THE STATE OF SOUTH CAROLINA
In the Supreme Court

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SC Court of Appeals

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas

Grace Gilchrist Knie, Circuit Court Judge

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

Betty Jean Perkins, Respondent,

v.

South Carolina Department of Transportation, Petitioner.

RETURN TO PETITION FOR WRIT OF CERTIORARI

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STATEMENT OF THE CASE

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

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

This matter was tried non-jury by consent of the parties before the Honorable Judge Grace Gilchrist Knie on February 12, 2018. The trial lasted one day and included the testimony of three witnesses; SCDOT District Maintenance Engineer Michael Holden, SCDOT Engineer G. Robert Bedenbaugh, and Ms. Betty Jean Perkins. On February 15, 2018, Judge Knie entered a verdict in favor of the Plaintiff, Betty Jean Perkins, for damages of $93,362.97. (R. 12-13). The verdict form indicated that SCDOT was negligent and that Ms. Perkins was not negligent in causing her injury. Accordingly, 100% of the fault was allocated to SCDOT and 0% was allocated to Ms. Perkins. (R. 12-13). On April 19, 2018, Judge Knie accompanied her verdict form with a formal order that specifically discussed her findings of fact and conclusions of law as required by Rule 52(a), SCRCP. (R. 1-5).

On April 30, 2018, SCDOT filed post-trial motions which were thoroughly briefed by the parties. (R. 21-24). Those motions were heard by Judge Knie on July 20, 2018, and on August 10,

2018, Judge Knie issued an order denying the motions. (R. 6-8). Following such denial, SCDOT moved yet again for reconsideration of the post-trial motions and once again, the parties thoroughly briefed the issues. (R. 70-72). Judge Knie filed an order denying those motions on September 28, 2018. (R. 9-11). During the pendency of those final motions, SCDOT timely filed a Notice of Appeal on September 10, 2018. After fully briefing the matter before the Court of Appeals, but without oral argument, the Court of Appeals issued an unpublished per curium opinion on July 7, 2021. In that opinion, the Court of Appeal affirmed every ruling of the trial court. SCDOT's petition for rehearing was summarily denied on August 10, 2021.

STATEMENT OF THE FACTS

On March 1, 2012, Respondent Betty Jean Perkins was driving southbound on Interstate I-85 on the return leg of a trip after visiting family in Eden, North Carolina. Shortly after 9 p.m., Ms. Perkins was driving a 1991 Lincoln Town Car in the far-left lane of travel when "all of a sudden [she] heard, -- it sounded like a gunshot. It was like, pow." (R. 159:25 to 160:2). After the loud noise, the "car stopped dead in the road." (R. 160:6). Due to the car stalling out, the vehicle came to rest in the far-left lane, and Ms. Perkins was not able to crank the car to move it out of its resting location in the highway. (R. 160:9-22). Ms. Perkins repeatedly tried to restart the vehicle. She also called her son-in-law, the owner of the vehicle, to see if he could determine what was wrong. (R. 161:2-7). Finally, in desperation, Ms. Perkins called 911 and was instructed, "Ma'am, get out of that vehicle . . . get out and get to your far right as far as you can away from traffic." (R. 161:11-12). Heeding the advice of the 911 dispatcher, Ms. Perkins exited her vehicle. Outside her vehicle, she was confronted by the dangerous environment of Interstate I-85. (R. 161:17-162:4). It was well past dark and she was barraged by approaching headlights of other vehicles.

Ms. Perkins walked over to and along the concrete median barrier in order to escape the traffic in the lane of travel in which her vehicle was stalled. (R. 163:20-22). While walking

alongside the barrier, towards the rear of her vehicle, Ms. Perkins' "right foot just went down in a hole." (R. 163:10-11). Ms. Perkins has a size 10 shoe and her foot was able to go down into the hole. (R. 165:19). As a result of her foot going into the hole, Ms. Perkins fell forward and was injured. Stranded on the ground after the fall, good Samaritans pulled up behind her vehicle, got Ms. Perkins to her feet, loaded her into their truck, and escorted her to the safety of the right shoulder. (R. 164:13-15). Those same Samaritans returned to her vehicle, tried to start it, and eventually used their own truck to ram the immobilized vehicle over to the right side of the interstate. (R. 166:7-21).

Following this incident, the vehicle was towed from the interstate using chains to a nearby Waffle House parking lot, and then towed using a trailer back to Smyrna, GA. (R. 172:13 to 173:18). The vehicle remained inoperable until Ms. Perkins and her boyfriend determined that an emergency fuel pump shutoff had been triggered by the incident, and after they pressed the reset button, fuel returned to the engine and the vehicle cranked up. (R. 175:5-25).

