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SC SUPREME COURT

IN THE STATE OF SOUTH CAROLINA
In the 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Unpublished Opinion No. 2016-UP-089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.

APPENDIX TO PETITION FOR WRIT OF CERTIORARI
VOLUME III of III

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IN THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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JUL 15 2015

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
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(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,

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 Judgment 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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- 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 *Vedri, 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 Shogun 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 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, *Vedri, 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, SCRCP, 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

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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 SCRCF 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. Clavenger*, 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 Mummanen 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 (Cr. 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.

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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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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

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SC Court of Appeals

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

William Breland, Respondent

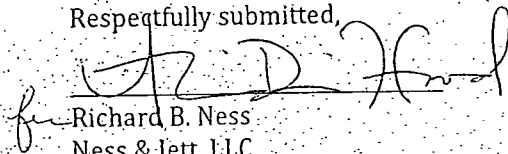
v.

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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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,

APPELLANT'S FINAL BRIEF

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STATEMENT OF ISSUES ON APPEAL

I. DID THE TRIAL COURT ERR IN ALLOWING RESPONDENT TO AUTHENTICATE A STILL PHOTO FROM GOOGLE STREETVIEW 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 STREETVIEW PRODUCES ITS IMAGES ?

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

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

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

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); SCRPC, *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/423228> (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 of 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 mortality 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

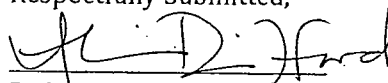
Investigation. (R. p. 519). Respondent's tardy discovery responses were delivered to counsel at his deposition, prior to which counsel would have no way of knowing Respondent lived in Washington or Nevada, nor that he had a criminal history in those states. Thus, defense counsel could not have divined 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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July 9 2015

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

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

William Breland,Respondent

v.

South Carolina Department of Transportation,Appellant

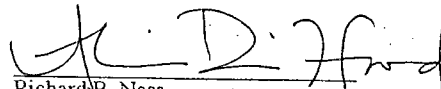
RULE 211(b) CERTIFICATION

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

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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 No. 2011-CP-35-1397

William Ireland

Respondent

South Carolina Department of Transportation

Appellant

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COUNTER-STATEMENT OF THE ISSUES ON APPEAL

- I. Did the trial judge abuse his discretion in admitting a photo from “Google Earth” because Plaintiff provided a sufficient foundation for admitting the photograph?
- II. Did the trial judge correctly deny SCDOT’s motion for JNOV because Plaintiff established constructive notice of the hazard in this case?
- III. Did the trial judge correctly charge the jury regarding the South Carolina Mortality Tables?
- IV. Did the trial judge abuse his discretion in excluding evidence Defendant proffered regarding Plaintiff’s criminal history?

COUNTER-STATEMENT OF THE CASE

Mr. Breland filed an action on November 28, 2011, against several defendants, including the South Carolina Department of Transportation (SCDOT). Mr. Breland asserted he was injured while driving his van on U.S. Highway 321 in Orangeburg County when he struck a dead tree that had fallen into the roadway. Mr. Breland contended SCDOT failed to inspect its right-of-way along U.S. Highway 321, failed to warn the traveling public about the hazard, and failed to keep the roadway safe. On January 31, 2012, SCDOT filed an Answer denying it was responsible and stating 16 separate defenses.

Following discovery, SCDOT moved for summary judgment on June 25, 2013, contending it was not liable for the crash. On August 9, 2013, the court held a hearing on the motion, and on September 5, 2013, the court denied SCDOT's motion for summary judgment.¹

On August 29, 2013, SCDOT filed a notice that pursuant to Rule 609(a), SCRE, SCDOT intended to use a criminal record to impeach Mr. Breland. SCDOT also raised the issue by motion in limine filed September 3, 2013.

The case was tried September 3, 2013, through September 6, 2013. The jury

¹ SCDOT attached the order denying summary judgment to its Notice of Appeal and asserted it was appealing that order. SCDOT also includes the summary judgment standard in its Brief of Appellant. (App. Br. pp. 3-4). Of course, the denial of summary judgment is never appealable, even after final judgment. *E.g.* Ballenger v. Bowen, 313 S.C. 476, 443 S.E.2d 379 (1994) (denial of summary judgment is not appealable); Olson v. Faculty House of Carolina, Inc., 354 S.C. 161, 580 S.E.2d 440 (2003) (adhering to Ballenger and holding the denial of summary judgment is not appealable, even after final judgment).

returned a verdict for Mr. Breland for \$225,000. SCDOT made post-trial motions for judgment notwithstanding the verdict (JNOV) or, alternatively, a new trial. On October 1, 2013, the trial court held a hearing on SCDOT's motions and on January 16, 2014; the court entered an order denying the motions.

On January 17, 2014, SCDOT filed and served its notice of appeal.

FACTS

When reviewing a motion for JNOV, an appellate court must employ the same standard as the trial court. *Law v. S.C. Dep't of Corr.*, 368 S.C. 424, 434, 629 S.E.2d 642, 648 (2006). On appeal from an order denying a motion for JNOV, an appellate court views the evidence and all reasonable inferences in a light most favorable to the non-moving party. *RFT Mgmt. Co. v. Tinsley & Adams L.L.P.*, 399 S.C. 322, 331-32, 732 S.E.2d 166, 171 (2012). Viewing the evidence in this manner, the record reveals the following:

This is a single-car automobile wreck. Mr. Breland was driving along U.S. Highway 321 in a van and struck a rotten pine tree that had fallen in the roadway. Mr. Breland was seriously injured in the wreck.

Mr. Breland sued the SCDOT, asserting the Department failed to locate and remove the dead tree before it fell into the roadway and caused a hazard to motorists. Following a trial the jury found in favor of Mr. Breland and returned a verdict for \$225,000. (R. p. 39). Remaining facts are discussed under each issue below.

ARGUMENTS

I. THE TRIAL JUDGE EXERCISED APPROPRIATE DISCRETION IN ADMITTING A PHOTO FROM “GOOGLE EARTH”

SCDOT contends the trial court erred in admitting evidence of “Google Street View computer-generated still images, or screen shots, without satisfying the [authentication] requirements of Rule 901, SCRE.” (App. Br. pp. 6-12). The Court should affirm.

In denying the post trial motions, the trial court noted SCDOT moved *in limine* to exclude the images from Google Earth. (R. p. 4). The images included “street scenes” of the wreck scene and the subject tree at the time the May 2008 Google Earth imagery was produced.

In denying the new trial motion, the trial court held the photograph was properly admitted. (R. pp. 4-5). The court noted “[s]atellite images have become a well-established tool used in everyday situations.” (R. p. 5). The court found the jury had adequate information to judge whether the images were accurate and what Mr. Breland claimed them to be. (R. p. 5). The court found there was a sufficient foundation for authentication and admissibility of the images by the testimony of several witnesses, including Cliff Harper, Mark Arena, Mr. Breland and other witnesses who testified they recognized the stretch of highway in the images. (R. p. 5).

Alternatively, the court noted SCDOT introduced a video clip taken from Google Earth Street View in its primary case without objection, and that video included some of the same images SCDOT claimed to have been improperly admitted. (R. p. 6). These

rulings are correct.

SCDOT frames its argument as if the photographs from Google Earth are unreliable without the testimony of either the person who actually took the photographs or a witness from Google who can testify in detail how the particular photograph was made. Neither Rule 901 nor courts around the country require such exacting foundation for admissibility.

Rule 901 of the South Carolina Rules of Evidence governs authentication of evidence and provides “[t]he requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims.” Rule 901(a), SCRE. The Rule then provides examples of authentication or identification, although the list is not exhaustive. *State v. Anderson*, 386 S.C. 120, 687 S.E.2d 35 (2009). One of those examples is: “**Testimony of Witness With Knowledge.** Testimony that a matter is what it is claimed to be.” Rule 901(b)(1). Thus, the Rule has never required the standard SCDOT would have this Court now adopt. *Cf.* Rule 901(b)(5), SCRE (including “[t]estimony that a matter is what it is claimed to be” and “[i]dentification of a voice, whether heard firsthand or through mechanical or electronic transmission or recording, by opinion based upon hearing the voice at any time under circumstances connecting it with the alleged speaker” as acceptable methods of authentication); *Winburn v. Minnesota Mut. Life Ins. Co.*, 261 S.C. 568, 576–77, 201 S.E.2d 372, 376 (1973) (“Authenticity of documentary evidence may be shown, so as to render it admissible in evidence, by indirect or circumstantial evidence.”).

The Google Earth photographs were properly admitted against the backdrop of the trial testimony. *Cf. State ex rel. JB*, 2010 WL 3836755 (N.J. Super. Ct. App. Div. 2010) (upholding decision to permit counsel to offer Google Earth photographs as illustrative aids to witness testimony). As noted, Cliff Harper, an expert professional land surveyor (R. p. 76, ll. 4-5, 21-23), testified that the latitudinal and longitudinal coordinates he found at the scene of the wreck were the same coordinates that the Google Earth images portrayed. (R. p. 50, l. 4 - p. 54, l. 19; p. 77, ll. 4-7; p. 78, ll. 20-23; p. 399). Harper stated that he uses Google Earth imagery often and finds “Google Earth Street View” imagery to be accurate. (R. p. 54, ll. 17-25; p. 82, l. 17 - p. 83, l. 1; p. 87, ll. 5-14). The location of the decayed tree portrayed in the Street View images was accurate within one foot of the stump of the tree that physical evidence on the scene showed caused the wreck. (R. p. 53, ll. 1-19; p. 80, ll. 19-22; p. 83, ll. 2-6; p. 84, l. 17 - p. 86, l. 6; p. 87, ll. 22-24; p. 97, l. 18 - p. 98, l. 3; p. 398). On cross-examination Mr. Harper stated, “I know it’s the same spot as the stump. That’s what I know.” (R. p. 92, ll. 5-6).

