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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.

PETITION FOR REHEARING

The Appellant South Carolina Department of Transportation petitions the South Carolina Court of Appeals for a rehearing of the Court's recent decision in *Perkins v. South Carolina Department of Transportation*, Op. No. 2021-UP-252 (S.C. Ct. App. filed July 7, 2021).

The grounds for the Appellant's petition for rehearing are addressed in detail in the supporting memorandum filed herewith and incorporated herein.

The Respondent's petition for rehearing is based on the Court's decision in *Perkins v. South Carolina Department of Transportation*, Op. No. 2021-UP-252 (S.C. Ct. App. filed July 7, 2021); the supporting memorandum filed herewith; the briefs and Record on Appeal; Rule 221(a), SCACR; Rule 224, SCACR; and other rules of court.

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MEMORANDUM IN SUPPORT OF PETITION FOR REHEARING

The Appellant South Carolina Department of Transportation ("SCDOT") has petitioned this Court for a rehearing of the recent decision *Perkins v. South Carolina Department of Transportation*, Op. No. 2021-UP-252 (S.C. Ct. App. filed July 7, 2021). SCDOT respectfully submits that the following points were overlooked or misapprehended by this Court:

I. The accident was not reasonably foreseeable within the contemplation of the law.

The Court concluded that "the record supports the trial court finding Perkins' injury was foreseeable." (Slip Op. at 5). In so ruling, the Court respectfully overlooked and misapplied the concept of "legal foreseeability" under South Carolina law.

The Court ruled that "foreseeability is determined by looking to the natural and probable consequences of the defendant's act or omission." (Slip Op. at 5). However, that is only part of the analysis. The foreseeability of the accident must also be *reasonable*. This is best stated in the Supreme Court's decision in *Stone v. Bethea*, 251 S.C. 157, 161 S.E.2d 171 (1968), where the 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). Similarly, in *Young v. Tide Craft, Inc.*, 270 S.C. 453, 242 S.E.2d 671 (1978), which is arguably the leading case on foreseeability, 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). This Court also adopted the same analysis in *Crolley v. Hutchins*, 300 S.C. 355, 387 S.E.2d 716 (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." 387 S.E.2d at 717. "Where the injury complained of is not reasonably foreseeable there is no liability." *Id*. *See also*, *McKenzie v. Leeke*, 292 S.C. 568, 357 S.E.2d 721, 722 (Ct. App. 1987) (Court found the shooting of an inmate was not "reasonably foreseeable as a matter of law"); *Hubbard v. Taylor*, 339 S.C. 582, 529 S.E.2d 549 (Ct. App. 2000) (Court found that leaving antifreeze in an unlocked car where it was accessed and drunk by a mentally instable resident at a nursing home was "not reasonably foreseeable" as a matter of law).

In its analysis in this case, the Court did not consider or address whether the Respondent Betty Perkins' accident and injury was "reasonably foreseeable." The Court also overlooked the important analysis of this issue in *Nelson v. Piggly Wiggly, Inc.*, 390 S.C. 382, 701 S.E.2d 776 (Ct. App. 2010), where 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).

Thus, in disregard of this critical analysis of legal foreseeability, this Court found that an accident where a pedestrian steps into what the Court called the "overflow gap," which is part of a catch basin that abuts the center median of an interstate highway where a vehicle could not be safely stopped or parked, is foreseeable within the contemplation of the law, meaning that it is "reasonably foreseeable" (although the Court did not address reasonableness). The Court reached that conclusion because it is "possible" that someone – be it a government employee or a motorist in distress – "may end up walking along the unlighted median at night for any number of legitimate reasons." (Slip Op. at 5). As this Court said in *Nelson*, "[i]n a sense all such occurrences are foreseeable." *Nelson*, 701 S.E.2d at 782. However, just because a scenario is possible and someone "may end up walking in the median" (using the Court's own words), that does not make it reasonably foreseeable within the contemplation of the law.

If the fact pattern in this case qualifies as "reasonable foreseeability," then in all candor the Court may as well eliminate the "legal cause" component from the proximate cause analysis. If this unusual, extraordinary, unprecedented, and remote accident meets the standard of "reasonable foreseeability," then the absence of "legal cause" may never be shown. As the Supreme Court has recognized in a similar context, if an occurrence that is only a "remote possibility" qualifies as "reasonably foreseeable," that "would completely obviate the foreseeability requirement." *Smith v. Breedlove*, 377 S.C. 415, 661, S.E.2d 67, 73 (2008). There should be no disputing the fact that Perkins' accident was a remote possibility at best, and if that occurrence is deemed to reasonably foreseeable, as this Court has now ruled, then the net result in the "complete obviation of the foreseeability requirement."

