

IN THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM ORANGEBURG COUNTY
Court of Common Pleas

Edgar W. Dickson, Circuit Court Judge

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AUG 25 2016

SC SUPREME COURT

Unpublished Opinion No. 2016-UP-089 (S.C. Ct App.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

Appellate Case Number: 2016-~~0~~001438

William Breland,Respondent

v.

South Carolina Department of Transportation,Petitioner.

REPLY

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ARGUMENT

I. A Writ of Certiorari Should Be Granted To Clarify the Applicability of Rule 901(a), SCRE to Google Street View and Google Earth images Offered for Substantive Purposes.

In his Return to the Petition for Certiorari, Respondent argues the Google Street View images included “street scenes of the wreck scene and the subject tree at the time the May 2008 Google Street View imagery was produced.” (*Return to Petition, p. 5, ll. 16-18*). Respondent claims SCDOT is arguing the images are “unreliable” and SCDOT is demanding an “exacting foundation” prior to admissibility. (*Return to Petition, p. 6, ll. 10-14*). Respondent misstates Petitioner’s argument.

At trial, no other images of the “wreck scene” or “subject tree” were admitted into evidence, save those produced by Google. The accident occurred in January, 2010. (App. p. 16). Respondent seeks to admit the Google images as the only discoverable, meaningful evidence of the existence of a dead or dying tree in the area over the two years preceding the collision. Respondent argues this alone, with no testimony authenticating the image and no testimony that the tree was in fact observable by any means other than the mounted Google Street View camera, amounts to constructive notice on the part of SCDOT.

In this case, whether SCDOT had the ability to observe the existence of the dead or dying tree is *the* central question. Respondent cannot point to any testimony or evidence of the existence of the tree before the accident, apart from the Google Street View photo. The Google Street View image is *the* central, in deed only, piece of

substantive evidence upon which the jury obviously relied in finding SCDOT “should have known” of the existence of the tree.

When a Google Street View image is offered as substantive evidence, Rule 901, SCRE, cannot be disregarded by the trial court. To waive the burden placed on the proponent of a piece of evidence by our rules is to abdicate the gate-keeping function of the trial judge and is the very definition of an abuse of discretion.

Respondent confuses the cumulative geographical evidence offered by the arborist and surveyor of the site of the alleged tree for evidence of constructive notice of the existence of the hazard before the date of the accident. (*Return to Petition, pp. 18-19*). This case does not concern a question of geography. Where the tree stood or where the accident took place are not at issue. Respondent offered ample testimony regarding the events that took place the night of the collision from which a jury is free to conclude Respondent had an accident thereabouts and suffered injuries. Respondent’s recollection is not at issue.

Rather this Petition for Certiorari is premised entirely on a novel question of law, which Respondent’s brief actually clarifies for the Court: In South Carolina, can our trial courts take judicial notice of images, offered as substantive evidence, produced from Google Street View or Google Earth without satisfying the typical burden of Rule 901, SCRE? Respondent argues the trial judge here acted appropriately in doing so, without requiring authentication of the image or the system that produced the image. Petitioner disagrees, and herein, asks the Court to clarify this issue of technological advancement colliding with the traditional rules of evidence.

A. On Judicial Notice

Respondent goes so far as to suggest that Google Street View images and Google Earth images might be admitted based on Rule 201, SCRE, subject to judicial notice. Rule 201(b), SCRE states: “A judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.”

Recently, courts across the country have taken judicial notice of Google Earth and Google Street View images for purely demonstrative purposes of measuring distances or for establishing geographical relationships. *See, on measuring distances, Pope v. Bridge Broom, Inc.*, 770 S.E.2d 702, (N.C. Ct. App 2015), 2015WL1529468; *Wilkins v. Edwards*, 2015WL6470466, (D. Or. 2015), fn. 2; *U.S. v. Perea-Rey*, 680 F.3d 1179 (9th Cir. 2012) fn. 2; *Mortenson v. Bend-La Pine*, 2015WL6124926, (D. Or. 2015), fn. 2. *See, on geographical relationships: Pahls v. Thomas*, 718 F.3d 1210, (10th Cir. 2013), fn. 1; *Rocca v. Den 109 LP*, No. 214CV00538ODWMRW, 2015 WL 4935499 (C.D. Cal. 2015), fn. 1; *People v. Clark*, 406 Ill.App.3d 622, 940 N.E.2d 755, (2010); *People v. Jackson*, 2016 IL App (1st) 141678-U, 2016WL4089141; *Peters v. Riggs*, 2015 IL App (4th) 140043, 32 N.E.3d 49, (2015). Petitioner seeks to be abundantly clear: This is not a case of geography or measurement.

