THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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SC Court of Appeals

APPEAL FROM ORANGEBURG COUNTY
Court of Common Pleas

Edgar W. Dickson, Circuit Court Judge

Case No. 2011-CP-38-1397

William Breland, ... Respondent,

v.

South Carolina Department of Transportation, ... Appellant.

INITIAL BRIEF OF RESPONDENT

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COUNTER-STATEMENT OF THE CASE

Mr. Breland filed an action on November 28, 2011, against several defendants, including the South Carolina Department of Transportation (SCDOT). Mr. Breland asserted he was injured while driving his van on U.S. Highway 321 in Orangeburg County when he struck a dead tree that had fallen into the roadway. Mr. Breland contended SCDOT failed to inspect its right-of-way along U.S. Highway 321, failed to warn the traveling public about the hazard, and failed to keep the roadway safe. On January 31, 2012, SCDOT filed an Answer denying it was responsible and stating 16 separate defenses.

Following discovery, SCDOT moved for summary judgment on June 25, 2013, contending it was not liable for the crash. On August 9, 2013, the court held a hearing on the motion, and on September 5, 2013, the court denied SCDOT's motion for summary judgment.[1]

On August 29, 2013, SCDOT filed a notice that pursuant to Rule 609(a), SCRE, SCDOT intended to use a criminal record to impeach Mr. Breland. SCDOT also raised the issue by motion in limine filed September 3, 2013.

The case was tried September 3, 2013, through September 6, 2013. The jury

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[1] SCDOT attached the order denying summary judgment to its Notice of Appeal and asserted it was appealing that order. SCDOT also includes the summary judgment standard in its Brief of Appellant. (App. Br. pp. 3-4). Of course, the denial of summary judgment is never appealable, even after final judgment. *E.g.* Ballenger v. Bowen, 313 S.C. 476, 443 S.E.2d 379 (1994) (denial of summary judgment is not appealable); Olson v. Faculty House of Carolina, Inc., 354 S.C. 161, 580 S.E.2d 440 (2003) (adhering to Ballenger and holding the denial of summary judgment is not appealable, even after final judgment).

returned a verdict for Mr. Breland for $225,000. SCDOT made post-trial motions for judgment notwithstanding the verdict (JNOV) or, alternatively, a new trial. On October 1, 2013, the trial court held a hearing on SCDOT's motions and on January 16, 2014, the court entered an order denying the motions.

On January 17, 2014, SCDOT filed and served its notice of appeal.

FACTS

When reviewing a motion for JNOV, an appellate court must employ the same standard as the trial court. *Law v. S.C. Dep't of Corr.*, 368 S.C. 424, 434, 629 S.E.2d 642, 648 (2006). On appeal from an order denying a motion for JNOV, an appellate court views the evidence and all reasonable inferences in a light most favorable to the non-moving party. *RFT Mgmt. Co. v. Tinsley & Adams L.L.P.*, 399 S.C. 322, 331–32, 732 S.E.2d 166, 171 (2012). Viewing the evidence in this manner, the record reveals the following:

This is a single-car automobile wreck. Mr. Breland was driving along U.S. Highway 321 in a van and struck a rotten pine tree that had fallen in the roadway. Mr. Breland was seriously injured in the wreck.

Mr. Breland sued the SCDOT, asserting the Department failed to locate and remove the dead tree before it fell into the roadway and caused a hazard to motorists. Following a trial the jury found in favor of Mr. Breland and returned a verdict for $225,000. (Verdict form). Remaining facts are discussed under each issue below.

ARGUMENTS

I. THE TRIAL JUDGE EXERCISED APPROPRIATE DISCRETION IN ADMITTING A PHOTO FROM "GOOGLE EARTH"

SCDOT contends the trial court erred in admitting evidence of "Google Street View computer-generated still images, or screen shots, without satisfying the [authentication] requirements of Rule 901, SCRE." (App. Br. pp. 6-12). The Court should affirm.

In denying the post trial motions, the trial court noted SCDOT moved *in limine* to exclude the images from Google Earth. (Order of 1/16/14, p.4). The images included "street scenes" of the wreck scene and the subject tree at the time the May 2008 Google Earth imagery was produced.

In denying the new trial motion, the trial court held the photograph was properly admitted. (Order of 1/16/14, pp. 4-5). The court noted "[s]atellite images have become a well-established tool used in everyday situations." (Order of 1/16/14, p. 5). The court found the jury had adequate information to judge whether the images were accurate and what Mr. Breland claimed them to be. (Order of 1/16/14, p. 5). The court found there was a sufficient foundation for authentication and admissibility of the images by the testimony of several witnesses, including Cliff Harper, Mark Arena, Mr. Breland and other witnesses who testified they recognized the stretch of highway in the images. (Order of 1/16/14, p. 5).

Alternatively, the court noted SCDOT introduced a video clip taken from Google Earth Street View in its primary case without objection, and that video included some of

the same images SCDOT claimed to have been improperly admitted. (Order of 1/16/14, p. 6). These rulings are correct.

SCDOT frames its argument as if the photographs from Google Earth are unreliable without the testimony of either the person who actually took the photographs or a witness from Google who can testify in detail how the particular photograph was made. Neither Rule 901 nor courts around the country require such exacting foundation for admissibility.

Rule 901 of the South Carolina Rules of Evidence governs authentication of evidence and provides "[t]he requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims." Rule 901(a), SCRE. The Rule then provides examples of authentication or identification, although the list is not exhaustive. *State v. Anderson*, 386 S.C. 120, 687 S.E.2d 35 (2009). One of those examples is: "**Testimony of Witness With Knowledge.** Testimony that a matter is what it is claimed to be." Rule 901(b)(1). Thus, the Rule has never required the standard SCDOT would have this Court now adopt. *Cf.* Rule 901(b)(5), SCRE (including "[t]estimony that a matter is what it is claimed to be" and "[i]dentification of a voice, whether heard firsthand or through mechanical or electronic transmission or recording, by opinion based upon hearing the voice at any time under circumstances connecting it with the alleged speaker" as acceptable methods of authentication); *Winburn v. Minnesota Mut. Life Ins. Co.*, 261 S.C. 568, 576–77, 201 S.E.2d 372, 376 (1973) ("Authenticity of documentary evidence may be shown, so as to render it admissible in evidence, by

indirect or circumstantial evidence.").

The Google Earth photographs were properly admitted against the backdrop of the trial testimony. *Cf. State ex rel. JB*, 2010 WL 3836755 (N.J. Super. Ct. App. Div. 2010) (upholding decision to permit counsel to offer Google Earth photographs as illustrative aids to witness testimony). As noted, Cliff Harper, an expert professional land surveyor (Tr. p. 122, ll. 4-5, 21-23), testified that the latitudinal and longitudinal coordinates he found at the scene of the wreck were the same coordinates that the Google Earth images portrayed. (Tr. p. 51, l. 4 - p. 55, l. 19; p. 123, ll. 4-7; p. 124, ll. 20-23; Pl. Exh. 2). Harper stated that he uses Google Earth imagery often and finds "Google Earth Street View" imagery to be accurate (Tr. p. 55, ll. 17-25; p. 128, l. 17 - p. 129, l. 1; p. 133, ll. 5-14). The location of the decayed tree portrayed in the Street View images was accurate within one foot of the stump of the tree that physical evidence on the scene showed caused the wreck. (Tr. p. 54, ll. 1-19; p. 126, ll. 19-22; p. 129, ll. 2-6; p. 130, l. 17 - p. 132, l. 6; p. 133, ll. 22-24; p. 143, l. 18 - p. 144, l. 3; Pl. Exh. 1). On cross-examination Mr. Harper stated, "I know it's the same spot as the stump. That's what I know." (Tr. p. 138, ll. 5-6).

