian traffic. Thus, Perkins' violation of S.C. Code Ann. § 56-5-2530(1)(i) constitutes comparative negligence *per se*, which precludes recovery when it exceeds fifty percent and proximately causes injury.

In rejecting the comparative fault defense, the trial court accepted Perkins' self-serving and unsupported testimony that her vehicle was unable to be moved to the right shoulder of the highway because she *simultaneously* blew a tire and experienced an engine failure rendering her vehicle incapable of being moved from its position adjacent to the concrete median barrier. SCDOT submits that Perkins' testimony is contrary to the competent evidence in the record as to the cause for her vehicle breakdown and is unsupported by expert testimony from any mechanic who inspected her vehicle. In response to post-trial motions, Perkins argued that her vehicle "stalled out ... due to the emergency fuel inertia switch becoming engaged during the tire blow out." (R. 55). Perkins had testified that pressing the fuel pump "reset button" – which her counsel now calls "the emergency fuel inertia switch" in her brief – allowed the car to be re-started *over a month later* after the

car was towed first to a Waffle House, then sat in a parking lot in South Carolina for "about a month" and then was towed to Atlanta. (R. 172-173). There is no competent evidence, however, that a tire blow out resulted in the "emergency fuel inertia switch" being engaged or that the tire blow out caused a simultaneous engine failure. If that is Perkins' theory to excuse her failure to move the vehicle to the right shoulder of the highway, that needed to be proven by expert automotive testimony. No such evidence was presented.

In addition, the claim that Perkins' vehicle suffered an engine failure is contrary to her own Complaint which alleges as follows: "On or about March 1, 2012, the Plaintiff was operating her motor vehicle on Interstate 85 in Spartanburg County when the left tire exploded." *See*, Complaint, ¶ 3. (R. 14). The Complaint makes no mention of any engine failure that rendered the vehicle inoperable. *See*, *Postal v. Mann*, 308 S.C. 385, 387, 418 S.E.2d 322, 323 (Ct. App. 1992) ("parties are judicially bound by their pleadings unless withdrawn, altered or stricken by amendment or otherwise").

In short, Perkins' violation of S.C. Code Ann. § 56-5-2530 establishes her comparative negligence of greater than fifty percent and bars her recovery in this case, or at the very least, the judgment should be reduced by some degree of fault on her part.[4]

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[4] This case is similar in many respects to *Bass v. Gopal, Inc.*, 384 S.C. 38, 680

IV. The trial court erred in failing to make specific findings of fact and conclusions of law in violation of Rule 52(a), SCRCP.

As discussed above, the standard of appellate review for an action at law on appeal of a case tried without a jury provides that the appellate court will not disturb the judge's findings of fact unless found to be without evidence which reasonably supports the judge's findings. *Townes Associates, Ltd. v. City of Greenville*, 266 S.C. 81, 221 S.E.2d 773, 775 (1976). As a result, it is critical that the trial court set forth its findings of fact and conclusions of law with sufficient specificity and detail to allow for proper appellate review. Rule 52(a), SCRCP, in fact, requires "[i]n all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon." Rule 52(a), SCRCP. This Court has likewise recognized that "meaningful appellate review is more readily obtained when we are presented with a clear presentation of the basis for the circuit court's findings." *In the Matter of the Care and Treatment of Corley,* 365 S.C. 252, 616 S.E.2d 441, 443 (Ct. App. 2005). The Supreme Court has similarly explained the critical

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S.E.2d 917 (Ct. App. 2009), where this Court concluded as a matter of law that the plaintiff's negligence claim was barred by comparative negligence because the only reasonable inference to be drawn from the evidence was that the plaintiff's actions placed himself in harm's way. Later, on a writ of certiorari, the Supreme Court affirmed this Court on different grounds. The Supreme Court did not reach or comment on the comparative negligence defense. Justice Pleicones, however, concurred by concluding "that the Court of Appeals correctly affirmed the grant of summary judgment on the comparative negligence ground." *Bass v. Gopal, Inc.*, 395 S.C. 129, 716 S.E.2d 910, 917 (2011).

necessity for adequate findings and conclusions of law:

> Trial courts, sitting without juries in an action at law, write their findings specially and separately to allow a reviewing court to determine from the record whether the judgment -- and the legal conclusions which underlie it -- represent a correct application of the law. The requirement for appropriately detailed findings is thus not a mere formality or a rule of empty ritual; it is designed instead to dispose of the issues raised by the pleadings and to allow the appellate courts to perform their proper function in the judicial system.

