THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM ORANGEBURG COUNTY
Court of Common Pleas

Edgar W. Dickson, Circuit Court Judge

Opinion No. 2016-UP-089 (S.C. Ct. App. filed Feb. 24, 2016)

Appellate Case No. 2016-0001438

William Breland, ... Respondent,

v.

South Carolina Department of Transportation, ... Petitioner.

RETURN

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COUNTER-STATEMENT OF THE QUESTIONS PRESENTED

I. Is this case appropriate for review by this Court?

II. Did the Court of Appeals properly affirm the trial court's discretionary decision to admit the "Google Street View" photographs?

III. Did the Court of Appeals properly affirm the trial court's decision to deny SCDOT's motion for directed verdict because there was some evidence from which the jury could find constructive notice of the dangerous condition?

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.

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.

The case was tried September 3, 2013, through September 6, 2013. The jury 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. The Court of Appeals heard arguments on January 7, 2016 and on February 24, 2016 issued its opinion affirming the judgment. *Breland v. SC Dept. of Transp.*, 2016-UP-089 (S.C. Ct. App. filed Feb. 24, 2016). SCDOT sought rehearing and the Court denied the request on June 10, 2016. This petition for review follows.

ARGUMENTS

SUMMARY OF ARGUMENTS

This Court should deny the SCDOT's Petition for Writ of Certiorari for a number of reasons. First, the Court of Appeals' decision is completely consistent with precedent from this Court and SCDOT has not demonstrated sufficient reason to grant the writ under Rule 242, SCACR. Second, the issues SCDOT present are within the trial court's discretion and SCDOT has not explained how the court abused that discretion. Finally, there is sufficient evidence of constructive notice apart from the "Google Street View" photograph so that SCDOT cannot establish prejudice from any alleged error.

This Court should deny this Petition and instruct the Court of Appeals to remit this matter to the circuit court.

I. THIS MATTER IS NOT APPROPRIATE FOR REVIEW BY THIS COURT PURSUANT TO RULE 242, SCACR

In the Petition for Writ of Certiorari, SCDOT contends that the Court of Appeals' decision appears to conflict with this Court's decision in *Clark v. Cantrell*, 339 S.C. 369, 529 S.E.2d 528 (2000). (Petition, pp. 5-6). SCDOT asserts this Court's review "is imperative...to address this novel question of the evidentiary burdens on proponents of evidence generated from the online Google Street View and Google Earth programs." (Petition, p. 11). The Court should not be persuaded to issue the writ in this case.

Rule 242, SCACR, governs certiorari to the Court of Appeals, and provides, in pertinent part:

(b) Considerations Governing Review. A writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted *only where there are special and important reasons*. The following, while neither controlling nor fully measuring the Supreme Court's discretion or power to grant review in general, indicate the character of reasons which will be considered:

(1) Where there are novel questions of law.

(2) Where there is a dissent in the decision of the Court of Appeals.

(3) Where the decision of the Court of Appeals is in conflict with a prior decision of the Supreme Court.

(4) Where substantial constitutional issues are directly involved.

(5) Where a federal question is included and the decision of the Court of Appeals conflicts with a decision of the United States Supreme Court.

(emphasis added). *See also Poston v. State*, 339 S.C. 37, 528 S.E.2d 422 (2000), *overruled on other grounds Douglas v. State*, 369 S.C. 213, 631 S.E.2d 542 (2006) (a petition for writ of certiorari to the Court of Appeals is a discretionary appeal, not an appeal to which petitioner is entitled as a matter of right).

In its unpublished opinion the Court of Appeals correctly applied relevant and settled precedent of this Court in affirming the trial court's rulings. SCDOT has not demonstrated any "special and important reasons" to grant the Petition and issue the writ to review the Court of Appeals' order in this matter, and no such "special and important reasons" exist in this case.

Furthermore, the case: (1) does not involve a novel question of law; (2) did not contain a dissent in the decision of the Court of Appeals (the Order denying rehearing

was signed by Chief Judge Few, Judge Konduros and Judge Lockemy without dissent); (3) does not involve a decision of the Court of Appeals that is in conflict with a prior decision of this Court; (4) does not involve substantial constitutional issues that are directly involved; or (5) does not include a federal question or a decision of the Court of Appeals that conflicts with a decision of the United States Supreme Court.

Accordingly, this Court should deny the Petition for writ of certiorari, and should instruct the Court of Appeals to remit the matter to the circuit court for further proceedings consistent with the Court of Appeals' decision.

