IN THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM ORANGEBURG COUNTY
Court of Common Pleas

Edgar W. Dickson, Circuit Court Judge

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

William Breland, ...Respondent

v.

South Carolina Department of Transportation, ...Appellant,

APPELLANT'S FINAL BRIEF

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STATEMENT OF THE CASE

This case arises from the alleged January 7, 2010 collision of Respondent and a dead pine tree lying across a portion of U.S. Highway 321 in Orangeburg County. Respondent claims SCDOT negligence in maintaining the roadway proximately caused his injuries related to the alleged collision.

On June 25, 2013, Appellant filed its Motion for Summary Judgment, pursuant to Rule 56, SCRCP, on the grounds Appellant did not have constructive notice of the specific tree that proximately caused Respondent's injuries, and Appellant complied with its internal manuals for roadway inspections in the relevant time frame. (R. pp. 19—29). By Order of the trial court, dated August 30, 2013, this Motion was denied. (R. pp. 8—9).

The trial court verbally denied Appellant's Motion *in limine*, on the admission of a certain Google Street View computer-generated image purporting to show the particular dead or dying tree still standing off the SCDOT right-of-way in May 2008, almost two years preceding the instant collision. (R. pp. 30-31; p. 64, lines 1—21).

Appellant sought, *in limine,* to impeach Respondent on his falsehood, under oath, regarding convictions for receiving stolen property and conspiring to commit a burglary in Nevada, and a conviction for manufacturing / delivering / possession with intent to distribute narcotics, a class B Felony in Washington State. Respondent had denied any criminal record at his deposition. (R. pp. 511—518). Appellant later discovered the convictions and sought to impeach Respondent. This motion was also denied. (R. pp. 30—31; p. 65, line 15—p. 69, line 17; p. 70, line 40—p. 74, line 7; pp. 511—518).

At trial, the Appellant's directed verdict motion was denied, and the jury found for Respondent. (R. p. 305, lines 6—10).

On September 13, 2013, Appellant filed its Motion for Judgment Notwithstanding the Verdict, or in the Alternative for New Trial. (R. pp. 34—38). On January 13, 2014, the trial court issued its Order denying Appellant's motion. (R. pp. 1—7).

From these Orders and rulings, Appellant appeals.

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); SCRCP, *Burriss v. Anderson County Bd. Of Educ.,* 369 S.C. 443, 633 S.E.2d 482 (2006); *Dawkins v. Fields,* 354 S.C. 58, 580 S.E.2d 433 (2003). "If the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law," the circuit court may grant a motion for summary judgment. *Ibid.*

Appellant, a governmental entity as contemplated by the South Carolina Tort Claims Act, is entitled to judgment as a matter of law for any loss proximately caused by "a defect or a condition in, on, under or overhanging a highway, road, street, causeway, or other public way caused by a third party unless the defect or condition is not corrected by the particular governmental entity responsible for the maintenance within a reasonable time after actual or constructive notice." §15-78-

60(15), *S.C. Code of Laws.* Being in derogation of sovereign immunity, the Act is to be strictly construed against liability. §15-78-20(f), *S.C. Code of Laws.*

The admission and exclusion of evidence rests within the sound discretion of the trial judge and his decision will not be disturbed on appeal absent a clear showing of an abuse of discretion, the commission of legal error in its exercise, and prejudice to the appellant. *Blackwell v. Paccar, Inc.*, 302 S.C. 294, 395 S.E.2d 736 (Ct.App.1990); *Pike v. S.C. Dep't of Transp.*, 343 S.C. 224, 234, 540 S.E.2d 87, 92 (2000).

"In ruling on the denial of motions for directed verdict, j.n.o.v. and a new trial, the evidence must be considered in a light most favorable to the non-moving party. [The Appellate Court is] not at liberty to pass upon the veracity of the witnesses and determine the case according to [their] view of the weight of the evidence." *Graham v. Whitaker,* 282 S.C. 393, 321 S.E.2d 40 (1984). "If there is any evidence to sustain the factual findings implicit in the jury's verdict, this court must affirm." *Hilton Head Island Realty, Inc. v. Skull Creek Club,* 287 S.C. 530, 339 S.E.2d 890 (Ct.App.1986), cited affirmatively in *Brown v. Orndorff,* 309 S.C. 320, 324-25, 422 S.E.2d 151, 153-54 (Ct. App. 1992).

