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

William Breland, Respondent,

v.

South Carolina Department of Transportation, Appellant.

RECORD ON APPEAL
Volume I of II

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STATE OF SOUTH CAROLINA)
COUNTY OF ORANGEBURG)

IN THE COURT OF COMMON PLEAS
CIVIL ACTION NO.: 2011-CP-38-1379

William Breland,)

PLAINTIFF,)

-vs-)

South Carolina Department of
Transportation,)

DEFENDANT.)

ORDER

ATTEST: TRUE COPY

Wingy B. Clark

CLERK OF COURT
ORANGEBURG COUNTY, SC

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ORANGEBURG COUNTY, SC

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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 of 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.

1/7/13

**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

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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.

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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. Mummanei 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

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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.

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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. Suárez-Irizarry, 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

Orangeburg, SC


Honorable Edgar W. Dickson
First Judicial Circuit

7/7/88

STATE OF SOUTH CAROLINA
COUNTY OF ORANGEBURG

) IN THE COURT OF COMMON PLEAS
) FOR THE FIRST JUDICIAL CIRCUIT
) C/A NO.: 2011-CP-38-1379

WILLIAM BRELAND,

Plaintiff,

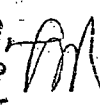
v.

SOUTH CAROLINA
DEPARTMENT OF TRANSPORTATION
Defendant.

ORDER
DENYING MOTION FOR
SUMMARY JUDGMENT

FILED FOR
WINNIE A. B. CLARK
CLERK OF COURT
ORANGEBURG, SC

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This matter came before the Court for hearing on August 9, 2013 upon Defendant SCDOT's Motion for Summary Judgment. Present at the hearing were J. Christopher Wilson, attorney for Plaintiff, and Richard B. Ness, attorney for Defendant SCDOT.

Plaintiff was injured in a single-car wreck on January 8, 2010 when he hit a tree that had fallen onto US Highway 321 in Orangeburg County, South Carolina. Among other allegations, Plaintiff claims in his Summons and Complaint that Defendant SCDOT was negligent in failing to properly inspect for, locate and/or remove a tree located on or near the highway right-of-way that was dead, diseased or decayed, thus creating a hazard to the roadway.

Summary Judgment is only appropriate when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Rule 56, SCRCP; Law v. SC Dept. Corrections, 368 SC 424, 629 SE2d 642 (SC 2006)(rehearing denied). Of course, when considering Summary Judgment, the Court must view the evidence submitted in the light most favorable to the non-moving party. Knight v. Austin, 396 SC 518, 722 SE2d 802 (SC 2012).

In this matter, after considering the affidavits, arguments, depositions, discovery responses, and other materials submitted to the Court by the parties, a genuine issue of material fact exists as to whether SCDOT had constructive notice of the tree and its condition and the

ATTEST: TRUE COPY

Winnie B. Clark
CLERK OF COURT
ORANGEBURG COUNTY, SC

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hazard caused by its condition. This is true even considering that the Court is required to liberally construe the SC Tort Claims Act as a whole, where possible, to limit the liability of the State. SC Code Section 15-28-20-(f).

By denying the Motion for Summary Judgment, the Court is not subjecting SCDOT to strict liability for merely failing to keep its roadways free from debris or hazards, but the Court is simply finding that a genuine issue of material fact exists as to whether SCDOT had constructive notice of this tree and the hazard it caused and therefore failed to meet its duty by protecting the highway from the hazard caused by this tree. Defendant SCDOT cited SC Code Section 15-78-60(10) in its argument as excluding SCDOT for liability; however, the Court notes that this exclusion of liability is not applicable if the defect is not corrected "within a reasonable time after actual or constructive notice of the defect or condition." SC Code Section 15-78-60(10). There exists a genuine issue as to SCDOT's notice, specifically any constructive notice, of the tree and the hazardous condition that it presented. Therefore, SCDOT is not entitled to Summary Judgment. Marsh v. SCDOT, 298 SC 420, 422, 380 SE2d 867 (Ct. App. 1989).

For the foregoing reasons, Defendant SCDOT's Motion for Summary Judgment is denied.


Honorable Edgar Dickson
Circuit Court Judge

Orangery, SC
August 30, 2013

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STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
COUNTY OF ORANGEBURG) FOR THE FIRST JUDICIAL CIRCUIT
C/A NO.: 2011-CP-38-_____

WILLIAM BRELAND,

Plaintiff,

v.

SCANA CORPORATION,
SCANA CORPORATION d/b/a SOUTH
CAROLINA ELECTRIC & GAS COMPANY,
SOUTH CAROLINA ELECTRIC & GAS
COMPANY, SOUTH CAROLINA
DEPARTMENT OF TRANSPORTATION
AND NANCY BOLIN.

Defendants.

SUMMONS
(Jury Trial Demanded)

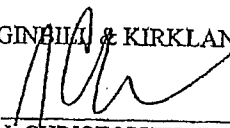
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MINNIE L. CLARK
CLERK OF COURT
ORANGEBURG, SC

2011 NOV 28 AM 10:41

TO THE DEFENDANT NAMED ABOVE:

YOU ARE HEREBY SUMMONED and required to answer the Complaint in this action, a copy of which is hereby served upon you, and to serve a copy of your Answer to the Complaint on Plaintiff or his attorney, J. Christopher Wilson, at his office, P.O. Box 1150, 3056 Railroad Avenue, Bamberg, SC 29003, within thirty (30) days after service hereof, exclusive of the day of service; and if you fail to answer the Complaint in said time, Plaintiff will apply to the Court for the relief requested in the Complaint.

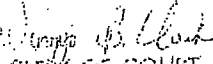
WILSON, LUGINBILL & KIRKLAND, LLC


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ATTORNEY FOR PLAINTIFF

Bamberg, SC

November 28, 2011

TRUE COPY


CLERK OF COURT

ORANGEBURG COUNTY, SC

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
COUNTY OF ORANGEBURG) FOR THE FIRST JUDICIAL CIRCUIT
C/A NO.: 2011-CP-38-_____

WILLIAM BRELAND,

Plaintiff,

vs.

SCANA CORPORATION,
SCANA CORPORATION d/b/a SOUTH
CAROLINA ELECTRIC & GAS COMPANY,
SOUTH CAROLINA ELECTRIC & GAS
COMPANY, SOUTH CAROLINA
DEPARTMENT OF TRANSPORTATION
AND NANCY BOLIN.

Defendants.

COMPLAINT
(Jury Trial Demanded)

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ORANGEBURG, SC

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THE PLAINTIFF COMPLAINING OF THE DEFENDANTS ALLEGES:

1. Plaintiff is a citizen and resident of Bamberg County, State of South Carolina.
2. SCANA Corporation, SCANA Corporation d/b/a South Carolina Electric & Gas Company and South Carolina Electric & Gas Company are corporations organized and existing under the laws of the state of South Carolina and are responsible for the safe inspection, upkeep and maintenance of its property and right-of-ways in Orangeburg County, South Carolina.
3. The South Carolina Department of Transportation is an agency of the state of South Carolina and is responsible for inspecting, maintaining and repairing right-of-ways and ditches in Orangeburg County, South Carolina and is subject to this lawsuit pursuant to §15-78-10 et. seq. of the South Carolina Code of Laws (1976).
4. Upon information and belief, Defendant Nancy Bolin is a resident and citizen of Orangeburg County, State of South Carolina.

ATTEST: TRUE COPY
Winnie B. Clark
CLERK OF COURT
ORANGEBURG COUNTY, SC

5. At all times herein mentioned, Defendants were acting either individually or through its agents, servants and/or employees who were acting within the course and scope of their employment.
6. On or about January 8, 2010, Plaintiff was traveling in Orangeburg County on the section of road known as Savannah Highway (U.S. Highway 321). Suddenly and without warning, the vehicle he was operating struck a dead tree that had fallen and covered the highway upon which he was traveling, causing him to be injured.
7. Defendants are either owners of property or property interests in the area where the tree that fell across the roadway was located before and after its fall.
8. Defendants, individually, and by and through their servants, employees and/or agents, as applicable, knew or should have known that this tree was dead and decayed, or that it had fallen and was blocking the roadway, and that it constituted a dangerous and hazardous condition but failed to take action to remedy the situation.
9. Plaintiff's injuries were due to and proximately caused by the negligent, reckless and willful conduct of the Defendants SCANA Corporation and SCANA Corporation d/b/a South Carolina Electric & Gas Company and South Carolina Electric & Gas Company by and through their agents, servants and employees in the following particulars, to wit:
 - (a) In failing to inspect, repair and/or maintain its rights of way on U.S. Highway 321, a/k/a Savannah Highway in a reasonably safe manner or condition;
 - (b) In failing to inspect its right of way along U.S. Highway 321, a/k/a Savannah Highway to find and remove trees which were obviously decayed and which were reasonably likely to fall, creating a potential danger to the motoring public, including plaintiff;
 - (c) In creating, maintaining or allowing a hazardous, dangerous and unsafe condition to exist;

- (d) In failing to warn the public of the dangerous condition in the area where the dead tree fell upon the highway;
- (e) In failing to take proper precautions to insure that the roadway was reasonably safe;
- (f) In such other particulars as the evidence may establish.

10. Plaintiff's injuries were due to and proximately caused by the negligent, reckless and willful conduct of the Defendant, South Carolina Department of Transportation by and through their agents, servants and employees in the following particulars, to wit:

- (g) In failing to inspect, repair and/or maintain its rights of way on U.S. Highway 321, a/k/a Savannah Highway in a reasonably safe manner or condition;
- (h) In failing to inspect its right of way along U.S. Highway 321, a/k/a Savannah Highway to find and remove trees which were obviously decayed and which were reasonably likely to fall, creating a potential danger to the motoring public, including plaintiff;
- (i) In creating, maintaining or allowing a hazardous, dangerous and unsafe condition to exist;
- (j) In failing to warn the public of the dangerous condition in the area where the dead tree fell upon the highway;
- (k) In failing to take proper precautions to insure that the roadway was reasonably safe;
- (l) In such other particulars as the evidence may establish.

11. Plaintiff's injuries were due to and proximately caused by the negligent, reckless and willful conduct of the Defendant Nancy Bolin in the following particulars to wit:

- a) In failing to inspect their premises to discover risks posed by trees on their property to the traveling public, including plaintiff;
- b) In failing to warn the traveling public, including plaintiff, of the risk or condition;

- c) In failing to remedy a risk or condition on their property which they knew or should have known posed a threat to the traveling public, including plaintiff;
- d) In maintaining a hazardous condition on their property which they knew or should have known posed a threat to the traveling public, including plaintiff;

12. By reason and in consequence of the aforesaid negligent, reckless and willful conduct of the Defendants, either to the exclusion of each other or in combination with each other, the Plaintiff:

- a. suffered serious personal injuries for which he incurred past and future medical bills;
- b. has suffered past, present, and future physical pain, suffering, and mental anguish;
- c. has suffered a past, present and future loss in the enjoyment of life;
- d. has suffered other damages as allowable by law.

Wherefore, having fully complained of these Defendants, Plaintiff prays this Court enter judgment for actual damages, and punitive damages, as allowable by law, in an amount to be determined by the trier of fact, plus the costs and disbursements of this action.

WILSON, LUGINBILL & KIRKLAND, LLC

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(803) 245-0037 Fax
ATTORNEY FOR PLAINTIFF

November 28, 2011
Bamberg, South Carolina

STATE OF SOUTH CAROLINA

COUNTY OF ORANGEBURG

William Breland,

Plaintiff,

-vs-

SCANA Corporation, SCANA Corporation
d/b/a South Carolina Electric & Gas
Company, South Carolina Electric & Gas
Company, South Carolina Department of
Transportation, and Nancy Bolin,
Defendants.

IN THE COURT OF COMMON PLEAS

CASE NO. 2011-CP-38-1379

AMENDED
ANSWER OF DEFENDANT,
SOUTH CAROLINA DEPARTMENT
OF TRANSPORTATION

FILED FOR RECORD
WINGYIA B. CLARK
CLERK OF COURT
ORANGEBURG, SC

2012 FEB -2 PM 12:58

COMES NOW Defendant, South Carolina Department of Transportation (hereinafter "SCDOT"), by and through their Counsel, and files this Answer to Plaintiff's Complaint:

FIRST DEFENSE

1. Each paragraph not hereafter admitted, denied, or explained is denied.
- 1A. As to Paragraph 1 of the Complaint, defendant is without sufficient information upon which to form a belief and therefore denies the same.
2. Paragraph 2 does not address this defendant and therefore requires no response.
3. Defendant, SCDOT, admits only so much of Paragraph 3 as it alleges that SCDOT is an agency of the state of South Carolina and is responsible for inspecting, maintaining, and repairing highway rights-of-way and highways in the state of South Carolina. SCDOT admits it is subject to suit pursuant to § 15-78-10, et seq. of the Code of Laws of South Carolina, (1976, as amended).
4. Paragraph 4 does not address this defendant and therefore requires no response.
5. As to Paragraph 5, SCDOT lacks sufficient information upon which to form a belief on this allegation regarding other defendants and therefore denies the same and demands strict proof thereof.
6. As to Paragraph 6, SCDOT, upon information and belief, an incident occurred on U. S. Highway 321, but SCDOT lacks sufficient information upon which to form a belief as to all other allegations set forth in Paragraph 6 and therefore denies the same and demands strict proof thereof.

Wingyia B. Clark
CLERK OF COURT
ORANGEBURG COUNTY, SOUTH CAROLINA

7. As to Paragraphs 7 and 8, SCDOT lacks sufficient information upon which to form a belief and therefore denies the same and demands strict proof thereof.
8. Paragraph 9 does not address this defendant and therefore requires no response.
9. SCDOT, as to Paragraph 10, denies the allegations thereof.
10. Paragraph 11 does not address this defendant and therefore requires no response.
11. Paragraph 12 is denied.

SECOND DEFENSE

12. SCDOT affirmatively pleads that even if it is shown to be negligent (which negligence is specifically denied) the acts or omissions of third parties not within the control of SCDOT, superceded and intervened to such an extent as to negate any affect SCDOT's negligence may have had on Plaintiff.

THIRD DEFENSE

13. SCDOT affirmatively pleads that if Plaintiff sustained any injuries or damages as set forth in the Complaint, the same were due to the willful, wanton, reckless, careless and negligent acts and conduct of Plaintiff in the operation of his said automobile, which combined with, concurred with and exceeded any willful, wanton, reckless or negligent acts and conduct on the part of Defendant, which are specifically and emphatically denied, to bring about the said injuries and damages, if any, as the proximate cause thereof and without which the same would not have occurred and bars any recovery by Plaintiff. That if Defendant was equally negligent as Plaintiff, which is specifically and emphatically denied, the amount of recovery of damages, if any must be reduced in proportion to the amount of Plaintiff's negligence.

FOURTH DEFENSE

14. SCDOT affirmatively pleads that pursuant to S.C. Code Ann. § 15-78-60(5), as a governmental entity it is not liable for the exercise of discretion or judgment of an employee or the failure to perform any act or service in the discretion or judgment of the entity or employee.

FIFTH DEFENSE

15. SCDOT affirmatively pleads any defense available under the South Carolina Tort Claims Act, S.C. Code Ann. §§ 15-78-10 et seq., not specifically plead herein.

SIXTH DEFENSE

16. SCDOT affirmatively pleads that punitive damages are not available against SCDOT as a governmental agency and entity of the State.

SEVENTH DEFENSE

17. Plaintiff has failed to join indispensable party-defendants whose absence will subject this defendant to a substantial risk of inconsistent obligations under the laws of South Carolina.

EIGHTH DEFENSE

18. SCDOT affirmatively pleads that pursuant to S.C. Code Ann. § 15-78-100(c), if liability is rendered against one or more Defendants including SCDOT (whose liability is specifically denied), that the proportion of liability be set out in a special verdict delineating the proportion of liability for each Defendant found liable.

NINTH DEFENSE

19. SCDOT asserts that the losses and damages, if any, sustained by the plaintiff, were caused by the sole negligence of another.

TENTH DEFENSE

20. SCDOT asserts it is entitled to dismissal of this action, because the tree alleged to have fallen on the roadway at the time of plaintiff's collision, if any, was there as a result of an act of God, for which this defendant cannot be held liable.

ELEVENTH DEFENSE

21. SCDOT affirmatively pleads that any recovery obtained by Plaintiff as against SCDOT in this case is subject to the damage limits as set forth in South Carolina Tort Claims Act, S. C. Code Ann. § 15-78-10, et seq.

TWELFTH DEFENSE

22. SCDOT affirmatively pleads that pursuant to § 15-78-60(8) a governmental entity is not liable for temporary or natural conditions on any public way due to weather conditions.

THIRTEENTH DEFENSE

23. SCDOT affirmatively pleads that pursuant to § 15-78-60(10) a governmental entity is not liable for natural conditions of unimproved property of a governmental entity.

FOURTEENTH DEFENSE

24. SCDOT affirmatively pleads that pursuant to § 15-78-60(13) a governmental entity is not liable for natural conditions for failure to make an inspection or making an inadequate or negligent inspection of any property to determine whether the property contains a hazard to safety.

FIFTEENTH DEFENSE

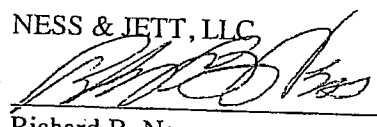
25. SCDOT affirmatively pleads that pursuant to § 15-78-60(15) a governmental entity responsible for maintaining highways is not liable for a loss arising out of a condition in, on, under, or overhanging a highway.

SIXTEENTH DEFENSE

26. SCDOT affirmatively pleads that pursuant to § 15-78-60(20) a governmental entity is not responsible for an act or omission of a person or persons not employed by SCDOT, including, but not limited to, the plaintiff, other defendants and property owner.

WHEREFORE, having fully answered the Complaint herein, the Defendant prays that same be dismissed with prejudice

January 31, 2012

By: 

NESS & JETT, LLC

Richard B. Ness

Norma A. T. Jett

Post Office Box 909

Bamberg, SC 29003

(803)245-5178

Attorney for Defendant, SCDOT

STATE OF SOUTH CAROLINA)

COUNTY OF ORANGEBURG)

William Breland,)

Plaintiff,)

v.)

South Carolina Department of
Transportation, and Nancy Bolin,)

Defendant.)

) IN THE COURT OF COMMON PLEAS

) NOTICE OF MOTION AND MOTION
) FOR SUMMARY JUDGMENT

) Case Number 2011-CP-38-1379

FILED FOR RECORD
CLERK OF COURT
ORANGEBURG, SC

2013 JUN 25 PM 4:12

TO: J. Christopher Wilson and Daniel W. Luginbill, Attorneys for Plaintiff:

YOU WILL PLEASE TAKE NOTICE, the defendant, will move within ten (10) days, or as soon thereafter as can be heard, for an Order granting summary judgment in this action, pursuant to SCRCP 56, on the ground that there is no genuine issue of material fact which would preclude judgment for this defendant, and this defendant is entitled to judgment as a matter of law, pursuant to §§ 15-78-60(5), (8), (10) and (15), S.C. Code of Laws, on the further following grounds:

1. Defendant had neither actual nor constructive notice of the defect which caused the Plaintiff's alleged injuries in this matter, despite having an effective and active inspection policy in place at the time of the alleged accident and using reasonable care in its implementation; and
2. Defendant is not responsible for latent defects in trees growing on private property which could not and were not discovered through reasonable inspection and the

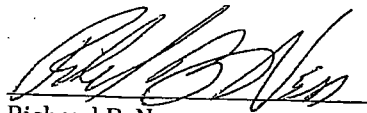
ATTEST TRUE COPY
Wm. B. Clark
CLERK OF COURT
ORANGEBURG COUNTY, SC

use of reasonable care, consistent with the inspection policy in place at the time of the alleged collision; and

3. Defendant took reasonable precautions to provide clean and passable roadways, and, at the time of the alleged collision, had in place an effective and active inspection policy, which was implemented with reasonable care.

This motion is supported by the law of South Carolina, both statutory and common law, and the deposition testimony of Dave Brandyburg, Wade Reed, and William Breland. Defendant will supplement this motion with a memorandum of law at a later date. There is no genuine issue of material fact in dispute, which would preclude judgment for Defendant.

Respectfully submitted,



Richard B. Ness
Norma A. T. Jett
Alison Dennis Hood
Ness & Jett, LLC
P.O. Box 909
Bamberg, South Carolina 29003

June 25, 2013
Bamberg, South Carolina

Wynne B. Clark
CLERK OF COURT
ORANGEBURG COUNTY, SC

STATE OF SOUTH CAROLINA)
COUNTY OF ORANGEBURG)

IN THE COURT OF COMMON PLEAS

William Breland,

Plaintiff,

v.

South Carolina Department of
Transportation,

Defendant.

MEMORANDUM OF LAW IN SUPPORT
OF SCDOT'S MOTION
FOR SUMMARY JUDGMENT

Case Number 2011-CP-38-1379.

On June 25, 2013, Defendant South Carolina Department of Transportation, hereafter "SCDOT," filed its motion for Summary Judgment pursuant to *Rule 56, SCRPC*, on the following grounds: 1.) Defendant SCDOT had neither actual nor constructive notice of the specific tree, which proximately caused the plaintiff's alleged injuries in this matter, even though SCDOT had an active and effective inspection policy in place at the time of the accident, and used reasonable care in its implementation; 2.) Defendant SCDOT is not responsible for a specific tree, which could not and was not discoverable through reasonable inspection and the use of reasonable care, consistent with SCDOT's inspection policy at the time of the alleged incident; and 3.) Defendant SCDOT took reasonable precautions to provide hazard free, unobstructed, and safe roadways, and, at the time of the alleged accident.

STATEMENT OF FACTS

Around midnight on the night of January 7, 2010, or morning of January 8, 2010, an incident occurred in rural Orangeburg County on Highway 321, south of Neeses, SC,

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Wm B. Blair

CLERK OF COURT

ORANGEBURG COUNTY, SC

and north of Norway, SC. According to testimony, Plaintiff Breland, along with passenger Wade Reed, was driving south on Highway 321 and struck a dead pine tree in the road with the plaintiff's van. The Neeses Fire Department was called out and quickly arrived on scene. The fire department's records reflect there were no injuries, and emergency personnel were cancelled. Plaintiff Breland drove his van back to his home in Denmark, SC after the accident. No accident report was filed by the South Carolina Highway Patrol. Later, Plaintiff did file his own Traffic Collision Report.

Plaintiff has failed to produce any evidence to establish with certainty the location of the fallen tree, though by all accounts it was a pine tree.

STANDARD OF REVIEW

Summary judgment is proper when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. *Rule 56(c), SCRPC; Major v. City of Hartsville*, 398 S.C. 257, 728 S.E.2d 52, 53 (Ct. App. 2012). To determine if any genuine issue of material fact exists, the evidence and all inferences that can reasonably be drawn therefrom must be viewed in the light most favorable to the nonmoving party. *Major*, 398 S.C. at 257, 728 S.E.2d at 52.

South Carolina Department of Transportation (SCDOT) is a political subdivision of the State of South Carolina, and tort actions against it are governed by the *South Carolina Tort Claims Act*, §15-78-10, *et seq.* Being in derogation of sovereign immunity, the *Act* is to be strictly construed against liability. §15-78-20(f).

ARGUMENT

I. SUMMARY JUDGMENT SHOULD BE GRANTED FOR SCDOT.

Summary judgment must be granted if there is a failure to present evidence of any notice of a specific defect or condition, which a plaintiff alleged proximately caused his injury. *Major*, 398 S.C. at 257, 728 S.E.2d at 52.

A. SCDOT is immune from liability under the South Carolina Tort Claims Act because no evidence has been presented to show SCDOT had any notice of a specific dead or dying tree that caused Plaintiff's accident.

Plaintiff has failed to produce any evidence of knowledge, either actual or constructive on the part of SCDOT, with respect to the "specific" dead or dying tree at issue. Plaintiff is required to demonstrate such knowledge, to overcome the immunity of the South Carolina Tort Claims Act. *Major*, 398 S.C. at 257, 728 S.E.2d at 54.

In *Major*, plaintiff was a student at Coker College who walked on a sidewalk and grassy area to reach her mailbox at the student union building. *Major*, 398 S.C. at 258, 738 S.E.2d at 52. One evening, the plaintiff's foot slipped into a hole causing injury. *Major*, 398 S.C. at 259, 738 S.E.2d at 53. The plaintiff brought suit against the City of Hartsville, alleging her injuries were proximately caused by the hole adjacent to the sidewalk. *Ibid*.

The plaintiff argued the City was on notice as to holes, ruts, and depressions because officials had knowledge of street corners with these continuing defects. *Major*, 398 S.C. at 260, 738 S.E.2d at 53. Relying on the South Carolina Tort Claims Act (SCTCA), the circuit court disagreed and granted summary judgment in favor of the City. The court's reasoning centered on its conclusion that the City had insufficient notice of the particular hole at issue. *Major*, 398 S.C. at 260-61, 738 S.E.2d at 53-4. The Court

of Appeals affirmed the ruling, finding the plaintiff failed to prove the governmental entity was on either actual or constructive notice of the specific defect, which proximately caused her injury. *Ibid*.

Neither Plaintiff, his passenger, SCDOT, SCHP, the owner of the adjoining land, nor anyone else had identified this specific tree as being a hazard. No reports were filed with SCDOT alerting the Department to its existence. *See Deposition of David Brandyburg, SCDOT Resident Maintenance Engineer, Orangeburg, Page 10, line 4—Page 17, line 25; Page 46, line 1—Page 57, line 9.* Land-owner Nancy Bolin and adjoining land-owner Rosa Sharpe have both given sworn statements that they did not observe or have knowledge of the dead pine tree, nor had they heard any complaints regarding any dead trees. *See Affidavits of Nancy Bolin and Rosa Sharpe, attached.* As Plaintiff has not offered any evidence to show SCDOT knew or should have known about this specific tree, SCDOT is entitled to the immunities available under the Tort Claims Act.

Pursuant to the SCTCA, "The governmental entity is not liable for a loss resulting from natural conditions of unimproved property of the governmental entity, unless the defect or condition causing a loss is not corrected by the particular governmental entity responsible for the property within a reasonable time after actual or constructive notice of the defect or condition." S.C. Code Ann. § 15-78-60(10) (2005).

In application, the legislature provides immunity for SCDOT for injuries proximately caused by a defect, such as a dead tree, on its property, unless it has either actual or constructive notice of the problem, and, despite said notice, does not address the defect promptly. As the suspected dead pine tree, which has not and cannot likely be

confirmed as the particular pine tree, stood on the private property of an individual, off of the SCDOT right-of-way, Plaintiff cannot prove constructive notice on the part of SCDOT by alleging the governmental entity "should have known," as the putative tree was not readily observable by ordinary means and located beyond the scope of typical maintenance.

SCDOT is entitled to the protections of the Tort Claims Act, and pursuant to § 15-78-60(10), S.C. Code of Laws, in conjunction with *Major*, is further entitled to judgment as a matter of law.

B. Prior Jurisprudence protects SCDOT from liability in the absence of substantial evidence of prior notice.

Considering a similar set of facts, the Court of Appeals held a public authority is liable for damages caused by the fall of a tree standing within the limits of or in close proximity to its highway, *provided the public authority had notice*. *Marsh v. S.C. Dept. of Highways and Pub. Transp.*, 298 S.C. 420, 380 S.E.2d 867 (Ct. App. 1989) (emphasis added).

In *Marsh*, SCDOT was sued after a leaning tree, which grew *within* the Department's right-of-way, fell onto the plaintiff's truck as he was driving down the highway. *Marsh*, 298 at 421, 380 S.E.2d at 868. This particular tree stood close to the road, on state right-of-way, and leaned across the road. *Marsh*, 298 at 422, 380 S.E.2d at 869. The particular tree had been obviously leaning for at least four years, and on the night of the accident, it leaned at a sixty or seventy degree angle. *Ibid.* SCDOT road crews even filled in holes in the vicinity of the tree before it fell, which gave SCDOT ample opportunity to observe the leaning tree. *Ibid.* The Court of Appeals, affirming the judgment for the plaintiff, said the jury could have concluded that prior to the tree's

falling, SCDOT saw, or should have seen, the tree was leaning across the highway but neglected to remove a potential hazard to motorists. *Marsh*, 298 at 423; 380 S.E.2d at 869.

In this case, the supposed tree did not stand next to the road, nor lean across the road at a sixty to seventy degree angle. The tree did not grow within SCDOT's right-of-way, nor had it been in a noticeably hazardous position or angle for any marked length of time. Rather, the putative tree was recessed off of SCDOT right-of-way, on private property, and concealed by other large, leafy trees in the immediate area.

It would have been extremely difficult for SCDOT crews to find the tree even if they were working in the immediate area, which they were not. SCDOT records indicate there were no crews working nearby where someone should have noticed the tree to put SCDOT on active notice. *See Deposition of David Brandyburg*, Pg. 43, line 16 – Pg. 44, line 25; Pg. 35, line 2-6 for *Mile Points; Daily Work Reports & Requests*, BRE 194.

Liability is contingent upon whether or not the Department knew, or in the exercise of reasonable care, should have known the condition of the tree would make it hazardous to persons or property in the immediate vicinity. *See Ford v. S.C. Dept. of Transp.*, 328 S.C. 481, 492 S.E.2d 811 (Ct. App. 1997).

In *Ford*, the personal representative of a deceased motorist brought suit against SCDOT when the motorist's car collided with a leaning tree that had fallen across the road. *Ford*, 328 S.C. at 484; 492 S.E.2d at 812. The Court of Appeals, reversing the trial court, found there was an issue of fact as to whether SCDOT had constructive notice. Documents submitted by SCDOT showed its crews had been working in the area within ten days before the accident occurred, and photographs showed several trees leaning

towards the road. *Id.* at 488; *Id.* at 815. Also, a man who lived near the vicinity of the accident testified he told SCDOT road crews once a month, for a year, trees were falling into the road and were dangerous. *Ibid.* The man even tried to discuss the problem with a highway patrolman. *Ibid.* In that case, the Court of Appeals determined SCDOT was certainly on constructive notice of the dead tree, at a minimum, given the testimony of the SCDOT employees, and neighbors, all of whom had either observed or has prolonged opportunity to observe the dead tree.

Plaintiff has failed to produce any evidence indicating the alleged dead pine tree was visible in 2010. There is no allegation the tree was leaning as in *Ford* and *Marsh*, which would create a situation of obvious visibility. Rather, Plaintiff's passenger, Wade Reed testified SCDOT could not have noticed the tree by doing these routine activities because the tree stood straight and was not visible from the roadway, as it was recessed in the woods, off of state right-of-way and on private property. *See Deposition of Wade Reed Page 39, line 15—Page 42, line 18; Page 57, line 20—Page 59, line 2.*

Plaintiff has likewise failed to produce any evidence showing SCDOT crews were in the area at any point prior to the accident other than for routine annual, and semi-annual inspections where the crews search for hazards or problems, including hazardous trees near the roadway. *See Deposition of David Brandyburg, Page 26, line 8—Page 36, line 10.* The SCDOT crews in *Ford* and *Marsh* should have noticed the hazards because they were working in the immediate area. SCDOT crews mowing grass during the growing season six (6) months prior to the incident would have had a difficult time seeing this pine tree recessed in the woods, on private property, while trying to maintain the safety of themselves, the machinery, and motorists on Highway 321. There is no

evidence the tree imposed any threat or visible danger at any time prior to its falling across the roadway.

Finally, this case shows no evidence of any person living in the vicinity of the area who complained to SCDOT or the Highway Patrol about trees leaning or falling in the roadway. In *Ford*, there were many specific complaints to SCDOT and an additional complaint to Highway Patrol, amounting to actual notice. In this case, SCDOT was unaware of the tree, or even the incident until served with the complaint in this case. See *Deposition of David Brandyburg, Page 51, line 23—Page 52, line 9.*

As there is no evidence available to demonstrate actual notice in this case, Plaintiff must rely on constructive notice to overcome the immunity prescribed by the legislature within the Tort Claims Act. *Ford* and *Marsh* offer six independent factors, which, if proven, may amount to constructive notice:

- 1.) Did the tree stand next to the road? (*Marsh*)
- 2.) Did the tree lean across or towards the road? (*Marsh & Ford*)
- 3.) Did the tree grow in SCDOT's right-of-way? (*Marsh*)
- 4.) Did the tree lean at a noticeably hazardous angle? (*Marsh*)
- 5.) Were SCDOT crews working in the vicinity? (*Marsh & Ford*)
- 6.) Were there specific complaints to SCDOT? (*Ford*)

Construing the evidence in this case in the light most favorable to Plaintiff, the answer to each inquiry is consistently negative. Not one of these factors is present in the instant case. SCDOT was not on constructive notice, and is entitled to the immunity provided under §15-78-60(10) of the South Carolina Tort Claims Act.

C. SCDOT has an effective inspection policy in place to identify hazards and conducts these inspections according to this policy.

SCDOT has an inspection policy regarding vegetation and safety maintenance.

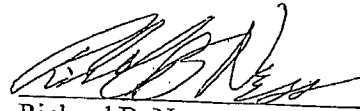
The documentation produced by SCDOT demonstrates the inspections were timely

conducted according to policy. *See attached Daily Work Reports & Requests, BRE 194, BRE 202, BRE 231, BRE 331, BRE 332, BRE 337, BRE 338, BRE 554, BRE 555, BRE 556.* Road maintenance and mowing contractors are told to look for hazards, including trees, which may fall from private property. The SCDOT work reports do not reflect any evidence that this regular maintenance yielded any information regarding the existence of this allegedly hazardous tree. Further, there are no photographs available showing this tree before or contemporaneous in time with the incident. *See Testimony of David Brandyburg, Page 25, line 21—Page 28, line 24; Page 34, line 3—Page 38, line 24; Page 44, line 7—Page 48, line 16.*

CONCLUSION

SCDOT is entitled to summary judgment on all causes of action, as a matter of law. SCDOT requests that this Court grant summary judgment in favor of SCDOT and issue its Order of dismissal, with prejudice.

Respectfully Submitted,



Richard B. Ness
Norma A. T. Jett
Alison Dennis Hood
Adam C. Ness
Ness & Jett, LLC
P.O. Box 909
Bamberg, SC 29003

Bamberg, S.C.

August 8, 2013

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF ORANGEBURG	)	Case Number 2011-CP-38-1379
	)	
William Breland,	)	
	)	
Plaintiff,	)	
	)	
	)	DEFENDANT'S MOTION
	)	IN LIMINE
v.	)	
	)	
South Carolina Department of	)	
Transportation,	)	
	)	
	)	
Defendant.	)	

TO: J. CHRISTOPHER WILSON, ATTORNEY FOR PLAINTIFF:

YOU WILL PLEASE TAKE NOTICE the defendant hereby moves the Court, *in limine*, for an Order excluding the following matters from the trial of this action:

1. Any and all use or mention in evidence and testimony of a Google photograph of a tree on U.S. Highway 321, on the grounds the photograph has not been and cannot be authenticated and is not relevant to the conditions of the scene of the alleged accident in January 2010, and a proper foundation has not been and cannot be laid for its use or introduction into evidence.
2. Any and all evidence of medical treatment or medical expenses until and unless an expert medical professional in the appropriate field has testified to an opinion that the treatment and expenses were necessitated and incurred in treatment of injuries and conditions which were, to a reasonable degree of medical certainty, more likely than not directly and proximately caused by the alleged collision which is the subject of this action.
3. Any and all testimony or evidence of complaints, symptoms, medical treatment or expenses related to the plaintiff's elbow or ulnar nerve, or other conditions pre-existing the alleged collision, on the grounds medical testimony has established that such conditions were not directly nor proximately caused by the alleged collision.
4. Any and all testimony related to claims of permanent injury, impairment, or disability arising from the collision which is the subject of this action,

on the grounds no expert medical testimony establishes such injury, impairment, or disability nor that it was directly and proximately caused by the collision.

5. Any testimony or evidence relating to the Highway Maintenance Manual Revised January 2010, effective February 2010, as it is irrelevant. Otherwise, it is a subsequent remedial measure, and is similarly inadmissible. Otherwise, it is more prejudicial than probative of SCDOT's policies in effect before the alleged January 8, 2010 wreck.

YOU WILL ALSO TAKE NOTICE THAT the defendant hereby moves the Court, *in limine*, for an Order allowing the introduction of the following matters into the trial:

1. Plaintiff's criminal record, under SC Rules of Evidence 609(a).
2. Plaintiff's criminal record, for purposes of impeaching false or misleading testimony, pertaining directly to Plaintiff's propensity for truthfulness.

Respectfully submitted,

NESS & JETT, LLC

By:

SI RBN

Richard B. Ness
P. O. Box 909
Bamberg, SC 29003
(803) 245-5178
Attorney for Defendant

Sept. 3, 2013

Bamberg, South Carolina

STATE OF SOUTH CAROLINA

COUNTY OF ORANGEBURG

William Breland,

Plaintiff,

-vs-

South Carolina Department of
Transportation,

Defendants.

) IN THE COURT OF COMMON PLEAS

) CASE NO. 2011-CP-38-1379

) NOTICE OF INTENT TO IMPEACH
) BY USE OF CRIMINAL
) CONVICTION PURSUANT TO
) RULE 609(a),
) SC RULES OF EVIDENCE

FILED FOR RECORD
WINNIE B. CLARK
CLERK OF COURT
ORANGEBURG, SC

2013 SEP -3 PM 3:03

TO: J. CHRISTOPHER WILSON, ESQUIRE, ATTORNEY FOR PLAINTIFF

YOU ARE HEREBY NOTIFIED, pursuant to Rule 609(b), South Carolina Rules of Evidence, that the defendant, South Carolina Department of Transportation, intends, by and through its undersigned attorney, to impeach the plaintiff, William Breland, through the use of his criminal convictions, pursuant to the Rule 609(a), South Carolina Rules of Evidence.

The criminal convictions of Plaintiff have been developed through the obtainment of records from Washington State and the State of Nevada. The conviction records of Plaintiff include a guilty plea on a charge of receiving stolen property entered October 28, 1988 and a guilty plea on a charge of conspiring to commit a burglary in/on an auto entered on April 10, 1992 in the State of Nevada. The conviction records of Plaintiff further include a guilty verdict on a charge of manufacturing / delivering / possession with intent to distribute narcotics, a class B felony, entered on September 3, 1996 in Washington State.

ATTEST: TRUE COPY

Winnie B. Clark
CLERK OF COURT
ORANGEBURG COUNTY, SC

[Copies of the Washington State and State of Nevada arrest records have been supplied to
Plaintiff's Counsel]

August 29, 2013.

Ness & Jett, LLC

By: Norma A. Jett

Richard B. Ness

Norma A. T. Jett

P.O. Box 909

Bamberg, SC 29003

Phone: (803) 245-5178

Fax: (803) 245-5384

ATTORNEYS FOR

DEFENDANT SCDOT

STATE OF SOUTH CAROLINA
COUNTY OF ORANGEBURG

William Breland,

PLAINTIFF,

v.

South Carolina Department of
Transportation,

DEFENDANT.

IN THE COURT OF COMMON PLEAS
CIVIL ACTION NO.: 2011-CP-38-1379

DEFENDANT'S MOTION FOR JUDGMENT
NOTWITHSTANDING THE VERDICT, OR, IN
THE ALTERNATIVE, FOR NEW TRIAL

FILED FOR RECORD
WINNIEA E. CLARK
CLERK OF COURT
ORANGEBURG, SC

2013 SEP 16 AM 11:54

TO: J. Christopher Wilson and Dan Luginbill, Attorneys for Plaintiff:

YOU WILL PLEASE TAKE NOTICE the defendant hereby moves the Court, pursuant to Rules 50 and 59, SCRPC, and the common law of South Carolina, for judgment notwithstanding the verdict or, in the alternative, for a new trial. The grounds for the motion are as follows:

1. The Court erred in denying defendant's motion in limine to introduce evidence that the Plaintiff lied in his deposition, saying that he had no criminal record. The Court held that Defendant should have known about Plaintiff's criminal history, by the time Defendant took Plaintiff's deposition. However, as was relayed contemporaneously to the Court, until the Defendant took Plaintiff's deposition, the Defendant was unaware that the Plaintiff had lived in the states of Washington and Nevada, where Defendant subsequently learned the Plaintiff had criminal records. Additionally, plaintiff produced at his deposition, for the first time, voluminous discovery responses. Attorneys do not have access to the National Crime Information Center (NCIC), which is restricted to law enforcement. Instead, attorneys must seek information from each specific state, such as South Carolina's SLED CATCH website. Thus, Defendant could not have known about the records, until Defendant learned in Plaintiff's deposition the States Defendant should search.