II. THE COURT OF APPEALS PROPERLY AFFIRMED THE TRIAL COURT'S DISCRETIONARY DECISION TO ADMIT THE "GOOGLE STREET VIEW" PHOTOGRAPHS

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." (Petition, pp. 4-11). The Court of Appeals disagreed, and applied settled law of this Court. That decision is correct.

In denying the post trial motions, the trial court noted SCDOT moved *in limine* to exclude the images from Google Earth. (App. p. 8). The images included "street scenes" of the wreck scene and the subject tree at the time the May 2008 Google Street View imagery was produced.

In denying the new trial motion, the trial court held the photographs were properly admitted. (App. pp. 8-9). The court noted "[s]atellite images have become a well-established tool used in everyday situations." (App. p. 9). The court found the jury had

adequate information to judge whether the images were accurate and what Mr. Breland claimed them to be. (App. p. 9). The court also 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. (App. p. 9).

Alternatively, the trial 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. (App. p. 10). These rulings are correct, and the Court of Appeals properly affirmed.

SCDOT frames its argument as if the photographs from Google Street View 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. (Petition, pp. 7-8, 10-11). Neither Rule 901 nor courts around the country require such exacting foundation for admissibility.

Rule 901 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 sought from the Court of Appeals and would now have this Court 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 Street View 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). Cliff Harper, an expert professional land surveyor (App. p. 80, 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 images portrayed. (App. p. 54, l. 4 - p. 58, l. 19; p. 81, ll. 4-7; p. 82, ll. 20-23; p. 407). Harper stated that he uses Google Earth imagery often and finds "Google Earth Street View" imagery to be accurate. (App. p. 58, ll. 17-25; p. 86, l. 17 - p. 87, l. 1; p. 91, ll. 5-14). The location of the decayed tree portrayed in the Google Street View images was accurate within one foot of the stump of the tree that physical evidence on the scene showed caused the wreck. (App. p. 57, ll. 1-19; p. 84, ll. 19-22; p. 87, ll. 2-6; p. 88, l. 17 - p. 90, l. 6; p. 91, ll. 22-24; p. 101, l. 18 - p. 102, l. 3; p. 406). On cross-examination Mr. Harper stated, "I know it's the same spot as the stump. That's what I know." (App. p. 96, ll. 5-6).

Mark Arena, a horticulturist and an arborist (App. p. 187, ll. 1-5; p. 187, l. 21 - p.

188, 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. (App. p. 190, ll. 9-24). Mr. Arena took photographs of the site on June 25, 2013, and reviewed the Google Street View imagery. (App. p. 188, l. 20 - p. 189, l. 5; p. 189, ll. 11-12; p. 197, ll. 15-19; pp. 454-456). When he 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 Street View image. (App. p. 198, ll. 5-8). That void also matched up with the stump he located on his visit in June 2013. (App. p. 197, ll. 9-12).

Moreover, several witnesses, including Mr. Breland, testified that they recognized the stretch of highway identified in the Google Street View imagery as U.S. Highway 321 in the area of the wreck. (App. p. 270, ll. 18-20; p. 282, l. 1 - p. 283, 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.

Some courts have used Google Earth and other online imaging services to buttress their decisions, stating these services (including Google map) 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 images produced by Google as representing what it is they purport to present.

Whether to admit the Google Street View 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 of Appeals applied settled law from this Court and properly affirmed the trial court's denial of SCDOT's motion for new trial on this ground. The Court should deny review of this issue.

III. The Record Contains Evidence of Constructive Notice

SCDOT contends that the *only* evidence Mr. Breland presented to establish constructive notice was the Google Earth Street View, which SCDOT asserts is insufficient as a matter of law. (Petition, p. 11). SCDOT frames the issue as the trial court allowing the Google Street View image to serve as constructive notice, and contends this was the *only* evidence of constructive notice. This Court should reject these arguments.

SCDOT conceded in its brief to the Court of Appeals that the evidence established it had road crews regularly in the vicinity of the tree, but asserted "this factor is largely irrelevant" because in SCDOT's view, surrounding foliage *necessarily* hid the subject tree. (App. Br. pp. 14-15). The jury disagreed, and the Court of Appeals affirmed. This Court should permit that decision to stand.