In fact, in *Nelson*, this Court warned of this very danger: "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." *Nelson*, 701 S.E.2d at 782. In this case, the Court has not considered that warning from its brethren in the context of the duty owed as to the condition of highway medians. The median in question was not one where it could be reasonably anticipated persons would be walking. If that occurred, it would be a remote and extraordinary occurrence. The

median was barely wide enough for the catch basin. No vehicle could be safely stopped in that area. Yet, because this Court finds that it is legally foreseeable that persons "may end up walking" along such a median, that net result is the creation of a duty of care that could never have been anticipated when that median was designed, constructed, or maintained prior to this accident. This Court is, in essence, telling SCDOT that a center median such as this must be maintained in such a condition that pedestrians may safely travel that area – despite the absence of evidence that Perkins' incident has ever happened before or since – at the point of the catch basin in question or anywhere along the hundreds of miles of interstate highways in South Carolina. If this Court's ruling is correct, that very occurrence – walking along a median designed solely for drainage – is legally foreseeable and a duty would then arguably exist to maintain that area so that it may be traversed safely. That will require constant monitoring and cleaning of many miles of similar medians. That cannot possibly be the ruling that this Court intended when it disregarded the clear and prudent warning voiced by this very Court (including Judge Thomas) in *Nelson*. Notably, in *Nelson*, this Court found that the mechanism of the accident was "not entirely unprecedented," but nonetheless this Court still correctly concluded that "[s]uch occurrences fall within the category of the unusual or extraordinary, and are therefore unforeseeable in contemplation of the law." *Nelson*, 701 S.E.2d at 782.

On the issue of foreseeability, the Court also erred in placing any weight on the testimony of SCDOT's engineers where they were asked questions that used the term "foreseeable." For instance, as referenced by Perkins in her response brief, 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, supra,* where 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 where "[i]n a sense all such occurrences are foreseeable." *Nelson,* 701 S.E.2d at 782. 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.* And certainly, if the engineers' testimony is deemed probative of "foreseeability," it is certainly not probative on the dispositive issue of "reasonable foreseeability." The Court should recognize

that the engineers' testimony in this context was not probative on the issue of legal foreseeability and does not support the judgment entered by the trial court.

In sum, this Court is respectfully asked to reconsider its analysis on legal foreseeability and to provide an assessment as to whether the accident – while perhaps "possible" – was reasonably foreseeable within the contemplation of the law. As SCDOT has argued, this Court should determine whether it was reasonably 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 "overflow gap" and be injured. There is no evidence that such an accident had previously occurred. Indeed, that accident is so remote, so unusual, and so extraordinary that it cannot be reasonably 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.

II. The absence of any probative or competent evidence of a defective or hazardous condition posed by the catch basin in the center median of Interstate-85.

SCDOT contends that there is no probative or 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 addressing this issue, the Court held simply that "the evidence at trial created a

reasonable inference the overflow gap was wider than SCDOT's design specifications." (Slip Op. at 3). The Court makes no mention of what that deviation was and whether that deviation creates a "hazard to the traveling public," as the trial judge erroneously states.

The Court does acknowledge that "it is odd no one at trial testified to the actual measurements of the gap." (Slip Op. at 3). Of course, Perkins, as the plaintiff, had the burden of proving that the gap was wider than the specifications allowed and constituted a hazard. And, of course, Perkins also had the ability to offer proof of the measurements. 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").

Nonetheless, this Court gives Perkins a pass on its burden of proof. Despite the inexplicable absence of actual measurements, the Court focuses instead on evidence that Perkins "wore a size ten shoe" and her "shoe was five inches wide." (Slip Op. at 2-3). With all due respect to this Court, is the standard of proof so low

in South Carolina that a plaintiff can hold up her shoe to the factfinder, then guess that it is five or six inches wide (no actual measurement was offered) (R. 164-165), and that is sufficient evidence to prove a construction defect? Not even the trial judge relied on the "shoe" evidence. That is no mention of the "shoe evidence" in the judge's findings of fact. Of course, a size ten shoe says nothing of its width nor of its height from sole to top. A shoe is not a rectangular block which is five inches wide *and* five inches high. Given the nature of the "overflow gap" in the catch basin, a shoe could slide into a three inch gap sideways as well, particularly given the positioning of the "overflow gap" in this case which was flush to the ground and sloped at a 45 degree angle into the box. Clearly, the width of Perkins' shoe is not probative evidence of the width of the "overflow gap" nor should it be considered probative evidence on which to rule that a construction defect exists. Inferences must be reasonable,[1] and quite frankly, the "shoe evidence" does not support a reasonable inference. It is, at best, speculation and conjecture which does not support the findings by the trial court, and classifying it as such is even