Respondent offers the Google Street View still image as substantive evidence, in fact the only substantive evidence, that the tree was observable by any means prior to the accident. In a constructive notice case, Respondent must demonstrate that SCDOT

“should have known” of the existence of the tree. *See* §15-78-60(15), *S.C. Code of Laws*. The Google Street View still-image is the only evidence that this tree was visibly damaged or dying prior to January 2010. The other evidence offered, which Respondent concedes is circumstantial at best, is retrospective and speculative, all relying wholly on the Google Street View image, without which, Respondent cannot demonstrate notice of any sort.

Respondent has not pointed to a single jurisdiction where trial judges have exercised discretion to take judicial notice of a Google Street View image offered for substantive purposes without first satisfying the burden of authentication. The Petition for Certiorari points to a number of cases where authentication preceded admission of Google evidence, maintaining the traditional application of Rule 901, SCRE. *See United States v. Nava-Arellano*, 2016WL2642156 (9th Cir. May 10, 2016); *Larry Crouch v. John Jewell Aircraft, Inc.*, 3:07-CV-638-CHL, 2016 WL 1178024 (W.D. Kent. March 22, 2016); *United States v. Lizarraga-Tirado*, 789 F. 3d 1107, 97 Fed. R. Evid. Serv. 1190, (9th Cir. 2015). While these cases are not binding on this Court, they are offered as instances where modern courts have been forced to wrangle with the conflicts presented when Google images are offered as substantive evidence, and the reasoning therein can be instructive in this novel question of law in South Carolina. Petitioner contends, the trial court should not be permitted to deviate from our well-settled understanding of the application of traditional authentication rules. Google Street View and Google Earth are simply not resources “whose accuracy cannot reasonably be questioned.” *See Commonwealth of Pennsylvania v. Keefer*, 329 MDA 2013, 2014 WL 109200299 (unreported, non-precedential decision, holding unauthenticated Google Street View

images, lacking in foundation, lack probative value and jury may be misled by unauthenticated Google Street View images which are “fraught with the limits of the technology”).

Petitioner reiterates that it is not proposing a new test, but rather uniform application of the present Rules of Evidence. Any individual with knowledge, could have satisfied Rule 901(a) by testifying that the Google image was consistent with the stretch of Highway 321 where the accident took place on or around the accident, or even in May 2008 when the image was captured. Respondent failed to do so, and instead was permitted to admit substantive evidence without first satisfying the authentication burden. This is reversible error, and Petitioner respectfully requests a Writ of Certiorari be granted.

II. Evidence that an Undiscoverable Hazard Existed for a Length of Time is Not Sufficient to Establish Constructive Notice if the Hazard is Proven to be Undiscoverable by the Normal Means of Inspection

Respondent argues that the capture by the Google Street View cameras of the image of a dead or dying tree within the canopy on Highway 321 necessarily means the hazard was capable of observation by SCDOT for a period of months preceding the accident in January 2010. Respondent misconstrues prior case law regarding the length of time of the existence of a hazard as a factor in considering whether or not circumstances rise to the level of constructive notice.

The South Carolina Tort Claims Act provides for immunity for state entities, like Petitioner, in instances where a state entity is not on notice of a hazard, despite the

exercise of reasonable care. This exception is to be liberally construed in favor of immunity. *See §15-78-20(f), South Carolina Code of Laws.*

Proving constructive notice requires some evidence that the condition or hazard was obvious or recurrent, such that knowledge can be inferred from the circumstantial evidence available. *See Ford v. S.C. Dept. of Transp.*, 328 S.C. 481, 492 S.E.2d 811 (Ct. App. 1997); *Marsh v. S.C. Dept. of Highways and Pub. Transp.*, 298 S.C. 420, 380 S.E.2d 867 (Ct. App. 1989). Constructive notice may be implied when a hazard is so blatant, like a branch growing across and over the highway, or so recurrent, like a pothole that refuses to be filled over time, that the governmental entity must exercise willful avoidance or neglect in order to remain unaware of the existence of a hazard. *See Major v. City of Hartsville*, 410 S.C. 17, 63 S.E.2d 348 (2014).

