

IN THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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APPEAL FROM ORANGEBURG COUNTY
Court of Common Pleas

SC Court of Appeals

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
SUPPLEMENTAL VOLUME
(In Addition to Volumes I and 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,

v.

South Carolina Department of
Transportation,

DEFENDANT.

MEMORANDUM IN SUPPORT OF
DEFENDANT'S MOTION FOR JUDGMENT
NOTWITHSTANDING THE VERDICT, OR, IN
THE ALTERNATIVE, FOR A NEW TRIAL

Defendant South Carolina Department of Transportation (SCDOT) filed its Motion for Judgement Notwithstanding the Verdict, or, in the alternative, for a New Trial on September 13, 2013 on the following grounds:

- 1) The Court erred in allowing Plaintiff to introduce an unauthenticated Google Street View image of a dead tree; and
- 2) The Court erred in denying SCDOT's motion in limine, and subsequent contemporaneous motion, to introduce evidence that the Plaintiff lied in his deposition, saying that he had no criminal record;
- 3) The Court erred by allowing the jury to consider whether the Plaintiff had permanent injury and the Plaintiff's life expectancy in its jury charge, despite there being no expert medical testimony supporting lasting or permanent injury to the Plaintiff;

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alternative, a New Trial
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- 4) The Court erred in allowing Plaintiff's testimony regarding pain in his left arm and hand, even after ruling in SCDOT's favor in limine and upon motion for directed verdict;
- 5) The Court erred in charging the life expectancy tables;
- 6) The Court erred by failing to instruct the jury on comparative negligence, which includes the issue of last clear chance.

STANDARD OF REVIEW

A party is entitled to judgment notwithstanding the verdict (JNOV), or, in the alternative, a new trial, under Rule 50(b), SCRCp, if only one reasonable inference can be drawn from the evidence.¹ The trial court must "view the evidence and the inferences that reasonably can be drawn therefrom in the light most favorable to the nonmoving party."² When considering the motion, the trial court lacks the authority to decide credibility issues or to resolve conflicts in the testimony and evidence.³ The Plaintiff's burden of proof cannot be met by relying on the theory that the thing speaks for itself or that the very fact of injury indicates a failure to exercise reasonable care.⁴

A new trial may be granted for any of the reasons for which new trials have heretofore been granted in actions at law in the courts of the State, under Rule 59, SCRCp. The "thirteenth juror doctrine" allows the circuit court judge to grant a new trial absolute when the judge finds the

¹ *Williams Carpet Contractors, Inc. v. Skelly*, 400 S.C. 320, 325, 734 S.E.2d 177, 180 (Cr. App. 2012).

² *Id.*

³ *See, Reiland v. Southland Equip. Serv., Inc.*, 330 S.C. 617, 634, 500 S.E.2d 145, 154 (Cr. App. 1998).

⁴ *Id.* at 634-35.

evidence does not justify the verdict.⁵ Additionally, the trial judge has broad discretion, sitting as 13th juror, to grant new trial when he is convinced that justice has not been done.⁶

ARGUMENT ONE

It is axiomatic that a photograph must have a foundation for its introduction. The Court erred when it allowed the Plaintiff to introduce an unauthenticated Google Street View picture of a dead tree. The photo was taken, according to the Google Earth timestamp, 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 picture 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, at the time 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, over Defendant's motion in limine and contemporaneous objection during trial.

Google's Street View cameras are not common cameras, intended to accurately represent the scene in front of them.⁷ The camera utilizes eleven (11) lenses to record video.⁸ Images are then

⁵ See, *Trivelas v. South Carolina Dept. of Transp.*, 357 S.C. 545, 593 S.E.2d 504 (S.C.App. 2004).

⁶ See, *Watson v. Pendleton*, 294 S.C. 155, 363 S.E.2d 234 (S.C. 1987).

⁷ 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").