Ms. Perkins argued and presented evidence at trial that the Defendant has an ongoing duty to ensure the safety of the entire traveling public and other users of the State's highways. The scope of this responsibility extends beyond the paved surfaces and includes the entire right-of-way. SCDOT breached this duty and was liable for the hazard presented by the hole in the ground created by the excessive overflow gap between the drainage culvert and the concrete center median into which Ms. Perkins fell. Ms. Perkins presented evidence establishing the existence of this hazard through the testimony of the SCDOT witnesses, the pictures, and the design plans for that stretch of I-85.

At trial, SCDOT's Preconstruction Support Engineer, George R. Bedenbaugh, Jr., and Assistant District Maintenance Engineer, Michael Holden, were questioned at length about the intended and foreseeable use of this stretch of I-85 by the traveling public. Mr. Bedenbaugh

acknowledged that the duty of SCDOT extends to the entire right-of-way, and that it is foreseeable and anticipated that motorists may deviate from the lanes of traffic. (R. 106:10-15). When asked specifically about the foreseeability of stranded motorists using the inside shoulder on which this incident occurred, Mr. Bedenbaugh reluctantly acknowledged the obvious that, "[i]t's not – it's not unforeseeable, but that's a very risky scenario." (R. 109:13-14). And then more specifically when asked a hypothetical question utilizing the identical facts of the present case:

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

(R. 111:11 – 112:4).

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

> Q. Okay, so people are going to use that drain, drive on it, whatever, walk on it? They're going to drive – they're going to be out there in that lane, correct?
>
> A. I'm not going to say that they're going to be. They could be.
>
> Q. They could be? Okay.
>
> A. Yeah.
>
> Q. They could be out there. It's foreseeable that a car will pull off in that shoulder?

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

(Tr. 144:9-20). And more specifically:

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

(Tr. 145:8-22). After discussing the foreseeability of the incident, the witnesses were questioned specifically about the hazardous condition itself. While examining the picture of the hole in the ground that is created by the excessive overflow gap between the drainage basin and the concrete barrier, Mr. Bedenbaugh testified:

> Q. --- above-hand picture right there. If the concrete lip around the grate is six inches, and the gap between the metal grate and the concrete barrier is supposed to be six inches, how wide is the gap in the picture?
>
> A. Oh, I can't speculate. I mean, I can tell that there's room in there, but I don't know the exact dimension.
>
> \- - - -
>
> Q. Is that cement, or asphalt, some kind of paving material between the concrete?
>
> A. I mean, it's hard to say. It looks like concrete that covered up with some sort of debris, ---

Q. Um-hum (affirmative).

A. --- but it's difficult to say.

Q. Well, let's look at some of the other pictures. Some of them may be zoomed in a little bit better. How about that?

A. Yep, for sure.

(R. 121:7 to 122:5).

When given the simple opportunity to describe the large hole in the ground created by the obvious non-conformity to the plans, Mr. Bedenbaugh simply evaded the question by acknowledging the overflow gap, but qualifying it with the explanation that there are construction tolerances and those tolerances are made with engineering discretion. (R. 122:17-25, 124:5-13). Mr. Bedenbaugh did acknowledge that a three-inch gap between the concrete basin and concrete barrier would not be acceptable and that an increase in the distance between the concrete edge of the drainage grate and the concrete barrier would correspondingly result in a wider drainage void, i.e. hole in the ground. (R. 123:23 – 124:47). This testimony by Mr. Bedenbaugh in conjunction with observations from photos clearly identify the presence of material in the area between the concrete edge of the drainage grate and the concrete barrier which according to the plans should be flush against each other. The void between the concrete edge of the drainage grate and the concrete barrier created a dangerous condition. (*See* pictures of scene, R. 293-307). The pictures, design drawings, and the appropriate inferences from Mr. Bedenbaugh's testimony established that there is a dangerous hole where Ms. Perkins fell.

ARGUMENT

Pursuant to Rule 242, SCACR, this Court has the sound discretion to grant a petition for certiorari only "where there are special and important reasons." Rule 242, SCACR. This case neither falls within one of the listed categories of Rule 242, nor is this matter otherwise "special or important" within the guidance of the Rule. The specific arguments provided within SCDOT's Petition for Certiorari have already been thoroughly briefed and argued at the Trial Court, as well as at the Court of Appeals. This case can be categorized as simple and ordinary within the paradigm of premises liability cases. There is no complexity that exceeds the contours of existing law. Neither of the lower courts have committed any error in finding for Ms. Perkins. SCDOT is once again reiterating the same identical arguments that were raised in post-trial motions and at the Court of Appeals. There is ample evidence in the record to support the findings of the Trial Court. The Court of Appeals agreed in a *per curium* opinion. Accordingly, Ms. Perkin asks that this Court deny SCDOT's Petition for Certiorari for the arguments provided herein.