In addition, Mark Arena, a horticulturist and an arborist (R. p. 183, ll. 1-5; p. 183, l. 21 - p. 184, l. 16), testified that the imagery of the tree was consistent with what he expected to see with respect to decay and condition of the tree. (R. p. 186, ll. 9-24). Mr. Arena took photographs of the site on June 25, 2013, and reviewed the Google Earth imagery. (R. p. 184, l. 20 - p. 185, l. 5; p. 185, ll. 11-12; p. 193, ll. 15-19; pp. 446-448). When Mr. Arena went to the scene he found a void in the tree line or the canopy that matched the tree that he had seen on the Google Earth image. (R. p. 194, ll. 5-8). That void also matched up with the stump he located on his visit in June 2013. (R. p. 193, ll. 9-

12).

Moreover, several witnesses, including Mr. Breland, testified that they recognized the stretch of highway identified in the Google Earth imagery as U.S. Highway 321 in the area of the wreck. (R. p. 266, ll. 18-20; p. 278, l. 1 - p. 279, l. 25). The trial court's decision to permit the photographs on the basis of this testimony was well within the parameters of Rule 901 and the trial court's sound discretion.

In fact, some courts have used Google Earth and other online imaging services to buttress their decisions, stating these services (including Google Earth) are subject to judicial notice. For instance, the Tenth Circuit recently stated:

An appendix to our opinion contains a helpful map of the site. The parties unfortunately did not provide us a map. However, based on the undisputed location of the President's visit, "[w]e take judicial notice of a Google map and satellite image as a 'source[] whose accuracy cannot reasonably be questioned' " for purposes of this case. *United States v. Perea-Rey*, 680 F.3d 1179, 1182 n. 1 (9th Cir.2012) (second alteration in original) (quoting Fed.R.Evid. 201(b)); see *Citizens for Peace in Space v. City of Colo. Springs*, 477 F.3d 1212, 1218 n. 2 (10th Cir.2007) (taking judicial notice of an online distance calculation that relied on Google Maps data); *United States v. Piggie*, 622 F.2d 486, 488 (10th Cir.1980) ("Geography has long been peculiarly susceptible to judicial notice for the obvious reason that geographic locations are facts which are not generally controversial..."); see also David J. Dansky, *The Google Knows Many Things: Judicial Notice in the Internet Era*, 39 Colo. Law. 19, 24 (2010) ("Most courts are willing to take judicial notice of geographical facts and distances from private commercial websites such as MapQuest, Google Maps, and Google Earth."). We do this here only to determine the "general location" of relevant events. *Perea-Rey*, 680 F.3d at 1182 n. 1. The map in the appendix identifies the approximate location of the southern checkpoint—150 yards south of the mayor's driveway—based on Google Maps's "Distance Measurement Tool." Cf. *Citizens for Peace in Space*, 477 F.3d at 1218 n. 2.

Pahls v. Thomas, 718 F.3d 1210, 1216 n. 1 (10th Cir. 2013). The Ninth Circuit agrees:

We take judicial notice of a Google map and satellite image as a “source[] whose accuracy cannot reasonably be questioned,” at least for the purpose of determining the general location of the home. Fed.R.Evid. 201(b). See also *Citizens for Peace in Space v. City of Colorado Springs*, 477 F.3d 1212, 1219 n. 2 (10th Cir.2007) (taking judicial notice of online distance calculations); cf. *Boyce Motor Lines v. United States*, 342 U.S. 337, 344, 72 S.Ct. 329, 96 L.Ed. 367 (1952) (“We may, of course, take judicial notice of geography.”) (Jackson, J., dissenting).

U.S. v. Perea-Rey, 680 F.3d 1179, 1182 n. 1 (9th Cir. 2012). Thus, contrary to SCDOT’s view, courts around the country accept these satellite images as representing what it is they purport to present.

Whether to admit the Google Earth photographs in this case was within the trial court’s sound discretion. See *Wright v. Pub. Sav. Life Ins. Co.*, 262 S.C. 285, 290–91, 204 S.E.2d 57, 60 (1974) (applying the rule that the admission or exclusion of evidence is in the trial court’s discretion to a finding by the trial court that certain evidence was sufficiently authenticated). The Court should affirm the trial court’s denial of SCDOT’s motion for new trial on this ground.

II. THE TRIAL JUDGE CORRECTLY PERMITTED PLAINTIFF TO ESTABLISH CONSTRUCTIVE NOTICE OF THE HAZARD IN THIS CASE

SCDOT argues the trial court erred in denying SCDOT's "repeated motions for judgment as a matter of law on this legal question." (App. Br. p. 16). SCDOT contends that the only evidence Mr. Breland presented to establish constructive notice was the Google Earth street view, which is insufficient as a matter of law. (App. Br. pp. 13, 15-16). SCDOT concedes that the evidence established it had road crews regularly in the vicinity of the tree, but asserts "this factor is largely irrelevant" because in SCDOT's view, surrounding foliage necessarily hid the subject tree. (App. Br. pp. 14-15). SCDOT asserts that the trial court's ruling permitting Mr. Breland to admit the Google Earth view of the dead tree "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." (App. Br. p. 16). The Court should not be persuaded by this argument.

Section 15-78-60(15) of the South Carolina Code provides:

** * * Governmental entities responsible for maintaining highways, roads, streets, causeways, bridges, or other public ways are not liable for loss arising out of a defect or a condition in, on, under, or overhanging a highway, road, street, causeway, bridge, 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.*

S.C. Code Ann. § 15-78-60(15)(2005) (emphasis added). Mr. Breland conceded at trial that he had no evidence of actual notice of the tree. (R. p. 271, l. 25 - p. 272, l. 4; p. 272, ll. 13-14). Therefore the issue is whether Mr. Breland presented any evidence of

SCDOT's failure to correct the defect (the rotten loblolly pine tree adjacent to the roadway) after SCDOT had constructive notice of its existence.

In the recent case of *Major v. City of Hartsville*, the Supreme Court discussed the concept of "constructive notice" in the context of the Tort Claims Act. The Court stated:

Constructive notice is a legal inference, which substitutes for actual notice. *Strother v. Lexington Cnty. Recreation Comm'n*, 332 S.C. 54, 504 S.E.2d 117 (1998). "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) (quoting *Jindra v. City of St. Anthony*, 533 N.W.2d 641 (Minn. Ct. App.1995)).

410 S.C. 1, 3-4, 763 S.E.2d 348, 350 (2014). *See also Hightower v. Greenville County*, 255 S.C. 192, 195, 177 S.E.2d 785, 786 (1970) ("Where a defect or dangerous condition, not created by its act or that of its agents, has existed for such length of time that in the exercise of reasonable care the defect should have been discovered and remedied, the county is chargeable with knowledge of such defect, and consequently with negligence in not having remedied it.").

In this case, Mr. Breland presented abundant evidence that SCDOT had procedures in place for locating and removing dead trees and had numerous opportunities to locate and remove the subject dead pine tree before it fell into the roadway. That evidence derives from the following testimony at trial.

Cliff Harper

Cliff Harper stated he measured the location of the tree to be 197.3 feet from the edge of the pavement at a neighboring driveway. (R. p. 80, ll. 8-11). From the stump to

the center line of the roadway was 42.17 feet. (R. p. 81, ll. 17-18, 23). The pieces of the tree added together were enough to reach the center line of the roadway from the stump. (R. p. 81, l. 24 - p.; 82, l. 1; p. 95, ll. 10-13). The stump was 4.67 feet from the edge of the SCDOT right-of-way. (R. p. 82, ll. 5-7; p. 95, ll. 14-19). It was not, as SCDOT asserts, "well off the SCDOT right-of-way...." (App. Br. p. 13).

David Brandyburg

Mr. Breland called David Brandyburg, the Resident Maintenance Engineer for the central portion of Orangeburg County, as an adverse witness under Rule 611, SCRE. (R. p. 110, ll. 4-7, ll. 20-22; p. 146, l. 11 - p. 147, l. 1). The central portion of Orangeburg County includes the area on U.S. Highway 321 where the wreck occurred. (R. p. 110, l. 23 - p. 111, l. 3). Mr. Brandyburg supervises the SCDOT employees who inspect the roadway as part of his job as Resident Maintenance Engineer. (R. p. 121, ll. 14-16; p. 147, ll. 2-7)

Mr. Brandyburg's job includes the maintenance and upkeep of the roads and highways in his area. (R. p. 112, l. 24 - p. 113, l. 1). This includes "maintaining roads, fixing potholes, identifying hazards, a number of things that are considered maintenance or upkeep of the roads or the highways." (R. p. 113, ll. 2-6; p. 114, ll. 14-17; p. 147, l. 20 - 148, l. 15). Part of these functions is to keep the highway safe for the traveling public who are using the roads and highways. (R. p. 113, ll. 7-14; p. 114, ll. 8-13). Mr. Brandyburg has approximately 75 employees under his supervision, and the number was about the same in 2010. (R. p. 113, l. 23 - p. 114, l. 7).

The employees are supposed to be on the lookout for hazards on the roadway. (R.

p. 114, l. 24 - p. 115, l. 1). Once an employee spots debris or trash in the roadway they are supposed to remove it. (R. p. 114, ll. 18-23). The employees are also supposed to actively look for, locate and identify trees that are diseased, dead or decayed that might fall into the roadway. (R. p. 115, ll. 5-9; p. 116, ll. 17-25; p. 118, ll. 15-22). In fact, the employees "have to be thorough" in discharging their active duty to locate and remove trees that pose a hazard to the roadway. (Tr. p. 180, ll. 1-2). Even if the tree is not in the SCDOT right-of-way, they are to remove it if it is "threatening the roadway." (R. p. 115, l. 10 - p. 116, l. 10; p. 119, ll. 3-6).

These obligations have been the policy and practice of SCDOT since Mr. Brandyburg has been the Resident Maintenance Engineer in Organgeburg. (R. p. 116, ll. 13-16; p. 117, ll. 3-5; p. 118, l. 23 - p. 119, l. 2; p. 409). The written policy under § 2.51 governs vegetation and states, "Dead or diseased trees located on or off the right-of-way which may fall onto the travel surface of the roadway should be removed." (R. p. 119, ll. 7-23; p. 467). Mr. Brandyburg described this duty as "important." (R. p. 118, ll. 6-10). He added, "[m]aintaining the roads for safe travel of the public is very important." (R. p. 118, ll. 13-14).