SCDOT asserts that the trial court's admission of the Google Street View of the dead tree "effectively placed Petitioner SCDOT on notice of every hazard that may have been captured by the Google Street View or Google Earth process, an unprecedented expansion of liability on the part of the state, and an impermissible deviation from the intent of the legislature." (Pet. p. 11, 12, 13). SCDOT claims it will be made "strictly liability for maintaining the thousands of miles of South Carolina roadways, regardless of whether or not hidden, obscured, hazards are observable by the traditional exercise of reasonable care." (Pet., p. 13). The Court should not be persuaded by these arguments.

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. (App. p. 275, l. 25 - p. 276, l. 4; p. 276, ll. 13-14). Therefore the issue was 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. The jury, the trial court, and the Court of Appeals all found that there was evidence of constructive notice and a failure to correct the defect.

In the recent case of *Major v. City of Hartsville*, this 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.").

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. Mr. Harper stated he measured the location of the tree to be 197.3 feet from the edge of the pavement at a neighboring driveway. (App. p. 84, ll. 8-11). From the stump to the center line of the roadway was 42.17 feet. (App. p. 85, ll. 17-18, 23). The pieces of the tree added together were enough to reach the center line of the roadway from the stump. (App. p. 85, l. 24 - p. 86, l. 1; p. 99, ll. 10-13). The stump was 4.67 feet from the edge of the SCDOT right-of-way. (App. p. 86, ll. 5-7; p. 99, 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 Mr. Brandyburg, the Resident Maintenance Engineer for the central portion of Orangeburg County, as an adverse witness under Rule 611, SCRE. (App. p. 114, ll. 4-7, ll. 20-22; p. 150, l. 11 - p. 151, l. 1). The central portion of Orangeburg County includes the area on U.S. Highway 321 where the wreck occurred. (App. p. 114, l. 23 - p. 115, l. 3). Mr. Brandyburg supervises the SCDOT employees who inspect the roadway as part of his job as Resident Maintenance Engineer. (App. p. 125, ll. 14-16; p. 151, ll. 2-7).

Mr. Brandyburg's job includes the maintenance and upkeep of the roads and highways in his area. (App. p. 116, l. 24 - p. 117, 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." (App. p. 117, ll. 2-6; p. 118, ll. 14-17; p. 151, l.

20 - 152, l. 15). Part of these functions is to keep the highway safe for the traveling public who are using the roads and highways. (App. p. 117, ll. 7-14; p. 118, ll. 8-13). Mr. Brandyburg has approximately 75 employees under his supervision, and the number was about the same in 2010. (App. p. 117, l. 23 - p. 118, l. 7).

The employees are supposed to be on the lookout for hazards on the roadway. (App. p. 118, l. 24 - p. 119, l. 1). Once an employee spots debris or trash in the roadway they are supposed to remove it. (App. p. 118, 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. (App. p. 119, ll. 5-9; p. 120, ll. 17-25; p. 122, 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. (App. p. 121, 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." (App. p. 119, l. 10 - p. 120, l. 10; p. 123, ll. 3-6).

These obligations have been the policy and practice of SCDOT since Mr. Brandyburg has been the Resident Maintenance Engineer in Organgeburg. (App. p. 120, ll. 13-16; p. 121, ll. 3-5; p. 122, l. 23 - p. 123, l. 2; p. 417). 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." (App. p. 123, ll. 7-23; p. 475). Mr. Brandyburg described this duty as "important." (App. p. 122, ll. 6-10). He added, "[m]aintaining the roads for safe travel of the public is very important." (App. p. 122, 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. (App. p. 121, 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. (App. p. 121, ll. 22-24). The department contacts the landowner about removing the tree and once they get permission then they remove the tree. (App. p. 121, ll. 12-17, 18-21; p. 152, l. 20 - p. 153, l. 7; p. 177, l. 12 - p. 178, 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." (App. p. 121, l. 25 - p. 122, l. 5).

Mr. Brandyburg identified a general maintenance manual which generally covered his job duties and responsibilities. (App. p. 123, l. 24 - p. 124, l. 2; p. 158, l. 1 - p. 159, l. 20; pp. 415-418). 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." (App. p. 124, ll. 6-12; p. 415).

The SCDOT gives its employees training on looking for these hazards. (App. p. 124, ll. 21-25). The employees are trained in all aspects of their jobs. (App. p. 125, ll. 2-4). The department gives the employees guidelines on "what to look for when [they] look for dead or diseased trees." (App. p. 125, ll. 8-13, 17-20; p. 131, l. 15 - p. 132, l. 2). This includes a tree that appears to be a dead tree, including the tree in the Google Earth photograph. (App. p. 132, ll. 3-22; p. 406).

