IN 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 Number 2011-CP-38-01379
Appellate Case Number: 2014-000168

William Breland, Respondent

v.

South Carolina Department of Transportation, Appellant.

APPELLANT'S INITIAL REPLY BRIEF

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STATEMENT OF ISSUES

I. Did the trial Court err is admitting Google Street View images for substantive purposes as opposed to purely demonstrative purposes?

II. Is Appellant SCDOT charged with constructive notice of any and all potential hazards, on or off their right-of-way, if those hazards have been captured by Google Street View?

III. Is a self-described personal physical injury a future damage such that presentation to the jury of the mortality tables is appropriate?

IV. Did Appellant preserve the question of admissibility of prior criminal convictions for purposes of impeachment?

ARGUMENT

I: Respondent's Use of Google Street View Photos for Substantive Purposes Violates Rule 901, SCRE

At trial, Appellant argued against the admission of still Google Street View images of a dead or dying tree not within Appellant's right-of-way, offered by Respondent as images of the tree at fault in the collision, which is the subject of this case. During its case-in-chief, Appellant presented the jury with series of images amounting to a "drive-through," also taken from Google Street View for demonstrative purposes. Respondent asserts Appellant waived any opposition to the still photos by utilizing the same technology. Respondent fails to grasp the critical distinction between evidence offered for demonstrative purposes versus substantive purposes, specifically related to Google Street View images.

As described in Appellant's Brief, Google Street View photos are taken during a process of simultaneous image collection, then stitched together to create a seamless effect, whereby one feels as if they were traveling through a roadway or neighborhood. At trial, Appellant showed the jury the Google Street View "footage" to provide them with a visual of the area and some context for the testimony they were hearing regarding the roadway. This purely demonstrative purpose is consistent with the uses described in the cases cited by Respondent in his Initial Brief. *See Pahls v. Thomas,* 718 F.3d 1210, 1216 n. 1 (10th Cir. 2013)(Court may take judicial notice of a Google generated map and satellite image for purposes of providing geographical context and other "facts which are not controversial"); *U. S.*

v. Perea-Ray, 680 F.3d 1179, 1182 n. 1 (9th Cir. 2012)(Court may take judicial notice of a general location as described on a Google map and satellite image).[1] Appellant offered the Google Street View "drive-through" for demonstrative purposes only, to demonstrate undisputed facts, specifically with regard to the size and shape of the roadway and the environment surrounding Highway 321.

Respondent, however, offered a still frame image taken from Google Street View for substantive purposes, specifically as the sole piece of evidence upon which to prove constructive notice on the part of SCDOT. Respondent utilized a tool on Google Street View to manipulate the "drive-through" as if an individual stopped in the middle of the roadway, turned at a ninety degree angle, and craned their neck at an odd angle to look high into the tree line and observe the tops of the foliage lining Highway 321. Appellant concedes that its inspections of the thousands of miles of roadway in South Carolina do not consist of such inspection, but rather mirror the street-level "drive-through" view generated by the Google Street View process. It is significant that Respondent's own experts conceded that the dead or dying tree identified as the subject tree would have been obscured from those traveling the roadway by adjacent sweet gum trees, and would have been most visible to an individual assuming the unnatural posture of the Google Street View image: "[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."

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[1] *See also Carter v. National Railroad Passenger Corporation,* 2013 WL 3300495, Not reported, Case Number C-13-00809-JCS (US Dist. Ct., ND California, 2013) (Court may take judicial notice of a Google Earth photo for purposes of measuring distance, when the accuracy of the Google image is not in dispute and comports with other evidence of distance offered).