I. THE COURT OF APPEALS AND TRIAL COURT CORRECTLY DETERMINED THAT MS. PERKINS' ACCIDENT WAS REASONABLY FORESEEABLE IN LAW AND IN FACT.

SCDOT has asserted that the Court of Appeals "erred in misapplying the concept" of legal foreseeability under South Carolina law. (Pet. Cert. at 10). It is unclear if SCDOT contends that the Court of Appeals erred in its analysis of legal foreseeability that was provided in its Opinion, or that the Court erred by applying a different concept of foreseeability than what SCDOT believes it to be. On one hand, SCDOT's argument completely disregards the actual reasoning and holding that was proffered by the Court of Appeals. On the other hand, SCDOT claims to provide a counter-analysis that essentially parallels the Court of Appeal's but with an alternative outcome.

Regardless, SCDOT's contentions are dismissive of the Court of Appeal's reasoning on foreseeability and incorrect in their insinuations as to the ultimate holding of the Court.

Legal cause turns on the issue of foreseeability. Foreseeability "is determined by looking to the natural and probable consequences of the defendant's act or omission." *Nelson v. Piggly Wiggly Cent., Inc.*, 390 S.C. 382, 392, 701 S.E.2d 776, 781 (Ct. App. 2010) (*quoting Baggerly v. CSX Transp., Inc.*, 370 S.C. 362, 369, 635 S.E.2d 97, 101 (2006)). An injury is foreseeable if it is the natural and probable consequence of a breach of duty. *Schmidt v. Courtney*, 357 S.C. 310, 592 S.E.2d 326, 335 (Ct. App. 2003). Foreseeability is not determined from hindsight, but rather from the defendant's perspective at the time of the alleged breach. *Parks v. Characters Night Club*, 345 S.C. 484, 548 S.E.2d 605, 609 (Ct. App. 2001). Furthermore, legal cause is ordinarily a question of fact for the factfinder. Only when the evidence is susceptible to only one inference does it become a matter of law for the court. *Oliver v. South Carolina Dep't. of Highways & Pub. Transp.*, 309 S.C. 313, 422 S.E.2d 128, 131 (1992). This negligence action is an action at law, tried without a jury, and the judge's findings will not be disturbed unless they are without evidentiary support. *Townes Assoc. Ltd. v. City of Greenville*, 266 S.C. 81, 221 S.E.2d 773, 775-76 (1976). The Judge's findings are equivalent to those of a jury in an action at law. *Id.* If there is not a factual basis for the findings, then the appellate court's review is limited to reviewing the record and determining whether there is ***any evidence*** that reasonably supports the challenged findings of the trial judge. *Ducworth v. Neely*, 319 S.C. 158, 459 S.E.2d 896, 900 (Ct. App. 1995) (emphasis added).

SCDOT claims that the Court of Appeals was lacking in the "reasonableness" portion of the foreseeability analysis. Specifically, SCDOT essentially offers a number of citations to case law that stand for the proposition that if something was remote, not probable, or highly extraordinary, then it cannot be reasonably foreseeable as a matter of law.

However, Ms. Perkins disagrees with SCDOT that this precise legal reasoning was considered and correctly ruled upon by the Court of Appeals in its Opinion. On the issue of "reasonableness" of foreseeability the Court of Appeals discussed the precise issue that SCDOT contends to be lacking, presumably because "reasonableness" is not explicitly stated:

> SCDOT argues because the left-lane median of the highway is not designed for pedestrian or vehicle refuge, there is no legal foreseeability that a pedestrian would fall in a hole caused by a defective drainage catch basin. We disagree. ***A hole in the ground wide enough for a woman's foot to fall straight through is a dangerous condition.*** We agree with Perkins that anyone—a State Trooper or other emergency responder, a driver in distress, or even an SCDOT employee—***may end up walking along the unlighted median at night for any number of legitimate reasons and is therefore naturally and probably at risk*** of falling into a hole in the ground.