U.S. Highway 321 is considered a "primary route" and is inspected once every six months. (App. p. 126, l. 23 - p. 127, l. 4; p. 155, 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." (App. p. 127, ll. 13-18). This purpose includes looking for "dead trees or overhanging limbs." (App. p. 127, 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. (App. p. 125, l. 21 - p. 126, l. 9). These employees are supposed to be looking for trees that pose a hazard to the roadway. (App. p. 128, ll. 11-20). The employees do some of these road inspections at night so they can see the visibility of signs and markings. (App. p. 126, ll. 10-13). They do some of the riding road inspections during the daytime. (App. p. 126, ll. 14-16). The employees ride the roadway in both directions. (App. p. 136, ll. 14-16; p. 176, 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." (App. p. 171, ll. 20-22; p. 172, 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." (App. p. 181, l. 25 - p. 182, l. 3). He added, "that's something – a tree you would remove." (App. p. 182, l. 7).

Mr. Brandyburg agreed these riding road inspections are "an important part of the job." (App. p. 126, 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. (App. p. 128, l. 16 - p. 129, l. 12; p. 240, ll. 17-25; p. 130, ll. 9-17; p. 160, ll. 8-15; p. 174, ll. 15-20). The employees are supposed to look low and to look high, including tree tops that are visible to them. (App. p. 130, l. 18 - p. 131, l. 11).

SCDOT keeps records of the employees' activities when they are working near the roadway, including inspecting for hazards. (App. p. 133, ll. 3-11). Each road contains "mile points," which permit the SCDOT to identify where on the road the employee is working. (App. p. 133, ll. 12-22). A "mile point" is approximately 1/100th of a mile, or 52 feet. (App. p. 133, l. 23 - p. 134, l. 4). The wreck in this case occurred between mile point 3.68 to mile point 10.68, around mile point 7.0. (App. p. 134, l. 5 - p. 135, 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. (App. p. 136, ll. 2-13; p. 136, l. 17 - p. 137, l. 3; p. 407). 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. (App. p. 137, ll. 10-24). He 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. (App. p. 138, l. 3 - p. 140, l. 8). In every inspection the employee is supposed to be looking for hazards on the highway. (App. p. 140, ll. 10-14). Mr. Brandyburg stated that in 2009 SCDOT removed 84 standing dead trees and over 200 trees which had fallen in the central area. (App. p. 153, ll. 13-14; p. 176, ll. 16-17; p. 185, ll. 11-16).

Mr. Brandyburg identified numerous work reports covering the subject stretch of U.S. Highway 321. (App. p. 157, ll. 1-4; p. 182, l. 8 - p. 185, l. 10; pp.421-454; p. 160, l. 20 - p. 170, l. 6; pp. 462-474). The reports included the following:

1. In 2008, someone called for work along the highway at mile point 7.56. (App. p. 147, ll. 15-24).

2. On August 12, 2008, an employee performed routine mowing between mile points 4.38 and 9.34. (App. p. 145, l. 25 - p. 146, 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. (App. p. 145, ll. 3-16; ll. 20-24).

4. On March 5, 2009, an employee did regrading on a roadside ditch. (App. p. 144, ll. 15-19).

5. On April 22, 2009, someone called with a problem with a "washout" from a driveway. (App. p. 146, l. 22 - p. 147, l. 6).

6. On July 8, 2009, an employee was doing routine mowing along mile point 4.0 to mile point 9.34. (App. p. 144, l. 20 - p. 145, 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. (App. p. 143, l. 21 - p. 144, 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. (App. p. 140, l. 15 - p. 142, l. 13).

9. On December 29, 2009, an employee cleaned out a ditch and driveway pipe at 7271 Savannah Highway. (App. p. 142, l. 25 - p. 143, l. 20).

These reports involved the area where the tree fell and the wreck occurred. (App. p. 142, ll. 14-23). The employees are supposed to be looking for hazards the entire time they are out there. (App. p. 145, 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. (App. p. 148, ll. 5-13). The only possibilities are that someone did not see the tree or it never got reported. (App. p. 149, 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." (App. p. 132, l. 23 - p. 133, l. 2). He admitted there was no contact made with any landowner about removing the tree that caused Mr. Breland's wreck. (App. p. 180, ll. 12-15). He estimated the tree was about 30 feet from the edge of the road. (App. p. 291, 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. (App. p. 116, ll. 11-17).