In addition, Mark Arena, a horticulturist and an arborist (Tr. p. 260, ll. 1-5; p. 260, l. 21 - p. 261, l. 16), testified that the imagery of the tree was consistent with what he expected to see with respect to decay and condition of the tree. (Tr. p. 263, ll. 9-24). Mr. Arena took photographs of the site on June 25, 2013, and reviewed the Google Earth imagery. (Tr. p. 261, l. 20 - p. 262, l. 5; p. 262, ll. 11-12; p. 270, ll. 15-19; Pl. Exh. 50, 51, 52). When Mr. Arena went to the scene he found a void in the tree line or the canopy that matched the tree that he had seen on the Google Earth image. (Tr. p. 271, ll. 5-8). That

void also matched up with the stump he located on his visit in June 2013. (Tr. p. 270, ll. 9-12).

Moreover, several witnesses, including Mr. Breland, testified that they recognized the stretch of highway identified in the Google Earth imagery as U.S. Highway 321 in the area of the wreck. (Tr. p. 385, ll. 18-20; p. 420, l. 1 - p. 421, l. 25). The trial court's decision to permit the photographs on the basis of this testimony was well within the parameters of Rule 901 and the trial court's sound discretion.

In fact, some courts have used Google Earth and other online imaging services to buttress their decisions, stating these services (including Google Earth) are subject to judicial notice. For instance, the Tenth Circuit recently stated:

> An appendix to our opinion contains a helpful map of the site. The parties unfortunately did not provide us a map. However, based on the undisputed location of the President's visit, "[w]e take judicial notice of a Google map and satellite image as a 'source[ ] whose accuracy cannot reasonably be questioned' " for purposes of this case. *United States v. Perea–Rey*, 680 F.3d 1179, 1182 n. 1 (9th Cir.2012) (second alteration in original) (quoting Fed.R.Evid. 201(b)); *see Citizens for Peace in Space v. City of Colo. Springs*, 477 F.3d 1212, 1218 n. 2 (10th Cir.2007) (taking judicial notice of an online distance calculation that relied on Google Maps data); *United States v. Piggie*, 622 F.2d 486, 488 (10th Cir.1980) ("Geography has long been peculiarly susceptible to judicial notice for the obvious reason that geographic locations are facts which are not generally controversial...."); *see also David J. Dansky, The Google Knows Many Things: Judicial Notice in the Internet Era*, 39 Colo. Law. 19, 24 (2010) ("Most courts are willing to take judicial notice of geographical facts and distances from private commercial websites such as MapQuest, Google Maps, and Google Earth."). We do this here only to determine the "general location" of relevant events. *Perea–Rey*, 680 F.3d at 1182 n. 1. The map in the appendix identifies the approximate location of the southern checkpoint—150 yards south of the mayor's driveway—based on Google Maps's "Distance Measurement Tool." *Cf. Citizens for Peace in Space*, 477 F.3d at 1218 n. 2.

Pahls v. Thomas, 718 F.3d 1210, 1216 n. 1 (10th Cir. 2013). The Ninth Circuit agrees:

> We take judicial notice of a Google map and satellite image as a "source[ ] whose accuracy cannot reasonably be questioned," at least for the purpose of determining the general location of the home. Fed.R.Evid. 201(b). *See also Citizens for Peace in Space v. City of Colorado Springs*, 477 F.3d 1212, 1219 n. 2 (10th Cir.2007) (taking judicial notice of online distance calculations); *cf. Boyce Motor Lines v. United States*, 342 U.S. 337, 344, 72 S.Ct. 329, 96 L.Ed. 367 (1952) ("We may, of course, take judicial notice of geography.") (Jackson, J., dissenting).

U.S. v. Perea-Rey, 680 F.3d 1179, 1182 n. 1 (9th Cir. 2012). Thus, contrary to SCDOT's view, courts around the country accept these satellite images as representing what it is they purport to present.

Whether to admit the Google Earth photographs in this case was within the trial court's sound discretion. *See Wright v. Pub. Sav. Life Ins. Co.*, 262 S.C. 285, 290–91, 204 S.E.2d 57, 60 (1974) (applying the rule that the admission or exclusion of evidence is in the trial court's discretion to a finding by the trial court that certain evidence was sufficiently authenticated). The Court should affirm the trial court's denial of SCDOT's motion for new trial on this ground.

II. THE TRIAL JUDGE CORRECTLY PERMITTED PLAINTIFF TO ESTABLISH CONSTRUCTIVE NOTICE OF THE HAZARD IN THIS CASE

SCDOT argues the trial court erred in denying SCDOT's "repeated motions for judgment as a matter of law on this legal question." (App. Br. p. 16). SCDOT contends that the only evidence Mr. Breland presented to establish constructive notice was the Google Earth street view, which is insufficient as a matter of law. (App. Br. pp. 13, 15-16). SCDOT concedes that the evidence established it had road crews regularly in the vicinity of the tree, but asserts "this factor is largely irrelevant" because in SCDOT's view, surrounding foliage necessarily hid the subject tree. (App. Br. pp. 14-15). SCDOT asserts that the trial court's ruling permitting Mr. Breland to admit the Google Earth view of the dead tree "effectively eviscerates the Tort Claims Act exception requiring constructive notice and essentially mandates that SCDOT utilize Google Street View or some similar technological means to inspect the roadways for potential hazards." (App. Br. p. 16). The Court should not be persuaded by this argument.

Section 15-78-60(15) of the South Carolina Code provides:

> * * * Governmental entities responsible for maintaining highways, roads, streets, causeways, bridges, or other public ways are not liable for loss arising out of a defect or a condition in, on, under, or overhanging a highway, road, street, causeway, bridge, or other public way caused by a third party *unless the defect or condition is not corrected by the particular governmental entity responsible for the maintenance within a reasonable time after actual or constructive notice.*

S.C. Code Ann. § 15-78-60(15)(2005) (emphasis added). Mr. Breland conceded at trial that he had no evidence of actual notice of the tree. (Tr. p. 401, l. 25 - p. 402, l. 4; p. 402, ll. 13-14). Therefore the issue is whether Mr. Breland presented any evidence of

SCDOT's failure to correct the defect (the rotten loblolly pine tree adjacent to the roadway) after SCDOT had constructive notice of its existence.