Transcript of Trial, Page 286, lines 2—4. While deciduous trees lose their leaves in fall and winter, the dead or dying tree was not simply standing alone, but was tucked away, several feet off the right-of-way, on private lands, in an area that was not readily observable by the normal means of inspection. Appellant's expert Mark Arena further conceded to using the Google Street View image to identify where the accident took place, basing his conclusions on a void in the tree line, also only observable from the odd position assumed by the Google Street View photo. *Transcript of Trial, Page 271, lines 5—8.*

Appellant does not require the development of any new or onerous application of Rule 901, SCRE. Rather, Appellant asserts the trial court erred in failing to require some testimony that the image, used to substantively prove Respondent's case, is a fair and accurate representation of what Respondent purports it to be. Respondent could not provide the trial court with testimony that the image is consistent with what an average traveler, or SCDOT employee, would observe from their vehicle while traveling down Highway 321, as the image is generated from a singular perspective not available to any person traveling the roadway in a normal vehicle. The image is reserved for those manipulating a piece of software, seeking to generate a certain angle of a certain tree at a certain time of year. *See Transcript of Trial, Page 57, lines 8—24.* Not a single witness testified the still selected frame from Google Street View accurately depicted the scene or tree at or about the time of the incident. Appellant asserts that this unique image, offered for substantive purposes, was improperly admitted without authentication, as the trial court did not require any testimony regarding the manufacturing of the photo.

The trial court did not inquire as to who took the photo, nor what means were used to capture the image, when the photo was taken, nor when the particular image was downloaded and generated. *See U. S. v. Gorny,* 2014 WL 4262178, August 27, 2014, Criminal No. 13-70, U. S. District Court W.D. Pennsylvania. (Insufficient foundation laid for admission of Google Street View photos without testimony regarding who took the Google photo or justification of the time/date stamp on the image).

Appellant does not argue that Respondent is required to produce a Google executive or engineer, but rather, in this case, where constructive notice is necessarily at issue, Respondent must produce a witness to confirm that SCDOT "in the exercise of reasonable care, should have known" of the hazard. Appellant asserts that some witness with knowledge of the process and knowledge of the steps taken to manipulate the program to generate the image must authenticate the image prior to admissibility, and provide the jury with the information it needs to evaluate the image, especially when the image is offered as evidence in a substantive manner. Couple the lack of proper authentication with the testimony of the landowner and adjacent landowner who never saw the tree at issue, and it becomes evidence that SCDOT in fact did not and could not have constructive notice of the tree. *See Transcript of Testimony, September 3, 2013, Page 413, line 7—Page 417, line 22; Deposition of Rosa Sharpe, Page 10, line 9—Page 12, line 20.*

The trial court failed to properly evaluate the Google Street View image and improperly balanced the testimony offered to authenticate the image by Respondent. This failure amounts to an abuse of discretion for which Appellant is entitled to a new trial.

II: The South Carolina Tort Claims Act Requires More than Retrospective Evidence of an Unobservable and Hidden Hazard's Existence Prior to an Accident to Establish Constructive Notice

In Respondent's brief, over five pages are dedicated to outlining the testimony of David Brandyburg, SCDOT Resident Maintenance Engineer, who provided copious evidence that SCDOT had been in the area, doing routine maintenance and clearing the roadway of hazards, as required in the SCDOT manuals and procedures. It is not the case that Appellant neglected this roadway or failed to adhere to its internal policies and procedures. Respondent did not present any expert testimony that SCDOT's own inspection policies were defective, or that SCDOT was negligent in performing its inspections and maintenance of the relevant portions of Highway 321. Respondent asserts the fact that SCDOT was actively maintaining the roadway, as evidence from which constructive notice can be gleaned. However, Respondent's case is entirely premised on a misunderstanding of the term "constructive notice" and an expansive and improper view of what SCDOT "should have known" prior to the collision in this case.

Constructive notice can certainly be demonstrated by circumstantial evidence. *See Strother v. Lexington Cnty. Recreation Comm'n,* 332 S.C. 54, 65, 504 S.E.2d 117, 123 (1998)(Notice implied through circumstantial evidence is called "constructive" notice.). However, Appellant asserts that constructive notice cannot be proven after the fact by retrospective evidence of a hidden hazard that was undiscoverable by the normal means of inspection.