ARGUMENT

STATEMENT OF FACTS

Respondent alleges he was driving down Highway 321 around midnight on January 7, 2010, when he struck a dead pine tree lying across the roadway. (R. p.12). The Neeses Fire Department was called to the scene. The records from the event

report no injuries, and the witnesses at the scene report they were able to remove the tree by rolling it to the side of the road. (R. p. 509; p. 283, lines 16-23).

While Respondent denied medical assistance the night of the accident, he claims he suffered injuries to his neck, which required surgical intervention, and which resulted in worsened and continuing neck pain. (R. p. 244, line 6—p.250, line 23). At trial, Respondent's treating physician testified Respondent had a previous neck injury, as well as a degenerative bone condition, which made him more susceptible to these neck injuries. (R. p. 380, line 7—p. 382, line 7).

At trial, Respondent waived actual notice on the part of Appellant (SCDOT) but proceeded on the theory that Appellant "should have known" of the existence of the dead or dying pine tree during the period of its rotting and collapsing, a period which Respondent's expert estimates would have been one to three years time. (R. p. 188, line 3—p. 190, line 1).

I. THE TRIAL COURT ERRED IN ALLOWING RESPONDENT TO AUTHENTICATE A STILL PHOTO FROM GOOGLE STREET VIEW THROUGH RESTROSPECTIVE, CIRCUMSTANTIAL EVIDENCE WITHOUT PRODUCING ANY TESTIMONY TO SUBSTANTIATE THE ACCURACY OF THE COMPUTER-GENERATED IMAGE OR ANY EVIDENCE DESCRIBING THE PROCESS OR SYSTEM WHEREBY GOOGLE STREET VIEW PRODUCES ITS IMAGES.

Rule 901(a), South Carolina Rules of Evidence, requires a party to satisfy "the requirement of authenticating or identifying an item of evidence," by producing "evidence sufficient to support a finding that the item is what the proponent claims it is." Authentication can be completed by any number of methods. In this case, the trial court permitted Plaintiff to admit into evidence Google Street View computer-

generated still images, or screen shots, without satisfying the requirements of Rule 901.

In order to attempt to authenticate the image under 901(b), Plaintiff employed experts, namely a surveyor and an arborist, to attempt to establish that the Google images were in fact an "accurate result" produced by an accurate "process or system," pursuant to 901(b)(1) or 901(b)(9). However, neither expert had any knowledge of the tree prior to its demise, and no other witness could speak to any characteristics of the standing tree, nor its visibility, prior to the incident giving rise to the claim in this action. Further, Respondent failed to produce any testimony regarding the "process or system" that is Google Street View, nor its accuracy. Despite these failings, the trial court improperly admitted the computer-generated Google image into evidence over the vociferous objections of Appellant.

Respondent used this image of some standing, dying tree, for exclusively substantive purposes to overcome the South Carolina Tort Claims Act's exception on constructive notice, as well as to discredit other witnesses and landowners who lived beside and in front of the offending tree, saw this tree line regularly, and uniformly testified they did not observe a dead or dying tree in the vicinity prior to the accident. (R. p. 273, line 7—p. 277, line 22; p. 395, line 9—p. 397, line 20).

In short, Respondent's case relied exclusively on this computer-generated Google image posted online almost two years prior to this incident, as no other evidence or testimony could be produced to indicate that Appellant "should have known" of some diseased or dying tree alleged to have contributed to the accident in this case. For this reason, the admission of the Google image was extremely

prejudicial to Defendant, and its improper admission warrants a new trial. *See Rule 403, SCRE.*

A: South Carolina courts are compelled to inquire into a specific process or system, and its accuracy, prior to accepting its results as authentic, particularly where images formed by a computer reconstruction are offered for substantive purposes.

The trial court accepted testimony from Respondent's experts that they routinely relied on Google Street View in the course of their business as sufficient evidence to authenticate the computer-generated Google image under Rule 901. As the Google images were offered into evidence for purely substantive purposes, as opposed to demonstrative purposes, and are a computer reconstruction themselves, this evidence was insufficient and the trial court's inquiry wholly deficient.