In the recent case of *Major v. City of Hartsville*, the Supreme Court discussed the concept of "constructive notice" in the context of the Tort Claims Act. The Court stated:

> Constructive notice is a legal inference, which substitutes for actual notice. *Strother v. Lexington Cnty. Recreation Comm'n*, 332 S.C. 54, 504 S.E.2d 117 (1998). "Constructive notice arises when a condition has existed for such a period of time that a municipality in the use of reasonable care should have discovered the condition." *Fickling v. City of Charleston*, 372 S.C. 597, 609–10 n. 34, 643 S.E.2d 110, 117 n. 34 (Ct. App.2007) (quoting *Jindra v. City of St. Anthony*, 533 N.W.2d 641 (Minn. Ct. App.1995)).

410 S.C. 1, 3-4, 763 S.E.2d 348, 350 (2014). *See also Hightower v. Greenville County*, 255 S.C. 192, 195, 177 S.E.2d 785, 786 (1970) ("Where a defect or dangerous condition, not created by its act or that of its agents, has existed for such length of time that in the exercise of reasonable care the defect should have been discovered and remedied, the county is chargeable with knowledge of such defect, and consequently with negligence in not having remedied it.").

In this case, Mr. Breland presented abundant evidence that SCDOT had procedures in place for locating and removing dead trees and had numerous opportunities to locate and remove the subject dead pine tree before it fell into the roadway. That evidence derives from the following testimony at trial.

Cliff Harper

Cliff Harper stated he measured the location of the tree to be 197.3 feet from the edge of the pavement at a neighboring driveway. (Tr. p. 126, ll. 8-11). From the stump to

the center line of the roadway was 42.17 feet. (Tr. p. 127, ll. 17-18, 23). The pieces of the tree added together were enough to reach the center line of the roadway from the stump. (Tr. p. 127, l. 24 - p.; 128, l. 1; p. 141, ll. 10-13). The stump was 4.67 feet from the edge of the SCDOT right-of-way. (Tr. p. 128, ll. 5-7; p. 141, ll. 14-19). It was not, as SCDOT asserts, "well off the SCDOT right-of-way...." (App. Br. p. 13).

David Brandyburg

Mr. Breland called David Brandyburg, the Resident Maintenance Engineer for the central portion of Orangeburg County, as an adverse witness under Rule 611, SCRE. (Tr. p. 173, ll. 4-7, ll. 20-22; p. 217, l. 11 - p. 218, l. 1). The central portion of Orangeburg County includes the area on U.S. Highway 321 where the wreck occurred. (Tr. p. 173, l. 23 - p. 174, l. 3). Mr. Brandyburg supervises the SCDOT employees who inspect the roadway as part of his job as Resident Maintenance Engineer. (Tr. p. 184, ll. 14-16; p. 218, ll. 2-7)

Mr. Brandyburg's job includes the maintenance and upkeep of the roads and highways in his area. (Tr. p. 175, l. 24 - p. 176, l. 1). This includes "maintaining roads, fixing potholes, identifying hazards, a number of things that are considered maintenance or upkeep of the roads or the highways." (Tr. p. 176, ll. 2-6; p. 177, ll. 14-17; p. 218, l. 20 - 219, l. 15). Part of these functions is to keep the highway safe for the traveling public who are using the roads and highways. (Tr. p. 176, ll. 7-14; p. 177, ll. 8-13). Mr. Brandyburg has approximately 75 employees under his supervision, and the number was about the same in 2010. (Tr. p. 176, l. 23 - p. 177, l. 7).

The employees are supposed to be on the lookout for hazards on the roadway. (Tr.

p. 177, l. 24 - p. 178, l. 1). Once an employee spots debris or trash in the roadway they are supposed to remove it. (Tr. p. 177, ll. 18-23). The employees are also supposed to actively look for, locate and identify trees that are diseased, dead or decayed that might fall into the roadway. (Tr. p. 178, ll. 5-9; p. 179, ll. 17-25; p. 181, ll. 15-22). In fact, the employees "have to be thorough" in discharging their active duty to locate and remove trees that pose a hazard to the roadway. (Tr. p. 180, ll. 1-2). Even if the tree is not in the SCDOT right-of-way, they are to remove it if it is "threatening the roadway." (Tr. p. 178, l. 10 - p. 179, l. 10; p. 182, ll. 3-6).

These obligations have been the policy and practice of SCDOT since Mr. Brandyburg has been the Resident Maintenance Engineer in Organgeburg. (Tr. p. 179, ll. 13-16; p. 180, ll. 3-5; p. 181, l. 23 - p. 182, l. 2; Pl. Exh. 10). The written policy under § 2.51 governs vegetation and states, "Dead or diseased trees located on or off the right-of-way which may fall onto the travel surface of the roadway should be removed." (Tr. p. 182, ll. 7-23; Def. Exh. 15). Mr. Brandyburg described this duty as "important." (Tr. p. 181, ll. 6-10). He added, "[m]aintaining the roads for safe travel of the public is very important." (Tr. p. 181, ll. 13-14).

If a tree that threatens to fall into the roadway is on the SCDOT right-of-way, the department removes it as soon as they locate it. (Tr. p. 180, ll. 6-11). If the tree is off the SCDOT right-of-way, and it is or should have been located, then the department has a process for removing those trees. (Tr. p. 180, ll. 22-24). The department contacts the landowner about removing the tree and once they get permission from the landowner then they remove the tree. (Tr. p. 180, ll. 12-17, 18-21; p. 219, l. 20 - p. 220, l. 7; p. 244, l. 12 -

p. 245, l. 2). Mr. Brandyburg agreed that this process is "quick" because if the tree poses a danger they must "get it down as quick as possible." (Tr. p. 180, l. 25 - p. 181, l. 5).

Mr. Brandyburg identified a general maintenance manual which generally covered his job duties and responsibilities. (Tr. p. 182, l. 24 - p. 183, l. 2; p. 225, l. 1 - p. 226, l. 20; Pl. Exhs. 9, 10). Part 28.822 provides "other tree removal guidelines" and states, "[o]ther tree removal guidelines are as follows: remove fallen trees from the right-of-way, remove dead or diseased trees located on or off the right-of-way or that may fall onto the travel-way or shoulder." (Tr. p. 183, ll. 6-12; Pl. Exh. 9).

The SCDOT gives its employees training on looking for these hazards. (Tr. p. 183, ll. 21-25). The employees are trained in all aspects of their jobs. (Tr. p. 184, ll. 2-4). The department gives the employees guidelines on "what to look for when [they] look for dead or diseased trees." (Tr. p. 184, ll. 8-13, 17-20; p. 190, l. 15 - p. 191, l. 2). This includes a tree that appears to be a dead tree, including the tree in the Google Earth photograph. (Tr. p. 191, ll. 3-22; Pl. Exh. 1).

U.S. Highway 321 is considered a "primary route" and is inspected once every six months. (Tr. p. 185, l. 23 - p. 186, l. 4; p. 222, ll. 14-15). The purpose of the inspection is "to detect deficiencies that could pose a hazard to motorists or pedestrians thus creating a risk for the department." (Tr. p. 186, ll. 13-18). This purpose includes looking for "dead trees or overhanging limbs." (Tr. p. 186, ll. 5-12).