Appellant SCDOT is charged with maintaining roadways across the state, which includes an unending process of identifying and removing dead or dying trees from both the SCDOT right-of-way and private property approaching the right-of-way. If Respondent's position is adopted, SCDOT is presently on constructive notice of every dead or dying tree on every roadway in the entire state if an image of the dead or dying tree can be identified on Google Street View or Google Earth, even after the tree falls and causes injury. This essentially makes SCDOT the guarantor of every dead or dying tree in the State. Constructive notice simply does not mean strict liability for SCDOT if a tree falls and injuries someone. Constructive notice must be proven and to do so Respondent must have provided some admissible evidence that others had seen the tree or that the tree should have been seen by an inspection. Appellant reasserts its argument that the admission of the manipulated still frame Google Street View was improper.

In Respondent's view, the fact that a tree may die over a period of years creates a presumption that SCDOT has sufficient time to ferret out these hidden hazards and remove them, regardless of the circumstances that may operate to conceal the hazard. The standard, however, is not simply a measure of time, but whether or not, "a condition has existed for such a period of time that [a governmental entity], in the use of reasonable care should have discovered the condition." *Major v. City of Hartsville*, 410 S.C. 1, 3-4, 763 S.E.2d 348, 350 (2014)

It is insufficient to establish a length of time in which the hazard might have existed, but rather, Respondent must demonstrate that SCDOT "should have" discovered the condition and failed to do so. In this case, SCDOT did not own or

maintain the subject tree. SCDOT did not discover the tree through the normal means of inspection, such inspections having been thoroughly completed as outlined by Respondent's own brief. While SCDOT is aware that trees tend to die and decay regularly, SCDOT cannot foresee which trees are fated to fall, and therefore is not in any position to anticipate or predict which trees require removal at any given time. *See Fickling v. City of Charleston,* 372 S.C. 597, 610, 643 S.E.2d 110, 117 (Ct. App. 2007)(Factors to consider in evaluating constructive notice include observation by governmental entity employees, length of time hazard exposed, and responsibility for maintenance.). *See also Hawks v. City of Westmoreland,* 960 S.W.2d 10 (Tenn. 1997)(Ownership of the instrumentality and a duty to maintain are factors to consider in evaluating constructive notice.).

Unreported, unobservable, obscured, and unnoticed they may be, Respondent's view makes SCDOT the guarantor of those latent, unseen hazards. While constructive notice may be proven by circumstantial evidence including ownership, a failure of inspection, or forseeability, none of these circumstances can be proven here.

The South Carolina Tort Claims Act contains an exception for instances where a state entity was not, despite the exercise of reasonable care, on notice of a hazard. §15-78-60(15), *S.C. Code of Laws.* The Tort Claims Act is to be liberally construed in favor of immunity. *See* §15-78-20(f), *S.C. Code of Laws.* If the exception is liberally construed in favor of immunity, constructive notice cannot be expanded to apply in this case, as a matter of law.

Respondent confuses Appellant's argument in favor of discoverability, as opposed to a hidden and undiscoverable hazard, with a standard of actual notice. While perhaps a subtle distinction, Appellant asserts that Respondent must prove the tree could have been and should have been discovered by reasonable and customary inspection. In other words, Respondent must demonstrate an actual reason SCDOT "should have known" of the hazard. In this case, there is no discernable reason, apart from the disputed Google Street View photo, that SCDOT *could* have known, much less *should* have known, of the tree's death and decay.

If the Court adopts Respondent's position as the standard of care, then SCDOT must employ Google Street View in its regular inspections and have human eyes review everything the Google cameras and satellites can capture from their perch. If SCDOT "should" have knowledge of all things observed by Google Street View or Google Earth, then constructive notice as a concept is meaningless, and the Tort Claims Act defense is completely ineffective in this context. As the legislature has directed the Court to construe this exception liberally in favor or immunity, such a result would be improper.