(Slip Op at 7-8) (emphasis added). In essence, the Court of Appeals is discussing the precise issue of "reasonableness" as it relates to foreseeability. This is exemplified by the Court of Appeal's discussion about a number of possible scenarios including other drivers, law enforcement, and even SCDOT employees. As referenced by SCDOT, "one is not charged with foreseeing that which is unpredictable or that which could not be expected to happen." *Stone v. Bethea*, 251 S.C. 157, 161 S.E.2d 171, 173 (1968).

Critically, this precise issue was discussed by this Court in *Oliver* in which the Highway Department presented the argument that its negligence was too remote to constitute the legal cause of Mr. Oliver's injuries. *Oliver*, 309 S.C. at 317. The Supreme Court was not persuaded by the Highway Department's arguments. *Id.* In that case, Oliver was traveling down a roadway on a motorcycle when another driver traveling in the opposite direction abruptly changed lanes in front of him. *Id.* Oliver collided with the front of that other vehicle's fender. *Id.* Oliver maintained his position on the motorcycle but left the roadway and then collided with a Lincoln Town Car that

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

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

Id. at 131. (*citing Tobias v. Carolina Power & Light Co.*, 190 S.C. 181, 2 S.E.2d 686, 688 (1939) (emphasis added). Clearly, the Court of Appeals considered this legal factor pertaining to the probability of an event like this one because it referenced a number of possible occurrences, and in doing so, the Court of Appeals determined that the likelihood of this event was sufficient for legal foreseeability. SCDOT contends that Ms. Perkins' actions were "unusual, extraordinary, unprecedented, and remote" despite the Court of Appeals acknowledgement that there were "any number of legitimate reasons" that someone may end up walking along this median. (Pet. Cet. at 13; Slip Op. at 8). Clearly, the Court of Appeals disagrees with SCDOT and determined that it was predictable, possible, and within the realm of that which could be expected to happen.

Nonetheless, despite this Court's clear direction in *Oliver*, SCDOT continues to rely extensively on the assertion that no other similar incident have been reported to have occurred at this location or on the hundreds of miles of instate highways in South Carolina. (Pet. Cet. at 12-

13). This is not probative for two reasons. First, this drainage basin was repaved, altered, and corrected during the pendency of this litigation, and second, the foreseeable incident in question is whether a pedestrian has traversed this paved portion of SCDOT's roadway. And so for the "reasonable foreseeability" question, the pertinent inquiry is whether any pedestrian activity has occurred on this roadway. The "natural and probable" answer is yes; just as the Trial Court and Court of Appeals have acknowledged. *Young*, 270 S.C. at 462. Arguably, most of those experiences occur without incident; thus, no documentation of such pedestrian activity is available for this record. But as the Trial Court and Court of Appeals noted, similar incidents could have occurred with a State Trooper during a traffic stop, another driver in distress, perhaps a tow truck driver responding to a broken-down vehicle, one of SCDOT's own employees could have been removing debris from the interstate, or possibly even the good Samaritans like in this case that came to Ms. Perkins' aid. There are countless examples of pedestrian activity that are not intended for the interstate, but occur nonetheless. Thus, it is obvious that the Court of Appeals did not err because it did in fact consider, apply, and hold that this incident falls within the contemplation of a legal foreseeability analysis. The unfortunate reality is that collisions and mechanical malfunctions occur frequently on interstates. In fact, SCDOT's witness, Mr. Bedenbaugh, acknowledged this and he also acknowledged that the roadside environment comes into play in a significant percentage of accidents. (R. 114:1 to 115:5). Mr. Bedenbaugh further acknowledged that in designing and maintaining the roadway, it is anticipated that motorists will have emergencies and will have to avail themselves of the shoulders. (R. 115:2-5). It is foreseeable that distressed motorists and passengers, persons, first responders, ***SCDOT workers***, contractors, good Samaritans, may have to seek the refuge and safety of either shoulder of the highway. These are foreseeable examples and these individuals performing these essential functions could also be

injured when stepping into this hole on the interstate. For obvious safety reasons, pedestrian traffic is not allowed in this particular area, but to claim that it is not foreseeable is not correct.

Furthermore, this appellate review is limited to reviewing the record and determining whether there is ***any evidence*** that reasonably supports the challenged findings of the trial judge. *Ducworth v. Neely*, 319 S.C. 158, 459 S.E.2d 896, 900 (Ct. App. 1995) (emphasis added). SCDOT makes the erroneous argument that no weight should be assigned to the testimony of its own engineers acknowledging the foreseeability of this incident. SCDOT contends that there is an analytical difference between someone conceding that something is foreseeable and legal foreseeability within the law. Yet, SCDOT deflects from the reality that foreseeability is an inquiry of fact for the factfinder. *Oliver*, 309 S.C. at 317. Thus, the testimony by SCDOT's own employees does in fact provide direct evidence that this incident was within the realm of that which could be expected to happen.