Winnie E. Clark
CLERK OF COURT
ORANGEBURG COUNTY, SC

WILLIAM BRELAND V. SCDOT
Civil Action No. 2011-CP-38-1379
Defendant's Motion for a New Trial
Page 1 of 5

The crimes were committed more than 10 years before the institution of this action; however, Plaintiff's character for truthfulness was immediately tainted when he answered that he had no criminal record. Plaintiff's case hinged on his recounting where this accident occurred. The Plaintiff's experts' investigations began with the Plaintiff's attorney showing them where the accident happened. In other words, the experts' opinions stem from Plaintiff's representations to his attorney. Additionally, Plaintiff's damages were established largely through his own testimony. Thus, all Plaintiff's evidence is based upon his word. From the credibility standpoint, if Plaintiff lies about his criminal record, then he may not be credible, and the jury should have been allowed to consider his credibility by receiving information about his denial of having a substantial criminal record. Plaintiff gave inconsistent testimony multiple times at trial. The Defendant had to ask Plaintiff to read his deposition testimony over and over during cross examination, which gives greater weight to the defendant's assertion that the Plaintiff lied throughout the history of the case about the wreck and its location, and his damages.

Defendant should have been allowed to introduce Plaintiff's history of lies, including lying about his criminal history, in its case in chief, and/or on cross examination, not necessarily for the purpose that he had a criminal record, but because Plaintiff concealed his background, thwarted discovery, and showed himself to lack credibility. The Court erred when it ruled evidence that Plaintiff lied in his deposition, regarding his criminal past, inadmissible, and this error prejudiced the defendant.

2. The jury verdict in this action resulted from the Court's instruction that the jury could consider whether the Plaintiff had permanent injury and the inclusion of plaintiff's life expectancy in the jury charge. The Plaintiff presented no expert medical testimony that his injuries would be lasting or permanent. Furthermore, the Plaintiff's expert medical testimony asserted that the Plaintiff's surgeries were a result of aging and were inevitable, as a consequence of prior neck fusions performed in 1999. In 2010, the Plaintiff's neck was fused above and below the 1999 fusions. Doctor Mummaneni testified that Plaintiff would have inevitably required those fusions. The doctor never testified that Plaintiff had

permanent injuries, and said plaintiff left his care in 2010. Plaintiff merely asserted that he had neck, back, and elbow pain and numbness in his left arm and hands, all of which he had prior to the wreck, and that he could not do as much as he used to do.

Notwithstanding Plaintiff's testimony, no expert medical testimony was introduced that remotely supported Plaintiff's assertions and did not satisfy the legally required "more likely than not and to a reasonable degree of medical certainty" standard.

3. The Court erred in allowing Plaintiff's testimony regarding pain in his left arm and hand. In its motion in limine and directed verdict motion, Defendant sought to have any evidence about Plaintiff's left arm and hand pain stricken, as Doctor Mummaneni testified the pain in his arm and the surgery required as a result of that pain were due to an abnormal or aberrant muscle in Plaintiff's arm. The Court agreed with Defendant and disallowed any and all medical damages and amounts relating to the left arm surgery; however, it allowed Plaintiff to testify about his arm pain and hand numbness during the Plaintiff's case in chief. During Defendant's motion for directed verdict, the Court explained that Defendant had already won on the issue of the left arm. Notwithstanding the Court's reassurances, Plaintiff had already tainted the trial by testifying about pain that was unrelated to his claims about his neck, and Defendant objected contemporaneously and even during the in-chambers conference regarding jury charges. This improper testimony may have been a consideration of the jury.
4. The Court erred when it allowed the Plaintiff to introduce a Google Street View image of a dead tree. The photo was taken, according to Google Earth, in May 2008. Plaintiff's expert, Registered Land Surveyor, Cliff Harper, provided testimony that the Google Earth image was 184 feet from a power pole, using Google Earth's measurement tool; and, using his surveying equipment, his measurements were within one to two feet of the spot where the Google Street View image of 2008 purportedly placed the alleged tree. Mr. Harper could not testify that this picture was a "fair and accurate representation" of that side of the road, during May 2008, nor that it represented a relevant scene, that of the accident.

No person testified to the authenticity of the image; nor that it was not altered nor enhanced; nor that it accurately depicted a relevant scene at a relevant time. No chain of custody testimony was introduced. The photograph was not a mere demonstrative exhibit, but was used to support expert testimony and admitted into evidence.

Google's Street View cameras are not common cameras, intended to accurately represent the scene in front of them.¹ The camera utilizes eleven (11) lenses to record video.² Images are then taken from the video and put together by software, causing an automatic and unavoidable distortion to the image recorded, thereby giving a distorted representation of the scene.³

Google does not allow its Street View images to be used in a commercial setting, "without prior authorization."⁴ In fact, Google specifically prohibits it.⁵ And for this image to be continually used in this case, the Court is allowing a violation of the Federal Copyright Act.⁶

The location of this image is based solely on Plaintiff's recollection of where this accident allegedly occurred, as relayed to his attorney, and subsequently relayed to Mr. Harper by Plaintiff's attorney. Plaintiff's memory was tenuous, at best, and ever-evolving, at worst. Thus, the location was not established as the accident scene.

¹ See *Vederi, LLC v. Google, Inc.*, 2:10-CV-07747-AK-CW, 2012 WL 4511424 (C.D. Cal. Sept. 26, 2012) (the court held that Google "Street View still depicts somewhat distorted views—i.e., curved/spherical ones").

² Riding Shotgun With Google Street View's Revolutionary Camera, POPULAR MECHANICS, <http://www.popularmechanics.com/technology/gadgets/news/4232286> (last visited September 13, 2013).

³ "And, while Google strives to minimize the distortion in its images, Street View still depicts somewhat distorted views—i.e., curved/spherical ones." See *Vederi, LLC v. Google, Inc.*, 2:10-CV-07747-AK-CW, 2012 WL 4511424 (C.D. Cal. Sept. 26, 2012).

⁴ Google Maps/Earth Additional Terms of Service, GOOGLE (March 1, 2012), https://www.google.com/intl/en_us/help/terms_maps.html (last visited September 13, 2013).

⁵ "You may print Google-owned Street View content from Maps and Earth for personal use but not for distribution to others." Permission Guidelines for Google Maps and Google Earth, GOOGLE, <http://www.google.com/permissions/geoguidelines.html> (follow "Using Street View and Panoramio" hyperlink; then follow "I'd like to use Street View imagery in my project. Can I?" hyperlink) (last visited September 13, 2013) (emphasis added).

⁶ 17 U.S.C.A. § 102 (West).

5. Despite the testimony of plaintiff and his passenger that the plaintiff was exceeding the speed limit when an oncoming vehicle alerted him to a hazard, the Court improperly refused to instruct the jury on comparative negligence, although it did instruct the jury that plaintiff had a duty to care for his own safety. This error precluded the jury's consideration of plaintiff's fault in the accident.

The errors of the Court, as set forth above, cannot be corrected in this action without a grant of judgment notwithstanding the verdict, or a new trial.

Respectfully submitted,

NESS & JETT, LLC

Bamberg, South Carolina

9-13, 2013

By:



RICHARD B. NESS

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ATTORNEY FOR DEFENDANT

SOUTH CAROLINA DEPARTMENT OF
TRANSPORTATION

STATE OF SOUTH CAROLINA)
COUNTY OF ORANGEBURG)

IN THE COURT OF COMMON PLEAS

Case No. 2011-CP-28-1379

William Breland,)
Plaintiff)

vs.)

VERDICT FORM

South Carolina Department of)
Transportation,)
Defendant)

X We, the jury, find in favor of Plaintiff in the amount of
\$225,000.00 Dollars.

OR

 We, the jury, find for Defendant.

9-6-13
Date

Alberta E. Gilmore
Foreperson

Print Name Alberta E. Gilmore

State of South Carolina)
County of Orangeburg)

In the Court of Common Pleas
First Judicial Circuit
2011-CP-38-01379

William Breland,

Plaintiff,

Vs.

South Carolina Department of
Transportation,

Defendant.

Transcript of Record

August 9, 2013
Orangeburg, South Carolina

B e f o r e :

The Honorable Edgar W. Dickson, Judge

A p p e a r a n c e s :

Richard B. Ness, Esquire
Attorney for the Defendant

J. Christopher Wilson, Esquire
Attorney for the Plaintiff

Bonnie H. Kelly, CVR
Circuit Court Reporter

I N D E X

<u>WITNESS/DESCRIPTION</u>	<u>PAGE NO.</u>
Case Called/The Court	4
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1 Highway 321, between Norway and Neeses, late at night,
2 either on January 7 or January 8. I'm not sure -- around
3 midnight, so one side or the other of midnight.

4 THE COURT: Okay.

5 MR. NESS: Mr. Breland and a passenger were driving in
6 what's been described as a "van." And the tree was either
7 in the road or fell, just as they were driving down the
8 road, in front of them. And testimony from Mr. Breland is
9 that he hit the tree.

10 The -- the facts of the case I think are somewhat
11 important in that Mr. Breland has described the tree as a
12 -- as various things, really. I don't know that he knows
13 what kind of tree it was. But he's -- had pointed out a
14 tree and produced pictures of a -- of what appear to be a
15 dead pine tree that were taken some time well after this
16 incident.

17 There are -- this case is covered by the South
18 Carolina Tort Claims Act, and we believe that Section 15-
19 78-60, subsection 10, is probably the most applicable
20 section that's involved. And that's -- provides that (as
21 read): "The State's not liable for natural conditions of
22 unimproved property of the government -- governmental
23 entity, unless the defect or condition causing a loss is
24 not corrected by the particular governmental entity
25 responsible for the property within a reasonable time

1 MR. NESS: That page is -- is an inspection page, in
2 this upper left-hand corner, the second printed line; says
3 "908 Inspections."

4 So DOT was doing inspections and you note the dates
5 here: 12/17/2009 and 1/4/2010, those are both within a
6 month of when this tree fell. One of them's actually
7 within about three days of when this tree fell.

8 And the next page, which is BRE556 -- all these have
9 been produced in discovery -- is another -- is a list of
10 total inspections going back into 2008, where DOT followed
11 their policy, which requires them to inspect every so
12 often, both at day and nighttime inspections. And Mr.
13 Brandyburg's testimony is that these were the required
14 inspections and that's when they did them.

15 And -- and so I -- DOT was doing its inspections; Mr.
16 Brandyburg's testimony is that they looked for trees, that
17 the -- the mowers, that do work in the summertime, had
18 been instructed to look for trees or look for debris or
19 something that might be indicative of a dead tree up in
20 the bushes. And at no point did they ever find a tree.

21 In fact, Mr. Brandyburg said that DOT was not aware of
22 this tree and this incident until the law suit was served
23 on DOT. So they never had any knowledge of it.

24 The night that this thing occurred there's some record
25 from the Neeses Fire Department, who got a call and

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
COUNTY OF ORANGEBURG) FIRST JUDICIAL CIRCUIT

2011-CP-38-01379

William Breland,

Plaintiff,

v.

South Carolina Department of
Transportation,

Defendant.

)
)
)
) Transcript of Record
)
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)
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)
)

September 3, 2013
Orangeburg, South Carolina

B E F O R E:

The Honorable Edgar W. Dickson, Judge and a jury

A P P E A R A N C E S:

Chris Wilson, Esquire
Dan Luginbill, Esquire
Attorneys for the Plaintiff

Richard Ness, Esquire
Norma Jett, Esquire
Adam Ness, Esquire
Attorneys for the Defendant

Hilda M. Jordan, CVR-M
Circuit Court Reporter

1 All right. Mr. Ness, this is your motion?

2 MR. NESS: Your Honor, the defendant moves in limine in
3 this case on a number of grounds. The first one, and it's
4 the one I think the surveyor is here to testify on is that a
5 Google photograph that has been printed, as I understand it,
6 from the Google road view map that you can seek on the
7 Internet and it's been -- the still photograph has been
8 printed, where is on the Google road map, you know, you go
9 up and down the road with these views and the photograph on
10 it says 2012, is my understanding. This wreck happened in
11 2010, but from my view of the photograph, if you look on
12 Google, at least of that road view, is a 2008 photograph or
13 a 2008 Google road view, and we ask the Court to exclude
14 this Google photograph as being unduly prejudicial because
15 there's not authentication that can happen with this
16 photograph. We've gotten -- and I realize the surveyor is
17 coming in and we'll hear whatever he has to say, but it's my
18 understanding that the wreck happened somewhere on Highway
19 321 from Neeses and Norway, late at night. Somewhere around
20 Midnight, give or take five minutes on either side of
21 Midnight, and the issues are a tree that fell on the road.
22 A 2008 photograph that they are going to use, there is
23 nobody from Google that's going to testify, there's nobody
24 that saw this tree anywhere prior to the night that it was
25 in the road. The landowner didn't see it, the next door

1 neighbor didn't see it. We have those folks under subpoena.
2 DOT didn't see it. DOT had no notice about it. And we take
3 the position that there is nobody that authenticate a 2008,
4 roughly two years prior to the incident happening, that that
5 photograph of a tree up into the tree line -- this tree was
6 not -- the alleged tree that's involved was not on the DOT
7 right-of-way. It was on private property and fell across
8 the -- it was close to the right-of-way, but it fell across
9 the right-of-way and into the road, is the testimony from
10 the plaintiff, but there's not one single person involved in
11 this case that can say that this is a true and accurate
12 depiction of the photograph as of January 7 or 8, whichever
13 date it happened on, 2010. And we take the position that if
14 you can't authenticate the photograph then the photograph is
15 not admissible.

16 MR. LUGINBILL: Judge, I'll just define that in
17 basically two ways. Initially, Mr. Ness indicated that it
18 was unduly prejudicial but then I -- hearing the rest of his
19 argument he is essentially just saying that the photograph
20 can't be authenticated.

21 THE COURT: Right.

22 MR. LUGINBILL: So I'm going to focus on the
23 authentication part.

24 First of all, we have two experts in this case. We have
25 a surveyor and we also have an arborist Mr. Arena, both of

1 whom say they use Google Earth in that their everyday jobs.
2 particularly Mr. Harper uses it --

3 THE COURT: Mr. Harper is --

4 MR. LUGINBILL: He's the surveyor.

5 THE COURT: Okay.

6 MR. LUGINBILL: He is a licensed surveyor, Your Honor.
7 He uses it in part and parcel of what they do every day.
8 You find a spot, you use -- they use Google Earth to
9 pinpoint it. You use the measuring tools on Google Earth to
10 get a rough estimate of what the boundaries, metes and
11 bounds, lengths, things like that would be. Also, to give
12 them a visual of the location that they are going to and
13 then they go out and survey it and get the more accurate,
14 you know, findings that they would use as far as drawing
15 boundary lines and things of that nature. He's very
16 familiar with it and he's going to testify that he's -- that
17 he saw it when he was doing what we asked him to do as far
18 as pinpointing the location of the wreck.

19 Picture -- nobody is saying, at least from what I've
20 heard, that the picture isn't -- that it's been doctored in
21 any way, that it isn't just a simple photograph of a
22 specific spot along Highway 321.

23 The foundations I think we would have to lay is -- and
24 this is what Mr. Harper will testify to is this is the spot
25 that according to Mr. Breland it was at. And that, you

1 know, he's going to be able to say what he saw out there,
2 but it's important in the case and it is relevant in the
3 case because it goes to the notice of DOT. It is a picture
4 of what we believe is the actual tree that fell, we're going
5 to be able to lay the foundation for that.

6 Judge -- and I've got the picture --

7 THE COURT: Did you show that to Mr. Ness?

8 (Photograph shown to Mr. Ness.)

9 THE COURT: All right.

10 MR. LUGINBILL: So we believe it comes in for two
11 reasons, one, you have an expert who uses it in the course
12 of forming his opinion. So it's something that an expert
13 relies on the ordinary course of his business and that he
14 relied on in forming the basis of his opinion of where this
15 tree is. So I believe it comes in under that.

16 Secondly, I think it comes in because both witnesses,
17 Mr. Arena and Mr. Harper, have indicated they went out to
18 the scene and found no discrepancies as far as the accuracy
19 of the photograph and not just the photograph, Your Honor,
20 but we may use the actual visual imagery from the Internet
21 during the course of the trial. So the same arguments will
22 apply.

23 THE COURT: You mean present day?

24 MR. LUGINBILL: Once you go to the street view you're
25 going to get that visual.

1 THE COURT: Okay. Here's my question, Mr. Luginbill.
2 Is -- and the Court is aware that when you take photographs
3 that certain additional information is imprinted on that
4 photograph and you take a digital photograph but I'm aware
5 of that but what I -- I mean, Mr. Harper or the arborist Mr.
6 Arena --

7 MR. LUGINBILL: Correct.

8 THE COURT: They are aware of how -- what I'm familiar
9 with digital photographs I know they put longitude latitude
10 in there, correct?

11 MR. LUGINBILL: When you take a still shot it just
12 doesn't print that. When you add -- when you go to it on
13 the screen itself it will tell you the date of the image,
14 which everybody agrees that it was 5, 2008, that's what's on
15 the screen when you look at it --

16 THE COURT: Okay.

17 MR. LUGINBILL: -- and you look at it --

18 THE COURT: Okay.

19 MR. LUGINBILL: -- and it gives you the exact latitude
20 and longitude points.

21 THE COURT: Okay, but that doesn't print on that.

22 MR. LUGINBILL: But that doesn't print when you take
23 the print.

24 THE COURT: Yes, I noticed it's not on here.

25 MR. LUGINBILL: Correct.

1 THE COURT: Okay.

2 CLIFF HARPER - DIRECT EXAMINATION

3 BY MR. LUGINBILL:

4 Q Mr. Harper, you were asked to come out and do a survey
5 of a particular point on US 321; correct?

6 A Yes, sir.

7 Q What I'm handing you is a plat; is that the plat you
8 generated?

9 A Yes, sir.

10 Q If you would, tell the Court how you got started
11 finding the point that you then worked off of to make that
12 particular plat?

13 A I met Mr. Chris Wilson at the site. He showed me a
14 stump that he wanted located along with some debris, some
15 pieces of debris that were around the stump, and so I went
16 ahead and made a note of the location and went back to the
17 office and set up a job and everything like that, the whole
18 routine as far as setting up a time and went back to the
19 site with the field crews and we located several points
20 along US 321, some asphalt drives, the actual stump location
21 and the pieces of the debris that were around the stump.

22 Q. All right. Tell the Court, if you would, how you used
23 Google Earth to assist you in identifying the location of
24 the tree?

25 A. What I did was I took our field coordinates that we had

1 when we did the survey of the site area out there and we
2 took those coordinates and rotated and translated them to
3 the Google Earth coordinates, and we overlaid those -- we
4 can see the asphalt drives and the edge of pavements and
5 everything match up with the Google Earth.

6 THE COURT: That is the plat that you have in front of
7 you?

8 MR. HARPER: This is the field work that we did to
9 begin with.

10 THE COURT: Okay.

11 MR. HARPER: Where we overlaid the information to the
12 Google Earth.

13 THE COURT: Okay. So let me just see if I've got this
14 right, if you don't mind?

15 MR. LUGINBILL: I don't, Your Honor.

16 THE COURT: Okay. You go out first to the scene and
17 mark where Mr. Wilson told you the accident occurred?

18 MR. HARPER: Yes. We located the tree that -- the stump
19 that he showed me and the debris that was around the stump
20 and we located the edge of the pavement in asphalt aprons
21 and stuff, some visible markers.

22 THE COURT: Okay, and you measured that from that spot?

23 MR. HARPER: Yes.

24 THE COURT: Okay, and then you measured out from that
25 spot to asphalt driveway --

1 MR. HARPER: Yes.

2 THE COURT: -- and another marker on the other end?

3 MR. HARPER: Yes. Power poles, yes, sir, on the other
4 side of it.

5 THE COURT: So you got those measurements on the ground?

6 MR. HARPER: Yes, sir.

7 THE COURT: Using your survey equipment on the ground?

8 MR. HARPER: Using conventional survey equipment. Yes,
9 sir.

10 THE COURT: Okay. Then you took those measurements and
11 put it into the Google Earth.

12 MR. HARPER: Yes, sir. I rotated it -- I took my
13 project coordinates on what we did out here --

14 THE COURT: Uh-huh. (Affirmative response.)

15 MR. HARPER: -- and then we brought -- imported them
16 into Google Earth and we rotated them and translated them to
17 match the Google Earth.

18 THE COURT: And when you match it up with Google Earth,
19 did the measurements and the coordinates match?

20 MR. HARPER: Yes.

21 THE COURT: What's the difference -- I know whenever I
22 have something that says -- well, whenever I have my GPS
23 that says within 16 feet of eight feet or something like
24 that --

25 MR. HARPER: Right.

1 THE COURT: -- How about how far is this?

2 MR. HARPER: As far as the actual, physical points that
3 we located you can see from the asphalt drive and the power
4 poles and everything that's it fairly close.

5 THE COURT: Well, fairly close doesn't answer my
6 question. How close?

7 MR. HARPER: I would say that it's within a foot.

8 THE COURT: Oh, within a foot?

9 MR. HARPER: Yes, sir. Just from overlaying it.

10 THE COURT: Okay. So you take your actual thing, put it
11 on top of the Google map, it is accurate -- the Google map
12 thing is accurate to within a foot?

13 MR. HARPER: That's what I would say, yes, sir.

14 THE COURT: Okay. All right. And that matched up also
15 with the telephone pole at one end and then the driveway at
16 the other?

17 MR. HARPER: Yes, sir.

18 THE COURT: Accurate to within a foot?

19 MR. HARPER: Yes, sir.

20 THE COURT: All right.

21 Go ahead.

22 BY MR. LUGINBILL:

23 Q Now, Mr. Harper, the street view imagery, which is
24 subject of what we're looking at here, and --

25 MR. LUGINBILL: Judge, I'd like to hold that photograph.

1 THE COURT: Oh, I'm sorry.

2 BY MR. LUGINBILL:

3 Q Do you recognize this as the street view imagery from
4 the location of the tree?

5 A Yes, sir.

6 Q Now, when you were there, obviously there was a tree on
7 the ground; correct?

8 A Yes, there was some debris on the ground, yes.

9 Q All right. Was that dead tree that's visible in the '08
10 photograph still in the canopy?

11 A No, sir. Not that I noticed.

12 Q Did you see anything different from the street view
13 other than that one difference, the tree being down, was
14 there anything else that you noticed that would lead you to
15 believe the street view imagery was in any way inaccurate?

16 A No, sir.

17 Q Did it seem to be a fair and accurate representation of
18 the location?

19 A Yes, sir.

20 Q Do you use Google Earth routinely in your business as a
21 surveyor?

22 A Yes, sir. We do.

23 Q Are you comfortable with the program, do you know how
24 to use it?

25 A Yes, sir.

1 MR. LUGINBILL: Judge, based on that testimony we would
2 move the photograph into evidence.

3 THE COURT: All right.

4 Mr. Ness, if you will do a limited cross on what we
5 talked about.

6 MR. NESS: I can, Your Honor.

7 THE COURT: Okay.

8 CLIFF HARPER - CROSS-EXAMINATION

9 BY MR. NESS:

10 Q When did you first go to the scene?

11 A I think it was -- November 27, 2012 on Thursday. I met
12 with Chris on the site.

13 Q So this wreck happened in January 2010 and you went
14 there two and half years later, almost three years later?

15 A Yes, sir. I guess.

16 Q Google photograph, the still version he's got of the
17 tree -- I don't know if it's got a number on it yet or not,
18 but that's the one I'm talking about. The one you've got
19 5/2008 written on it?

20 A Yes, sir.

21 Q Did you take this photograph?

22 A I did not.

23 Q You stopped the camera, so to speak, on the Google
24 street view and still shot this picture?

25 A Yes, sir.

1 Q That's not the view you see when you ride down the
2 highway is it?

3 A That's look up at the canopy.

4 Q When you ride down the highway you're looking at the
5 highway. You see trees or fields or whatever on either side
6 of the road, right?

7 A Yes, sir.

8 Q So this picture, you had to stop the camera or stop the
9 program on the computer and turn it to the right?

10 A It came in -- I had to turn it to the left.

11 Q Okay. So you're --

12 A You're looking back toward Neeses.

13 Q North or east -- north or south?

14 A Looking to the north. I was looking north --

15 Q So you had to turn to the west?

16 A Yes, sir.

17 Q All right. Then you had to take the camera and shine
18 it -- point it up into the air?

19 A Yes, sir. I basically set it on the measurements that
20 I found out in the field and came down the distance along
21 the road edge and set the street image on there and I
22 rotated it 90 degrees to the left. Yes, sir.

23 Q Now, what kind of tree were you looking for when you
24 were looking?

25 A I wasn't looking for a tree to be honest with you. I

1 just was looking -- using the imagery to see what was there.

2 Q When you went to the scene what kind of tree did you --
3 were you looking for?

4 A I wasn't looking for a tree, I was looking for a stump.

5 Q What kind of stump?

6 A I don't --

7 Q What kind of species is what I'm asking you?

8 A I don't know what kind it was. It looked like a pine
9 tree. I think that's what it used to be. I don't know.

10 Q. And were you told to look for a pine tree, is that the
11 information you were provided?

12 A. No, sir. I was just asked to look at the stump.

13 Q. All right, the picture that you have here, can you
14 state that this picture accurately depicts this scene as of
15 January 7, 2010?

16 A. No, sir.

17 Q. But this is a 2008 photograph?

18 A. Yes, sir.

19 Q. So in terms of being able to testify absolutely to the
20 court here today, you can't state that that picture was what
21 was there in 2010, in any way, can you?

22 A. No, sir. It's not 2010, no, sir.

23 Q. Did you look at any depositions when you were preparing
24 your chart there, the plat that you made or of those
25 photographs?

1 A. No, sir.

2 Q. Are you aware that Mr. Breland, the plaintiff in this
3 case, testified that he didn't know what kind of tree it
4 was?

5 A No, sir.

6 Q So if this is a picture of a pine tree and Mr. Breland
7 didn't know what kind of tree it was we might even have the
8 wrong picture wouldn't we?

9 A. . Could be.

10 Q. From the debris, and I realize you're not a arborist,
11 but from the debris you found there, could you tell whether
12 it was a pine tree or a gum tree or an oak tree?

13 A I'm not a species of trees, an arborist. I can't
14 testify as to what kind of tree it was.

15 Q. Do you know how the Google computer system works? I
16 mean, you use it but do you know how it works, how it takes
17 a picture like you're using here from a 2000 -- May 2008?

18 A They use GPS is how they get on the street views.

19 Q Well, have you seen the Google car riding around with
20 the funny looking camera thing on top?

21 A Yes, sir.

22 Q And that camera takes snapshots forward, to the side,
23 all the way around continuously, doesn't it as it's riding
24 down the highway?

25 A Yes, sir. That's my understanding.

1 Q. So you can't -- what?

2 A I said that's my understanding of how it works?

3 Q So as far as what the snapshot was here, you don't know
4 if it accurately depicts for sure this spot. It could be
5 any spot in the state of South Carolina, couldn't it?

6 A It uses GPS coordinates as far as they're all tied
7 together --

8 Q So you think you're at the right location?

9 A I think I'm at the right location. Yes, sir.

10 Q But you don't have any way of ascertaining because you
11 don't know what kind of tree it was, this tree that's shown
12 in the May 2008 was the tree that fell in the road in 2010,
13 do you?

14 A No, sir.

15 MR. NESS: Your Honor, I think that's all I have for Mr.
16 Harper.

17 THE COURT: Mr. Harper, let me ask you a question.

18 MR. HARPER: All right.

19 THE COURT: How do you know when that picture was taken?

20 MR. HARPER: On the actual Google Earth program at the
21 bottom, it tells you the image date at the bottom.

22 THE COURT: Okay.

23 MR. HARPER: But when you print it out, it does not.

24 THE COURT: Okay. It tells you the image date. Now, I
25 notice at the bottom of that it says image date of May 2008,

CLIFF HARPER -- RECROSS - EXAMINATION

1
2 BY MR. NESS:

3 Q If you're inside the car, the roof on the car and you
4 look out the window you're riding down the road you can't
5 see up where this tree was can you, because of the foliage
6 and canopy of the trees, can you?

7 MR. LUGINBILL: Judge, in the interest of time, I don't
8 know if that goes to the admissibility of the photograph.

9 THE COURT: Well, that's something you can ask, but I'm
10 actually just kind of concerned about the place in time. Do
11 you mind.

12 MR. NESS: Nothing else from Mr. Harper.

13 THE COURT: Okay.

14 MR. NESS: Your Honor, I want to submit a copy of the
15 page of Mr. William Breland's deposition, Page 49, and I
16 apologize for the copy I have. I actually highlighted it
17 and then I tried to copy it and my highlighter eroded some,
18 but the question was asked of Mr. Breland, and I want to
19 make this part of the record: What kind of tree was that
20 that was involved in this. His answer: I don't know.

21 I think that's significant because they're out there
22 looking for a pine tree.

23 And, Your Honor, we also took the deposition of the
24 arborist one day last week and I've got an excerpt from his
25 deposition which I'd like to hand up to the Court. I handed

1. Mr. Luginbill a copy. The arborist was also using this
2. group of photographs and I think it's important the arborist
3. says he did not take the picture, he did not download the
4. image, he had no idea when the picture was taken, and I
5. highlighted it for the Court.

6. Your Honor, again, I object to the use of the picture
7. based on the fact that he, Mr. Harper stated that he could
8. not state that it accurately depicts the tree, but they used
9. it to prove it's the tree, but yet he states he can't say
10. that it accurately depicts the tree because it's a 2008
11. photograph, and that's generally our position on it. I just
12. don't think that it lays the foundation under the
13. authentication rule which is Rule 901 and I would -- section
14. (a) which says the requirement of authentication or
15. identification as a condition precedent to admissibility is
16. satisfied by evidence sufficient to support a finding that
17. the matter in question is what the proponent claims. And
18. they are claiming in this case that that's the tree. For
19. something that's two years different in time and all the
20. other issues that have come along with the Google program
21. with the camera going around taking a series of pictures and
22. then putting it on the Internet, I submit to you that the
23. timing of the 2008, that I don't dispute the 2008 was the
24. date the picture was taken. We just dispute that's
25. foundation under 901 and we don't think that foundation can

1 be laid unless you bring somebody from Google that will say
2 this is business records exception, you know, we keep these
3 records in our normal course of taking photographs and that
4 this is an accurate depiction of what we took on that day.
5 They haven't taken a Google deposition or tried to subpoena
6 anybody or anything else from the standpoint of Google. The
7 fact that Mr. Harper uses it or I use it doesn't mean that
8 it's so. You have to lay that foundation under Rule 901.

9 THE COURT: Okay.

10 MR. LUGINBILL: Well, obviously, Your Honor, our
11 position Mr. Harper went out and made a physical measurement
12 of it and then compared that to the Google image and found
13 that it was within exactly one foot, so he knew he was
14 standing in the location of the stump that he found. And
15 then what you have is an image taken from 2008 and the only
16 thing that we have to authenticate for that image to be
17 admissible, in my opinion, Your Honor, and under the rule
18 would just be that there is sufficient evidence to support a
19 finding that it is what we claim it to be. We claim it to
20 be a picture of that spot on the highway in May 2008. There
21 is no evidence that it's anything other than that. And
22 whether or not it's the right spot would be an issue of
23 admissibility and that's what Mr. Harper has made abundantly
24 clear, that he physically measured it to that spot, overlaid
25 it with Google and they were accurate to a foot of each

1 other. That is what that spot looked like in May of 2008,
2 therefore, it is what we claim it is and therefore it's
3 admissible.

4 MR. NESS: One other thing I want to ask Mr. Harper
5 while we're got him on the stand.

6 THE COURT: I'll give you a little bit of leeway on
7 that.

8 CLIFF HARPER - FURTHER RE-CROSS - EXAMINATION

9 BY MR. NESS:

10 Q Mr. Harper, the longitude and latitude coordinates you
11 used were based on something Chris Wilson, the plaintiff's
12 attorney told you or showed you?

13 A He showed me where the stump was.

14 Q He showed you the location?

15 A Yes, sir.

16 Q Did you use the traffic collision report that was done
17 by Mr. Breland in this case?

18 A No, sir.

19 Q You know the traffic collision reports if they're done
20 by Highway Trooper they usually have longitude and latitude
21 and that sort of thing on it?

22 A I didn't know that.

23 Q But you didn't use the traffic collision report from a
24 trooper in this case, did you?

25 A No, sir.

1 THE COURT: All right. Okay.

2 Well, for the purposes of the Motion in Limine, I'm
3 going to let it in. Okay.

4 You will get to make all your arguments -- this is a
5 2008 photograph that he says matches up. Now, if that
6 longitudinal thing doesn't match up that's another argument
7 you get to make, if it's the wrong place.

8 I don't know that they're saying -- I think they're
9 implying that they think this is the right tree, but to me I
10 thought their purpose in trying to get it in was to show
11 that this tree in that area was showing up bad in 2008 and
12 nobody did anything about it. I mean, that was my
13 indication from what y'all argued, Mr. Wilson, the first
14 time.

15 I'll note your objection. You need to make the
16 objection to my ruling so you'll have that.

17 MR. NESS: Yes, sir.

18 THE COURT: But I think for purposes of this being a
19 2008 photograph from Google at that -- matches up
20 longitudinally and latitudinally with his survey, I'll let
21 it in for that purpose.

22 MR. LUGINBILL: Thank Your Honor.

23 THE COURT: Okay. What else.

24 Okay, you can step down, sir.

25 What else we got? There was another motion or two?

1 MR. NESS: Your Honor, we have several grounds for
2 this motion. One of the issues, I think, we resolved. We
3 have two highway vegetation manuals that were involved in
4 this case. This was by Subsection 5 on the Motion in Limine.

5 THE COURT: I don't know if I got -- I got your pre-
6 trial. All right, I'm with you.

7 MR. NESS: I think Mr. Wilson has agreed that he's not
8 going to use the revised version in January 2010 that became
9 effective in 2010. He's going to use the 2016 version. If
10 that's what he's going to use then I don't have any
11 objection to that.

12 THE COURT: That's the one you're going to use?

13 MR. WILSON: Correct.

14 THE COURT: Okay. Then we're okay with that.

15 MR. NESS: Then the issue about the criminal records,
16 Your Honor, we gave them notice of intent to use criminal
17 record.

18 THE COURT: Right. Now the way I see the rule is it's
19 10 years from either the date of conviction or the date he
20 last served. Was this within the 10-year period?

21 MR. NESS: Your Honor, we took Mr. Breland's deposition
22 I've got the excerpt of his deposition which I'll hand up
23 just a -- and then we asked the question and he said he had
24 not been convicted of any crime, but we did our research in
25 the state of Washington and the state of Nevada. He's got a

1 criminal record from that point in time and we take the
2 position that it's an impeachment of him telling something
3 that's untrue in the deposition. It's not just a matter of
4 him getting on the stand and us using the rule to ask him
5 about a 15 to 20 year old conviction, it's the fact that we
6 asked him in a deposition and he said, I have not been
7 convicted which is an untruth based on the record we pulled
8 off of the system in Washington and Nevada.

9 THE COURT: Okay.

10 Mr. Wilson?

11 MR. WILSON: Judge, he -- anything -- Rule 609 clearly
12 says impeach -- if it's used for impeachment for purposes of
13 attacking the credibility of a witness and Subsection (b) is
14 very clear that anything more than 10 years old is not
15 admissible unless the Court makes a determination that it
16 should be admitted in the interest of justice and the
17 probative value outweighs the prejudicial effect.

18 Your Honor, I don't -- I mean, Mr. Breland testified he
19 said he didn't think he had been convicted of anything that
20 he knew of. He didn't say he hadn't been convicted of
21 anything, Your Honor. And I don't believe that just because
22 they asked him in a deposition and he gave an answer that
23 wasn't quite clear or as clear as they would like to have it
24 --

25 THE COURT: It -- I'm sorry. Go ahead.

1 MR. WILSON: -- it gets them around the rule. If Mr.
2 Ness had wanted to get a yes or no answer whoever is taking
3 the deposition they could have got a yes or no answer out of
4 him, Your Honor, at that time, but I don't think the fact
5 that he answered it one way in the deposition would be
6 admissible for impeachment purposes under 609 (b). Your
7 Honor, it clearly says evidence of a conviction under this
8 rule is not admissible if more than 10 years has lapsed
9 since the conviction or the release and we know -- I think
10 these convictions were in the late '80s or early '90s, but
11 by 1999 the evidence is going to show that Mr. Breland was
12 having neck surgery in Las Vegas, Nevada. So he's out by
13 1999 for sure, if not before that, Your Honor.

14 I can go through -- if the Court is considering I can
15 go through each conviction individually.

16 THE COURT: No. I've got the -- according to -- the
17 burglary charges were dropped. At least the way it looks to
18 me.

19 MR. NESS: There was another charge right at the same
20 time.

21 THE COURT: Receiving --

22 MR. WILSON: Stolen goods.

23 THE COURT: -- He was found guilty of that.

24 MR. WILSON: Yes, sir.

25 THE COURT: And then they go through, you know, what

1 they did with that and then the other charge is conspiring
2 to commit a burglary in or on an auto and he was found
3 guilty of that. And -- I don't really understand -- it
4 looks like a nine month sentence for that.

5 MR. NESS: Then there's another conviction.

6 THE COURT: Where?

7 MR. NESS: If you'll follow on down. That was in
8 Nevada, I believe, and a conviction in the state of
9 Washington, as well.

10 THE COURT: Highlight them all for me.

11 MR. NESS: It's hard to follow these kinds of documents.

12 THE COURT: Oh, I know.

13 MR. NESS: The issue is not -- you know, if he'd said
14 yes, I've been convicted of these crimes when I asked him
15 that question then we wouldn't be here arguing over this,
16 but the rule says what the rule says, but it really a lie
17 issue, it's a perjury issue because we asked him and he said
18 no. I think we're allowed to go into that. That brings the
19 whole issue of his credibility, which is what the jury is
20 supposed to be judging into evidence as to whether he's
21 lying or telling the truth on the stand. So when I asked
22 him before and he lied and if I hadn't gone and dug into
23 this I wouldn't have come up with it.

24 THE COURT: And nobody has this information when they
25 took his deposition?

1 MR. NESS: I didn't.

2 THE COURT: All right. Let me think about that. I'll
3 tell y'all what I'm going to do with that before we get
4 started. I'll tell y'all how I'm going to handle that.
5 Just give me a second to get it straight in my mind how I
6 want to handle this, because I do understand what you're
7 getting at, Mr. Ness, but I'm concerned that -- is that just
8 a way to -- You don't have any case law on that do you?

9 MR. NESS: No, sir.

10 THE COURT: Okay.

11 MR. NESS: It's just that if he's up on the stand and
12 the jury is judging his credibility.

13 THE COURT: I understand. I understand that and I
14 understand they way the question, have you ever been
15 arrested, charged or convicted of any crime and he says not
16 that I know of. This was taken in 2012. What was happening
17 -- the latest of these seems to be 1990 -- 1992, I guess?

18 MR. WILSON: I believe it's 1992, Your Honor.

19 THE COURT: Yeah, 1992. Whereas these are crimes -- let
20 me just think about it. I'll tell y'all what I'm going to
21 do when we come back. We'll take a break. Okay.

22 Anything else?

23 MR. NESS: I have one other issue. Judge, numbers two
24 and three kind of go together. When Mr. Breland was deposed
25 he said he claimed that he had elbow surgery and another

1 THE COURT: Okay. All right.

2 Thank you. We'll see y'all in little over an hour.

3 Thank you.

4 (Court in recess for lunch at 1:00 p.m.)

5 (Court in session after lunch at 2:44 p.m.)

6 (Court's Exhibit No. 1 was marked.)

7 (Court's Exhibit No. 2 was marked.)

8 (Court's Exhibit No. 3 was marked.)