III: Expert Testimony is Required to Prove Injury Permanency, as a Prospective Injury and an Element of Future Damages

Respondent asserts that future pain and suffering are not an element of future damages, claiming future damages only include future medical care or future lost wages. Patently, a personal injury case that makes a claim for future pain and suffering requires a prospective evaluation of a plaintiff's future. Appellant is not

arguing semantics, but Appellant takes issue with the implications to the jury the publication of the mortality tables necessarily makes.

Appellant reasserts its argument that future pain and suffering in this case were likely linked to Respondent's underlying degenerative spine condition. Appellant further reiterates that expert testimony regarding injury permanency, causation, and the likelihood of ongoing pain and suffering require expert testimony in this case, where an underlying injury may have been accelerated by the car wreck which is the subject of this action. *See Haltiwanger v. Barr,* 258 S.C. 27, 186 S.E.2d 819 (1972) (Expert testimony of injury permanency is sufficient to warrant future damages for pain and suffering.).

"In a personal injury action, the plaintiff must recover for all injuries, past and prospective, which arose and will arise from the defendant's tortious activity. Thus, recovery must be had for future pain and suffering, and for the reasonable value of medical services and impaired earning capacity, to the extent that these injuries are reasonably certain to result in the future from the injury complained of." 22 Am.Jur. Damages § 27. In this case, Respondent sought and was awarded future damages for future pain and suffering. Respondent's own testimony was insufficient as a matter of law to amount to a "reasonable certainty" as to either causation or permanency. Respondent's treating physician likewise did not testify future pain was more likely than not to be related to injuries suffered in this incident. The physician could not differentiate between pain caused by natural processes versus the injury suffered here. *See Deposition of Dr. Reddiah Babu*

Mummaneni, Page 90, line 1—Page 92, line 17. For this reason the trial court committed reversible error in permitting the jury to consider the mortality tables.

IV: Appellant Properly Provided the Trial Court Documentary Evidence of Respondent's Criminal Convictions and Properly Filed the Appropriate Post-trial Motions Asserting an Abuse of Discretion by the Trial Judge

Appellant timely filed and served a Notice pursuant to Rule 609(a) SCRE to notify Respondent of its intention to use prior criminal convictions for purposes of impeachment only prior to trial. *See Notice of Intent to Impeach, Criminal Records, with attached Exhibits.* At trial, Appellant provided the trial court with copies of the relevant conviction records for review during the hearing on its Motions in Limine, which including a pre-trial request for admission of the criminal convictions, specifically limiting the use of the evidence to Respondent's propensity for truthfulness. *See Motion in Limine; See also Transcript of Trial Testimony, Page 67, line 15—Page 71, line 21.* After trial, Appellant again raised the issue of prior criminal convictions, as evidence of a lack of truthfulness in the context of the case as a whole, as Respondent provided the only substantial testimony of injury permanency, pain and suffering, and the circumstances of the accident at issue. *See Motion for Judgment JNOV or on the Alternative for a New Trial; See also Transcript of Testimony, October 1, 2013, Page 5, line 3—Page 19, line 2.* Again, on the Notice of Appeal, Appellant raised the Rule 609 inquiry, and stated the trial court failed to properly balance the issues, giving more weight to the potential for prejudice than to the relevance of Respondent's propensity for dishonesty. *See Notice of Appeal.*

Respondent takes the position that Appellant failed to proffer the evidence. This is incorrect. Appellant provided the court with the evidence, which the court reviewed, prior to granting its verbal ruling denying the admission of the criminal convictions. *See Transcript of Trial Testimony, September 3, 2013, Page 68, line 18—line 24.* The trial court having reviewed the proffered the documentary evidence and having received the court's ruling on inadmissibility, Appellant had no further obligation to re-offer the evidence at a later stage of the trial. The case law cited by Respondent in his brief is misleading. Those criminal law cases require an unsuccessful party, having moved in limine to *exclude* certain evidence, to repeatedly object to its admission at each stage of the trial. In the event a party's motion to exclude is successful, the nonmoving party is similarly charged with the requirement to continue to attempt to admit the evidence, if circumstances warrant a reevaluation of the proffered evidence.

