The State of South Carolina
In the Court of Appeals

Appeal from Darlington County
Court of Common Pleas

Honorable J. Michael Baxley

Case # 2010-CP-16-0315
Appellate Case # 2014-000134

Bobby Lee Tucker, Sr., ... Respondent

v.

John Doe, individually, and d/b/a Doe Trucking Company..... Appellant

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Respondent's Initial Brief

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Summary of Argument

Bobby Tucker Sr. sued an unknown John Doe driver to recover uninsured motorist benefits. At trial, the jury heard evidence from which it could infer that Tucker crashed his truck after swerving to try to miss an improperly secured, 650 pound block that fell off Doe's flatbed on to I-95 South and sat there, without Doe's warning, for an hour and a half. Representing Doe, Tucker's insurance company agreed that Tucker suffered "grievous, grievous injury" of a kind that they do not talk about "even in the Bible." Trial Tr. 310 ll.18-23.

The jury awarded Tucker $2.5 million in damages and $2.5 million in punitive damages. Verdict Form. The trial judge reviewed the evidence, ruled that it supports the compensatory award, and remitted the punitive damages award to $500,000. Post-trial Order.

On appeal, Doe challenges the sufficiency of the evidence submitted in the S.C. Code Ann. § 38-77-170(2) affidavit and at trial, and raises four issues for the first time on appeal.

None of Doe's arguments justify upending the jury's view of the evidence and the trial judge's confirmation that the verdict is supported by evidence. The Court should leave Tucker with the benefit of the bargain for his uninsured motorist benefits, and affirm.

Statement of the Issues

1. Does Anthony Bernardo's affidavit satisfy § 38-77-170(2)?

2. Is there any evidence that an unknown driver injured Tucker?

3. Is there any evidence that the unknown driver was reckless?

Statement of Facts

The unknown vehicle

Around 10:00 -10:30 pm on April 29, 2010, Donald Wilson noticed a freightliner at a truck stop off of Exit 52 on I-95. Trial Tr. 68 ll.11-25, 71 ll.17-21. It caught Wilson's attention because he formerly hauled loads and had driven a similar truck. Trial Tr. 69 ll.9-17, 74 ll.4-21. The freightliner had a flatbed loaded with pipes, rebar, and what Wilson identified as an object that "looked just like" the block that Tucker later hit and that the tow truck operator found at the crash scene. Trial Tr. 68 l.23 - 69 l.8, 77 l.20 - 78 l.9, 108 l.16 - 109 l.3, 207 l.24 - 208 l.7.

The block was not chained to the flatbed through the hole in its middle but was secured with a single yellow strap running across it. Trial Tr. 78 l.21 - 79 l.2. Unlike the single-strapped block, the pipes and rebar were secured with multiple straps. Trial Tr. 78 ll.5-16. Other straps and chains remained on the truck. Trial Tr. p. 78 l.17.

It occurred to Wilson that using a single strap across the block could be a problem. Trial Tr. 78 l.21 - 79 l.6. He explained, "And, well, you've got a lot of them out there running them flatbeds, and if you stop in time, man, the stuff will come off of them . . . Because if that metal ever starts sliding, you're in trouble." Trial Tr. 73 ll.7-12. Tucker's expert agreed that a strap across the block was not adequate to secure it. Trial Tr. 88 l.22 - 90 l.8.

Wilson unsuccessfully tried to contact the freightliner's driver on Wilson's CB before the freightliner left the truck stop and turned on to I-95 South. Trial Tr. 71 ll.22-24, 72 ll.11-15, 79 ll.3-15.

Bobby Tucker Sr.

About the time Wilson saw the single-strapped block, Bobby Lee Tucker Sr. was at his granddaughter's ball game. Trial Tr. 197 ll.19-25. Tucker was then 79 years old with a 50 year old body, and had hauled cars as a trucker for over 45 years. Trial Tr. 192 ll.16-20, 199 ll.10-14. His last vacation was in 1960. Trial Tr. 193 ll.22-23. Throughout these decades, Tucker never had a chargeable accident. Trial Tr. 192 ll.13-15.

Tucker left his granddaughter's ball game to haul two cars to Florida. Trial Tr. 198 l.23-199 l.3. He was rested and ran his truck through a pre-trip inspection. Trial Tr. 198 ll.6-22, 199 ll.23-24. After

the truck passed inspection, Tucker drove to the same truck stop where Wilson saw the freightliner. Trial Tr. 200 ll.16-18. Tucker left there at 12:02 am and, like the freightliner, turned on to I-95 South. Trial Tr. 200 ll.21-25.

The crash

After getting on the interstate, Tucker stayed in the right line and set the cruise control at 68 miles per hour to keep from wearing out his brakes. Trial Tr. 201 ll.5-13. He traveled down I-95 South for 10-15 minutes when the car immediately in front of him hit its brakes and moved into the left, passing lane. As the car moved over, Tucker saw an object ahead of him in the right lane. He too hit his brakes, and tried to swerve over into the left lane, but another car blocked his path. Trial Tr. 202 ll.8-23, 204 ll.3-21, 206 ll.23-25. Tucker hit the object, lost control, and crashed into a pillar for an overpass. Trial Tr. 203 ll.1-14.

Anthony Bernardo was traveling behind Tucker and saw him "suddenly veer[] to the left as if to avoid something in the roadway and in doing so [strike] a cement pillar supporting the overpass." Bernardo March 3, 2011 Affidavit, ¶¶ 1-4. Bernardo pulled his car over so that his headlights would light the scene and waited there until the EMS and Highway Patrol arrived. Bernardo March 3, 2011 Affidavit, ¶¶ 5-6, 8.

