

IN THE STATE OF SOUTH CAROLINA
In the Supreme Court

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SC SUPREME COURT

APPEAL FROM ORANGEBURG COUNTY
Court of Common Pleas

Edgar W. Dickson, Circuit Court Judge

Unpublished Opinion No. 2016-UP-089

William Breland,Respondent

v.

South Carolina Department of Transportation,Petitioner.

PETITION FOR WRIT OF CERTIORARI

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INTRODUCTION

Petitioner South Carolina Department of Transportation (SCDOT) moves, pursuant to Rule 242(b), SCACR, for a Writ of Certiorari, on the grounds the lower court failed to draft any opinion in this case, leaving unanswered novel questions of law. The lower court failed to consider the significant, practical legal questions presented in this case, and failed to provide any clarification on the unsettled matters of the admissibility of computer-generated Google Street View still images and the application of our law of constructive notice in light of the prevalence and retrospective availability of those images.

Petitioner respectfully requests that the Court consider these issue, not only to provide clarity on this novel issue of law, but to remedy a misapplication of South Carolina law to this case at hand.

CERTIFICATE OF COUNSEL

Counsel for Petition herein certifies the Petition for Rehearing was made and finally ruled upon by the South Carolina Court of Appeals on June 10, 2016. (App. p. 641).

QUESTIONS PRESENTED

1. Did the Court of Appeals err in affirming the ruling of the lower court admitting Google Street View images into evidence without first requiring authentication under Rule 901(a), SCRE?

2. Did the Court of Appeals err in affirming the ruling of the lower court permitting an unauthenticated Google Street View image to serve as constructive notice, effectively placing Petitioner SCDOT on constructive notice of all circumstances that may have been momentarily captured and archived by Google Street View cameras?

STATEMENT OF THE CASE

A. Procedural History

This case arises from the alleged January 7, 2010 collision of a vehicle driven by William Breland (Respondent) with a dead pine tree lying across a portion of U. S. Highway 321 in Orangeburg County. Respondent claims SCDOT was on constructive notice of the dead or dying tree because an image purporting to show a dead or dying tree, standing on private property well off the SCDOT right-of-way, was discovered by attorneys for Respondent after the accident in the online database Google Street View. Respondent claims negligent maintenance on the part of SCDOT proximately caused his injuries related to the alleged collision.

At the trial of this matter, Petitioner sought to exclude the Google Street View image offered by Respondent on the grounds that the image was not authenticated properly, the image was irrelevant, given the date-stamp on the image was May 2008, almost two years before the claimed accident, and the image was more prejudicial than probative, having been manipulated by Respondent to isolate the alleged dead or dying tree to present a still image unanticipated by the Google Street View process. (App. pp. 34-35; p. 68, lines 1-21). This motion was denied, and the images were admitted for substantive purposes, specifically as the only evidence offered by Respondent to

demonstrate that SCDOT knew, or should have known, of the existence of the circumstances giving rise to the dead or dying tree, which eventually fell and, allegedly, obstructed Respondent's lane of traffic.

A jury verdict was entered in favor of Respondent on September 6, 2013. On January 13, 2014 Judge Edgar W. Dickson entered his Order denying Petitioner's motion for judgment notwithstanding the verdict. Therein, the court found that the Google Street View system produces accurate imagery based only on the testimony of a surveyor who uses Google Earth GPS software regularly, and found retrospective confirmation by a surveyor that the images were likely captured near or around the accident site was sufficient authentication to admit the images without evaluation of the system or process required under Rule 901(b)(9), SCRE (App. pp. 10-11). The Court was further persuaded by theoretical testimony offered by arborist Mark Arena that the image was consistent with what he imagined the tree may have looked like prior to the accident. (App. p. 10). The Court failed to distinguish between the satellite imagery, gathered by Google Earth satellites, and the process of image manipulation and stitching utilized by Google Street View technology. (App. pp. 8–10).

Petitioner appealed these rulings of the lower court. The Court of Appeals issued its Order affirming the lower court, in an unpublished decision. A Petition for Rehearing was filed March 10, 2016. The Court of Appeals issued its Order denying the Petition for Rehearing on June 10, 2016. (App. p. 641).

B. Applicable Law and Standard of Review

“The admission of evidence is within the trial court's discretion. The court's ruling to admit or exclude evidence will only be reversed if it constitutes an abuse of

discretion amounting to an error of law.” *Proctor v. Dep’t of Health & Envtl. Control*, 368 S.C. 279, 312-13, 628 S.E.2d 496, 514 (Ct. App. 2006). *See also Pike v. S.C. Dep’t of Transp.*, 343 S.C. 224, 234, 540 S.E.2d 87, 92 (2000).