9 THE COURT: You may be seated.

10 Is everybody ready?

11 MR. NESS: Yes, sir.

12 THE COURT: Mr. Wilson are you ready?

13 MR. WILSON: Yes, sir.

14 THE COURT: The last thing I had on my handy-dandy
15 docket of things to do is the Motion in Limine and I told
16 y'all I would think about it. It's a question of whether
17 you get into his criminal record because Mr. Breland's
18 answer in his deposition to the question, have you ever been
19 arrested, charged with or convicted of any crimes. His
20 answer was, not that I know of.

21 Mr. Ness was kind enough to find a conviction in
22 Washington state, two convictions in Nevada. All these
23 convictions were over 20 years old. And the way he answered
24 the questions are a concern to the Court. Under Rule 609, I
25 think it's not questioned that those convictions could not

1 come in under 609 and had the plaintiffs been specifically
2 asked about those conversations in his depositions and had
3 he responded accurately those convictions could not come in,
4 no question about that, I think, but because of the way he
5 answered about those three arrests you'd like to be able to
6 impeach him about that?

7 MR. NESS: Yes, Your Honor. It's a perjury issue from
8 this standpoint.

9 THE COURT: I understand. I'm concerned about the way
10 the plaintiff answered, but I am also concerned that the
11 convictions were not checked before the deposition and
12 because there were no check there was no follow-up questions
13 to refresh the plaintiff memory. I'm also concerned that
14 when the plaintiff was at a deposition his mind was
15 channeled to the accident and the injury probably not to old
16 convictions. I believe coming in now would be more
17 prejudicial than probative because not only -- you would not
18 only be getting in old convictions that were too old to come
19 in under 609 but there would also the implication that he is
20 lying not just not remembering.

21 So I'm going to deny your request to get into that, but
22 I will mark these as Court's Exhibit so you will have them,
23 and this will be Page 11 from Mr. Breland's deposition of
24 November 19, 2013 will be a Court's Exhibit as well as a
25 nine page document of this prior record. The nine pages,

1 it's three prior convictions, okay.

2 And I'll note your objection to my ruling.

3 MR. NESS: Your Honor, one thing, certainly not to be
4 argumentative with the Court.

5 THE COURT: No, no.

6 MR. NESS: The day of the deposition that was taken,
7 just to put this on the record, was taken to spend this on
8 the record was a date Mr. Wilson produced medical records to
9 us which is when we found out the date of birth and Social
10 Security number --

11 THE COURT: Oh, okay.

12 MR. NESS: That later enabled us to then check these
13 records. We didn't have them until the day of the
14 deposition.

15 THE COURT: Okay.

16 MR. WILSON: Judge, know if I agree with Mr. Ness or
17 stipulate that they didn't have his date of birth or his
18 address or his identifying information on something other
19 than the medical records I produced. Might be, might not
20 be.

21 THE COURT: No, I understand.

22 MR. WILSON: I don't want it to be uncontested that
23 that's the first time they had his date of birth.

24 THE COURT: And even if -- even if you did, it just --
25 it bothers me that there is a way to keep these things alive

1 longer than 10 years, you know. I am concerned about the
2 way he answered, but had the question been, you know, --
3 and, of course, you didn't have it. It there had been
4 something not as some equivocal, to me as equivocal as not
5 that I can think of. I hate to say it, but if you asked me
6 -- of course, I don't have any criminal convictions that I
7 can think of right now, either, but there were certain
8 things that you were to ask me if I remembered doing
9 something even five years ago or something like that, I need
10 something to kind of trigger my memory. That's a long time.
11 So I will note your objection and note the fact that for
12 purposes of your argument you might have -- unless you want
13 to add something else to it or if Ms. Jett wants you to add
14 something else to it?

15 MR. NESS: No, Your Honor, nothing else.

16 THE COURT: Oh, come on. I can't believe you're going
17 to ignore her note.

18 MR. NESS: I'm not ignoring her note.

19 THE COURT: Okay.

20 MR. NESS: She said attorneys have no access to
21 nationwide data base. We have to go state by state.

22 MS. JETT: We can't. We can only check South Carolina
23 under SLED and have to know where he lived and go to those
24 states.

25 THE COURT: Okay.

1 MS. JETT: Without deposing him first we didn't know
2 where all he had lived.

3 THE COURT: Okay.

4 MS. JETT: There's no way to have it, other than to have
5 asked him at the deposition.

6 THE COURT: Okay. Another good point. Thank you ma'am.
7 That may help on appeal.

8 MR. NESS: Thank Your Honor. I understand.

9 THE COURT: All right. Thank you, sir.

10 Did I tell the jury to be back at 3:00?

11 MR. WILSON: 3:00.

12 THE COURT: Okay.

13 MR. WILSON: I didn't mean to jump the gun. I was just
14 going to say I can go ahead and move the exhibits we agree
15 on in, Your Honor --

16 THE COURT: Okay.

17 MR. WILSON: -- We've got some stuff we've pre-marked
18 and agreed on.

19 THE COURT: Okay.

20 MR. WILSON: We can take care of that.

21 THE COURT: Okay. Get that on the record.

22 MR. WILSON: Sure. Thank you, Your Honor.

23 We have stipulated to enter into evidence without
24 objection from the defense, a number of exhibits. I'll just
25 go ahead and put them in now.

1 statements as long as things will last for each particular
2 witness, but we'll ask you at the end of the case to find a
3 verdict for the defendant, South Carolina Department of
4 Transportation.

5 Thank you very much.

6 THE COURT: Thank you, Mr. Ness.

7 Mr. Luginbill, you're prepared to call your first
8 witness?

9 MR. LUGINBILL: We are, Your Honor.

10 THE COURT: Okay.

11 MR. LUGINBILL: Call Cliff Harper to the stand, please.

12 THE COURT: Mr. Harper, if you'll put your left hand on
13 the Bible and raise your right hand.

14 Madam Clerk, if you'd swear him in, please.

15 THE CLERK: Yes, Your Honor.

16 Could you state your name for the record, please.

17 MR. HARPER: Clifton A. Harper.

18 (WHEREUPON, Clifton Hayne Harper
19 was sworn to tell the truth.)

20 THE CLERK: Thank you. You may be seated.

21 THE COURT: As soon as you get comfortable, Mr. Harper.

22 Mr. Luginbill, your witness.

23 CLIFF HARPER - DIRECT EXAMINATION

24 BY MR. LUGINBILL:

25 Q If you would, state your name for the record?

1 A Clifton Hayne Harper.

2 Q Mr. Harper, where do you work?

3 A I work for Edisto Engineers and Surveyors.

4 Q And what do you do there?

5 A I'm a professional land surveyor?

6 Q. How does one become a professional land surveyor; what
7 kind of schooling do you have to have?

8 A I went to four years of civil engineering and
9 environmental engineering at the University of South
10 Carolina and had to do a two-year apprenticeship to be able
11 to become a licensed surveyor.

12 Q. How long have you been doing that?

13 A I've been doing that since I was probably 18, off and
14 on part-time and then once I graduated from college I went
15 full-time working in 1999.

16 Q. Have you always worked at Edisto Surveyors?

17 A. I have not.

18 Q. In the industry, though?

19 A. Yes.

20 Q. All right.

21 MR. LUGINBILL: Your Honor, at this point, I would
22 submit Mr. Harper as an expert in the field of surveying.

23 MR. NESS: Yes. We stipulate Mr. Harper is a surveyor.

24 THE COURT: Okay. So stipulated. So stipulated that he
25 is an expert surveyor.

1 MR. LUGINBILL: Thank you, Your Honor.

2 BY MR. LUGINBILL:

3 Q. What were you asked to do in this particular case?

4 A. I was asked to locate a stump, that I met with Mr.
5 Wilson out there. He showed me where stump was located and
6 I located the stump and the debris that was around the
7 stump.

8 Q. Did he indicate that was the location of the wreck?

9 A. I don't think he did at the time.

10 Q. All you were looking for was the stump?

11 A. That's correct.

12 Q. All right. Tell me what you found?

13 A. I found the stump and some debris and we located it and
14 located the edge of the pavement throughout the area right
15 there at the site. We located some power poles.

16 Q. Okay. Can you tell the jury where that location is?

17 A. As far as?

18 Q. How far is it from the county line?

19 A. It is 6.94 miles from Bamberg along US 321.

20 Q. It beyond the Bamberg County --

21 A. Yes.

22 Q. -- line?

23 A. Yes.

24 Q. Okay. How far is it from say Neeses, the next town up?

25 A. I don't know exactly, but I'm thinking three and a-half

1 miles, maybe.

2 Q All right. Just tell the jury kind of how you came up
3 with the exact location. What measurements did you take,
4 what did you use as a place to start?

5 A We used standard surveying procedures. We located the
6 edge of pavement, with driveway aprons along the way, some
7 power poles, the location of the stump and the debris that
8 was located near the stump.

9 Q. Okay. Now, when you say standard survey techniques
10 what is that?

11 A. Using just using basically theodolite, which is a
12 survey instrument and you take angles and distances. That's
13 how you create a plan.

14 Q. So you've got a fixed point and you use your angles and
15 your distances and from that do the math and it comes up to
16 where everything is in relation to each other; is that fair?

17 A Yes.

18 Q All right. You indicated you found a stump and some
19 debris; what sort of debris did you see?

20 A. It looked like remnants or pieces of the tree laying on
21 the side of the road or around the shoulder of the road and
22 in a ditch along the shoulder of the road and one of them
23 was laying next to the ditch -- I mean, next to the stump.

24 Q Did it look like all the pieces and parts went together
25 and would have attached to the stump at some point?

1 A. It could have. Yes.

2 MR. NESS: Judge, he's a surveyor, not a horticulturist.

3 MR. LUGINBILL: We'll --

4 THE COURT: Thank you.

5 BY MR. LUGINBILL:

6 Q. All right. Now, you created a document for us, I
7 believe, which is in your file.

8 MR. WILSON: This is going to be Plaintiff's No. 2.

9 MR. NESS: No objection.

10 (Plaintiff's Exhibit No. 2,
11 drawing, was marked and entered.)

12 MR. LUGINBILL: If you bear with us just a minute,
13 we'll pull this up on the screen.

14 BY MR. LUGINBILL:

15 Q Does it look essentially like Plaintiff's Exhibit
16 No. 2 and I'll let you work off that and the jury will be
17 able to see what you're referring to?

18 A. Yes.

19 Q. All right.

20 THE COURT: Just for the record, that is the drawing
21 that you made?

22 MR. HARPER: Yes.

23 THE COURT: Okay. And it's in evidence without
24 objection?

25 MR. NESS: Yes. Without objection, Your Honor.

1 THE COURT: Okay. All right. Thank you, sir.

2 BY MR. LUGINBILL:

3 Q If would you just kind of tell the jury -- you had
4 mentioned earlier, you mentioned earlier that you found
5 asphalt pavings and telephone poles. Is that what you're
6 referring to as fixed points?

7 A. Yes.

8 Q. How far is it from the asphalt drive to the location
9 where the tree was?

10 A. From the tree perpendicular to the edge of the pavement
11 like 197.3 feet.

12 Q. Okay. And how did you calculate that?

13 A. We located -- as we said, we located the points, the
14 asphalt drives and everything --

15 Q. That would be these right here?

16 A. Yes.

17 Q. And you just measured it out?

18 A. Yes.

19 Q. At any point, did you use Google Earth to kind of
20 overlay that?

21 A. I did. I took drawing I'm holding here, it's up on the
22 screen and I overlaid that on Google Earth.

23 Q. Okay. Now, before we get into that, you actually
24 measured the pieces that you found at the scene; is that
25 right?

1 A. Yes.

2 Q Okay. Go ahead.

3 A I'm just saying yes.

4 Q Do you have those on the drawing itself?

5 A. Yes.

6 Q. Where would they be, this down here?

7 A. Yes. That's the 17.31 and 18.1 and 9.54 and the 7.14.
8 507.14.

9 Q. And you add all that up, I mean, if you add all that up
10 what exactly did you get?

11 A 52.09 feet.

12 Q That 52 feet, is that enough to get across the
13 southbound lane of travel.

14 A. From where?

15 Q. From where it fell. If you measured from the stump how
16 far over -- is that enough to reach the center line of 321?

17 A. From the stump to the center line of the roadway is
18 42.17 feet.

19 Q And how long is one lane of travel?

20 A. Typically, they --

21 Q. Well, let me ask it this way, could you measure the
22 center line to the stump; how far is that?

23 A From the center line to the stump is 42.17 feet.

24 Q Right. And if you add the length of the pieces of the
25 tree together is that enough to reach the center line?

1 A. Yes.

2 Q. And it would have gone some little ways over that into
3 the northbound lane of travel?

4 A Yes.

5 Q Okay. How far was it from the stump itself to the edge
6 of the area that DOT keeps mowed?

7 A. 4.67 from the edge of the 75 foot right-of-way.

8 Q. They mow up to the edge of right away from what you can
9 tell out there?

10 A. Uh --

11 Q. Well, you measured the right-of-way based on the center
12 line; correct?

13 A Correct.

14 Q All right. Was it mowed, essentially, up to the end of
15 that right-of-way?

16 A I really recall.

17 Q. Fair enough. All right. Now, you said -- getting back
18 to the Google Earth issue, you've used Google Earth to sort
19 of double check your work, as it were? Explain to the jury
20 how you use Google Earth along with the measurements you
21 took on the scene?

22 A. I took the measurements that I took on the survey that
23 are performed right here and overlaid them on a Google Earth
24 image to see where the tree location would be located.

25 Q. Were you able to do that, everything checked out?

1 A. Yes.

2 Q. How much difference was there between and what you
3 physically measured on the ground and what you measured
4 using Google Earth?

5 A. I would say less than a foot, the difference between
6 the two.

7 Q. All right. What I'm going to have you do, if you're
8 walking through I'm going to be your right arm.

9 A All right.

10 Q I'm just going to close this down and I want you to
11 show the jury what you did.

12 MR. NESS: Your Honor, I think I'm going to object to
13 the Google Earth issues.

14 THE COURT: Okay.

15 MR. NESS: I'm not sure where Mr. Luginbill is going
16 with -- what's he putting up on the screen before he asks
17 the question, but I think I have an objection to that.

18 THE COURT: Yes. Do you want to --

19 MR. LUGINBILL: I'm going to ask him how he uses Google
20 Earth to verify what he did.

21 THE COURT: Right. And I understand that, but I think
22 what Mr. Ness's objection to is wait until he testifies as
23 to what he does and then you can put the stuff up.

24 MR. NESS: That's correct up to this point. Yes, sir.

25 MR. LUGINBILL: Essentially, Judge, what I'm going to

1 have him do, if it suits everybody is I'm just going to have
2 him tell me what he did and rather than have him coming down
3 here, -- why don't you just come down here and do it. That
4 takes me out of the equation.

5 Is that better?

6 THE COURT: Yeah, that will be good.

7 Now, Mr. Harper, let me remind you, you don't have the
8 microphone with you.

9 MR. HARPER: Yes, sir.

10 THE COURT: You need to speak up because not only does
11 the jury need to hear, the court reporter needs to hear, I
12 need to hear --

13 MR. HARPER: Okay.

14 THE COURT: -- so you need to be loud.

15 And Mr. Ness you get in a position where you can see,
16 as well.

17 A All right. To start off with, I got to the location
18 that was close to the site.

19 Can everybody hear that?

20 THE COURT: A little louder.

21 A - I started with a location that was close to the site to
22 get me in the area and it was -- 7238 Savannah Highway and
23 that is in Nesses, South Carolina.

24 All right, as I said, I put in the address that was
25 close to the site which was 7238 Savannah Highway -- Highway

1 in Nesses, South Carolina. This is the asphalt drive that I
2 located on the right-hand side right here and I had a
3 measurement down to the edge of the pavement to the location
4 of the stump that I located and that corner of the asphalt
5 right there that we located to 190.67 and then I took the
6 street view and put it on the end of that distance that I
7 surveyed out in the field. Oops. I'll try that again.
8 (pause)

9 A. And based on the measurements that I had in the field
10 from the asphalt apron this would be looking toward Neeses,
11 looking north towards Neeses.

12 MR. NESS: Your Honor, this is the point we object to
13 because the street view is the street view. He's turning --

14 THE COURT: Okay. I'll note your objection. I'm
15 assuming he's going to tell us a little bit more about it
16 but just so your objection will be preserved on the record,
17 I will keep my ruling the same as I made earlier.

18 MR. NESS: That's fine.

19 THE COURT: Thank you, sir.

20 BY MR. LUGINBILL:

21 Q. Now, the location that you're at right now, can you
22 tell us about where the stump was?

23 A. The stump was -- this is looking dead at where the
24 stump was located according to the measurements from the
25 field.

1 Q. All right. And if you pan up from there what do you
2 see?

3 A. That's what you would see if you would pan up.

4 Q And does that appear to be a tree right there without
5 any needles?

6 A It appears to be. Yes, sir.

7 Q Now, when you were out there --

8 MR. LUGINBILL: Your Honor, before I forget, this is a
9 still shot of exactly what Mr. Harper is showing on the
10 screen and we would move that in as Plaintiff's Exhibit No.
11 1, subject to Mr. Ness's objection.

12 THE COURT: The same objection. Yes, sir.

13 MR. NESS: I still object because he hasn't laid a
14 foundation for this picture. He's saying where he went. I
15 understand that, but he's not ever laid the foundation to
16 get the picture into evidence.

17 MR. LUGINBILL: I'll ask him another way.

18 THE COURT: Thank you, sir.

19 BY MR. LUGINBILL:

20 Q What is the date of this image?

21 A 5/2008.

22 Q Well, that's not showing on the screen, but it's right
23 -- somehow when you project it doesn't show up. If you spin
24 it around -- can you see it on what you're looking at right
25 there?

1 A Yes. It says it on the bottom of the picture.

2 Q So on the screen that you're looking at it shows 5/2008
3 as the date of this image; is that correct?

4 A Yes, sir.

5 Q All right. Now, is Google Earth something that you use
6 all the time and -- I'll take that. Is that something that
7 you are familiar with and in the process of doing your job
8 as a surveyor?

9 A Yes.

10 Q Do you find it to be accurate?

11 A Yes.

12 Q All right. And as a surveyor, it's something you rely
13 on in the normal course of your business?

14 A Yes.

15 Q Did you use it to form part of your opinion as to
16 whether or not the location Mr. Wilson showed you was, in
17 fact, the same location as we see on this screen? In other
18 words, the stump that you physically saw out there, did you
19 use Google Earth to match up with the distances you took and
20 the distances on Google Earth itself to say that this tree
21 was at that spot?

22 A That is the location of where the stump -- the distance
23 of the stump to the edge of that asphalt located in the
24 field. Yes.

25 MR. LUGINBILL: Based on that, your Honor, we would

1 again move Plaintiff's Exhibit No. 1 into evidence.

2 THE COURT: Okay.

3 MR. NESS: Same objections, Your Honor.

4 THE COURT: All right. Plaintiff's No. 1 into evidence.
5 Note your objection to my ruling, Mr. Ness so that will be
6 preserved on the record for you. Okay.

7 MR. NESS: All right.

8 THE COURT: Thank you, sir.

9 (Plaintiff's Exhibit No. 1, photo,
10 was marked and entered.)

11 BY MR. LUGINBILL:

12 Q As part of your measurements did you measure from 7271
13 Savannah Highway, which is just south of this, to the stump,
14 itself?

15 A. Yes.

16 Q. How far is that?

17 A. It's .17 miles.

18 Q. .17 Miles. I many feet is that?

19 A. That is 893 feet.

20 Q. All right. I think that's all I have. Please answer
21 any questions Mr. Ness might have --

22 THE COURT: Can I see you both of y'all for one second.
23 Just step up here.

24 (Off the record bench conference with counsel and the
25 Court.)

1 THE COURT: Mr. Ness, your witness.

2 MR. NESS: Thank Your Honor.

3 CLIFF HARPER - CROSS-EXAMINATION

4 BY MR. NESS:

5 Q. Mr. Harper, you don't work for Google do you?

6 A. No, sir.

7 Q. And you didn't take this picture of the road view
8 street or the street view or any of that, did you?

9 A. No, sir.

10 Q. You weren't involved in doing any work for Google along
11 this road in 2008, were you?

12 A. No, sir.

13 Q. And you can't sit here today and tell this jury that
14 what we were looking at and they've shown you here, the
15 canopy of trees and some type of other tree in the middle
16 there, you can't tell the jury that the 2008 photograph that
17 you're looking here is anything, got anything to do with the
18 tree involved in this incident?

19 A. No, sir.

20 Q. It could've been a different tree?

21 A. Could have been.

22 Q. Because this was when in 2008?

23 A. May, 2008 was the image.

24 Q. And you're aware that this incident happened on January
25 7, 2010, aren't you?

1 A I am now.

2 Q All right, and Mr. Breland didn't go out there and show
3 you this tree did he?

4 A No, sir.

5 Q And Mr. Wilson, the attorney showed you?

6 A. Yes, sir..

7 Q. Well, showed you the stump, I think?

8 A. Yes sir. The stump.

9 Q There wasn't a tree there?

10 A There was no tree there.

11 Q And the trees that we're looking at, did you make any
12 understanding of what these trees are, gums, pines, or did
13 you even notice.

14 A I didn't notice or wasn't asked to do that.

15 Q Okay. Now, you were hired as the surveyor in this case;
16 right?

17 A. Yes, sir.

18 Q. You don't know Mr. Breland, do you?

19 A. No, sir.

20 Q. And you're being paid by time or the job to work on
21 this case?

22 A. The job work that I did to locate the stump. Yes, sir.

23 Q. The testimony today, are you being paid for your time?

24 A I really don't know, to be honest with you?

25 Q. Okay. Well, what have you charged so far in this case?

1 A. I think I sent an invoice for \$645.

2 Q. Okay, and did you intend to send another invoice for
3 your time today, you've been here virtually all day haven't
4 you?

5 A I have been here all day, but I had not intended to do
6 anything. No, sir.

7 Q. Okay. You weren't present in 2008 to look and see what
8 Google was taking in terms of pictures were you?

9 A. No, sir.

10 Q. You familiar with how Google takes their photographs?

11 A I'm vaguely familiar, yes.

12 Q. Let me ask you a few questions about that and see if we
13 agree. Google has vehicles that ride all over the country
14 and the world with some kind of big camera on top, don't
15 they?

16 A. Yes, sir.

17 Q. And they take snapshots of whatever they see as they're
18 riding along the highway; is that what you understand?

19 A. That's what I understand. Yes, sir.

20 Q. And once they take all the snapshot they go into some
21 kind of database and a snapshot of this spot and this spot
22 are then hooked together and that's how they make the road
23 view like we started off looking at down Highway 321; right?

24 A. That's my understanding.

25 Q. All right. So whether this is exactly spot this tree

1 was or it's exactly the spot Mr. Breland is going to testify
2 about, you don't know if it's the same spot or not do you?

3 You know it's the same spot Mr. Wilson showed you the stump,
4 but not about Mr. Breland?

5 A I know it's the same spot as the stump. That's what I
6 know.

7 Q And how many other stumps did you find in the area; did
8 you look for them?

9 A I didn't look for any.

10 Q So there could have been other stumps out there?

11 A. Could be.

12 Q. Mr. Wilson showed you, this is the stump?

13 A He asked me to locate a stump. Yes, sir.

14 Q. But that might have been a stump over here and a stump
15 over here, right?

16 A. I didn't look.

17 Q. Okay. And did you read in depositions in preparation
18 for your testimony today?

19 A No, sir.

20 Q And you can't state with any certainty that the picture
21 of May 2008 accurately depicts the scene as it existed in
22 January 2010 on the seventh when this wreck happened; can
23 you?

24 A. All I can say is this is how it looked in may of 2008.

25 Q. Okay. Now, the debris that you said you found out

1 there, they were broken up pieces of tree that you measured?

2 A. Yes, sir.

3 Q And the pieces for jagged, aren't they?

4 A. I mean, it looked like some of them were cut and some
5 of them were jagged and split.

6 Q. And the jagged ones would be indicative of having
7 fallen and cracked apart when it fell?

8 A. I don't really know to be honest with you.

9 Q. You wouldn't disagree with me on that, would you?

10 A. I don't have any an opinion, to be honest with you. I
11 don't know whether it would be from that or not.

12 Q. Okay.

13 A. I'm assuming that could cause that. I don't know what
14 would cause that.

15 Q. And to get to this view that they've shown you that's
16 on this screen and on this picture, Exhibit No. 1, you have
17 to stop in the road, take the Google view, I think you said
18 you were headed north?

19 A. Yes, sir.

20 Q. All right. You were headed north, turn to the left
21 with the camera -- manipulating the actual controls that
22 shows Google, you have to stop on the road, is that right?

23 A Yes, sir.

24 Q I mean, if you kept on going you'd pass this wouldn't
25 you?

1 A. Yes, sir.

2 Q. All right. And if you stopped, you turn to the left
3 and then you actually have to focus the camera up in the
4 air, don't you?

5 A Yes, sir.

6 Q You focus the camera straight to the left, you don't
7 see this do you?

8 A. No.

9 Q. Well, let's back up to the road view. Back up to the
10 road view to the left. What I'm saying is bring it down.
11 All right, Mr. Harper look at the view from that, you don't
12 see a dead tree up in the air do you?

13 A. No, sir.

14 Q Okay.

15 A You can see, looks like some debris on the bottom.

16 Q This is a limb.

17 A A limb.

18 Q Okay. But you don't see a tree?

19 A No, sir.

20 Q And if you're sitting in a car and you look out to your
21 left that's what you're going to see?

22 A Yes, sir.

23 Q Okay. Or a motorist riding down the highway or an
24 inspector riding down the highway looking for things on the
25 sides of the road aren't necessarily going to see anything

1 way up in the air are they?

2 A I can't answer that. I don't know what they're going
3 to see.

4 Q Well, you would agree with me the other trees in there,
5 a lot of other trees in front of the tree that are involved
6 in this case, supposedly, aren't there?

7 A Yes, sir.

8 Q That's what it shows?

9 A No response.

10 Q And the pieces of the tree that you measured, you said
11 came out to about 50 feet; is that what I understood you to
12 say? .

13 A. 52.09.

14 Q. Okay. Now, this tree is not on the South Carolina
15 Department of Public transportation right-of-way, is it?

16 A. No, sir. I said it was 4.67 -- 4.67 feet outside the
17 right-of-way.

18 Q 4.67 feet?

19 A Yes, sir.

20 Q Outside of the right-of-way. And in looking at this
21 Exhibit No. 2, which is the plat that you drafted for the
22 drawing you drafted. This isn't a signed plat is it?

23 A No, sir.

24 Q Whose property is this stump on that you've drawn in
25 here, according to your drawing?

1 A According to Orangeburg County Tax Assessor's Office,
2 it's Nancy H. Boland.

3 Q And that's public records, people with land title's
4 right?

5 A Yes, sir.

6 Q All right, and whose property is just up the road on
7 the north side of Ms. Bolin's property?

8 A It's Rosa W. Sharpe.

9 Q Okay. Did you talk to either one of those folks?

10 A No, sir.

11 Q So you didn't interview anybody in connection with the
12 work you were doing other than talking to Mr. Wilson?

13 A That's correct.

14 Q Now, when you made these drawings and measurement and
15 stuff, how did you do that, I mean, did you step it off with
16 a yardstick or a tape measure or did you use some type of
17 equipment?

18 A We used surveying instruments.

19 Q And was that some kind of instrument that you'd
20 calibrated?

21 A Yes, sir.

22 Q Had it been calibrated that day?

23 A Not that day, but, I mean, they're calibrated
24 frequently.

25 Q Okay. So it may have been exactly right or it may not

1 have been exactly right; is that right?

2 A I would say it was exactly right.

3 Q Well, if it wasn't exactly right, your measurements or
4 four feet or so off of the right-of-way would be a little
5 bit different, wouldn't it.

6 A If it wasn't right, yes, sir.

7 Q It could be closer or farther away from the road?

8 A Yes, sir.

9 Q Okay. Thank you.

10 MR. NESS: Your Honor, I don't have any further
11 questions.

12 THE COURT: All right.

13 Mr. Luginbill, anything on redirect?

14 MR. LUGINBILL: Just very, very briefly.

15 THE COURT: Okay.

16 CLIFF HARPER - REDIRECT EXAMINATION

17 BY MR. LUGINBILL:

18 Q Mr. Harper, you indicated that after you took your
19 measurement using your survey equipment you overlaid with
20 Google on top of it to double check those measurements; is
21 that right?

22 A Yes.

23 Q How far apart were the two?

24 A I would say they were within a foot.

25 Q So when you located the -- using two different types of

1 measure now, you located the stump with in a one foot area;
2 correct?

3 A Yes.

4 Q So when you were checking the stump did you see any
5 other stumps within one foot of that stump?

6 A I did not look, but I did not see -- It would be hard
7 for it to be within a foot to that stump.

8 Q Do you think using your normal powers of human
9 observation you would have noticed another stump capable of
10 supporting a 50 foot tree within one foot --

11 MR. NESS: Objection speculation on that.

12 MR. LUGINBILL: I think it's within his common
13 knowledge.

14 THE COURT: You can ask him if he remembers if he saw
15 any other stumps in the area.

16 MR. LUGINBILL: Do you think you would have noticed
17 another stump?

18 THE COURT: Yes.

19 BY MR. LUGINBILL:

20 Q Do you think you would have noticed another stump
21 within one foot of the one you measured?

22 A Yes.

23 MR. LUGINBILL: No further questions.

24 THE COURT: All right. Anything on recross?

25 MR. NESS: Very quickly, Your Honor.

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1 Q No EMT, no paramedic?

2 A No, sir.

3 Q Okay. No other kind of medical training?

4 A No, sir.

5 Q All right. But you were a volunteer firefighter, yes?

6 A Yes.

7 Q Okay. On January 7 or 8, 2010 were you called out to a
8 wreck scene on Highway 321 between Neeses and Norway?

9 A Yes, sir.

10 Q Do you have any real recollection of the scene or of
11 that night?

12 A. Not really.

13 Q. Okay, but you would have completed a report, correct?

14 A. Yes, sir.

15 Q. I want to take a look at your report and talk a little
16 bit about that. You've got your report with you.

17 A. Yes, sir.

18 Q. I'm going to put it up on the screen so the jury can
19 see what we're talking about while you look. All right. So
20 that's your writing on one of your fire department reports?

21 A Yes, sir.

22 Q Okay. Now, Highway 321 between Neeses and Norway?

23 A Yes, sir.

24 Q Now, your report says it was at -- shows the location
25 there as what?

1 where Ada Road is and about where Hutto Road is.

2 (pause)

3 Q Ada Road, I think is just up -- this is Highway 321
4 between Neeses and Norway. Ada Road is located just north
5 of the dirt track, isn't it?

6 A Yes, sir.

7 Q You're familiar with where that is?

8 A Yes, sir.

9 Q Hutto Road would be several miles south of Ada Road;
10 correct?

11 A Yes, sir.

12 Q So Ada Road is going to be up in here on this aerial
13 and Hutto Road is going to be down here somewhere?

14 A Yes, sir.

15 Q Okay, let's go back to your report. Y'all got called
16 out at 23:52?

17 A Yes, sir.

18 Q That's 11:52 at night?

19 A Yes, sir.

20 Q So that would have been on January 7?

21 A Yes, sir.

22 Q And you arrived on scene or somebody from your fire
23 department arrived on scene at 0:03 which is 12:03 in the
24 morning?

25 A. Yes, sir.

1 Q. Just over into the next morning of January 8?

2 A Yes, sir.

3 Q What time did you or your department depart the scene?

4 A. Zero 27. Which is 12:27.

5 Q 12:27. So about 24 minutes after getting there y'all
6 departed the scene?

7 A. Yes, sir.

8 Q. And it was just you and it looks like a guy named
9 Boogie Hoover?

10 A Yes, sir.

11 Q Okay. So y'all responded on behalf of Neeses Fire
12 Department?

13 A Yes, sir.

14 Q That's shown on your report, here, you would have shown
15 Mr. Boogie Hoover and you have responded, correct?

16 A Yes, sir.

17 Q And this just shows the time you got dispatched and
18 arrived, correct?

19 A Yes, sir.

20 Q Okay. And what was the nature of the call?

21 A We got toned out as a vehicle accident verses a tree.

22 Q. So you're responding to a vehicle involved in a
23 collision or a wreck with a tree?

24 A Yes, sir.

25 Q And that's what you would have written on your report

1 there at the bottom, right, vehicle verses tree?

2 A Yes. No injuries.

3 Q All right. Do you remember the specifics of the tree,
4 do you remember where the tree was located?

5 A No, sir, not at all.

6 Q Do you remember what size of tree?

7 A No.

8 Q Type of tree?

9 A No.

10 Q Condition of the tree?

11 A No, sir.

12 Q Number of pieces of the tree?

13 A No, sir.

14 Q But you do know you responded to a vehicle that was in
15 a wreck with a tree?

16 A Yes, sir.

17 Q Okay. All right. You just mentioned no injuries.

18 That's your notation on the report?

19 A Yes, sir.

20 Q Okay. What does that mean; what does no injuries mean?

21 A Even though they tone us out for a vehicle accident
22 with injuries it is our duty when we get on scene to ask if
23 there's one person or three people or however many people's
24 involved, are you injured, do you need medical assistance.

25 Q Okay.

- 1 A Yeah.
- 2 Q -- like I said, bleeding --
- 3 A Yes.
- 4 Q -- broken bones, those type things?
- 5 A Yes, sir.
- 6 Q You don't check for things like torn ligaments or
- 7 sprained ankles or disk injuries or those types of things?
- 8 A If the patient is immobilized and not able to move we
- 9 will check that, but if he's walking around and alert, we
- 10 just ask him. You know, it's up to him.
- 11 Q And you don't try to make an diagnoses of those types
- 12 of injuries?
- 13 A No, absolutely not.
- 14 Q Okay. So we know a vehicle hit a tree that night from
- 15 your report; correct?
- 16 A Yes, sir.
- 17 Q And we know that somebody would have spoken to Mr.
- 18 Breland and he would have said either I don't need to be
- 19 checked out or I don't need the ambulance?
- 20 A Yes.
- 21 Q Okay, and that's by the no injuries in your report?
- 22 A Yes, sir.
- 23 Q Now, just one other thing on your report. Did you fill
- 24 out the vehicle information, correct?
- 25 A Yes, sir.

1 Q And you put the occupants name of the vehicle, correct?

2 A Yes, sir.

3 Q Okay, so you have Mr. William Breland on there and you
4 have a '94 Dodge Caravan?

5 A Yes, sir.

6 Q So you would have gotten that information from Mr.
7 Breland?

8 A Somebody would have gotten it, yes. Whoever talked to
9 him would have gotten it, but I filled out the report. Say
10 Mr. Hoover got the information and I had the report, he
11 would have brought it to me and I would have filled it out.

12 Q Somebody talked to William Breland that night to get
13 that information?

14 A Yes.

15 Q Okay. Do you recall any other emergency personnel that
16 was on the scene?

17 A I do know there was a guy from Boland Town who was on
18 the scene, but he was there when we got there.

19 Q Okay, you don't remember anyone else?

20 A No.

21 Q Do you know who removed the tree or moved the tree from
22 the roadway or moved it from the shoulder?

23 A No, sir.

24 Q Okay. You don't recall in having any involvement in
25 doing that?

1 A No, sir.

2 Q But you just don't remember?

3 A No.

4 Q Okay.

5 MR. WILSON: Just one moment, please, Your Honor.

6 BY MR. WILSON:

7 Q All right. I mean, y'all go so far when you're getting
8 information from Mr. Breland do you get his drivers' license
9 and his license tag number; correct?

10 A Yes, sir.

11 Q Okay. That's all the questions I have. Thank you, Mr.
12 Miller.

13 THE COURT: Mr. Ness.

14 JIMMY MILLER - CROSS EXAMINATION

15 BY MR. NESS:

16 Q Mr. Miller, do your records reflect how many people
17 from Neeses Fire Department went out there?

18 A Yes, sir.

19 Q How many was that?

20 A Two.

21 Q Okay. Does it reflect what trucks you took?

22 A Yes, sir.

23 Q What trucks did you take?

24 A Engine 101 and Tanker 105.

25 Q All right. Fire engine.

1 A Fire engine and a tanker.

2 Q All right. You drove one and Mr. Hoover drove the
3 other, is that right?

4 A Yes, sir.

5 Q All right. Do either one of those vehicles have
6 chainsaws on them?

7 A. No, sir.

8 Q. All right. And -- you told Mr. Wilson just now that
9 the ambulance was cancelled just now?

10 A. Yes, sir.

11 Q. Is that something that you would have done or somebody
12 with your department?

13 A If I would talked to him I would have done it. I
14 didn't talk to him that I can remember talking to him. Like
15 I said, it was Midnight, I don't even remember. I know what
16 I did. All I can speak of is what I did. I asked them,
17 they either tell me I'm fine or I want to be checked out.
18 If I talked to them and they said they fine, then I
19 cancelled the ambulance. So I don't know who talked to
20 them. I can't remember talking to them.

21 Q Okay. I understand that, but if the ambulance was
22 cancelled and your records show no injuries, that indicates
23 somebody from one of the two fire departments talked with
24 him, he said he had no --

25 A Yes, sir.

1 Q -- injuries and the ambulance was cancelled?

2 A Yes, sir.

3 Q And the records show that it indeed was cancelled,
4 right?

5 A Yes, sir.

6 Q And that's on CAD report?

7 A Yes, sir.

8 Q And you've got a copy of that with you as well?

9 A Yes, sir.

10 Q And you said somebody from Boland Town responded, as
11 well?

12 A Yes, sir.

13 Q Do you know who that was?

14 A I know who it is now, but at the time I only knew him
15 by his number, because we don't work a lot of calls with
16 Boland Town.

17 Q Okay. And he happened -- do you know how he happened
18 to be there?

19 A No, sir.

20 Q Okay. Well, when you -- the records here reflect that
21 you were out here from 12:03 to 12:27. That's 24 minutes.

22 A Yes, sir.

23 Q All right. How far is it from your station in Neeses
24 to somewhere around Ada Road, two or three miles?

25 A Two or three miles at the most.

1 BY MR. NESS:

2 Q This is a true copy of your report isn't it?

3 A Yes, sir.

4 Q Both pages?

5 A Yes, sir.

6 Q Okay.

7 MR. NESS: Your Honor, I'd offer it into evidence as
8 Defendant's No. 1.

9 THE COURT: Any objection?

10 MR. WILSON: None, Your Honor.

11 THE COURT: Defendant's No. 1 is in evidence without
12 objection.

13 (Defendant's Exhibit No. 1, Neeses
14 Fire Department report, was marked and entered.)

15 BY MR. NESS:

16 Q Mr. Miller, on the second page of the CAD report, just
17 to make sure we explained it for the jury, about mid-way on
18 the page there's a BT.

19 A Uh-huh. (Affirmative response.)

20 Q What does that mean?

21 A That's abbreviations for Boland Town Fire Department.

22 Q And right below that it says NS. That would be Neeses?

23 A Yes, sir.

24 Q And where does it show on here that you were one of the
25 firemen there, or does it show on this page?

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1 Q Mr. Miller, Mr. Ness was asking you about this CAD
2 report that you're familiar with?

3 A Uh-huh. (Affirmative response.)

4 Q You're familiar with how those are set up and how they
5 read; correct?

6 A Uh-huh. (Affirmative.)

7 Q You've got to say yes.

8 A Yes, sir. I'm sorry.

9 Q No problem. Right there it indicates, about the second
10 or third paragraph down it says caller name. It says, last
11 Breland; first William.

12 A Yes, sir.

13 Q That indicates who made the phone call who called 911
14 to cal in this wreck, right?

15 A Yes, sir.

16 Q So that indicates that William Breland called in the
17 wreck?

18 A Yes, sir.

19 Q Okay, and what we know from your report is that you
20 arrived on a wreck scene on Highway 321, motor vehicle
21 verses a tree, correct?

22 A Yes, sir.

23 Q And your report said there's no injuries because
24 someone would have asked about do you need to be transported
25 or do you have any injuries or do you need to be checked

1 THE COURT: Yeah, make sure you can speak into the
2 microphone so they can hear you.

3 Mr. Wilson.

4 MR. WILSON: Your Honor, we've called Mr. Brandyburg as
5 an adverse witness pursuant to Rule 611 since he is the
6 representative of the DOT so the rules allow me to question
7 him.

