STATE OF SOUTH CAROLINA	)	
	)	IN THE COURT OF COMMON PLEAS
COUNTY OF ORANGEBURG	)	CIVIL ACTION NO.: 2011-CP-38-1379
William Breland,	)	
	)	
PLAINTIFF,	)	**ORDER**
	)	
-vs-	)	
	)	
South Carolina Department of Transportation,	)	
	)	
DEFENDANT.	)	

This matter came before the Court on October 1, 2013 for a hearing on Defendant's Motion for JNOV, or in the Alternative, for a New Trial. Defendant filed its Motion September 13, 2013, after trial in this matter resulting in a jury verdict rendered in favor or Plaintiff on September 6, 2013. Present for Plaintiff were J. Christopher Wilson and Daniel W. Luginbill. Present for Defendant were Richard B. Ness, Adam C. Ness and Norma A. T. Jett.

Defendant's Motion sets forth the following grounds for seeking a JNOV, or in the Alternative, a New Trial:

(1) The Court erred in denying Defendant's attempts to introduce Plaintiff's prior criminal record;

(2) The Court erred by allowing the jury to consider Plaintiff's life expectancy and allowing Plaintiff to argue to the jury for an award for permanent impairment and erred by instructing the jury on both;

(3) The Court erred by allowing Plaintiff's testimony regarding arm pain;

(4) The Court erred in allowing Plaintiff to introduce Google Earth Street View imagery;

(5) The Court erred by failing to instruct the jury on comparative negligence, to include the issue of last clear chance.

After considering the record before the Court and the arguments of counsel, this Court denies the Defendant's Motion for the reasons set forth below.

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EXCLUSION OF EVIDENCE OF PLAINTIFF'S PRIOR CRIMINAL RECORD

During the trial, Defendant sought to introduce evidence of Plaintiff's prior convictions in the states of Washington and Nevada. The convictions were more than ten years old. The Court ordered the exclusion of the convictions on the grounds the evidence was remote and more prejudicial than probative. A trial judge has considerable discretion in ruling on the admissibility of evidence, and his/her determination will not be overturned absent abuse of discretion. State v. Colf, 337 S.C. 622, 625, 525 S.E.2d 246, 247 (2000); State v. Sosebee, 284 S.C. 411, 413, 326 S.E.2d 654, 656 (1985). Generally, a witness cannot be impeached by a prior conviction occurring more than ten (10) years before the witness' testimony. S.C. Rules of Evidence Rule 609(b). Remote convictions can only be used for impeachment if the court determines the probative value of a remote conviction substantially outweighs its prejudicial effect. State v. Black, 400 S.C. 10, 17, 732 S.E.2d 880, 884 (2012); Hunter v. Staples, 335 S.C 93, 515 S.E.2d 261 (Ct. App. 1999); Sosebee, supra. Defendant sought to introduce evidence of Plaintiff's prior remote conviction, in spite of S.C. Rules of Evidence Rule 609, by claiming the prior conviction as an "inconsistent statement" or "lie" made by Plaintiff during his deposition.

On September 19, 2012, Defendant deposed Plaintiff and asked if he had been arrested, charged with or convicted of any crime. Plaintiff responded, "not that I know of." *See* Breland Dep. p. 11:18-20. Defendant alleges that Plaintiff "lied" in his deposition, thus making a "prior inconsistent statement," which Defendant claims it should have been allowed to submit to call into question for the jury whether Plaintiff had also "lied" about the location of the accident or the facts of the accident or his injuries. Given the uncertainty as to whether Plaintiff could fairly be said to have "lied" or misrepresented his prior criminal record in his deposition, and that the criminal convictions could not otherwise have been admitted into evidence, the evidence sought to be admitted by Defendant was properly excluded. In addition, testimony from other sources – eyewitness/passenger in the wreck, fire department personnel, treating doctors – corroborated Plaintiff's testimony as to the location of the wreck and the nature of Plaintiff's injuries. Any probative value of admitting evidence of Plaintiff's prior, remote

convictions and his deposition testimony would have been greatly outweighed by its prejudicial effect. See Otwell v. Bulduc, 76 Conn. App. 75 (Conn. App. Ct 2003).

EVIDENCE CONCERNING CAUSATION OR PERMANENCY OF PLAINTIFF'S INJURIES

At trial, Defendant asserted that Plaintiff had not sufficiently proven that the wreck was the cause of his injuries or that he was entitled to a permanency charge or life expectancy charge, claiming instead that since Plaintiff failed to present any medical expert testimony of permanency, such a charge was improper. Defendant asserted that Dr. Mummanei, a treating neurologist and medical testimony expert witnesses offered by Plaintiff, did not satisfy the "more likely than not and to a reasonable degree of medical certainty" standard with respect to his testimony regarding causation and permanency.