The EMS found Tucker pinned to his seat by the steering column. As the EMS was using a jack to remove the steering column from Tucker's chest, Tucker told the first responder that he had hit something in the road. Trial Tr. 157 ll.12-17, 159 l.15 - 160 l.4, 163 ll.2-3, 172 ll.8-21. When later shown a photograph of the block that "looked just like" the one Wilson saw on the flatbed, Tucker testified, "That's what I hit." Trial Tr. 207 l.24 - 208 l.10.

The 650 pound bearing block at the crash scene

The tow trucker operator who helped clean up the crash scene found the block on the right shoulder of the interstate. Trial Tr. 75 ll.2-5, 108 l.16 -110 l.3. It is a 650 pound, cast-metal bearing block with a hole in its middle. Pl.Exs. 22-23; Trial Tr. 68 ll.23-25, 75 ll.2-5. The tow truck operator and another man, working together, could not budge it. Trial Tr. 110 ll.14-17. To move the block, the tow truck operator had to use a front end loader. Trial Tr. 112 l.20 - 113 l.1.

The tow truck operator also testified that the marks that he saw on the road left him "no doubt" that Tucker had hit the block. Trial Tr. 118 l.6 - 120 l.7. Tucker's expert agreed that the impact marks were consistent with the block striking the road where Tucker said the block was before he hit it, and that the scrape marks were consistent with the

block sliding down the road after being hit. Pl.Exs. 8-9 (showing scrape marks). Damage to Tucker's tire rim was also consistent with striking the block. Trial Tr. 79 l.8 - 81 l.23, 84 l.16 - 87 l.3.

Pedestrians are not allowed where the accident occurred. Only vehicular traffic is allowed on the interstate. Trial Tr. 261 ll.9-15.

Given the block's weight, and the prohibition on pedestrians, a DOT engineer testified "I don't know of any way" that the block was where it was unless by a vehicle. Trial Tr. 261 ll.9-22, 262 ll.1-14. He added that it is "not uncommon" for objects to fall off vehicles. Trial Tr. 262 ll.1-14.

Doe did not warn about the fallen block

Doe presented evidence that he did not call 911 after the block fell off his flatbed. Trial Tr. 250 ll.3-8, 251 l.4 - 252 l.13, 255 l.22 - 256 l.6. According to Doe, there was "[n]ot one phone call, not one call, from a passerby or from anyone else either to nine one one or to the highway patrol." Trial Tr. 316 ll.20-22.

Argument

Doe wrongly dismisses as speculation inferences that the jury could draw — and that the trial judge did draw — from the 650 pound block and the other circumstances of the crash. Because the evidence yields

more than one inference, this Court must reject Doe's attacks on the evidence's sufficiency. Doe's remaining attacks were not preserved in the trial court and likewise lack merit.

This Court should thus affirm the judgment for what Doe described as Tucker's "grievous, grievous injury" and for the remitted punitive damages award. Trial Tr. 310 ll.18-23; Post-trial Order.

I. Bernardo's affidavit satisfies § 38-77-170(2).

Automobile insurance policies must cover injuries from unknown drivers. *See* S.C. Code Ann. § 38-77-150 (mandating uninsured motorist coverage); § 38-77-30(14) ("A motor vehicle is considered uninsured if the owner or operator is unknown."). But because the at-fault driver is unknown, the Legislature balanced its mandate that insurance companies cover the injuries with safeguards against fraudulent claims.

Section 37-77-170, S.C. Code Ann., is this balance. It authorizes policy holders to recover uninsured motorists benefits by bringing a suit against the unknown driver. In authorizing the action, the Legislature imposed only three hoops, two of which are not at issue. The injured policy holder must show that the at-fault driver and unknown vehicle remain unknown despite reasonable efforts to identify them. And the accident must be reported to the police within a reasonable time.

Tucker's insurance company stipulated that he satisfied these two elements. Trial Tr. 40 ll.11-23.

The fighting issue is over § 38-77-170(2). It requires that policy holders who are not injured by physical contact with an unknown vehicle show that "the accident must have been witnessed by someone other than the owner or operator of the insured vehicle" who "must sign an affidavit attesting to the truth of the facts of the accident contained in the affidavit." § 38-77-170(2).

Doe's fight does not rest on the statute's text. The affidavit satisfies the text: Bernardo witnessed the accident and attested to it from personal knowledge. Bernardo Affidavit, dated March 3, 2011, ¶¶ 1-6. This distinguishes cases where no one else saw the accident. *Cf. Bradley v. Doe*, 374 S.C. 622, 634, 649 S.E.2d 153, 160 (Ct.App. 2007)("Bradley's affiants had no personal knowledge of the facts of the accident."); *Shealey v. Doe*, 370 S.C. 194, 200, 634 S.E.2d 45, 48 (Ct.App. 2006)(the "affidavits do not attest to facts they perceived.").

Doe instead wants to read into the text three hoops that are not there. The statute does not require that the affiant see the unknown vehicle or fallen object. Such direct evidence is unnecessary; circumstantial evidence suffices. *Gilliland v. Doe,* 357 S.C. 197, 202, 592

S.E.2d 626, 629 (2004), *rev'g* 351 S.C. 497, 570 S.C.2d 545 (Ct.App. 2002).[1] The text likewise does not require that the affidavit be served with the summons and complaint or that the affiant testify at trial. And Doe created these last two hoops just for the appeal.

The Supreme Court recently reversed this Court for reading requirements into a statute that are not found in the text. *Ferguson Fire and Fabrication, Inc. v. Preferred Fire Protection, L.L.C.,* Op. No. 27410 (S.C. Sup. Ct. refiled Aug. 13, 2014)(Shearouse Ad.Sh. No. 32 at 18). Doe wants the Court to repeat the same error here.