8 THE COURT: And ladies and gentlemen of the jury, when
9 it's -- when he mentioned adverse witness that doesn't mean
10 that Mr. Brandyburg is going to be antagonistic or anything
11 like that. That just means he represents the other side so
12 he's allowed a little bit of different leeway in his
13 questioning. That's the only thing that means.

14 All right, Mr. Wilson.

15 MR. WILSON: Thank you, Your Honor.

16 DAVID BRANDYBURG - DIRECT EXAMINATION

17 BY MR. WILSON:

18 Q Mr. Brandyburg, state your name for the record, please?

19 A David Adrian Brandyburg.

20 Q Okay. And you are the Resident Maintenance Engineer
21 for Orangeburg County?

22 A For the central portion of Orangeburg.

23 Q Central portion of Orangeburg, and that covers the area
24 were talking about here on Highway 321 between Neeses and
25 Norway?

1 A Yes, sir.

2 Q So that's your area of supervision?

3 A Yes, sir.

4 Q. Okay. In his opening statement, Mr. Ness said that if
5 the DOT had constructive notice of this tree, if it knew or
6 could have known or should have known that the tree was
7 there, then the DOT should be held liable.

8 Do you agree with that statement?

9 A Restate that question again?

10 Q Mr. Ness said in his opening statement he told the jury
11 that if they thought the DOT had constructive notice of this
12 tree, that you knew or should have known or could have known
13 that the tree was there that the DOT should be held liable.

14 Do you agree with that statement?

15 MR. NESS: Your Honor, I have an objection on that. I
16 didn't say could. I think the law says should have known.

17 BY MR. WILSON:

18 Q Knew or should have known that the tree was there?

19 THE COURT: If you'll correct the question.

20 MR. WILSON: Sure. I'll correct the question.

21 BY MR. WILSON:

22 Q That the DOT had constructive notice of the tree. That
23 the DOT knew or should have known that the tree was there
24 that the DOT should be held liable.

25 Do you agree with that statement?

1 A I disagree.

2 Q You disagree with that statement?

3 A Yes, I do.

4 Q Okay, why do you disagree with that statement?

5 A Because there are several trees within the
6 right-of-way. You just stated because there are trees there
7 we should be liable. If there's a -- if we know there's a
8 diseased tree or dead tree then I agree that we're liable.
9 Just because there's a tree there I don't think we're liable
10 for it.

11 Q Okay. My question is this. Mr. Ness told the jury in
12 his opening statement, if the DOT had notice of this tree,
13 this tree that fell, that Mr. Breland hit. That is you
14 knew or should have known the tree was there then the DOT
15 should be held liable.

16 Do you agree with that statement?

17 A Yes. With that statement, yes.

18 Q Okay. All right. You've been the Resident Maintenance
19 Engineer since 2003?

20 A Yes, in Orangeburg.

21 Q In Orangeburg, but you've been with the Highway
22 Department for 20 plus years; correct?

23 A Yes, sir.

24 Q Okay. And your job includes the maintenance and upkeep
25 of the road and highways in your area; correct?

1 A Yes, sir.

2 Q And so your job entails maintaining roads, fixing
3 potholes, identifying hazards, a number of different things
4 that are considered maintenance or upkeep of the roads or
5 the highways; correct?

6 A. Correct.

7 Q. Part of your maintenance and upkeep of the roads and
8 the highways, part of your departments function is to keep
9 the highways safe; correct?

10 A. Correct.

11 Q. Safe for the traveling public?

12 A. Correct.

13 Q. Safe for people using the road and highways?

14 A. Correct.

15 Q. And you have a full staff of employees to do that;
16 correct?

17 A I wouldn't say a full staff. We have employees to do
18 that.

19 Q You have employees, you have a department to help you?

20 A Yes, sir.

21 Q. You supervise the overall operation?

22 A Yes.

23 Q. Okay. About how many employees are under your
24 supervision?

25 A. Currently, approximately 75.

- 1 Q. Okay. And has that number changed much since 2010?
- 2 A. I would say some. We have some more or less.
- 3 Q. But not a significant number?
- 4 A. Not a significant numbers.
- 5 Q. So you've pretty much had 75 or so employees under your
- 6 supervision from 2010 to current?
- 7 A. I would say, yes.
- 8 Q. Okay. Your job is to maintain the roads, maintain safe
- 9 roads; correct?
- 10 A. Correct.
- 11 Q. Okay. And part of that maintenance is to keep the
- 12 roads free or safe from hazards; correct?
- 13 A. Correct.
- 14 Q. And that's hazards in the roadway, things that might be
- 15 in the roadway, potholes or deficiencies in the roadway,
- 16 correct?
- 17 A. Correct.
- 18 Q. So things that may be in the roadway like debris or
- 19 trash or blown tires or any of that type stuff, part of your
- 20 job, part of your department's job is to keep the roadway
- 21 free from that kind of debris; correct?
- 22 A. We are to -- once we spotted it, notice it, we are to
- 23 remove it. Yes.
- 24 Q. Okay. All right. And you're supposed to be on the
- 25 lookout for that kind of stuff; correct?

1 A. Correct.

2 Q. And as you do your job or as your employees do their
3 job; correct?

4 A. Correct.

5 Q. Okay. Part of the maintenance or keeping the roads
6 safe is to look for, locate and identify trees that are
7 diseased or dead or decayed that might threaten or fall into
8 the roadway; isn't that correct?

9 A. Correct.

10 Q. Okay. And it doesn't matter whether the tree is in the
11 DOT right-of-way or outside of the DOT right-of-way, you
12 have the same job and the same duty, don't you?

13 A. It depends on if it's threatening the roadway.

14 Q. All right. So if we've got a tree that's in the DOT
15 right-of-way, that's threatening the roadway and what you
16 mean by threatening the roadway is it may fall into the
17 road; correct?

18 A. Correct.

19 Q. So if we've got a tree that's in the Highway
20 Department's right-of-way and it's threatening the roadway,
21 if might fall into the roadway, y'all have a duty to locate,
22 identify and remove that tree; correct?

23 A. Correct.

24 Q. And if the tree is outside of the right-of-way, if it's
25 off the DOT property and it's the same kind of tree, it's

1 dead or diseased or decayed and it may fall into the
2 roadway, it threatens the roadway, same job, same duty;
3 correct?

4 A. Correct.

5 Q. So it doesn't matter whether the tree is on DOT
6 property or right-of-way or off of DOT property or
7 right-of-way you have the same duty, the same responsibility
8 when it comes to trees that are dead or diseased or decayed
9 and may threaten or fall into the roadway?

10 A. Correct.

11 Q. Okay. He's going to pull this up all I ask you some
12 more questions. Okay.

13 But that's been the policy and the practice of DOT
14 since you've been the Resident Maintenance Engineer in
15 Orangeburg County; isn't that correct?

16 A. Correct.

17 Q. Okay. And in doing that job, Mr. Brandyburg, your
18 employees -- and in doing that job and in doing that
19 responsibility, your employees must be active in their job,
20 actively looking for dead or diseased trees that are decayed
21 and may fall onto the roadway, don't they?

22 A. Yes, sir.

23 Q. They have to be vigilant don't they?

24 A. They have to be actively looking for them in their
25 duties.

1 Q. They have to be thorough, don't they?

2 A. Yes, sir.

3 Q. And that's been the policy and practice of DOT since
4 you've been the Resident Maintenance Engineer?

5 A. Yes, sir.

6 Q. Okay. So if a tree that threatens to fall into the
7 roadway is on the Department of Transportation's
8 right-of-way, that's a tree that y'all can remove. It's in
9 your right-of-way, soon as that tree is located it is
10 removed immediately, isn't it?

11 A. Soon as we located it, yes, sir.

12 Q. Okay. If a tree that's diseased or decayed or damaged
13 and is threatening to fall into the roadway and it's off of
14 the Highway Department's right-of-way and it's located and
15 should be located, then that's a tree that you contact the
16 landowner about removing, correct?

17 A. Correct.

18 Q. And you contact the landowner and you immediately
19 remove the tree; correct?

20 A. Yes. Once we get the approval from the landowner to go
21 on their property then we would remove the tree.

22 Q. So the DOT has a process for removing trees that are
23 located off of the Highway Department's right-of-way?

24 A. Yes, sir.

25 Q. Okay. And that's a pretty quick process to remove that

1 tree?

2 A. I would say it's quick.

3 Q. Because, I mean, the tree is dangerous, you've got to
4 get it down as quick as possible; correct?

5 A. Correct.

6 Q. Now, these duties -- I mean, this job that y'all have
7 to do when it comes to locating, identifying and removing
8 dead or diseased trees that might fall in the roadway, I
9 mean, it's a real important duty and job to DOT; correct?

10 A. It's important.

11 Q. It's one of your very important responsibilities,
12 agreed?

13 A. Maintaining the roads for safe travel of the public is
14 very important.

15 Q. Okay. In order to do that we've got to be this active,
16 thorough, diligent inspection in looking for trees that are
17 dead or diseased. You've got to be doing that job actively?

18 A. Yes, we are looking for hazards actively, yes.

19 Q. And that would include the trees that we're talking
20 about that are dead or diseased and may fall into the
21 roadway?

22 A. Correct.

23 Q. It's so important that the DOT puts it into -- I mean,
24 what I'm going to show you here is Plaintiff's Exhibit No.

25 10. That's y'all policy, correct? That's y'all policy when

1 it comes to to vegetation management?

2 A. Yes, sir.

3 Q. That would include trees on the highway or the highway
4 right-of-way or just off the -- or outside of the highway
5 right-of-way; correct?

6 A. And includes trees that are on the right-of-way.

7 Q. Flip over to the second page. Right there under 2.51.
8 I mean, this is an important enough policy that the DOT
9 writes it down and puts it into a written memorandum or a
10 written policy; correct?

11 A. Correct.

12 Q. It's an important enough job that they write it down;
13 correct?

14 A. Correct.

15 Q. And it indicates -- trees along the roadway are to be
16 maintained in a safe manner for the protection of the
17 traveling public. That's your policy; correct?

18 A. Correct.

19 Q. All right. Then let's go down about two thirds the way
20 right here, and what does your vegetation manual say?

21 A. Dead or diseased trees located on or off the
22 right-of-way which may fall onto the travel surface of the
23 roadway should be removed.

24 Q. Okay. You also have a general maintenance manual which
25 generally covers your job duties and responsibilities

1 correct?

2 A. Correct.

3 Q. I'm going to show you what's Plaintiff's Exhibit No. 9
4 to your deposition. That also talks about trees doesn't it?

5 A. Correct.

6 Q. Let's go down to 28.822. What does that say there?

7 A. Other tree removal guidelines.

8 Q. Okay. Go ahead read the first parts of it.

9 A. Other tree removal guidelines are follows: remove
10 fallen trees from the right-of-way, remove dead or diseased
11 trees located on and off the right-of-way or that may fall
12 onto the travel-way or shoulder.

13 Q. Okay.

14 MR. NESS: Your Honor, may we approach the bench?

15 THE COURT: Sure.

16 (Off the record bench conference with counsel and the
17 Court.)

18 (pause)

19 THE COURT: Okay. Go ahead.

20 BY MR. WILSON:

21 Q. Mr. Brandyburg, since this is such an important job,
22 such an important duty of the DOT, your employees are
23 trained and instructor and supervised on how to perform
24 these job duties; correct?

25 A. We give them training on looking for these hazards. Yes

1 sir.

2 Q. Okay. So they are trained on all aspects of their
3 jobs, clearly; correct?

4 A. Yes, sir.

5 Q. And they're trained on how to go about looking for or
6 identifying trees that are dead, diseased or decayed that
7 may fall onto the roadway; correct?

8 A. We give them guidelines on what to look for when the
9 look for dead or diseased trees.

10 Q. You don't just give them that guideline, you train
11 them, you teach them, you supervise them; correct?

12 A. We give them guidelines on what they're looking for and
13 we give them guidelines on what we expect from them.

14 Q. Okay. And you supervise that, correct, as part your
15 job as Resident Maintenance Engineer?

16 A. Yes, we supervise them?

17 Q. Okay. So you train them or you supervise them or you
18 give them guidelines on how to find these trees and how to
19 go about removing these threes; correct?

20 A. Correct.

21 Q. Okay. And the DOT's policy is that periodically
22 someone from the DOT does road inspections; isn't that
23 correct?

24 A. Correct.

25 Q. Riding road inspections?

1 A. Correct.

2 Q. Get in a vehicle and you ride down the road looking for
3 hazards or problems with the road; correct?

4 A. Correct.

5 Q. And those are just general road inspections and they're
6 done generally by whom in your department?

7 A. Our foremen do the road inspections -- do some road
8 inspections and then the engineers in our department do
9 other road inspections.

10 Q. And some of those road inspections are done at
11 nighttime so you can see signs and markings and visibility;
12 correct?

13 A. Correct.

14 Q. Some of those road inspections, those riding
15 inspections are done during the daytime; correct?

16 A. Correct.

17 Q. Okay. And, I mean, that's an important part of the job
18 of the DOT to also perform on those road inspections;
19 correct?

20 A. Correct.

21 Q. I'm going to show you what is marked as Plaintiff's
22 Exhibit No. 8 to your deposition, and I've highlighted the
23 portion I think apply. Let me show you No. 8. Highway is
24 considered a primary route?

25 A. Correct.

1 Q This is not real clear scan but primary routes are
2 inspected during daylight hours how often?

3 A. Primary routes are inspected during daylight hours once
4 every six months.

5 Q. Okay. The purpose of the inspection is to do what?

6 A. Looking for pavement, including pavement markings,
7 including shoulders, including sidewalk and roadside
8 appurtenances --

9 Q Keep going.

10 A -- barriers, signs, vegetation and drainage.

11 Q. That vegetation that you're looking for includes what?

12 A. Includes dead trees or overhanging limbs.

13 Q. All right. Right here, first sentence of that
14 paragraph right there. What's the purpose of these
15 inspections?

16 A The purpose of these inspections is to detect
17 deficiencies that could pose a hazard to motorist or
18 pedestrians thus creating a risk for the department.

19 Q. Okay. Thank you, very much. In district, I think your
20 district is District 7?

21 A Correct.

22 Q That's your area of supervision?

23 A Correct.

24 Q In District 7, y'all actually do road inspections more
25 often than once every six months don't you?

1 A. No. Certain road we do more often. Interstates we do
2 monthly.

3 Q. Okay. Highway 321 would be a road that was done more
4 often than every six months?

5 A. Currently, we do it every six months, once of twice a
6 year.

7 Q. All right. When I took your deposition you told me
8 that y'all did road inspections more frequently in District
9 7 than the policy required; do you recall that?

10 A. I don't recall that.

11 Q. Okay. Well, we'll come back to that. So when your
12 foremen or your employees are out there doing road
13 inspection they're supposed to be looking for these types of
14 trees?

15 A. Correct.

16 Q. But in addition to specific right inspection your
17 employees are expected to or supposed to be looking for
18 these kind of trees while they're doing their other duties;
19 correct?

20 A. Correct.

21 Q. While they're cutting grass, mowing?

22 A. Correct.

23 Q. Drainage ditch work?

24 A. Correct.

25 Q. Driveways?

1 A Correct.

2 Q Shoulder re-grades?

3 A. Correct.

4 Q. Litter pickup?

5 A. Correct.

6 Q Any kind of duty that a DOT employee is performing
7 they're also supposed to be on the lookout, actively and
8 thoroughly, for hazards with the roadway; correct?

9 A. Correct.

10 Q. And those hazards could include the trees that we're
11 talking about that could fall into the roadway?

12 A. Correct.

13 Q. Now, while you're employees are performing these other
14 duties they're supposed to look at all aspects of the road;
15 isn't that correct?

16 A. Repeat the question?

17 Q. They're supposed to look at all aspects of the road
18 when they're doing these duties. Supposed to look at the
19 shoulder, the right-of-way, property off the right-of-way.
20 They're supposed to look at all aspects of the road while
21 performing these other duties like mowing or grading or
22 shoulders; they're supposed to be looking for hazards?

23 A. Correct.

24 Q. In all aspects of the road; correct?

25 A. Correct.

1 Q. Okay. We talked about this in your deposition, I
2 believe. I'm going to show you -- I'm going to show you
3 your deposition.

4 (pause)

5 MR. WILSON: Your Honor, I'm just going to hand up Mr.
6 Brandyburg's deposition to the Court.

7 THE COURT: Okay. Go ahead.

8 BY MR. WILSON:

9 Q. So, Mr. Brandyburg, your employees are supposed to be
10 looking for these types of trees at all times of the year;
11 correct?

12 A Correct.

13 Q. 365 days or how many days they're actually working;
14 correct?

15 A Correct.

16 Q Spring, summer, winter, fall?

17 A. Correct.

18 Q. And I think I asked you, they're supposed to look at
19 all aspects of the road, they're supposed to go -- they're
20 supposed to look low and they're supposed to look high;
21 isn't that correct?

22 A. Correct.

23 Q. They're supposed to look in the tree tops; correct?

24 A. What is visibly for them to see.

25 Q. Okay. All right, and that includes looking up into the

1 tree tops means looking up in the tree tops, doesn't it?

2 A. Correct.

3 Q. Looking down at the edge of the shoulder or at eye
4 level; correct?

5 A. Correct.

6 Q. But they're not just supposed to look at eye level
7 they're supposed to look at all aspects?

8 A. Correct.

9 Q. Be looking low, high and everywhere they can look;
10 correct?

11 A. Correct.

12 Q. Okay. So we've got employees that are doing road
13 inspections -- So we've got employees that are doing road
14 inspections and we've got employees that are out there doing
15 their daily duties. So y'all train your employees or
16 instruct your employees on what to look for to identify dead
17 or diseased trees; don't you?

18 A. Yes.

19 Q. I mean you train them to look for a tree that has no
20 leaves?

21 A. Correct.

22 Q. Tree that has no needles?

23 A. Correct.

24 Q. Tree that has no bark?

25 A. Correct.

1 Q. Tree that has limbs falling off of it?

2 A. Correct.

3 Q. Okay. I'm going to show you Plaintiff's Exhibit No. 1.
4 A tree that looks like that; correct?

5 A. Looks like what?

6 Q. Like that tree right there?

7 A. (No response.)

8 Q. You train your employees to look for a tree that looks
9 like that right there, don't you?

10 A. What appears to be a dead tree.

11 Q. That appears to you to be a dead tree; correct?

12 Q. From this photograph here?

13 Q. Okay. No needles, no leaves; correct?

14 A. Correct.

15 Q. No bark; correct?

16 A. I can't tell about the bark from this.

17 Q. Okay. That tree right there, you can't tell it doesn't
18 have bark or it's missing some of the bark?

19 A. From this photograph it -- I can't tell from this
20 photograph.

21 Q. Okay. Does it look like it's had limbs fall off of it?

22 A. I would say it looks like there's some limbs missing.

23 Q. Okay. So when your employees identify a tree that
24 looks like that tree that's in Exhibit No. 1, they're
25 supposed to remove that tree; correct?

1 A. That would be a tree I would say would need to be
2 removed; correct.

3 Q. Okay. Now, Mr. Brandyburg, when your employees are
4 performing their jobs, when they're doing their regular
5 duties like mowing and grading and that type stuff, any job,
6 road inspections, the DOT maintains a record of those
7 activities; correct?

8 A. Correct.

9 Q. Your people have to fill out a work forms or job duty
10 forms; correct?

11 A. Correct.

12 Q I want to look at some of those. I want to go over
13 some of those records, but what I want to ask about first is
14 some of these records are going to reference things called
15 mile points. A mile point is what?

16 A. In layman's terms, when a road is built -- when a road
17 is built in order to build the road we have to have some-
18 type of way of knowing how far the road goes, how many miles
19 it goes. When we are building a road they build it based on
20 stations which are feet increments, but what we do is
21 convert that to miles and that is how we identify where on a
22 road that they are working.

23 Q. All right. So I think you told me in your deposition a
24 mile point is 1/100 of the mile or about 52 feet?

25 A. Every hundredth of a mile is about 52 feet.

1 Q. So every hundredth of a mile is a mile point?

2 A. Correct.

3 Q. So every 52 feet is a mile point?

4 A. Correct.

5 Q. I think you determine that the relevant portions of a
6 highway that took into the area where this wreck occurred
7 were mile point 3.68 to mile point 10.68; does that sound
8 correct?

9 A. That sounds about correct.

10 Q. Okay. I want to make sure you're clear on that so that
11 we're clear. Okay, I want you to look at your deposition at
12 Page 35 right there. I want you to look at Line 15? See
13 where I'm talking about. And I asked the question how did
14 you determine to pull records -- records be pulled beginning
15 at mile point 3.68 and going to 10.68, and your answer was?
16 Can you read it?

17 A. Based on information I received from the lawyer, my
18 lawyer in reference to the location, those were the mile
19 points that fit the general area.

20 Q. Okay. And then finish reading?

21 A. The site fit in those mile points.

22 Q. Okay. Thank you. Now, if this site, the site of this
23 wreck was, I believe Mr. Harper testified that the site of
24 this wreck was 6.9 miles, approximately, from the Bamberg
25 County line. 6.9 miles, approximately, from the Bamberg

1 County line. 6.94. That's going to put this at somewhere
2 around mile point 7.0, somewhere in that range?

3 A. Without looking at the mile point book, because as a
4 general rule for north to south route the zero end is going
5 to be on the southern most part. So --

6 Q. Starting at the Bamberg County line?

7 A. Correct.

8 Q. So you go north on Highway 321 with the mile points
9 increasing?

10 A. Correct.

11 Q. So the general vicinity is going to be somewhere in
12 that 7.0 mile point range?

13 A. Without looking at the mile point book I would say yes.

14 Q. Okay. So I would take about these DOT maintenance
15 records. I want to look at them now that we understand how
16 mile points work.

17 I'm going to show you what's marked as Plaintiff's
18 Exhibit No. 11. It's Bates stamped 555, and ask you if you
19 recognize that document?

20 A. Yes, sir.

21 Q. Okay, and what is that document?

22 A. This is a daily work report selection form.

23 Q. Hold on one second. We've got a problem.

24 Mr. Brandyburg, I'll ask you about that. That's a
25 daily work report selection; correct?

1 A. Yes, sir.

2 Q. And that just shows inspections that are being done on
3 Highway 321?

4 A. Yes.

5 Q. That starts at zero mile point and goes to mile point
6 9.44?

7 A. For that one record, yes, sir.

8 Q. And what day was that road inspection being done on
9 Highway 321 between mile point zero and mile point 9.44?

10 A. December 17, 2009.

11 Q. Okay. All right, somebody's riding down the road on
12 December 17, 2009; correct?

13 A. Correct.

14 Q. And when you do those road inspections you ride both
15 directions on the road, south and north; correct?

16 A. Correct.

17 Q I'm going to show you what's marked as Plaintiff's
18 Exhibit No. 2. That's Bates stamped 548. All right. That
19 is an inspection being done December 17, 2009; correct?

20 A Correct.

21 Q And that's on Highway 321? We've got it being done on
22 Highway 321; isn't that correct?

23 A. Correct.

24 Q And that's from zero mile marker to the 9.44 mile
25 marker; correct?

1 A Correct.

2 Q And that's a nighttime inspection?

3 A Correct.

4 Q So up here where it says, work description, if it's a
5 nighttime inspection it's going to say nighttime?

6 A Correct.

7 Q And if it's a daytime inspection it's going to say
8 something else?

9 A Correct.

10 Q I'm going to show you what's marked as Exhibit No. 13
11 for your deposition, and that's going to be Bates stamp 423.

12 MR. NESS: What was that Bates stamp number?

13 MR. WILSON: 423.

14 MR. NESS: What's the exhibit number on that?

15 MR. WILSON: 13.

16 BY MR. WILSON:

17 Q That's a daytime inspection done October 2, 2008;
18 correct?

19 A Correct.

20 Q That's done on Highway 321; correct?

21 A Correct.

22 Q That's done from the 2.36 mile point to the 9.34 mile
23 point; correct?

24 A Correct.

25 Q And that's somebody riding the roadways north and

1 south?

2 A. Correct.

3 Q. I'm showing you what's marked as Exhibit 14 to your
4 deposition. That's Bates stamped 426. That's another
5 daytime inspection; correct?

6 A. Correct.

7 Q. That's done November 26, 2008?

8 A. Correct.

9 Q. That's on Highway 321?

10 A. Correct.

11 Q. From the mile point of 2.36 to the mile point of 9.34
12 correct?

13 A. Correct.

14 Q. I'm going to show you what's Plaintiff's Exhibit No. 15
15 to your deposition. That's Bates stamped 429. That's
16 another daytime inspection; correct?

17 A. Correct.

18 Q. Done February 6, 2009?

19 A. Correct.

20 Q. That's on Highway 321?

21 A. Correct.

22 Q. From the 2.36 mile marker to the 9.34 mile marker;
23 correct?

24 A. Correct.

25 Q. Okay. Plaintiffs 16. Bates stamped 432. That's an

1 inspection done in the daytime of April 16, 2009; correct?

2 A Correct.

3 Q Highway 321, same mile points, 2.36 to 9.34?

4 A Correct.

5 Q Riding both ways on the road, correct?

6 A Correct.

7 Q. Plaintiff's Exhibit No. 17. Bates stamped 435. Same
8 thing, inspection done June 25, 2009; correct?

9 A. Correct.

10 Q On Highway 321, same mile points; correct?

11 A Correct.

12 Q. Plaintiff's Exhibit No. 18. Bates stamped 440, I'll
13 show you that. October 1, 2009, road inspection; correct?

14 A. Correct.

15 Q. Same parts of Highway 321, same mile points; correct?

16 A. Correct.

17 Q. Let me show you Plaintiff's Exhibit No. 19. Bates
18 stamped 442. This is an inspection done December 17, 2009;
19 correct?

20 A. Correct.

21 Q. We even know who did the inspection, don't we, Mr.
22 Murray?

23 A. Correct.

24 Q. That's your foreman; right?

25 A. Correct.

1 Q. That inspection is done on Highway 321; correct?

2 A. Correct.

3 Q. Site mile points, 2.36 to 9.34; correct?

4 A. Correct.

5 Q. Now we looked at that earlier about a December 17, '09
6 road inspection and that was a nighttime inspection, but
7 this is a daytime inspection, all right?

8 A. This is a daytime inspection.

9 Q. Okay. I want to show you what is Plaintiff's Exhibit
10 No. 20. Bates stamp number 339. In all of these
11 inspections you're employees are supposed to be looking for
12 hazards on the road or hazards off the roadway including
13 dead trees; correct?

14 A. Correct.

15 Q. All right. This was -- this was Bates 339, Exhibit No.
16 20. This is November 5, 2009 work report; correct?

17 A. It's a what now?

18 Q. November 5, 2009? Do we have the wrong one up?

19 A. Yes.

20 Q. Okay. There we are. December 29, 2009, that's a work
21 report; correct?

22 A. Correct.

23 Q. Some employees of yours are out there regrading the
24 shoulder; correct?

25 A. Correct.

1 Q. Okay. This says it's beginning at mile point 6.47 and
2 ending at mile point 7.41; correct?

3 A. Correct.

4 Q. On US Highway 321?

5 A. Correct.

6 Q. And it even tell you what shoulder they're working on.
7 They're working on the north shoulder; correct?

8 A (No response.)

9 Q It shows the direction; correct?

10 A. Oh, the direction. Correct.

11 Q. So we've got somebody from the DOT out there on
12 December 29, 2009, regrading 9/10 of a mile of northbound
13 shoulder on Highway 321; correct?

14 A. Grading 75 linear feet of shoulder.

15 Q Okay. I see what you -- 75 linear feet. Okay.
16 Beginning at mile point 6.47 and ending at mile point
17 7.41?

18 A. Correct.

19 Q. Okay. Let's take a look at Exhibit 21, which is Bates
20 stamp 340. That is December 30, 2009; correct?

21 A. Correct.

22 Q. Regrading the same area of the shoulder, looks like;
23 correct?

24 A. Correct.

25 Q. On Highway 321. So it looked like somebody had to go

1 back out there and do some follow-up work the next day?

2 A. It appears they didn't finish the first day and went
3 back and finished the second day.

4 Q. Okay. And that would be somebody working on -- it
5 actually gives you the type of equipment that's being used;
6 correct?

7 A. Correct.

8 Q. You've got all these trucks and other equipment that's
9 being used; correct?

10 A. Correct.

11 Q. Looks like they've got more than one person out there;
12 correct?

13 A. Correct.

14 Q. Okay. Let's go to Exhibit 22, which is Bates stamp --
15 Let's go back and talk about this. 6.47 to 7.41, that's
16 about the area where this tree where this wreck occurred
17 would be located, basically, just off the mileage from the
18 county line; correct?

19 A. Based on what you're saying, correct.

20 Q. Okay. And what I'm saying is the amount of distance
21 that the surveyor said he measured from the county line to
22 the wreck scene?

23 A. Correct.

24 Q. Okay. Let's go to Exhibit 22, which is Bates stamp
25 178. Exhibit 22, Bates stamp 178. December 29, 2009

1 somebody is cleaning out a ditch and pipe, right?

2 A. Requested work. Driveway pipe clogged up. Correct.

3 Q. That's a request for work y'all would have received and
4 would have performed; correct?

5 A. Yes.

6 Q. Okay. So on December 29, 2009, somebody from the DOT
7 is cleaning out a ditch and a pipe; correct?

8 A. This is a work request when someone calls in and
9 requests work. This is what this form is.

10 Q. And the work would be performed, correct?

11 A. This is not showing any work performed, this is showing
12 when they called in.

13 Q. Okay.

14 A. This is a work request.

15 Q. If we look at these other records we see when the work
16 was performed?

17 A. Correct.

18 Q. And that address is where; where was that work
19 requested?

20 A. 7271 Savannah Highway.

21 Q. Okay. Let's go to Exhibit 23, which is Bates stamp
22 335. August 31, 2009; correct?

23 A. Correct.

24 Q. Highway 321, beginning at mile point 4.38 and ending at
25 mile point 9.34; correct?

1 A. Correct.

2 Q. Doing land management?

3 A. Correct.

4 Q. Both sides of the highway?

5 A. Correct.

6 Q. You have a truck out there, a mower, a boom tractor and
7 a slope tractor; correct?

8 A. And a slope mower.

9 Q. Slow mower. I'm sorry. So that lays out all the
10 equipment y'all had out there working August 31, 2009;
11 correct?

12 A. Correct.

13 Q. To do land management?

14 A. Correct.

15 Q. Let's go to Exhibit 24, which is Bates 320. March 5,
16 2009; correct?

17 A. Correct.

18 Q. Somebody's regrading a roadside ditch on Highway 321?

19 A. Correct.

20 Q. Okay. Let's go to Exhibit 25, which is Bates stamp
21 333. That is July 8, 2009. Somebody is doing routine mowing;
22 correct?

23 A. Correct.

24 Q. Highway 321?

25 A. Correct.

1 Q. That smile point 4.0 to 9.34?

2 A. Correct.

3 Q. All right. Let's go to Plaintiff's Exhibit No. 26.

4 Highway 321 -- I'm sorry, I misspoke. Exhibit No. 26, Bates
5 stamp number 321. March 6, 2009, employees are picking up
6 litter; correct?

7 A. Correct.

8 Q. Both sides of the highway; correct?

9 A. Correct.

10 Q. Starting at mile point 6 and going to mile point .34;
11 correct?

12 A. Incorrect.

13 Q 8.34. I'm sorry. 6.0 to 8.34; correct?

14 A Correct.

15 Q Both sides of the highway; correct?

16 A Correct.

17 Q Whole time they're out there they're supposed to be
18 looking for hazards that might effect the roadway; correct?

19 A Correct.

20 Q Looks like y'all were doing -- I think y'all had a
21 litter campaign back in early 2009, looks like y'all were
22 out there on February 27, 2009, doing the same type of work.
23 That's Plaintiff's Exhibit No. 27. Does that look right?

24 A. Correct.

25 Q. Plaintiff's Exhibit No. 28, which is Bates 227, August

1 12, 2008. Somebody is doing routine mowing; correct?

2 A. Correct.

3 Q. Highway 321 between 4.38 and 9.34; correct?

4 A. Correct.

5 Q. Both sides of the roadway?

6 A. Correct.

7 Q. I'm going to show you Exhibits 29, 30, 31, 32, 33, 34, ,
8 35, 36 -- I'll show you all those exhibits. Those are work
9 request forms -- excuse me, work forms much like we just
10 went over; correct?

11 A. (No response.)

12 Q. For different time at different dates?

13 A. Correct.

14 Q. So you go through the same type information. It will
15 show where work was being done and what date it was being
16 done and what type of work was being done; correct?

17 A. Correct.

18 Q. And if you look at it you'll see Highway 321 and then
19 you look at the mile points and that's how you tell;
20 correct?

21 A. Correct.

22 Q. I want to show you what is Plaintiff's Exhibit No. 37,
23 Bates stamp 183. That is another one of those work request
24 report; correct?

25 A. Correct.

1 Q. Somebody called in wanting)-- had some problem with a
2 washout from a driveway?

3 A. Correct.

4 Q. That was in August 2009; correct -- No, I'm sorry.
5 That was April 22, 2009; correct?

6 A. Correct.

7 Q. Is it your department's policy to respond to these type
8 of requests for work when it comes to these type of things
9 as quicky as possible?

10 A. Typically, within six -- eight weeks. Six to eight
11 weeks.

12 Q. Okay. You have everything done and completed within an
13 eight week period?

14 A. Correct.

15 Q. Okay. I want to show you Plaintiff's Exhibit 38 and
16 39. Similar type work request. These are people calling in
17 saying hey, I need this done, I need you to come out and fix
18 this or address this; correct?

19 A. Correct.

20 Q. Okay. I want to show you Plaintiff's Exhibit No. 46.
21 I'm not going to put that on the screen. Same type work
22 request; correct, from 2008? Somebody calling in for work
23 at mile point 7.56?

24 A. Correct.

25 Q. Okay. Mr. Brandyburg, I'll lastly I just want to show

1 you Plaintiff's Exhibit Nos. 40 through 44 and ask you if
2 these are daily work reports very similar to what we just
3 went over?

4 A. Correct.

5 Q. Okay. I'm not put them all up on the board because
6 they're exhibits already in evidence. So each one of these
7 times we've gone over that the employees of DOT were out
8 there performing other duties or road inspections, if
9 they've seen that tree that's shown in Exhibit No. 1, if
10 somebody had seen that tree right there that's shown in
11 Exhibit No. 1, you'd expect your employees would take steps
12 to have that tree removed, wouldn't you?

13 A. Correct.

14 Q. So there's really only two possibilities here, right?
15 Either no one from the DOT saw this tree and located this
16 tree because they weren't doing their job or somebody saw it
17 and just decided not to do anything about it. There's
18 -really only two possibilities isn't it?

19 MR. NESS: Your Honor, objection. There's no evidence
20 that somebody saw this tree and ignored it. If he has
21 evidence -- we don't have any evidence that we ignored the
22 tree.

23 MR. WILSON: I'm just asking what the possibilities are,
24 Your Honor.

25 THE COURT: Well, I think you've asked the question if

1 somebody had seen the tree they're supposed to take it down.

2 MR. WILSON: Right.

3 THE COURT: If they haven't seen the tree it was never
4 reported. You can ask it that way.

5 MR. WILSON: Okay.

6 BY MR. WILSON:

7 Q. So the only possibilities are somebody didn't see this
8 tree or it never got reported; correct?

9 A. Correct.

10 Q. Or somebody saw it and didn't do anything about it?

11 MR. NESS: Your Honor, same objection.

12 MR. WILSON: I apologize, Your Honor. You can strike
13 that.

14 THE COURT: Okay. He's withdrawing it. Thanks.

15 BY MR. WILSON:

16 Q. When I took your deposition, Mr. Brandyburg, you
17 haven't been to the scene had you?

18 A. No, sir.

19 Q. Have you been to the scene since I took your
20 deposition?

21 A. No, sir.

22 Q. Okay.

23 MR. WILSON: Just one moment.

24 THE COURT: Okay. Take your time.

25 (pause)

1 THE COURT: Thank you, sir.

2 (Jury in at 10:56 a.m.)

3 THE COURT: All right, ladies and gentlemen, I hope
4 y'all appreciated the break as much as I did. Mr. Ness is
5 now going to go forward with his cross-examination.

6 Mr. Ness.

7 MR. NESS: Thank, Your Honor.

8 THE COURT: Yes, sir. Your witness.

9 DAVID BRANDYBURG - CROSS-EXAMINATION

10 BY MR. NESS:

11 Q Mr. Brandyburg, how long have you been with the South
12 Carolina Department of Public Transportation?

13 A In November it will be 21 years.

14 Q Okay. Have you always been in Orangeburg County?

15 A No, sir.

16 Q Where else have you been stationed?

17 A When I graduated from school, I started in construction
18 in Orangeburg. After that, working there five years I was
19 Permits Coordinator in Orangeburg Maintenance. Did that for
20 three years, and after that I went to Manning where I was
21 the Assistant Residence Maintenance Engineer. Did that for
22 a year. After that, I went to Allendale Maintenance, where
23 I was their Residence Maintenance Engineer there for three
24 years, I believe. After that I moved to Orangeburg in --
25 came back to Orangeburg in 2003, where I've been the

1 Resident ever since.

2 Q And by Resident Maintenance Engineer, we're talking
3 about in charge of all maintenance in central Orangeburg
4 County?

5 A That is correct.

6 Q All under your purview or supervision?

7 A That is correct.

8 Q Now, you mentioned when you finished school; where did
9 you go to school?

10 A I went to South Carolina State University.

11 Q Okay. I think you may have played football there?

12 A Yes, sir, I did.

13 Q Okay. Do you live here in Orangeburg?

14 A Yes, sir, I do.

15 Q And you have a family, as well?

16 A Yes, sir. I have two kids. A 13 year old and a seven
17 year old.

18 Q Okay. They play football, as well?

19 A My son -- the 13-year-old does.

20 Q Okay. Tell me just generally what you're -- I guess
21 your activities you have to supervise are?

22 A Not only do we supervise the mowing of the
23 right-of-ways, I supervise installation of driveways for
24 residence, we supervise the repairing of washouts, the
25 clearing of ditches, it's a lot that we do. Also, we

1 maintain the traffic signals in Orangeburg, pavement,
2 repairing the pavement for potholes and other things. Also,
3 we have vehicles we have to repair and make sure they're
4 operational so we can go out and do these things. That's --
5 I'm sure I'm missing some of it, but that's the vast
6 majority of what we're doing.

7 Q. The stop lights, that's all electrical kinds of issues,
8 isn't it?

9 A. Yes, it is.

10 Q. And you have a team of electricians that work under
11 you?

12 A. That is correct.

13 Q. All of these issues that you just explained to the jury
14 they all come across your desk at some point?

15 A. That is correct?

16 Q. Now, as part of the tree removal issues that you and
17 Mr. Wilson went through extensively, but I want to ask you a
18 few kind of clarification questions?

19 A. Sure. S

20 Q. When you have an issue with a tree on private property;
21 what's your procedure with that?

22 A. Our procedure is we make contact with the property
23 owner and get permission to remove the trees. In some cases
24 where they won't give permission then we have to let them
25 know what it's a liability issue that they may be liable if

1 something happens and the tree falls onto the public
2 right-of-way.

3 Q Because you've told them about it; correct?

4 A. Correct.

5 Q. And generally you get cooperation with folks about
6 removing a dead tree?

7 A. Generally, we do get cooperation.

8 Q. And have you gone back and looked at your records for
9 say 2009 about three removal?

10 A. Yes, sir, I did.

11 Q. How many dead trees has your Central Orangeburg County
12 Maintenance Department, how many did you remove in 2009?

13 A. In 2009 we removed 84 standing dead trees and over 200
14 trees which had fallen and we cleaned them up.

15 Q. Did you remove all those -- your maintenance section or
16 were some of them were done by private contractor the DOT
17 hires?

18 A. 84 we did in-house and we had 29 removed by contractor.

19 Q. So you have contacted folks once you identify a tree
20 that you may not have the equipment to remove it, the bucket
21 trucks or whatever you need to remove a tree, you bring in a
22 contractor to do that?