"In personal injury actions great latitude is allowed in the introduction of evidence to aid in determining the extent of the damages; and as a broad general rule any evidence which tends to establish the nature, character, and extent of injuries which are the natural and proximate consequences of defendant's acts is admissible in such actions, if otherwise competent." Martin v. Mobley, 253 S.C. 103, 109, 169 S.E.2d 278, 282 (1969), citing 25A C.J.S. Damages section 146, p.28. This rule generally allows either plaintiffs or expert witnesses to testify as to the extent of plaintiff's damages. Ballenger v. S. Worsted Corp., 209 S.C. 463, 465, 40 S.E.2d 681, 682 (1946). "When the testimony of an expert witness is not relied upon to establish proximate cause, it is sufficient for plaintiff to put forth some evidence which rises above mere speculation or conjecture; however, when the opinions of medical experts are relied upon to establish causal connection of negligence to injury, the proper test to be applied is that the expert must, with reasonable certainty, state that in his professional opinion the injuries complained of most probably resulted from the alleged negligence of the defendant." Armstrong v. Weiland, 267 S.C. 12, 16, 225 S.E.2d 851, 853 (1976).

Dr. Mummanei testified in his video trial deposition that, to a reasonable degree of medical certainty, the wreck caused Plaintiff's neck problems, or caused the worsening of Plaintiff's prior neck problems. *See* Mummanei Depo. pp. 37:9-25, 38:1-12. Dr.

Mummanei's professional opinion satisfies the "more likely than not to a reasonable degree of medical certainty" standard as to causation. Weiland, 267 S.C. at 16. In addition, Plaintiff testified that he was experiencing pain and limitations in his neck after the wreck that were significantly different from and increased from those that he experienced before the wreck. Plaintiff further testified about the treatment and surgery he had undergone and how the neck pain and limitations continued even until the date of trial.

Considering the evidence presented, the Court's jury charge on causation and permanency was appropriate, especially given Plaintiff's testimony that he was still experiencing pain resulting from his injury and that he could no longer perform activities that he could perform before the wreck. Wilder v. Blue Ribbon Taxicab Corp., 396 SC 139, 719 SE2d 703 (Ct App. 2011); Johnston v. Aiken Auto Parts, 311 SC 285, 428 SE2d 737 (Ct. App. 1993), rehearing denied, cert. denied. Plaintiff and Defendant both were allowed to argue to the jury concerning the permanency issue, and the Court's charge fairly allowed both parties to submit arguments concerning future permanency damages to the jury without over-emphasizing any aspect to the jury.

EVIDENCE CONCERNING PLAINTIFF'S ARM PAIN

At trial, Defendant also moved to exclude Plaintiff from submitting to the jury any evidence of damages as related to Plaintiff's arm and hand pain. Dr. Mummaneni testified in his video trial deposition that Plaintiff's arm pain was a result of an abnormal muscle in his arm. As such, Plaintiff agreed not to present evidence for or argue to the jury for damages for Plaintiff's arm pain, and Plaintiff did not submit evidence for or argue for damages to the jury on this issue. Defendant submits in its Motion that Plaintiff submitted evidence and argument on this issue; however, the only evidence in this regard was Plaintiff's response to Defendant's questions about his arm/elbow. The Court does not believe that any evidence in this regard would have affected the decision of the jury by placing before it the arm pain or would rise to the level warranting JNOV or new trial.

EVIDENCE CONCERNING GOOGLE STREET VIEW IMAGERY

Defendant argued *in limine* for the exclusion of images taken from Google Earth satellite imaging. The Google Earth imagery included "street views" of the scene and subject tree and its condition when the May 2008 imagery was produced. The Google

Earth imagery street view image was properly admitted into evidence.

"The established rule, in both civil and criminal cases, is that a photograph is admissible in evidence only if it is authenticated or verified by some other evidence to establish that the photograph is a substantially true, accurate, and faithful representation or portrayal of the place, person, or subject it purports to represent or portray. The testimony of a witness or of witnesses is required to authenticate or verify a photograph, because a photograph, of itself and without testimonial sponsorship, proves nothing. There must be testimony as to who or what the photograph shows; in other words, the persons, places, or things shown in the photograph must be 'identified'." Carson v. Squirrel Inn Corp., 298 F. Supp. 1040, 1048 (D.S.C. 1969).