SCDOT's own witness Michael Holden acknowledged that this scenario was neither unexpected, nor highly extraordinary as argued by SCDOT:

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

(R. 144: 9-20) During examination, Michael Holden was asked what he would do if confronted with a situation in which his vehicle stalled out in the far-left lane of the interstate to which he responded:

> A. If you're – if your car was absolutely stalled out and you had no other options you would, you know, pull to the – probably, yeah, you would pull to the median or get as much off as you can, but you're not going to be totally off the road. You're still in – you're still in the left lane.
>
> Q. Okay. But you as an individual, you get out of the line of traffic and you'd get up out of the – out of the traffic and out of the way of everybody, right?
>
> A. Um-hum (affirmative)
>
> Q. As quick as you can because you don't want to get hit by a car whizzing by at 70 miles an hour, right?
>
> A. Right. I'm doing the best I can to make it to the right side is what I'm going to do.

(R. 145:14 to 146:1). Not surprisingly, this is exactly what Ms. Perkins did:

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

(R. 161:8-15). Analyzing this issue within the context of foreseeability, such actions would clearly occur within reason and within the "ordinary and normal course of events" as opposed to falling "within the category of the unusual or extraordinary." *Nelson v. Piggly Wiggly, Inc.*, 390 S.C. 382, 701 S.E.2d 776, 782 (Ct. App. 2010).

Additional factual evidence is found and supported by testimony that SCDOT's responsibility is to "ensure the safety of the traveling public," (R. 106:1-4), as well as SCDOT's own internal Engineering Directive Memorandum # 8 that specifically provides for inspections on interstates to "detect deficiencies that could pose a hazard to motorists or ***pedestrians***, thus creating a risk for the Department." (emphasis added). The Trial Court properly found that the foreseeability is supported by facts, and based on these facts, the Trial Court properly ruled in its order that "roadside safety is an integral component of maintaining a safe highway for the traveling public and that hazards within such roadside should be eliminated." (R. 3). The Trial Court established this legal causation by stating that "it is reasonably foreseeable that the traveling public and other individuals may avail themselves of this lane." *Id.* Further, the Trial Court correctly stated that its finding "is based on the evidence and the testimony provided by the SCDOT employees." *Id.* The Court of Appeals similarly reviewed these findings by the Trial Court and affirmed them. *Moseley v. All Thing Possible, Inc.*, 395 S.C. 492, 495, 719 S.E.2d 656, 658 (2011) ("In an action at law, on appeal of a case tried without a jury, the findings of fact will not be disturbed if there is any evidence which reasonably supports the judge's finding. The judge's findings in such an instance are equivalent to a jury's findings in a law action."). The Trial Court and Court of Appeals properly found this incident to be foreseeable.

Moreover, the Court of Appeals went on to provide that "this type of danger (a hole in the ground) is distinguishable from other dangers found not to be legally foreseeable." (Slip Op. at 8) *citing Young v. Tide Craft, Inc.*, 270 S.C. 453, 464, 242 S.E. 2d 671, 676 (1978). In fact, it is somewhat ironic that SCDOT contends that the Court of Appeals "did not consider or address," and that the Court of Appeals was in "disregard of this critical analysis" regarding reasonable foreseeability, when the Court of Appeals' Opinion explicitly cites *Young v. Tide Craft, Inc.*, a

case that is admitted by SCDOT in its brief to be "arguably the leading case on foreseeability." (Pet. Cet. at 10). The Court of Appeals not only considered the realm of the impermissible from *Young v. Tide Craft, Inc.*, and also from *Nelson v. Piggly Wiggly,* but held that this case is distinguishable. (Slip Op. at 8).

Still, SCDOT argues that "the median in question was not one where it could be reasonably anticipated [that] persons would be walking." (Pet. Cet. at 12). Clearly, Ms. Perkins, the Trial Court, and the Court of Appeals disagree because that is precisely what has been held by the discussion of possible occurrences involving first responders, officers, the public, and SCDOT's own employees. *Oliver* is once again instructive.