In this case, Appellant's Rule 609 pre-trial motion was not a motion to exclude, but rather a motion to seek permission to utilize the prior criminal convictions affirmatively. As there was no additional evidence to consider as the trial developed, there was no reason to re-offer the evidence for additional evaluation, especially in light of the court's ruling. Had Appellant attempted to raise the prior criminal convictions at a later time, Appellant may have created a mistrial situation. The pre-trial ruling was the final ruling, and the evidence was not admitted. In this instance, Appellant's motion was not a motion to exclude, contingent on the development of the trial, but rather a motion to admit, pursuant to Rule 609. No additional review was necessary and would have been contrary to the

court's pre-trial ruling on the documentary evidence, which was fully reviewed prior to the court's ruling.

Respondent argues that Appellant failed to raise the appropriate standard, by failing to specifically state the applicability of Rule 403 and the abuse of discretion standard. Rule 609(a), raised by Appellant at every stage of the proceeding, incorporates Rule 403 by reference. Appellant argues the trial judge failed to give proper weight to the relevance of the misrepresentation regarding the criminal convictions. While Appellant did not raise Rule 608(b)(1) SCRE below, Appellant contends the factors offered in a Rule 608(b) analysis are the same factors weighed by the Court in the Rule 609 context, as these rules center on the admissibility of evidence regarding the propensity for truthfulness. As early as the pre-trial notice, Appellant sought to admit the evidence solely for impeachment purposes.

Appellant takes the position the trial court failed to balance the proper considerations below, ignoring the weight necessarily placed on Respondent's own testimony, given the slight evidence presented at trial. This prejudicial failure to properly analyze the misstatements regarding criminal convictions amount to reversible error.

CONCLUSION

For the foregoing reasons, Appellant is entitled to judgment as a matter of law or in the alternative, a new trial. The decisions of the trial court should be reversed and a new trial granted.

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May 29, 2015

IN THE STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

APPEAL FROM ORANGEBURG COUNTY

Honorable Edgar Warren Dickson, Chief Administrative Judge, Presiding

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CASE NO.: 2011-CP-38-1379

APPELLATE CASE NO.: 2014-000168

William Breland,

Respondent,

-vs-

South Carolina Department of Transportation,

Appellant.

PROOF OF SERVICE

I certify that I have served Appellant's Initial Reply Brief and Appellant's Supplemental Designation of Matter to be Included in Record on Appeal on counsel for Respondent, William Breland, and all other counsel of record, by depositing a copy of it in the United States Mail, postage prepaid, on May 29, 2015, addressed to the persons below-listed:

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Respectfully Submitted,

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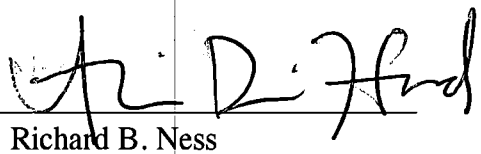
BY: 

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Re: William Breland v. South Carolina Department of Transportation
Appellate Case No.: 2014-000168

Dear Ms. Kitchings:

Please find enclosed for filing the original and one copy of Appellant's Initial Reply Brief, as well as Appellant's Supplemental Designation of Matter to be Included in Record on Appeal in reference to the above matter. I have also enclosed a Proof of Service of these document on counsel for the Respondent. Please return the additional filed copy of each to me in the self-addressed, stamped envelope I have enclosed.

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

Sincerely,

Alison D. Hood

ADH/dlh

Enclosures

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