Satellite images have become a well-established tool used in everyday situations. Although Plaintiff did not produce a Google representative to explain how the imagery was taken, the Court believes that the jury had adequate information to judge whether the images were accurate and what Plaintiff claimed them to be. There was a sufficient foundation laid for authentication and admissibility of the Google Street View images by the testimony of several witnesses. Clif Harper, a professional surveyor, testified that the latitudinal and longitudinal coordinates of the accident site he found on scene were the same coordinates that were portrayed in the Google images; that he regularly relies on Google Earth in the performance of his job; that he finds Google Earth Street View imagery to be accurate; and that the location of the decayed tree portrayed in the Street View images was accurate within one foot on the stump of the tree that physical evidence on the scene showed caused the wreck. In addition, tree expert Mark Arena testified that the imagery of the tree was consistent with what he expected to see with respect to decay, condition, etc. of the tree.

Several witnesses, including Plaintiff, testified that they recognized the stretch of highway identified in the Google imagery as U.S. Highway 321 in the area of the wreck. To admit the images as evidence, Plaintiff was only required to make a showing sufficient to support a finding that the images in the photographs were what he claimed. S.C. Rules of Evidence Rule 901(a). The Court believes Plaintiff met this burden for admissibility, and that the Court properly left to the jury the factual determination as to whether the images were indeed what they were purported to be.

Furthermore, Defendant introduced a video clip taken from Google Earth Street View in its primary case without objection. This video included some of the same images Defendant claims to have been improperly admitted.

It is not necessary for authentication that the photographer or any person who saw the making of the photograph testify. U.S. v. Clayton, 643 F.2d 2071 (5th Cir. 1981). This would be even more true when it comes to satellite imagery. See Commonwealth v. Suarez-Irizzary, 2010 WL 5312257 (Pa. Com. Pl. 2010) The S. C. Rules of Evidence Rule 901(b)(9) illustrates that authentication may be shown by evidence describing a process or system used to produce a result and by showing that the process or system produces an accurate result. That is exactly the case here. The system used by Google to produce imagery was shown to produce an accurate result – ie accurate imagery. This was confirmed by the testimony of Clif Harper that the imagery corresponded with the physical evidence he found on the scene and the testimony of Mark Arena that the imagery depicted a tree in the condition that he expected to find based on his site visit and observations of the physical evidence on the scene.

The process producing the imagery, and therefore, the imagery itself was shown to be reliable by testimony concerning the physical evidence at the wreck scene. Much like with X-rays, authentication does not require a witness to testify that the Xray accurately portrays the place, person or subject it purports to portray. Often, no such witness exists, but because the process that produces the Xray is trustworthy to produce an accurate result, the evidence is considered trustworthy and thus admissible. In addition to the imagery showing the condition of the tree in May 2008, Plaintiff submitted the testimony of Mark Arena which described the conditions the tree would have exhibited prior to its fall – decay, pine needles falling off, denuding of bark, limb detachment, etc. This testimony corroborated the Google Earth imagery of the tree providing an additional indicia or reliability of the imagery and additional evidence of the condition of the tree.

COMPARATIVE NEGLIGENCE

Finally, in its Motion, Defendant argues that the Court erred by declining to charge the jury on the doctrine of comparative negligence. At trial, Defendant argued to the Court for a comparative negligence charge claiming there was evidence that Plaintiff

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was speeding prior to the wreck. There was no evidence sufficient to support a comparative negligence charge. The trial testimony was that Plaintiff may have been speeding prior to an oncoming vehicle flashing its lights at Plaintiff, upon which Plaintiff slowed. In any event, there was no evidence submitted by Defendant or otherwise that Plaintiff's speed was a proximate cause of the wreck, and therefore submission of comparative negligence would have been improper. Horton v. Greyhound Corp, 241 SC 430, 128 SE2d 776 (1962); Clark v. Cantrell, 332 SC 433, 504 SE2d 605 (Ct. App. 1998), affirmed as modified by Clark v. Cantrell, 339 SC 369, 529 SE2d 528 (2000). In addition, pursuant to Defendant's charge request, the Court did instruct the jury that Plaintiff had a legal obligation to operate its vehicle on the road in a reasonable, safe manner.

CONCLUSION

Lastly, the Court believes that the parties are entitled to a fair trial - not a perfect trial. The case was well tried by both sets of attorneys. Both sides were able to make their points to the jury and the Court does not have reason to believe another jury would do a better job. Therefore, the Motion for Judgment Notwithstanding the Verdict, or in the alternative for a New Trial, is denied.

AND IT IS SO ORDERED:

January 13, 2014

~~Honorable~~ Edgar W. Dickson
First Judicial Circuit

Orangeburg, SC

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