23 A. That is correct.

24 Q. Okay, so between you -- you being the maintenance
25 department and the contractor, y'all removed well over 100

1 trees?

2 A. That is correct.

3 Q. In 2009, alone?

4 A. That is correct.

5 Q. And that's the year before this incident allegedly
6 happened?

7 A. That is correct.

8 Q. And that doesn't county the other sections of
9 Orangeburg County not under your purview?

10 A. No, it does not.

11 Q. Do you know how many miles are in your area of
12 Orangeburg County that you have to maintain?

13 A. Roughly, 1,000 miles.

14 Q. And that crew of 75 that Mr. Wilson asked you about
15 that's who has to maintain it?

16 A. That is correct?

17 Q. And do you have just a desk job or do you have other
18 jobs besides just looking at issue that you have to deal
19 with paper-wise?

20 A. I have permits. I have a lot of other issues as well.

21 Q. Do you do inspections yourself?

22 A. Yes, I do.

23 Q. How many other folks do expansions of the highway in
24 your district?

25 A. In our county?

1 Q No, in your section, the Central Orangeburg County?

2 A We have 12 foreman that does the inspections and
3 typically it's five of us that -- night inspectors, because
4 that 1,000 miles of roads for the inspections, we have to do
5 it -- some of it is twice, some of it just once, the night
6 inspection we have to do it one time a year.

7 Q. Okay. So the 1,000 miles has to be ridden one time at
8 night under your policy guidelines?

9 A That is correct.

10 Q Okay, and I think that's one of the documents Mr.
11 Wilson showed you earlier talk that talked about how often
12 you have to do these inspections, right?

13 A That is correct.

14 Q. All right. And US 321, what kind of highway is that?

15 A. It is a primary road.

16 Q. What does that mean?

17 A. For the -- the gist of it, our primary roads, we get
18 federal funds to help us repair and maintain.

19 Q. All right. What's a secondary road?

20 A. A secondary road would be what might be called a farm
21 to market roads. They are low volume, low speed roads.
22 Sometimes they're in a subdivision, sometime they're roads
23 that just connect other main roads.

24 Q. But regular arteries, main arteries would be a primary
25 highway?

1 A. That is correct.

2 Q. That's be like US 321 that runs from Bamberg to Santee?

3 A. That is correct.

4 Q. And other places?

5 A. Correct.

6 Q. US 321, which is this highway, 301, you've got Highway
7 15 that goes through Orangeburg County?

8 A. That is correct.

9 Q. US 15, primary highway?

10 A. That is correct.

11 Q. Okay. And they have high volumes?

12 A. They have higher volumes than our secondary roads.

13 Q. Okay. The interstate is a whole different story, isn't
14 it?

15 A. Yes, sir.

16 Q. You have to inspect monthly and you do those
17 inspections?

18 A. Yes, sir, we have to inspect those monthly.

19 Q. Okay.

20 A. As well as inspect nighttime.

21 Q. Now, Mr. Wilson asked you about a number of documents
22 that he showed you that are in evidence here about
23 inspections. Those are records that you keep of the
24 inspections DOT does?

25 A. That is correct.

1 Q. And in 2009 the year more or less in question here
2 since this wreck happened, I think on January 7 or 8 of
3 2010, did DOT do all this inspection?

4 A Yes, sir, we did.

5 Q. Okay, were there any inspections that had to be
6 completed in multiple parts, in other words, you have to
7 part of it today, part of it tomorrow, part of the next day?

8 A. Yes, because some of our foreman have such a large area
9 they can't inspect all of it at one time so they have to do
10 multiple days to do their inspections.

11 Q. Okay, and what kind of records you keep for the
12 multiple inspections, multiple days that you do inspection?

13 A. We do it with a daily work report. Whatever they are
14 going out and doing work they have to keep up with that --
15 that's how they get paid is the amount of time that they
16 show for these work reports. So that's how they keep up
17 with it is what we -- commonly known as the Highway
18 Maintenance Management System.

19 Q. Okay, and that's not the vegetation manual that we've
20 talked about some here?

21 A. No, sir. That's the work reports that Mr. Wilson was
22 inquiring about.

23 Q. The vegetation manual, which I want to show you here,
24 can you explain what this document is, Defendant's Exhibit
25 No. 15?

1 A. This is a document that we use to give guidelines to
2 not only DOT, but to private individuals on what our
3 policies are for doing different things, such as routine
4 mowing, right-of-way clearing, bridge and vegetation mowing,
5 fence clearing, tree maintenance, herbicides, turf
6 conversions.

7 Q. All that's just connected to vegetation?

8 A. That is correct.

9 Q. That's not stop lights, that's not patching potholes,
10 that's not doing anything pavement wise, is it?

11 A. No, sir. That's just vegetation.

12 Q. Okay. And your busy time of year in that is when?

13 A. Busy time is in spring and summer.

14 Q. Okay. Now, that vegetation manual, is that adopted by
15 the maintenance department out of Columbia that controls the
16 whole state?

17 A. Yes, sir.

18 Q. Is this document, which has been marked as Plaintiff's
19 No. 10, Engineering Directive Memorandum Number 29, I think
20 it is. What is that?

21 A. This is a vegetation management on state highways.
22 This is a policy that tells us what we should do with
23 vegetation management for our roadways.

24 Q. So that's the policy that says go use this manual and
25 implement this manual?

1 A. That is correct, more or less. Yes.

2 Q. Okay. Now, is there any difference in general between
3 Plaintiff's No. 9, that I have in my hand, Number 10 that
4 you have in your hand. This is a document called tree
5 removal or essentially are they part of the same thing?

6 A This is more of a training guide for people telling
7 them where they need to go to find information and -- this
8 is more of a where to go to find information and where they
9 would go would be the vegetation management for these
10 different issues.

11 Q Okay. So it all goes to the same thing; dealing with
12 trees?

13 A. That is correct.

14 Q. And the second page, I think number 10 right there that
15 you have, that is page -- what page out of the manual Mr.
16 Wilson has attached to that document?

17 A It's Page 20.

18 Q All right. So that's Page 20, right here, that deals
19 with dead or diseased trees?

20 A That is correct.

21 Q And the rest of this manual deals with all with all of
22 the other things that you talked about, mowing and bridge
23 vegetation, how you mow around a bridge, regular fence
24 clearing; all of those other issues you have to deal with?

25 A That is correct.

1 Q Okay. So -- but the page dealing with tree management
2 is right here on page -- dead or diseased trees location on
3 or off the right-of-way which may fall on the travel --
4 should be removed?

5 A That is correct.

6 Q You've got to know the tree is there, don't you?

7 A That is correct.

8 Q And do you and your staff, your employees look as hard
9 as you can for trees?

10 A Yes, we do. We look as hard as we can, as well as when
11 the public call us and notifies us about trees, and when we
12 are notified we go and move immediately.

13 Q You look for them and then if the general public calls
14 in you deal with it at that angel?

15 A Corrects.

16 Q So of the 84 tree that you actually took down in 2009
17 that is a combination of what your folks found and or what
18 people called in about?

19 A That is correct.

20 Q Okay. I'm going to show you some document, trying not
21 to go through too many of the documents, but eight or 10, I
22 want to go through. Tell me what Plaintiff's Exhibit No. 2
23 is, if you would?

24 A It's a --

25 MR. WILSON: What's that Bates -- I'm sorry.

1 MR. NESS: It's 181.

2 A -- that is a work request report and what that is is
3 when someone calls in and requests work this is how we
4 document it.

5 BY MR. NESS:

6 Q What kind of issue was involved in that particular
7 document?

8 A A tree needs cutting.

9 Q Is that a work report that you folks generate or is
10 that a call in from somebody outside DOT?

11 A It was a call in from somebody outside DOT who called
12 in and requested that we remove a dead tree. A tree needs
13 cutting.

14 Q Okay. From where you're reading that document, was
15 that project completed?

16 A Yes, sir, it was.

17 Q When was that done?

18 A It was done September of '09, according to this.

19 Q Okay. Now, I'll show you Exhibit No. 3. Tell me what
20 that document is?

21 A This is a daily work report. And this is how we
22 document what we do in-house, internally.

23 Q And what was that particular document showing that you
24 did internally?

25 A Limb management.

1 Q Okay. Is that part of the vegetation manual
2 requirements?

3 A Yes, sir.

4 Q When was that done?

5 A July 22, 2008.

6 Q Okay. I think this is maybe a second page of that same
7 document. Is that the same date, the same issue?

8 A That is correct. Second page.

9 Q Okay. That was Number four?

10 A That is correct.

11 Q That showed your people were out on the road somewhere,
12 again, looks about four or five people that were actually on
13 the limb management responsibility?

14 A That's correct.

15 Q Okay. Tell me about the limb management; what does
16 that involve?

17 A Typically, limb management is as you're riding you have
18 limbs that are low hanging or encroaching upon the
19 right-of-way. We go out and we trim them back and then we
20 remove the stumps and grind up -- not stumps, the limbs.
21 The limbs we grind them up or we haul them off.

22 Q And you say, low hanging, like tractor trailers would
23 hit the low hanging limbs and damage a truck?

24 A That is correct.

25 Q So you trim limbs to make sure they're not hanging on

1 the road where somebody can get hit?

2 A Open up so they have visibility, so you have
3 visibility.

4 Q Okay. Now, I want to show you what's been marked as
5 Defendant's Exhibit No. 5. Tell me what this document is?

6 MR. WILSON: What Bates number is that?

7 MR. NESS: 313.

8 A This is a daily work report.

9 BY MR. NESS:

10 Q Okay. For what kind of work?

11 A For limb management. It was on November 5, 2008.

12 Q All right. Does that involve any kind of tree removal?

13 A In the comments, they removed trees from the shoulder.

14 Q All right. Could you tell me the mile points on that
15 document?

16 A The mile points for 321 was 6.81.

17 Q All right. So that's US 321, that's what 321 means,
18 right?

19 A Yes, sir.

20 Q That's the highway in question.

21 A Yes, sir.

22 Q And the mile point is 6.81?

23 A That's correct.

24 Q All right. That's approximately within the mile points.
25 Mr. Wilson was asking you based on information you have

1 where this incident occurred?

2 A That is correct.

3 Q So the tree was removed according to that document?

4 A Correct.

5 Q That's Exhibit No. 5. Mr. Brandyburg, I'll show you
6 Defendant's Exhibit No. 6; is that a tree removal document,
7 as well?

8 A Yes, it is.

9 Q Where was that tree removed?

10 A On US 321, as well.

11 Q What's the mile point on that?

12 A 8.0.

13 Q That's sort of within the area Mr. Wilson was asking
14 you about, as well?

15 A That's correct.

16 Q And does that show the tree had to be taken out?

17 A It was a tree removed, a fallen tree.

18 Q Okay. Mr. Brandyburg, I want to show you Defendant's
19 No. 7. I guess another tree removal document?

20 A Yes, sir, it is.

21 Q Does that involve a Highway 321 tree?

22 A This is the first page and this page shows 4 and 132,
23 but they removed four trees on this one?

24 Q What date is on that?

25 A November 13, 2 --

- 1 Q This is the second page. Does that show a 321 tree?
- 2 A Yes, sir, it does.
- 3 Q So that's a two page document?
- 4 A Yes, sir.
- 5 Q All right. And for a tree removed on 321?
- 6 A Yes, sir, it was.
- 7 Q Can you tell what mile point it was?
- 8 A 3.75.
- 9 Q All right. This would be in the other direction from
- 10 the last one?
- 11 A Yes, sir, it is.
- 12 Q Okay. I want to show you Defendant's No. 9, and does
- 13 that show an inspection for Highway 321?
- 14 A Yes, sir, it does.
- 15 Q What date was that?
- 16 A October 1, 2009.
- 17 Q Okay, so that's about three months before this incident
- 18 happened?
- 19 A Yes, sir.
- 20 Q On US 321, according to that document?
- 21 A Yes, sir, it was.
- 22 Q Do you know who did it?
- 23 A Not from -- it's the crew 3811, but it doesn't have the
- 24 employees on this sheet.
- 25 Q Okay, but if that document is generated then someone

1 has inspected the highway for those areas that's shown
2 there?

3 A That is correct.

4 Q What mile points are those?

5 A For 321, it was 2.36 to 9.34.

6 Q So that's generally between Norway and Neeses?

7 A That's correct.

8 Q Okay. Mr. Brandyburg, I want to to show you another
9 inspection document that's Bates stamped 442. Does this
10 show additional inspections on Highway 321?

11 A Yes, sir, it does.

12 Q When was that done?

13 A This was done December 17, 2009.

14 A. That is correct.

15 Q. All right. What mile points was that?

16 A On 321, was 2.36 to 9.34.

17 Q. Same area that you did in October?

18 A. Correct.

19 Q. Okay, that's above and beyond the requirements you have
20 to do in terms of inspections or is that a different kind of
21 inspection?

22 A This is daytime inspection. At this time I believe we
23 did them four times a year.

24 Q Okay. So back in 2009, you did them four times a year?

25 A That is correct.

- 1 Q And this -- is this a daytime or nighttime inspection
2 that we showed on Exhibit No. 9?
- 3 A This is a daytime inspection as well, on October 1.
- 4 Q All right. So you did them in October and December?
- 5 A Yes, sir.
- 6 Q This incident happened in January?
- 7 A Yes, sir.
- 8 Q The best you know about it?
- 9 A Yes, sir.
- 10 Q Did you know about this case, this situation at all
11 when it happened?
- 12 A No, sir, I did not.
- 13 Q When's the first you found out about it?
- 14 A When we were being sued by Mr. Breland's attorney?
- 15 Q When the paper's came in from Mr. Breland's attorney?
- 16 A Yes, that is correct.
- 17 Q Okay. You had not had a report from Mr. Breland?
- 18 A No, sir, we did not.
- 19 Q Hadn't had a report from anybody?
- 20 A No, sir, we did not.
- 21 Q No trooper?
- 22 A No, sir.
- 23 Q No, fireman?
- 24 A No, sir.
- 25 Q Just didn't know about it.

1 A That is correct, sir.

2 Q Okay. I'm going to show you Exhibit No. 11. I want
3 you to tell me what that is.

4 A This is a daily work report for inspections, nighttime
5 inspection, for November 27, 2007.

6 Q Okay, is that one that you would have probably done in
7 2007?

8 A This is Mr. Herndon. Mr. Herndon did this one on
9 November 27.

10 Q All right. Is that US 321 between Neeses and Norway?

11 A Yes, sir, it is.

12 Q So it was done in accordance with the guidelines, as
13 well?

14 A That is correct.

15 Q I want to show you Exhibits 12 and 13. Bates stamped
16 554, and 555. Can you tell me what those are?

17 A This are -- one is a work request report for US 321
18 from January 2010 through February 2012.

19 Q All right. That encompasses part of the month that
20 we're here today about?

21 A That is correct?

22 Q All right. Were there any trees removed in January of
23 2010?

24 A Yes, sir. There was one removed from US 321 on January
25 24, 2010.

1 Q All right. That's two weeks or so after this incident
2 happened?

3 A Yes, sir.

4 Q And does it show the work was completed?

5 A No tree found, no action taken.

6 Q You didn't find a tree?

7 A That's is correct?

8 Q How would that come in, how would you even have a
9 record of that?

10 A When law enforcement calls us out to -- the foreman
11 will call or whoever law enforcement calls then we go out
12 and we look for what they're calling about. If we find it
13 we -- we still make a note of what we're called about.

14 Q Okay. And you didn't find any hazard in the road from
15 that?

16 A No, sir, we did not.

17 Q Okay. What's the next document that you have, No. 13?

18 A This is a daily work selection report and it shows
19 inspections of US 321 from November 2009 to February 2010.

20 Q So that encompasses -- is that a summary, is that what
21 that is?

22 A Yes, sir, it is.

23 Q Because Mr. Wilson and I both put in various inspection
24 documents. Is that a summary of your inspections?

25 A That is correct.

1 Q Is that a daytime inspection?

2 A This actually shows -- it shows all inspections so it
3 should show both daytime and nighttime inspections.

4 Q Okay, and during the time period you just mentioned,
5 how many inspections were done on US 321?

6 A About -- four inspections on 321.

7 Q Okay, and I want to show you exhibit that's marked 556,
8 kind of in conjunction with that one, would you tell me if
9 there's any difference in those two documents or what the
10 difference is?

11 A This document was just from -- it's a summary of
12 inspections done from January 1, 2008 through December 31,
13 2009.

14 Q So it's a little bit different period?

15 A That is correct.

16 Q So during that -- so basically a two year period how
17 many inspections were done on US 321 then?

18 A 20, approximately 20 inspections were done in this time
19 period.

20 Q On US 321?

21 A That is correct. On US 321.

22 Q So that'd be 20 inspections. Does that include daytime
23 and nighttime?

24 A That includes daytime and nighttime. Yes, sir.

25 Q From January 31, '08 to December 31, '09, roughly two

1 full years?

2 A That's correct, sir.

3 Q Mr. Brandyburg, tell me what you do procedurally, I
4 guess, is the best way to ask that question, when you do an
5 inspection. When you ride the road for inspection or you
6 have your employees, your foreman, tell me how you do your
7 inspections?

8 A For -- I start with me. I do nighttime inspections.
9 When I'm doing a nighttime inspection I'm looking for
10 payment markers to make sure that pavement markers are
11 visible, that they are reflecting in the night. We're
12 looking for the signs to see that they're reflecting to make
13 sure the people can see them, as well, and you are looking
14 for any hazards that may obstruct people's vision or may
15 obstruct people while they're driving during the nighttime.

16 Q Are the daytime inspections different than that?

17 A Daytime inspections you're looking pretty -- you see a
18 lot more during the daytime inspections.

19 Q Obviously.

20 A Daytime inspection you're basically looking from
21 right-of-way to right-of-way, any type of hazard that you
22 can see in that area that may effect the road.

23 Q Okay, and what else besides looking for hazards do you
24 do on your daytime inspections. Are you looking for signs
25 up or down, stop lights that are burned out, those kind of

1 things?

2 A Yes, sir, as well as drainage -- you do a lot more in
3 the daytime to make sure the drainage is functional, to make
4 sure that any kind of hazard that may effect the traveling
5 public.

6 Q Well, when you say any kind of hazard, kind of expound
7 a little bit, because I want to jury to understand what --
8 you're not just looking for a tree on a particular
9 inspection. I want to know what else you look for?

10 A We are looking for high or low shoulders, because if
11 you have a high shoulder you can trap water and create a
12 hazard of hydroplaning. You can look for low shoulders,
13 because if you low shoulders people can run off the road and
14 over correct and create a hazard. You're also looking for
15 vegetation that will block -- you're looking for any type of
16 blockage for your signs, because if you have signs and
17 people can't read them and they're warning for something,
18 they're not able to react to them. So you're looking for
19 signs to be sure they're visible in the daytime and there's
20 nothing obstructing them.

21 Q Visible, visible or invisible?

22 A Visible. Making sure they're visible. Making sure
23 that they're -- that they can see them while they're
24 driving. If it's a curve sign and there's vegetation
25 blocking the curve sign, that a hazard, because someone goes

1 too fast and they don't realize the curve is there they
2 could lose control and go off the road, so you have to make
3 sure that while they're driving they can see these hazards
4 and make sure that anything that could create a hazard for
5 the traveling public, drainage in the ditch, making sure
6 that your ditches are functional so that it doesn't back up
7 water and back up onto the roadway or back up onto property.
8 So making sure that your ditches are functional.

9 Q All right. You mentioned a few minutes ago when you
10 first started talking about your duties high shoulder, low
11 shoulder. When you say high shoulder, if you've got --
12 let's say my pad is the road. If the dirt on the side of
13 the road builds up a little bit higher on the shoulder on
14 either or both sides, that's traps water?

15 A That is correct.

16 Q A low shoulder, let's say my, again, my pad is the
17 road. If the shoulder is down lower than the road and
18 there's a drop-off, what's the hazard there?

19 A People can drop off the road and the tendency once you
20 drop off is to snatch back and if you snatch back and you
21 can't get your vehicle back quick enough it could
22 overcorrect and go into the opposite lane and create a
23 hazard of head on collisions or people could lose control of
24 your vehicles.

25 Q So you do your best to identify all those issues?

1 A Yes, sir.

2 Q We talked about the Highway 321 inspections, but you
3 said 1,000 miles of road in central Orangeburg County?

4 A Yes, sir.

5 Q How often are inspectors out there working?

6 A Every day they're out there working and they're looking
7 for stuff, you know, as they're out there working every day.

8 Q So is there -- are there really many days of the 365
9 days of the year that you don't have an inspector doing
10 inspections somewhere in your part of the county?

11 A No, sir.

12 Q So you have people that do just inspections?

13 A No, no, sir.

14 Q Okay. Explain that to the jury, if you would.

15 A As they're out there doing their regular routine work,
16 they're also inspecting -- they're doing due duties.
17 They're inspecting as they're normal routine of work.

18 Q So they're looking for anything while they're doing
19 regular work?

20 A That is correct.

21 Q But you also have certain days that are designated as
22 inspection day?

23 A Well, not days, but because you have to get inspections
24 done, you have to do them on -- twice a year, days of most
25 of them they have to go and do just inspections.

1 Q And that's what the records reflect?

2 A That is correct.

3 Q Those type of days?

4 A That is correct.

5 Q Okay. Mr. Brandyburg, when you're riding down the road
6 -- you've done daytime inspections before haven't you?

7 A Yes, sir.

8 Q When you're doing a daytime inspection what kind of
9 vehicle do you drive?

10 A I drive a Stratus. A Dodge Stratus, a sedan.

11 Q Okay, and it's got your basic windshield on it, right?

12 A Yes, sir.

13 Q Did doesn't have a sunroof does it?

14 A No, sir.

15 Q All right. So what you're looking at is a windshield
16 view?

17 A That is correct.

18 Q And a side window view?

19 A That is correct.

20 Q How do you look for -- let's specifically draw
21 attention to trees. When you're looking for all kinds of
22 things, but specifically for a tree. How do you look for a
23 tree?

24 A The most common way is your side view. You see it on
25 your side view, being limbs or bark or something that shows

1 it something wrong with the tree. The majority of the time
2 it's from the side view as you're driving along.

3 Q Either side?

4 A Either side.

5 Q Okay. When you do inspections do you ride north and
6 south or east and then west?

7 A Yes, you ride both ways on the road.

8 Q So if you were going to do inspections on 321 one day
9 you will start going in one direction and then when you get
10 to the end of your inspection district you turn around and
11 go the other way?

12 A That is correct.

13 Q Now, do your folks do the best job they can do?

14 A Yes, sir. We do the best job we can with identifying
15 hazards.

16 Q And in fact you found or worked on 84 dead trees?

17 A Yes, sir.

18 Q But that doesn't count limb management does it?

19 A No, sir.

20 Q And you had contractors come in and take out 29 dead
21 trees?

22 A Yes, sir.

23 Q That's doesn't count limb management either?

24 A No, sir.

25 Q Mr. Brandyburg, when you do these daytime inspections

1 and you look to the right and to the left, you look with the
2 right-of-ways, correct?

3 A Correct.

4 Q And you also look outside of the right-of-ways while
5 you're looking for trees?

6 A Correct.

7 Q Is that what your policy, your procedure says to do?

8 A It states to look as much as visibly possible for
9 diseased trees that could effect the right-of-way.

10 Q And it says on or off of the right-of-way?

11 A That is correct.

12 Q Okay. When they are off of the right-of-way, is it
13 standard procedure to contact the landowner?

14 A Yes, sir, it is.

15 Q I mean, you just don't go onto somebody's property and
16 start cutting down live or dead trees, do you?

17 A No, sir.

18 Q You don't want any unhappy citizens out there do you?

19 A No, sir.

20 Q So you figure out who the landowner is?

21 A Yes, sir. We do.

22 Q Do you go to the courthouse?

23 A Well, typically we use Orangeburg County map, property
24 maps that locate property owners that way.

25 Q Then you contact them by phone or you go see them if

1 you have to?

2 A That is correct.

3 Q I want to show you a picture, I'll represent you to
4 that we looked at it, and it's Highway 321 going south.

5 A Yes, sir.

6 Q You recognize generally that view?

7 A Yes, sir.

8 Q Is that about three-quarters of a mile or so of where
9 the incident allegedly happened in this case?

10 A I believe it is. Yes, sir.

11 Q This is US 321 looking south, right?

12 A That is correct.

13 Q All right. And you see fields on both sides?

14 A Correct.

15 Q But down three-quarters of a mile or so you see woods
16 on the right?

17 A That is correct?

18 Q That's generally the woods we're talking about here?

19 A I believe that's the general area the wreck occurred
20 in.

21 Q All right. Now, would that be the same kind of view
22 that you would see if you were driving in the car?

23 A Yes, sir.

24 MR. NESS: Your Honor, I offer this into evidence.

25 THE COURT: No objection?

1 MR. ADAM NESS: Yes, sir.

2 MR. NESS: Far as I know, Your Honor. If it hadn't
3 changed it's just what came down off of Google....

4 THE COURT: Okay.

5 MR. NESS: If you'll give him a second we can hook up to
6 that system.

7 THE COURT: Okay.

8 BY MR. NESS:

9 Q Mr. Brandyburg, in looking at this earlier you can tell
10 this is roughly a section of woods just shown on the
11 picture, I think, the jury is passing around.

12 A Yes, sir.

13 Q Okay. That's the same view you see if you're driving
14 down the road?

15 A Yes, sir.

16 MS. JETT: Your Honor, may we dim the lights?

17 THE COURT: Sure.

18 (Video is played.)

19 BY MR. NESS:

20 Q Is this what you'd see if you were riding down the
21 road?

22 A Yes, sir.

23 Q Generally speaking?

24 A Yes, sir.

25 Q Okay. Mr. Brandyburg, having looked at that film

1 there's nothing that you saw on that little film that would
2 cause you to stop and see a tree was it?

3 A No, sir.

4 MR. NESS: Your Honor, I think that's all the questions
5 I have for Mr. Brandyburg at this time.

6 THE COURT: All right. Thank you, sir.

7 Mr. Wilson, anything on redirect, limited to his cross?

8 MR. WILSON: Yes, sir, Your Honor.

9 THE COURT: Okay.

10 DAVID BRANDYBURG - REDIRECT EXAMINATION

11 BY MR. WILSON:

12 Q Mr. Brandyburg, there was no contact made with any
13 property owner about removing this tree that William Breland
14 was involved in a wreck with was it?

15 A No, sir.

16 Q Okay. And I think you said to remove the tree you
17 gotta know where it is, I think is what you told Mr. Ness
18 earlier, correct?

19 (No response.)

20 Q Gotta know there's a tree; correct?

21 A Correct.

22 Q So you either got to be looking for trees or somebody's
23 got to call you and tell you there's a tree?

24 A Correct.

25 Q Now, when the DOT gets a call about a tree whether it's

1 a tree that's fallen or a tree somebody has called about
2 that say's hey, this tree needs to be removed or you're just
3 out there removing trees, when y'all take a tree down you
4 haul the pieces off; correct?

5 A It depends. Sometimes we haul them off. Sometime if
6 it's a rural area we leave them on the property.

7 Q Okay.

8 A So it depends on where the area is.

9 Q But y'all don't leave them laying out on the shoulder
10 or sticking out in the ditch or anything like that?

11 A No.

12 Q They wouldn't be in the shoulder of the highway or they
13 wouldn't be in the ditch --

14 A No, sir.

15 Q -- just off of the edge of the right-of-way or the
16 mowed area?

17 A Talking about when we remove a tree?

18 Q You removed the tree.

19 A No, sir, we wouldn't leave it at that location.

20 Q Okay. And I'm a little bit confused because at one
21 point I thought you told the jury when your people are out
22 doing their jobs they're supposed to look right-of-way to
23 right-of-way, but then you said they're supposed to see
24 outside the right-of-way to define or to locate hazards.

25 A If you're riding down the road and you're looking in

1 the right-of-way and you see a tree that's five or so feet
2 beyond the right-of-way, but it's going to fall into the
3 right-of-way, that is something that you would see.

4 Q Okay. So if you see anything that indicates you've got
5 that kind of tree that's something you would see while
6 you're doing your riding inspections?

7 A That's something -- a tree you would remove.

8 Q Okay. Now, I want to show you, just go back through a
9 couple of things Mr. Ness did with some of these work
10 orders. Defendant's Exhibit No. 2, Bates 181. That's --
11 I'm going to stand back here so I can look at them with you.

12 MR. WILSON: Can I do that, Your Honor.

13 THE COURT: Sure.

14 BY MR. WILSON:

15 Q That's July, 2009. That's a tree that needed cutting.
16 Y'all got a phone call or a request about that, correct?

17 A Correct.

18 Q And that was at mile point 4.75?

19 A That is correct.

20 Q Some three or four miles from this site?

21 A Correct.

22 Q All right. I'm going to leave that there. I'm going to
23 show you what Mr. Ness showed you here. Defendant's Exhibit
24 No. 3. That's a July 2008 work report where somebody
25 removed a fallen tree from the shoulder of the road?

1 A Correct.

2 Q So that's a fallen tree?

3 A Actually, it was limb management and they removed the
4 fallen tree.

5 Q Okay. I want to show you what's Defendant's Exhibit
6 No. 4. That's just limb management; correct?

7 A That is correct.

8 Q That doesn't have anything to do with removing trees,
9 just cutting back limbs?

10 A That's what it appears to be just cutting back limb.

11 Q Okay. I'll put that there. Defendant's Exhibit No. 5,
12 that's November 2008. That shows some trees were removed
13 from the shoulder of Highway 321?

14 A Correct. Limb management when -- they removed trees
15 from the shoulder.

16 Q Okay. Can you tell whether the trees were standing or
17 down already?

18 A No. This doesn't show. This doesn't say.

19 Q And that was at mile point 6.81?

20 A That is correct.

21 Q Okay. Let's put that right there. Defendant's Exhibit
22 No. 6, June 2009, that's somebody removing an already fallen
23 tree, right?

24 A That's correct.

25 Q Seven, Defendant's Exhibit No. 7, November 13, 2009.

1 That's somebody already removing a fallen tree; correct?

2 A Correct.

3 Q Defendant's Exhibit No. 8, November, 2009, that's
4 somebody already removing a fallen tree; correct?

5 A I believe this is Page 2 to this Page 1.

6 Q Okay. So seven and eight go together?

7 A Correct.

8 Q Okay. And the rest of these exhibits that Mr. Ness put
9 into evidence, 10 through 13, those are all inspection
10 records; correct or a summary?

11 A These are inspection records and this is a work
12 request, selection report.

13 Q So that's No. 12?

14 A And these are daily report selection summaries.

15 Q Okay. All right. So when I look back at it, one, two,
16 three -- looks like we've got three work reports for trees
17 that were fallen that were removed?

18 A No. These are one -- this is Page 1 and Page 2.

19 Q So we've got two work reports for trees that were
20 fallen and that were removed?

21 A Correct.

22 Q And we've got two work reports for trees that were
23 removed before they fell?

24 A This says remove fallen trees from shoulder. This
25 one just says remove trees from shoulder.

1 Q So we've got three work reports for trees that were
2 removed after they fell and one work report for threes that
3 were removed before they fell?

4 A This just says remove trees from shoulder.

5 Q Okay. That's what it sounds like though, isn't it?

6 A Yes, sir. It appears, yes, sir.

7 Q And every time one of your employees goes out and does
8 work, like removing a tree, they have to complete a work
9 report form, don't they?

10 A Correct.

11 Q Where are the records for the 84 standing trees that
12 were removed in 2009?

13 A That was just for US 321.

14 Q Okay. So the 84 standing trees that were removed in
15 2009, that was all your highways, correct?

16 A In the central area, correct.

17 Q Okay. So what we're looking at a two year period is y'all
18 took down three threes that somebody had already called
19 about that had fallen and one tree or trees that y'all took
20 down while they were standing? That's the work request that
21 had been entered into evidence?

22 A I don't know if somebody called or they saw them while
23 they were out working. I didn't -- that information is not
24 on there.

25 Q Okay.

1 THE COURT: All right. Thank you, sir.

2 All right. Mr. Brandyburg, you may step down.

3 Mr. Wilson, are you ready to call your next witness?

4 MR. WILSON: Yes, sir. We are, Your Honor.

5 THE COURT: Okay.

6 MR. WILSON: We call Mr. Mark Arena.

7 THE COURT: Mark Arena?

8 MR. WILSON: Yes, sir. It's A-r-e-n-a.

9 THE COURT: All right. Mr. Arena, if you'd put your left
10 hand on the Bible and raise your right hand.

11 THE CLERK: Can you state your name for the record,
12 please?

13 MR. ARENA: Mark Arena.

14 (WHEREUPON, Mark Arena was sworn to
15 tell the truth.)

16 THE CLERK: Thank you. You may be seated.

17 THE COURT: All right. Mr. Wilson, your witness.

18 MR. WILSON: Thank Your Honor.

19 THE COURT: Yes, sir.

20 MARK ARENA - DIRECT EXAMINATION

21 BY MR. WILSON:

22 Q Mr. Arena, can I get your full name for the record,
23 please?

24 A Mark James Arena.

25 Q Okay, and where are you employed?

1 A I'm employed with Clemson University, Cooperative
2 Extension Service, Moncks Corner, South Carolina.

3 Q What do you do there?

4 A I serve as a horticulturist and I'm provide educational
5 and pesticide training to the green industry.

6 Q Okay. Do you also have another business, a consulting
7 business?

8 A That is correct.

9 Q What's the name of that?

10 A Botanical Choice. I do independent consultant work for
11 tree issues, horticulture issues and plant issues.

12 Q Are you the only employee of Botanical Choice?

13 A That is correct.

14 Q Did I contact you and engage your services concerning
15 this case involving William Breland?

16 A Yes, you did.

17 Q Okay. I want to get some of your educational
18 background, just for the jury. Just generally give me your
19 educational background, give the jury generally your
20 educational background.

21 A I have an associates degree in Forestry from Penn State
22 University, a degree from Rutgers University in Plant
23 Science and a master's degree in Arboriculture from the
24 University of Tennessee.

25 Q You said arborist and horticulturist?

1 A Arboriculture.

2 Q Arboriculture. Okay. What does that mean?

3 A The study of trees.

4 Q All right. Do you have any certifications or
5 accreditations?

6 A Yes, I do. I have two. The first one is the with the
7 International Society of Arboriculture. I'm a certified
8 arborist with that organization. The second one is American
9 Society of Consultant Arborist. I'm a registered Consultant
10 Arborist.

11 Q Okay.

12 MR. WILSON: Your Honor, we'd like to submit Mr. Arena
13 as an expert arborist or --

14 A Arborist is all right.

15 MR. WILSON: -- arborist at this point, Your Honor.

16 MR. NESS: No objection, Your Honor.

17 THE COURT: All right. He is so noted as an expert
18 arborist.

19 BY MR. WILSON:

20 Q Mr. Arena, did you review a number of photographs in
21 connection with your work in this case?

22 A Yes, I did.

23 Q Okay. Did you take some photographs of your own?

24 A I did when I visited the site.

25 Q So you visited the site?

1 A That's correct.

2 Q Okay. And did you also view or review the Google
3 imagery that some of which we just went over while you were
4 in the courtroom today?

5 A Yes, I did.

6 Q All right. I'm going to show you what's already been
7 entered into evidence as Plaintiff's Exhibit No. 50, 51 and
8 52, and ask you; are those photographs that you took on your
9 site visit?

10 A Yes, they are.

11 Q Okay. So when did you make your site visit?

12 A June 25, 2013.

13 Q I'm going to come back to those in just a moment, okay?

14 A Sure.

15 Q Mr. Arena, do you have an opinion as to what was the
16 cause of the tree falling that William Breland hit; what was
17 the cause of that tree falling?

18 A The tree fell due to the loss of structural integrity
19 which is the direct result of a disease issue, typically, a
20 fungal pathogen.

21 Q What kind of tree is it that we're talking about?

22 A Loblolly Pine.

23 Q And you said it fell because of structural integrity
24 because of disease?

25 A Yes.

1 Q I think you testified in your deposition something
2 about a fungal disease?

3 A Right. When a fungus enters a tree, depending on what
4 type it is, this one in particular, is a fungal disease that
5 effect the hardwood, which is the internal structure of the
6 tree. As the fungus enters the tree and decay starts to
7 occur, it creates voids in the wood and therefore it leads
8 to structural integrity.

9 Q Okay. So you didn't see any evidence in the
10 photographs you reviewed of the site visit of any kind of
11 beetles or lightening or other reasons for decay for
12 falling?

13 A I did not.

14 Q Now, explain what you saw, and if there's photograph
15 that you need just let me know, but explain what you saw
16 that caused you to come to the opinion that the tree fell
17 because of the fungal disease and decay?

18 A Based on the pictures that I was provided, the majority
19 of the tree was denuded of all bark. The way the tree had
20 fallen, it fell apart in segments and you could see the
21 splintering of the tree in different portions of the tree
22 that were lying on the ground. Based on those facts, I find
23 it conclusive that it was a diseased tree and lost it's
24 structural ability and therefore it failed.

25 Q These are the conditions that you are talking about

1 shown in what's Plaintiff's Exhibit Nos. 5, 6, 7 and No. 3,
2 that I'm showing to you now?

3 A Yes, they are.

4 Q You saw numerous other pictures of the same type of
5 conditions?

6 A That is true.

7 Q Okay. Did you also, when you visited the scene was
8 there anything about the stump that you saw that caused you
9 to come to that opinion about the tree being diseased?

10 A Yes. Trees will typically fail on two manners. Number
11 one, they will dislodge from the earth due to the wind or
12 other weather related conditions and also root rots, which
13 will render the tree instability. Secondly, when the tree
14 breaks above the ground it lets you know that there's an
15 internal fungal disease, as I stated earlier, loses the
16 structural stability. The tree will typically sever or
17 break anywhere from six inches to about four to five feet
18 above ground.

19 Q What'd you find about the stump at this stump when you
20 went out there on your site visit?

21 A The stump was degraded pretty severely and also
22 appeared that it broke about two feet above ground.

23 Q Did the photographs confirm that, also?

24 A The photographs do support that statement.

25 Q And that allowed you to come to the opinion that this

1 was disease and rot; correct?

2 A That is correct.

3 Q Explain how a tree that has a -- a Loblolly Pine that
4 has this fungal disease, explain to the jury how it decays
5 or what kind of process it will go through decay, what
6 happens during that process?

7 A It will be a slow process. It will start showing die-
8 back at the tips. Usually at the top of the plant on the
9 crown, as we refer to it. You will slowly see the tip die-
10 back will generate throughout the tree. So the outer
11 portion of the tree will slowly die. You will see yellowing
12 of the leaves, they will turn brown and it will start
13 defoliating. This decay will further move inward towards
14 the tree to the stump of the tree. This is a slow process
15 that takes anywhere from one to three years. As the decay
16 progresses into the tree it will start to move apart. The
17 bark will start to fall off in chunks or small pieces and
18 fall to the ground.

19 Q What does denude mean?

20 A Naked bark on the tree.

21 Q Bark falls off?

22 A Bark falls off the tree.

23 Q All right.

24 A As the tree uses its bark and its needles and its
25 structural stability, smaller branches will start to fall

1 off, because they are smaller in circumference and size and
2 the fungus will effect that part of the tree at a faster
3 rate and therefore those branches will fall off when they
4 lack the structural stability to hold the weight of the
5 tree.

6 Q Okay.

7 A So as time continues the larger branches will fall to
8 the ground and eventually the tree, the trunk of the tree
9 will collapse and fail.

10 Q Okay. So we've got leaves turning yellow, in this case
11 we've got pine needles; correct?

12 A Correct, pine needles.

13 Q Needles turning yellow and falling off, bark falling
14 off, and limbs and branches falling off?

15 A That is correct.

16 Q And that would be happening all throughout the
17 deterioration process?

18 A Yes.

19 Q And I think you testified just a moment ago, your
20 opinion is that this process will take place in this type of
21 tree over a period of one to three years?

22 A That would be a good estimation, one to three years.

23 Q Okay, and would these type of signs be obvious and
24 visible?

25 A For a trained professional and anybody that has

1 training they should be visible.

