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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In The Supreme Court

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.

PETITIONER'S REPLY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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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 her return, the Respondent Betty Jean Perkins initially posits that "it is unclear" how the Petitioner South Carolina Department of Transportation ("SCDOT") contends that the Court of Appeals erred in misapplying the concept of legal foreseeability. SCDOT, however, made its position very clear – the Court of Appeals failed to consider or address whether Perkins' accident and injury were *reasonably* foreseeable. Importantly, "[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*." *Stone v. Bethea*, 251 S.C. 157, 161 S.E.2d 171, 173 (1968). (Emphasis added). Thus, reasonable foreseeability is the critical inquiry.

In her return, Perkins acknowledges that "'reasonableness' is not explicitly stated" in the Court of Appeals' analysis. *See*, Respondent's Return, p. 9. But, Perkins claims that the Court of Appeals "in essence" discussed the "reasonableness" of the foreseeability because the Court mentioned "possible scenarios" where 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 and is therefore naturally and probably at risk of falling into a hole in the ground." (Slip Op. at 5-6). Yet, even consideration of "possible scenarios" does not equate to reasonable foreseeability – not at least where those "possible scenarios" are unusual, extraordinary, unprecedented, and remote. That is precisely what the Court of Appeals, the trial court, and Perkins have overlooked or misapprehended.

It bears repeating that the Court of Appeals in *Nelson v. Piggly Wiggly, Inc.*, 390 S.C. 382, 701 S.E.2d 776 (Ct. App. 2010), adopted the following analysis:

> 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). Critically, while all possible occurrences are perhaps "foreseeable" per the explanation in *Nelson*, they are not "reasonably

foreseeable" in contemplation of the law such that the requirement of proximate cause is satisfied. Similarly, in *Wickersham v. Ford Motor Co*., 432 S.C. 384, 853 S.E.2d 329 (2020), this Court observed 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). Causation cannot be remote or based on mere possibilities. *Nguyen v. Uniflex Corp.*, 312 S.C. 417, 440 S.E.2d 887, 889 (Ct. App. 1993) ("causation … must be based on probabilities not mere possibilities"). Thus, when an occurrence is remote or unusual or extraordinary or unprecedented, then it is *not reasonably foreseeable* in contemplation of the law and does not satisfy the requirement of proximate cause. With respect to the case at bar, 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. Otherwise, any "possible" occurrence would be legally foreseeable, and the Court may as well abolish the requirement of legal foreseeability. *See, Smith v. Breedlove*, 377 S.C. 415, 661, S.E.2d 67, 73 (2008) (recognizing that if an occurrence which is only a "remote possibility" qualifies as "reasonably foreseeable," that "would completely obviate the foreseeability requirement").

In her return, Perkins relies exclusively on the case of *Oliver v. South Carolina Department of Highways and Public Transportation*, 309 S.C. 313, 422

S.E.2d 128 (1992), in which this Court found that there was sufficient evidence of foreseeability where there was a prior history of similar accidents occurring at the very same location. Specifically, this Court highlighted the fact that "there had been three prior accidents involving cars parked on the lot and motorists using the highway." 422 S.E.2d at 131. *Oliver* is readily distinguishable from this case because, quite simply, there is no evidence of any prior accidents similar to the one experienced by Perkins. She presented no evidence of a similar occurrence happening where a motorist or anyone stepped into a catch basin while traversing the center median of an interstate anywhere in the State. Thus, the evidence in *Oliver* demonstrated that the accident that occurred was predictable -- it had occurred three times in the past *at that specific location*. Hence, in *Oliver*, this Court could conclude that the accident was reasonably foreseeable and was not "highly extraordinary"[1] or "within the category of the unusual or extraordinary."[2]

This case is much different than *Oliver* and more in line with *Nelson* and other cases addressing remote causation, including *Young v. Tide Craft, Inc.*, 270 S.C. 453, 242 S.E.2d 671 (1978). Reasonable foresight is the touchstone. It is not reasonably foreseeable that a motorist would be traversing the center median of an interstate highway so narrow that a vehicle could not be safely stopped and then

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

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

would step into the opening or "overflow gap" at the edge of a catch basin where it abuts the concrete barrier. Perkins' accident and injury are so remote, so unusual, and so extraordinary that they cannot be foreseeable within the contemplation of the law. Thus, any alleged negligence on the part of SCDOT was not a proximate cause of Perkins' injury, and judgment should be entered for SCDOT as a matter of law.

This case presents an excellent opportunity for this Court to stress the requirement for "reasonable foreseeability" in assessing legal foreseeability and to reinforce the explanation, as adopted in *Nelson* from Alabama and Florida courts, that "foreseeability" in a general sense of the term is not the standard because "[i]n a sense all such occurrences are foreseeable." *Nelson*, 701 S.E.2d at 782.