SCDOT's policy is also that department foremen or engineers do "riding road inspections" looking for hazards and problems with the road. (Tr. p. 184, l. 21 - p. 185, l. 9). These employees are supposed to be looking for trees that pose a hazard to the

roadway. (Tr. p. 187, ll. 11-20). The employees do some of these road inspections at night so they can see the visibility of signs and markings. (Tr. p. 185, ll. 10-13). They do some of the riding road inspections during the daytime. (Tr. p. 185, ll. 14-16). The employees ride the roadway in both directions. (Tr. p. 195, ll. 14-16; p. 243, ll. 7-12). The employee is "looking from right-of-way to right-of-way, any type of hazard that you can see in that area that may [affect] the road." (Tr. p. 238, ll. 20-22; p. 239, ll. 2-5). Mr. Brandyburg stated that "[i]f you're riding down the road and you're looking in the right-of-way and you see a tree that's five or so feet beyond the right-of-way, but it's going to fall into the right-of-way, that is something you would see." (Tr. p. 249, l. 25 - p. 250, l. 3). He added, "that's something – a tree you would remove." (Tr. p. 250, l. 7).

Mr. Brandyburg agreed these riding road inspections are "an important part of the job." (Tr. p. 185, ll. 17-20). The employees are also supposed to be actively looking for these hazardous trees at all times of the year while they are cutting grass, ditch draining work, driveways, shoulder re-grades, litter pick up, or any kind of duty that an employee is performing. (Tr. p. 187, l. 16 - p. 188, l. 12; p. 188, ll. 17-25; p. 189, ll. 9-17; p. 227, ll. 8-15; p. 241, ll. 15-20). The employees are supposed to look low and to look high, including tree tops that are visible to them. (Tr. p. 189, l. 18 - p. 190, l. 11).

SCDOT keeps records of the employees' activities when they are working near the roadway, including inspecting for hazards. (Tr. p. 192, ll. 3-11). Each road contains "mile points," which permit the SCDOT to identify where on the road the employee is working. (Tr. p. 192, ll. 12-22). A "mile point" is approximately 1/100th of a mile, or 52 feet. (Tr. p. 192, l. 23 - p. 193, l. 4). The wreck in this case occurred between mile point

3.68 to mile point 10.68, around mile point 7.0. (Tr. p. 193, l. 5 - p. 194, l. 13).

Mr. Brandyburg identified a nighttime inspection report of U.S. Highway 321 that started at "zero" mile point and went to mile point 9.44 on December 17, 2009. (Tr. p. 195, ll. 2-13; p. 195, l. 17 - p. 196, l. 3; Pl. Exh. 2). He also identified a daytime inspection report of U.S. Highway 321 that started from 2.36 mile point to the 9.34 mile point on October 2, 2008. (Tr. p. 196, ll. 10-24). Mr. Brandyburg identified other daytime inspection reports of the highway from mile point 2.36 to mile point 9.34 on November 26, 2008, February 6, 2009, April 16, 2009, June 25, 2009, October 1, 2009, and December 17, 2009. (Tr. p. 197, l. 3 - p. 199, l. 8). In every inspection the employee is supposed to be looking for hazards on the highway. (Tr. p. 199, ll. 10-14). Mr. Brandyburg stated that in 2009 the SCDOT removed 84 standing dead trees and over 200 trees which had fallen in the central area. (Tr. p. 220, ll. 13-14; p. 243, ll. 16-17; p. 253, ll. 11-16).

Mr. Brandyburg identified numerous work reports covering the subject stretch of U.S. Highway 321. (Tr. p. 224, ll. 1-4; p. 250, l. 8 - p. 253, l. 10; Pl. Exhs. 13-44, 46; p. 227, l. 20 - p. 237, l. 6; Def. Exhs. 2-14). The reports included the following:

1. In 2008, someone called for work along the highway at mile point 7.56. (Tr. p. 206, ll. 15-24).
2. On August 12, 2008, an employee performed routine mowing between mile points 4.38 and 9.34. (Tr. p. 204, l. 25 - p. 205, l. 4).
3. On February 27, 2009 and March 6, 2009, employees were picking up litter on both sides of the highway starting at mile point 6.0 and going to

mile point 8.34. (Tr. p. 204, ll. 3-16; ll. 20-24).

4. On March 5, 2009, an employee did regrading on a roadside ditch. (Tr. p. 203, ll. 15-19).

5. On April 22, 2009, someone called with a problem with a "washout" from a driveway. (Tr. p. 205, l. 22 - p. 206, l. 6).

6. On July 8, 2009, an employee was doing routine mowing along mile point 4.0 to mile point 9.34. (Tr. p. 203, l. 20 - p. 204, l. 2).

7. A report on August 31, 2009, mentioned an employee doing "land management" beginning at mile point 4.38 and ending at mile point 9.34. (Tr. p. 202, l. 21 - p. 203, l. 14).

8. On November 5, 2009 and December 30, 2009, employees were regrading a portion of the northbound shoulder beginning at mile point 6.47 and ending at mile point 7.41. (Tr. p. 199, l. 15 - p. 201, l. 13).

9. On December 29, 2009, an employee cleaned out a ditch and driveway pipe at 7271 Savannah Highway. (Tr. p. 201, l. 25 - p. 202, l. 20).

These reports involved the area where the tree fell and the wreck occurred. (Tr. p. 201, ll. 14-23). The employees are supposed to be looking for hazards the entire time they are out there. (Tr. p. 204, ll. 17-19). Had an employee seen the subject tree during any of these work reports the employee should have taken steps to have the tree removed. (Tr. p. 207, ll. 5-13). The only possibilities are that someone did not see the tree or it never got reported. (Tr. p. 208, ll. 7-9).

Mr. Brandyburg agreed that the tree in the Google Earth photograph "would be a

tree I would say would need to be removed." (Tr. p. 191, l. 23 - p. 192, l. 2). He admitted there was no contact made with any landowner about removing the tree that caused Mr. Breland's wreck. (Tr. p. 248, ll. 12-15). He estimated the tree was about 30 feet from the edge of the road. (Tr. p. 442, ll. 6-10). Mr. Brandyburg also agreed that if SCDOT had notice of the tree that Mr. Breland hit, that is, knew or should have known the tree was there, then SCDOT should be liable. (Tr. p. 175, ll. 11-17).

Mark Arena

Mark Arena, the expert arborist, stated the tree that fell was a "loblolly pine" which "fell due to a loss of structural integrity which is the direct result of a disease issue, typically, a fungal pathogen." (Tr. p. 262, ll. 18-25; p. 263, ll. 18-24; p. 264, ll. 10-18; p. 265, l. 7 - p. 266, l. 5; p. 273, ll. 2-7; Pl. Exhs. 3, 5, 6, 7). The disease process takes place over a period of one to three years. (Tr. p. 266, ll. 19-22). The signs of disease would be obvious and visible to anybody that has training. (Tr. p. 266, l. 23- p. 267, l. 1; p. 269, ll. 1-20; p. 274, ll. 13-15). Mr. Arena stated the signs of decay would have become obvious to a person. (Tr. p. 290, ll. 4-11).