If a tree that threatens to fall into the roadway is on the SCDOT right-of-way, the department removes it as soon as they locate it. (R. p. 117, ll. 6-11). If the tree is off the SCDOT right-of-way, and it is or should have been located, then the department has a process for removing those trees. (R. p. 117, ll. 22-24). The department contacts the landowner about removing the tree and once they get permission from the landowner then they remove the tree. (R. p. 117, ll. 12-17, 18-21; p. 148, l. 20 - p. 149, l. 7; p. 173, l. 12 -

p. 174, l. 2). Mr. Brandyburg agreed that this process is “quick” because if the tree poses a danger they must “get it down as quick as possible.” (R. p. 117, l. 25 - p. 118, l. 5).

Mr. Brandyburg identified a general maintenance manual which generally covered his job duties and responsibilities. (R. p. 119, l. 24 - p. 120, l. 2; p. 154, l. 1 - p. 155, l. 20; pp. 407-410). Part 28.822 provides “other tree removal guidelines” and states, “[o]ther tree removal guidelines are as follows: remove fallen trees from the right-of-way, remove dead or diseased trees located on or off the right-of-way or that may fall onto the travel-way or shoulder.” (R. p. 120, ll. 6-12; p. 407).

The SCDOT gives its employees training on looking for these hazards. (R. p. 120, ll. 21-25). The employees are trained in all aspects of their jobs. (R. p. 121, ll. 2-4). The department gives the employees guidelines on “what to look for when [they] look for dead or diseased trees.” (R. p. 121, ll. 8-13, 17-20; p. 127, l. 15 - p. 128, l. 2). This includes a tree that appears to be a dead tree, including the tree in the Google Earth photograph. (R. p. 128, ll. 3-22; p. 398).

U.S. Highway 321 is considered a “primary route” and is inspected once every six months. (R. p. 122, l. 23 - p. 123, l. 4; p. 151, ll. 14-15). The purpose of the inspection is “to detect deficiencies that could pose a hazard to motorists or pedestrians thus creating a risk for the department.” (R. p. 123, ll. 13-18). This purpose includes looking for “dead trees or overhanging limbs.” (R. p. 123, ll. 5-12).

SCDOT’s policy is also that department foremen or engineers do “riding road inspections” looking for hazards and problems with the road. (R. p. 121, l. 21 - p. 122, l. 9). These employees are supposed to be looking for trees that pose a hazard to the

roadway. (R. p. 124, ll. 11-20). The employees do some of these road inspections at night so they can see the visibility of signs and markings. (R. p. 122, ll. 10-13). They do some of the riding road inspections during the daytime. (R. p. 122, ll. 14-16). The employees ride the roadway in both directions. (R. p. 132, ll. 14-16; p. 172, ll. 7-12). The employee is “looking from right-of-way to right-of-way, any type of hazard that you can see in that area that may [affect] the road.” (R. p. 167, ll. 20-22; p. 168, ll. 2-5). Mr. Brandyburg stated that “[i]f you’re riding down the road and you’re looking in the right-of-way and you see a tree that’s five or so feet beyond the right-of-way, but it’s going to fall into the right-of-way, that is something you would see.” (R. p. 177, l. 25 - p. 178, l. 3). He added, “that’s something – a tree you would remove.” (R. p. 178, l. 7).

Mr. Brandyburg agreed these riding road inspections are “an important part of the job.” (R. p. 122, ll. 17-20). The employees are also supposed to be actively looking for these hazardous trees at all times of the year while they are cutting grass, ditch draining work, driveways, shoulder re-grades, litter pick up, or any kind of duty that an employee is performing. (R. p. 124, l. 16 - p. 125, l. 12; p. 236, ll. 17-25; p. 126, ll. 9-17; p. 156, ll. 8-15; p. 170, ll. 15-20). The employees are supposed to look low and to look high, including tree tops that are visible to them. (R. p. 126, l. 18 - p. 127, l. 11).

SCDOT keeps records of the employees’ activities when they are working near the roadway, including inspecting for hazards. (R. p. 129, ll. 3-11). Each road contains “mile points,” which permit the SCDOT to identify where on the road the employee is working. (R. p. 129, ll. 12-22). A “mile point” is approximately 1/100th of a mile, or 52 feet. (R. p. 129, l. 23 - p. 130, l. 4). The wreck in this case occurred between mile point

3.68 to mile point 10.68, around mile point 7.0. (R. p. 130, l. 5 - p. 131, l. 13).

Mr. Brandyburg identified a nighttime inspection report of U.S. Highway 321 that started at "zero" mile point and went to mile point 9.44 on December 17, 2009. (R. p. 132, ll. 2-13; p. 132, l. 17 - p. 133, l. 3; p. 399). He also identified a daytime inspection report of U.S. Highway 321 that started from 2.36 mile point to the 9.34 mile point on October 2, 2008. (R. p. 133, ll. 10-24). Mr. Brandyburg identified other daytime inspection reports of the highway from mile point 2.36 to mile point 9.34 on November 26, 2008, February 6, 2009, April 16, 2009, June 25, 2009, October 1, 2009, and December 17, 2009. (R. p. 134, l. 3 - p. 136, l. 8). In every inspection the employee is supposed to be looking for hazards on the highway. (R. p. 136, ll. 10-14). Mr. Brandyburg stated that in 2009 the SCDOT removed 84 standing dead trees and over 200 trees which had fallen in the central area. (R. p. 149, ll. 13-14; p. 172, ll. 16-17; p. 181, ll. 11-16).

Mr. Brandyburg identified numerous work reports covering the subject stretch of U.S. Highway 321. (R. p. 153, ll. 1-4; p. 178, l. 8 - p. 181, l. 10; pp.413-446; p. 156, l. 20 - p. 166, l. 6; pp. 454-466). The reports included the following:

1. In 2008, someone called for work along the highway at mile point 7.56. (R. p. 143, ll. 15-24).
2. On August 12, 2008, an employee performed routine mowing between mile points 4.38 and 9.34. (R. p. 141, l. 25 - p. 142, l. 4).
3. On February 27, 2009 and March 6, 2009, employees were picking up litter on both sides of the highway starting at mile point 6.0 and going to mile point 8.34. (R. p. 141, ll. 3-16; ll. 20-24).

4. On March 5, 2009, an employee did regrading on a roadside ditch. (R. p. 140, ll. 15-19).
5. On April 22, 2009, someone called with a problem with a "washout" from a driveway. (R. p. 142, l. 22 - p. 143, l. 6).
6. On July 8, 2009, an employee was doing routine mowing along mile point 4.0 to mile point 9.34. (R. p. 140, l. 20 - p. 141, l. 2).
7. A report on August 31, 2009, mentioned an employee doing "land management" beginning at mile point 4.38 and ending at mile point 9.34. (R. p. 139, l. 21 - p. 140, l. 14).
8. On November 5, 2009 and December 30, 2009, employees were regrading a portion of the northbound shoulder beginning at mile point 6.47 and ending at mile point 7.41. (R. p. 136, l. 15 - p. 138, l. 13).
9. On December 29, 2009, an employee cleaned out a ditch and driveway pipe at 7271 Savannah Highway. (R. p. 138, l. 25 - p. 139, l. 20).

These reports involved the area where the tree fell and the wreck occurred. (R. p. 138, ll. 14-23). The employees are supposed to be looking for hazards the entire time they are out there. (R. p. 141, ll. 17-19). Had an employee seen the subject tree during any of these work reports the employee should have taken steps to have the tree removed. (R. p. 144, ll. 5-13). The only possibilities are that someone did not see the tree or it never got reported. (R. p. 145, ll. 7-9).

Mr. Brandyburg agreed that the tree in the Google Earth photograph "would be a tree I would say would need to be removed." (R. p. 128, l. 23 - p. 129, l. 2). He admitted

there was no contact made with any landowner about removing the tree that caused Mr. Breland's wreck. (R. p. 176, ll. 12-15). He estimated the tree was about 30 feet from the edge of the road. (R. p. 287, ll. 6-10). Mr. Brandyburg also agreed that if SCDOT had notice of the tree that Mr. Breland hit, that is, knew or should have known the tree was there, then SCDOT should be liable. (R. p. 112, ll. 11-17).

Mark Arena

Mark Arena, the expert arborist, stated the tree that fell was a "loblolly pine" which "fell due to a loss of structural integrity which is the direct result of a disease issue, typically, a fungal pathogen." (R. p. 185, ll. 18-25; p. 186, ll. 18-24; p. 187, ll. 10-18; p. 188, l. 7 - p. 189, l. 5; p. 196, ll. 2-7; pp. 400, 402-404). The disease process takes place over a period of one to three years. (R. p. 189, ll. 19-22). The signs of disease would be obvious and visible to anybody that has training. (R. p. 189, l. 23- p. 190, l. 1; p. 192, ll. 1-20; p. 197, ll. 13-15). Mr. Arena stated the signs of decay would have become obvious to a person. (R. p. 210, ll. 4-11).

Mr. Arena opined that the tree was about 50 feet tall. (R. p. 191, ll. 10-11). He believed the weight of the tree would have been substantial. (R. p. 199, ll. 11-15). Mr. Arena also opined that the tree would have grown towards the direction of the road, which would be where the most sunlight would be. (R. p. 190, ll. 5-14). Based upon photographs he was provided he opined that the tree fell towards the roadway. (R. p. 190, ll. 20-23; p. 401). Mr. Arena stated the tree would have "undoubtedly" covered the lane of travel closest to the shoulder from which it fell. (R. p. 191, ll. 19-21). If the tree fell at a certain angle it would have covered some but not all of the opposing lane of travel. (R.

p. 191, ll. 22-25). Mr. Arena believed the tree broke apart when it fell. (R. p. 201, ll. 12-19). He opined that “a majority of the trunk came down at the same time.” (R. p. 203, ll. 15-22; p. 212, ll. 2-5). Based upon the pieces found at the scene Mr. Arena believed that the majority of the tree fell at one time as opposed to breaking off piece by piece. (R. p. 210, l. 17 - p. 211, l. 11).