In *Oliver*, the Highway Department argued that the sidewalk was intended for pedestrian traffic and thus the only legal causation for injuries due to an obstructed sidewalk could be to pedestrians, not vehicular traffic. *Oliver*, 422 S.E.2d at 131. The Supreme Court was not persuaded and found that testimony by the Highway Department's own witness acknowledged that hazards existed beyond the scope of the intended users of the sidewalk and those hazards included unexpected obstructions to vehicular traffic. *Id.* SCDOT argues that this area was not intended or designed for pedestrian traffic and therefore, pedestrian injuries are not expected or foreseeable. But, as instructed by this Court in *Oliver*, the realm of foreseeability is not limited to the intended user, and actually includes that which "contemplated the probable happening of some accident of this kind." *Id.* As previously stated, SCDOT must acknowledge and concede that incidents occur on its roadways that include and result in pedestrian activity. Further, SCDOT should acknowledge and concede that such pedestrians have a reasonable and foreseeable expectation that they would not encounter a hole in the ground when traversing an otherwise flat, paved surface. Accordingly,

it is foreseeable that liability arising from such conceivable pedestrian activity is both the natural and probable result.

Lastly, SCDOT also makes the argument that an affirmation of the Court of Appeals will equate to a mandate that all center medians "must be maintained in such a condition that pedestrians may safely travel that area." (Pet. Cet. at 12). This hyperbole drastically inflates what an affirmation would really provide. SCDOT would continue to be responsible for providing safe roadways for the traveling public and for providing road surfaces without holes when reasonably anticipated by the traveling public. If SCDOT had adhered to its own specifications, then this incident would not have occurred. Presumably, the same could be said for the remainder of its roadways as well.

The Trial Court determined that it is reasonably foreseeable that a person could be injured as a natural and probable result of the hazardous condition that existed in this instance. That determination by the Trial Court was supported by facts in the record. Accordingly, the Court of Appeals properly affirmed the Trial Court's finding and because no error occurred, SCDOT's petition for certiorari should be denied.

II. THE TRIAL COURT AND COURT OF APPEALS CORRECTLY DETERMINED THAT THE HOLE PRESENTED A HAZARDOUS CONDITION.

SCDOT is an entity that is subject to South Carolina Tort Claims Act, S.C. Code Ann. § 15-78-10, et. seq., and may be held liable on a general negligence theory of liability. S.C. Code Ann. § 15-78-60(15). Under a negligence theory, SCDOT can be held liable if it knew, or in the exercise of reasonable care should have known, that a hazardous condition existed. *Marsh v. South Carolina Dep't of Highways and Pub. Transp*., 298 S.C. 420, 380 S.E.2d 867, 868 (Ct. App. 1989). This liability arises from the SCDOT's duty to use reasonable care to keep streets and highways

within its control in a reasonably safe condition for public travel. *Inabinett v. State Highway Dep't*, 196 S.C. 117, 12 S.E.2d 848, 851 (1941). Accordingly, SCDOT has a duty to discover and eliminate unreasonable hazards for the safety of the traveling public. SCDOT has a duty to ensure that the traveling public does not confront a condition or hazard that may endanger it. *Gianni v. S.C. Dep't. of Transp.*, 378 S.C. 573, 664 S.E.2d 450, 453-54 (2008). In applying this precedent in conjunction with the Tort Claims Act, the S.C. Supreme Court has held that SCDOT may be liable for "failure to take corrective action subsequent to notice of a defect." *Id*.

The ultimate holding of the Court of Appeals and Trial Court was that "the drainage catch basin was defective and presented a hazardous condition." (Slip Op. at 3). In essence, that the "gap presents a hazard to the traveling public," i.e. that the hole is large enough for someone to step into it as Ms. Perkins did. (R. 3). This holding was based on multiple factual bases and in the context of this specific appellate challenge by the SCDOT, all inferences must be taken in a light most favorable to Ms. Perkins.

SCDOT has reiterated the same erroneous argument to the Trial Court, the Court of Appeals, and now this Court, that the Trial Court could not have found that the large hole in the ground created by an excessively wide overflow gap was a hazardous condition based on the evidence. However, the Trial Court made that precise finding based on direct and circumstantial evidence and it was affirmed by the Court of Appeals. Again, SCDOT contends that the evidence was insufficient. SCDOT also seeks to convolute the evidentiary threshold by imposing an unnecessary and unreasonable burden of expert testimony.

SCDOT contends that without specific measurements, it is impossible to determine that this gap presents an unreasonable hazard. This is inaccurate. "Circumstantial evidence is proof of a chain of facts and circumstances indicating the existence of a fact." *Moriarty v. Garden*

Sanctuary Church of God, 341 S.C. 320, 337, 534 S.E.2d 672, 681 (2000) (*citing State v. Needs*, 333 S.C. 134, 156 n. 13, 508 S.E.2d 857, 868 n. 13 (1998). "The law makes absolutely no distinction between the weight or value to be given to either direct or circumstantial evidence." Id. The significance of these measurements, the pictures, and the testimony regarding that documentation provides the information from which it can be reasonably inferred that this hole was substantial enough to allow an individual to step and fall into it; thus creating a hazard to the public.