Mark Arena. Mr. 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." (App. p. 189, ll. 18-25; p. 190, ll. 18-24; p. 191, ll. 10-18; p. 192, l. 7 - p. 193, l. 5; p. 200, ll. 2-7; pp. 408, 410-412). 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. (App. p. 193, l. 23- p. 194, l. 1; p. 196, ll. 1-20; p. 201, ll. 13-15). Mr. Arena stated the signs of decay would have become obvious to a person. (App. p. 214, ll. 4-11).

Mr. Arena opined that the tree was about 50 feet tall. (App. p. 195, ll. 10-11). He believed the weight of the tree would have been substantial. (App. p. 203, 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. (App. p. 194, 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. (App. p. 195, 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. (App. p. 195, ll. 22-25). Mr. Arena believed the tree broke apart when it fell. (App. p. 205, ll. 12-19). He opined that "a majority of the trunk came down at the same time." (App. p. 207, ll. 15-22; p. 216, 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. (App. p. 214, l. 17 - p. 215, l. 11).

Mr. Arena observed in the Google Earth photograph that other evergreen trees were around the dead tree. (App. p. 196, l. 21 - p. 197, l. 2). The deciduous trees around the dead tree would have lost their leaves in the late fall and winter time. (App. p. 197, 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." (App. p. 212, ll. 2-4).

Wade Reed. Mr. Reed is Mr. Breland's friend and was in the van when the collision occurred. (App. p. 217, ll. 23-24). Mr. Breland was driving and Mr. Reed was in the passenger seat. (App. p. 218, ll. 2-4). He identified the area where they hit the tree. (App. p. 219, ll. 6-23; pp. 458-459).

Mr. Reed stated they were proceeding south in the nighttime on U.S. Highway 321. (App. p. 220, ll. 13-21). A vehicle approached them flashing its lights to warn them of something. (App. p. 220, l. 22 - p. 221, l. 1; p. 223, ll. 5-10; p. 229, ll. 7-8). Mr.

Breland slowed down. (App. p. 223, ll. 20-21). They were suddenly upon the tree in the roadway and Mr. Breland "snatched the wheel to the left to avoid it." (App. p. 221, ll. 3-7; p. 222, ll. 3-4, 19-24; p. 223, ll. 22-24). The van hit the tree and went over the tree, proceeding down the roadway 10 to 12 yards. (App. p. 224, ll. 1-7; p. 228, ll. 1-7). The airbags in the van were deployed. (App. p. 224, ll. 8-13). Although the van was damaged on the right front passenger side it was still driveable. (App. p. 224, ll. 17-24).

Mr. Breland called "9-1-1." (App. p. 225, ll. 8-9). Within about 15 minutes the Neeses Fire Department arrived and a rescue squad came from Norway. (App. p. 225, ll. 16-25). A state trooper also came to the scene. (App. p. 226, ll. 2-3; p. 228, ll. 12-14; p. 231, ll. 3-16). The fire department moved the tree from the roadway. (App. p. 226, ll. 9-11; p. 230, l. 23 - p. 232, l. 10; p. 233, l. 8 - p. 235, l. 16; p. 236, l. 24 - p. 237, l. 12).

Mr. Reed stated they struck a pine tree. (App. p. 227, ll. 2-11). The tree lying in the roadway had no bark, no limbs, and no pine needles. (App. p. 227, ll. 16-25).

Mr. Breland. Mr. Breland stated that he saw an approaching truck flashing its lights. (App. p. 241, ll. 21-23; p. 242, ll. 2-5). Mr. Breland began to slow down. (App. p. 242, ll. 8-9). As he began up a hill he saw a tree lying in the roadway. (App. p. 242, ll. 11-12, 19-21). Mr. Breland tried to dodge the tree but could not. (App. p. 242, l. 22 - p. 243, l. 6). The airbags deployed. (App. p. 243, ll. 6-7; p. 268, l. 23 - p. 269, l. 4). Once the vehicle stopped Mr. Breland called "9-1-1." (App. p. 245, ll. 17-19). A state trooper and two fire department vehicles came to the scene. (App. p. 245, l. 22 - p. 246, l. 1; p. 267, l. 25 - p. 268, l. 19). The fire department employees cut the tree up and moved it out of the roadway. (App. p. 246, ll. 2-3; p. 269, 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. (App. p. 247, l. 1 - p. 248, l. 5). The van was driveable. (App. p. 248, ll. 9-10).