Mr. Arena observed in the Google Earth photograph that other evergreen trees were around the dead tree. (R. p. 192, l. 21 - p. 193, l. 2). The deciduous trees around the dead tree would have lost their leaves in the late fall and winter time. (R. p. 193, ll. 3-10). Mr. Arena stated, “[t]here wasn’t much in front of this tree going toward the road side. The deciduous trees, which the majority were sweet gums, were to the right and left of the tree.” (R. p. 208, ll. 2-4).

Wade Reed

Mr. Reed is Mr. Breland’s friend and was in the van when the collision occurred. (R. p. 213, ll. 23-24). Mr. Breland was driving and Mr. Reed was in the passenger seat. (R. p. 214, ll. 2-4). He identified the area where they hit the tree. (R. p. 215, ll. 6-23; pp. 450-451).

Mr. Reed stated they were proceeding south in the nighttime on U.S. Highway 321. (R. p. 216, ll. 13-21). A vehicle approached them flashing its lights to warn them of something. (R. p. 216, l. 22 - p. 217, l. 1; p. 219, ll. 5-10; p. 225, ll. 7-8). Mr. Breland slowed down. (R. p. 219, ll. 20-21). They were suddenly upon the tree in the roadway and Mr. Breland “snatched the wheel to the left to avoid it.” (R. p. 217, ll. 3-7; p. 218, ll. 3-4, 19-24; p. 219, ll. 22-24). The van made contact with the tree and went over the tree,

proceeding down the roadway 10 to 12 yards. (R. p. 220, ll. 1-7; p. 224, ll. 1-7). The airbags in the van were deployed. (R. p. 220, ll. 8-13). Although the van was damaged on the right front passenger side it was still driveable. (R. p. 220, ll. 17-24).

Mr. Breland called "9-1-1." (R. p. 221, ll. 8-9). Within about 15 minutes the Neeses Fire Department arrived and a rescue squad came from Norway. (R. p. 221, ll. 16-25). A state trooper also came to the scene. (R. p. 222, ll. 2-3; p. 224, ll. 12-14; p. 227, ll. 3-16). The fire department moved the tree from the roadway. (R. p. 222, ll. 9-11; p. 226, l. 23 - p. 228, l. 10; p. 229, l. 8 - p. 231, l. 16; p. 232, l. 24 - p. 233, l. 12).

Mr. Reed stated they struck a pine tree. (R. p. 223, ll. 2-11). Mr. Reed stated the tree lying in the roadway had no bark, no limbs, no pine needles (R. p. 223, ll. 16-25).

Mr. Breland

Mr. Breland stated that he saw an approaching truck flashing its lights. (R. p. 237, ll. 21-23; p. 238, ll. 2-5). Mr. Breland began to slow down. (R. p. 238, ll. 8-9). As he began up a hill he saw a tree lying in the roadway. (R. p. 238, ll. 11-12, 19-21). Mr. Breland tried to dodge it but could not. (R. p. 238, l. 22 - p. 239, l. 6). The airbags deployed. (R. p. 239, ll. 6-7; p. 264, l. 23 - p. 265, l. 4). Once the vehicle stopped Mr. Breland called "9-1-1." (R. p. 241, ll. 17-19). A state trooper and two fire department vehicles came to the scene. (R. p. 241, l. 22 - p. 242, l. 1; p. 263, l. 25 - p. 264, l. 19). The fire department employees cut the tree up and moved it out of the roadway. (R. p. 242, ll. 2-3; p. 265, ll. 18-23). Mr. Breland did not go to the hospital because his van would have been towed and he would have lost his cargo of fish he had in his van. (R. p. 243, l. 1 - p. 244, l. 5). The van was driveable. (R. p. 244, ll. 9-10).

After he got home, Mr. Breland started getting sharp pains in his back, neck, head and arms. (R. p. 245, ll. 19-24). He also experienced numbness. (R. p. 246, ll. 1-4). Mr. Breland was referred to Dr. Mummaneni, but he was unable to get Mr. Breland's pain back to the level it was before the wreck. (R. p. 247, ll. 3-10).

Mr. Breland went back to the scene within 30 days of the wreck and located the tree that he hit. (R. p. 240, l. 2 - p. 241, l. 9; pp. 400, 449-450).

Jimmy Miller

Jimmy Miller, who worked for the Neeses Fire Department, responded to a call from Mr. Breland about the wreck. (R. p. 99, ll. 7-9; p. 109, ll. 9-18, 13-17; p. 452). The Neeses Fire Department got the call at 11:52 p.m. on January 7, 2010. (R. p. 100, ll. 15-21). The call was for "a vehicle accident versus a tree." (R. p. 101, ll. 20-24; p. 103, ll. 14-16; p. 188, ll. 19-22). Mr. Miller and Boogie Hoover of the Neeses Fire Department arrived at the scene at 12:03 a.m. on January 8, 2010. (R. p. 100, l. 22 - p. 101, l. 2; p. 101, ll. 11-16; p. 105, l. 16 - p. 106, l. 4). They departed the scene at 12:27 a.m. (R. p. 101, ll. 3-7; p. 107, ll. 20-22). Someone from the Boland Town Fire Department also was at the scene. (R. p. 104, ll. 15-18; p. 107, ll. 10-19; p. 108, l. 21).

Mr. Miller agreed they did respond to a wreck of a vehicle with a tree. (R. p. 102, ll. 14-16). Mr. Miller does not know who removed the tree from the roadway. (R. p. 104, ll. 21-23).

Harold Rutland

Harold Rutland was a volunteer fireman for Bolen Town. (R. p. 280, ll. 20-23). He responded to the call regarding Mr. Breland's collision with the tree. (R. p. 280, l. 9 -

p. 281, l. 24). Mr. Rutland found the Ford van had struck a tree that was lying in the roadway. (R. p. 282, ll. 1-6). He stated a portion of the tree was lying in the roadway and the tree, had no bark, no limbs, and was rotten. (R. p. 283, ll. 15, 21; p. 284, ll. 7-10; p. 285, ll. 6-16; p. 286, ll. 12-16). This was after the van had hit the tree. (R. p. 286, ll. 4-11). He and several others rolled the tree out of the roadway so no one else could hit it. (R. p. 283, ll. 17-19; p. 284, ll. 6-10).

This testimony supports the inference that the subject loblolly pine tree was in a state of disease and decay for a sufficient period of time such that SCDOT employees had constructive notice that the tree should be removed. SCDOT's own policies and procedures required regular inspections for dangerous trees, whether or not those trees were in the SCDOT right-of-way.

SCDOT appears to argue that Mr. Breland could not prove constructive notice by circumstantial evidence, but had to present direct evidence that someone actually saw the dead tree before it fell. (App. Br. p. 16). Of course, "[a]ny fact in issue may be proved by circumstantial evidence as well as direct evidence, and circumstantial evidence is just as good as direct evidence if it is equally as convincing to the trier of the facts." *St. Paul Fire & Marine Ins. Co. v. American Ins. Co.*, 251 S.C. 56, 59-60, 159 S.E.2d 921, 923 (1968). It is the very nature of "constructive" notice, as opposed to "actual" notice, that it is proven by circumstances that give rise to a legal inference as a substitute for actual notice. *Major v. City of Hartsville*.

When considering a directed verdict motion, the trial court is required to view the

evidence in the light most favorable to the nonmoving party. *North American Rescue Products, Inc. v. Richardson*, 411 S.C. 371, 769 S.E.2d 237 (2015); *Jones v. Lott*, 387 S.C. 339, 692 S.E.2d 900 (2010). The appellate court will reverse the trial court's ruling only where there is no evidence to support the ruling or it is controlled by an error of law. *North American Rescue Products*.

The record contained sufficient if not abundant evidence that SCDOT had constructive notice of the hazard posed by the subject tree but took no steps to remedy that hazard. This Court should affirm the trial court's denial of SCDOT's motions for directed verdict and JNOV on this issue.

III. THE TRIAL JUDGE CORRECTLY CHARGED THE JURY REGARDING THE SOUTH CAROLINA MORTALITY TABLES

SCDOT contends the trial court erred in charging the statutory life expectancy tables “without first requiring expert testimony on causation and future damages.” (App. Br. pp. 16-18). The Court should not be persuaded by this argument as such is not the law of South Carolina.

Section 19-1-150 of the South Carolina Code provides:

When necessary, in a civil action or other litigation, to establish the life expectancy of a person from any period in his life, whether he is living at the time or not, the table below must be received in all courts and by all persons having power to determine litigation as evidence, along with other evidence as to his health, constitution, and habits, of the life expectancy of the person. In determining the age of a person as of any particular time, periods of six months or more beyond the last full year must be treated as one year in using the table below.

S.C. Code Ann. § 19-1-150 (2004).

In its motion for JNOV or new trial, SCDOT contended the trial court erred in instructing Section 19-1-150 to the jury because there was evidence Mr. Breland’s surgery was due to prior surgeries and were inevitable due to aging, and further that Mr. Breland failed to present expert evidence to support his assertion of permanency. (R. pp. 35-36, ¶ 2; Supp. R. p. 525, No. 3; pp. 532-533; pp. 533-534).

Mr. Breland offered the deposition testimony of Dr. Reddiah Babu Mummaneni. (R. pp. 234-236). Dr. Mummaneni is board certified in neurology. (R. p. 338, ll. 5-8; p. 339, ll. 2-9). SCDOT agreed he was qualified as an expert in general neurology and as a neurologist. (R. p. 340, ll. 2-6).