First, the trial court discussed that there is evidence through testimony discussing the photographs that there was a wider and larger than normal hole on the surface of the roadway because the concrete drainage basin and concrete center median are not flush together. (R. 3). During the trial, testimony was offered by SCDOT employee Mr. Bedenbaugh that the concrete edge of the drainage basin and the concrete median barrier are supposed to be flush against each other with the exception of the emergency overflow gap. (R. 119-120). In fact, those two concrete structures are supposed to touch on either side of the overflow gap. (R. 120). But in examining the pictures, Mr. Bedenbaugh acknowledged the clear observation that on either side of the overflow gap, "it's got some concrete material [he] can see right here between this concrete and that concrete." (R. 122). Mr. Bedenbaugh also acknowledged that the presence of this material indicates that the overflow gap between the edge of the concrete drainage basin and the concrete median barrier could be wider than the specifications in the plans. (R. 124). This testimonial evidence provided by an SCDOT employee is certainly probative of the fact that the overflow gap is wider than intended and designed because either side of the gap is not touching.

Despite the aforementioned testimonial evidence, SCDOT focuses exclusively on the pictorial evidence and asserts that Respondent "did not present . . . any measurements of the catch

basin as built." (Pet. Cet., p. 16) In fact, SCDOT argues that Ms. Perkins can only speculate as to the dimensions and measurements of the components of this drainage structure despite the testimonial evidence that provides additional inferences. *Id.* However, the record unequivocally reveals that this is inaccurate. Ms. Perkins submitted into evidence design plans for "SCDOT Standard Drawing No. 719-9." (R. 276-281). The testimony of Mr. Bedenbaugh confirmed that this is the "construction detail for a catch basin type 15." (R. 116). He further indicated that this is the standardized plan for use across the State and that it was also the type of catch basin in question in this case. (R. 117:1-3, 13-16). This point was secondarily confirmed by SCDOT's employee Michael Holden. (R. 133:23-24). Closer examination of that design plan's notes reveal that the cast iron or steel grate and frame are to be standardized dimensions so that they can be interchangeable. (R. 276-281). The notes also provide that concrete catch basin walls are to be a standard six inches thick. In short, these plans provide numerous definitive measurements. These standardized measurements offer the same reasonable certainty that an inch would represent on a photograph of a ruler. The Trial Court appropriately relied on these measurements not just for their exact values, but also in support of the reasonable inferences that could be drawn from them.

When reviewing the pictures in conjunction with the design plans, the Trial Court made reasonable inferences as to the width of the overflow gap in support of the ultimate conclusion that "this gap presents a hazard to the traveling public." (R. 3). Examination of the photographs in evidence reveal that the width of the extra material on either side of the overflow, between the edge of the concrete drainage basin and the concrete median barrier, is similar in size to the width of the forty-five degree overflow gap or the flat concrete portion between the forty-five degree overflow and the grate frame, both of which have a cross-section of three inches. Another comparison reveals that the overflow gap is much wider than the width of the openings in the grate

itself, which are a standardized measurement of three and a half inches by nine and a quarter inches. To be clear, Ms. Perkins is not relying on apparent deviations of this drainage culvert to establish that a construction defect occurred because SCDOT deviated from "the precise dimensions reflected in the designed specifications." (Pet. Cert. at 20). Rather, Ms. Perkins offered this information to prove to the Trial Court that this gap, i.e. this hole, was substantial enough to allow a pedestrian's foot to enter it and thus, establish that it is an unreasonable hazard to the traveling public.

The factual basis establishing this hazard is further corroborated by Ms. Perkins herself testifying that her foot went down in the hole and that she wears a size ten shoe. (R 163:23-25, 164:19 to 165:22). One of her shoes was removed from her foot and displayed to the trial court for examination and reference of size. (R. 165).