A. The affidavit satisfies the governing *Gilliland* standard.

The Bernardo affidavit rests on his direct observation. By testifying that Tucker "suddenly veered to the left as it to avoid something in the roadway," Bernardo described what he saw and so excluded other causes for the crash. Bernardo March 3, 2011 Affidavit, ¶ 4. Tucker did not put on his turn signal and change lanes gradually, or drift over through inadvertence or sleepiness. He veered suddenly. And he did not veer suddenly because a tire blew out or from any other mechanical failure that Bernardo, traveling directly behind him, observed. Tucker

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[1]The *Gilliland* decision is attached as an addendum.

instead veered suddenly as if to avoid something in the road. The inference is that Tucker veered suddenly as if to avoid something in the road because there was something in the road.

This inference is as reasonable as the layers of inferences at issue in *Gilliland.* In that case, an injured motorist claimed that an unknown vehicle ran her off the road. The Supreme Court used the case to resolve the extent to which a § 38-77-170(2) witness must tie an unknown vehicle to an accident. It held:

- the statute is liberally construed such that the witness need not provide a clear answer on causation
- the witness's testimony may be circumstantial
- the normal standard of review applies, requiring the Court to affirm if there is more than one inference or if any evidence supports the trial court's ruling.

Gilliland, 357 S.C. at 199-202, 592 S.E.2d at 627-629.

Applying its holdings, the Supreme Court reversed this Court and reinstated the trial judge's ruling and the jury's verdict. *Id.* at 202, 592 S.E.2d at 629.

The trial judge here rightly ruled that the Bernardo affidavit

satisfies *Gilliland*. Order Denying Summary Judgment, p. 3; Order Denying Reconsideration, p. 2. To attack the ruling, Doe argues that the witness in *Gilliland* saw the unknown vehicle. But this reimposes a requirement that the witness give direct evidence — the very requirement that the Court rejected when it held that circumstantial evidence works too. *Id.* at 202, 592 S.E.2d at 629.

Besides, the witness in *Gilliland* did not actually see the unknown vehicle. She saw headlights. From the lights, she convinced herself that there was another car. 351 S.C. at 499, 502, 570 S.E.2d at 546-548. Even then, she could not say that the car ran the plaintiff off the road or how close it got to the plaintiff's car. 351 S.C. at 502, 570 S.E.2d at 548. She instead saw the headlights "arc through a field" after the accident. 357 S.C. at 199, 592 S.E.2d at 627. The Supreme Court described the arc "as if making a U-turn" to "flee[] the scene." 357 S.C. at 199, 202, 592 S.E.2d at 627, 629. From there, the Supreme Court reinstated the jury verdict because the jury could have inferred that the unknown car fled because its driver caused the accident.

So *Gilliland* rests on layers of inferences. The lights imply an unknown car. The lights' arc implies that the unknown car made a U-turn. The U-turn implies fleeing the scene. And fleeing the scene

implies that the unknown driver fled because he caused the accident.

This is how circumstantial evidence works. By definition, it proves facts indirectly. A fact or chain of facts implies other facts. To work, one only needs enough evidence to draw the inference. *Marks v. Indus. Life and Health Cas.*, 212 S.C. 502, 506, 48 S.E.2d 445, 447 (1948). And ordinary experience and common sense help determine if the inference can be drawn. *Green v. Lilliewood*, 272 S.C. 186, 192, 249 S.E.2d 910, 913 (1978).

Describing how Tucker veered rests on ordinary experience, not mere speculation. It is not uncommon for objects to fall off vehicles. Trial Tr. 262 ll.1-14. Faced with these sudden obstacles, we know how we react and what the reaction looks like. From these experiences, one can infer that Tucker veered suddenly as if to avoid something in the road because there was something in the road.

The inference is not a leap. After all, the tow truck operator found the block and saw the tell-tale marks that left him "no doubt" that Tucker had hit it. Trial Tr. 108 l.16 - 110 l.3, 118 l. 6 - 120 l.7.

One can also infer that the block did not get on I-95 South by itself. Unlike *Bradley*, Tucker did not hit a bag of garbage that a pedestrian could have dropped. *See Bradley*, 374 S.C. at 634, 649 S.E.2d at160.

Tucker was on an interstate, where pedestrians are not allowed, when he hit a 650 pound hunk of metal that required a front-end loader to move. Trial Tr.75 ll.2-5, 112 l.24 - 113 l.1, 261 ll.9-15. As the DOT engineer testified, there was no way that the 650 pound block got there without a vehicle. Trial Tr. 261 ll.9-22.

B. Doe is at odds with the statute's text and context.

Doe's view that the affiant must see the unknown vehicle or object, and so give direct evidence about it, is not only at odds with *Gilliland*. It is also at odds with the statute's text and context.

For context, the Supreme Court held in 1985 that the John Doe statute did not cover injuries from fallen objects. It added, "If it is advisable that the statute be changed, the solution lies within the province of the Legislature." *Davis v. Doe*, 285 S.C. 538, 541, 331 S.E.2d 352, 354 (1985). The General Assembly accepted the invitation and amended the statute two years later. As amended, the statute covers fallen objects if someone else witnesses the "accident." Act No. 166, 1987 S.C. Acts 1122.

In overruling *Davis,* the Legislature could have required that the witness see the object or the vehicle from which the object fell. It did not. As the trial judge aptly noted, "The witness must have witnessed

the 'accident,' not the other vehicle, not the other driver, and not the foreign object." Order Denying Summary Judgment, p. 2.