"According to Google, Street View combines images of a wide range of views recorded by multiple cameras having wide-angle lenses mounted on a moving vehicle. Those photographs are overlapping pictures taken from a single location at approximately the same time. The images are stitched together into a virtual spherical composite image. The resulting image is a two-dimensional representation of a spherical shape." *Verderi, LLC v. Google, Inc.*, 744 F.3d 1376, 1380, 110 U.S.P.Q.2d 1001 (U.S. Ct. of Appeals, Federal Circuit) (March 14, 2014). Further, the images are "curved or spherical, and never flat," and are not intended to be viewed as a flat, two-dimensional representation, but rather give the viewer the experience of "standing in the center of [a] sphere." *Id.* This process can be compared to the warping inherent in maps, two-dimensional representations of our spherical Earth. In both cases, there is distortion at the margins where the empty space must be "filled in" to create a complete image.

The mounted cameras at use in the collection of these images utilize eleven (11) distinct lenses to record images from an unnatural height several feet on the top of a vehicle traveling the roadway, in this case, Highway 321 in Orangeburg County. *See Riding Shotgun with Google Street View's Revolutionary Camera,* Popular Mechanics,http://www.popularmechanics.com/technology/gadgets/news/4232286 (last visited September 13, 2013); *See Behind the Scenes of Google Street View,* www.google.com/maps/about/behind-the-scenes/streetview/ (last visited September 26, 2014).

In this case, Respondent did not inform the trial court of this complicated and inaccurate process, nor of the inherent and unavoidable distortion caused by the Street View compilations. In fact, the trial court failed to conduct any such inquiry into the process or system, or its accuracy. To authenticate evidence before admission, Rule 901(b)(9), South Carolina Rules of Evidence, compels such inquiry.

In *Clark v. Cantrell,* 339 S.C. 369, 529 S.E.2d 528 (2000), the Supreme Court of South Carolina provided a test concerning the admissibility of demonstrative evidence created by computer-generation. The trial court incorrectly applied this test in this case, weighing the four *Clark* factors of (1) authentication, (2) relevancy, (3) accurate representation, and (4) compliance with Rule 403, in favor or Respondent.[1] However, in the instant case, the image of the dead or dying tree, while computer-generated, was not offered as a demonstrative aid, evidence "that explains or summarizes other evidence and testimony. Such evidence has

[1] Appellant continues to object to both the use of the *Clark* demonstrative evidence test, as well as its application in this particular case. As Respondent failed to authenticate the image properly, even this lower-standard balancing test should not favor Respondent.

secondary relevance to the issues at hand; it is not directly relevant, but must rely on other material testimony for relevance." *Clark v. Cantrell,* 339 S.C. 369, 383, 529 S.E.2d 528, 537 (2000).

Contrary to *Clark,* the computer-generated Google image in this case was the *only evidence* offered to prove that a dead or dying tree, which was not on SCDOT's right-of-way, was visible and in fact "should" have been observed and removed by Appellant prior to its collapse, rendering the image the single substantive piece of evidence offered in Appellant's attempt to overcome the constructive notice bar of the South Carolina Tort Claims Act. The record contains no evidence, prior to the collision, that a dead or dying tree was visible to humans performing inspections from the roadway, nor any other evidence which might lead a jury to conclude that the tree was visible, to either the residents nearby, the SCDOT during routine inspection, or any other travelers on the roadway. (R. pp. 411—445). Further, the record contains no evidence that the tree depicted in the Google image was the particular tree Respondent claims he struck.

In short, the computer-generated Google image, obtained exclusively through the mounted drive-by lenses of the spherical, wide-angled Google cameras, was offered in this case as substantive evidence of the truth of the matter therein asserted, i.e., the visibility of some dead or dying tree. Under Respondent's theory, the caption, dating the image in May 2008, almost two years prior to the instant collision, and the screen shot itself taken together, provided unique and uncorroborated evidence that the tree "should have been" located and removed by

Appellant prior to this accident. In order to authenticate the substantive computer-generated image and caption, Respondent is required to do more.