Mr. Arena opined that the tree was about 50 feet tall. (Tr. p. 268, ll. 10-11). He believed the weight of the tree would have been substantial. (Tr. p. 276, ll. 11-15). Mr. Arena also opined that the tree would have grown towards the direction of the road, which would be where the most sunlight would be. (Tr. p. 267, ll. 5-14). Based upon photographs he was provided he opined that the tree fell towards the roadway. (Tr. p. 267, ll. 20-23; Pl. Exh. 4). Mr. Arena stated the tree would have "undoubtedly" covered the lane of travel closest to the shoulder from which it fell. (Tr. p. 268, ll. 19-21). If the tree

fell at a certain angle it would have covered some but not all of the opposing lane of travel. (Tr. p. 268, ll. 22-25). Mr. Arena believed the tree broke apart when it fell. (Tr. p. 278, ll. 12-19). He opined that "a majority of the trunk came down at the same time." (Tr. p. 281, ll. 15-22; p. 293, ll. 2-5). Based upon the pieces found at the scene Mr. Arena believed that the majority of the tree fell at one time as opposed to breaking off piece by piece. (Tr. p. 290, l. 17 - p. 291, l. 11).

Mr. Arena observed in the Google Earth photograph that other evergreen trees were around the dead tree. (Tr. p. 269, l. 21 - p. 270, l. 2). The deciduous trees around the dead tree would have lost their leaves in the late fall and winter time. (Tr. p. 270, ll. 3-10). Mr. Arena stated, "[t]here wasn't much in front of this tree going toward the road side. The deciduous trees, which the majority were sweet gums, were to the right and left of the tree." (Tr. p. 286, ll. 2-4).

Wade Reed

Mr. Reed is Mr. Breland's friend and was in the van when the collision occurred. (Tr. p. 298, ll. 23-24). Mr. Breland was driving and Mr. Reed was in the passenger seat. (Tr. p. 299, ll. 2-4). He identified the area where they hit the tree. (Tr. p. 300, ll. 6-23; Pl. Exh. 54, 55).

Mr. Reed stated they were proceeding south in the nighttime on U.S. Highway 321. (Tr. p. 301, ll. 13-21). A vehicle approached them flashing its lights to warn them of something. (Tr. p. 301, l. 22 - p. 302, l. 1; p. 304, ll. 5-10; p. 314, ll. 7-8). Mr. Breland slowed down. (Tr. p. 304, ll. 20-21). They were suddenly upon the tree in the roadway and Mr. Breland "snatched the wheel to the left to avoid it." (Tr. p. 302, ll. 3-7; p. 303, ll.

3-4, 19-24; p. 304, ll. 22-24). The van made contact with the tree and went over the tree, proceeding down the roadway 10 to 12 yards. (Tr. p. 305, ll. 1-7; p. 310, ll. 1-7). The airbags in the van were deployed. (Tr. p. 305, ll. 8-13). Although the van was damaged on the right front passenger side it was still driveable. (Tr. p. 305, ll. 17-24).

Mr. Breland called "9-1-1." (Tr. p. 306, ll. 8-9). Within about 15 minutes the Neeses Fire Department arrived and a rescue squad came from Norway. (Tr. p. 306, ll. 16-25). A state trooper also came to the scene. (Tr. p. 307, ll. 2-3; p. 310, ll. 12-14; p. 317, ll. 3-16). The fire department moved the tree from the roadway. (Tr. p. 307, ll. 9-11; p. 316, l. 23 - p. 318, l. 10; p. 319, l. 8 - p. 321, l. 16; p. 323, l. 24 - p. 324, l. 12).

Mr. Reed stated they struck a pine tree. (Tr. p. 309, ll. 2-11). Mr. Reed stated the tree lying in the roadway had no bark, no limbs, no pine needles (Tr. p. 309, ll. 16-25).

Mr. Breland

Mr. Breland stated that he saw an approaching truck flashing its lights. (Tr. p. 344, ll. 21-23; p. 345, ll. 2-5). Mr. Breland began to slow down. (Tr. p. 345, ll. 8-9). As he began up a hill he saw a tree lying in the roadway. (Tr. p. 345, ll. 11-12, 19-21). Mr. Breland tried to dodge it but could not. (Tr. p. 345, l. 22 - p. 346, l. 6). The airbags deployed. (Tr. p. 346, ll. 6-7; p. 383, l. 23 - p. 384, l. 4). Once the vehicle stopped Mr. Breland called "9-1-1." (Tr. p. 348, ll. 17-19). A state trooper and two fire department vehicles came to the scene. (Tr. p. 348, l. 22 - p. 349, l. 1; p. 382, l. 25 - p. 383, l. 19). The fire department employees cut the tree up and moved it out of the roadway. (Tr. p. 349, ll. 2-3; p. 384, ll. 18-23). Mr. Breland did not go to the hospital because his van would have been towed and he would have lost his cargo of fish he had in his van. (Tr. p.

350, l. 1 - p. 351, l. 5). The van was driveable. (Tr. p. 351, ll. 9-10).

After he got home, Mr. Breland started getting sharp pains in his back, neck, head and arms. (Tr. p. 352, ll. 19-24). He also experienced numbness. (Tr. p. 353, ll. 1-4). Mr. Breland was referred to Dr. Mummaneni, but he was unable to get Mr. Breland's pain back to the level it was before the wreck. (Tr. p. 354, ll. 3-10).

Mr. Breland went back to the scene within 30 days of the wreck and located the tree that he hit. (Tr. p. 347, l. 2 - p. 348, l. 9; Pl. Exh. 3, 53, 54).

Jimmy Miller

Jimmy Miller, who worked for the Neeses Fire Department, responded to a call from Mr. Breland about the wreck. (Tr. p. 148, ll. 7-9; p. 165, ll. 9-18, 13-17; Def. Exh. 1). The Neeses Fire Department got the call at 11:52 p.m. on January 7, 2010. (Tr. p. 150, ll. 15-21). The call was for "a vehicle accident versus a tree." (Tr. p. 151, ll. 20-24; p. 154, ll. 14-16; p. 265, ll. 19-22). Mr. Miller and Boogie Hoover of the Neeses Fire Department arrived at the scene at 12:03 a.m. on January 8, 2010. (Tr. p. 150, l. 22 - p. 151, l. 2; p. 151, ll. 11-16; p. 156, l. 16 - p. 157, l. 4). They departed the scene at 12:27 a.m. (Tr. p. 151, ll. 3-7; p. 158, ll. 20-22). Someone from the Boland Town Fire Department also was at the scene. (Tr. p. 155, ll. 15-18; p. 158, ll. 10-19; p. 163, l. 21).

Mr. Miller agreed they did respond to a wreck of a vehicle with a tree. (Tr. p. 152, ll. 14-16). Mr. Miller does not know who removed the tree from the roadway. (Tr. p. 155, ll. 21-23).

Harold Rutland

Harold Rutland was a volunteer fireman for Bolen Town. (Tr. p. 426, ll. 20-23). He responded to the call regarding Mr. Breland's collision with the tree. (Tr. p. 426, l. 9 - p. 427, l. 24). Mr. Rutland found the Ford van had struck a tree that was lying in the roadway. (Tr. p. 429, ll. 1-6). He stated a portion of the tree was lying in the roadway and the tree, had no bark, no limbs, and was rotten. (Tr. p. 430, ll. 15, 21; p. 431, ll. 7-10; p. 433, ll. 6-16; p. 440, ll. 12-16). This was after the van had hit the tree. (Tr. p. 440, ll. 4-11). He and several others rolled the tree out of the roadway so no one else could hit it. (Tr. p. 430, ll. 17-19; p. 431, ll. 6-10).