⁸ Riding Shotgun With Google Street View's Revolutionary Camera, POPULAR MECHANICS, <http://www.popularmechanics.com/technology/gadgets/news/4232286> (last visited September 13, 2013).

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.⁹

Google does not allow its Street View images to be used in a commercial setting, "without prior authorization."¹⁰ In fact, Google specifically prohibits it.¹¹ And for this image to be continually used in this case, the Court is allowing a violation of the Federal Copyright Act.¹²

Additionally, the date shown by Google was never confirmed. The timing of the photograph was a crucial consideration for the "notice" requirement. The jury was told that the picture was taken in 2008; however, no testimony was offered to verify that the picture was an accurate representation of the tree in 2008. Defendant was unable to cross-examine anyone, and the court, essentially, took judicial notice of the date the photograph was taken. Defendant strenuously objected the this photo's usage throughout the trial. Furthermore, "notice" hinged greatly on when that image was taken.

"Exhibits such as diagrams and photographs used to illustrate testimony about the scene of an accident must be identified as accurate before they may be properly introduced into evidence."¹³ "Ordinarily, testimony that the exhibit is a fair and accurate portrayal of the scene at the time of the accident is sufficient to satisfy this requirement."¹⁴ In *Thomas v. Dixon*, "to authenticate the

⁹ "And, while Google strives to minimize the distortion in its images, Street View still depicts somewhat distorted views —i.e., curved/spherical ones." See *Vedri, LLC v. Google, Inc.*, 2:10-CV-07747-AK-CW, 2012 WL 4511424 (C.D. Cal. Sept. 26, 2012).

¹⁰ 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).

¹¹ "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).

¹² 17 U.S.C.A. § 102 (West).

¹³ *Thomas v. Dixon*, 88 N.C. App. 337, 344, 363 S.E.2d 209, 214 (1988).

¹⁴ *Thomas v. Dixon*, 88 N.C. App. 337, 344, 363 S.E.2d 209, 214 (1988).

exhibits at trial, plaintiff's son testified on voir dire that all of the photographs as well as the diagram were fair and accurate representations ¹⁵ Here, Plaintiff's witnesses, one after the other, admitted they could not testify that the Google Street View picture was a fair/true and accurate representation. The witnesses did not take the picture, they were not present when the picture was taken, and they could not authenticate the picture to the standard described in *Thomas v. Dixon*.¹⁶ Furthermore, Google Street View is computer-generated.¹⁷ In *Webb v. CSX*, the South Carolina Supreme Court held that "computer animations" may be admitted only after proper authentication.¹⁸ In *Webb*, the court held that computer animations are "admissible if [they are]: 1) authentic under Rule 901, SCRE; 2) relevant under Rules 401 and 402, SCRE; 3) a fair and accurate representation of the evidence; and 4) more probative than prejudicial under Rule 403, SCRE."¹⁹ To draw a corollary between the photographs in North Carolina's *Thomas v. Dixon* and the computer animation in South Carolina's *Webb v. CSX*, the Courts used the same phrase, "fair and accurate representation."²⁰ Thus, the Google Street View picture should only have been admitted into evidence upon proper authentication, and it was error to admit the picture otherwise.

Finally, 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.

¹⁵ *Thomas v. Dixon*, 88 N.C. App. 337, 344, 363 S.E.2d 209, 213-14 (1988).

¹⁶ See, *Thomas v. Dixon*, 88 N.C. App. 337, 363 S.E.2d 209 (1988) (the court held photographs must be identified as accurate before they may be properly introduced into evidence).

¹⁷ See, *Vederi, LLC v. Google, Inc.*, 2:10-CV-07747-AK-CW, 2012 WL 4511424 (C.D. Cal. Sept. 26, 2012) (The court described the street view pictures as "stitched together").

¹⁸ See, *Webb v. CSX Transp., Inc.*, 364 S.C. 639, 654, 615 S.E.2d 440, 448 (2005).

¹⁹ *Webb v. CSX Transp., Inc.*, 364 S.C. 639, 654, 615 S.E.2d 440, 448 (2005) (*emphasis added*).