After he got home, Mr. Breland started getting sharp pains in his back, neck, head and arms. (App. p. 249, ll. 19-24). He also experienced numbness. (App. p. 250, 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. (App. p. 251, ll. 3-10).

Mr. Breland went back to the scene within 30 days of the wreck and located the tree that he hit. (App. p. 244, l. 2 - p. 245, l. 9; pp. 408, 457-458).

Jimmy Miller. Mr. Miller worked for the Neeses Fire Department and responded to a call from Mr. Breland about the wreck. (App. p. 103, ll. 7-9; p. 113, ll. 9-18, 13-17; p. 460). The Neeses Fire Department got the call at 11:52 p.m. on January 7, 2010. (App. p. 104, ll. 15-21). The call was for "a vehicle accident versus a tree." (App. p. 105, ll. 20-24; p. 107, ll. 14-16; p. 192, 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. (App. p. 104, l. 22 - p. 105, l. 2; p. 105, ll. 11-16; p. 109, l. 16 - p. 110, l. 4). They departed the scene at 12:27 a.m. (App. p. 105, ll. 3-7; p. 111, ll. 20-22). Someone from the Boland Town Fire Department also was at the scene. (App. p. 108, ll. 15-18; p. 111, ll. 10-19; p. 112, l. 21).

Mr. Miller agreed they responded to a wreck of a vehicle with a tree. (App. p. 106, ll. 14-16). He did not know who removed the tree from the road. (App. p. 108, ll. 21-23).

Harold Rutland. Harold Rutland was a volunteer fireman for Bolen Town. (App. p. 284, ll. 20-23). He responded to the call regarding Mr. Breland's collision with the tree. (App. p. 284, l. 9 - p. 285, l. 24). Mr. Rutland found the Ford van had struck a tree that

was lying in the roadway. (App. p. 286, 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. (App. p. 287, ll. 15, 21; p. 288, ll. 7-10; p. 289, ll. 6-16; p. 290, ll. 12-16). This was after the van had hit the tree. (App. p. 290, ll. 4-11). He and several others rolled the tree out of the roadway so no one else could hit it. (App. p. 287, ll. 17-19; p. 288, ll. 6-10).

The testimony outlined above 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.

In the Court of Appeals SCDOT appeared 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. pp. 12, 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.*

The record contained sufficient if not abundant evidence apart from the Google Street View that SCDOT had constructive notice of the hazard posed by the subject tree

but took no steps to remedy that hazard. The Court of Appeals appropriately affirmed the trial court's denial of SCDOT's motions for directed verdict and JNOV on this issue.

SCDOT makes the hyperbolic argument that if the decision is permitted to stand, then "constructive notice swallows up actual notice, and SCDOT becomes strictly liable for maintaining the thousands of miles of South Carolina roadways, regardless of whether or not hidden, obscured, hazards are observable by the traditional exercise of reasonable care." (Petition, p. 13). The Court should not be persuaded by this contention.

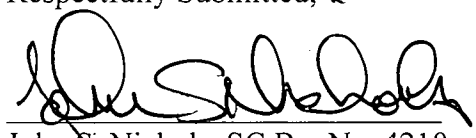
As noted, Mr. Breland presented abundant circumstantial evidence from which the jury could find SCDOT had constructive notice of the dead pine tree. If SCDOT is correct that it takes someone who actually saw the dead tree, then it is SCDOT who advocates a rule where constructive notice is erased from the statute. That is, SCDOT would have this Court read Section 15-78-60(15) as follows: "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) (emphasis and strikeout provided). SCDOT would then *never* be liable unless an eyewitness had seen the defect. But that is not what the statute provides, nor is that what "constructive notice" requires. *Major v. City of Hartsville.*

The Court should reject SCDOT's argument and deny the petition.

CONCLUSION

For the reasons stated the Court should deny the Petition and permit the Court of Appeals to remit the matter to the circuit court.

Respectfully Submitted,



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THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM ORANGEBURG COUNTY
Court of Common Pleas

Edgar W. Dickson, Circuit Court Judge

Opinion No. 2016-UP-089 (S.C. Ct. App. filed Feb. 24, 2016)

William Breland, ... Respondent,

v.

South Carolina Department of Transportation, ... Petitioner.

PROOF OF SERVICE

The undersigned hereby certifies that on the date indicated below she served counsel for the Petitioner with a copy of the *Return to Petition for Certiorari* by mailing copies of the same by United States Mail with first class postage prepaid to the following address:

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