Dr. Mummaneni treated Mr. Breland for injuries Mr. Breland received in the

wreck. (R. p. 336, l. 21 - p. 337, l. 1; p. 340, ll. 10-13). Dr. Mummaneni opined to a reasonable degree of medical certainty that surgery performed by Dr. Haroon Choudhri at the Medical College of Georgia on Mr. Breland was reasonable and necessary based upon Mr. Breland's injury and condition. (R. p. 341, ll. 12-16; p. 341, l. 23 - p. 342, l. 3). Conservative treatment did not help Mr. Breland's symptoms so the surgery was necessary and reasonable under the circumstances. (R. p. 342, ll. 5-19; p. 344, l. 16 - p. 345, l. 3; p. 350, l. 23 - p. 356, l. 7). According to Dr. Mummaneni, Mr. Breland's injuries to his neck reflected a "new problem" even though he had a history of neck and back problems. (R. p. 352, ll. 13-16).

Dr. Choudhri kept in touch with Dr. Mummaneni about Mr. Breland's care. (R. p. 356, l. 22 - p. 357, l. 4). Dr. Choudhri referenced the January 2010 wreck in his communications with Dr. Mummaneni. (R. p. 357, ll. 13-18). In his records Dr. Choudhri opined that the wreck significantly aggravated Mr. Breland's neck pain, adding "he has had progressive pain since that time." (R. p. 357, ll. 21-24; see also p. 383, ll. 17-25; p. 384, l. 22 - p. 385, l. 4; p. 388, ll. 15-23).

Dr. Choudhri performed a laminectomy on Mr. Breland's neck. (R. p. 358, ll. 3-20). Dr. Mummaneni described the procedure as "major surgery." (R. p. 386, ll. 5-10). Mr. Breland was discharged in stable condition and "did better after surgery." (R. p. 359, ll. 13-19). When asked about residual pain, Dr. Mummaneni stated it was difficult to predict which patients will have residual pain and which patients will not have residual pain. (R. p. 360, l. 14 - p. 30, l. 10).

Mr. Breland's medical records revealed that after he had surgery in 1999 on his

neck he experienced significant improvement. (R. p. 362, ll. 7-22). Dr. Mummaneni also reviewed records of treatment Mr. Breland had for back pain in 2007 and 2008. (R. p. 363, l. 1 - p. 367, l. 1). There were no records of Mr. Breland having complaints about his neck, shoulder, or arm from April 2008 until the wreck in January 2010. (R. p. 367, l. 2 - p. 368, l. 3; p. 387, ll. 4-13; p. 392, l. 18 - p. 393, l. 17).

Dr. Mummaneni testified to a reasonable degree of medical certainty that, based upon the history given by Mr. Breland, the wreck triggered the symptoms. (R. p. 368, ll. 9-25). He opined that the wreck caused or caused the worsening of Mr. Breland's problems and complaints. (R. p. 369, ll. 1-9; p. 389, l. 14 - p. 390, l. 15; p. 391, ll. 16-19).

Other testimony in the record supports the trial court's decision to charge the mortality tables. Mr. Breland testified that he was experiencing pain and limitations in movement of his neck after the wreck that were significantly different from and were increased from the pain and limitations he experienced before the wreck. (R. p. 247, ll. 8-10; p. 249, l. 4 - p. 250, l. 2). Mr. Breland also testified regarding the treatment he had undergone, including surgery, and how the pain in his neck and increased limitations continued even until the date of the trial. (R. p. 246, l. 6 - p. 249, l. 3; p. 250, l. 3 - p. 252, l. 11; p. 253, l. 10 - p. 255, l. 13). Both parties argued about the permanency issue to the jury. (R. p. 291, l. 7 - p. 293, l. 15; p. 294, ll. 7-21; p. 295, l. 16 - p. 296, l. 20; p. 297, l. 16 - p. 301, l. 14; p. 302, l. 16 - p. 304, l. 15).

This evidence was sufficient to support the trial court's decision to charge the jury on causation and permanency. *See, e.g., Wilder v. Blue Ribbon Taxicab Corp.*, 396 S.C. 139, 148, 719 S.E.2d 703, 708 (Ct. App.2011) (holding plaintiff's testimony about

continued pain nearly three years after the wreck was sufficient, though sparse, to support an award for future pain and suffering); *Johnston v. Aiken Auto Parts*, 311 S.C. 285, 428 S.E.2d 737 (Ct. App.1993), *cert. denied* Nov. 2, 1003 (affirming the trial judge's decision to charge the life expectancy tables based upon plaintiff's testimony that his right knee "never has gotten right" and that "nothing can be done" about his knee).

SCDOT contends that because the trial court refused to charge the jury on "future damages," the court should not have charge the life expectancy tables. (App. Br. p. 18). SCDOT has confused apples with oranges here. Future damages involve a claim regarding future lost income or future medical care. *Pearson v. Bridges*, 344 S.C. 366, 544 S.E.2d 617 (2001) (discussing various scenarios for future damages in a personal injury case). This case, however, involves the issue of permanency of Mr. Breland's injuries, and the continuation of his pain and suffering for the rest of his life, not a claim for future medical care or lost wages. It was for the jury to determine whether Mr. Breland experienced pain and suffering that was different than before and which would continue into the future.

The record contains sufficient evidence to support the trial court's charge on the mortality tables. This Court should affirm the trial court's discretionary ruling denying SCDOT's motion for new trial on this basis.

IV. THE TRIAL JUDGE EXERCISED APPROPRIATE DISCRETION IN EXCLUDING EVIDENCE DEFENDANT PROFFERED REGARDING PLAINTIFF'S CRIMINAL HISTORY

During his deposition, Mr. Breland was asked if he had “ever been arrested, charged with, or convicted of any crime,” and Mr. Breland responded “not that I know of.” (R. p. 510, ll. 18-20). SCDOT produced records showing Mr. Breland had, in fact, been arrested in Nevada in 1988 and 1992 and in Seattle, Washington, in 1996. (R. p. 511). The trial court refused to permit SCDOT to inquire into those convictions “on the grounds the evidence was remote and more prejudicial than probative.” (R. pp. 2-3).

On appeal, SCDOT argues the trial court erred in denying SCDOT's motion in limine to permit SCDOT to question Mr. Breland about a prior old criminal conviction. SCDOT contends it should have been able to examine Mr. Breland about the fact of a conviction, not the details, because of a response Mr. Breland gave to a deposition question. This Court should affirm the trial court's discretionary ruling on this point.

To begin with, SCDOT raised this issue only by motion in limine at the commencement of the trial. The court heard argument on the issue and ruled on the motion. When Mr. Breland testified, however, SCDOT did not proffer the evidence again, nor did SCDOT seek a final ruling on the issue at trial. The issue, then, may not be preserved for this Court's review.

A ruling on a motion *in limine* is generally not considered a final order on the admissibility of evidence. *See, e.g. State v. Floyd*, 295 S.C. 518, 369 S.E.2d 842 (1988) (rulings *in limine* do not constitute final determinations on admissibility of evidence). This is because a ruling on a motion *in limine* is subject to change based upon

developments during the trial. *State v. Smith*, 383 S.C. 159, 679 S.E.2d 176 (2009). This is true even as to rulings that grant a motion *in limine*. See *South Carolina Dept. of Highways and Public Transp. v. Galbreath*, 315 S.C. 82, 83 n. 2, 431 S.E.2d 625, 627 n. 2 (Ct. App. 1993) (even where a motion *in limine* is granted, it is not the final ruling on the admissibility of the evidence; appellant must proffer the excluded evidence at trial). See also *State v. Wiles*, 383 S.C. 151, 156, 679 S.E.2d 172, 175 (2009) (“Generally, a motion in limine is not a final determination; a contemporaneous objection must be made when the evidence is introduced.”).

“There is an exception to this general rule when a ruling on the motion in limine is made ‘immediately prior to the introduction of the evidence in question.’” *State v. Wiles* (quoting *State v. Forrester*, 343 S.C. 637, 642, 541 S.E.2d 837, 840 (2001)). “This exception is based on the fact that when the trial court’s ruling is not preliminary, but instead is clearly a final ruling, there is no need to renew the objection.” *Id.* at 156–57, 679 S.E.2d at 175; see also *State v. Mueller*, 319 S.C. 266, 268–69, 460 S.E.2d 409, 410–11 (Ct. App. 1995) (noting where there is no evidence between the motion and the testimony, there is no basis for the trial court to change its ruling, so the decision is a final one).

The motion in limine in this case came at the beginning of the trial. (R. p. 65, l. 15 - p. 69, l. 21; p. 70, l. 14 - p. 74, l. 7). Thereafter the parties made opening statements, and plaintiff called several witnesses. Mr. Breland was the sixth witness presented, and followed Dr. Mummaneni’s video deposition. During cross examination, SCDOT did not seek to admit the evidence for impeachment purposes, nor did it proffer the evidence for

the record. Accordingly, the evidence does not fall within the exception described in *Wiles and Mueller*.

In any event, SCDOT has not demonstrated an abuse of discretion. The admission or exclusion of evidence is left to the sound discretion of the trial judge, whose decision will not be reversed on appeal absent an abuse of discretion. *State v. Brewer*, 411 S.C. 401, 768 S.E.2d 656 (2015); *Pike v. S.C. Dept. of Transp.*, 343 S.C. 224, 234, 540 S.E.2d 87, 92 (2000); *Gooding v. St. Francis Xavier Hosp.*, 326 S.C. 248, 252, 487 S.E.2d 596, 598 (1997); *Means v. Gates*, 348 S.C. 161, 166, 558 S.E.2d 921, 923 (Ct. App.2001). An abuse of discretion occurs when the ruling is based on an error of law or a factual conclusion that is without evidentiary support. *Carlyle v. Tuomey Hosp.*, 305 S.C. 187, 193, 407 S.E.2d 630, 633 (1991); *Fontaine v. Peitz*, 291 S.C. 536, 538, 354 S.E.2d 565, 566 (1987).