This testimony supports the inference that the subject loblolly pine tree was in a state of disease and decay for a sufficient period of time such that SCDOT employees had constructive notice that the tree should be removed. SCDOT's own policies and procedures required regular inspections for dangerous trees, whether or not those trees were in the SCDOT right-of-way.

SCDOT appears to argue that Mr. Breland could not prove constructive notice by circumstantial evidence, but had to present direct evidence that someone actually saw the dead tree before it fell. (App. Br. p. 16). Of course, "[a]ny fact in issue may be proved by circumstantial evidence as well as direct evidence, and circumstantial evidence is just as good as direct evidence if it is equally as convincing to the trier of the facts." *St. Paul Fire & Marine Ins. Co. v. American Ins. Co.*, 251 S.C. 56, 59-60, 159 S.E.2d 921, 923 (1968). It is the very nature of "constructive" notice, as opposed to "actual" notice, that it

is proven by circumstances that give rise to a legal inference as a substitute for actual notice. *Major v. City of Hartsville*.

When considering a directed verdict motion, the trial court is required to view the evidence in the light most favorable to the nonmoving party. *North American Rescue Products, Inc. v. Richardson*, 411 S.C. 371, 769 S.E.2d 237 (2015); *Jones v. Lott*, 387 S.C. 339, 692 S.E.2d 900 (2010). The appellate court will reverse the trial court's ruling only where there is no evidence to support the ruling or it is controlled by an error of law. *North American Rescue Products.*

The record contained sufficient if not abundant evidence that SCDOT had constructive notice of the hazard posed by the subject tree but took no steps to remedy that hazard. This Court should affirm the trial court's denial of SCDOT's motions for directed verdict and JNOV on this issue.

III. THE TRIAL JUDGE CORRECTLY CHARGED THE JURY REGARDING THE SOUTH CAROLINA MORTALITY TABLES

SCDOT contends the trial court erred in charging the statutory life expectancy tables "without first requiring expert testimony on causation and future damages." (App. Br. pp. 16-18). The Court should not be persuaded by this argument as such is not the law of South Carolina.

Section 19-1-150 of the South Carolina Code provides:

> When necessary, in a civil action or other litigation, to establish the life expectancy of a person from any period in his life, whether he is living at the time or not, the table below must be received in all courts and by all persons having power to determine litigation as evidence, along with other evidence as to his health, constitution, and habits, of the life expectancy of the person. In determining the age of a person as of any particular time, periods of six months or more beyond the last full year must be treated as one year in using the table below.

S.C. Code Ann. § 19-1-150 (2004).

In its motion for JNOV or new trial, SCDOT contended the trial court erred in instructing Section 19-1-150 to the jury because there was evidence Mr. Breland's surgery was due to prior surgeries and were inevitable due to aging, and further that Mr. Breland failed to present expert evidence to support his assertion of permanency. (Motion, pp. 2-3, ¶ 2; Memorandum in Support, p. 1, No. 3; pp. 8-9; pp. 9-10).

Mr. Breland offered the deposition testimony of Dr. Reddiah Babu Mummaneni. (Tr. pp. 328-330). Dr. Mummaneni is board certified in neurology. (Mummaneni Dep. p. 6, ll. 5-8; p. 7, ll. 2-9). SCDOT agreed he was qualified as an expert in general neurology and as a neurologist. (Mummaneni Dep. p. 9, ll. 2-6).

Dr. Mummaneni treated Mr. Breland for injuries Mr. Breland received in the

wreck. (Mummaneni Dep. p. 4, l. 21 - p. 5, l. 1; p. 9, ll. 10-13). Dr. Mummaneni opined to a reasonable degree of medical certainty that surgery performed by Dr. Haroon Choudhri at the Medical College of Georgia on Mr. Breland was reasonable and necessary based upon Mr. Breland's injury and condition. (Mummaneni Dep. p. 10, ll. 12-16; p. 10, l. 23 - p. 11, l. 3). Conservative treatment did not help Mr. Breland's symptoms so the surgery was necessary and reasonable under the circumstances. (Mummaneni Dep. p. 11, ll. 5-19; p. 13, l. 16 - p. 14, l. 3; p. 19, l. 23 - p. 25, l. 7). According to Dr. Mummaneni, Mr. Breland's injuries to his neck reflected a "new problem" even though he had a history of neck and back problems. (Mummaneni Dep. p. 21, ll. 13-16).

Dr. Choudhri kept in touch with Dr. Mummaneni about Mr. Breland's care. (Mummaneni Dep. p. 25, l. 22 - p. 26, l. 4). Dr. Choudhri referenced the January 2010 wreck in his communications with Dr. Mummaneni. (Mummaneni Dep. p. 26, ll. 13-18). In his records Dr. Choudhri opined that the wreck significantly aggravated Mr. Breland's neck pain, adding "he has had progressive pain since that time." (Mummaneni Dep. p. 26, ll. 21-24; see also p. 59, ll. 17-25; p. 70, l. 22 - p. 71, l. 4; p. 86, ll. 15-23).

Dr. Choudhri performed a laminectomy on Mr. Breland's neck. (Mummaneni Dep. p. 27, ll. 3-20). Dr. Mummaneni described the procedure as "major surgery." (Mummaneni Dep. p. 80, ll. 5-10). Mr. Breland was discharged in stable condition and "did better after surgery." (Mummaneni Dep. p. 28, ll. 13-19). When asked about residual pain, Dr. Mummaneni stated it was difficult to predict which patients will have residual pain and which patients will not have residural pain. (Mummaneni Dep. p. 29, l. 14 - p.

30, l. 10).

Mr. Breland's medical records revealed that after he had surgery in 1999 on his neck he experienced significant improvement. (Mummaneni Dep. p. 31, ll. 7-22). Dr. Mummaneni also reviewed records of treatment Mr. Breland had for back pain in 2007 and 2008. (Mummaneni Dep. p. 32, l. 1 - p. 36, l. 1). There were no records of Mr. Breland having complaints about his neck, shoulder, or arm from April 2008 until the wreck in January 2010. (Mummaneni Dep. p. 36, l. 2 - p. 37, l. 3; p. 85, ll. 4-13; p. 91, l. 18 - p. 92, l. 17).

Dr. Mummaneni testified to a reasonable degree of medical certainty that, based upon the history given by Mr. Breland, the wreck triggered the symptoms. (Mummaneni Dep. p. 37, ll. 9-25). He opined that the wreck caused or caused the worsening of Mr. Breland's problems and complaints. (Mummaneni Dep. p. 38, ll. 1-9; p. 87, l. 14 - p. 88, l. 15; p. 90, ll. 16-19).

Other testimony in the record supports the trial court's decision to charge the mortality tables. Mr. Breland testified that he was experiencing pain and limitations in movement of his neck after the wreck that were significantly different from and were increased from the pain and limitations he experienced before the wreck. (Tr. p. 354, ll. 8-10; p. 356, l. 4 - p. 357, l. 2). Mr. Breland also testified regarding the treatment he had undergone, including surgery, and how the pain in his neck and increased limitations continued even until the date of the trial. (Tr. p. 353, l. 6 - p. 356, l. 3; p. 357, l. 3 - p. 359, l. 11; p. 360, l. 10 - p. 362, l. 13). Both parties argued about the permanency issue to the jury. (Tr. p. 480, l. 7 - p. 482, l. 15; p. 483, ll. 7-21; p. 485, l. 16 - p. 486, l. 20; p. 505, l.