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*.

“Constructive notice arises when a condition has existed for such a period of time that a municipality in the use of reasonable care should have discovered the condition.” *Fickling v. City of Charleston*, 372 S.C. 597, 609–10 n. 34, 643 S.E.2d 110, 117 n. 34 (Ct.App.2007).

ARGUMENT

- I. The Court of Appeals Erred in Affirming the Lower Court Ruling Admitting a Google Street View Image into Evidence Without First Satisfying the Traditional Authentication Requirements of Rule 901(a), SCRE.

Rule 901(a), South Carolina Rules of Evidence, compels a party offering evidence to offer some justification to “support a finding that the item is what the proponent claims it is.” Rule 901(b) lays out a non-exhaustive list of no less than ten different methods for

demonstrating that an image is what it is claimed to be, ranging from simple testimony of a witness with knowledge to an evaluation of the reliability of a process or system. This evidentiary burden is a condition precedent that must be satisfied prior to admission of evidence. While the sufficiency of the authentication is a matter for the trial judge's discretion, Rule 901(a) requires a proponent to lay a proper foundation prior to admission, to confirm that the evidence "is what the proponent claims it is." In this case, the trial court failed to require authentication of a still image produced by Google Street View.

In *Clark v. Cantrell*, 339 S.C. 369, 529 S.E.2d 528 (2000), this Court provided a test concerning the admissibility of demonstrative evidence created by computer-generation, requiring: (1) authentication; (2) relevancy; (3) accurate representation; and (4) compliance with Rule 403. In this instance, the court permitted the admission of the Google Street View image, stitched together by computer-generation and edited by Respondent, for substantive purposes, as the only evidence of the existence of any dead or dying tree in the vicinity of the accident, and failed to require any inquiry into the four-part *Clark* test. The Google image is the only evidence in this case that suggests SCDOT "should have known" of the existence of a potential hazard on the land of a third party near Highway 321. The failure of the court to even consider the *Clark* factors, compulsory for demonstrative evidence, in this substantive matter, amounts to an abuse of discretion, and being central to the outcome of this case, reversible error. While Petitioner finds the May 2008 image to be largely irrelevant to the inquiry into the roadside circumstances at or around the time of the January, 2010 accident, and certainly more prejudicial than probative, given that the Google Street View camera has the

potential to capture images unavailable to the human eye during the normal means of inspection, this Petition will focus on the primary *Clark* factor of authentication, which was improperly omitted in this case.

Regarding Authentication

A party offering evidence must meet “[t]he requirement of authentication ... as a condition precedent to admissibility.” Rule 901(a), SCRE. The authentication requirement “is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims.” *Id.* “[T]he burden to authenticate ... is not high” and requires only that the proponent “offer a satisfactory foundation from which the jury could reasonably find that the evidence is authentic.” *See United States v. Hassan*, 742 F.3d 104, 133 (4th Cir. 2014) (decided under Fed.R.Evid. 901(a)3).

A: Rule 901(b)(1), SCRE.

In *Deep Keel, LLC v. Atlantic Private Equity Group, LLC*, 413 SC 58, 773 S.E.2d 607 (Ct. App. 2015), the court found it was not necessary to clarify how loan documents submitted as evidence were created, who created them, or when they were created, so long as an individual with personal knowledge of the documents could testify regarding *their personal knowledge* of the content and consistency of the forms typically used by the bank. There, the court accepted the foundation offered by a witness with *personal knowledge* that a set of loan documents were copies of the same loan documents provided to him at the time of the closing of the loan. As a condition precedent, the court required testimony by an individual with

prior, personal knowledge, to confirm that the documents were what they purported to be. Google Street View images are not exempt from the authentication requirements of Rule 901(a), SCRE.

In a recent immigration case, the Ninth Circuit ruled a series of Google Earth images were properly authenticated based on the testimony of a federal agent who testified he knew the area personally. The agent testified he had regularly patrolled the area for over a year, he had regularly hiked the region, and he had received training in the area, having seen the landscape from the aerial view and with his own eyes. *See United States v. Nava-Arellano*, 2016WL2642156 (9th Cir. May 10, 2016). The court found that State satisfied the minimal burden of authentication based on the personal recollections of the agent. While personal foreknowledge is sufficient, no such inquiry was conducted in the instant case.