²⁰ *Thomas v. Dixon*, 88 N.C. App. 337, 344, 363 S.E.2d 209, 213 (1988); *Webb v. CSX Transp., Inc.*, 364 S.C. 639, 654, 615 S.E.2d 440, 448 (2005).

ARGUMENT TWO

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. On September 4, 2013, the Court orally 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. Furthermore, 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. Defendant was not able to cross examine Plaintiff on his untruthful testimony from the deposition, regarding his convictions. Thus, prohibiting defendant from bringing up perjured testimony at trial.

Similarly, Defendant was prevented from questioning Plaintiff about his van and any damages thereto. Plaintiff testified there were pictures of the damaged van, yet none were ever turned over to Defendant, and none apparently exist. Defendant relied on this representation, and were not able to cross-examine Plaintiff on the alleged damage to his van. In fact, other than Plaintiff and his passenger's testimony, no evidence was introduced at trial of any damage to the vehicle. Yet, Plaintiff testified that the airbags went off, signifying a significant impact. And yet, no pictures, receipts, or other evidence was introduced about the damage or state of the van. In fact, Plaintiff testified the van was drivable.

Rule 32, SCRPC, says "the deposition of a party . . . may be used by an adverse party for any purpose." Yet, here, Defendant was prevented from using the Plaintiff's deposition testimony

about the lack of criminal record, despite a strong presentation of Plaintiff's chameleon-like testimonies, which shifted and changed to suit his perceived audience. In fact, Defense counsel spent a majority of Plaintiff's time on the witness stand reading Plaintiff's deposition to him because Plaintiff was consistently inconsistent at best, and very likely perjuring his testimony.

Under Rule 609, SCRE, evidence of a conviction is "not admissible if a period of more than ten years has elapsed since the date of the conviction or of the release of the witness from the confinement imposed for that conviction, whichever is the later date, unless the court determines, in the interests of justice, that the probative value of the conviction supported by the specific facts and circumstances substantially outweighs its prejudicial effect." Plaintiff's 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 pain and suffering and 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, its location, and his damages. Furthermore, Defendant sought only to introduce the convictions as evidence of false testimony, not for the substance of those convictions.

Under both the SCRCPP and SCRE, as above-outlined, Defendant should have been allowed to introduce Plaintiff's entire history of lying in this matter, including lying about his criminal history, in its case in chief, and/or on cross examination, not necessarily for the purpose

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of his criminal record, but because Plaintiff concealed his background, thwarted discovery, and showed himself to lack credibility. Those errors prejudiced the Defendant, and the Defendant believes he is entitled to a new trial.

ARGUMENT THREE

The Court's erred in its instruction that the jury could consider whether the Plaintiff had permanent injury and the inclusion of plaintiff's life expectancy during the jury charge.

- "Where the injury is obscure, that is, the effects of which are not readily ascertainable, demonstrable, or subject of common knowledge, mere subjective testimony of the injured party or other lay witnesses does not provide sufficient proof; medical or other expert opinion testimony is required to establish the future effects of an obscure injury to a degree of reasonable certainty."²¹

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.

Courts have also held that expert testimony was required to support recovery for permanent injury and future pain and suffering resulting from back injuries, where the plaintiff complained of pain in his back and neck resulting from an automobile collision, and there was no direct declaration by any medical witness concerning the medical probability as to either permanence or future pain and suffering, leading the court to determine that the jury should

²¹ 20 A.L.R.5th 1 (Originally published in 1994) (citing *Strahin v. Cleavenger*, 603 S.E.2d 197 (W. Va. 2004)).

not have been allowed to award damages for permanent injury or future pain and suffering, since the injuries were clearly subjective in character.²²

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.