Furthermore, under Rule 609(a)(1), SCRE, evidence that a witness, to include a party in a civil trial, has been convicted of a crime shall be admitted subject to Rule 403, SCRE. The trial court felt that because SCDOT did not seek the information before the deposition, Mr. Breland did not have a chance to explain why he did not recall the 20-year old arrests. (R. p. 70, l. 14 - p. 71, l. 20). In denying SCDOT's post-verdict motions, the trial court stated it excluded the evidence because the convictions were more than 10 years old and were remote, and further the evidence was more prejudicial than probative. (R. p. 2). The court noted that SCDOT argued that because Mr. Breland "lied" in his deposition, SCDOT should be able to demonstrate Mr. Breland also lied about the location of the wreck, the facts of the wreck, or the extent of his injuries. (R. p. 2). The

trial court held:

Given the uncertainty as to whether [Mr. Breland] 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 [SCDOT] was properly excluded. In addition, testimony from other sources – eyewitness/passenger in the wreck, fire department personnel, treating doctors – corroborated [Mr. Breland’s] testimony as to the location of the wreck and the nature of [Mr. Breland’s] injuries. Any probative value of admitting evidence of [Mr. Breland’s] prior, remote convictions and his deposition testimony would have been greatly outweighed by its prejudicial effect. See *Otsell v. Bulduc*, 76 Conn. App. 75 (Conn. App. Ct. 2003).

(R. pp. 2-3).

SCDOT has not argued error in the trial court’s Rule 403 analysis and thus it is the law of the case. An unappealed ruling is the law of the case and requires affirmance. *Dreher v. SC Dept. of Health and Envir. Control*, 412 S.C. 244, 772 S.E.2d 505 (2015), citing *Shirley’s Iron Works, Inc. v. City of Union*, 403 S.C. 560, 573, 743 S.E.2d 778, 785 (2013). Thus, should the appealing party fail to raise all of the grounds upon which a lower court’s decision was based, those unappealed findings—whether correct or not—become the law of the case. *Dreher*, citing *Judy v. Martin*, 381 S.C. 455, 458, 674 S.E.2d 151, 153 (2009) (“Under the law-of-the-case doctrine, a party is precluded from relitigating ..., [*inter alia*,] matters that were [] not raised on appeal, but should have been....”).

Furthermore, the trial court’s Rule 403 analysis was within its sound discretion. “A trial judge’s decision regarding the comparative probative value and prejudicial effect of evidence should be reversed only in exceptional circumstances.” *State v. Collins*, 409

S.C. 524, 534, 763 S.E.2d 22, 28 (2014). The appellate court reviews Rule 403 rulings pursuant to an abuse of discretion standard “and are obligated to give great deference to the trial court’s judgment.” *Id. Accord Lee v. Bunch*, 373 S.C. 654, 658, 647 S.E.2d 197, 199 (2007) (applying these rules in a civil case). Even if the appellate court might have reached a different result, this alone is not sufficient to reverse the trial judge’s decision under Rule 403. *Hunter v. Staples*, 335 S.C. 93, 102, 515 S.E.2d 261, 266 (Ct. App. 1999). Rule 609(a)(1) gives broad discretion to the trial judge and his or her ruling should not be disturbed absent an abuse of discretion. *Hunter v. Staples*.

SCDOT contends that the evidence was admissible under Rule 608(b)(1), SCRE, as impeachment evidence. (App. Br. pp. 19, 21). SCDOT did not argue the applicability of Rule 608(b)(1) before the trial court, nor did the trial court rule upon the issue.

A losing party must present its issues and arguments to the trial court and obtain a ruling before an appellate court will review those issues and arguments. *I’On, L.L.C. v. Town of Mt. Pleasant*, 338 S.C. 406, 441–42, 526 S.E.2d 716, 724 (2000). Even if the losing party has raised an issue in the lower court, but the court fails to rule upon it, the party must file a Rule 59(e), SCRCF, motion to alter or amend the judgment in order to preserve the issue for appellate review. *Id.* Imposing this preservation requirement on the appellant is meant to enable the lower court to rule properly after it has considered all relevant facts, law, and arguments. *Id.*

Even if the issue is preserved, this Court should affirm. Whether to permit cross-examination of a witness pursuant to Rule 608(b)(1) is within a trial court’s sound discretion. *State v. Burgess*, 408 S.C. 421, 759 S.E.2d 407 (2014); *Wilder v. State*, 388

S.C. 282, 696 S.E.2d 587 (2010). The Rule itself provides:

(b) Specific Instances of Conduct. Specific instances of the conduct of a witness, for the purpose of attacking or supporting the witness' credibility, other than conviction of crime as provided in Rule 609, may not be proved by extrinsic evidence. They may, however, *in the discretion of the court*, if probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness (1) concerning the witness' character for truthfulness or untruthfulness, or (2) concerning the character for truthfulness or untruthfulness of another witness as to which character the witness being cross-examined has testified.

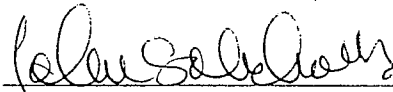
(Emphasis added). Therefore, even if SCDOT has argued the evidence was admissible under Rule 608(b)(1), and even if the trial court had addressed that argument and excluded the evidence under Rule 608(b)(1), that decision was "in the discretion of the court."

Accordingly, this Court should affirm the trial court's denial of SCDOT's motion for a new trial on this ground.

CONCLUSION

For the reasons stated this Court should affirm the trial court's denial of SCDOT's post-verdict motions.

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July 15, 2015

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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.

APPELLANT'S FINAL REPLY BRIEF

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STATEMENT OF ISSUES

- I. Did the trial Court err in admitting Google Street View images for substantive purposes as opposed to purely demonstrative purposes?
- II. Is Appellant SCDOT charged with constructive notice of any and all potential hazards, on or off their right-of-way, if those hazards have been captured by Google Street View?
- III. Is a self-described personal physical injury a future damage such that presentation to the jury of the mortality tables is appropriate?
- IV. Did Appellant preserve the question of admissibility of prior criminal convictions for purposes of impeachment?

ARGUMENT

I: Respondent's Use of Google Street View Photos for Substantive Purposes Violates Rule 901, SCRE

At trial, Appellant argued against the admission of still Google Street View images of a dead or dying tree not within Appellant's right-of-way, offered by Respondent as images of the tree at fault in the collision, which is the subject of this case. During its case-in-chief, Appellant presented the jury with series of images amounting to a "drive-through," also taken from Google Street View for demonstrative purposes. Respondent asserts Appellant waived any opposition to the still photos by utilizing the same technology. Respondent fails to grasp the critical distinction between evidence offered for demonstrative purposes versus substantive purposes, specifically related to Google Street View images.

As described in Appellant's Brief, Google Street View photos are taken during a process of simultaneous image collection, then stitched together to create a seamless effect, whereby one feels as if they were traveling through a roadway or neighborhood. At trial, Appellant showed the jury the Google Street View "footage" to provide them with a visual of the area and some context for the testimony they were hearing regarding the roadway. This purely demonstrative purpose is consistent with the uses described in the cases cited by Respondent in his Initial Brief. *See Pahls v. Thomas*, 718 F.3d 1210, 1216 n. 1 (10th Cir. 2013)(Court may take judicial notice of a Google generated map and satellite image for purposes of providing geographical context and other "facts which are not controversial"); *U. S. v. Perea-Ray*, 680 F.3d 1179, 1182 n. 1 (9th Cir. 2012)(Court may take judicial notice

of a general location as described on a Google map and satellite image).¹ Appellant offered the Google Street View “drive-through” for demonstrative purposes only, to demonstrate undisputed facts, specifically with regard to the size and shape of the roadway and the environment surrounding Highway 321.

Respondent, however, offered a still frame image taken from Google Street View for substantive purposes, specifically as the sole piece of evidence upon which to prove constructive notice on the part of SCDOT. Respondent utilized a tool on Google Street View to manipulate the “drive-through” as if an individual stopped in the middle of the roadway, turned at a ninety degree angle, and craned their neck at an odd angle to look high into the tree line and observe the tops of the foliage lining Highway 321. Appellant concedes that its inspections of the thousands of miles of roadway in South Carolina do not consist of such inspection, but rather mirror the street-level “drive-through” view generated by the Google Street View process. It is significant that Respondent’s own experts conceded that the dead or dying tree identified as the subject tree would have been obscured from those traveling the roadway by adjacent sweet gum trees, and would have been most visible to an individual assuming the unnatural posture of the Google Street View image:

“[T]here wasn’t much in front of this tree going toward the road side. The deciduous trees, which the majority were sweet gums, were to the right and left of the tree.”

(R. p. 208, lines 2—4). While deciduous trees lose their leaves in fall and winter,

¹ See also *Carter v. National Railroad Passenger Corporation*, 2013 WL 3300495, Not reported, Case Number C-13-00809-JCS (US Dist. Ct., ND California, 2013) (Court may take judicial notice of a Google Earth photo for purposes of measuring distance, when the accuracy of the Google image is not in dispute and comports with other evidence of distance offered).

the dead or dying tree was not simply standing alone, but was tucked away, several feet off the right-of-way, on private lands, in an area that was not readily observable by the normal means of inspection. Appellant's expert Mark Arena further conceded to using the Google Street View image to identify where the accident took place, basing his conclusions on a void in the tree line, also only observable from the odd position assumed by the Google Street View photo. (R. p. 194, lines 5—8).

Appellant does not require the development of any new or onerous application of Rule 901, SCRE. Rather, Appellant asserts the trial court erred in failing to require some testimony that the image, used to substantively prove Respondent's case, is a fair and accurate representation of what Respondent purports it to be. Respondent could not provide the trial court with testimony that the image is consistent with what an average traveler, or SCDOT employee, would observe from their vehicle while traveling down Highway 321, as the image is generated from a singular perspective not available to any person traveling the roadway in a normal vehicle. The image is reserved for those manipulating a piece of software, seeking to generate a certain angle of a certain tree at a certain time of year. (R. p. 56, lines 8—22). Not a single witness testified the still selected frame from Google Street View accurately depicted the scene or tree at or about the time of the incident. Appellant asserts that this unique image, offered for substantive purposes, was improperly admitted without authentication, as the trial court did not require any testimony regarding the manufacturing of the photo. The trial court did not inquire as to who took the photo, nor what means were used to capture the image, when the photo was taken, nor when the particular image was downloaded

and generated. *See U. S. v. Gorny*, 2014 WL 4262178, August 27, 2014, Criminal No. 13-70, U. S. District Court W.D. Pennsylvania. (Insufficient foundation laid for admission of Google Street View photos without testimony regarding who took the Google photo or justification of the time/date stamp on the image).