The Supreme Court then rendered *Gilliland* in 2004, holding that the witness need only provide circumstantial evidence. *Gilliland*, 357 S.C. at 202, 592 S.E.2d at 629. In the decade since, the General Assembly has not seen fit to require more. This shows that direct evidence was not required then and is not required now.

Lastly, if the statute is ambiguous enough to consider Doe's proposed additions, it is ambiguous enough to construe in Tucker's favor. Because uninsured-motorists statutes are remedial, ambiguities are construed to benefit the injured policy holders. *Unison Ins. Co. v. Schmidt*, 339 S.C. 362, 366, 529 S.E.2d 280, 282 (2000). So insurance companies do not get the benefit of the doubt. Their policy holders do.

C. Doe's other attacks on the affidavit are new and lack merit.

Doe next contends that a § 38-77-170(2) affidavit must be served with the summons and complaint and requires the affiant to testify at trial. Neither of these two issues are preserved or persuasive.

1. Doe's extra issues are new.

Appellants may not normally raise issues for the first time on

appeal. *Johnson v. Lloyd,* 407 S.C. 610, 612, 757 S.E.2d 705, 706 (2014). The issue must instead be raised in the trial court with enough specificity to give the trial judge notice of the argument's precise nature. *Bryant v. Waste Mgmt., Inc.,* 342 S.C. 159, 172 n. 27, 536 S.E.2d 380, 387 n. 27 (Ct.App. 2000). Requiring specificity prevents appellants from shifting grounds on appeal. *Id.*

Doe is shifting grounds here. Before now, Doe never argued that Bernardo's affidavits were untimely. Doe recounted when the affidavits were served without arguing that the statute required that they be served any earlier. Doe's Post-trial Memorandum, p. 7.

Before trial, Doe also conceded that the statute did not require Tucker to depose Bernardo and that the jury could hear the case without Bernardo's affidavit testimony. Trial Tr. 40 l.11 - 41 l.24. After trial, Doe argued that Bernardo's failure to testify helped show that the evidence was insufficient. Post-trial Order, p. 3. Doe only now says that Bernardo's failure to testify at trial violated the statute.

Because these issues were never raised, the trial judge never ruled on when the affidavit must be served or whether the statute required Bernardo to testify at trial. So these issues are not properly before the Court. *Johnson,* 407 S.C. at 612, 757 S.E.2d at 706.

2. The extra attacks are lack merit.

These brand new attacks also ignore the statute's text. Section 38-77-170(1) imposes time requirements on a police report, not the § 38-77-170(2) affidavit. Section 38-77-170(2) requires an affidavit, not trial testimony. So Doe is again asking the Court to read words into the statute, skewing the balance that the General Assembly struck.

This case is a poor candidate for the proposed revisions. After his accident on April 30, 2010, Tucker had three years to sue. S.C. Code § 15-3-530(5). He served Bernardo's first affidavit within three months. Bernardo's July 14, 2010 Affidavit. He served the revised affidavit within a year of the accident — and well within the time that Rule 56 gives to serve opposing affidavits. Rule 56(c), SCRCP; Bernardo's March 3, 2011 Affidavit. After that, trial did not start for over two more years. Trial Tr. 1 (showing trial began April 15, 2013).

Had Doe said anything before now, the statute of limitations gave Tucker time to dismiss this action without prejudice and re-serve the affidavit with a new summons and complaint. Had Doe said anything before now, Tucker could have deposed Bernardo to use the deposition at trial or subpoenaed him for trial. And throughout these years, Doe knew from Bernardo's affidavits where to find him — and so had years

to depose him or subpoena him for trial. As it was, however, no one believed that the statute required Bernardo to give more testimony. Trial Tr. 41 l.10-13.

The Court should not undo a jury verdict and the trial judge's rulings about the verdict because Tucker did not offer testimony that his insurance company could have offered just as easily.

II. The jury could infer that the 650 pound block fell into the road because Doe failed to adequately strap it.

Doe next wants this Court to rule that the evidence linking the 650 pound block to the unknown vehicle is not sufficiently probative. The jury viewed the evidence differently, and specifically found that Doe caused Tucker's injuries. Verdict Form. The trial judge agreed that this finding is supported by evidence. Post-trial Order, p. 5.

In an action at law, tried to a jury, the jury gets to determine whether evidence is probative. This Court only corrects errors of law. *Manos v. Nelson, Mullins, Riley & Scarborough, LLP,* 389 S.C. 126, 140-141, 144, 697 S.E.2d 644, 652, 654 (Ct.App. 2010). In determining if there was a an error of law, the evidence — and the inferences that can be reasonably drawn therefrom — must be viewed in a light most favorable to Tucker. If any evidence yields more than one inference, the

Court must affirm. *Steinke v. South Carolina Dept. Of Labor, Licensing and Regulation,* 336 S.C. 373, 386, 520 S.E.2d 142, 148 (1999).

The evidence easily yields more than one inference. Wilson saw the blue freightliner and its flatbed before it turned on to I-95 South. Trial Tr. 71 l.22 - 72 l. 13. On the flatbed was a block that "looked just like" the block that Tucker later hit while driving further down I-95 South and that the tow truck operator found at the crash scene. Trial Tr. 68 l.23 - 69 l.8, 77 l.20 - 78 l.9, 108 l.16 - 109 l.13, 207 l.24 - 208 l.7. It does not take leaps to infer that the block that Wilson saw on the flatbed and the one that Tucker later hit "looked just like" each other because it was the same block.