[1] The applicable standard for at the directed verdict, involuntary nonsuit, or JNOV stages requires consideration only of "reasonable inferences." The Supreme Court has explained that "[w]hen considering a directed verdict motion, the trial court should view the evidence and all *reasonable inferences* in the light most favorable to the non-moving party." *South Carolina Federal Credit Union v. Higgins*, 394 S.C. 189, 714 S.E.2d 550, 552 (2011). (Emphasis added). In *Jones v. Sun Publishing Co., Inc.*, 278 S.C. 12, 292 S.E.2d 23 (1982), the Supreme Court also explained: "South Carolina adheres to the 'scintilla of evidence' rule which requires submission of an issue to a jury whenever there is competent and relevant evidence tending to establish the issue in the mind of a reasonable juror. The rule does not authorize submission of speculative, theoretical or hypothetical views nor does it permit a verdict to stand upon surmise, conjecture or speculation." 292 S.E.2d at 27.

generous. It is an absurd measure when the Plaintiff could have and should have presented evidence of the actual measurements, the absence of which this Court at least acknowledged was "odd."

As stated, the trial judge did not even rely on the "shoe evidence." She certainly did not cite that evidence in her findings of fact, and if it was the critical evidence (as this Court seems to suggest), the trial judge would have cited it. What the trial judge did was rely on the photographs of the catch basin and attempt to derive measurements simply by "eye-balling" those photographs. However, as discussed at length in SCDOT's briefs to this Court, such photographic evidence alone, without any measure or scale, is not competent unless supported by the science of photogrammetry.[2] The Court rejects the necessity of having an expert in photogrammetry but the Court also does not find that the trial judge's reliance on the photographs to determine the size of the "overflow gap" was correct either. In addition to the non-probative "shoe evidence," the Court points to the "basin's edges not being flush." (Slip Op. at 3). Of course, that provides no measurement either, and frankly, if the edge is not "flush," does that create a hazard?

[2] "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).

In reality, the trial judge did "eyeball" the photographs and that was in error. 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. When he took the photographs that were admitted into evidence, Dixon could have displayed a ruler or other measuring device to provide the specific measurements of the various openings and other portions of the catch basin. He did not do so. 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 trial court did, and this Court in turn has voiced no problem with that pure speculation.

These issues are particularly problematic 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," as Perkins describes in her filings. 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 "overflow 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). Yet, this Court did not even address that issue. This Court just assumed that the appearance on photographs that the "edges were not flush" translates into a construction defect,[3] but this Court never even considers whether that condition can be adjudged a "hazard to the traveling public" without some type of expert testimony or industry standards at a minimum. On rehearing, the Court is respectfully requested to address this very issue.

[3] It is questionable whether this Court could make a finding that the edges were not flush from a two-dimensional photograph.

In sum, the evidence presented by Perkins is not probative or competent to prove the measurements of the opening of the "overflow 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 “overflow 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. The Court is respectfully requested to rehear these issues and the absence of probative and competent evidence. The Court is also requested to reject the highly speculative and meaningless "shoe evidence" that even the trial judge did not rely upon.

CONCLUSION

Based on the foregoing discussion, the Appellant South Carolina Department of Transportation respectfully requests that the Court rehear its decision in this case.

Respectfully submitted,

LINDEMANN & DAVIS P.A.

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CERTIFICATE OF SERVICE

Pursuant to Section (g)(3) of the Supreme Court's Amended Order Re: Operation of the Appellate Courts During the Coronavirus Emergency (as Amended May 29, 2020), the undersigned employee of Lindemann & Davis, P.A., counsel for the Appellant, does hereby certify that service of the **Petition for Rehearing** and **Memorandum in Support of Petition for Rehearing** in the above-captioned matter was made upon all counsel of record by email only at the below listed email addresses this the 22nd day of July 2021:

John E. Parker, Esquire
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July 22, 2021

Via Email Only
The Honorable Jenny Abbott Kitchings
Clerk of Court
South Carolina Court of Appeals
Email: ctappfilings@sccourts.org

RE: Betty Jean Perkins v. South Carolina Department of Transportation
Appellate Case Number: 2018-001665
Civil Action Number: 2016-CP-42-2478
Claim Number: 01391
File Number: 104.20000

Dear Ms. Kitchings:

Pursuant to Section (c)(6) of the Supreme Court's Amended Order Re: Operation of the Appellate Courts During the Coronavirus Emergency (As Amended May 29, 2020), please find enclosed for filing by email only the **Petition for Rehearing** and **Memorandum in Support of Petition for Rehearing** in the above referenced matter. By copy of this letter, I am serving copies on all counsel of record by email only in accordance with Section (g)(3) of the same order. No filing fee is required as the Appellant is an agency of the State of South Carolina and is exempt from a filing fee.

Thank you for your assistance in this matter.

Sincerely,

LINDEMANN & DAVIS, P.A.

Andrew F. Lindemann

AFL/jmb
Enclosures

cc: John E. Parker, Esquire *(w/ Enclosures, Via Email Only)*
Neil E. Alger, Esquire *(w/ Enclosures, Via Email Only)*