SCDOT is extremely critical of the "shoe evidence" that was offered by Ms. Perkins at trial and its probative value. Undoubtedly, SCDOT would be equally critical of a photograph of water on the floor of a shop that's being offered to infer a slippery surface; or, the offering of a shoe's sole into evidence without an expert friction analysis. Or perhaps, in a motor vehicle wreck case in which a photograph is submitted showing skid marks behind the Plaintiff's vehicle on the assertion that the Plaintiff had a last clear chance to avoid the accident. Without measurements accompanying this photographic evidence, according to SCDOT, they offer no probative value and are rendered useless. However, the rules of evidence in South Carolina do not create such limitations, nor permit such exclusion. *Id.* ("This court has not distinguished between the two types of evidence in numerous cases."). And so, as offensive as it may be to SCDOT, the reality is that our standard of proof allows for this kind of creative, circumstantial evidence.

Lastly, SCDOT makes the erroneous and circuitous argument that photographic evidence alone, without any measure or scale, is not competent unless supported by the testimony of a photogrammetrist, an expert in deriving measurements from images. This contention is without merit. Primarily because the photographs in evidence actually do provide scale. Additionally, because the probative inference in this instance is whether a person's foot could fit into this gap. But moreover, because this expert proposition would result in an unreasonable burden on Ms. Perkins and a complete abdication of the factfinder's ability to perform their duty of drawing inferences from the evidence that is at their disposal. Importantly, a factfinder is not even charged with the absolute reliance on expert testimony as SCDOT contends in this instance. Factfinders are charged that they do not have to accept an expert's opinion; that they can consider whether the opinions are sound; and whether the opinion is outweighed by other evidence, even though it is uncontradicted. *Berkeley Elec. Coop. Inc. v. S.C. Public Service Comm'n*, 304 S.C. 15, 20, 402 S.E.2d 674, 677 (1991). No doubt that a photogrammetrist would make for a fine expert and certainly could offer relevant testimony in almost any case involving photographs. But their inclusion is not dispositive on the usage of photographs as evidence, or in this specific determination that this gap is capable of engulfing a person's foot. The trial court was sitting as the finder of fact and had the opportunity to consider the angle, perspective, and dimensions of the photographs in the court's decision. This is role that most trial courts employ on a daily basis. The Trial Court understood the limitations of what can and cannot be inferred from the photos submitted into evidence. After reviewing all the photographs, listening to testimony, and reviewing the design specifications that were submitted into evidence, the trial court made the inference that "this particular gap is drastically wider than the analogous opening within the drainage grate itself." (R. 3). The Court then used this inference in support of its conclusion that the "gap presents

a hazard to the traveling public." (R.3). This conclusion and finding by the Trial Court demonstrates the trial court's thorough review of the evidence, the Trial Court's finding for Ms. Perkins, and the correct factual basis upon which the Trial Court was affirmed by the Court of Appeals.

In sum, the Court had multiple references for scale and for making the reasonable inference that this gap constitutes a hazard. Thus, findings of fact will not be disturbed if there is any evidence which reasonably supports the judge's finding, and more than enough evidence exists in this instance. *Moseley*, 395 S.C. at 495. The trial court was the ultimate factfinder in this trial. The Court capably reviewed all the evidence, including the photographs, design plans, and testimony to reach its findings. The trial court made multiple findings of the hazardous nature of this gap that were clearly supported by the facts and evidence in the record. The Trial Court's findings of fact should not be disturbed because they are supported the evidence.

CONCLUSION

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

Respectfully submitted,

BY: __*s/ Neil E. Alger*________________________

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November 5, 2021

THE STATE OF SOUTH CAROLINA
In the Supreme Court

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SC Court of Appeals

APPEAL FROM SPARTANBURG COUNTY
Grace Gilchrist Knie, Circuit Court Judge

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

Betty Jean Perkins, Respondent,

v.

South Carolina Department of Transportation, Petitioner.

CERTIFICATE OF SERVICE

The undersigned employee of Peters, Murdaugh, Parker, Eltzroth & Detrick, PA, counsel for the Respondent Betty Jean Perkins, does hereby certify that service of the **Respondent's Return to Petition for Writ of Certiorari** in the above-captioned matter was made upon all counsel of record on November 5, 2011 by email only pursuant to section (d)(1) of the Supreme Court's Order re: Methods of Electronic Filing and Service Under Rule 262 of the South Carolina Appellate Court Rules to the individuals listed below:

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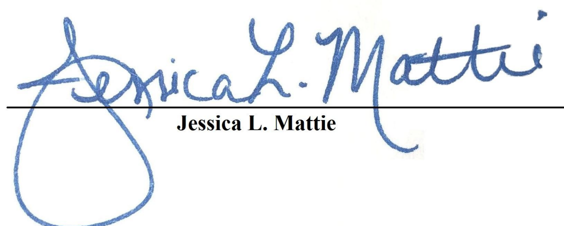

Jessica L. Mattie