2 Q Okay. Now, do you have any opinion as to whether --
3 how this tree fell towards the road?

4 A I do have --

5 Q First of all, let's talk about what caused it to fall
6 towards the roadway?

7 A Okay. Trees grow towards sunlight. This tree on
8 probably 75 percent of it on the right side, the south side
9 and then the westward side and eastward side, the tree is
10 competing with other trees and foliage in that area of
11 trees. The majority of light is coming from the direct
12 angle of the roadway. The tree will tend to grow towards the
13 direction of sunlight, which is towards the direction of the
14 road, in this case.

15 Q Okay, and what happens as it grown back towards the
16 direction of the road?

17 A Well, these branches become larger in size and weight
18 and therefore it puts a stress load on the tree, which in
19 this case would be leaning towards the roadway.

20 Q Did you come to an opinion that this tree fell towards
21 the roadway?

22 A Based on the pictures that I was provided I conclude
23 that the tree fell towards the roadway.

24 Q I'm going to show you Plaintiff's Exhibit No. 4. Is
25 that one of the photographs that you relied upon in making

1 that opinion?

2 A Yes, it is.

3 Q Okay. I just wanted to show that to the jury. That's
4 the photograph of Mr. Breland standing on the shoulder with
5 the tree; is that correct?

6 A That is correct.

7 Q It appears to you -- you said the tree fell at an angle
8 to the roadway?

9 A Yeah.

10 Q About how tall was this tree?

11 A I would estimate about 50 feet tall.

12 Q Okay. If it fell at an angle to the roadway from where
13 it was located, would it cover all of Highway 321?

14 A That is difficult to say because we don't know the true
15 angle. If it was a marginal angle it would definitely go
16 across the road. If we're looking at almost running
17 parallel to the roadway it would probably go at least half-
18 way across the road.

19 A And so it would have covered the lane of travel closest
20 to the shoulder from which it fell?

21 A It undoubtedly would have done that.

22 Q And then it would have covered some of but not all of
23 the opposing lane of travel if it fell at that angle?

24 A If it fell on that angle, yes. The greater the angle
25 the less likely the tree would have gone across the roadway.

1 Q Okay. Now, these signs of decay, the limbs falling,
2 the bark falling off, the needles falling off. Those are
3 signs that would be visible to someone who was trained to
4 look for diseased or decayed or dead trees?

5 A Other than the obvious yellowing. When trees die they
6 become a bright yellow and then the brown would have been a
7 definite great contrast against the green foliage that would
8 have been a recognizable sign that this tree was in
9 distress.

10 Q That's what I was about to ask you. Do these signs or
11 these conditions become more visible or more obvious at
12 certain times of the season or at different times?

13 A Well, as the progression of the disease, I mean, it
14 would be a lot more noticeable, and also depending on the
15 time of the year when a lot of the trees have lost their
16 leaves, it should have been visibly noticed.

17 Q Okay. So when you got winter time and the trees that
18 are-around that aren't evergreen lose their foliage a dead
19 tree becomes more visible?

20 A It should be, yes.

21 Q Now, I want to show you Plaintiff's Exhibit No. 1,
22 which is the photograph of this tree from Google Earth?

23 A Yes.

24 Q Do you see some other evergreen trees in that
25 photograph?

1 A There are evergreen trees to the right and to the left
2 of the subject tree.

3 Q Okay. Do you also see, I think deciduous is the word
4 for non-evergreen trees; is that correct?

5 A That's correct.

6 Q Do you see other deciduous trees?

7 A I do.

8 Q And those trees would have lost their leaves in the
9 late fall and winter time?

10 A That is correct.

11 MR. WILSON: Your Honor, just one moment. That may be
12 all I have.

13 Oh, I'm sorry, it's not.

14 BY MR. WILSON:

15 Q Mr. Arena, the photographs that you took here, Exhibits
16 52, 53, I believe. Those were taken June of 2013?

17 A The 25 of June.

18 Q 2013; correct?

19 A Yes.

20 Q Okay. What is the significance of those photographs?

21 A Well, as a professional I can notice in Exhibit 51 that
22 there is a void in the canopy, which is created by the tree
23 that fell or fallen. That's the primary photo I used to
24 come to that conclusion.

25 Q For the record, you're talking about Plaintiff's

1 Exhibit No. 51?

2 A Correct.

3 Q Okay.

4 A And you can also see that in Exhibit No. 52.

5 Q Okay. So when you went out to look you found a void in
6 the tree line or the canopy that match the tree that you had
7 viewed or seen on Google Earth?

8 A My conclusion would support that. Yes.

9 Q And the void in the canopy in the tree line would match
10 up with the stump that you located on your visit in June of
11 2013?

12 A Yes, it did.

13 Q I believe that's all the questions I have. Thank you,
14 Mr. Arena.

15 THE COURT: Mr. Ness, anything on cross?

16 MR. NESS: Yes, sir, Your Honor. Thank you.

17 THE COURT: Your witness.

18 MARK ARENA - CROSS-EXAMINATION

19 BY MR. NESS:

20 Q Hi, Mr. Arena.

21 A Hello.

22 Q I don't think we've had a chance to meet you. You
23 actually met my son earlier.

24 A That's right.

25 Q Now, Mr. Arena, the -- you never saw this tree standing

1 did you?

2 A That is correct. I never saw the tree standing.

3 Q You did not take any measurements or recheck the
4 measurements of what the surveyor showed you because you
5 looked at his documents, didn't you?

6 A That is correct.

7 Q The CAD document that the surveyor put in, which would
8 be Plaintiff's Exhibit No. 2. You didn't take any new
9 measurements beyond what the surveyor showed you on this?

10 A I did not.

11 Q And you had this document with you when you were
12 working on this case?

13 A That is correct.

14 Q Okay. Now, you've been hired by Mr. Wilson to give
15 expert opinions in this case, right?

16 A Yes.

17 Q So you're charging him as part of your business?

18 A I am.

19 Q And you're charging him how much per hour?

20 A Approximately, \$125 per hour.

21 Q And how many hours have you worked on this case?

22 A Approximately 18.

23 Q 18?

24 A Yes.

25 Q At \$125 an hour?

1 A That's correct.

2 Q And you, as I understood your opinion it fell due to
3 disease; is that right?

4 A Yeah.

5 Q And that's your central opinion here is that this tree
6 that you looked at was a diseased tree?

7 A That is my opinion, yes.

8 Q Okay. And you don't think that the tree fell
9 perpendicular to the road?

10 A I believe it fell at a slight angle.

11 Q A slight angle?

12 A Yes.

13 Q Towards the south?

14 A Let me get my bearings correct. South is going towards
15 Norway.

16 Q Norway.

17 A That would be correct. Yes.

18 Q So as far as the vehicle that struck this tree the tree
19 would be pointing in the direction more or less the vehicle
20 was going and it wouldn't be a straight on impact, it would
21 be an impact at an angle, right?

22 A I had estimated about a five to eight degree angle.

23 Q It would not be perpendicular 90 degree hit at all?

24 A I can't confirm that, but that would be my speculation.

25 Q Well, your opinion is that it fell at an angle, right?

1 A Yes.

2 Q Okay. So --

3 A But I don't know what angle. A slight angle.

4 Q All right. Fell at a slight angle?

5 A Yes.

6 Q When you first visited this scene, June 25, 2013?

7 A Yes.

8 Q So that's a little over 60 days ago?

9 A Correct.

10 Q So you had never been to the scene other than June 25,
11 2013, since the day of this incident on January 7, 2010?

12 A That is correct.

13 Q So substantial decay could have happened to this tree,
14 did happen to this tree?

15 A Yes, I agree with that.

16 Q And you don't know for sure if all the pieces of this
17 tree are here?

18 A I agree with that statement. Yes.

19 Q You just saw what you found?

20 A Correct.

21 Q And in terms of whether the pieces had been moved
22 around this way or moved around that way, you don't know
23 that, do you?

24 A I don't know that either.

25 Q Wouldn't that effect your ability to determine if the

1 tree fell at an angle?

2 A I really looked at the stump and the surrounding
3 foliage and trees to come to that conclusion and where a
4 majority of the branches would have been present and the
5 weight load of those branches.

6 Q Now, the picture -- the Google picture, if we can see
7 this thing properly. It's a tree that's already dead,
8 already lost limbs, already lost bark.

9 A Yes.

10 Q So we don't know where all the limbs were on this tree
11 do we? 276

12 A Well, they should be down on the ground or the smaller
13 limbs in the canopy of the trees if they were able to
14 support the weight.

15 Q All right, but you didn't find any limbs on the ground,
16 did you?

17 A Not that I can truly say were part of that tree.

18 Q You found the big chunks of the tree piled up over in
19 the woods, right?

20 A That is correct.

21 Q They weren't on the shoulder of the road?

22 A They were not on the shoulder of the road.

23 Q They were not in the ditch?

24 A They were not in the ditch.

25 Q They were piled up over in the woods?

1 A Yes.

2 Q Okay. And when you looked at it, parts of this tree
3 had broken apart hadn't it?

4 A Yes.

5 Q In pieces?

6 A Yes.

7 Q And were there chain saw marks on it?

8 A No chain saw marks.

9 Q No chain saw marks?

10 A None that I witnessed.

11 Q Okay. Do you have any idea what the weight of this tree
12 would have been when it fell?

13 A It would have been substantial. It will take me a
14 minute to actually calculate it out to give you an estimate,
15 if you'd like, but it would be substantial.

16 Q It would not be something that you and I could go pick
17 up and move is it?

18 A No.

19 Q Now, in looking at the tree you can't tell the jury
20 today that you can identify marks where the tree was struck
21 by an automobile can you?

22 A I'm not an expert in that field, but I think there
23 would be indications that a vehicle struck the wood and it
24 should be visible.

25 Q You said it would be marks you could see if an

1 automobile stuck the tree?

2 A Possibly, possibly.

3 Q Possibly?

4 A Possible.

5 Q So not to a reasonable degree of surveying certainty or
6 arboriculturist certainty?

7 A I can't say that.

8 Q You can't say that?

9 A I can't say that.

10 MR. NESS: Your Honor, I'd move to strike his opinion.
11 He said it looked like it had been struck by an automobile
12 but then he said he can't say it to a reasonable degree of
13 arboriculturist certainty.

14 THE COURT: Okay. I'll strike.

15 Ladies and gentlemen, they're asking me to rule on
16 striking. That means you are to disregard his statement
17 regarding being able to see anything, any marks on the tree.
18 So you're to disregard that testimony. Okay.

19 BY MR. NESS:

20 Q I want to show you your deposition, Mr. Arena. I'll
21 stand beside you and show you. You were asked the question
22 in your deposition; do you see anywhere in any of these
23 images evidence of having being struck by a motor vehicle.
24 What is your answer?

25 A I did not see any evidence in any of these pictures

1 showing a motor vehicle struck the tree where it was
2 located.

3 Q Okay. So you don't have any evidence whatsoever that
4 an automobile struck this particular tree that you found
5 over in the woods?

6 A I do not.

7 Q And when you got to the site there was very little left
8 of this tree, wasn't it?

9 A There was very little left of the tree.

10 Q Okay. Mostly rotten and flattened out?

11 A Yes, decomposed.

12 Q But you do see indications on that tree that it broke
13 apart when it fell?

14 A Yes.

15 Q Broke into pieces?

16 A Yes.

17 Q And that's because of the jagged edges and that sort of
18 thing?

19 A Right. The splintering.

20 Q Looking at Plaintiff's No. 7, that's splinter mark
21 right there?

22 A That is correct.

23 MR. NESS: Your Honor, may I publish this to the jury?

24 THE COURT: You may.

25 (Photo passed to jury.)

1 A That's a possibility. Weather would also have an impact
2 on it. So depending on if we had snow, ice storm, heavy
3 winds. That would also impact the time the tree had fallen.

4 Q Correct me if I'm wrong, you can't tell this jury if
5 all 50 feet fell on not a perpendicular angle to this road,
6 can you?

7 A The entire complete tree?

8 Q Yes, sir.

9 A I would say that would be very unlikely.

10 Q Unlikely. So I'm speaking of a length of the tree, not--
11 just the limbs, but the length of the height of the tree,
12 you can't tell the jury that all that tree was intact to
13 fall toward the road can you?

14 A I honestly don't know if I agree with that. It would
15 be difficult to conclude that.

16 Q But you just said a minute ago that parts of the tree
17 potentially fell straight down, they broke off before --

18 A We're talking about the branches now. We were
19 specifically talking about the trunk, the mass of the trunk
20 and the weight. So there is a possibility the tree could
21 have fallen, the majority of the tree could have fallen
22 specially based on where the tree had severed at the bottom
23 of the stump.

24 MR. NESS: Your Honor, he's saying this is a
25 possibility. So I -- I think the standard has to be to a

1 reasonable degree of arboricultural certainty. Again, I
2 move to strike.

3 THE COURT: Well, ask him the question that way. You've
4 asked possibility.

5 MR. NESS: All right.

6 THE COURT: If you'll rephrase it.

7 MR. NESS: Thank Your Honor.

8 BY MR. NESS:

9 Q Dr. Arena -- is it Dr. Arena or Mr. Arena?

10 A Mr. Arena.

11 Q Okay. And you can't state to a reasonable degree of
12 arboricultural certainty that it's more likely than not that
13 all 50 feet of this tree fell on the night in question, can
14 you?

15 A I would say a majority of the trunk came down at the
16 same time.

17 Q A majority?

18 A Yes.

19 Q 40 of the 50 feet, 35 of the 50 feet?

20 A I'd lean more towards 30 to 35 feet.

21 Q 30 to 35 feet?

22 A Yes, and that's an estimate.

23 Q Okay. So we're talking 20 -- 15 to 20 feet didn't fall
24 potentially on that day, didn't it?

25 A Based on the picture on Google Earth, it looks like a

1 lot of the upper branches have been or are removed at that
2 point in time, no longer intact.

3 Q Well, if this is the tree that's in question, this is a
4 document in question, if this is a tree that fell in 2010,
5 that's a year and a half since this Google photograph was
6 taken?

7 A Correct.

8 Q Maybe substantially, a good chance to a reasonable
9 degree of arboricultural certainty that more of this tree
10 decayed from May of 2008, that's what's on this document --

11 A Right.

12 Q -- to January 7, 2010?

13 A Once again. I'll go back. It would be the smaller
14 portions of the tree and the branches.

15 Q But the height portion, the top part of the tree very
16 likely would have broken off?

17 A Yes.

18 Q By January of 2010?

19 A I don't know if I want to speculate on that.

20 Q Okay.

21 A There's a lot of variables. I'm not trying to be
22 difficult, but there are so many variables. I'm trying to be
23 accurate.

24 Q I understand that and I appreciate your honesty on
25 that. We don't know do we, but we don't know exactly what

1 happened that night either do we?

2 A No, we don't.

3 Q And as I understand you also in your deposition and you
4 might even say here today, you don't see evidence as an
5 horticulturist or an arborist that this tree, part of this
6 tree actually hit an asphalt road?

7 A Oh, you could possibly relate the splintering of the
8 tree, the segments that are splintered, that could have
9 happened upon impact of the earth or the pavement.

10 Q But you don't see evidence on this tree which you were
11 observing out there as an expert that it actually hit an
12 asphalt road, do you?

13 A Out on the site there was very little of what I could
14 truly attest to as being that tree. A lot of my
15 observations are based on the pictures and the photos.

16 Q And is there somewhat speculation -- are you trying to
17 predict what happened when you don't know what happened?

18 A No, I'm not speculating at all I'm just saying I used
19 the photos more than an on-site visit.

20 Q I'll show you your deposition again about this issue on
21 the gravel or asphalt.

22 MR. WILSON: What page?

23 MR. NESS: Page 22, Line 22.

24 BY MR. NESS:

25 Q You were asked the question and this is under oath,

1 right --

2 A Yes.

3 Q -- when it was done, court reporter present?

4 A Correct.

5 Q The question was, you don't see any indentations in the
6 tree where it actually hit asphalt or gravel road? And what
7 was your response?

8 A The portions of the tree --

9 Q No, no. Read what your response was?

10 A I agree with your statement. Your comment.

11 Q I agree with your comment.

12 A I agree with your comment.

13 Q And the comment was you don't see any indentations that
14 it had actually hit asphalt or gravel?

15 A That is correct.

16 MR. LUGINBILL: Your Honor, he's now allowed to explain
17 that answer. You cut him off, but he was getting ready to
18 explain that. He's allowed --

19 THE COURT: Well, first of all, he needed to read his
20 answer --

21 MR. LUGINBILL: I understand.

22 THE COURT: -- and then if he needs to explain it he
23 can.

24 MR. LUGINBILL: As long as he understands he can now
25 explain it.

1 MR. NESS: I didn't know he wanted to explain it, Your
2 Honor.

3 THE COURT: Yeah. Did you want to explain that answer?

4 A Yes. I'll go back to what I said. I was given
5 pictures and 70 percent of the tree is visible and there's
6 pictures where a portion of the tree that is directly in
7 contact with the ground which is not visible. So it leaves
8 a little bit of speculation that those portions of the tree
9 could have been the portions of the tree could have been the
10 portions that actually hit the ground or the pavement.

11 BY MR. NESS:

12 Q Okay.

13 A And that's where my comment comes from the visible
14 pieces of the tree did not have evidence.

15 Q And area you reviewed when you went out to the scene in
16 2013, there was forest on both sides of where you think the
17 tree was, is that right?

18 A That is correct.

19 Q And the forest consisted of deciduous trees, that is,
20 gum, sweet gum or oak. But it also consisted of pine trees
21 on the left and right, didn't it?

22 A Yes, it did.

23 Q Other pine trees.

24 A That is correct.

25 Q And most of the sweet gum and oak were in front on the

1 road side of where this stump was, wasn't it?

2 A There wasn't much in front of this tree going toward
3 the road side. The deciduous trees, which the majority were
4 sweet gums were to the right and left of the tree.

5 Q Well, you took these pictures in June of --

6 A That's correct.

7 Q No, 50, Plaintiff's Exhibit No. 50. All of this is
8 foliage from other trees, isn't it?

9 A Right, but the majority of it is not in front of the
10 tree.

11 Q Well, the tree's not there now?

12 A Right.

13 Q But if the tree had been still there this would have
14 all been in front of it wouldn't it?

15 A There's holes present in front of the tree, when the
16 tree was in place. I wouldn't say the majority -- the
17 majority of the holes would have been to the right and left
18 of the tree.

19 Q Well, let's look at Plaintiff's No. 53. That's a
20 picture that looks like it was taken in a different season
21 of the year.

22 A That is correct.

23 Q All these branches you see here have leaves on it some
24 time in the year, right?

25 A That is correct.

1 Q All these branches are in front of where the stump was.
2 The branches are between the stump and the road?

3 A Yes, those branches are.

4 Q Okay. How tall were these surrounding trees?

5 A The majority of the trees surrounding the subject tree
6 are approximately the same height of 50 feet.

7 Q Okay. And they were still living at 50 feet?

8 A Yes, they were.

9 Q But the tree in question had shortened itself during
10 the disease process at some point down to 30 to 35 feet,
11 hadn't it?

12 A Possibly.

13 Q Mostly likely to an Arboricultural certainty hadn't it,
14 because if it rots some of it's going to fall off, branches
15 are going to fall off. You just said that, right?

16 A Right. I heard that.

17 Q Okay. And this tree was on the west side of this
18 ditch. It was off of the highway right-of-way wasn't it?

19 A That is correct.

20 Q And looking at the diagram drawn by Mr. Harper, you
21 didn't take any of these measurements and verify them did
22 you?

23 A I did not take any of the measurements nor did I verify
24 them.

25 Q Okay. But this little sub-drawing off to the right-hand

1 cross, Mr. Wilson?

2 MARK ARENA - REDIRECT EXAMINATION

3 BY MR. WILSON:

4 Q Mr. Arena, at some point this tree decays, it becomes
5 obvious with the signs of decay, the limbs falling, the
6 needles being off and the bark -- those signs become obvious
7 to a person; correct?

8 A I believe so, yes.

9 Q Okay. And that happens throughout the process of the
10 deterioration and the decay of the tree?

11 A I would agree with that, yes.

12 Q Mr. Ness asked you about how the tree may have fallen.
13 The tree may have fallen intact, all 50 feet or the tree may
14 have fallen a piece of it fell off and then the rest of it
15 fell at one time. I think that's what you said, isn't it?

16 A That is correct.

17 Q You've have Plaintiff's Exhibit No. 2. That's
18 something you've reviewed; correct?

19 A Yes, I have reviewed this.

20 Q Okay. And that shows the stump just off the edge of
21 the mowed portion of the highway right-of-way?

22 A Yes, it does.

23 Q And it also shows some pieces of the tree that Mr.
24 Harper located and measured; isn't that correct?

25 A That is correct.

1 Q Okay. It shows about a 17 foot piece that's just off
2 of the edge of the mowed right-of-way?

3 A Yes, it does.

4 Q And then it shows three pieces out in the highway
5 right-of-way, out in the mowed area, 18 feet, 10 feet and
6 seven feet and some change; correct?

7 A That is correct.

8 Q Does that indicate to you a majority of this tree fell
9 at one time as opposed to breaking off piece by piece as Mr.
10 Ness indicated?

11 A It does support that observation.

12 Q Okay. And I believe Mr. Ness was asking you about
13 signs of damage to the tree. You saw splintering --

14 A Yes.

15 Q -- in the portions that you reviewed?

16 A Yes, I did.

17 Q And those splintering portions that would be indicative
18 of a tree being damaged when it falls and either hit the
19 ground or hit asphalt or hit any other surface; correct?

20 A Yes, it would be. Any type of impact with the tree
21 would cause the damage.

22 Q Okay. So in your opinion it would be extremely
23 difficult to tell the difference between damage that was
24 caused by the tree falling and hitting the ground or the
25 tree falling and hitting asphalt; correct?

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1 time. You can't say that can you?

2 A Well, the entire tree. You're making reference to the
3 50 foot of the tree. I made the comment that I believe 30
4 to 35 feet of the tree did fall across the road based on the
5 type of decay that was present and the age of the tree.

6 Q Well, you're saying there's 30 to 35 feet left of the
7 tree to fall at approximately the time that it fell. Is
8 that what your opinion is?

9 A That would be my opinion, yes.

10 Q Okay. Mr. Wilson was asking you -- pieces of what Mr.
11 -- you didn't find the tree in the shape that Mr. Harper has
12 got it drawn here, did you?

13 A I did not.

14 Q Okay. So there is no question that it had been moved
15 or altered or something, piled up in the woods when you got
16 there, was it?

17 A My conclusions are totally made off of the photographs.

18 Q Okay.

19 A Has nothing to do with the site visit at all.

20 Q Okay. So your conclusions aren't based on where Mr.
21 Harper shows pieces of limbs or trees or whatever he shows
22 here?

23 A They were not, but they do support my conclusion.

24 Q Okay, but you didn't find on the ground when you went
25 out there as an arborist working for Mr. Wilson on this case

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1 little business, a little fish business that he does;
2 correct?

3 A Yes, sir.

4 Q Explain that to the jury, if you would, please?

5 A It's just assistance of selling fish and fruits and
6 vegetables and stuff like that.

7 Q Y'all sell it out of his van?

8 A At that time, yes, sir.

9 Q All right. I think that's the same van that y'all
10 were in when this wreck occurred?

11 A Yes, sir.

12 Q I want to come back to that, maybe. So you were with
13 William when the van that he was driving hit the tree that
14 had fallen on Highway 321 just south of Neeses?

15 MS. JETT: Object --

16 A Yes, sir.

17 MS. JETT: Your Honor, I object to the form of the
18 question.

19 THE COURT: If you don't mind, just rephrase the
20 question please, sir.

21 MR. WILSON: Sure.

22 BY MR. WILSON:

23 Q Were you with Mr. William when the wreck occurred?

24 A Yes, sir.

25 Q Okay. Were you driving or were you a passenger or

1 what?

2 A I was a passenger.

3 Q And who was driving?

4 A. Mr. Breland.

5 Q And what were y'all in?

6 A We was in a gray Dodge van.

7 Q Okay. All right. And you're familiar with the area
8 where the wreck occurred?

9 A Yes, sir.

10 Q And you pass by -- have you passed by that area since
11 the wreck?

12 A Uh -- once or twice.

13 Q Okay. I'm going to show you a photograph that's
14 marked, right now, for identification purposes as
15 Plaintiff's No. 54. I'll show you what's marked for
16 identification as Plaintiff's Exhibit No 54. Do you
17 recognize that photograph and that area?

18 A Yes, sir.

19 Q And what is that a picture of?

20 A That's a picture of Highway 321.

21 Q What direction is that looking?

22 A From the picture itself it's headed north.

23 Q Okay. So that's back towards Neeses?

24 A Yes, sir.

25 Q And does that show the area where the wreck occurred

1 with the tree?

2 MS. JETT: Your Honor, I'm trying to give some leeway,
3 but he is leading them through the answers before the
4 question mark.

5 BY MR. WILSON:

6 Q What does that show, Mr. Reed?

7 A This indicate roughly the area where the accident
8 occurred?

9 Q Does that fairly and accurately show and depict that
10 area?

11 A Yes, sir.

12 MR. WILSON: Your Honor, I'd move that in as Exhibit No.
13 54, Plaintiff's.

14 THE COURT: Okay. No. 54 is in without objection.

15 (Plaintiff's Exhibit No. 54,
16 photograph, was marked and entered.)

17 BY MR. WILSON:

18 Q Same thing on 55, Plaintiff's 55, what does that show?

19 A That's gives the view of the same location but it's
20 headed in the opposite direction.

21 Q Okay. And does that fairly and accurately depict the
22 area that we're here about today?

23 A Yes, sir.

24 MR. WILSON: Your Honor, I'd move that in as Plaintiff's
25 Exhibit No. 55.

1 MS. JETT: No objection, Your Honor.

2 THE COURT: All right. Plaintiff's No. 55, in without
3 objection.

4 (Plaintiff's Exhibit No. 55,
5 photograph, was marked and entered.)

6 BY MR. WILSON:

7 Q You didn't take these pictures did you?

8 A No, sir.

9 Q You don't know when they were taken?

10 A No, sir.

11 Q Okay. You don't know who took them?

12 A No, sir.

13 Q Now, Mr. Reed, I want you to tell me about this wreck.
14 I want you to start as y'all were coming out of Neeses and
15 tell me what happened?

16 A All right, sir.

17 Q First, was it daytime or nighttime?

18 A It was at night.

19 Q Okay. Let's go.

20 A We was proceeding south on Highway 321.

21 Q Okay.

22 A Prior to the incident a vehicle approached us blinking
23 its lights.

24 Q Okay?

25 A To warn us of something. We didn't have no knowledge

1 for what it was.

2 Q Okay.

3 A And as we prepared ourselves for a traffic stop or
4 whatever the up pops the tree in the road.

5 Q Okay.

6 A And at that time Mr. Breland snatched the wheel to the
7 left to avoid it.

8 Q Okay. All right. Let's go back. How far out of Neeses
9 were y'all?

10 A Four or five miles. I really can't say.

11 Q Not exactly sure, but y'all were just south of Neeses?

12 A Yes, sir.

13 Q And you said as y'all were heading out of Neeses and
14 heading on 321 was there any kind of hill or any kind of
15 area that you --

16 A Yes, sir.

17 MS. JETT: Your Honor.

18 BY MR. WILSON:

19 Q Tell me about the roadway as you were --

20 MS. JETT: These are leading questions, Your Honor.

21 THE COURT: And he's just rephrased the question.

22 BY MR. WILSON:

23 Q Tell me about the roadway as you were proceeding just
24 before the wreck.

25 A As we proceeded south on 321 it was a, like a down hill

1 slope prior to the incident.

2 Q Okay.

3 A And the tree had fallen into the road on the upgrade of
4 it.

5 Q Okay. Let me show you Plaintiff's Exhibit No. 54.

6 Does that photograph show that downslope that you're talking
7 about?

8 A Yes, sir.

9 Q Okay. And that's what you see right here kind of at
10 the top of that picture, that's the downslope?

11 A No, that's the up slope.

12 Q Okay.

13 A And the up slope is here and past the mailbox was the
14 down slope because we was coming from Neeses, which would be
15 to the back of the picture.

16 Q So y'all were kind of coming from this direction on the
17 picture --

18 A No, we was coming this way headed south.

19 Q All right. So you come down this downhill -- you come
20 down this downhill slope and then you start to head back up
21 the other side?

22 A Yes, sir.

23 Q And that's where the tree was?

24 A That's where the tree was.

25 Q All right. Were you able to see the tree as y'all went

1 down the down hill slope?

2 A No.

3 Q How about as your van started back up?

4 A As we started back up the slope then I saw the tree.

5 Q And you said there was a vehicle that approached y'all
6 that flashed its lights?

7 A Yes, sir.

8 Q How many times did that vehicle flash its lights?

9 A I couldn't really say. It was a flicker of the lights
10 so I couldn't exactly say how many times?

11 Q What did you think when you saw that?

12 A That there was a highway patrolman or state trooper
13 further up the road.

14 Q Did Mr. Breland have on his bright lights or his dim
15 lights?

16 A I didn't pay any attention.

17 Q Okay. Before the vehicle flashed, do you know how fast
18 Mr. William Breland was traveling?

19 A Um -- 60.

20 Q Okay. After the vehicle flashed what did he do?

21 A He slowed down.

22 Q Okay. Now, when you saw the tree what did you do?

23 A I act surprised and then when Mr. Breland snatched the
24 wheel I sort of prepared myself for the impact.

25 Q And what happened with the van and the tree?

1 A After Mr. Breland snatched the vehicle to the left the
2 vehicle made contact with the tree.

3 Q Okay.

4 A After making contact with the tree it went over the
5 tree.

6 Q Okay.

7 A And proceeded down the road, maybe 10, 12 yards.

8 Q Tell me about the impact with the tree. Did the
9 airbags go off in the van?

10 A Yes, sir.

11 Q What happened with the airbags in the van?

12 A when the vehicle made contact with the tree, the impact
13 caused the airbags to come open.

14 Q What happened to you in the van?

15 A It throw me up against the dashboard and then the
16 airbags came out and hit me in the face.

17 Q Okay. Was there damage to the van?

18 A Yes, sir.

19 Q Where was more of the damage to Mr. Breland's van?

20 A To the right front side of the van.

21 Q Okay. That would be the right front passenger side?

22 A Yes, sir.

23 Q Was the van still driveable that night?

24 A Yes, sir.

25 Q Okay. Now, y'all were leaving Neeses?

1 A Yes, sir.

2 Q Why had you stopped by Neeses?

3 A He was going to stop by the strip club and the strip
4 club was closed and since the strip club was closed we
5 proceed south to Denmark.

6 Q Okay. Where were you going in Denmark?

7 A He was going to drop me off at home.

8 Q Okay. Now, after the wreck, who called 911?

9 A Mr. Breland.

10 Q Did his van have to be towed that night?

11 A No, sir.

12 Q What did y'all do?

13 A After the incident -- we walked around and checked the
14 van and we made sure it was driveable and then we got back
15 into the van and we proceeded south and he dropped me off.

16 Q Okay. Had emergency personnel, had emergency people
17 already arrived before you left?

18 A They had already arrived and they was preparing to
19 leave.

20 Q Okay. Who arrived?

21 A The fire department came from behind us, which was
22 Neeses.

23 Q Okay.

24 A The rescue squad came from in front of us, which was
25 Norway.

1 Q Okay.

2 A State trooper, highway patrolman, he came from the rear
3 of us which would have been from Neeses side.

4 Q Okay. Do you remember the state trooper, do you
5 remember what he looked like?

6 A He was black, kind of short, maybe 190, 195 pounds.

7 Q Okay. Do you remember his name?

8 A No, sir.

9 Q Do you know who moved the tree that y'all struck with
10 the van out of the highway?

11 A I assume the fire department.

12 Q Okay. Now, I want you to look back at Exhibit No. 54,
13 Plaintiff's Exhibit No. 54. Are there any kind of homes or
14 residences or anything in that area?

15 A I see mailboxes.

16 Q Okay. Where is that in relation to where the wreck
17 occurred?

18 A Well, traveling south the location would be further up
19 the road, which would be going south.

20 Q Okay. So just past that mailbox going south?

21 A No, a little bit further up from that.

22 Q Okay. Now, you've seen the stump -- let me back up.
23 You've passed by that scene since the wreck?

24 A Yes, sir.

25 Q How long after the wreck did you pass by that area?

1 A Yes, sir.

2 Q Okay. That night could you tell what kind of tree it
3 was?

4 A Yes, sir.

5 Q What kind of tree did you think it was?

6 A I farm. I'm associated with trees. I -- a pine tree.

7 Q A pine tree?

8 A Yes, sir.

9 Q How could you tell that?

10 A Just by looking at it. A pine tree, there's
11 distinctive character between that and any other trees.

12 Q Okay. All right. I'll show you Plaintiff's Exhibit
13 No. 6. Does that look like the pine tree you're talking
14 about?

15 A Yes, sir.

16 Q That night did you see places in the tree or the trunk,
17 was there bark on the tree and the trunk?

18 A At the time when we got out of the vehicle, the part
19 that was in the road, there was no bark on it.

20 Q Okay. Did you see any limbs?

21 A No, sir.

22 Q Did you see any pine needles?

23 A No, sir.

24 Q Did you see any pine needles?

25 A No, sir.

1 Q Okay. I think you said after y'all hit it, you went
2 forward a little bit?

3 A Yes, sir.

4 Q And you pulled the van off to the side of the road?

5 A Yes, sir.

6 Q Mr. Breland did?

7 A Yes, sir.

8 Q And you got out and walked back to check?

9 A I walked back and looked, then I went back -- got
10 ourselves together and checked around the vehicle for
11 damages and stuff.

12 Q Okay. How long did it take for anyone to get there
13 after Mr. Breland called 911?

14 A 15 minutes.

15 Q Okay.

16 MR. WILSON: Your Honor, I think that's all I have. Let
17 me have one second.

18 THE COURT: Okay.

19 MR. WILSON: Can I have just one moment, please?

20 THE COURT: You've got it.

21 MR. WILSON: That's all I have. Thank you.

22 THE COURT: Ms. Jett?

23 MS. JETT: Thank Your Honor.

24 WADE REED - CROSS-EXAMINATION

25 BY MS. JETT:

1 to Neeses?

2 A Yes, ma'am.

3 Q Okay. And then you left for Denmark?

4 A Yes, ma'am.

5 Q And then you met this van with flashing lights?

6 A No, no, no. Yeah.

7 Q Or met a vehicle with flashing lights?

8 A Yeah.

9 Q What kind of vehicle?

10 A It looked like a delivery truck.

11 Q Okay. And when that truck flashed the lights a while
12 ago you said that y'all thought it might be a road check
13 ahead?

14 A Yes, ma'am.

15 Q What's to prepare?

16 A Getting ready to make the stop.

17 Q How do you get ready to make a stop?

18 A Well, I mean --

19 Q You're sitting in the passenger side, you're not even
20 going to have to hit the brakes are you?

21 A True, but in a incident like that, you being alerted --

22 Q Right.

23 A -- you obviously preparing yourself and gather yourself
24 to --

25 Q What are you doing. You're using your hands and I'm

1 Q And you were talking about the blinking lights. Start
2 with, well, about the same.

3 A All right. Well, about the same, about the same. You
4 know, if I -- if I meet you and I blink my lights the first
5 thing that comes in, maybe not in your mind, but average
6 person that's out there on the highway they take that as a
7 warning as there is a state trooper or some sort of road
8 check up front and they are obviously spontaneously slow
9 down, gather themselves as there is something that they need
10 to get rid of they get rid of it. Yeah. Then they
11 proceeded on.

12 Q All right. And that's all I needed you to read. And
13 that was your answer on June 13; correct?

14 A Yes, ma'am.

15 Q And is that your answer today?

16 A Yes, ma'am.

17 Q Did you and Mr. Breland have something to get rid of?

18 A No.

19 Q You said earlier that the state trooper responded?

20 A Yes, ma'am.

21 Q And you don't know his name?

22 A No, ma'am.

23 Q What happened to the tree after the wreck?

24 A After we ran over the tree the fire department came.

25 There was a portion of the tree in the opposite lane. They

1 moved that out the way to clear passage for on-coming
2 traffic. The part that was in the lane which we were
3 traveling, they left it there. They waited until the state
4 trooper came and investigated, whatever they do, take
5 evidence, pictures or whatever, then after all of that had
6 completed and the state trooper checked the van, I assume --

7 Q Now, let's not talk about what you assume. I want to
8 know what you know, what you saw happen?

9 A -- and --

10 Q Or sensed with your own senses, heard or saw.

11 A -- when the state trooper came the part of the tree was
12 still in the road.

13 Q Okay.

14 A The state trooper came up, the highway -- the fire
15 department came up and they all walked around the vehicle,
16 checking for damages and everything.

17 Q What happened with the tree?

18 A Well, the tree was still in the road, then.

19 Q So when you left the tree was still in the road?

20 A No, the fire department must have moved it.

21 Q Well, I don't know what they -- I don't want to know
22 what they must have done, but when you left the tree wasn't
23 in the road?

24 A No, it wasn't.

25 Q Did you see them do something to the tree?

1 A I saw them back there at the tree.

2 Q Okay. I want to show you your deposition, Page 43,
3 Line 2, and you were asked the question; So when you and Mr.
4 Breland left the scene in his vehicle the tree was still
5 laying there and your answer starting at Line 5 was what?

6 A No, no, no. The -- after the fire department and
7 ambulance came and the state trooper came, then the fire
8 department proceeded to move it out of the road. We never
9 touch it. The department, the fire department out of the
10 road and slid it to the side.

11 Q And then you were asked, how did they move it out of
12 the road, at Line 12, starting --

13 MR. WILSON: Your Honor, I object to her going through
14 is deposition. I mean when she asks him a questions and he
15 says something that's --

16 MS. JETT: I --

17 MR. WILSON: -- then she can impeach him with his
18 deposition, but she's got to ask him the question first and
19 let him answer.

20 MS. JETT: Your Honor, it's absolutely contradictory.
21 He just said he doesn't know what was done with the tree,
22 and I'm pointing out that on June 13 he knew what was done
23 with the tree.

24 THE COURT: Well, he indicated -- I thought he said that
25 the fire department must have moved it because he saw them

1 at the tree?

2 MS. JETT: He said that just now, but that's
3 inconsistent with what he said at his deposition with the
4 tree.

5 MR. WILSON: Your Honor, it's fine. She can go ahead.

6 THE COURT: Okay. Go ahead.

7 BY MS. JETT:

8 Q Okay. So you were asked how did they move it out of
9 the road and at Line 12 what was your answer?

10 A They moved it by hand and then the part that was longer
11 they cut it and then they rolled out of the road to the side
12 of the road.

13 Q And then you were asked what did they cut it with and
14 your answer?

15 A What did they cut it with? Some sort of saw.

16 Q All right, and then you were asked was it like a
17 mechanical saw and your answer at Line 18?

18 A Yeah, a mechanical saw because it was three or four of
19 them and then they might just lift it out of the road. At
20 that time, if I may --

21 Q No, sir. I want you to continue reading your answer
22 and then you can explain your answer.

23 MR. WILSON: Judge --

24 MS. JETT: He hasn't finished his answer, Your Honor.

25 BY MS. JETT:

1 Q And you said, yeah.

2 A Yeah, it was so -- it was so thin in there but the
3 people that was in the fire truck moved the tree out of the
4 road.

5 Q Okay. And now do you need to explain that answer that
6 you gave in June. You just said if I can explain and I want
7 to let you do that.

8 A All right. At that time, me and Mr. Breland and the
9 trooper, we was at our vehicle when -- when the fire
10 department had came up and circled around looking at our
11 vehicle then returned to their vehicle, right. And when we
12 left, the tree was gone, the fire department was gone. So I
13 can't really say.

14 Q On June 13 you gave a very detailed account of your
15 observation about them moving it out of the road, sliding it
16 to the side, lifting it by hand. The part that was longer
17 they cut it, they rolled it out of the side of the road,
18 they used a saw, a mechanical saw and there was a part that
19 was so thin in there, but the people in the fire truck
20 removed the tree out of the road. So today your memory is
21 that you didn't really see all that?