Appellant does not argue that Respondent is required to produce a Google executive or engineer, but rather, in this case, where constructive notice is necessarily at issue, Respondent must produce a witness to confirm that SCDOT "in the exercise of reasonable care, should have known" of the hazard. Appellant asserts that some witness with knowledge of the process and knowledge of the steps taken to manipulate the program to generate the image must authenticate the image prior to admissibility, and provide the jury with the information it needs to evaluate the image, especially when the image is offered as evidence in a substantive manner. Couple the lack of proper authentication with the testimony of the landowner and adjacent landowner who never saw the tree at issue, and it becomes evidence that SCDOT in fact did not and could not have constructive notice of the tree. (R. p. 273, line 7—p. 277, line 22; p. 395, line 9—p. 397, line 20).

The trial court failed to properly evaluate the Google Street View image and improperly balanced the testimony offered to authenticate the image by Respondent. This failure amounts to an abuse of discretion for which Appellant is entitled to a new trial.

II: The South Carolina Tort Claims Act Requires More than Retrospective Evidence of an Unobservable and Hidden Hazard's Existence Prior to an Accident to Establish Constructive Notice

In Respondent's brief, over five pages are dedicated to outlining the testimony of David Brandyburg, SCDOT Resident Maintenance Engineer, who provided copious evidence that SCDOT had been in the area, doing routine maintenance and clearing the roadway of hazards, as required in the SCDOT manuals and procedures. It is not the case that Appellant neglected this roadway or failed to adhere to its internal policies and procedures. Respondent did not present any expert testimony that SCDOT's own inspection policies were defective, or that SCDOT was negligent in performing its inspections and maintenance of the relevant portions of Highway 321. Respondent asserts the fact that SCDOT was actively maintaining the roadway, as evidence from which constructive notice can be gleaned. However, Respondent's case is entirely premised on a misunderstanding of the term "constructive notice" and an expansive and improper view of what SCDOT "should have known" prior to the collision in this case.

Constructive notice can certainly be demonstrated by circumstantial evidence. *See Strother v. Lexington Cnty. Recreation Comm'n*, 332 S.C. 54, 65, 504 S.E.2d 117, 123 (1998) (Notice implied through circumstantial evidence is called "constructive" notice.). However, Appellant asserts that constructive notice cannot be proven after the fact by retrospective evidence of a hidden hazard that was undiscoverable by the normal means of inspection.

Appellant SCDOT is charged with maintaining roadways across the state, which includes an unending process of identifying and removing dead or dying trees from both the SCDOT right-of-way and private property approaching the right-of-way. If Respondent's position is adopted, SCDOT is presently on constructive notice

of every dead or dying tree on every roadway in the entire state if an image of the dead or dying tree can be identified on Google Street View or Google Earth, even after the tree falls and causes injury. This essentially makes SCDOT the guarantor of every dead or dying tree in the State. Constructive notice simply does not mean strict liability for SCDOT if a tree falls and injures someone. Constructive notice must be proven and to do so Respondent must have provided some admissible evidence that others had seen the tree or that the tree should have been seen by an inspection. Appellant reasserts its argument that the admission of the manipulated still frame Google Street View was improper.

In Respondent's view, the fact that a tree may die over a period of years creates a presumption that SCDOT has sufficient time to ferret out these hidden hazards and remove them, regardless of the circumstances that may operate to conceal the hazard. The standard, however, is not simply a measure of time, but whether or not, "a condition has existed for such a period of time that [a governmental entity], in the use of reasonable care should have discovered the condition." *Major v. City of Hartsville*, 410 S.C. 1, 3-4, 763 S.E.2d 348, 350 (2014).

It is insufficient to establish a length of time in which the hazard might have existed, but rather, Respondent must demonstrate that SCDOT "should have" discovered the condition and failed to do so. In this case, SCDOT did not own or maintain the subject tree. SCDOT did not discover the tree through the normal means of inspection, such inspections having been thoroughly completed as outlined by Respondent's own brief. While SCDOT is aware that trees tend to die

and decay regularly, SCDOT cannot foresee which trees are fated to fall, and therefore is not in any position to anticipate or predict which trees require removal at any given time. *See Fickling v. City of Charleston*, 372 S.C. 597, 610, 643 S.E.2d 110, 117 (Ct. App. 2007)(Factors to consider in evaluating constructive notice include observation by governmental entity employees, length of time hazard exposed, and responsibility for maintenance.). *See also Hawks v. City of Westmoreland*, 960 S.W.2d 10 (Tenn. 1997)(Ownership of the instrumentality and a duty to maintain are factors to consider in evaluating constructive notice.)

Unreported, unobservable, obscured, and unnoticed they may be, Respondent's view makes SCDOT the guarantor of those latent, unseen hazards. While constructive notice may be proven by circumstantial evidence including ownership, a failure of inspection, or foreseeability, none of these circumstances can be proven here.

The South Carolina Tort Claims Act contains an exception for instances where a state entity was not, despite the exercise of reasonable care, on notice of a hazard. §15-78-60(15), *S.C. Code of Laws*. The Tort Claims Act is to be liberally construed in favor of immunity. *See* §15-78-20(f), *S.C. Code of Laws*. If the exception is liberally construed in favor of immunity, constructive notice cannot be expanded to apply in this case, as a matter of law.

Respondent confuses Appellant's argument in favor of discoverability, as opposed to a hidden and undiscoverable hazard, with a standard of actual notice. While perhaps a subtle distinction, Appellant asserts that Respondent must prove

the tree could have been and should have been discovered by reasonable and customary inspection. In other words, Respondent must demonstrate an actual reason SCDOT "should have known" of the hazard. In this case, there is no discernable reason, apart from the disputed Google Street View photo, that SCDOT could have known, much less *should* have known, of the tree's death and decay.

If the Court adopts Respondent's position as the standard of care, then SCDOT must employ Google Street View in its regular inspections and have human eyes review everything the Google cameras and satellites can capture from their perch. If SCDOT "should" have knowledge of all things observed by Google Street View or Google Earth, then constructive notice as a concept is meaningless, and the Tort Claims Act defense is completely ineffective in this context. As the legislature has directed the Court to construe this exception liberally in favor of immunity, such a result would be improper.

III: Expert Testimony is Required to Prove Injury Permanency, as a Prospective Injury and an Element of Future Damages

Respondent asserts that future pain and suffering are not an element of future damages, claiming future damages only include future medical care or future lost wages. Patently, a personal injury case that makes a claim for future pain and suffering requires a prospective evaluation of a plaintiff's future. Appellant is not arguing semantics, but Appellant takes issue with the implications to the jury the publication of the mortality tables necessarily makes.

Appellant reasserts its argument that future pain and suffering in this case were likely linked to Respondent's underlying degenerative spine condition. Appellant further reiterates that expert testimony regarding injury permanency, causation, and the likelihood of ongoing pain and suffering require expert testimony in this case, where an underlying injury may have been accelerated by the car wreck which is the subject of this action. See *Haltiwanger v. Bari*, 258 S.C. 27, 186 S.E.2d 819 (1972) (Expert testimony of injury permanency is sufficient to warrant future damages for pain and suffering.)

"In a personal injury action, the plaintiff must recover for all injuries, past and prospective, which arose and will arise from the defendant's tortious activity. Thus, recovery must be had for future pain and suffering, and for the reasonable value of medical services and impaired earning capacity, to the extent that these injuries are reasonably certain to result in the future from the injury complained of." 22 Am.Jur. Damages § 27. In this case, Respondent sought and was awarded future damages for future pain and suffering. Respondent's own testimony was insufficient as a matter of law to amount to a "reasonable certainty" as to either causation or permanency. Respondent's treating physician likewise did not testify future pain was more likely than not to be related to injuries suffered in this incident. The physician could not differentiate between pain caused by natural processes versus the injury suffered here. (R. p. 391, line 1—p. 393, line 17). For this reason the trial court committed reversible error in permitting the jury to consider the mortality tables.

IV: Appellant Properly Provided the Trial Court Documentary Evidence of Respondent's Criminal Convictions and Properly Filed the Appropriate Post-trial Motions Asserting an Abuse of Discretion by the Trial Judge

Appellant timely filed and served a Notice pursuant to Rule 609(a) SCRE to notify Respondent of its intention to use prior criminal convictions for purposes of impeachment only prior to trial. (R. pp. 32—33). At trial, Appellant provided the trial court with copies of the relevant conviction records for review during the hearing on its Motions in Limine, which including a pre-trial request for admission of the criminal convictions, specifically limiting the use of the evidence to Respondent's propensity for truthfulness. (R. pp. 30—31; p. 65, line 15—p. 69, line 21). After trial, Appellant again raised the issue of prior criminal convictions, as evidence of a lack of truthfulness in the context of the case as a whole, as Respondent provided the only substantial testimony of injury, permanency, pain and suffering, and the circumstances of the accident at issue. (R. pp. 34—38; p. 310, line 3—p. 324, line 2). Again, on the Notice of Appeal, Appellant raised the Rule 609 inquiry, and stated the trial court failed to properly balance the issues, giving more weight to the potential for prejudice than to the relevance of Respondent's propensity for dishonesty. *See Notice of Appeal.*

Respondent takes the position that Appellant failed to proffer the evidence. This is incorrect. Appellant provided the court with the evidence, which the court reviewed, prior to granting its verbal ruling denying the admission of the criminal convictions. (R. p. 66, line 18—24). The trial court having reviewed the proffered

the documentary evidence and having received the court's ruling on inadmissibility, Appellant had no further obligation to re-offer the evidence at a later stage of the trial. The case law cited by Respondent in his brief is misleading. Those criminal law cases require an unsuccessful party, having moved in limine to *exclude* certain evidence, to repeatedly object to its admission at each stage of the trial. In the event a party's motion to exclude is successful, the nonmoving party is similarly charged with the requirement to continue to attempt to admit the evidence, if circumstances warrant a reevaluation of the proffered evidence.

