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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In The Supreme Court

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APPEAL FROM SPARTANBURG COUNTY
Grace Gilchrist Knie, Circuit Court Judge

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Opinion No. 2021-UP-252
(S.C. Ct. App. filed July 7, 2021)

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Betty Jean Perkins,......................................................................... Respondent,

v.

South Carolina Department of Transportation,............................... Petitioner.

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**PETITION FOR WRIT OF CERTIORARI**

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## CERTIFICATE OF COUNSEL

Counsel for the Petitioner South Carolina Department of Transportation certifies that its Petition for Rehearing was made and finally ruled on by the South Carolina Court of Appeals on August 10, 2021.

## QUESTIONS PRESENTED

I. Did the Court of Appeals err in its application of existing precedent requiring "reasonable foreseeability" and in concluding that the Respondent's accident was legally foreseeable within the contemplation of the law?

II. Did the Court of Appeals err in not recognizing the absence of probative or competent evidence of a defective or hazardous condition posed by the catch basin in the center median of Interstate-85?

## STATEMENT OF THE CASE

This is an appeal from a negligence action brought by the Respondent Betty Jean Perkins against the Petitioner 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 the 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 Petitioner 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 Petitioner SCDOT filed a timely appeal to the Court of Appeals from each of the orders issued by Judge Knie and challenging the judgment entered in favor of Betty Jean Perkins. Without holding oral argument, the Court of Appeals issued an unpublished opinion on July 7, 2021, affirming the judgment entered in

the Circuit Court. SCDOT filed a petition for rehearing which was summarily denied by order issued on August 10, 2021.

## 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 alongside 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 alleges that the catch basin where she fell along the Interstate-85 median was defective. SCDOT's Assistant District Maintenance Engineer, Michael Holden, 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. (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 vehicle 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).

# ARGUMENTS

**I. The Court of Appeals erred in its application of existing precedent requiring "reasonable foreseeability" and in concluding that the Respondent's accident was legally foreseeable within the contemplation of the law.**

In affirming the trial court, the Court of Appeals concluded that "the record supports the trial court finding Perkins' injury was foreseeable." (Slip Op. at 5). In so ruling, the Court erred in misapplying the concept of "legal foreseeability" under South Carolina law.

The Court of Appeals ruled that "foreseeability is determined by looking to the natural and probable consequences of the defendant's act or omission." (Slip Op. at 5). While correct, 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 this 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, this 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 Court of Appeals 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 unstable resident at a nursing home was "not reasonably foreseeable" as a matter of law); *Eadie v. Krause*, 381 S.C. 55, 671 S.E.2d 389 (Ct. App. 2008) (in legal malpractice case, it was not "reasonably foreseeable" as a matter of law for counsel to recognize that pursuit of a workers' compensation claim in South Carolina constituted a binding election of remedies under Tennessee law thereby barring a subsequent workers' compensation claim in that state).

In its analysis in this case, the Court of Appeals did not consider or address whether Perkins' accident and injury were "reasonably foreseeable." The Court of

Appeals also disregarded 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 the Court of Appeals 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, the Court of Appeals 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 of

Appeals 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 the Court in *Nelson* observed, "[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 of Appeals' 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 this Court 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).[1] There should be no disputing the fact that Perkins' accident was a remote possibility at best, and if that occurrence is deemed to be reasonably foreseeable, as the Court of Appeals has

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[1] Just recently, in *Wickersham v. Ford Motor Co.*, 432 S.C. 384, 853 S.E.2d 329 (2020), this Court observed once again that "[i]n causation, as in other contexts, 'proximate' is the opposite of 'remote.'" 853 S.E.2d at 332, *citing Stone v. Bethea*, 251 S.C. 157, 161 S.E.2d 171, 173 (1968).

ruled, then the net result in the "complete obviation of the foreseeability requirement."

In fact, in *Nelson*, the Court of Appeals 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 of Appeals did not consider nor heed 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 the Court of Appeals found 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.

The Court of Appeals has, in essence, told 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. Practically speaking, if the Court of Appeals' ruling is correct, that very occurrence – walking along a narrow center 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 so that pedestrians may walk safely along that median in the remote chance a vehicle breaks down and is abandoned in the middle of an interstate highway. That cannot possibly be the law in this State based on years of precedent from this Court, including *Stone*, *Young,* and others. Notably, in *Nelson*, the Court of Appeals found that the mechanism of the accident was "not entirely unprecedented," but nonetheless the 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 of Appeals 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 in *Nelson, supra*, where the Court of Appeals 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"). The *Nelson* Court 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 of Appeals erred in not recognizing 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 requested to issue a writ of certiorari to properly analyze the issue of 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, a proper analysis based on this Court's precedent requires the Court to address 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 Court of Appeals erred in not recognizing the absence of 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 of Appeals 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 of Appeals, however, made no mention of what that deviation was and whether that deviation creates a "hazard to the traveling public," as the trial court erroneously states.

The Court of Appeals did 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 catch basin as built, including the "overflow 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, the Court of Appeals, like the trial court, gave Perkins a pass on her burden of proof. Despite the inexplicable absence of actual measurements, the Court of Appeals 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 the Court of Appeals, 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." There 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.[2] 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,[3] 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 generous. It is an absurd measure when Perkins could have and should have presented evidence of

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[2] The "overflow gap" 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).

[3] The applicable standard for at the directed verdict, involuntary nonsuit, or JNOV stages requires consideration only of "reasonable inferences." This 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), this 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.

the actual measurements, the absence of which the Court of Appeals at least acknowledged was "odd." (Slip Op. at 3).

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 the Court of Appeals seemed to conclude), 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 the Court of Appeals, such photographic evidence alone, without any measure or scale, is not competent unless supported by the science of photogrammetry.

It is well settled that 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 in the absence of a measure or scale on the photograph, 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).

The Court of Appeals, however, rejected the necessity of having an expert in photogrammetry, but the Court did 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 of Appeals pointed 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?

In reality, the trial judge did "eye-ball" 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 components 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 the Court of Appeals took no issue 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 made a finding as to the extent of the deviation, if any, from the design specifications and offered no ruling whatsoever as to what point a deviation becomes hazardous or unreasonably dangerous so as to be actionable. The trial court never explained how even a minor deviation from the specifications, 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, the Court of Appeals chose to disregard that issue. The Court of Appeals just assumed that the appearance on photographs that the "edges were

not flush" translates into a construction defect,[4] but the Court never even considered whether that condition can be adjudged a "hazard to the traveling public" without some type of expert testimony or industry standards at an absolute minimum.

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. This Court is respectfully requested to grant a writ of certiorari to address these issues and specifically the absence of probative and competent evidence. This Court is also requested to reject the highly speculative and meaningless "shoe evidence" that even the trial judge did not rely upon. Finally, this case presents the Court with a unique opportunity to address whether two-dimensional photographs are probative evidence of precise measurements, that is, in the absence of a ruler or scale on the photographs themselves, or otherwise in the absence of expert testimony from a photogrammetrist to establish those dimensions scientifically rather than by use of "eye-balling," as what the factfinder did in this case.

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[4] It is questionable whether the Court of Appeals may make make a finding that the edges were not flush from a two-dimensional photograph for the reasons discussed above.

# CONCLUSION

Based on the foregoing discussion, the Petitioner South Carolina Department of Transportation respectfully requests that this Court grant its petition for a writ of certiorari.

Respectfully submitted,

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