16 - p. 509, l. 14; p. 515, l. 16 - p. 517, l. 15).

This evidence was sufficient to support the trial court's decision to charge the jury on causation and permanency. *See, e.g., Wilder v. Blue Ribbon Taxicab Corp.*, 396 S.C. 139, 148, 719 S.E.2d 703, 708 (Ct. App.2011) (holding plaintiff's testimony about continued pain nearly three years after the wreck was sufficient, though sparse, to support an award for future pain and suffering); *Johnston v. Aiken Auto Parts*, 311 S.C. 285, 428 S.E.2d 737 (Ct. App.1993), *cert. denied* Nov. 2, 1003 (affirming the trial judge's decision to charge the life expectancy tables based upon plaintiff's testimony that his right knee "never has gotten right" and that "nothing can be done" about his knee).

SCDOT contends that because the trial court refused to charge the jury on "future damages," the court should not have charge the life expectancy tables. (App. Br. p. 18). SCDOT has confused apples with oranges here. Future damages involve a claim regarding future lost income or future medical care. *Pearson v. Bridges*, 344 S.C. 366, 544 S.E.2d 617 (2001) (discussing various scenarios for future damages in a personal injury case). This case, however, involves the issue of permanency of Mr. Breland's injuries, and the continuation of his pain and suffering for the rest of his life, not a claim for future medical care or lost wages. It was for the jury to determine whether Mr. Breland experienced pain and suffering that was different than before and which would continue into the future.

The record contains sufficient evidence to support the trial court's charge on the mortality tables. This Court should affirm the trial court's discretionary ruling denying SCDOT's motion for new trial on this basis.

IV. THE TRIAL JUDGE EXERCISED APPROPRIATE DISCRETION IN EXCLUDING EVIDENCE DEFENDANT PROFFERED REGARDING PLAINTIFF'S CRIMINAL HISTORY

During his deposition, Mr. Breland was asked if he had "ever been arrested, charged with, or convicted of any crime," and Mr. Breland responded "not that I know of." (Court's Exh. 2, ll. 18-20). SCDOT produced records showing Mr. Breland had, in fact, been arrested in Nevada in 1988 and 1992 and in Seattle, Washington, in 1996. (Court's Exh. 3). The trial court refused to permit SCDOT to inquire into those convictions "on the grounds the evidence was remote and more prejudicial than probative." (Order of 1/13/14, pp. 2-3).

On appeal, SCDOT argues the trial court erred in denying SCDOT's motion in limine to permit SCDOT to question Mr. Breland about a prior old criminal conviction. SCDOT contends it should have been able to examine Mr. Breland about the fact of a conviction, not the details, because of a response Mr. Breland gave to a deposition question. This Court should affirm the trial court's discretionary ruling on this point.

To begin with, SCDOT raised this issue only by motion in limine at the commencement of the trial. The court heard argument on the issue and ruled on the motion. When Mr. Breland testified, however, SCDOT did not proffer the evidence again, nor did SCDOT seek a final ruling on the issue at trial. The issue, then, may not be preserved for this Court's review.

A ruling on a motion *in limine* is generally not considered a final order on the admissibility of evidence. *See, e.g. State v. Floyd*, 295 S.C. 518, 369 S.E.2d 842 (1988) (rulings *in limine* do not constitute final determinations on admissibility of evidence).

This is because a ruling on a motion *in limine* is subject to change based upon developments during the trial. *State v. Smith*, 383 S.C. 159, 679 S.E.2d 176 (2009). This is true even as to rulings that grant a motion *in limine*. *See South Carolina Dept. of Highways and Public Transp. v. Galbreath*, 315 S.C. 82, 83 n. 2, 431 S.E.2d 625, 627 n. 2 (Ct. App. 1993) (even where a motion *in limine* is granted, it is not the final ruling on the admissibility of the evidence; appellant must proffer the excluded evidence at trial). See also *State v. Wiles*, 383 S.C. 151, 156, 679 S.E.2d 172, 175 (2009) ("Generally, a motion in limine is not a final determination; a contemporaneous objection must be made when the evidence is introduced.").

"There is an exception to this general rule when a ruling on the motion in limine is made 'immediately prior to the introduction of the evidence in question.'" *State v. Wiles* (*quoting State v. Forrester*, 343 S.C. 637, 642, 541 S.E.2d 837, 840 (2001)). "This exception is based on the fact that when the trial court's ruling is not preliminary, but instead is clearly a final ruling, there is no need to renew the objection." *Id.* at 156–57, 679 S.E.2d at 175; *see also State v. Mueller*, 319 S.C. 266, 268–69, 460 S.E.2d 409, 410–11 (Ct. App.1995) (noting where there is no evidence between the motion and the testimony, there is no basis for the trial court to change its ruling, so the decision is a final one).

The motion in limine in this case came at the beginning of the trial. (Tr. p. 67, l. 15 - p. 71, l. 21; p. 76, l. 14 - p. 80, l. 7). Thereafter the parties made opening statements, and plaintiff called several witnesses. Mr. Breland was the sixth witness presented, and followed Dr. Mummaneni's video depositon. During cross examination, SCDOT did not

seek to admit the evidence for impeachment purposes, nor did it proffer the evidence for the record. Accordingly, the evidence does not fall within the exception described in *Wiles* and *Mueller*.

In any event, SCDOT has not demonstrated an abuse of discretion. The admission or exclusion of evidence is left to the sound discretion of the trial judge, whose decision will not be reversed on appeal absent an abuse of discretion. *State v. Brewer*, ___ S.C. ___, 768 S.E.2d 656 (2015); *Pike v. S.C. Dept. of Transp.*, 343 S.C. 224, 234, 540 S.E.2d 87, 92 (2000); *Gooding v. St. Francis Xavier Hosp.*, 326 S.C. 248, 252, 487 S.E.2d 596, 598 (1997); *Means v. Gates*, 348 S.C. 161, 166, 558 S.E.2d 921, 923 (Ct. App.2001). An abuse of discretion occurs when the ruling is based on an error of law or a factual conclusion that is without evidentiary support. *Carlyle v. Tuomey Hosp.*, 305 S.C. 187, 193, 407 S.E.2d 630, 633 (1991); *Fontaine v. Peitz*, 291 S.C. 536, 538, 354 S.E.2d 565, 566 (1987).