It is as reasonable to infer that the block fell off the flatbed because it was strapped inadequately. Wilson explained that the block he saw could be a problem because it only had "a strap across it" and not a chain going through it. Trial Tr. 78 l.21 - 79 l.6. Tucker's expert opined to a reasonable degree of certainty that the strap would not keep the block from sliding off as the truck accelerated to interstate speeds and took curves in the road. Trial Tr. 88 l.19 - 90 l.8.

Doe responds by arguing that Tucker's hypothetical question to the expert did not account for the pipes and rebar. This is Doe's third

unpreserved contention in that Doe never objected to the hypothetical's completeness when the question was asked. Trial Tr. 88 l.22 - 89 l. 25. Even if the basis of the opinion is incomplete, a jury can rely on expert opinions that are admitted without objection. *Hanna v. Palmetto Homes, Inc.,* 300 S.C. 535, 536-537, 389 S.E.2d 164, 165 (Ct.App. 1990).

Besides, Wilson never suggested that the pipes and rebar that he saw encircled, anchored, or concealed how the block was secured to the truck. He quite simply explained that he saw that the pipes and rebar were secured with multiple straps while the block only had a single, yellow strap running across it. Trial Tr. 77 l.25 - 78 l.17. Multiple straps may hold pipes and rebar in place as a 650 pound block slides out from under its single strap.

Doe lastly cites cases involving a bag of garbage and a tire to imagine other ways that the block found itself on the interstate. These range from folks heaving the block off an overpass, to walkers pushing the block into the interstate, to a shadowy saboteur who unfastened the strap. The problem for Doe is that none of this is supported by any evidence. Doe is the one speculating without evidence, not Tucker.

Doe's theories also seem more far fetched than the much simpler explanation about the inadequate strap. This case involves a 650 pound

block that couldn't be moved without a front end loader, found where only vehicular traffic is allowed. Trial Tr. 75 ll.2-5, 110 ll.14-17, 112 l.20 - 113 l.1, 261 ll.9-15. The jury could have thus agreed with the DOT engineer that a vehicle had to be involved. Trial Tr. 261 ll.9-22.

This Court's limited standard of review requires it to draw this inference in Tucker's favor.

III. The attack on the recklessness finding is new and lacks merit.

Doe lastly challenges whether the causative violation of an applicable statute is evidence of recklessness. This is Doe's fourth unpreserved attack on the judgment. It is also contrary to South Carolina law, ignores evidence that the § 56-5-4100(A) violation was in fact reckless, and overlooks Doe's separate § 56-5-4100(D) violation.

A. The attack is new.

Tucker used § 56-5-4100(A) and (D) at trial as evidence of Doe's recklessness. Section (A) requires that vehicles be loaded as to prevent any of the load from dropping off. Section (D) separately requires that operators "make every reasonable effort to immediately cause the public highway to be cleaned of such substances" if the load falls and endangers travel upon the highway. S.C. Code § 56-5-4100.

Before now, Doe never hinted that § 56-5-4100 is irrelevant on recklessness. When Doe moved for a directed verdict on recklessness, the trial judge ruled "there is a statute on securing the load, and the requirement of what happens if you lose a portion of your load. . . and there is evidence in this record that statute has been violated in part or in whole." Trial Tr. 244 l.2 - 245 l.2. Doe never spoke up and said that this misapplies a strict liability statute.

Doe likewise never suggested that the court was giving the jury bad law when the court charged on § 56-5-4100 and explained that a violation "may be considered in deciding whether the Defendant was reckless[.]" Trial Tr. 288 ll.8-21, 349 ll.3-23, 359 ll.10-15, 366 ll.13-18.

Doe then submitted a trial brief which states that a statute's violation is "some evidence that the defendant acted recklessly . . .." Doe's Punitive Damages Brief, p. 5, citing *Wise v. Broadway*, 315 S.C. 273, 276, 433 S.E.2d 857, 859 (1993). Doe incorporated this concession into his motion for a jnov. Doe's Post-Trial Memorandum, p. 16 n.6.

Doe lastly never got a ruling on whether § 56-5-4100 is an irrelevant strict liability statute. The trial judge instead cited Doe's concession. Post-trial Order, p. 4 ("Defendants concede that violation of a statute is negligence *per se* and may be considered as evidence of recklessness.").

The court then reviewed the evidence and found that Doe failed to properly secure the block; failed to notice that the block had fallen off; and failed to respond or warn the appropriate authorities of the danger. Post-trial Order, p. 8. "[T]his conduct certainly qualifies as reckless[,]" the court concluded. *Id.*

Doe still argues that his attack is preserved because "the trial court would be required to charge South Carolina law in its current form." Doe's Initial Brief, n. 9. Yet the footnote deals only with Doe's failure to object to the jury charges. Doe does not mention his later concession that a statutory violation is indeed some evidence of recklessness or the trial court's citation to the concession.

Futility sometimes excuses a failure to object contemporaneously. But an appellant can't tell the trial judge that the law is one thing and then tell this Court the exact opposite. Flip-flopping is not allowed. *Bryant,* 342 S.C. at172 n. 27, 536 S.E.2d at 387 n. 27.

B. Doe's change in the law lacks merit.

Doe's futility argument does show that Doe is not asking the Court to apply South Carolina law in its current form. Doe is asking the Court to alter a century-old rule and then apply the change retroactively to undo the jury's verdict and the trial court's post-trial review.

For over a century, the Supreme Court has held that the causative violation of an applicable statute is evidence of recklessness. *See Callison v. Charleston & W.C. Ry. Co.,* 106 S.C. 123, 90 S.E.2d 260 (1916). Over 20 years ago, Justice Chandler considered this rule so fixed that change must come from the General Assembly or the Supreme Court on a motion to overrule precedent. *Wise*, 315 S.C. at 280, 433 S.E.2d at 861. In the decades since *Wise*, neither the General Assembly nor the Supreme Court has limited this rule. The Supreme Court recently reaffirmed it. *Fairchild v. South Carolina Dept. of Transp.*, 398 S.C. 90, 98-102, 727 S.E.2d 407, 412-413 (2012).