Under the Federal Rules of Evidence, Rule 901(b)(9) can be satisfied by showing: (1) the computer equipment is accepted in the field as standard and competent and was in good working order when the image was captured; (2) qualified computer operators were employed; (3) proper procedures were followed in connection with the input and output of information; (4) a reliable software program was utilized; (5) the equipment was programmed and operated correctly; and (6) the exhibit is properly identified as the output in question. *State of Connecticut v. Swinton,* 268 Conn. 781, 811, 847 A.2d 921, 942 (S. Ct. Conn. 2004), citing *Clark v. Cantrell,* 339 S.C. 369, 384, 529 S.E.2d 528 (2000), all other references omitted. While this test has not been adopted by our Courts, it is worth noting that Respondents did not make any meaningful effort to address any of these factors.

Appellants do not propose that the Court should adopt any overly complicated or nuanced test for admitting a substantive photo obtained through an untested and unproven process or system like Google Street View. Rather, Appellants assert that the Court should enforce Rule 901(a) as written and require "evidence sufficient to support a finding that the item is what the proponent claims it is." "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." *Sizemore v. Raxter,* 73 N.C. App. 531, 537, 327 S.E.2d 258, 262-263, aff'd per curiam, 314 N.C. 527, 334 S.E.2d 391 (1985). In this instance, there is no such testimony.

Appellant does not assert a still-shot image from Google Street View is *per se* inadmissible. If properly authenticated as accurately depicting the scene at or about the time in question, Rule 901 can be easily satisfied. Here, there is no authentication the 2008 computer-generated image depicted the subject scene or subject tree as it was in January 2010, at the time of the collision. There is no testimony to establish the tree that fell is the same tree shown in the image taken about two years prior to this accident.

In this case, the trial court allowed Respondent improperly to shift the burden of authentication onto Appellant, accepting Respondent's argument on its face without further inquiry: "We claim it to be a picture of that spot on the highway in May 2008. There is no evidence that it's anything other than that." (R. p. 62, lines 19—21). In arguing against Appellant's post-trial motions, Respondent continued this improper burden-shifting in again alleging Appellant failed to negate the proposed content of the image: "...[T]he defense did not bring in one single witness in here, Your Honor...They did not produce any evidence to dispute the accuracy of the Google Earth imagery, even after we laid the foundation to authenticate it and have it admissible. Your Honor, they could have brought witnesses in. They could have brought experts in." (R. p. 325, line 8—p. 327, line 6). Respondent simply cannot shift to Appellant the burden of "dis-authenticating" a photograph or image.

Respondent properly bears the burden to authenticate the image, to satisfy Rule 901(b)(9), to justify Google Street View, as described above, or to call a witness who had observed the alleged tree prior to its collapse, to satisfy Rule 901(b)(1). As Respondent did neither, the trial court committed reversible error in admitting the

Google Street View image without testimony or corroborating evidence that the computer-generated image accurately depicted the state of this tree on or in close proximity to the January 2010 incident.

II. THE TRIAL COURT ERRED IN ALLOWING RESPONDENT TO ESTABLISH CONSTRUCTIVE NOTICE BY ASSERTING THAT A HAZARD COULD HAVE BEEN DISCOVERED BY MORE DILIGENT INSPECTION WHERE RESPONDENT DID NOT PRODUCE ANY EVIDENCE THAT ANY WITNESS OR PARTY OBSERVED THE HAZARD PRIOR TO THE INCIDENT GIVING RISE TO LIABILITY.

Appellant is a governmental entity, entitled to the protections of the South Carolina Tort Claims Act. Pursuant to the Tort Claims Act, the governmental entity, Appellant herein, is not responsible for defects in, on, or overhanging a highway, road, or other public way caused by a third party unless the defect or condition is not corrected by the governmental entity responsible for the maintenance within a reasonable time after constructive notice. *See S.C. Code Ann. §15-78-60(15)(2005).*[2] In this case, it is uncontested that the dead or dying tree which fell stood well off the SCDOT right-of-way on the property of an Orangeburg County resident.

At trial, Respondent argued that Appellant was on constructive notice of the recessed dead or dying tree, depicted by Google, because the tree *could* have been discovered by using the Google imaging obtained through Google Street View. Again, it is paramount to note that Respondent did not call a single witness who could confirm that the tree was visible or viewed in the days, months, or years preceding the alleged collision, nor that the tree in the image was the one Respondent struck.