Furthermore, under Rule 609(a)(1), SCRE, evidence that a witness, to include a party in a civil trial, has been convicted of a crime shall be admitted subject to Rule 403, SCRE. The trial court felt that because SCDOT did not seek the information before the deposition, Mr. Breland did not have a chance to explain why he did not recall the 20-year old arrests. (Tr. p. 76, l. 14 - p. 77, l. 20). In denying SCDOT's post-verdict motions, the trial court stated it excluded the evidence because the convictions were more than 10 years old and were remote, and further the evidence was more prejudicial than probative. (Order of 1/13/14, p. 2). The court noted that SCDOT argued that because Mr. Breland "lied" in his deposition, SCDOT should be able to demonstrate Mr. Breland also lied

about the location of the wreck, the facts of the wreck, or the extent of his injuries. (Order of 1/13/14, p. 2). The trial court held:

> Given the uncertainty as to whether [Mr. Breland] 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 [SCDOT] was properly excluded. In addition, testimony from other sources – eyewitness/passenger in the wreck, fire department personnel, treating doctors – corroborated [Mr. Breland's] testimony as to the location of the wreck and the nature of [Mr. Breland's] injuries. Any probative value of admitting evidence of [Mr. Breland's] prior, remote convictions and his deposition testimony would have been greatly outweighed by its prejudicial effect. See *Otsell v. Bulduc*, 76 Conn. App. 75 (Conn. App. Ct. 2003).

(Order of 1/13/14, pp. 2-3).

SCDOT has not argued error in the trial court's Rule 403 analysis and thus it is the law of the case. An unappealed ruling is the law of the case and requires affirmance. *Dreher v. SC Dept. of Health and Envir. Control*, Op. No. 27507 (S.C. Sup. Ct. filed March 18, 2015) (Shearouse Adv. Sh. No. 11 at 15), citing *Shirley's Iron Works, Inc. v. City of Union*, 403 S.C. 560, 573, 743 S.E.2d 778, 785 (2013). Thus, should the appealing party fail to raise all of the grounds upon which a lower court's decision was based, those unappealed findings—whether correct or not—become the law of the case. *Dreher*, citing *Judy v. Martin*, 381 S.C. 455, 458, 674 S.E.2d 151, 153 (2009) ("Under the law-of-the-case doctrine, a party is precluded from relitigating ..., [*inter alia,*] matters that were [ ] not raised on appeal, but should have been....").

Furthermore, the trial court's Rule 403 analysis was within its sound discretion. "A trial judge's decision regarding the comparative probative value and prejudicial effect

of evidence should be reversed only in exceptional circumstances." *State v. Collins*, 409 S.C. 524, 534, 763 S.E.2d 22, 28 (2014). The appellate court reviews Rule 403 rulings pursuant to an abuse of discretion standard "and are obligated to give great deference to the trial court's judgment." *Id. Accord Lee v. Bunch*, 373 S.C. 654, 658, 647 S.E.2d 197, 199 (2007) (applying these rules in a civil case). Even if the appellate court might have reached a different result, this alone is not sufficient to reverse the trial judge's decision under Rule 403. *Hunter v. Staples*, 335 S.C. 93, 102, 515 S.E.2d 261, 266 (Ct. App. 1999). Rule 609(a)(1) gives broad discretion to the trial judge and his or her ruling should not be disturbed absent an abuse of discretion. *Hunter v. Staples*.

SCDOT contends that the evidence was admissible under Rule 608(b)(1), SCRE, as impeachment evidence. (App. Br. pp. 19, 21). SCDOT did not argue the applicability of Rule 608(b)(1) before the trial court, nor did the trial court rule upon the issue.

A losing party must present its issues and arguments to the trial court and obtain a ruling before an appellate court will review those issues and arguments. *I'On, L.L.C. v. Town of Mt. Pleasant*, 338 S.C. 406, 441–42, 526 S.E.2d 716, 724 (2000). Even if the losing party has raised an issue in the lower court, but the court fails to rule upon it, the party must file a Rule 59(e), SCRCP, motion to alter or amend the judgment in order to preserve the issue for appellate review. *Id.* Imposing this preservation requirement on the appellant is meant to enable the lower court to rule properly after it has considered all relevant facts, law, and arguments. *Id.*

Even if the issue is preserved, this Court should affirm. Whether to permit cross-examination of a witness pursuant to Rule 608(b)(1) is within a trial court's sound

discretion. *State v. Burgess*, 408 S.C. 421, 759 S.E.2d 407 (2014); *Wilder v. State*, 388 S.C. 282, 696 S.E.2d 587 (2010). The Rule itself provides:

> **(b) Specific Instances of Conduct**. Specific instances of the conduct of a witness, for the purpose of attacking or supporting the witness' credibility, other than conviction of crime as provided in Rule 609, may not be proved by extrinsic evidence. They may, however, *in the discretion of the court*, if probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness (1) concerning the witness' character for truthfulness or untruthfulness, or (2) concerning the character for truthfulness or untruthfulness of another witness as to which character the witness being cross-examined has testified.

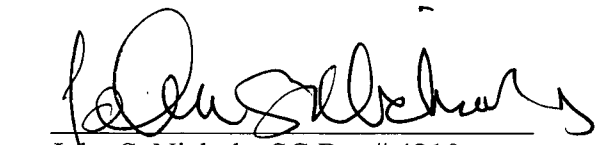
(Emphasis added). Therefore, even if SCDOT has argued the evidence was admissible under Rule 608(b)(1), and even if the trial court had addressed that argument and excluded the evidence under Rule 608(b)(1), that decision was "in the discretion of the court."

Accordingly, this Court should affirm the trial court's denial of SCDOT's motion for a new trial on this ground.

CONCLUSION

For the reasons stated this Court should affirm the trial court's denial of SCDOT's post-verdict motions.

Respectfully submitted,



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April 21, 2015

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM ORANGEBURG COUNTY
Court of Common Pleas

Edgar W. Dickson, Circuit Court Judge

Case No. 2011-CP-38-1397

William Breland, ... Respondent,

v.

South Carolina Department of Transportation, ... Appellant.

PROOF OF SERVICE

The undersigned hereby certifies that on the date indicated below she served counsel for the Appellant with a copy of the *Initial Brief of Respondent and Designation of Matter to be Included in the Record on Appeal* by mailing copies of the same by United States Mail with first class postage prepaid to the following address:

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Bamberg, SC 29003

April 21, 2015

Erin Bridges
BLUESTEIN, NICHOLS,
THOMPSON & DELGADO, LLC

BLUESTEIN · NICHOLS · THOMPSON · DELGADO LLC
ATTORNEYS AT LAW

April 21, 2015

VIA HAND DELIVERY
Honorable Jenny Kitchings
Clerk of Court
South Carolina Court of Appeals
1220 Senate Street
Columbia, South Carolina 29201

RE: William Breland v. South Carolina Department of Transportation
Case Tracking No.: 2014-000168

Dear Ms. Kitchings:

Please find enclosed for filing the original and one (1) copy of the *Initial Brief of Respondent* and *Designation of Matter to be Included in the Record on Appeal* in regards to this case. I have also enclosed a proof of service of this document on counsel for the Appellant. Please return the additional filed copies to me via our courier.

Thank you for your attention to this matter. If you need any additional information, please do not hesitate to contact me.

Sincerely,

Erin Bridges
Paralegal to John S. Nichols
BLUESTEIN, NICHOLS, THOMPSON & DELGADO, LLC

/emb
Enclosures
cc: J. Christopher Wilson, Esquire
Richard B. Ness, Esquire
Alison D. Hood, Esquire
Norma Anne Turner Jett, Esquire
Adam C. Ness, Esquire