Doe argues this needs changing because some statutory violations occur despite the exercise of all possible care. While perhaps true hypothetically, this is not the only inference or even the most reasonable one. A more reasonable inference is that violators are culpable because they knew about the law when they broke it. This prior knowledge of the law is what allows one to infer recklessness. *Callison,* 106 S.C. at 129, 90 S.E.2d at 262.

Now this is inference is not mandatory. Violators remain free to convince a jury that they exercised all possible care or were at most negligent. *Fairchild*, 398 S.C. at 98, 727 S.E.2d at 411. Failing that,

violators may still challenge recklessness during the trial court's post-trial review. *Id.* at 102, 727 S.E.2d at 413.

What violators may not do is say that their violation does not even imply recklessness. *Callison* rejected that view years ago when the court held the inference is permissible because violators are conclusively presumed to know the law before they break it.

South Carolina law also differs from the foreign cases that Doe relies on. In South Carolina, violating the statute on going too fast for conditions is evidence of recklessness. *Fairchild,* 398 S.C. at 97, 727 S.E.2d at 410. So is violating the statute on posted speed limits. *Jowers v. Dupriest,* 249 S.C. 506, 511-512, 154 S.E.2d 922, 924-925 (1967). Violating the statute on stop signs is too. *Austin v. Specialty Transp.,* 358 S.C. 298, 314-315, 594 S.E.2d 867, 875-876 (Ct.App. 2004).

And unlike Kentucky, seat-belt violations are never admissible as evidence in a civil action. S.C. Code Ann. § 56-5-6540(C). This statute shows that the Legislature knows how our courts treat statutory violations in civil actions, and decided to exclude the effect of some violations without touching the century-old rule that admissible statutory violations are evidence of recklessness. Had it wanted to alter or limit the rule, the Legislature could have done so when it recently

overhauled how punitive damages are pleaded and proven. S.C. Code Ann. § 15-32-510 *et. seq.* It did not.

So Doe not only wants this Court to alter a century-old rule that the Supreme Court reaffirmed in 2012. Doe yet again wants the Court to make a change that the General Assembly has not seen fit to make.

1. Doe secured the block recklessly.

This is not the case to overthrow such a venerable rule. The trial court, for example, did not seem to rely on the statutory violation when the court concluded that Doe was reckless in failing to properly secure the 650 pound block. Post-trial Order, p. 8. In reviewing this ruling, the same standard of review that applies to the jury's finding on causation applies to the jury's finding on recklessness.

Recklessness is ordinarily a question for the jury. *Cooper v. County of Florence,* 306 S.C. 408, 411, 412 S.E.2d 417, 418-419 (1991). If any evidence supports the verdict and trial court ruling, this Court must affirm. *Mishoe v. QHG of Lake City, Inc.,* 366 S.C. 195, 200-201, 621 S.E.2d 363, 366 (Ct.App. 2005). If more than one reasonable inference can be drawn, this Court must affirm. *Hollis v. Stonington Dev., L.L.C.,* 394 S.C. 383, 393-394, 714 S.E.2d 904, 909-910 (Ct.App. 2011).

Evidence beyond the statutory violation exists on Doe's recklessness

in failing to secure the load. The block, for example, was not secured to the flatbed through the hole in the block's middle. Pl.Exs. 8-9 (showing hole); Trial Tr. 78 l.21 - 79 l.2. Despite the other chains and straps that were available, it was secured by a single strap running across it. Trial Tr. 78 l.17 - 79 l.15. Tucker's expert explained that the strap could not keep the bearing block from sliding off the rear of the flatbed as the truck accelerated to interstate speeds and took curves in the road. Trial Tr. 88 l.19 - 90 l. 9.

So Doe knew he was hauling a 650 pound block down I-95 South, knew or had to know that a 650 pound block would create havoc if it fell off the flatbed on to the interstate, and yet chose not to use multiple straps or chains — or even strap or chain the block thorough its hole in its middle.

The jury could find that this goes beyond mere inadvertence. The trial judge did. Post-trial Order, p. 8 (concluding that the failure to appropriately secure the block was reckless).

2. Doe's failure to call 911 after the block fell was reckless.

Doe also concedes that recklessness may be inferred when the violator breaches a statute negligently. Doe's Initial Brief, p. 25. This describes perfectly Doe's S.C. Code § 56-5-4100(D) violation. Doe

overlooks this separate provision.

Section 56-5-4100(D) is not a strict liability statute. Rather it requires operators to "make every reasonable effort to immediately cause the public highway to be cleaned of such substances" once a load falls and endangers travel upon the highway. The court charged that this provision "may be considered in deciding whether the Defendant was reckless[.]" Trial Tr. 349 ll.16-23, 359 ll.10-15.

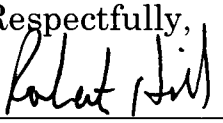
On this point, Doe presented evidence that he never called 911 about the block after it fell off of the flatbed. Trial Tr. 250 ll.3-8, 251 l.4 - 252 l.13, 255 l.22 - 256 l.5. Doe then emphasized to the jury that there was "not one phone call, not one call, from a passerby or from anyone else either to nine one one or to the highway patrol." Trial Tr. 316 ll.20-22. Doe continued, "The Highway Department gets that call if it comes in after hours — no calls." Trial Tr. 317 ll.3-4.

