IIN THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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APPEAL FROM ORANGEBURG COUNTY
Court of Common Pleas



Edgar W. Dickson, Circuit Court Judge

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

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William Breland, .....Respondent

v.

South Carolina Department of Transportation, .....Appellant.

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PETITION FOR REHEARING OR REHEARING EN BANC

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Appellant South Carolina Department of Transportation (SCDOT) moves, pursuant to Rule 221, SCACR, and Rule 219, SCACR, for a rehearing in the above-captioned matter, or a rehearing *en banc*, on the grounds the Court failed to draft any opinion in this case, leaving unanswered legitimate questions of law. In so doing, the Court failed to consider the novel and significant practical legal questions presented in this case, and failed to provide any clarification on the unsettled matters of the admissibility of Google Street View still images and the application of our law of constructive notice in light of the prevalence of those images. Appellant respectfully requests that the Court revisit this issue, not only to provide clarity on this novel issue or law, but to remedy a misapplication of South Carolina law to this case at hand.

**The Decision of the Court Permits the Admissibility of All Google Streetview or Earth Images, Without Applying Rule 901**

The Decision issued by the Court cites a number of South Carolina cases, elevating the discretion of the trial judge over the application of Rule 901(a), and granting a blank check for the admissibility of any image from Google Street View or Google Earth offered for any purpose at all, so long as a surveyor can certify that the image was collected from a close proximity of some actual physical space. This is an improper result, and this case demonstrates the dangers of omitting Rule 901(a) from consideration.

Rule 901(a), South Carolina Rules of Evidence, requires a party offering the evidence to satisfy an evidentiary burden. The party offering the evidence, Respondent herein, must offer some justification to "support a finding that the item is what the

proponent claims it is." Rule 901 goes on to list no less than ten different methods for demonstrating that an image, in this case, is what it is claimed to be. The Decision of the Court permits a proponent to bypass the process of authentication, and admit any found image, discovered even long after the fact, to support any proposition at all.

In this case, the Decision of the Court allows Respondent Breland (Breland) to offer the still image to a jury in support of the proposition that a certain tree was visible and hazardous sufficient to place SCDOT on constructive notice. Breland has no testimony from any party that the tree was observable by the human eye. In fact, the adjacent property owners uniformly testified they had never seen a tree that matched the Google image. (R. p. 273, line 7—p. 277, line 22; p. 395, line 9—p.397, line 20). Breland offered no testimony regarding the process of Google Street View, nor the distortion inherent in those images. *See Riding Shotgun with Google Street View's Revolutionary Camera,* Popular Mechanics, *http://www.popularmechanics.com/technology/gadgets/news/4232286*. In fact, the trial court permitted Breland to offer the images with no investigation into the process by which they were generated, or its accuracy. Further, Breland could not produce one soul who could answer a simple question, uniformly and routinely asked prior to the admissibility of evidence: "Does this image accurately reflect the tree line on Highway 321 near the site of the accident at some time prior to the accident?" Any pedestrian, any commuter, any neighbor, even Breland himself, could have answered "yes" to this question, and this burden would be satisfied. This is not a high bar, and Appellants have asserted throughout that no new test is needed to address the application of this new

technological world we live in. Rather, the Court must apply Rule 901, as it is has been applied in every courtroom across the State.

The Decision of this Court opens a floodgate. Any party can arrive at any scene of any event, and immediately have access to a wealth of old images through online resources, any of which might be admitted for any purpose, under the Decision of this Court. A surveyor can easily be employed to discern the image was collected from a certain physical locality, but this cannot be sufficient to justify an admittedly distorted, self-serving, edited, retrospective image being admitted as substantive evidence. To do so imputes knowledge on us all of things captured in a one-off drive-by camera lens mounted to the top of a Google car. This is an unfortunate precedent, and the Court should grant a rehearing or a rehearing *en banc* to reconsider this Decision.

**The Decision of the Court Eviscerates §15-78-60(15), South Carolina Tort Claims Act: SCDOT is on Constructive Notice of Everything**

The South Carolina Tort Claims Act contains an exception for instances where a state entity is not on notice of a hazard, despite the exercise of reasonable care. This exception is to be liberally construed in favor of immunity. *See §15-78-20(f), South Carolina Code of Laws.*

When applicable, SCDOT, a state entity, is immune from suit for damages caused by the dead and decaying trees of third party landowners when that potential hazard cannot be discovered even by the exercise of reasonable care. *See §15-78-60(15), South Carolina Code of Laws.* This is the law of the land. The Decision of the Court permits Breland to imply constructive notice, essentially to infer that such trees are in fact

discoverable through the exercise of reasonable care, through the admission of the much-maligned Google Street View still image. If the Decision of the Court stands, SCDOT is presently on constructive notice of every dead or dying tree across the State of South Carolina that has ever, through history, been captured by a Google camera and recorded online. This is a monumental shift in our jurisprudence, and cannot have been intended by the legislature, who codified immunity in certain instances, and further directed the courts to construe any ambiguity in favor of immunity.

If SCDOT "should have known" of this contested tree, of this instant in time caught by no human eye but only by a mounted Google camera, then SCDOT is presently on constructive notice of all things observed at any time by Google Street View, Google Earth, or any other online imaging process. SCDOT is further tasked with the burden of removing trees on private property, even though their hazardous condition is not observable by human SCDOT employees driving and inspecting the roads. In this framework, constructive notice takes the place of actual notice, and SCDOT becomes strictly liable for maintaining the thousands of miles of South Carolina roadways, regardless of whether or not hidden, obscured hazards are observable by the historical exercise of reasonable care.

This result is improper under South Carolina law, and in derogation of the plain language of the statute. It is imperative that the Court grant a rehearing or a rehearing *en banc* to reconsider this Decision.

## CONCLUSION

Appellant SCDOT respectfully petitions the Court for a rehearing on this matter, or in the alternative, for a rehearing *en banc*.

Respectfully Submitted,

Bamberg, S.C.
3/10, 2016

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IN THE STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

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APPEAL FROM ORANGEBURG COUNTY



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CASE NO.: 2011-CP-38-1379

APPELLATE CASE NO.: 2014-000168

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William Breland, Respondent,

-vs-

South Carolina Department of Transportation, Appellant.

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**PROOF OF SERVICE**

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I certify that I have served the Motion for Rehearing or Rehearing En Banc on counsel of record, on March 10, 2016 as follows:

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P. O. Box 7965
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3/10, 2016

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March 10, 2016

The Honorable Jenny Abbott Kitchings
S.C. Court of Appeals Clerk of Court
P.O. Box 11629
Columbia, SC 29211



Via Hand-delivery

Re: William Breland v. SCDOT
Appellate Case No.: 2014-000168

Dear Ms. Kitchings,

Please find enclosed the original and six copies of *Appellant SCDOT's Petition for Rehearing and a Certificate of Service* in the above-referenced matter. Please file the originals and return clocked copies of each in the enclosed envelope.

By copy of this letter, a copy of this motion is being served on all counsel of record.

Sincerely,

Richard B. Ness
Alison Dennis Hood

CC: J. Christopher Wilson, Esq. (Via Hand Delivery)
Daniel W. Luginbill, Esq. (Via Hand Delivery)
John S. Nichols, Esq.