[2] Respondent concedes Appellant did not receive actual notice of the dead or dying tree prior to the collision at issue in this case. (R. p. 271, line 25—272, line 2).

In South Carolina, no court has extended constructive notice to include the retrospective availability of an unauthenticated Google Street View image, taken from the roof-top camera system of the Google imaging car two years prior to an accident, at an unnatural height and angle not available to a human performing inspections, as sufficient to place SCDOT on notice of a dead or dying tree.

Constructive notice has, however, been demonstrated in a number of other ways in similar incidents. In *Marsh v. S. C. Dept. Of Highways and Pub. Transp.*, 298 S.C. 420, 380 S.E.2d 867 (Ct. App. 1989), SCDOT was found liable for a tree standing on its right-of-way leaning at a sixty or seventy degree angle over the roadway for a period of four years prior to its falling and causing injury. This tree was obvious and observable from routine SCDOT inspection, and SCDOT crews had been in close proximity to the leaning tree and had failed to make efforts to remove the hazard.

Again in *Ford v. S.C. Dept. of Transp.*, 328 S.C. 481, 492 S.E.2d 811 (Ct. App. 1997), the court found constructive notice may be inferred where a neighboring resident had called SCDOT to report hazardous dead or dying trees near the roadway once a month, for a year, prior to an incident causing harm to a member of the motoring public.

In the instant case, the tree at issue grew far off the SCDOT right-of-way. According to Respondent's expert, the tree was likely breaking, piece-meal, from top to bottom, and was not growing at any noticeable angle toward the roadway. (R. p. 186, line 14—p. 190, line 23). Appellant had not received any complaints from motorist or residents concerning the particular tree. Appellant had properly completed its inspections, a fact Respondent conceded at trial. (R. p. 162, line 19—

p. 173, line 24). In fact, the adjoining property owners testified they had not observed the tree despite their careful observation of their lands and continuous routine maintenance of their property adjoining Highway 321. (R. p. 273, line 7—p. 277, line 22; p. 395, line 9—p. 397, line 20).

The only element that even lends itself toward slight consideration of constructive notice on the part of Appellants is the fact that SCDOT did in fact have road crews in the vicinity during the year or years during which the alleged tree was dying and collapsing. In this case, this factor is largely irrelevant because foliage and the canopy of the surrounding trees would have obscured the alleged particular tree, hiding it from observation by the normal means of inspection. The conclusion that SCDOT had constructive notice ("knew or should have known") is wholly inconsistent with the testimony of the neighbors, who testified they never observed the dead tree. (R. p. 273, line 7—p. 277, line 22; p.394, line 9—p. 397, line 20).

The lower court misapplied the law of constructive notice. Relying wholly on the properly excluded computer-generated Google Street View image, Respondent argued that the tree *could* have been observed, had SCDOT utilized Google Street View in its process of identifying and removing dead or dying trees, instead or in addition to its regularly performed inspections. Respondent put forth no evidence that the tree was in fact observed or observable by any normal means. Neither routine inspection, nor maintenance, nor owning the property in question, nor living next door, nor traveling the roadway by any number of the motoring public produced any testimony or evidence that the tree was observable by the human eye. Rather, on a single day in May, 2008, the Google Street View camera,

mounted to an unnatural height and taking video with 11-simultaneously employed lenses observed a composite glimpse of a tree, only retrospectively and circumstantially identified to have been dead or dying at that time. Respondent failed to produce any other evidence of the existence or visibility of the tree in the computer-generated Google image, or any other tree that might be a candidate for the one involved in this collision, prior to the date of the accident.

Appellant simply cannot be on notice of that which is unobservable by the normal means of inspection. Appellant completed its inspections of U.S. Highway 321 within the appropriate time frame, including both daytime and nighttime inspections. (R. p. 166, lines 16—24; pp. 411—445). No expert testimony was offered to opine that the inspection process was inadequate.