In this case, the court further failed to consider the temporal requirement of personal knowledge. In *Larry Crouch, et al., v. John Jewell Aircraft, Inc.*, 2016 WL 157464 (W.D. Kent. January 12, 2016), an expert sought to rely on a Google Earth image, gleaned retrospectively, to provide testimony regarding the availability of alternative landing sites in a case concerning a plane crash. The court noted that the image was date-stamped several years before the accident. The court expressed unease with the image, noting that no witness had been offered who could testify to any personal knowledge that the image was consistent with the scene on the day of the accident. In short, the court excluded the image, and the expert opinions related to that image, because the proponent of the evidence failed to offer any testimony of any individual with any knowledge of the scene on or near the date of the accident: “The court does not

dispute that any witness, expert or law, may use his or her personal knowledge of a scene to lay a proper foundation for use of a photograph. The issue...is temporal. Saying that the Google image accurately represents [a witness's] recollection of the fields over which Crouch glided after losing engine power is only helpful if his recollection is of the fields *on or reasonably near the day Crouch crashed.*" *Id.* at 17 (emphasis original). A Order denying a motion for reconsideration yielded a more direct description of the appropriate standard for authentication: "Even if the Google Earth images depict the area surrounding the crash site as it appeared on June 14, 2006, that was still five months before the crash occurred and in a different season." *Larry Crouch v. John Jewell Aircraft, Inc.*, 3:07-CV-638-CHL, 2016 WL 1178024 (W.D. Kent. March 22, 2016).

South Carolina jurisprudence similarly should be read to require a temporal component of personal foreknowledge related to an image under Rule 901(b)(1). In this case, an image of a tree discovered after the fact and edited by Respondent to produce the most favorable view of the tree possible cannot be authenticated without testimony from some individual with knowledge of the area on or around May, 2008, the time-stamp on the computer-generated Google Street View image. As the photo is offered as the only substantive evidence from which the jury could have concluded SCDOT "should have known" of the potential hazard of the dead or dying tree, Respondent must offer some corroboration that the image is what it purports to be: An image of a dead or dying tree off the right-of-way of Highway 321 that was visible in May, 2008. Respondent could produce no witness with such personal foreknowledge, meaning Respondent could not and did not authenticate the image under Rule 901(b)(1), SCRE.

B: Rule 901(b)(9), SCRE.

It is possible that the Respondent could have also authenticated the Google Street View photo with evidence that the image was the product or result of a system or process that produces accurate results. In this case, the Respondent conflates the two-dimensional satellite imagery of Google Earth with the “stitched together” three-dimensional imaging of Google Street View. This distinction is significant, as Google Street View is specifically intended to be utilized as a three dimensional walk-through, and not a still image capture software. (App. pp. 528—532). Respondent offered the court no information regarding the process of Google Street View or the process of image capture itself, performed retrospectively by Respondent with the benefit of hindsight.

In *United States v. Lizarraga-Tirado*, 789 F. 3d 1107, 97 Fed. R. Evid. Serv. 1190, (9th Cir. 2015), the Ninth Circuit considered these issues, specifically with regard to a Google Earth image. In *Lizarraga-Tirado*, a Google Earth image was presented as evidence, edited to highlight the area in which a crime was alleged to have taken place. The court found that the satellite image with the “tack” indicating the appropriate area of concern must be authenticated prior to admission:

“A proponent must show that a machine is reliable and correctly calibrated, and that the data put into the machine (here, the GPS coordinates) is accurate. A specific subsection of the authentication rule allows for authentication of a process or system with evidence describing the process or system and showing that it produces an accurate result. So when faced with an authentication objection, the proponent of Google-Earth generated evidence would have to establish Google Earth’s reliability and accuracy. That burden could be met, for example, with testimony from a Google Earth programmer or a witness who frequently

works with and relies on the program.” See Charles Alan Wright & Victor James Gold, *Federal Practice and Procedure* §7114 (2000).

In this case, expert witness and surveyor Cliff Harper testified that he routinely worked with Google Earth and felt comfortable with the program. (App. pp. 60-66). However, neither Mr. Harper, nor any other witness could speak to the functionality or accuracy of the software that is Google Street View. Testimony of reliability and accuracy is necessary in seeking to authenticate an image generated by a process or system, under Rule 901(b)(9), SCRE, and such testimony was not required by the trial court in this case.