22 A (No response.)

23 Q I just want to know which memory was correct; June or
24 now?

25 MR. WILSON: I object to that question. She can ask him

1 what his testimony is today, but to ask which memory is
2 correct. I object to that.

3 MS. JETT: Your Honor, we've heard two memories.

4 THE COURT: Well, I will let you answer the question. If
5 you'll answer the question, please, sir.

6 A All right. At the time the fire department returned --

7 BY MS. JETT:

8 Q That's not the question, Mr. Breland (sic). I want to
9 make sure that you understand.

10 A Okay.

11 Q I asked you was today's story of the event or the June
12 13, 2013, deposition's story of your memory of the event.

13 Now, you're under oath, with one is correct?

14 A The first one.

15 Q The one is June?

16 A Yes, ma'am.

17 Q All right. Thank you. Now, Mr. Breland, that night
18 didn't appear to be too injured to drive home did he?

19 A No.

20 Q Okay. You worked some for Mr. Breland and you get paid
21 to help him sell these fish and vegetables, right?

22 A Yes, ma'am.

23 Q And you don't have any other paid jobs do you?

24 A No, sir. I mean, no, ma'am.

25 Q That's all right. And part of that job was to help Mr.

1 Q Because you could not work?

2 A Yes, ma'am. Could I give a response to that?

3 Q Sure.

4 A They allow me to work so many hours or earn so much
5 money regardless of my receiving of --

6 Q Disability?

7 A Yes, ma'am.

8 Q But you work some?

9 A Yes, ma'am.

10 Q But Mr. Breland was the only person you were working
11 for at that time, right?

12 A Yes, ma'am.

13 Q And are you still doing some work for him, now?

14 A No, no.

15 Q Not at all?

16 A No, ma'am.

17 Q Okay. Thank you.

18 THE COURT: Okay. Anything on redirect?

19 MR. WILSON: Yes, sir.

20 THE COURT: Okay. Anything related to the cross..

21 MR. WILSON: Yes, sir. Thank you.

22 WADE REED - REDIRECT EXAMINATION

23 BY MR. WILSON:

24 Q Mr. Reed, Ms. Jett had asked you about the tree being
25 moved and all that stuff. Were you standing right there

1 beside the tree when the fire department was working on it?

2 A No.

3 Q Where were you?

4 A I was back at our van, the van which I was traveling in
5 which was 25 yards from that.

6 Q And where were the fire department people at that time?

7 A They was back near the tree.

8 Q Okay. When you and Mr. Breland got ready to leave was
9 the tree gone?

10 A The tree was out the road.

11 Q Out of the road, that's what I meant.

12 A Yeah. Yes, sir.

13 Q Okay. All right. I want to show you something in your
14 deposition, I want you to read another portion of your
15 deposition that Ms. Jett didn't go over with you.

16 MR. WILSON: Your Honor, you've got that one?

17 THE COURT: Yes. I've got one. Does he need a copy?

18 MR. WILSON: No, sir, I've got it right here.

19 THE COURT: What page are you referring to?

20 MR. WILSON: It's Page 29, the same page, Line 9.

21 BY MR. WILSON:

22 Q Mr. Ness asked you about Mr. Breland having some neck
23 problems before. The question I'm starting right here on
24 Page 29, Line 9. The question is; All right. Now, he, Mr.
25 Breland had some neck problems before, hadn't he? And your

1 (Court in recess for short break.)

2 (Court in session after short break.)

3 THE COURT: Okay, bring the jury in.)

4 THE BAILIFF: Yes, Your Honor.

5 (Jury in at 2:46 p.m.)

6 THE COURT: All right. Ladies and gentlemen, before we
7 took the break Mr. Wilson told us they were going to play
8 the video deposition of Dr. Mummaneni. Dr. Mummaneni was
9 one of the doctors, one of the main doctors that treated Mr.
10 Breland. They took his video deposition in lieu of his
11 testimony on the stand. A video deposition is just as if he
12 appeared here in court. When the deposition is taken, they
13 swear the doctor in and the attorneys get to ask him
14 questions just as if he was here. So you get to see him,
15 you get to see the deposition and you will give it the same
16 attention and consideration that you do the live witnesses
17 that we've had here today. Mr. Wilson with your able
18 assistant.

19 MR. WILSON: Correct, Your Honor.

20 Dr. Mummaneni is qualified as an expert.

21 MR. NESS: No objection to his expertise.

22 THE COURT: And just as the other people qualified as
23 experts, they are based on the situation able to give an
24 opinion. Most people at trial are not able to give their
25 opinions, but experts are allowed to give an opinion. I will

1 charge you all about expert testimony when we get to the
2 charge of the end of the trial. Okay.

3 All right, sir.

4 MR. WILSON: Dr. Mummaneni, Your Honor.

5 (The video deposition of Dr. Reddiah Babu Mummaneni was
6 played for the jury.)

7 MR. LUGINBILL: Your Honor, if you want to give them a
8 break, I'll close this one down and open the other one up.

9 THE COURT: All right.

10 ladies and gentlemen, I'm going to let y'all step back
11 into the jury room for just a second while we get that --

12 MR. LUGINBILL: It won't take us a second. I just
13 wanted to know if you wanted -- 15 seconds, tops.

14 THE COURT: I'll let them stay in the room for a minute.
15 I'll let y'all right back in. It will be good to stretch
16 your legs.

17 (Jury out between videos at 3:44 p.m.)

18 THE COURT: Who are y'all calling next?

19 MR. LUGINBILL: Plaintiff and then we'll be done.

20 THE COURT: Oh, okay. We're getting towards the
21 doctor's deposition.

22 MR. LUGINBILL: 49 more minutes.

23 THE COURT: How many?

24 MR. LUGINBILL: 49 more minutes.

25 THE COURT: Okay.

1 MR. WILSON: It is what it is.

2 THE COURT: Okay.

3 (Court in recess for short break for video adjustment.)

4 (Court in session after short break.)

5 THE COURT: Mr. Luginbill, are you ready?

6 MR. LUGINBILL: Yes, Your Honor.

7 THE COURT: Are you ready?

8 MR. NESS: Yes, Your Honor.

9 THE COURT: All right. Bring the jury out.

10 THE BAILIFF: Yes, Your Honor.

11 (Jury in at 3:58 p.m.)

12 THE COURT: Ladies and gentlemen, we are going to
13 continue with the video deposition of Dr. Mummaneni.

14 Mr. Luginbill, are you ready?

15 MR. LUGINBILL: Ready, Your Honor.

16 THE COURT: Okay.

17 (Video deposition of Dr. Mummaneni continues.)

18 THE COURT: Can I see you all for just a moment?

19 (Off the record bench conference with counsel and the
20 Court.)

21 THE COURT: All right, ladies and gentlemen, I
22 appreciate your attention during the video deposition and
23 your attention so far during this trial. Since it's nearly
24 5:00 o'clock, we're going to take a break for the evening.
25 Get you to come back 9:30 tomorrow morning.

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1 Q Did the manager of that club, is that somebody that you
2 had sold fish to before?

3 A Yes, it was.

4 Q All right. Were they open?

5 A No they wasn't.

6 Q So you weren't able to sell any fish there, but that's
7 about it.

8 A Right.

9 Q By that time what time is it?

10 A It was about 11:30 at night, give or take.

11 Q And you figure that's enough for the day?

12 A I told Jimbo I was taking him home.

13 Q So where does he live?

14 A In Denmark, South Carolina.

15 Q So if you're in Nesses and he's in Denmark what's the
16 best route to get there?

17 A 321 south.

18 Q All right. You head on 321 south. What's the next
19 thing that you remember seeing that night?

20 A We pass Piggly Wiggly was to the left and we was
21 traveling down 321 south. We get about a mile or two out of
22 town somewhere in that area and there was a truck flashing
23 his lights.

24 Q Let me ask you this, when you say miles, you're just
25 guessing, right?

1 A Just guessing.

2 Q Okay. You see a truck.

3 A And he was dimming his lights and I dimmed mine. Jimbo
4 says -- he got nervous -- he said, why is he dimming his
5 lights. I said, I don't know, Jimbo. I got mine on high.

6 Q And then what did he say -- he flashes his lights and
7 then you start what?

8 A I started to -- I slowed down because I was on cruise
9 control between 60 and 65 to keep my cruise control on that.

10 Q Okay.

11 A I was getting ready to go down the hill and coming up
12 the hill there was a tree in the road.

13 Q As you're coming down that slope did you see anything?

14 A I didn't see anything.

15 Q Did your headlights shine enough where you can see
16 what's on the upward part of that hill?

17 A No, it wasn't. Like going down coming to the hill --

18 Q Okay.

19 A -- then coming up the hill.

20 Q And you're --

21 A That tree was right there.

22 Q What did you do once you saw the tree?

23 A I tried to dodge it.

24 Q Let me ask you, you slowed down a good bit before you
25 got to the tree; you said you took it off cruise?

1 A I was doing about -- I was doing about 50.

2 Q Okay.

3 A About in that area.

4 Q So you see the tree, then what did you do?

5 A I turned to my left. I yelled Jimbo hold on. And then
6 boom, I hit the, you know, top of the truck. Airbags, boom,
7 hit me.

8 Q Did you hit anything inside the car?

9 A I hit the ceiling. I broke the mirror off.

10 Q The rear-view mirror

11 A Yes.

12 Q Did you hit up here on the top of your head?

13 A Yes, I did.

14 Q All right. Where did the car go?

15 A The van went to the left almost in the ditch and I
16 stirred back out, after the air bag. I get maybe back in my
17 right lane, give or take, it had to be in between 50 to
18 maybe a football field away from the accident.

19 Q The actual tree?

20 A Yes.

21 Q Okay. I'm going to show you what's been marked as
22 Plaintiff's Exhibit 53 and 54. One looking south and one
23 looking north.

24 A Yes. Yes.

25 Q Do you remember it pretty well?

1 A Yes, I do.

2 Q Did you go back out to the scene after that?

3 A Yes, I did.

4 Q How long after the wreck do you think that you went
5 back out there?

6 A I took my lawyer.

7 Q Do you remember how long it was?

8 A Within 30 days.

9 Q Is that the picture that y'all took that day?

10 A Yes, it was.

11 Q All right. In this picture there's tree that looks
12 like it's broken off and sticking out right there?

13 A Yes.

14 Q Is that the tree you hit?

15 A Yes, it is.

16 Q No doubt about it?

17 A No doubt.

18 Q All right. And just --

19 MR. LUGINBILL: Your Honor, if I can publish that to the
20 jury. It's in, but I just wanted to --

21 THE COURT: Sure.

22 BY MR. LUGINBILL:

23 Q What you're talking about here is there's a car wreck
24 and then there's a -- the tree sticking out?

25 A Yes, that's it.

1 Q That's the tree that comes right to the edge of the
2 road and it's broken right there as you start to get to the
3 flat part of the road?

4 A Yes.

5 Q Okay. And were there some pieces piled up along the
6 side of the road?

7 A Yes, it was.

8 Q Does that look like them?

9 A Yes, it is. That's it.

10 Mr. Luginbill: This is Plaintiff's No. 3 and these are
11 the pictures of the trunk.

12 BY MR. LUGINBILL:

13 Q Is there any bark on that thing at all?

14 A No.

15 Q Is that how -- you remember seeing it that night?

16 A Yes.

17 Q All right. Once you got stopped over there on the side
18 of the road, what did you do next?

19 A I dialed 911.

20 Q All right. Did they tell you they were going to send
21 help?

22 A They sent a state trooper out. Before the state
23 trooper got there --

24 Q Let me ask you, who got there first; who was the first
25 person that came and started helping y'all?

1 A I think it was the fire department and I'm not sure, it
2 was two pickup trucks with lights. They was cutting up the
3 tree and moving it out of the road and stuff.

4 Q Clearing the road. Did they check on you?

5 A Yes, they did.

6 Q All right. What did you tell them?

7 A He asked me what happened and I explained it to them.

8 Q Did he ask if you were hurt?

9 A Yes, he did.

10 Q Do you remember what you told him?

11 A I told him I don't feel too good and he said, would you
12 like to go to the hospital.

13 MR. NESS: Your Honor, I object to that. That's
14 hearsay. What he told somebody else.

15 THE COURT: Well, he -- he --

16 MR. LUGINBILL: I'll rephrase it.

17 THE COURT: Okay.

18 BY MR. LUGINBILL:

19 Q When the first person that came up and was talking to
20 you, do you remember what you told them about going to the
21 hospital?

22 A Yes. I told them I think I should go.

23 Q Did you go?

24 A No, I didn't.

25 Q Why not?

1 A I had a talk with the highway patrol officer. At that
2 time he said my van would --

3 MR. NESS: Your Honor. Objection, hearsay.

4 THE COURT: Hold on a second.

5 MR. LUGINBILL: Your Honor, I think he's allowed to say
6 that, because I'm asking him why he did what he did.

7 Somebody told him something and that's why he did what he
8 did. That's an exception to the hearsay rule.

9 MR. NESS: Your Honor, it's still hearsay.

10 MR. LUGINBILL: It's not offered for the truth of the
11 matter asserted.

12 THE COURT: Oh, I understand that. He can just -- he
13 can just tell us why he decided not to go. He doesn't need
14 to get into what he told the patrolman or anything like
15 that.

16 MR. LUGINBILL: I understand.

17 BY MR. LUGINBILL:

18 Q Without telling me what anybody told you why did you
19 decide not to ride in the ambulance?

20 A Well, I would have lost my van with all the cargo to go
21 to the hospital at that time or go later on.

22 Q So if they towed your van, which is what would have had
23 to happen, if you went to the hospital?

24 A Right.

25 Q You were worried about losing your cargo, right?

1 A Yes.

2 Q How much in dollars do you think you had left in there?

3 A It was about \$300 or more.

4 Q Is that a lot of money to you?

5 A Yes, it is, sir.

6 Q Okay. All right. So you tell them you don't want the
7 ambulance?

8 A Yes, sir.

9 Q Were you able to get the car driveable?

10 A Yes, sir.

11 MR. NESS: Your Honor, I've been trying to give Mr.
12 Luginbill some leeway to question his client, but the rule,
13 as we all know, require him to ask questions that are not
14 leading questions and he is just giving questions that are
15 kind of yes, yes, yes, answers. That's improper and I
16 object to it.

17 THE COURT: Okay. I'll note your objection.

18 Mr. Luginbill, if you'll just let him tell the story.

19 MR. LUGINBILL: I understand.

20 THE COURT: Thank you.

21 BY MR. LUGINBILL:

22 Q Once you decided not to go to the hospital where did
23 you go next?

24 A I drove the van. The highway patrolman instructed me
25 to keep my flares on, check to see if they was working and

1 stuff.

2 MR. NESS: Your Honor, same objection.

3 THE COURT: Okay.

4 BY MR. LUGINBILL:

5 Q Don't tell me what anybody else told you, just tell me
6 what you did?

7 A I told Jimbo, they checked him out and everything.
8 I'll do what you do, go ahead and take me home. We'll
9 finish working in the morning.

10 Q So where's the next place you went?

11 A I went and dropped Mr. Reed off at home.

12 Q That's Jimbo?

13 A Yeah.

14 Q And where did you go?

15 A I went home, myself.

16 Q And how were you feeling?

17 A I didn't -- I was feeling not too bad.

18 Q Did you stay up for a while or did you go to sleep?

19 A I laid down on my couch, to get up, because I knew I
20 had to get up real soon to go back to work after I
21 transferred my cargo to the -- my dually pickup truck.

22 Q How'd you feel when you woke up?

23 A I didn't. I started getting sharp pains in everything,
24 back in my neck, my head, my arms.

25 Q All right, so --

1 A And numbness set in and set in real hard that I was
2 unable to move, you know, like my arms.

3 Q You felt numbness?

4 A It was real numb. There was nothing there at times.

5 Q Where'd you go?

6 A I went to Bamberg Hospital.

7 Q What'd they do for you?

8 A They checked me.

9 Q Now, this would have been on January 8, right?

10 A Yes, sir.

11 Q What did they do for you?

12 A They give me xrays and stuff. Dr. Gray gave me a note
13 to --

14 Q Hang on. We'll get back to that. Now, you went back
15 to the emergency room a second time?

16 A Yes, I did.

17 Q And then what did he do, after you went to the
18 emergency room the second time where did you go for follow
19 up?

20 A To see my family physician.

21 Q Who is that?

22 A Dr. William Glenn.

23 Q Okay. What did Dr. Glenn do for you?

24 A Dr. Glenn was testing me. Give me an MRI and
25 everything?

1 Q That's an MRI?

2 A Yes.

3 Q Okay. Where did Dr. Glenn send you after the MRI?

4 A He sent me to Aiken to a Dr. Mummaneni.

5 Q Okay. And you were here when we played that long video
6 tape.

7 A Yeah.

8 Q Was Dr. Mummaneni able to get your pain back to the
9 level it was before the wreck?

10 A No, he wasn't.

11 Q So where did he send you?

12 A Augusta, Georgia to the medical clinic down there.

13 Q Is that what everybody calls MCG?

14 A Yes, sir.

15 Q Okay. Did you see Dr. Chaudry (sp)?

16 A Yes, sir.

17 Q What did he do for you --

18 MR. NESS: Your Honor, I object to what the doctor --

19 BY MR. LUGINBILL:

20 Q Don't tell me what the doctor told you, just tell me
21 what he did.

22 A He tested me and have me come back for another day.

23 Q And when you came back what did you then find out was
24 going to have to happen?

25 A He explained to me that I needed surgery.

1 Q Did you have the surgery?

2 A Yes, I did.

3 Q How long were you in the hospital with the surgery?

4 A About a week.

5 Q Okay. So it wasn't go in, go home?

6 A No, no.

7 Q Did you have to have some medical care in your home
8 once you were sent home?

9 A Yes, I did.

10 Q Was that handled by another agency or did MCG do that?

11 MR. NESS: Your Honor, he's leading again.

12 MR. LUGINBILL: Your Honor, I'm giving him a choice
13 between answers. He can pick either one. That's not a
14 leading question.

15 THE COURT: If you'd just ask him --

16 MR. LUGINBILL: Okay.

17 BY MR. LUGINBILL:

18 Q Did you get treatment at home after you were released?

19 A Yes, I did.

20 Q What kind of treatment?

21 A In house treatment, how to exercise, and how to change
22 my surgery dressing. They helped me take showers and stuff.

23 Q Who helped you with that?

24 A The nurse.

25 Q Do you know where the nurse worked?

1 A Yes.

2 Q Where'd she work?

3 A Bamberg Clinic that sends peoples out.

4 Q All right. Now, after they got it all done with the
5 exercises and all that and the treatment that you were
6 getting in your home, did your neck feel the same as it did
7 before the accident?

8 A No.

9 Q Tell me how it was different?

10 A For about a couple months I was getting around, I
11 wasn't able to go back to work. I had to wear a cast.

12 Q A cast, was that like a --

13 A A neck cast. I had to stay in a neck cast.

14 Q Okay.

15 A And I couldn't drive with that cast. It caused me to
16 faint like when I tried to turn or what you know using my
17 mirrors or anything. I wasn't able to work.

18 Q How long did it take after that before you could start
19 driving again; how many months?

20 A How many months? I think it was a long time.

21 Q How about just general pain levels, did they go back to
22 where they were?

23 A The pain wasn't that bad. It eased up some.

24 Q Okay.

25 A I'm very active and I love to get around.

1 Q Were you able to do that?

2 A No, sir.

3 Q How about now, how are you feeling now?

4 A Not doing good at all, sir.

5 Q Tell me how your necks doing, just tell me what kind of
6 problems are you having with it?

7 A My problems with my neck, if I'm not sitting down or
8 take care of my neck and I take my pain pill it will swell
9 up.

10 Q What medications did they give you just for your neck,
11 I know you have other medications for blood pressure and
12 what not, but what do you take just for your neck?

13 A Right now, Lortab.

14 Q Now, you were taking -- were you taking Lortab before
15 the wreck?

16 A No, sir.

17 Q What were you taking before the wreck for your lower
18 back?

19 A I wasn't taking anything.

20 Q Did you have a muscle relaxer?

21 A I wasn't -- before I had this wreck I haven't used any
22 pills.

23 Q Okay.

24 A I haven't go to the doctor to see him or nothing until
25 like my lower back get wacky sometime and sometime I can lay

1 down or work too hard and the pelvis and my right hip, my
2 lower hip act up and then I'll go to the doctor for some
3 pills.

4 Q So basically you'll just go when you needed to?

5 A Yes.

6 Q Okay. I gotcha. Well, when it acted up what did they
7 give you?

8 A They gave me Lortab.

9 Q Okay. Did you get any kind of muscle relaxer?

10 A Somas.

11 Q How about after the surgery what were you taking?

12 A After the surgery the doctor gave me Percocets and
13 Somas.

14 Q Okay. Do you still take that or did they change it
15 again?

16 A They changed it.

17 Q Okay. What do you take now?

18 A Right now I take Lortab and Somas.

19 Q Do you take them more often than you used to or is it
20 about the same? When I say used to I mean before the wreck?

21 A Sometimes I -- at that time I was seeing Dr. Glenn
22 maybe once a month or maybe every three months and I call
23 them up and say would you prescribe me to get some Somas.
24 Can I have some Somas this time. He says okay. He will
25 give me the Somas, that will be for my neck.

1 Q Okay.

2 A Because they don't treat me the same. It's not the
3 same like -- my back pain is way different than my neck
4 pain.

5 Q Can you tell the difference about what you need to take
6 based on what's hurting?

7 A Yes, I can. It's a different kind of pain and
8 everything.

9 Q So how often do you have to go back to Dr. Glenn now to
10 get medicine?

11 A Every month.

12 Q I'm going to show you what's been marked and agreed to
13 as Plaintiff's Exhibit No. 55. This has two visits to the
14 Bamberg County Emergency Room. That would be the emergency
15 room?

16 A Yeah.

17 Q Then you got a bill from the ER Group, Lowcountry MRI,
18 Dr. Glenn, Bamberg Physical Therapy, Aiken Neuroscience,
19 which would be Dr. Mummaneni and then MCG Health. Is that,
20 to the best of your knowledge, all the places you went?

21 A Yes, sir.

22 Q And to the best of your knowledge all the bills for
23 those places?

24 A Yes, sir.

25 Q And if I'm reading this right it comes to a total of

1 \$18,717.

2 A Yes, sir.

3 Q How old are you, William?

4 A I'm 68.

5 Q What your date of birth?

6 A 10/31/44.

7 Q 1944?

8 A Yes, sir.

9 Q It's a good year. We ended World War II and we got you.

10 Has this wreck changed your life?

11 A Yes, it did.

12 Q You don't deny you had pre-existing problems do you?

13 A I had problems, but every morning when I get up I
14 usually do my push-ups, knee bend. I exercise on my floor.
15 I'm not able to perform that no more. I had to change,
16 trying to change the way I live and stuff now.

17 Q Tell me how it's changed the way you get out and about?

18 A I get out and about to get my body going I take my
19 medicine about 4:00 o'clock in the morning. I do my Bible
20 work and then I do my exercises and then I take my shower.
21 Sometime my shower -- doing it like that will keep the
22 swelling and stuff. Like if I walking around or working in
23 the yard or something or going -- you know, people sometime
24 call and come over to my house.

25 Q And I guess what I'm getting at. Do you see people as

1 often as you used to?

2 A No, I don't.

3 Q Okay. Are you less mobile.

4 A They come to my house and stuff to pick up they orders.

5 Now, the ones that's having, you know, the fish frys and
6 stuff.

7 Q Okay.

8 MR. LUGINBILL: One moment, Your Honor.

9 BY MR. LUGINBILL:

10 Q I guess what I want you to tell the jury is this; are
11 you an invalid, do you just lay up in your bed all day and
12 do nothing?

13 A Sometimes I have to.

14 Q But sometimes you don't?

15 A Right.

16 Q And you had problems before, we're not hiding that?

17 A Huh-Uh. (Affirmative response.)

18 Q Okay. That difference, help me explain how much that's
19 changed. How are you different then before you hit that
20 tree?

21 A Before I hit that tree I was working, I was going to
22 farmer's market. I was picking up fish, fish orders twice a
23 week, you know, just to get buy. I'm a deacon in the church
24 and I dealt with a lot of peoples in my side of town.

25 Q Do you enjoy doing that?

1 A Yes.

2 Q And how about now?

3 A It's not --

4 Q Just tell the jury how you do now?

5 A And now when I go to church and stuff and sometimes I
6 do preaches from the Bible. Sometimes I do prayers and
7 stuff for people. I do, you know, basically do what my
8 pastor tells me to do. I'm not able to do that too much. I
9 can't open up Sunday School and stuff no more because
10 sometime I can't get up and meet my needs.

11 Q How are you feeling today?

12 A This morning I didn't meet my needs. I'm sick right
13 now. Very sick.

14 Q Okay. I appreciate you pushing through this so we can
15 get the jury the information they need. Other than Dr.
16 Glenn do you have another local doctor?

17 A Here?

18 Q In the Bamberg, Orangeburg area.

19 A No, sir.

20 Q Okay.

21 MR. LUGINBILL: One minute, I might be finished.

22 BY MR. LUGINBILL:

23 Q All right. Please answer any questions Mr. Ness has.

24 THE COURT: Mr. Ness. Your witness, please, sir.

25 WILLIAM BRELAND - CROSS-EXAMINATION

1 sir.

2 Q Let's finish reading. The question was, after leaving
3 Rudy's house did you stop anywhere else until the time when
4 the accident occurred.

5 MR. LUGINBILL: Your Honor, I have an objection I'd like
6 to take up with the bench.

7 A I might have didn't remember that part.

8 THE COURT: All right. Hold on, sir.

9 MR. LUGINBILL: I have an objection I'd like to take up
10 at the bench, if I could.

11 THE COURT: Do I need to excuse the jury?

12 MR. LUGINBILL: Your Honor, very short.

13 THE COURT: Okay. Come up here.

14 (Off the record bench conference with counsel and the
15 Court.)

16 THE COURT: Go ahead, Mr. Ness.

17 MR. NESS: Thank you, sir.

18 BY MR. NESS:

19 Q Mr. Breland, let's read this question. In your
20 deposition on November 19, now, did you stop after leaving
21 Rudy's house, did you stop anywhere else until the time when
22 the accident occurred? I want you to read all three of
23 these lines, your whole answer.

24 A I stopped in Norway to drop off some fish, but then
25 went there so I went to go down 321 to drop one of my

1 helpers off. That was Jimbo, sir.

2 Q Let me read this just so we --

3 MR. NESS: Your Honor, I just want to help him with the
4 reading part, if I may.

5 A Okay.

6 THE COURT: I'll allow you to read it and you can ask
7 him if that's what he said.

8 MR. NESS: All right, sir.

9 BY MR. NESS:

10 Q I stopped in Norway to drop off some fish but they
11 wasn't there so I proceeded to go down 321 to drop off one
12 of my helpers off. Is that what you said?

13 A Yes, sir.

14 Q Okay. So Mr. Breland, when I took your deposition you
15 went from Rudy's house in Charleston to 321 to drop off one
16 of your helpers and that was Wade Reed, but what you really
17 did that night is you stopped at a place right here behind
18 South Carolina State University. --

19 A Yes, I did.

20 Q -- that sells food and sells beer, and you stayed there
21 a while didn't you?

22 A Yes, I did. I didn't deny that, sir.

23 Q Now, the van that you were driving, what kind of van
24 was it?

25 A I believe it was a 2006 Dodge Diplomat or 2005,

1 something like that, sir. It was gray in color.

2 Q Okay. And we don't have any pictures of that van do
3 we?

4 A No.

5 Q Okay. So we don't know what the van looked like after
6 this wreck do we?

7 A No, sir.

8 Q And there's, nowhere pictures to be found of this van?

9 A No, sir.

10 Q And drove the van home from the site where this
11 accident happened that night, right?

12 A Yes, sir.

13 Q Do you know what kind of tree it was that you hit?

14 A I didn't at first, but they said it was a pine tree.

15 Q But do you know?

16 A Sir, I didn't know what kind of tree it was, but after
17 I hit the tree then I known what it was.

18 Q All right. And then the tree was in pieces on the
19 road, was that the way it was?

20 A There were three different pieces of that tree on that
21 road, sir.

22 Q Okay. Three pieces?

23 A I think so.

24 Q Okay.

25 A I'm not sure.

1 Q Okay.

2 A But there was more than one, sir.

3 Q More than one. The tree was in your lane; is that
4 right?

5 A In my lane and partially the other lane. Incoming
6 lane, left -- and I was in the right and the left.

7 Q Did the tree look rotten to you?

8 A Sir, I didn't know that.

9 Q You didn't know the tree looked rotten?

10 A No, sir.

11 Q Well, I understand you didn't know what tree looked
12 like before you hit it, but did you know the tree was rotten
13 after you hit it, when you were standing around out there?

14 A Sir, I don't know anything about trees, but I know it,
15 you know --

16 Q You were able to walk around out there at the scene
17 after you hit the tree weren't you?

18 A I walked around and checked the tree, sir.

19 Q Okay. In fact, you actually took a picture of the tree
20 that night didn't you?

21 A I believe I did, sir.

22 MR. NESS: Beg the Court's indulgence while I find one
23 of these pictures, Your Honor.

24 THE COURT: I know you've got plenty of pictures. Take
25 your time, Mr. Ness.

1 MR. NESS: I've got it.

2 BY MR. NESS:

3 Q Mr. Breland, I want to show you that's been marked as
4 Plaintiff's Exhibit No. 7.

5 A Yes.

6 Q Is that the picture you took that night?

7 A I believe so. I'm not sure. I believe so, sir. It's
8 been a long time since that picture was taken.

9 Q But you did take some pictures that night?

10 A I believe with my cell phone, I did.

11 Q Yes, sir.

12 A Yes.

13 Q And you provided those to Mr. Wilson and Mr. Luginbill
14 didn't you?

15 A I believe so, yes, sir.

16 Q Okay. Do you remember there being a house right up the
17 road near where this thing happened?

18 A Before I hit the tree there was a house to the right.

19 Q And you later found out that's Ms. Sharp's house?

20 A I did.

21 Q Now, when you saw the tree what did you do as far as
22 driving, what did you physically do when you first saw the
23 tree?

24 A I tried to get out the way of it, sir. Just natural
25 instinct. I just couldn't.

1 Q Did you slam on brakes?

2 A It just happened. I don't know if I slammed on brakes
3 or what happened. You know the tree just hit.

4 Q Did you put skid marks on the road?

5 A No. I don't know, sir.

6 Q When you hit the tree did you scatter pieces of the
7 tree around or did the tree just stay in the pieces that you
8 mentioned earlier?

9 A Some of it, yes, sir.

10 Q Mr. Breland, did you bring any pictures of the skid
11 marks that you left on the road that night with you?

12 MR. LUGINBILL: Your Honor, I'm going to object. He
13 just said he didn't know if he left skid marks. He just
14 answered that.

15 BY MR. NESS:

16 Q Okay, Mr. Breland, let me show you your deposition that
17 we took November 19, Page 114.

18 A Yes, sir.

19 Q At that deposition we asked you -- I'm going to read
20 the question here --

21 A Yes, sir.

22 Q -- and then I'm going to skip over to Page 150, which
23 is the next page.

24 A Okay.

25 Q Did you leave any skid marks on the highway? And what

1 was your answer?

2 A Yes, I did.

3 Q Okay. And were those skid marks located on the
4 highway? And what was your answer?

5 A He checked and --

6 Q Do you want me to read it.

7 A Where are you, sir?

8 Q Where were those skid marks located on the highway?
9 And your answer was, the highway patrol came and everything.
10 He checked and everything.

11 A Yes.

12 Q Okay. So do you have any pictures of those skid marks?

13 A I don't remember, sir, to be honest with you. If I
14 did, I don't have them now.

15 Q That's fair enough. Mr. Breland, the case you're
16 presenting here now doesn't involve any claims by you about
17 your left elbow, does it?

18 A What do you mean, sir?

19 Q You're not seeking anything from the jury in terms of
20 compensation because of your left elbow are you, just your
21 neck injury; is that right?

22 A Would you be more specific, please?

23 Q Well, are you asking the jury to compensate you for
24 injuries to your elbow that you had in this case or are you
25 saying it's just your neck. That's a simple questions.

1 Traffic Collision Report, was marked and entered.)

2 BY MR. NESS:

3 Q I've got a couple of questions I want to ask you about
4 that, Mr. Breland. Now, this traffic collision report up
5 near the top, right up here where the dark print is. It
6 says, Traffic Collision Report; is that correct?

7 A Yes, sir.

8 Q And below that, right below it, it says not
9 investigated by law enforcement; is that right?

10 A That's what it says right underneath, sir.

11 Q Okay. And all the handwriting on his document is your
12 handwriting, isn't it?

13 A Yes, sir.

14 Q Okay. Just to make sure we all can see what we're
15 talking about. That's your handwriting right there. What
16 does that say?

17 A Jim, J-i-m. I can't make that out, sir.

18 Q I have trouble reading my handwriting sometime.

19 A I don't make it out, sir.

20 Q I understand, but is that a J-i-m-b-o-w. Is that what
21 that is?

22 A I don't know, sir.

23 Q But that is your handwriting.

24 A This is my handwriting, sir.

25 Q Okay. Now, did a trooper come to the scene that night?

1 A Yes, he did.

2 Q And you had a conversation with him?

3 A Yes, I did.

4 Q Did he give you anything that night?

5 A He gave me, I believe, some papers to fill out about
6 the accident and his card.

7 Q Do you have his card?

8 A I believe I do.

9 Q You do have it?

10 A I believe it's in the office.

11 Q Okay. It's not in evidence here, is it?

12 A I don't know that, sir.

13 Q And do you know the troopers name?

14 A No, sir, I don't.

15 Q You don't know his name.

16 A (No response.)

17 Q But this gentleman talked to you face-to-face; is that
18 right?

19 A Yes, sir, he did.

20 Q When this thing happen, Mr. Breland, that night, going
21 back to when it actually occurred. You testified a little
22 earlier that your head hit the mirror; is that right?

23 A My head hit the ceiling, the mirror, and boom the air
24 bag -- the tree, I just shot straight up and down and the
25 air bag, boom. I've never been hit by an air bag before. It

1 just -- it just --

2 Q And air bag expands with air and it hits you right
3 there in the face; is that right?

4 A Yeah. I was never -- my steering wheel.

5 Q And when you were standing around there after you got
6 out of the car, the fire department came up, I think you
7 said.

8 A Yes, they did.

9 Q Well --

10 A I think they was fire department.

11 Q Well, you heard Mr. Miller testify here day before
12 yesterday, didn't you?

13 A Yes.

14 Q From the Neeses Fire Department?

15 A Yes, sir.

16 Q Did you recognize him?

17 A No, I didn't, sir.

18 Q You indicated earlier they cut up the tree, didn't you?

19 A Yes, they did.

20 Q How did they do that?

21 A Sir, it was at night, but I hear the chain saw and they
22 was moving the tree to the right. They moved the debris to
23 the right.

24 Q You didn't help them move the debris did you?

25 A No.

1 Q And when you left there at evening you took Mr. Jimbo
2 home, you took Wade Reed home?

3 A Yes, sir.

4 Q And where did you take the fish that night?

5 A I took the fish home.

6 Q Okay. Did you keep it in the coolers or did you take
7 the coolers out?

8 A I didn't do anything, sir. I got help to do that to put
9 it on my dually.

10 Q Okay.

11 A I had to transfer the fish from my van to my dually.

12 Q And the fish was in a number of different coolers?

13 A Three coolers.

14 MR. NESS: Your Honor, beg the Court's indulgence one
15 moment. I want to find another photograph here.

16 THE COURT: Yes, sir.

17 BY MR. NESS:

18 Q Mr. Luginbill showed you Exhibit No. 54, and you told
19 him you could identify that; where is that location?

20 A That's where the accident occurred. Right there.

21 Q That is where the accident happened?

22 A Yes, sir.

23 Q No. 54?

24 A Yes, sir.

25 Q Do you see any difference, other than the kind of paper

1 excuse the jury again, I believe, Mr. Ness, you may or may
2 not have motions.

3 MR. NESS: Yes, Your Honor. We have a Directed Verdict
4 Motion. Adam will argue.

5 THE COURT: Oh, Adam is arguing.

6 Let me hear from you, please, sir.

7 MR. ADAM NESS: May it please the Court.

8 THE COURT: Yes, sir.

9 MR. ADAM NESS: We believe, the defense believes, that
10 we are entitled to a Motion for Directed Verdict on the
11 issue of actual notice. No evidence has been presented that
12 DOT knew of this accident or that we had been contacted by
13 anyone who knew of the tree. We believe we are entitled to
14 a directed verdict on that issue, the actual notice issue.

15 Furthermore, as far as comparative negligence goes, we
16 owe a duty to the citizens traveling on the roads of South
17 Carolina. No witness has said that the tree in the Google
18 picture is the same tree that's lying on the ground and it's
19 the same tree that the defendant hit. None of those pieces
20 have been put together all in one part.

21 Furthermore, we've had testimony from the plaintiff's
22 expert witness that the tree was only about 30 or 35 feet
23 tall at the time it fell, and based on Mr. Harper's
24 measurements that would up the tree to reach the road, but
25 not fall on the road. And in addition, the plaintiff's

1 expert tree witness said he saw no markings on this tree
2 where it had hit the road or whether it had hit or had been
3 hit by a motor vehicle.

4 The tree was not visible. We've had several witnesses
5 say that it was flanked on either sides by pine trees and
6 that it was behind other trees that had foliage on them,
7 therefore, we do not believe that we owe a duty for a tree
8 that was obscured, does not hit the road and that has not
9 been shown to have injured this plaintiff.

10 Now, as far as breach DOT had a policy in place. It
11 followed that policy and there has been no showing by lay
12 witnesses or expert witnesses that the DOT's policy was
13 unreasonable. In fact, we've had testimony from Mr.
14 Brandyburg that the DOT, in just a small section of
15 Orangeburg, removed 100 trees, dead trees, from the sides of
16 its roads.

17 So, we argue that this policy, not only was it
18 reasonable, but it was acted upon and yielded results,
19 Moreover, the DOT also had manuals with regard to this
20 policy as how to train their employees and how their
21 employees should act, to go out and inspect these dangerous
22 road hazards and it didn't include just dead trees, it
23 included potholes, low shoulders, high shoulders, any sort
24 of hazard on the roadway.

25 We believe we are entitled to a Directed Verdict

1 Motion, in that we did not breach our duty to protect the
2 citizens of South Carolina traveling on highways or anyone
3 traveling on highways because we had a policy, acted on the
4 policy and we actually yielded results.

5 There is a Kentucky case, the cite is 381 S.W. 2d, 623.
6 It's a 1964 case, but they talk about constructive notice.

7 In this case a tree fell across the road, and since the
8 issue in this case was whether the department was chargeable
9 with constructive notice of the defective condition, which
10 is similar to what we have here, it says, or stated another
11 way whether a reasonable inspection would have disclosed the
12 condition.

13 Now, I've argued that we inspected per our policy and
14 those reasonable inspections yielded results, and we also
15 saw testimony that this road was inspected and this tree was
16 never found even though we did find trees within the vicinity
17 of this tree and up and down the road beyond the tree.

18 DOT had no notice until this lawsuit. We believe we
19 are entitled to directed verdict because we have not
20 breached our duty to act reasonably and have a reasonable
21 policy and act on that policy and find for us.

22 Now, causation. They have not establish causation.
23 Again, we had testimony from the plaintiff's expert that a
24 30 to 35 foot stump of a tree fell towards the road,
25 although that same expert said there's no evidence on that

1 tree of actually hitting the road. No indentations or
2 anything that showed that it hit and asphalt road.

3 Furthermore, Dr. Mummaneni testified that he was told
4 by the plaintiff that the wreck is what caused his neck
5 injuries and caused his neck pain even though we have also
6 seen testimony and Bamberg Hospital record and other things
7 that show that he had neck pain between his 1999 surgery and
8 this wreck. So he's saying on one hand he had neck pain and
9 he's saying on the other hand, no, I didn't have neck pain.
10 So if this accident caused his neck pain, how is a
11 reasonable jury to distinguish between prior neck pain and
12 neck pain after this accident in 2010.