Voluminous evidence has been generated to demonstrate that SCDOT was actively maintaining the stretch of Highway 321 implicated in the alleged accident. However, no reports, complaints, photographic imagery, or witness statements—in fact no evidence of any kind indicating any prior knowledge of the offending tree, save the Google Street View image—were offered at trial. Respondent’s Reply provides the Court with pages and pages of evidence of due care on the part of SCDOT. (*Return to Petition*, pp. 12-16). No expert testimony was presented at trial of any deviation from the standard of care, either in policy or procedure or practice. This is not a case where SCDOT failed to diligently maintain the roadway as required by policy. Rather, this is a case where the hazard was not alleged to be obvious or recurrent. In fact, the hazard was only subject to observation only retrospectively by means of the Google Street View database, and only after manipulation of the program to produce a favorable view of the canopy and the

alleged offending tree. If this image is sufficient to amount to constructive notice without any authentication that the image is what it purports to be, then SCDOT is presently on constructive notice of every dead tree, concealed or unknown, so long as it has been captured by a Google camera at some remote point in time. The length of time between the captured moment in time represented by the Google image and the date of the alleged accident is irrelevant for purposes of considering constructive notice unless the hazard is also confirmed by some living person to have been obvious, recurrent, or otherwise susceptible to observation by the normal means of inspection.

Respondent argues Petitioner is arguing for actual notice only, and abandoning the applicability of constructive or circumstantial notice altogether. However, it is Respondent who would permit all images captured by the Google Street View or Google Earth cameras to serve as actual, uncontestable, notice of all hazards visible therein, regardless of the fact that no individual observed, or could observe, the alleged hazard before the date this otherwise silent tree in the woods made itself known. There is a temporal component of constructive notice that simply must precede the accident, which is the basis of the complaint.

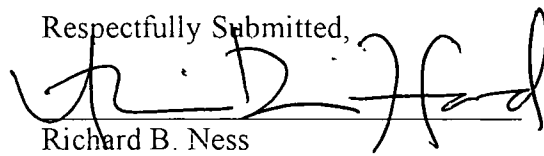
The result in this case is improper under South Carolina law and in derogation of the plain language of §15-78-60(15), S.C. Code of Laws, and the South Carolina Rules of Evidence regarding foundation and authentication of photographic evidence. Petitioner respectfully requests the Court grant its Writ of Certiorari to evaluate this decision, which contradicts the plain language of the Tort Claims Act, and conflicts with prior jurisprudence.

The decision of the lower court effectively placed Petitioner SCDOT on notice of every hazard that may have been captured by the Google Street View or Google Earth processes, an unprecedented expansion of liability on the part of the state, and an impermissible deviation from the intent of the legislature.

CONCLUSION

For the reasons set forth above, petitioner prays this Court consider these matters and grant a Writ of Certiorari.

Bamberg, S.C.
Aug 25, 2016

Respectfully Submitted,

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CERTIFICATE OF SERVICE

This is to certify that I, Alison Dennis Hood, Attorney for South Carolina Department of Transportation, along with Richard B. Ness of Ness & Jett, LLC, have this date mailed via the U.S. Postal Service with first class postage prepaid, a true and correct copy of the within **REPLY BRIEF OF SCDOT**, in the matter captioned *William Breland v. SCDOT*, Appellate Case Number: 2016-0001438 to the following parties, at the following addresses:

John S. Nichols
Blake Alexander Hewitt
Bluestein Nichols Thompson
& Delgado, LLC

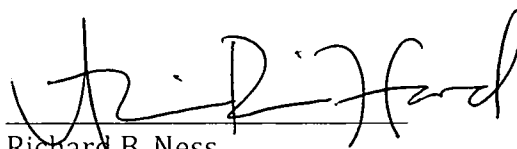
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