The decision of the lower court permits a proponent to bypass the process of authentication found in Rule 901(a) and in its place permits a proponent of a Google-generated image to admit any found image, discovered even long after the fact, as substantive evidence, without any testimony from any individual with personal knowledge to vouch for the image, without regard specifically to the accuracy of the image temporally, as all images are by nature fixed in a particular time, and without regard to the process that generated the image. This is a novel interpretation of an emerging area of law that is being considered across the country by a number of courts. As described herein, these courts apply Rule 901(a) in its traditional manner, requiring some evidence that the image is what it purports to be.

The admission of the photo without satisfying Rule 901, SCRE and without considering the *Clark* factors is a novel deviation from standard practice, seemingly based on the failure of the court to grasp the relatively new technological process of Google Street View. Instead of being unquestioningly accepting of new technology, this

Court should require the lower courts to apply South Carolina evidentiary rules uniformly and equitably. Petitioners have asserted throughout this case that no additional test is necessary, but rather, archival Google images must be subjected to the traditional questions raised by Rule 901, SCRE.

A Writ of Certiorari is imperative in this case, to address this novel question of the evidentiary burdens on proponents of evidence generated from the online Google Street View and Google Earth programs.

II. The Court of Appeals Erred in Affirming the Lower Court Ruling Permitting an Unauthenticated Google Street View Image to Serve as Constructive Notice, Effectively Placing Petitioner SCDOT on Constructive Notice of All Circumstances Captured by a Google Street View Camera.

At the trial of this matter, Respondent offered only the disputed May 2008 Google Street View image in support of the proposition that a certain tree was hazardous and visible sufficient to place SCDOT on constructive notice. Respondent had no other testimony or evidence from any party that the tree was observable by the human eye through the normal means of inspection. In fact, the adjacent property owner and even the owner of the tract of land in which the tree stood, uniformly testified they had never seen a tree that matched the Google image. (App. p. 277, line 7—App. p. 281, line 22; App. p. 403, line 9—p. 405, line 20). The decision of the lower court effectively placed Petitioner SCDOT on notice of every hazard that may have been captured by the Google Street View or Google Earth processes, an unprecedented expansion of liability on the part of the state, and an impermissible deviation from the intent of the legislature.

The South Carolina Tort Claims Act provides for immunity for state entities, like Petitioner, in 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 lower court permits an inference that images captured and cataloged on Google Street View and Google Earth put the state on notice of any defects that may be captured therein. Frankly, if the decision of the lower court stands, SCDOT and other state entities are 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.

Traditionally, establishing constructive notice required some evidence that the condition or hazard was obvious or recurrent, such that knowledge could be inferred. *See Ford v. S.C. Dept. of Transp.*, 328 S.C. 481, 492 S.E.2d 811 (Ct. App. 1997); *Marsh v. S.C. Dept. of Highways and Pub. Transp.*, 298 S.C. 420, 380 S.E.2d 867 (Ct. App. 1989). In this case, Respondent claims SCDOT “should have known” of the dead or dying tree because an image of the tree was computer-generated by Google Street View processes on or around May, 2008. No other evidence has been put forward to substantiate the

claim that the tree was visible or obvious. Voluminous evidence has been generated to demonstrate that SCDOT was actively maintaining the stretch of Highway 321 implicated in the alleged accident, yet no reports or complaints, no witness testimony or photographic imagery was provided, save the Google Street View image.

If SCDOT “should have known” of this contested tree, of the instant in time caught by no known 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. If this construction persists, constructive notice swallows up 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 traditional exercise of reasonable care.

This result is improper under South Carolina law and in derogation of the plain language of the statute. Petitioner respectfully requests the Court grant its Writ of Certiorari to evaluate this decision, which contradicts the plain language of the Tort Claims Act, and conflicts with prior jurisprudence.

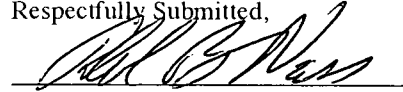
CONCLUSION

For the reasons set forth above, petitioner prays this Court consider these matters and grant a Writ of Certiorari, that it may review the decision of the Court of Appeals and finally determine the law of this state on the proper manner of authentication of images gleaned retrospectively from Google Street View or other internet databases for evidentiary purposes, and specifically for the purposes of overcoming the statutory

immunity granted to the South Carolina Department of Transportation, in the absence of constructive notice.

Bamberg, S.C.
July 7, 2016

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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, in the following case:
Breland v. SCDOT, Appellate Case: 2014-000168, Unpublished Opinion Number: 2016-UP-089:

Pleadings: Petition for Certiorari

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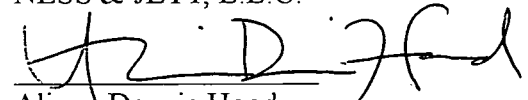
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