13 Furthermore, they talk about the van, this gray van
14 they were driving. They do not have any pictures of it.
15 They do not have any work record that shows the van had to
16 be repaired or any actual physical or other testimony that
17 would show there was some sort of damage to this van which
18 seems to go to reason that it would have had damage if they
19 had damage.

20 Now, as far as the elbow pain, I think we've
21 established, and Mr. Reed (sic) testified that this case had
22 nothing to do with the elbow pain.

23 THE COURT: They conceded that. They conceded that. You
24 won that point.

25 MR. ADAM NESS: Okay.

1 THE COURT: Thank you, Mr. Ness.

2 MR. ADAM NESS: One more matter, Your Honor.

3 THE COURT: Okay.

4 MR. ADAM NESS: Furthermore, permanent injury and
5 disability has not been established by medical testimony. We
6 saw testimony from Dr. Mummaneni that said he was told the
7 neck injury was a result of this wreck, but, also, we've
8 also seen testimony that the neck injury or rather the neck
9 pain happened before this wreck, up to a year or two before
10 and he was on pain medications right up until this wreck.

11 THE COURT: Okay.

12 MR. ADAM NESS: Thank you, Your Honor.

13 THE COURT: Mr. Ness, you're offering comparative
14 negligence?

15 MR. ADAM NESS: That's the constructive notice part.
16 The first part I talked about was the actual notice.

17 THE COURT: I understand, but you're arguing
18 comparative?

19 MR. ADAM NESS: Yes, sir.

20 THE COURT: Okay. All right.

21 All right. Mr. Wilson.

22 MR. WILSON: Thank Your Honor.

23 THE COURT: I'm concerned about the actual issue that he
24 brought up.

25 MR. WILSON: Your Honor, we concede we don't have any

1 evidence of actual notice. It's not what we're going to
2 submit or argue.

3 THE COURT: Okay.

4 MR. WILSON: I'll concede yet another point.

5 THE COURT: Okay.

6 MR. ADAM NESS: Your Honor, we ask that any comments
7 made by the Court be constricted to should have known.
8 Obviously since we did not know that.

9 THE COURT: And I'm going to try and remember to do that
10 with my charge. The way that the statute reads is knew or
11 should have known.

12 MR. ADAM NESS: Yes, sir.

13 THE COURT: So I will try and remember to do that, but
14 they are conceding no actual notice. As to all the other
15 issues that you mentioned, Mr. Ness. I'm denying the Motion
16 for Directed Verdict. I believe there are questions of fact
17 for the jury to decide, unless you want me to go to each one
18 of them --

19 MR. ADAM NESS: No, sir, Your Honor.

20 THE COURT: -- I'll just do it that way. And you did
21 good. You did much better than your daddy would have done.

22 Okay. And Mr. Wilson, you said there was an issue
23 about --

24 MR. WILSON: Yes, sir, Your Honor, there is. I've got a
25 Motion in Limine about one of the witnesses I anticipate

1 MS. BOLIN: Okay.

2 THE COURT: All right. Mr. Ness, your witness.

3 NANCY BOLIN - DIRECT EXAMINATION

4 BY MR. NESS:

5 Q Hi, Ms. Bolin. You're Nancy Bolin, correct?

6 A Yes, sir.

7 Q Where do you live, Ms. Bolin?

8 A Between Nesses and Norway on Savannah Highway, 321.

9 Q But you actually live -- you house actually front US
10 321?

11 A Uh-huh. (Affirmative response.)

12 Q Okay, and you own property in addition to just the
13 house and the lot that the house is on?

14 A Yes.

15 Q You own some timberland?

16 A Well, not timberland, but I own -- it's on both sides
17 of the road.

18 Q Okay. And you -- do you know where Ms. Rosa Sharp
19 lives?

20 A Yes, I do.

21 Q And y'all, would y'all's property lines adjoin?

22 A Yes, it does.

23 Q Okay. I think her property line is the ditch maybe in
24 between your lines; isn't that right?

25 A Uh-huh. (Affirmative response.)

1 Q Okay, and when you go to -- when you leave your house
2 and you're going somewhere you pretty much have to get on US
3 321?

4 A Yes, either way.

5 Q Whether you're going north or south?

6 A Yes.

7 Q Which way do you have to get on 321 to go passed Ms.
8 Rosa Sharp's house?

9 A I have to go north.

10 Q So you're going like --

11 A Towards Neeses.

12 Q How often do you go that route?

13 A Probably every day.

14 Q How long have you lived on US 321?

15 A Over 60 years.

16 Q Have you lived in the same home over 60 years?

17 A Yes.

18 Q Okay. So for years and years you've gone up and down
19 321?

20 A Up and down the road.

21 Q And the land you own that adjoins Ms. Sharp's property,
22 how long have you owned that?

23 A It's been in my family and I've owned it probably for
24 60 years, too.

25 Q Okay. Now, when you -- you have trees on your property

1 that sort of front the highway right-of-way?

2 A Yes, there's trees.

3 Q All right. What kinds of trees?

4 A They just came up voluntarily, because we used to have
5 pine trees and when that ice storm can through it knocked
6 them all down.

7 Q Yes, ma'am.

8 A And then we had to have them cut and removed, you know,
9 what could be salvaged.

10 Q So what's come back has just been volunteered by
11 nature?

12 A Uh-huh. (Affirmative response.)

13 Q Natural regrowth?

14 A Uh-huh. (Affirmative response.)

15 Q And does that involve trees such as sweet gum?

16 A Yes, sir.

17 Q Such as oak?

18 A Yes.

19 Q Pine trees?

20 A Yeah, volunteer pine trees.

21 Q And being an owner of your land, when you go and down
22 321, do you look at your land?

23 A Yeah, all the time.

24 Q All right.

25 A Every time --

1 Q Go ahead.

2 A Sometime I pick up cans, some of them's laying beside
3 the road.

4 Q So you actually walk the shoulder of the road?

5 A I have, yes.

6 Q Well, this case that we're here today about is about an
7 incident that occurred in January, either late overnight of
8 January 7, 2010 or early on the morning of January 8, 2010.
9 You were living along this stretch of road at that in time,
10 right?

11 A Yes.

12 Q Is that a yes?

13 A Yes.

14 Q She's recording everything so you have to give a verbal
15 response.

16 A Yes.

17 Q Were you aware there was a wreck there?

18 A No, I was not.

19 Q So at some point you learned there was a wreck there,
20 so you knew about it, right?

21 A Yeah, at some point, yeah.

22 Q Okay. Are you aware or were you ever aware of having
23 any trees on your property that had died and were just
24 standing there?

25 A No, I have not. None at all.

1 Q Okay. If you had seen any trees that were dead or
2 diseased or dying would it have concerned you?

3 A Yes, it would.

4 Q All right. Because trees will eventually will have some
5 kind of market value if you have enough of them, right?

6 A Yes.

7 Q And when you rode up and down 321 between your house
8 and Ms. Sharp's house, is the area we're talking about, you
9 are not aware of having any dead trees?

10 A No, I wasn't.

11 Q Did you see any dead trees in the 2009, early 2010?

12 A Not to my knowledge.

13 Q Okay. And were you walking picking up cans along 321
14 in 2009, occasionally?

15 A Occasionally. Occasionally, I was. Not every day but
16 once a week.

17 Q And you go north from your house and obviously you had
18 to go back south if you went north?

19 A Yes.

20 Q And you go to Ms. Sharp's house occasionally to see
21 her?

22 A Yes, we're friends.

23 Q Okay. Thank you. Answer any questions Mr. Wilson or
24 Mr. Luginbill may have for you.

25 THE COURT: Mr. Luginbill, your witness.

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1 Q And that is your property?

2 A Yes.

3 Q This is a plat that was done by Mr. Harper. This is
4 Exhibit No. 2. This plat shows that you and Ms. Sharp is up
5 here to the north and you're down here to the south and it
6 has a stump just off the right-of-way that was located by
7 Mr. Harper. You would agree with me that that spot where
8 he's got it marked is on your property?

9 THE COURT: That's Plaintiff's 2?

10 MR. LUGINBILL: Plaintiff's 2, Your Honor.

11 THE COURT: All right.

12 A That is on my property? That's a stump?

13 BY MR. LUGINBILL:

14 Q Yes, ma'am.

15 A I -- I would say if that's a stump that's my property.

16 Q And you never noticed the stump being there?

17 A No.

18 Q Doesn't mean it wasn't there, it just means you didn't
19 notice it?

20 A No, but, I mean, it could have been there for years.

21 Q Okay. I've got one more picture to show you if I can
22 get my hands on it. There it is. This is Plaintiff's No.
23 1. This is a still picture that Mr. Harper took off of his
24 computer that is directly above that point right there that
25 you just said is on your property. So this is a still

1 picture that he took off his computer up there.

2 A Uh-huh. (Affirmative response.)

3 Q And I'll tell you that everybody's been able to agree
4 that this was taken in May 2008.

5 A Uh-huh. (Affirmative response.)

6 Q Does that appear to be a dead tree right there?

7 A Could be, you know, but it's in the middle of a lot of
8 green trees.

9 Q Sure. And this is in May so everything's got leaves on
10 it.

11 A Yeah.

12 Q But you would agree with me that that looks to be a
13 dead tree, it's got no bark, no branches coming off of it,
14 no needles?

15 A Doesn't appear to have any but --

16 Q Would you agree with me that it's probably a dead tree,
17 then?

18 A Probably.

19 Q Okay. That was all I was going to ask you. So we kind
20 of connect all those dots. Surveyor found a stump and then
21 he found on the computer a picture from May of 2008 right
22 above that stump of a tree that was dead and there's no
23 other trees and no other stumps around there. All you can
24 really say is you just never noticed it, right?

25 A I never noticed it.

1 going to start asking you questions. Okay.

2 MR. RUTLAND: Okay.

3 HAROLD RUTLAND - DIRECT EXAMINATION

4 BY MR. NESS:

5 Q Mr. Rutland, where do you live?

6 A I live on Tall Creek Road in the Bolen Town Community.
7 Route 2, Neeses.

8 Q Okay. So that's not far from Neeses?

9 A No, sir. Not far at all.

10 Q From your house to Neeses cross-roads how far would
11 that be?

12 A Approximately five miles.

13 Q Okay. Where do you work?

14 A I work for Michelin Tire in Lexington, South Carolina.

15 Q So when you go from your house in Bolen Town to
16 Michelin, you go through Neeses; is that right?

17 A Yes, sir.

18 Q And how long have you been working at Michelin?

19 A 25 years.

20 Q Are you also a volunteer Firefighter?

21 A Yes, sir.

22 Q Which fire department are you a member of?

23 A Bolen Town.

24 Q Do you have a rank with that fire department?

25 A I'm presently the chief of that fire department.

1 Q Okay. How long have you been the chief?

2 A Four months.

3 Q So what were you in January of 2010, were you assistant
4 chief?

5 A Captain.

6 Q Well, captain. And you were working at Michelin at
7 that time, as well?

8 A Yes, sir.

9 Q All right. The incident that we're here about that
10 we've asked you to come talk about is an incident that
11 happened on the night of January 7 or either early, early
12 morning of January 8, involving Mr. William Breland and a
13 tree. Are you aware of that incident?

14 A Yes, sir.

15 Q Okay. Were you going to work that night at
16 approximately 11:30, 12:00 o'clock?

17 A No, sir?

18 Q Where were you going that night or were you going
19 anywhere for that matter?

20 A I was coming home. I think that was a Friday night and
21 I'd probably been to the Grand American Coon Hunt in
22 Orangeburg.

23 Q Okay, and tell me about how you learned about this
24 incident?

25 A We all carry two-way radios or pagers of both. I heard

1 A When I arrived there was a van, a small van like a Ford
2 Aerostar facing south, an Aerostar, Voyager, small compact
3 van facing south --

4 Q Yes, sir.

5 A -- 321 and it had struck a piece of tree that was lying
6 in the highway.

7 Q Do you have lights on your truck or did you just drive
8 up there in an unmarked, no lights, pickup truck?

9 A No, sir. I had a red light on the dash and two red
10 lights in the back window just for visibility when I'm
11 directing traffic or something at the scene?

12 Q Okay, did you have those on?

13 A Yes, sir.

14 Q That's standard procedure?

15 A Yes.

16 Q When you got there and found the van, where was the van
17 parked, to your recollection?

18 A It was on the shoulder of the road.

19 Q Okay. How many people were there?

20 A I only recollect one, but I didn't get, you know, that
21 deep into what was going on.

22 Q Okay. Were you the first person beside whoever was in
23 the van to get there?

24 A I believe I was. Yes, sir.

25 Q All right. Do you remember anything about the tree

1 that you saw?

2 A It was a small piece of a tree, probably 10, 12 inches
3 in diameter, several feet long. It was protruding into the
4 southbound lane.

5 Q 10 to 12 inches is roughly that size?

6 A Something about that diameter.

7 Q Okay. And how long?

8 A Several feet, four, five, six feet long.

9 Q Five, six. Somewhere in this neighborhood?

10 A Yes, sir, about like that.

11 Q All right. And do you know what kind of tree it was?

12 A From my experience with trees, I'd say it was a pine
13 tree.

14 Q Okay.

15 A No bark, no limbs.

16 Q What did you do about the tree, if anything?

17 A After Neeses arrived several of us rolled it out of the
18 roadway, just rolled it over into the ditch so one else
19 could hit it.

20 Q Okay. Was there any difficulty in moving it?

21 A No, it was rotten and light.

22 Q Lightweight?

23 A Lightweight, yes, sir.

24 Q All right. Did you have to get a chainsaw out to cut it
25 up to move it?

- 1 A No, sir.
- 2 Q Did you have a chainsaw with you?
- 3 A No, sir.
- 4 Q So it was light enough that you and another man would
5 roll it or did you have to pick it up?
- 6 A We rolled it. No limbs on it, so we just rolled it.
- 7 Q There were no limbs at all on it?
- 8 A No.
- 9 Q Any bark on it that you remember?
- 10 A No, it was pretty rotten.
- 11 Q Had you had any discussion of the person in the
12 vehicle?
- 13 A I asked him if he was okay, if he needed any help.
- 14 Q And what response did you get?
- 15 A I can't remember exactly. He wasn't bleeding, he
16 didn't have anything broken or anything serious. I think he
17 was in some pain. You know, he was a little bounced around,
18 but no broken windows, no glass, no cuts.
- 19 Q Did he indicate he needed any kind of help?
- 20 A I can't remember at that time.
- 21 Q The documents, have you seen the documents at the
22 Neeses Fire Department, are you privy to those documents?
- 23 A No. I get a CAD from the county that gives me the time
24 and the run number. I can see their times, but I don't see
25 their actual report.

1 Q All right. But did anybody pull out a chainsaw that you
2 saw?

3 A No, sir.

4 Q Did anyone else from Bolen Town report?

5 A No, sir. I was the only one.

6 Q Was it -- how much of the tree was in the road?

7 A Just a piece of the trunk, several feet long, four,
8 five, six feet long.

9 Q Was it in the road or on the shoulder?

10 A It was partially in the road and partially on the
11 shoulder.

12 Q Okay. And was there any that went as far as the center
13 line?

14 A No, sir, it didn't go as far as the center line.

15 Q Any tree go across the center line?

16 A No, sir.

17 Q Did the individual that you spoke to, did he tell you
18 his name?

19 A If he did I don't remember it. I don't think he told
20 me his name, but if he did I don't remember it.

21 Q Was he the driver of the vehicle?

22 A I think I did speak to the driver of the vehicle, yes,
23 sir.

24 Q Okay. And when -- did he help you in any way remove
25 the tree?

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1 Q And you remember him saying I just want to go ahead and
2 dive my van home?

3 A Yes, sir.

4 Q You don't know the location of the tree or any parts of
5 the tree or any parts of the trunk, you don't know where
6 those were located in the road before the vehicle hit the
7 tree, do you?

8 A No, sir.

9 Q You just know where you helped move a piece of the tree
10 from after it was hit by the vehicle?

11 A Yes.

12 Q Okay. And the tree that you helped move you thought
13 was a pine tree, no bark, no limbs?

14 A Yes, sir.

15 Q Clearly rotten?

16 A Yes, sir.

17 MR. WILSON: Your Honor, that's all the questions I
18 have. Thank you, Mr. Rutland.

19 THE COURT: Anything on redirect?

20 MR. NESS: No, Your Honor, nothing on redirect and I'd
21 ask that this witness be excused.

22 THE COURT: Thank you, sir. You may be excused.

23 MR. RUTLAND: Thank you.

24 THE COURT: Mr. Ness. Next witness.

25 MR. NESS: Your Honor, I'd call Mr. David Brandyburg to

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1 half feet. And based on what the surveyor said, the stump
2 was four and a-half feet away from the center line -- four
3 and a-half feet away from the edge of the right-of-way,
4 which would put it 42 feet and a-half away from the center
5 line of the road.

6 Q And how many feet would that be from the edge of the
7 road?

8 A Taking 12 feet away from the road it would be -- let me
9 get my math right. 42 feet, minus the 12 would be 30 feet
10 away from the edge of the road from where the stump is.

11 Q Okay. Let me make sure I understand how highways, how
12 this highway is built. A 75 foot right-of-way means from
13 ditch to ditch?

14 A From right-of-way to right-of-way it's 75 feet.

15 Q Okay. From the center line, the yellow or white line
16 that runs down the middle of the road in this area how much
17 is from the center line to the right and from the center
18 line to the left?

19 A From the center line to the left and center line to the
20 right is 37 and a-half feet from the center line to each
21 side.

22 Q Okay. And the center line to the edge of the road is
23 how far?

24 A It's 12 from the centerline to the edge of the road.

25 Q So what your math was, if it's 42 feet, roughly, from

1 verdict.

2 THE COURT: Okay.

3 MR. WILSON: I'd like to submit my same eloquent
4 argument that I submitted earlier in opposition.

5 THE COURT: All right. My ruling is going to be the
6 same, but we've got that preserved on the record.

7 Before we take a break do y'all want to go over the
8 charges. Y'all come back and we'll go to chambers to do
9 that.

10 (Court in recess for lunch at 1:08 p.m.)

11 (Court in session after lunch at 2:35 p.m)

12 THE COURT: Are they all there?

13 THE BAILIFF: Yes, Your Honor.

14 THE COURT: Okay. Y'all be seated.

15 All right. We've had meeting -- I just wanted to make
16 sure -- we've had a meeting in chambers to go over the
17 charges. One of the things that we had finished off with
18 was whether I was going to charge life expectancy tables and
19 Mr. Wilson or Mr. Luginbill, I don't know who, was kind
20 enough to send me a case and forward that on to y'all.

21 MS. JETT: I haven't seen it.

22 MR. WILSON: We sent it to Adam.

23 THE COURT: Oh, you sent it to Adam. I made a note on
24 there for you to look at. Well, actually for me to look at,
25 but now that you have my copy you can look at it.

1 And just for the record we had my law clerk double
2 check. The holding here is not flagged. That does not mean
3 it's changed. This is a 1978 case and interestingly enough
4 trying to get on the good side of the Court it comes out of
5 Williamsburg County and the presiding judge was my next door
6 neighbor that the Court said made an error, which my mother
7 would have never believed, but apparently the Supreme Court
8 took it as making an error in failing to charge the future
9 damages issue. Of course, I'm not charging future damages,
10 as we talked about. I'm charging the life expectancy table,
11 but let me hear from you, Mr. Ness.

12 MR. NESS: Norma is arguing that.

13 THE COURT: Let me hear from you, Ms. Jett.

14 MS. JETT: We still assert that there was no medical
15 testimony that was testifying treating physician in this
16 case that wasn't an expert who testified --

17 THE COURT: Yes, ma'am.

18 MS. JETT: -- he was not asked and did not testify
19 about permanent injuries.

20 THE COURT: Right.

21 MS. JETT: Your Honor, the difference in this case and
22 other reported cases that talked about plaintiff's
23 testifying about their own damages and their own injuries --

24 THE COURT: Right.

25 MS. JETT: -- is that in this case he already has an

1 injury to the same body part. He's already on pain
2 medication for that injury, he already undergoing treatment
3 for that injury and it just is another layer perhaps of pain
4 and injury to the same body part and, Your Honor, that's not
5 within that layperson's ability to testify nor to comprehend
6 without the assistance of the expert physician who can sort
7 that out as to the -- to what degree is he worse and is his
8 worsening more permanent than he already was.

9 THE COURT: Right.

10 MS. JETT: So, Your Honor, we would take exception to
11 the life expectancy table.

12 THE COURT: Okay. And just --

13 MS. JETT: Without that, there's no reason to say how
14 long he's going to live.

15 THE COURT: Okay. Okay. Just so y'all will be clear.
16 I'm not making a future damages charge. I am charging the
17 life expectancy where it has the very much qualifying
18 sentence in there and I am going to rely on the fact that
19 the quote from Daniels verses Bernard, is that the testimony
20 of Daniels, who was the plaintiff, was some evidence of
21 future pain and suffering.

22 In this case the judge did not charge future damages,
23 which I'm also not doing. I'm just explaining -- I'm
24 essentially splitting the baby on that. Is the way I look
25 at it.

1 You can't see the tree in this picture. It's taken
2 north, three-quarters of a mile from this site, ladies and
3 gentlemen. Nobody would expect you to see the tree from
4 that far away. But we know what you can see when you're
5 right there on the shoulder. We know what you can see when
6 you're right there on the site.

7 So what else did we have to prove, ladies and
8 gentlemen? We have to prove that William was injured and
9 that he suffered damages. How have we done that? You've
10 heard from Dr. Mummaneni. I know it was long. I didn't do
11 as good a job of moving that forward as quickly as I should.
12 Maybe Mr. Ness didn't. Maybe we both didn't, but it was
13 important that it took that time, because what was important
14 was that Dr. Mummaneni had to see everything, see all those
15 records, to know everything to reach the opinion that he
16 reached. To give the opinions that he thought were
17 appropriate and proper and correct. So he had to see all
18 those records. He had to hear all those records and he had
19 to consider all that stuff, and that took some time, ladies
20 and gentlemen. So after he saw and heard everything what
21 were his opinions? His opinions were the wreck aggravated
22 William's prior neck condition. That it caused his pain to
23 become significantly worse, much worse to the point that he
24 couldn't treat it any longer, even after physical therapy
25 and that he had to send William to a surgeon to have the

1 surgery done. And the surgery was necessary. Those were
2 his opinions.

3 Ladies and gentlemen, that was after Dr. Mummaneni had
4 seen Mr. Breland, treated Mr. Breland, evaluated Mr.
5 Breland, examined him, tested him, seen all of his records
6 from 1999 from his surgery in Nevada, seen all of this
7 medical records from 2007 and 2008. After seeing all that
8 what were his opinions. The wreck caused the condition to
9 become much worse. A condition that William hadn't sought
10 treatment for in almost two years. And it caused him to
11 have to undergo surgery.

12 DOT didn't have Mr. Breland evaluated. They didn't
13 bring another doctor in to look at him. They didn't bring
14 anybody in here to refute that or contest that.

15 Dr. Mummaneni said William had a pre-existing condition
16 and he did. He had previous neck surgery. And the Judge is
17 going to tell you that just because you have a pre-existing
18 condition doesn't mean you're not to be compensated under
19 the law. The Judge is going to tell you what the law is
20 that if you have a pre-existing condition and the injury or
21 the damage caused by somebody else causes it to be worsened
22 and causes you to have damages and injuries that come after
23 that, that that's what the law compensates you for. The
24 Judge is going to charge you that in his charge. Dr.
25 Mummaneni says the same thing that Dr. Chaudry says in his

1 reports. He sent Dr. Mummaneni letters and reports and they
2 say the same thing.

3 Mr. Ness asked him, well, is that based on the clinical
4 history? Yes, based on the clinical history. Mr. Ness told
5 you that that means it's based on what William said, it's
6 based on what William told him, it's just based on what the
7 patient told him. That's the only thing he's basing his
8 opinion on. No, ladies and gentlemen, that's not the only
9 thing. He is basing it on the fact that William told him
10 that the wreck made his neck problems significantly worse,
11 but he's also basing it on the fact that from April 2008
12 until January 2010, William didn't seek treatment for his
13 neck or treatment for his neck, and after about two hours of
14 seeing everything and hearing everything, Dr. Mummaneni's
15 opinions remain the same.

16 Now what do the DOT and contracts submit to you, they
17 submitted to you some questions of Wade Reed, trying to say
18 William had been having problems with his neck all along.
19 Page 29 of Wade Reed's deposition. They questioned him
20 about the neck. I had to go back in and get Mr. Reed the
21 rest of his deposition where they said, all right, now. He
22 had some neck problems before has he? Yes, I reckon. I
23 mean, as far as his medical history I didn't know. Mr. Reed
24 told them clearly, I don't know what his medical history was
25 and that's what he told you from the witness stand, and the

1 implication was that somehow he knew that Mr. Breland had
2 been having neck problems all this time. That's not what he
3 says, ladies and gentlemen.

4 You've got to read the complete story, you've got to
5 see all the evidence, you've got to hear it all to make a
6 decision.

7 Dr. Mummaneni was questioned a lot about some thing
8 that really weren't related. I'm just going to go through
9 one little part of his deposition that you heard. Mr. Ness
10 asked him a lot about spinal canal narrowing. So he has a
11 narrowing of the spinal canal that caused some problems.
12 It's something that he was born with not something that was
13 caused by this wreck. Mr. Ness was asking about a lot of
14 different things. Dr. Mummaneni's answer was, let me
15 explain to you exactly what that means. What it means is
16 that some people have a narrow space there and you usually
17 do not have any symptoms from that. We're not here about
18 those things. We're here about the injuries that were
19 caused to Mr. Breland by this wreck, the worsening neck
20 condition, and this disk surgery that he had to undergo in
21 2010 and everything that came from that.

22 So we need your help resolving this. We need your
23 help, as we see it, in holding SCDOT accountable and
24 ultimately liable. If you decide -- and we need you to
25 evaluate what we've proven by the preponderance of the

1 So we don't have to prove our damages to an exact
2 dollar figure, but what the Judge is going to tell you and
3 what the Judge is going to charge you is there are some
4 things that you should be able to consider in deciding how
5 much the verdict should be for. And those things will
6 consist of basically this, the medical bills. We put in,
7 without objection, Plaintiff's Exhibit No. 55. I'm just
8 going to show it -- Mr. Breland's bills. You can see them.
9 Treatment at the hospital, emergency room doctors at the
10 Bamberg Hospital. This was right after the wreck. An MRI
11 that was done. Dr. Glenn his family doctor. Some physical
12 therapy he tried, it didn't work. Dr. Mummaneni and the
13 surgery at the Medical College of Georgia. Those total out
14 to \$118,717.00. That's the easy part, ladies and gentlemen.
15 You can look saw at the numbers.

16 The Judge is also going to tell you that you can
17 consider other things, pain and suffering, past and future.
18 We know that from January 2010 until October 2010 Mr.
19 Breland was in certain condition of pain and suffering
20 before he had the surgery. That's why he had the surgery,
21 to lessen some of that. So there's a period of time in there
22 for this pain and suffering that you should consider. Then
23 there's a period of time after October 2010 going forward
24 that you should consider whether you aware pain and
25 suffering. Now, Dr. Mummaneni said in his deposition very

1 clearly, some people have problems after this surgery and
2 some people don't.

3 Mr. Breland has gotten up and testified for you that
4 he's having some problems. I think he's not an invalid. He
5 can still get up and do things, but there's some times that
6 he can't. There's some times that it hurts. So you should
7 consider the period of time between October 2010 when the
8 surgery was completed, now and going forward. Judge is
9 going to tell you that Mr. Breland that a 14.68 year life
10 expectancy. He's 68. We're all expected to live to about
11 83 or 84.

12 If you decide the evidence supports future pain and
13 suffering then you award for it. You build that into your
14 calculation and you put that into the verdict that you
15 decide to award. If you don't, then you don't. And you
16 only take into account the medical bills and the pain and
17 suffering that he would have had after the wreck and up
18 until the surgery, but I submit to you he said it's
19 continuing. It is not life debilitating, but it is life
20 changing.

21 Ladies and gentlemen, you must decide whatever it is,
22 and you must fully compensate William Breland. If you don't
23 award full compensation then you don't hold the DOT fully
24 responsible. If you don't give a full verdict and a full
25 award that fully compensates Mr. Breland for the injuries

1 is down here at the bottom it says, vehicle verses tree, no
2 injuries. Mr. Breland refused to go in the ambulance or
3 cancelled the ambulance or whatever happened. You can look
4 at the second page of this document -- okay, we've got it
5 up. I'm sorry, I'm blocking you. This says no injuries.
6 If you -- right about here it shows, this is talking about
7 the ambulance. Responded Mr. Gibbons, Mr. Gengch (sp),
8 canceled call. At some point in this evening the ambulance
9 was called out but then cancelled. It's cancelled I submit
10 to you because there's no injuries, backs up what the report
11 says, no injuries.

12 Don't you think if you had injuries that are let EMS
13 take them to a hospital? Don't you think they would have
14 been treated at the scene with a medical record to show you
15 here today that they'd been injured at the scene?

16 Now, Mr. Breland claims neck injuries and I want to
17 talk a little bit about that. No question Mr. Breland had
18 significant neck problems before this wreck. Three or four
19 levels fused and hooked together by bone in the back of his
20 neck. Then four or five years goes by, he has more problems
21 he goes back to his doctors in Nevada. Las Vegas, Nevada.
22 When he goes back he has to get epidural steroid injections.
23 That's for swelling of those same areas. Dr. Mummaneni said
24 later that he was having problems above and below -- this is
25 what he interpreted from the records in Nevada from 2007,

1 2008, he was already having problems above and below the
2 previous fusion. The reason that's important is the above
3 and below sites are where the doctor operated on in this
4 case after this wreck. Same spot he was already having
5 problems with in 2007, 2008.

6 Now, Mr. Wilson asked Mr. Breland a couple of time, a
7 number of time if he had any more problems after 2007, 2008,
8 even when he came back to South Carolina, Mr. Breland told
9 him no. Well, ladies and gentlemen, we put in a record, and
10 we hadn't thought about this, but I want you to note it,
11 because it's a really important issue, I believe. This is
12 a medical record from the Bamberg County Hospital Emergency
13 Department. The date of it is May 13, 2009, about six
14 months before this happened. The date up here. Let's look
15 at a couple of things Mr. Breland said wasn't happening to
16 him at any point. This is what he tells the doctor when he
17 goes into the emergency room. I've had chronic neck and
18 back pain. Chronic. As was described yesterday, chronic is
19 being continuous. This is May of '09, he's telling the
20 doctor he's got chronic neck and back pain. I don't he went
21 to the doctor for neck pain that day. Don't misunderstand
22 what I'm suggesting here. You can go over this. He told
23 the doctor that he was having chronic neck pains.

24 And you heard him talking about Lortab, same thing as
25 Dilaudid, the same medication. Mr. Breland said oh, I took

1 Lortab every now and then. Let me interpret this for you.
2 That says Lortab, L-o-r-t-a-b. That's the milligrams of the
3 medicine. Six times a day or as needed. May 13, 2009, he's
4 taking up to six Lortab a day, but he's not having neck
5 pain. That's a really controlled substance. It has to be
6 prescribed, can't buy that over the counter, but he comes in
7 here and tells you folks oh, I've taken it every now and
8 again, I wasn't having any trouble with my neck.

9 Now, ladies and gentlemen, these are some of these
10 credibility issues that I've mentioned to you.

11 There one other thing I'm going to and I'm going to sit
12 down. I've talked enough, now. The live testimony of Dr.
13 Mummaneni's deposition and from Mr. Breeland about issues
14 going down to his elbow to his fingers, his fingers getting
15 numb. Well, Dr. Mummaneni said in his deposition, that was
16 a long deposition and I can understand why it would be
17 boring in some respects, but Dr. Mummaneni said that in, I
18 think it was in 1999, he had problems -- Mr. Breeland had
19 problems in his elbow and tingling into his fingers. When
20 he went to see Dr. Mummaneni in 2010 he had the same issues,
21 along with neck pain. But Mummaneni went on to say, and
22 sometimes it's hard to understand him, but he said it's not
23 related at all, not caused by -- at all a connection to this
24 wreck. He said the reason he's having tingling in his
25 fingers, pain down his arm that he had a (inaudible) muscle

1 and I asked what does that mean, and he said that's an extra
2 muscle in his elbow that most of us don't have and it pushed
3 on the nerve root and that's what was causing -- he had an
4 extra muscle that nobody had, that's where his problem is at
5 least from here all the way down. Yet he kept testifying to
6 day about his elbow issues. That's something that's not
7 related here at all.

8 One last thing. When you -- he had the surgery on his
9 neck. Nobody is denying he had surgery on it, but he had
10 osteophyte growths, which is boney growth, bones that grow
11 and push against nerve endings and nerve roots in your neck.
12 He had bulging disks in 2007 and 2008. He had those same
13 exact issues when he went to the hospital in Augusta for
14 this surgery. Those were pre-existing issues.

15 So what this case is about, ladies and gentlemen, is
16 did he get osteophytes in his neck. That's why it went kind
17 of long because I had to prepare to ask the questions I
18 asked in that deposition. I had to figure out -- what I had
19 to figure out was he had all these issues and the only new
20 issue that he had was, according to Mr. Breeland, by
21 history, by history. Can you tell about the pain and
22 suffering, by history, he said, he did not have any pain and
23 suffering.

24 Well, that's all the doctor knew. Where did that come
25 from, from Mr. Breland's mouth. You'll have this medical

1 record from Bamberg Hospital, there it is. Lortab for pain,
2 chronic neck pain. And I submit to you that he already had
3 a lot of these problems, he already had a lot of pain and
4 suffering, and what he gets -- even if you find that DOT
5 didn't do its inspection, it's up to you, your province, but
6 you need to think about it. I ask you to think about it
7 very closely. What -- if DOT didn't do that inspection
8 correctly then what did Mr. Breland suffer as a result of
9 something DOT may have done. He already had the
10 osteophytes, the bulging disks. They operated on him to
11 relieve some of that, but he already had it. He says his
12 pain's gotten better since then, but that's a credibility
13 issue. What are we trying to stretch in this case. I think
14 you've got to look at that closely.

15 I ask you to make a finding of a verdict, when you go
16 back there, and look through all this evidence. Don't take
17 my word for it, look at these documents closely when you get
18 in that jury room. Look at everything in there. I ask you
19 to find a verdict for the defendant.

20 Thank you very much.

21 THE COURT: Thank you, Mr. Ness.

22 Mr. Wilson.

23 MR. WILSON: Ladies and gentlemen, I just want to start
24 with something that Mr. Ness said in his closing argument.
25 He said if they hadn't proved we saw a tree, if they proved

1 they were hurt at that time. And they said they wanted to
2 go home and get their van home, and there wasn't any broken
3 bones, and there wasn't any blood, and the damage to the van
4 wasn't significant enough that it couldn't be driven home.
5 Does that mean there was nobody hurt? No.

6 That's what happened that night, ladies and gentlemen.

7 Did they really go to the right place. That's where
8 William Breland went, ladies and gentlemen, right there.
9 This is not showing up, clear. That's Plaintiff's No. 4.
10 He went right there. That's the right place, ladies and
11 gentlemen. There's no evidence to the contrary. That's the
12 picture and y'all have seen it before. That's the exact
13 place Mr. Harper went to do the survey, that's the exact
14 place that Google took him to. That's the exact place Mr.
15 Arena went, ladies and gentlemen.

16 I want to talk just briefly about Mr. Breland's
17 injuries and Mr. Ness's argument about that. ladies and
18 gentlemen, he said William had bulging disks before this
19 wreck. He did. He had osteophytes before this wreck. He
20 did. Dr. Mummaneni told you he had those conditions before
21 the wreck, but what he didn't have was significant pain.
22 The pain got much more significant after the wreck. What he
23 didn't have was any treatment from any doctor from May of
24 2008 until after this wreck in January of 2010. He had
25 those things, but it wasn't bothering him to the point that

1 he had to seek out medical treatment until after the wreck.

2 The left elbow. We never claimed the left elbow. The
3 doctor said it was a muscle situation he was born with.
4 It's not related to the wreck. We hadn't put it up as
5 damages. It's not -- no treatment for that is included
6 anywhere in that.

7 Mr. Ness brought up these records, Defendant's 17.
8 These are the Bamberg County Hospital records. I agreed for
9 these to go into evidence without objection. Agreed for
10 them to put them in evidence. Didn't make them bring
11 anybody over here to put them in. When you go back there
12 and take a look at these record, ladies and gentlemen, what
13 you're going to see, May of 2007, Mr. Breland goes in for
14 generalized complaints of dizziness times three days, comes
15 and goes. And like everybody should do when they're talking
16 to the doctor or the hospital and they say tell me about
17 your history, he says, I've had chronic neck and back pain.
18 I've had neck and back problems in the past. They are on-
19 going. His back pain has been on-going since the 1990s.
20 His neck pain had been on-going. It got significantly worse
21 after the wreck. That's exactly what he told Dr. Mummaneni.
22 That's exactly what he told Mr. Chaudry and that's exactly
23 what all the medical evidence shows.

24 Mr. Ness issued a stack of subpoenas for medical
25 records to all of Williams prior doctors looking for

1 complaints of neck pain before this wreck in 2009 and that's
2 the only thing he's got.

3 That's not what he complained about that night, that's
4 not what he went to the hospital for. He's on medication,
5 Lortab. He testified that he took Lortab as he needed it.
6 PRN. Those are the magic words in there. PRN means as
7 needed. He can take up to six a day as needed. If he
8 doesn't need it he doesn't have to take it.

9 Ladies and gentlemen, this is a distraction. It's not
10 what he's going in there for. That's what he's telling the
11 doctor he's had in the past. His complaint was being dizzy
12 and that's because his neck injury got significantly worse
13 after the wreck and that's when he had to seek out the
14 Bamberg Hospital and that's when he had to seek out Dr.
15 Glenn, and Dr. Mummaneni and ultimately the surgery.

16 So ladies and gentlemen, that's just some things I
17 wanted to respond to. What the Judge will tell you is what
18 the issues in this case are, and you do have to decide who
19 you believe and what do you believe. That's in any case.
20 Did the DOT do its job, did they have a job to do, did they
21 do it. If they didn't do it, did it cause this wreck, did
22 it cause Mr. Breland's injuries.

23 I agree, ladies and gentlemen, it's an important case
24 to both parties. Mr. Breland, the plaintiff, is asking for a
25 verdict. He stands to gain. Can't deny that. The DOT also

1 THE COURT: Would you give the verdict form to the
2 bailiff?

3 THE BAILIFF: May I approach, Your Honor?
4 (Verdict passed to the Court.)

5 THE COURT: Thank you.

6 THE COURT: All right, case number 2011-CP-38-1379.
7 William Breland, plaintiff verses South Carolina Department
8 of Transportation, defendant. We the jury find for the
9 plaintiff in the amount of \$225,000. It is signed to day by
10 the forelady of the jury.

11 Anything from the plaintiff before I release the jury?

12 MR. WILSON: Nothing, Your Honor.

13 THE COURT: Anything from the defense?

14 MS. JETT: Your Honor, can the jury be polled, please?

15 THE COURT: Yes, ma'am.

16 All right. Ladies and gentlemen, the attorney has
17 requested that I poll the jury concerning your verdict.
18 What I'm going to do when I call your names I'm going to ask
19 you to stand. I'm going to ask you if it is your verdict
20 and if it is still your verdict and I'll need for you to
21 respond, Okay.

22 Dianna Calloway.

23 Ms. Calloway: Yes, it is.

24 THE COURT: Stand up, please, ma'am.

25 Ms. Calloway, was that your verdict?

CERTIFICATE OF SERVICE

RECEIVED

JUL 09 2015

SC Court of Appeals

I, the undersigned of the law offices of Ness & Jett, L.L.C, attorneys for Appellant, South Carolina Department of Transportation (SCDOT), do hereby certify that I have served all counsel in this action with a copy of the pleading(s) herein below specified by mailing a copy of the same by United States Mail, postage prepaid, to the following address:

Pleadings: Appellant's Final Brief, Appellant's Final Reply Brief, and Record on Appeal (Volume I and II), as well as a Certificate of Service

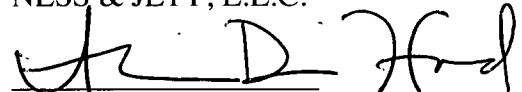
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