Of everyone who Doe argued failed to call, Doe was the only one statutorily required to try to get the block out of the interstate. The jury could have found that the failure to call 911 violated § 56-5-4100(D), and was in any event reckless. Again, the trial judge did. Post-trial Order, p. 8 (finding recklessness from Doe's "fail[ure]] to respond or otherwise warn the appropriate authorities of this danger.").

Conclusion

Doe's disdain for circumstantial evidence does not justify reading words into § 38-77-170(2), resolving unpreserved claims, or exceeding the standard for reviewing whether any inference or evidence supports a jury verdict. Circumstantial evidence may support a jury verdict for death. *State v. Williams*, 321 S.C. 327, 338-339, 468 S.E.2d 626, 632-633 (1996). It should also support a jury verdict for insurance benefits. The Court should affirm.

Respectfully,



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Supreme Court of South Carolina.
Angel Ann Brown GILLILAND, Petitioner,
v.
John DOE, an unknown motorist, Respondent.
No. 25777.

Heard Dec. 3, 2003.
Decided Jan. 27, 2004.

Background: Motorist brought action seeking coverage for personal injuries she sustained in car accident involving unknown driver. After trial, the Greenville County Circuit Court, Alison Renee Lee, J., awarded actual and punitive damages and denied motion for judgment not withstanding the verdict (JNOV). On appeal, the Court of Appeals, 351 S.C. 497, 570 S.E.2d 545, reversed. Motorist petitioned for review.

Holding: The Supreme Court, Toal, C.J., held that: question whether there was a causal connection between unknown driver and accident was for jury.
Court of Appeals reversed.

West Headnotes

Insurance ⇐2815(4)
217k2815(4) Most Cited Cases

Insurance ⇐2816
217k2816 Most Cited Cases
Question whether there was a causal connection between unknown driver and accident resulting in motorist's injuries was for jury in motorist's action under "John Doe" statute seeking uninsured motorist (UM) coverage; independent witness's affidavit stating that witness saw lights of two cars as cars came around curve, and that, after accident, lights of second vehicle indicated that vehicle was making U-turn sufficiently corroborated plaintiff's testimony that accident resulted when unknown driver pursued her vehicle and she lost control when she attempted to get away from unknown driver. Code 1976, § 38-77-170.
****626*197** Bryan D. Ramey, of Bryan D. Ramey & Associates, P.A., of Piedmont and John S. Nichols, of Bluestein & Nichols, of Columbia, for Petitioner.

***198** Samuel C. Weldon, of Clarkson, Walsh, Rheney & Turner, of Greenville, for Respondent.

Chief Justice TOAL:

Angel Gilliland ("Petitioner") sought coverage for personal injuries she sustained from a car accident involving an unknown driver. At trial, Gayle Norris ("Norris") testified that she saw Petitioner's accident. The parties dispute whether this witness testimony implicated the unknown car's involvement in Petitioner's accident. The jury awarded Petitioner actual and punitive damages. Respondent ****627** made a motion for JNOV, which was denied. The Court of Appeals later reversed and granted the JNOV on grounds that Norris's testimony did not satisfy S.C.Code § 38-77-170 because she was unable to provide evidence that the unknown car caused Petitioner's accident. *Gilliland v. Doe,* 351 S.C. 497, 570 S.E.2d 545 (Ct.App.2002). Petitioner seeks this Court's review of that ruling.

FACTUAL/PROCEDURAL BACKGROUND

At trial, Petitioner testified that on the night of March 29, 1996, as she was leaving a grocery store in Greenville, SC, two young men waved at her from a pick-up

truck. As she drove from the store, the boys began to follow her.

Soon after Petitioner turned north on Berea Drive, the boys began to closely pursue her vehicle. She testified that they "rode her bumper" for a two-mile stretch. Petitioner sped up in a frightened attempt to get away from the boys' truck. As she accelerated, Petitioner lost control of her car, ran off the road, and hit a tree. Upon impact, she suffered substantial bodily injuries and spent nine days in the hospital.

Petitioner testified that the boys' truck never made contact with her car and that the boys "backed off" once she began to lose control.

The investigating officer testified that when he questioned Petitioner at the scene of the accident, she told him that she was run off the road by an unknown vehicle.

During the accident, Gayle Norris was stopped at a nearby intersection. She testified that she saw the lights of two cars ***199** as the cars came around the curve. She also testified that after the accident, she saw the lights of the car behind Petitioner's "arc through a field" as if it were making a U-turn.

After the jury returned a verdict for Petitioner, Respondent made a JNOV Motion, which Judge Alison Lee denied. The Court of Appeals reversed Judge Lee's ruling and granted the JNOV. Petitioner asks the following on appeal:

> **Did the Court of Appeals err when it granted Respondent's JNOV because Norris's testimony did not meet the "independent witness" requirements of § 38-77-170?**

LAW/ANALYSIS

Petitioner argues that the Court of Appeals erred when it granted Respondent's JNOV Motion. We agree.

This Court recently reiterated the standard for appellate review of JNOVs:

> ... [u]nder the state standard the trial court should not grant JNOV where the evidence yields more than one inference. An appellate court may not overturn the decision of the trial court, under the state standard, if there is any evidence to support the trial court's ruling

Rogers v. Norfolk Southern Corp., 356 S.C. 85, 92, 588 S.E.2d 87, 90 (2003). We have also held that "[i]n ruling on motions for directed verdict or judgment notwithstanding the verdict, the trial court is required to view the evidence and the inferences that reasonably can be drawn therefrom in the light most favorable to the party opposing the motions." *Steinke v. S.C. Dep't of Labor, Licensing and Regulation,* 336 S.C. 373, 386, 520 S.E.2d 142, 148 (1999).