Without a single corroborating witness and with only circumstantial evidence to demonstrate that this is in fact the particular tree, which proximately caused Respondent's injuries, Respondent cannot rely on the computer-generated Google Street View image to retrospectively and circumstantially imply constructive notice where no human witness can be found to have observed the tree prior to the incident giving rise to this case. To allow Respondent to do so effectively eviscerates the Tort Claims Act exception requiring constructive notice and essentially mandates that SCDOT utilize Google Street View or some similar technological means to inspect the roadways for potential hazards. The trial court erred in denying Appellant's repeated motions for judgment as a matter of law on this legal question.

III. THE TRIAL COURT ERRED IN CHARGING THE LIFE EXPECTANCY TABLES TO THE JURY WHEN RESPONDENT WAS NOT ENTITLED TO FUTURE DAMAGES.

Prior to this accident, Respondent suffered from chronic disc disease problems and narrowing, as well as osteophyte formations, more formally identified as chronic disc degenerative changes at C-4, C-5, C5-6 and C6-7 with bony foraminal encroachment bilaterally at C4-5 and C5-6. (R. p. 380, line 7—382, line 7). These underlying neck problems required Respondent to receive serious neck surgery in 1999, wherein his affected vertebrae were fused. At trial, Respondent claimed the collision with the tree caused his otherwise manageable neck issues to become symptomatic again. (R. p. 249, line 4—p. 252, line 11).

Dr. Mummaneni, who treated Respondent in the months after the accident eventually referred Respondent for subsequent treatment and surgery, to address the further degeneration of Respondent's pre-existing neck condition. Dr. Mummaneni provided the only expert testimony regarding any causal link between the car accident and the injuries above and below the previous vertebral fusion. This testimony was not conclusive. In response to an inquiry regarding this causal link, Dr. Mummaneni testified: "This is how—and—how I have to go by. I have to go by the history the patient was giving. It's the cause-and-effect mechanism. So he said he was not having significant amount of pain. He was in an accident, and his pain got significantly worse. So I have assumed that it was a cause-and-effect mechanism and the accident might be—might be—might have been a trigger for the symptoms." (R. p. 368, line 18—line 25). Essentially, Dr. Mummaneni relied exclusively on Respondent's own statements regarding pain in order to treat Respondent, whose only observable injury was the anticipated exaggeration of a pre-existing chronic condition, essentially guaranteed to degrade and worsen overtime. (R. p. 376, lines 6—19; p. 377, lines 9—24).

When questioned regarding the likelihood of continued pain for Respondent after the surgical remedial measures, Dr. Mummaneni was unable to conclusively state one

way or the other: "So the -- the -- my answer is, like, after surgery, it depends on patient...Some patients don't have any pain. Some do. So it's very difficult to predict which ones will, which ones don't." (R. p. 359, line 20—p. 361, line 10). As Dr. Mummaneni did not continue treating Respondent, he provided no further information regarding this particular patient's progress or impairment.

At trial, the court denied Appellant's motion for a directed verdict on the grounds that Respondent had failed to prove causation to a degree of reasonable certainty, as required under South Carolina law.

The trial court further determined that it would be inappropriate to charge the jury on future damages, and rather offered the jury the South Carolina life expectancy tables, with the qualifying restriction that the jury could disregard Respondent's own testimony regarding his future pain and suffering if the jury found the testimony incredible. *See Daniels v. Bernard,* 270 S.C. 51, 240 S.E.2d 518 (1978).

In this case, Respondent's injuries, if any, were at most an acceleration or exaggeration of a pre-existing condition. Respondent is not capable of differentiating from the natural progression of his prior condition and any new injuries sustained as a result of this incident. While typically a party is able to testify to their personal pain and expectation for future losses, where that inquiry is outside the sphere of lay knowledge and complicated by a degenerative condition, causation and future damages must be proven by expert testimony.

The trial court erred in charging the mortuary tables without first requiring expert testimony on causation and future damages.

IV. THE TRIAL COURT ERRED IN EXCLUDING EVIDENCE OF RESPONDENT'S CRIMINAL HISTORY, WHEN APPELLANT OFFERED THIS EVIDENCE FOR PURPOSES OF IMPEACHMENT.