In this case, Appellant's Rule 609 pre-trial motion was not a motion to exclude, but rather a motion to seek permission to utilize the prior criminal convictions affirmatively. As there was no additional evidence to consider as the trial developed, there was no reason to re-offer the evidence for additional evaluation, especially in light of the court's ruling. Had Appellant attempted to raise the prior criminal convictions at a later time, Appellant may have created a mistrial situation. The pre-trial ruling was the final ruling, and the evidence was not admitted. In this instance, Appellant's motion was not a motion to exclude, contingent on the development of the trial, but rather a motion to admit, pursuant to Rule 609. No additional review was necessary and would have been contrary to the court's pre-trial ruling on the documentary evidence, which was fully reviewed prior to the court's ruling.

Respondent argues that Appellant failed to raise the appropriate standard, by failing to specifically state the applicability of Rule 403 and the abuse of discretion standard. Rule 609(a), raised by Appellant at every stage of the proceeding,

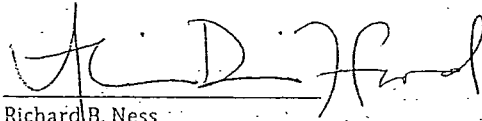
incorporates Rule 403 by reference. Appellant argues the trial judge failed to give proper weight to the relevance of the misrepresentation regarding the criminal convictions. While Appellant did not raise Rule 608(b)(1) SCRE below, Appellant contends the factors offered in a Rule 608(b) analysis are the same factors weighed by the Court in the Rule 609 context, as these rules center on the admissibility of evidence regarding the propensity for truthfulness. As early as the pre-trial notice, Appellant sought to admit the evidence solely for impeachment purposes.

Appellant takes the position the trial court failed to balance the proper considerations below, ignoring the weight necessarily placed on Respondent's own testimony, given the slight evidence presented at trial. This prejudicial failure to properly analyze the misstatements regarding criminal convictions amount to 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 decisions of the trial court should be reversed and a new trial granted.

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July 9, 2015

IN THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM ORANGEBURG COUNTY
Court of Common Pleas

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SC Court of Appeals

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 Reply Brief of Appellant complies with Rule 211(b), SCACR.

July 8, 2015

Bamberg, South Carolina

Respectfully submitted,



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**THIS OPINION HAS NO PRECEDENTIAL VALUE. IT SHOULD NOT BE
CITED OR RELIED ON AS PRECEDENT IN ANY PROCEEDING
EXCEPT AS PROVIDED BY RULE 268(d)(2), SCACR.**

**THE STATE OF SOUTH CAROLINA
In The Court of Appeals**

William Breland, Respondent,

v.

South Carolina Department of Transportation, Appellant.

Appellate Case No. 2014-000168

Appeal From Orangeburg County
Edgar W. Dickson, Circuit Court Judge

Unpublished Opinion No. 2016-UP-089
Heard January 7, 2016 – Filed February 24, 2016

AFFIRMED

Richard B. Ness, Norma Anne Turner Jett, Alison Dennis
Hood, and Adam Christopher Ness, all of Ness & Jett,
LLC, of Bamberg, for Appellant.

John S. Nichols and Blake Alexander Hewitt, both of
Bluestein Nichols Thompson & Delgado, LLC, of
Columbia, and J. Christopher Wilson and Daniel W.
Luginbill, both of Wilson & Luginbill, LLC, of Bamberg
for Respondent.

PER CURIAM: The South Carolina Department of Transportation appeals several of the circuit court's evidentiary rulings, including the court's admission of a Google Street View photograph and life expectancy tables, and the court's exclusion of the plaintiff's criminal record. We affirm pursuant to Rule 220(b), SCACR, and the following authorities:

1. As to the admission of the Google Street View photograph: *Proctor v. Dep't of Health & Envtl. Control*, 368 S.C. 279, 312-13, 628 S.E.2d 496, 514 (Ct. App. 2006) ("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." (citations omitted)); *id.* at 313, 628 S.E.2d at 514 ("The trial court's decision will not be reversed on appeal unless it appears the trial court clearly abused its discretion and the objecting party was prejudiced by the decision."); Rule 901(a), SCRE (addressing the authentication of evidence sought to be introduced at trial and stating "[t]he requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims"); *Deep Keel, LLC v. Atl. Private Equity Grp., LLC*, 413 S.C. 58, 64-65, 773 S.E.2d 607, 610 (Ct. App. 2015) ("'[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.'" (alterations in original) (quoting *United States v. Hassan*, 742 F.3d 104, 133 (4th Cir. 2014))); *id.* at 65, 773 S.E.2d at 610 ("The authentication requirement does not demand that the proponent of . . . evidence conclusively demonstrate [its] genuineness . . .") (alterations in original) (quoting 29A Am. Jur. 2d Evidence § 1045 (2008))).

2. As to the issue of constructive notice: *Ford v. S.C. Dep't of Transp.*, 328 S.C. 481, 487, 492 S.E.2d 811, 814 (Ct. App. 1997) ("In South Carolina, the Department of Transportation can be held liable for damages caused by the fall of a tree standing within the limits of or in close proximity to a public highway. Liability depends on whether the Department knew, or in the exercise of reasonable care should have known, that the condition of the tree would make it hazardous to persons or property in the immediate vicinity."); *id.* ("This liability arises from the Department's duty to use reasonable care to keep streets and highways within its control in a reasonably safe condition for public travel."); *Wimberly v. Winn-Dixie Greenville, Inc.*, 252 S.C. 117, 123, 165 S.E.2d 627, 630 (1969) (Bussey, J., dissenting) ("When liability of a defendant, if any, is predicated upon constructive notice, . . . the instances are, indeed, rare in which a plaintiff can

prove constructive notice by other than circumstantial evidence . . . ; *id.* ("The pivotal question . . . is whether there was evidence from which the jury might reasonably infer that the defendant, by the exercise of reasonable diligence, should have known of the hazard . . . which caused the injury to the plaintiff.").

3. As to the circuit court's charging the life expectancy tables: *Johnston v. Aiken Auto Parts*, 311 S.C. 285, 288, 428 S.E.2d 737, 739 (Ct. App. 1993) ("A trial judge may properly charge the life expectancy tables to the jury in a personal injury action when there is evidence of 'permanent injury.'"); *id.* (affirming the trial court's charging the life expectancy table when plaintiff testified his injured knee had "never gotten right" and was too badly damaged to receive a prosthesis); *Wilder v. Blue Ribbon Taxicab Corp.*, 396 S.C. 139, 148, 719 S.E.2d 703, 708 (Ct. App. 2011) ("The amount of damages suffered in a personal injury action is a question for the fact-finder. Future damages are generally recoverable in personal injury actions as long as the damages are reasonably certain to result in the future from the injury." (citations omitted)); *id.* (affirming the jury's award of future damages when the plaintiff testified "she continued to experience pain nearly three years after the accident").

4. As to the circuit court's exclusion of Breland's prior criminal convictions: *State v. Black*, 400 S.C. 10, 16, 732 S.E.2d 880, 884 (2012) ("The admission of evidence concerning past convictions for impeachment purposes remains within the trial judge's discretion, provided the judge conducts the analysis mandated by the evidence rules and case law."); *id.* ("An abuse of discretion occurs when the trial court's ruling is based on an error of law or, when grounded in factual conclusions, is without evidentiary support."); *State v. Colf*, 337 S.C. 622, 626, 525 S.E.2d 246, 248 (2000) (noting the Fourth Circuit has explicitly held evidence of remote convictions should only be admitted for impeachment purposes in exceptional circumstances); *id.* at 626-27, 525 S.E.2d at 248 ("Rule 609(b) establishes a presumption against admissibility of remote convictions, and the State bears the burden of establishing facts and circumstances sufficient to substantially overcome that presumption." (citation omitted)).

AFFIRMED.

FEW, C.J., and KONDUROS and LOCKEMY, JJ., concur.

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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:

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.

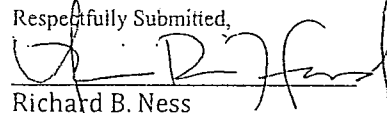
This result is improper under South Carolina law, and in derogation of the plain language of the statute. It is imperative that the Court grant a rehearing or a rehearing *en banc* to reconsider this Decision.

CONCLUSION

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

Bamberg, S.C.
3/10, 2016

Respectfully Submitted,



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Attorneys for Appellant SCDOT

The South Carolina Court of Appeals

William Breland, Respondent,


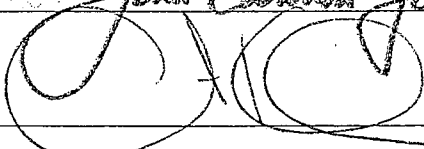
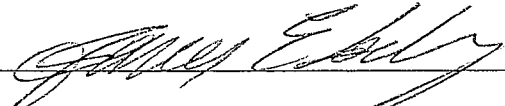
v.

South Carolina Department of Transportation, Appellant.

Appellate Case No. 2014-000168

ORDER

After careful consideration of the petition for rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing. Accordingly, the petition for rehearing is denied.

 C.J.
 J.
 J.

Columbia, South Carolina

cc:

J. Christopher Wilson, Esquire
Richard B. Ness, Esquire
Alison Dennis Hood, Esquire
Norma Anne Turner Jett, Esquire
John S. Nichols, Esquire

FILED

June 10, 2016 *AS*

Blake Alexander Hewitt, Esquire
Adam Christopher Ness, Esquire
Daniel W. Luginbill, Esquire
The Honorable Edgar W. Dickson