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.

REPLY BRIEF OF APPELLANT

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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 Appellant South Carolina Department of Transportation ("SCDOT") maintains that there is no competent evidence in the record of a defective or hazardous condition posed by the catch basin in the center median of Interstate-85 on which the Respondent Betty Perkins stepped. In response, Perkins makes repeated references to a "large hole" and an "excessively wide overflow gap." Quite frankly, that language goes far beyond what the trial court even describes. Without question, there is no evidence -- photographic or otherwise -- of a "large hole" or an "excessively wide overflow gap."

Remarkably, Perkins never explains or justifies the obvious absence of evidence of the actual measurements or dimensions of the pertinent components of the catch basin. Instead, Perkins claims that the trial court "had multiple references for scale" and, as an example, points to Perkins' testimony that she wears a size 10 shoe. But, such evidence, which is not even mentioned in the trial court's findings as probative evidence, does not give rise to any reasonable inference that the "gap" at issue was not built to the design specifications or created a hazardous condition.

In addition, in an attempt to overcome the absence of evidence of the as-built dimensions of the catch basin, Perkins makes the same error that the trial court did. Perkins relies on the photographs and attempts to derive measurements simply by "eye-balling" those photographs. However, as discussed at length in SCDOT's opening brief, such photographic evidence alone, without any measure or scale, is not competent unless supported by the science of photogrammetry.[1] Perkins suggests that it is sufficient for the trial judge "to consider the angle, perspective, and dimensions of the photographs" and that is "a role that most trial courts employ on a daily basis." *See*, Respondent's Brief, p. 15. There is no support for that broad contention. Trial judges, like juries, do not have the expertise to derive the actual measurements from a photograph. That is a science that requires expert testimony. That is precisely why, in the absence of photogrammetric evidence, a two-dimensional photograph is not competent evidence of measurements or dimensions where there is no ruler or other scale included in the photograph for reference.[2]

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[1] "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 aide, from directly overhead, or from overhead at an oblique angle)." *Pictometry Int. Corp. v. Geospan Corp.*, 2012 WL 3679208, *1 (D. Minn. 2012).

[2] In her brief, Perkins inadvertently reinforces this very point by referencing a photograph from SCDOT based upon which "one could easily argue that the width of gap in that photograph appears even wider than in the photographs provided by Ms. Perkins." *See* Respondent's Brief, p. 15. The reason for that is obvious -- dimension cannot be determined from a two-dimensional photograph absent the use of photogrammetry. Two photographs of the same object taken at different angles and from different perspectives will suggest different dimensions.

That is particularly true in a case such as this where the deviation from the specifications, if it exists, is not substantial. Certainly, as stated above, there is no basis in the record for any rational conclusion that there was a "large hole" or an "excessively wide overflow gap." In fact, that is one of SCDOT's primary criticisms -- that the trial court never makes a finding as to the extent of the deviation, if any, from the design specifications and offers no ruling whatsoever as to what point a deviation becomes hazardous or unreasonably dangerous so as to be actionable. The trial court never explains how even a minor deviation from the specification, such as an inch or two, would create a hazardous condition -- particularly with respect to a catch-basin in the median of an interstate highway. There was no expert testimony presented or evidence of any industry standards that dictate that a three-inch "gap" is safe but a gap that is even an inch larger is not. That is highly illogical particularly given the preponderance of catch basins on municipal streets and neighborhoods throughout the State have openings greater than three inches. There has to be a standard by which to assess what dimension in an interstate catch basin is unsafe, and no such evidence was presented in this case nor formed the basis for the trial court's conclusion that the "gap presents a hazard to the traveling public." (R. 3).

In sum, the evidence before the trial court is not competent to prove the measurements of the opening or "gap" in 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." The findings at the heart of this case 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.

As SCDOT points out in its opening brief, the trial court did not even legally analyze the critical issue of foreseeability. Not a single case on foreseeability was discussed or even cited. Rather, in a purely conclusory manner, the trial court ruled that "it is reasonably foreseeable that the traveling public and other individuals may avail themselves of this lane." (R. 3). This, of course, refers to the center median of Interstate-85 which is substantially less than the width of a vehicle and not an area where a vehicle may safely stop and be out of the roadway.

Under South Carolina law, "[o]ne is not charged with foreseeing that which is unpredictable or which would not be expected to happen as a natural and probable consequence of the defendant's negligent act." *Crolley v. Hutchins*, 300 S.C. 355, 387 S.E.2d 716, 717 (Ct. App. 1989). "Foreseeability is to be judged from the perspective of the defendant at the time of the negligent act, not after the injury has occurred." *Id. See also, Young v. Tide Craft, Inc.*, 270 S.C. 453, 242

S.E.2d 671, 676 (1978) ("[t]he actor cannot be charged with that which is unpredictable or that which could not be expected to happen"). Importantly, "[t]he law requires only reasonable foresight." *Stone v. Bethea*, 251 S.C. 157, 161 S.E.2d 171, 173 (1968). That is the critical inquiry.