At trial, Appellant moved *in limine* to admit evidence of Respondent's prior criminal convictions in the states of Washington and Nevada. (R. pp. 30—31). These convictions were outside of the span of ten-years, as permitted by Rule 609(a), but Appellant argued that Respondent's intentional concealment of his criminal past during sworn deposition testimony should be admissible nonetheless under Rule 32(a)(1) which states: "Any deposition may be used by any party for the purpose of contradicting or impeaching the testimony of deponent as a witness, or for any other purpose permitted by the rules of evidence."

In fact, Rule 608(b)(1) allows the admission of outdated criminal convictions so long as their probative value substantially outweighs the prejudicial effect of admission. Our Supreme Court has adopted a test to guide trial courts in weighing these factors in the criminal context that is helpful to analyze the case at bar. This balancing test compels the trial judge to consider: (1) the impeachment value of the prior crime; (2) the point in time of the conviction and the witness's subsequent history; (3) any similarity in the past crime and present circumstances; (4) the importance of the testimony; and (5) the centrality of the credibility issue. *See State v. Black,* 400 S.C. 10, 19, 732 S.E.2d 880, 885 (2012).

In the instant case, Respondent was the primary witness for his own case regarding not just the events that took place the night of the alleged collision, but also his medical treatment and pain and suffering. Respondent was given wide latitude to address both his present disability and the level of his pain, without any

corroborating evidence from a treating physician. No images were produced of the vehicle involved in the collision, nor its damage. All expert witnesses relied solely on Respondent in locating the stump, which supported the tree at issue. As the jury was compelled to rely heavily on Respondent's testimony, his credibility became a central issue in the case.

At trial, Appellant proposed use of the criminal convictions as evidence of incredibility only. In fact, Appellant proposed to use the evidence of a criminal conviction in only a circumspect manner, leaving off any mention of the actual charges involved and highlighting only the misleading and false answer found within Respondent's deposition testimony: "Q: Have you ever been arrested, charged with, or convicted of any crime? A: Not that I know of." (R. p. 333, lines 18—20; p. 65, line 15—p. 69, line 21). It borders on the absurd to suggest, as Respondent did at trial, that Respondent could be ignorant of criminal convictions for which he spent time incarcerated. (R. p. 511—518; p. 66, lines 18—24). The jury should have been allowed this information to judge credibility or predisposition for dishonest or self-serving testimony.

In excluding the evidence, the trial court stated counsel should have questioned Respondent in his deposition concerning the convictions, and should have confronted Respondent then with the records. The Court may take judicial notice that the South Carolina State Law Enforcement Division's website for criminal records check states that only South Carolina records are available, and, may further take judicial notice, that members of the public have no access to the National Criminal Information Center (NCIC) operated by the Federal Bureau of

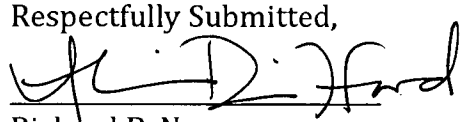
Investigation. (R. p. 519). Respondent's tardy discovery responses were delivered to counsel at his deposition, prior to which counsel would have no way of knowing Respondent lived in Washington or Nevada, nor that he had a criminal history in those states. Thus, defense counsel could not have divined the existence of records with which to confront Respondent in his deposition. (R. p. 72, line 6—p.74, line 8).

The trial judge improperly weighed the Rule 608(b) factors, and this error prejudiced Appellant's case in a meaningful way. Respondent's credibility should have been properly weighed by the jury, and the exclusion of this serious falsehood, the probative value of which substantially outweighs any prejudice, is reversible error.

CONCLUSION

For the foregoing reasons, Appellant is entitled to judgment as a matter of law or in the alternative, a new trial. The above-described errors of law, violations of the South Carolina Rules of Evidence and abuses of discretion by the trial judge prejudiced the Appellant and resulted in an unfair trial and an unjust verdict. The trial court rulings should be reversed.

Respectfully Submitted,



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IN THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM ORANGEBURG COUNTY
Court of Common Pleas

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

William Breland, ...Respondent

v.

South Carolina Department of Transportation, ...Appellant

RULE 211(b) CERTIFICATION

I, Richard B. Ness, attorney for the Appellant, do hereby certify the foregoing Final Brief of Appellant complies with Rule 211(b), SCACR.

July 9, 2015

Bamberg, South Carolina

Respectfully submitted,

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CERTIFICATE OF SERVICE

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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