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 maintains that there is no competent evidence in the record of a defective or hazardous condition posed by the catch basin located in the center median of Interstate-85 on which Perkins stepped. In response, Perkins makes several references to a "large hole" and an "excessively wide overflow gap." Quite frankly, that language goes far beyond what the trial court even describes. Without

question, there is no evidence -- photographic or otherwise -- of a “large hole” or an “excessively wide overflow gap.”

Remarkably, despite the Court of Appeals finding it to be "odd no one at trial testified to the actual measurements of the gap" (Slip Op. at 3), Perkins never explains or justifies the obvious absence of evidence of the actual measurements or dimensions of the any components of the catch basin to support her claim that it was not been built to exact specifications. Instead, Perkins inaccurately claims that the trial court “had multiple references for scale.” *See*, Return, p. 22. As an example, Perkins cites her own testimony that she wears a size 10 shoe – which she calls a "kind of creative, circumstantial evidence." *See*, Return, p. 20. A shoe, however, is not a measuring device and frankly does not constitute circumstantial evidence. Moreover, with respect to the size of the "overflow gap," a shoe's width is not competent evidence because Perkins' right shoe could have slid into a three inch gap sideways causing her to lose her balance and fall, which is consistent with her testimony. (R. 163). Thus, the "shoe evidence," which is not even mentioned in the trial court’s findings as probative evidence, does not give rise to any reasonable inference that the “overflow gap” at issue was not built to the design specifications or created a hazardous condition.

Next, Perkins baldly claims that "the photographs in evidence actually do provide scale." *See*, Return, p. 21. There is no evidence to support that. Perkins

does not identify a single photograph displaying a ruler or other measuring device to provide the specific measurements of the various openings and other components of the catch basin.

Finally, Perkins asserts that the design plans, together with the photographs, allowed the trial court to make "reasonable inferences as to the width of the overflow gap." *See*, Return, p. 19. She claims that the design specifications included "definitive measurements" of components of the catch basin which the trial court could use to infer the width of the "overflow gap." That argument fails for two reasons. First, the trial court was never provided the actual, as-built measurements of those components either. The photographs do not confirm that the components, including the "openings within the drainage grate itself," were constructed precisely as the design specifications state. That is an assumption being made by Perkins without proof. Second, Perkins is refusing to acknowledge the science involved – that a photograph is a two-dimensional representation of a three-dimensional object, and as a result, the angle, perspective, and distance from which a photograph is taken impacts the ability to accurately measure what appears on the photograph. Like the trial court did, Perkins relies in error on the photographs and attempts to derive measurements simply by "eye-balling" those photographs. However, as discussed at length in SCDOT's petition, such photographic evidence

alone, without any measure or scale, is not competent unless supported by the science of photogrammetry.[3]

Perkins suggests that it is sufficient for the trial judge "to consider the angle, perspective, and dimensions of the photographs" and that is a "role that most trial courts employ on a daily basis." *See*, Return, p. 21. There is no support for that broad contention. Trial judges, like juries, do not have the expertise to derive the actual measurements from a photograph. That is a science that requires expert testimony. That is precisely why, in the absence of photogrammetric evidence, a two-dimensional photograph is not competent evidence of measurements or dimensions where there is no ruler or other scale included in the photograph for reference. That is particularly true in a case such as this where the deviation from the specifications, if it exists, is not substantial. Certainly, as stated above, there is no basis in the record for any rational conclusion that there was a "large hole" or an "excessively wide overflow gap," as Perkins claims.

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[3] Perkins also complains that SCDOT's position that an expert in photogrammetry is needed would create an "unreasonable burden" on a plaintiff. *See*, Return, p. 21. Perkins misses the point. The party with the burden of proof – Perkins in this case – has the burden of proving the as-built dimension of the "overflow gap" in order to prove her allegation that the catch basin deviated from the design specifications. That burden could have easily been satisfied, as the Court of Appeals recognized, by presenting evidence of the measurements by a person who actually measured the gap or by presenting a photograph with a ruler or other scale used for measuring. Perkins did not provide such evidence. Given the absence of such competent evidence, the trial court attempted to improvise by "eye-balling" the photographs, which is where the error occurred. A photograph cannot be "eye-balled" to determine dimensions. That requires an expert in photogrammetry. However, the requirement of photogrammetrist could have been avoided if evidence of the actual dimensions of the "overflow gap" had been presented by Perkins in the first place.

In sum, the evidence before the trial court is not competent to prove the measurements of the opening or "gap" in the catch basin. The trial court did not have competent evidence on which to base its decision that the "gap" exceeded the design specifications or constituted a "hazard." The findings at the heart of this case are purely speculative and cannot support the judgment entered.

CONCLUSION

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

Respectfully submitted,

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