In her response brief, Betty Perkins relies exclusively on the case of *Oliver v. South Carolina Department of Highways and Public Transportation*, 309 S.C. 313, 422 S.E.2d 128 (1992), in which the Supreme Court found that there was sufficient evidence of foreseeability where there was a prior history of similar accidents occurring at the very same location. Specifically, the Supreme Court highlighted the fact that "there had been three prior accidents involving cars parked on the lot and motorists using the highway." 422 S.E.2d at 131. *Oliver* is readily distinguishable from this case because, quite simply, there is no evidence of any prior accidents similar to the one experienced by Perkins. She presented no evidence of a similar occurrence happening where a motorist stepped into a catch basin while traversing the center median of an interstate anywhere in the State. Thus, the evidence in *Oliver* demonstrated that the accident that occurred was predictable -- it had occurred three times in the past *at that specific location.* Hence, in *Oliver*, the Court could conclude that the accident was legally

foreseeable and was not "highly extraordinary"[3] or "within the category of the unusual or extraordinary."[4]

This case is much different than *Oliver* and more in line with *Young* and *Nelson*. Reasonable foresight is the touchstone. It is not reasonably foreseeable that a motorist would be traversing the center median and may step into the opening or "gap" at the edge of the catch basin where it abuts the concrete barrier. Perkins argues, however, that SCDOT did reasonably foresee or anticipate that a vehicle may enter the median and thus placed a metal grate over the catch basin. Hence, Perkins suggests that the same foresight should have been applied to dangers posed to pedestrians in the center median. But that argument is illogical. There is a reasonable expectation that vehicles, which are intended to be in the roadway, may veer slightly into the center median and thus cross over the catch basin. But, there is not the same expectation that a pedestrian will be traversing the roadway or the center median and have their foot step into the overflow gap that abuts the concrete barrier.

Finally, Perkins, as well as the trial court, seem to rely on the testimony of SCDOT employees where they were asked questions that used the term "foreseeable." For instance, as referenced by Perkins in her response brief,

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

4 *Nelson v. Piggly Wiggly, Inc.*, 390 S.C. 382, 701 S.E.2d 776, 782 (Ct. App. 2010).

Michael Holden was asked by Perkins' attorney: "It's foreseeable that a car will pull off in that shoulder?" Holden responded: "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." (R. 144:16-20). Of course, the use of the word "foreseeable" in the question does not mean that the witness was addressing or conceding "legal foreseeability" which has a specific meaning within the contemplation of the law. This distinction is aptly described by this Court in *Nelson v. Piggly Wiggly, Inc.*, 390 S.C. 382, 701 S.E.2d 776 (Ct. App. 2010). This Court expressly "adopted" the following analysis from Alabama and Florida courts:

> We are not unmindful of the obvious fact that at times operators lose control over the forward progress and direction of their vehicles either through negligence or as a result of defective mechanisms, which sometimes results in damage or injury to others. *In a sense all such occurrences are foreseeable.* They are not, however, incidents to ordinary operation of vehicles, and do not happen in the ordinary and normal course of events. When they happen, the consequences resulting therefrom are matters of chance and speculation. *If as a matter of law such occurrences are held to be foreseeable and therefore to be guarded against, there would be no limitation on the duty owed by the owners of establishments into which people are invited to enter. Such occurrences fall within the category of the unusual or extraordinary, and are therefore unforeseeable in contemplation of the law.*

701 S.E.2d at 782. (Emphasis added). This Court drew a distinction between what is "foreseeable" as a generic term vis-à-vis foreseeable "in contemplation of the law" (also referred to as "legal foreseeability"). This Court in *Nelson* explained that foreseeability in a general sense is not the standard. Instead, "legal foreseeability" or foreseeability "in contemplation of the law" is not found where there are occurrences that fall "within the category of the unusual or extraordinary." *Id.* This is entirely consistent with the Supreme Court's analysis in the leading case on foreseeability -- *Young v. Tide Craft, Inc.*, 270 S.C. 453, 242 S.E.2d 671 (1978) -- where the Supreme Court focused on what it described as "the highly extraordinary character of [the boat mechanic's] actions" in finding the absence of foreseeability. 242 S.E.2d at 677.

Therefore, as SCDOT has argued, this 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. Thus, any 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.

CONCLUSION

Based on the foregoing discussion and analysis, the Appellant South Carolina Department of Transportation respectfully renews its request 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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CERTIFICATE OF COUNSEL

The undersigned counsel for the Appellant South Carolina Department of Transportation certifies that the Final Reply 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 Reply 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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CERTIFICATE OF SERVICE

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 Reply 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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