The Legislature first enacted a "John Doe" statute in 1963, recognizing an insured's right to receive uninsured motorist coverage for injuries caused by unknown drivers. Since the statute's enactment, the Legislature placed safeguards within the statute to prevent citizens from bringing fraudulent "John Doe" actions. The initial safeguard was a requirement that the unknown vehicle make "physical contact" with the plaintiff's car. Act No. 312, 1963 S.C. Acts 535.

***200** Then in 1987, the Legislature amended the statute once again to allow insureds to bring a "John Doe" action regardless of physical contact as long as an independent person witnessed the accident. Act. No. 166, 1987 S.C. Acts 1122.

In 1989, the Legislature again amended the

statute to require that the independent witness provide the court with a signed affidavit ****628** attesting to the unknown vehicle's involvement in the accident.

This Court must now determine to what extent an independent witness must testify about the causal connection between the unknown vehicle and the accident to satisfy the legislature's intent to protect insurance companies from fraudulent claims in "John Doe" actions.

South Carolina Code § 38-77-170 (Supp.2002) provides:

> If the owner or operator of any motor vehicle which causes bodily injury or property damage to the insured is unknown, there is no right of action or recovery under the uninsured motorist provision, unless:
> (1) the insured or someone in his behalf has reported the accident to some appropriate police authority within a reasonable time, under all circumstances, after its occurrence;
> (2) the injury or damage was caused by physical contact with the unknown vehicle, or **the accident must have been witnessed by someone other than the owner or operator of the insured vehicle;** provided however, the witness must sign an affidavit **attesting to the truth of the facts of the accident** contained in the affidavit;
> (3) the insured was not negligent in failing to determine the identity of the other vehicle and the driver of the other vehicle at the time of the accident.

In *Wausau Underwriters Ins. Co. v. Howser,* 309 S.C. 269, 422 S.E.2d 106, (1992) this Court indicated that the statute required an independent witness to attest to facts that provide at least some causal connection between an unknown driver and the accident. The Court provided that the adequacy of the "causal connection" should pass the same test used in determining whether an injury or damage arose out of the ownership, maintenance, or use of the uninsured vehicle. ***201***Id.* at 275, 422 S.E.2d at 110. The Court explained that this test regarding the sufficiency of the evidence is "something less than proximate cause and something more than the vehicle being the mere site of the injury." *Id.* at 272, 422 S.E.2d at 108 (citing *Continental Western Ins. Co. v. Klug,* 415 N.W.2d 876 (Minn.1987)).

Based on the test set forth in *Howser,* § 38-77-170(2) may be satisfied even though an independent witness fails to provide a clear answer to the question of proximate cause. *Howser* suggests that § 38-77-170 (2) should be interpreted liberally. This Court arguably abandoned a liberal interpretation of § 38-77-170(2) in *Collins v. Doe,* 352 S.C. 462, 574 S.E.2d 739 (2002).

In *Collins,* this Court strictly interpreted § 38-77-170(2). This Court held that while the purpose of the affidavit requirement of § 38-77-170(2) could have been met by witness testimony, the statute specifically required that the plaintiff provide an affidavit of an independent witness.

Here, § 38-77-170(2) provides that an independent witness must attest to "the truth of the facts of the accident." On one hand, *Collins* suggests that we should not apply standards that are not specifically set forth in the statute. On the other hand, the provision in question here is arguably ambiguous (while the affidavit requirement, according to *Collins,* is not); therefore, a strict interpretation of § 38-77-170(2) would undermine the statute's purpose. *See Kiriakides v. United Artists Communications, Inc.,* 312 S.C. 271, 275, 440 S.E.2d

364, 366 (1994)("However plain the ordinary meaning of the words used in a statute may be, [we] will reject that meaning when to accept it would lead to a result so plainly absurd that it could not possibly have intended by the Legislature or would defeat the plain legislative intention.")

In the case at hand, the Court of Appeals held that the witness must "be able to attest to the circumstances surrounding the accident, i.e., what actions of the unknown driver contributed to the accident." *Gilliland,* 351 S.C. at 500, 570 S.E.2d at 548. We agree that this analysis is consistent with *Howser* and constitutes a fair interpretation of the ambiguous fact requirement of § 38-77-170(2). However, the Court of Appeals found that Norris failed to attest to the existence of ***202** an unknown vehicle. *Gilliland,* 351 S.C. at 498, 570 S.E.2d at 546. We find ****629** the record includes sufficient evidence that an unknown vehicle was involved in Petitioner's accident.

In *Marks v. Indus. Life & Health Ins. Co.,* 212 S.C. 502, 505, 48 S.E.2d 445, 446, this Court held that "[t]he attending circumstances along with direct testimony may be taken into account by the jury in arriving at its decision as any fact in issue may be established by circumstantial evidence, if the circumstances, which must themselves be proven lead to the conclusion with reasonable certainty."

We now hold that the testimony of Gayle Norris contained circumstantial evidence that supports Petitioner's testimony that an unknown driver contributed to her accident. Norris's testimony that she saw the lights of an unknown car that was turning around and fleeing the scene of the accident sufficiently corroborates Petitioner's testimony creating a question of fact as to causation for the jury.

CONCLUSION

We believe that the record includes sufficient circumstantial evidence for the jury to find the requisite causation necessary to satisfy § 38-77- 170(2). We therefore reverse the Court of Appeals and reinstate the trial court's judgment for Petitioner.

MOORE, WALLER, BURNETT and PLEICONES, JJ., concur.

357 S.C. 197, 592 S.E.2d 626

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