In the Matter of the Treatment and Care of Luckabaugh, 351 S.C. 122, 568 S.E.2d 338, 343 (2002). While the Supreme Court "do[es] not require a lower court to set out findings on all the myriad factual questions arising in a particular case," it is required that the key factual questions of a case be stated with clarity and specificity. *Id.* The same is certainly also true with respect to the key legal issues of the case. As the Supreme Court instructs, "the findings must be sufficient to allow [a] 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." *Luckabaugh*, 568 S.E.2d at 343.

In the case at bar, the Appellant SCDOT submits that the trial court failed to set forth its findings of fact and conclusions of law with sufficient specificity and detail on several key issues. As asserted in its Rule 52(b) Motion to Alter or Amend Order, SCDOT contends that the trial court's Order Denying Defendant's

Post-Trial Motions does not include any discussion of the merits of the following issues:

1. The Plaintiff failed to present any competent evidence of a defect or deviation in the opening of the catch basin. The Court's finding that "this particular gap is drastically wider than the analogous openings within the drainage grate itself" is purely speculative because no measurements were offered into evidence by which the Court could determine any deviation from the design specifications. The photographs alone, absent expert testimony, were not competent to determine accurate measurements necessary to support the Court's finding and the Court was not able to infer the measurements by merely eye-balling the photographs. The Court failed to specifically address this absence of competent evidence in either of its Orders.

2. The Court did not address what made the opening as constructed "a hazard to the traveling public." The Court never made a finding as to the extent of deviation, if any, from the design specifications and at what point a construction deviation becomes a "hazard" particularly where the catch basin was located adjacent to a concrete center median of an interstate highway.

3. The Court failed to address the merits of the foreseeability issue in either Order issued. The Court did not discuss (nor even cite) any case law or other authorities on the issue of foreseeability and failed to legally analyze that critical issue to this case. Instead, the Court found foreseeability in a purely conclusory manner.

4. The Court failed to address whether there was competent evidence, absent expert testimony, to support the Court's conclusion that the Plaintiff experienced a simultaneous tire blowout and engine failure so as to support the Court's finding that the Plaintiff was not negligent in any respect for stopping her vehicle in the left

> lane of an interstate highway in violation of S.C. Code Ann. § 56-5-2530.

(R. 71).

The trial court denied that Rule 52(b) motion by order filed September 28, 2018. (R. 9-11). The trial court did not even recognize or consider that the motion was based upon Rule 52(b) and was premised on the court's failure to sufficiently set forth the bases for its findings of fact and conclusions of law as required by Rule 52(a). Instead, the trial court only summarily denied the motion using the "boiler plate" language seen in the denial of many Rule 59(e) orders to the effect that "the Court is unable to discover any material fact or principle of law that either has been overlooked or disregarded and further finds no error of law or fact not appropriately considered." (R. 9).

In sum, SCDOT submits that the judgment by the trial court cannot be affirmed on appeal absent a remand requiring the trial court to issue an order complying with Rule 52(a), SCRCP, that addresses all issues and defenses and provides sufficient findings of fact and conclusions of law that will allow for appropriate appellate review.

CONCLUSION

Based on the foregoing discussion and analysis, the Appellant South Carolina Department of Transportation respectfully requests that this Court reverse the orders of Circuit Court Judge Grace Gilchrist Knie and remand with instructions that judgment be entered in favor of the Appellant. In the alternative, the Appellant requests that the Court remand with instructions that the trial court issue an order complying with Rule 52(a), SCRCP, that addresses all issues and defenses and provides sufficient findings of fact and conclusions of law that will allow for appropriate appellate review.

Respectfully submitted,

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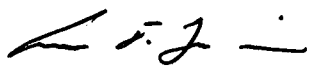
BY: 

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CERTIFICATE OF COUNSEL

The undersigned counsel for the Appellant South Carolina Department of Transportation certifies that the Final Brief of Appellant complies with Rule 211(b), SCACR.

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CERTIFICATE OF COMPLIANCE

The undersigned counsel for the Appellant South Carolina Department of Transportation certifies that the Final Brief of Appellant complies with the Supreme Court's Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings, issued April 15, 2014.

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The undersigned employee of Lindemann, Davis & Hughes, P.A., counsel for the Appellant South Carolina Department of Transportation, does hereby certify that service of the **Final Brief of Appellant** 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 15th day of May 2019:

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