ARGUMENT FOUR

Similarly, the Court erred in instructing the jury on the life expectancy tables in § 19-1-150 of the Code of Laws of South Carolina. In *Johnston v. Aiken Auto Parts*, the Court held where the plaintiff testified his right knee had "never gotten right," and that "nothing can be done" about it, and thus there was evidence of permanent injury.²³ Unlike *Johnston*, here, expert medical testimony was offered. In fact, more than an hour of questions were asked by the Plaintiff's attorney. Yet, the medical expert testified to neither permanent injury nor future pain and suffering. In *Fishburne v. Short*, the Court held it is proper to charge the table if there is evidence which would make the issue of permanent injury a jury question.²⁴ In *Fishburne*, as here, the plaintiff testified she had pain, which continued for two years after her car accident.²⁵ The Court

²² 20 A.L.R.5th 1 (Originally published in 1994) (emphasis added) (citing *Huss v. Vande Hey*, 29 Wis 2d 34, 138 NW2d 192 (1965)).

²³ 311 S.C. 285, 289, 428 S.E.2d 737, 739 (Ct. App. 1993).

²⁴ 268 S.C. 546, 550, 235 S.E.2d 118, 120 (1977).

²⁵ See, *Fishburne v. Short*, 268 S.C. 546, 550, 235 S.E.2d 118, 120 (1977).

in *Fishburne* found "no evidence tending to establish permanent disability was presented."²⁶ Therefore, the Court in *Fishburne* did not find the plaintiff's testimony about pain she experienced for two years after the accident to be sufficient to establish permanent disability, and therefore insufficient to support a charge of the life expectancy tables.²⁷ Thus, the Court in this case erred by charging the jury with the life expectancy tables, after the only testimony regarding permanent injury came from the Plaintiff himself. This improper jury charge may have been a consideration of the jury in its verdict, which exceeded the Plaintiff's actual medical bills by more than \$100,000.00.

ARGUMENT FIVE

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. Plaintiff consented and the Court agreed with Defendant and disallowed any and all medical damages and amounts relating to the left arm surgery; however, Plaintiff testified 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 in its verdict, which exceeded the Plaintiff's actual medical bills by more than \$100,000.00.

²⁶ *Id.*

²⁷ See, *Id.*

ARGUMENT SIX

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. Furthermore, Doctor Mummaneni testified that Plaintiff had previous surgeries and would have, at some point, required further surgery, due to the Plaintiff's previous surgery. In other words, the doctor testified that the Plaintiff would get worse, and was getting worse, as evidenced by the bone spurs on Plaintiff's spine. In light of Doctor Mummaneni's testimony, the jury may have found that the Defendant did not proximately cause some percentage of Plaintiff's damages, had they been charged with comparative negligence. This error precluded the jury's consideration of plaintiff's fault in the accident.

CONCLUSION

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,

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October 1, 2013

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Edgar W. Dickson, Circuit Court Judge

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William Breland, Respondent

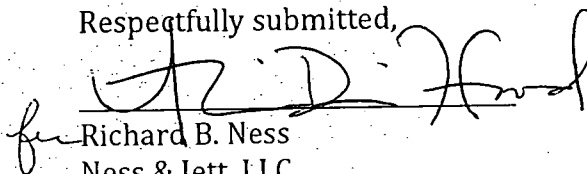
v.

South Carolina Department of Transportation, Appellant.

CERTIFICATE OF COUNSEL

I certify that the Supplemental Record on Appeal contains material proposed
to be included by the parties and not any other material.

Respectfully submitted,



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July 15, 2015

IN THE STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

APPEAL FROM ORANGEBURG COUNTY

Honorable Edgar Warren Dickson, Chief Administrative Judge, Presiding

CASE NO.: 2011-CP-38-1379

APPELLATE CASE NO.: 2014-000168

William Breland, Respondent,

-VS-

South Carolina Department of Transportation, Appellant.

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SC Court of Appeals

PROOF OF SERVICE

I certify that I have served the Motion to Supplement Record on Appeal and Bound Supplemental Record on Appeal on counsel of record, on July 15th, 2015 as follows:

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