THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM DARLINGTON COUNTY
Court of Common Pleas
Honorable J. Michael Baxley

Case No. 2010-CP-16-0315
Appellate Case No. 2014-000134

Bobby Lee Tucker, Sr., ... Respondent,

v.

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

PETITION FOR REHEARING AND REHEARING EN BANC

Pursuant to Rule 221 of the South Carolina Rules of Appellate Procedure, John Doe, Individually, and d/b/a Doe Trucking Company ("Doe") hereby petitions the panel of this Court, which issued the decision in this matter, for rehearing and petitions the entire Court of Appeals for rehearing of the matter en banc. The grounds for the petitions are that the opinion represents a misapprehension of several matters of law, including a particular interpretation of a Supreme Court precedent, and that rehearing is appropriate, because the opinion conflicts with the decisions of the South Carolina Supreme Court and prior decisions of this Court.

Introduction

The opinion erroneously interprets prior precedent regarding the sufficiency of the eyewitness affidavit mandated by section 38-77-170(2) of the South Carolina Code, which must be strictly satisfied for a plaintiff to have a right of action against his own

uninsured motorist insurer to recover for his single-vehicle accident. The panel held that Doe was not entitled to judgment notwithstanding the verdict, because the attestations in the Anthony Bernardo Affidavit "amounted to sufficient circumstantial evidence that supported Tucker's testimony and the other evidence in the record suggesting an unknown driver contributed to the accident." The panel's holding is inconsistent with South Carolina law in several significant respects.

First, this holding is contrary to binding precedent of our Supreme Court unequivocally establishing that the eyewitness affidavit mandated by section 38-77-170(2) must be sufficient *on its own*. *Collins v. Doe*, 352 S.C. 462, 471, 574 S.E.2d 739, 743 (2002). The panel essentially relies on *Gilliland v. Doe*, 357 S.C. 197, 592 S.E.2d 626 (2004) as a means to avoid the holding in *Collins*. This is error. *Gilliland* did not involve the issue of the sufficiency of an eyewitness affidavit. No affidavit appears in the record in in *Gilliland*, and the relevant issue on appeal in *Gilliland* was whether the ***trial testimony*** of the "independent witness" created a question of fact for the jury at directed verdict. *Id.*, 357 S.C. at 202, 592 S.E.2d at 629[1]. Here, without reliance on the trial testimony, the Bernardo Affidavit simply cannot be determined to have sufficiently "attest[ed] to the unknown vehicle's involvement in the accident." *Wausau Underwriters Ins. Co. v. Howser*, 309 S.C. 269, 275, 422 S.E.2d 106, 109 (1992).

The full Court should also rehear this opinion en banc, because this court has previously appeared to express the view, as has the panel here, that *Gilliland* was an affidavit case rather than a testimony case. *See Shealy v. Doe*, 370 S.C. 194, 204, 634

[1] At the time of the initial briefing to this Court in *Gilliland*, this Court's opinion—later reversed—in *Collins v. Doe*, 343 S.C. 119, 539 S.E.2d 62 (Ct. App. 2000) had been published and was cited by the Appellant in *Gilliland*. This Court's *Collins v. Doe* opinion stood for the erroneous proposition that trial testimony could substitute for the required statutory affidavit.

S.E.2d 45, 50 (Ct. App. 2006) (discussing the Supreme Court's decision in *Gilliland* and stating, "The linchpin of the court's ruling was its determination that the ***witness affidavit*** contained circumstantial evidence corroborating Gilliland's testimony that an unknown vehicle contributed to her accident . . . ." (emphasis added)); *Bradley v. Doe*, 374 S.C. 622, 633, 649 S.E.2d 153, 159 (Ct. App. 2007) ("However, Bradley overlooks that the ***affiant in Gilliland*** contemporaneously witnessed both the collision and the headlights of an unknown vehicle turning and leaving the scene." (emphasis added)). The full Court needs to rehear this opinion to establish the distinction between the eyewitness affidavit mandate of section 38-77-170(2) and *Gilliland* in order to bring this Court's jurisprudence in compliance with *Collins*'s requirement of a sufficient standalone eyewitness affidavit. *See* Rule 219(a), SCACR.

Additionally, the panel's opinion misconstrues South Carolina law regarding error preservation with respect to precedent. Finally, the panel in its opinion overlooks that there is no evidence in the record that the object actually fell from Doe's truck such that Doe was the "most probable" cause of Tucker's accident. The Court should grant rehearing and issue a revised opinion, reversing the trial court's order denying Doe's motions for directed verdict and judgment notwithstanding the verdict and granting judgment in favor of Doe. Failing that, rehearing en banc should be granted by the full court in order to secure uniformity of the decisional law regarding actions of this type. Rule 219, SCACR.

Argument

I. The Court's holding that the Bernardo Affidavit complied with the requirements of section 38-77-170(2) is erroneous because the holding was impermissibly based on trial testimony and failed to require any evidence in the affidavit of an unknown vehicle's involvement.

The Court holds that the statutorily required eyewitness affidavit may be satisfied if it corroborates the plaintiff's trial testimony. This holding directly contravenes the Supreme Court's holding in *Collins v. Doe*, barring the use of trial testimony as a substitute for the eyewitness affidavit. 352 S.C. 462, 471, 574 S.E.2d 739, 743 (2002). To satisfy section 38-77-170(2), an eyewitness affidavit must provide a sufficient attestation such that no more is necessary to determine that the accident was caused by the ownership, maintenance or use of an unknown vehicle. *Wausau Underwriters Ins. Co. v. Howser*, 309 S.C. 269, 275, 422 S.E.2d 106, 109 (1992).

The Bernardo Affidavit states, in relevant part:

> 3. I was traveling in the outside southbound lane of Interstate 95 in Florence County, South Carolina, following a truck pulling a car carrier at a distance of approximately 150 feet.
>
> 4. As I approached exit 153, the truck and car carrier suddenly veered to the right as if to avoid something in the roadway and in doing so struck a cement pillar supporting the overpass.

(Bernardo Affidavit ¶ 4, R. 416.) This attestation fails to provide any "independent evidence of an unknown vehicle's involvement in the accident" whatsoever. *Bradley*, 374 S.C. at 635, 649 S.E.2d at 16. "Something in the roadway" could be anything, including a dead animal or tree branch or something else unrelated to an automobile. The observed swerve was caused "as if" to avoid this unspecified "something." Mr. Bernardo

merely observed the vehicle swerve and speculated as to why. Nothing about that speculation can possibly create an inference that an unknown vehicle was involved with the "something."

The only way that this Court could have attempted to determine that the "something" could have been related to an unknown vehicle is by reference to the trial testimony. Indeed, the Court premised its holding on the basis that the Bernardo Affidavit was sufficient *on* the trial testimony. *See Tucker v. Doe*, Op. No. 5041 (S.C. Ct. App. filed August 5, 2015) (Shearouse Adv. Sh. No. 30 at 59) ("[I]t amounted to sufficient circumstantial evidence that supported Tucker's testimony and the other evidence in the record suggesting an unknown driver contributed to the accident."). However, our Supreme Court has expressly held that the sufficiency of the eyewitness affidavit cannot be determined by reference to the trial testimony. *Collins*, 352 S.C. at 471, 574 S.E.2d at 743. Strict compliance with section 38-77-170(2) is required for the plaintiff to have a right of action, and the statute makes no provision for the eyewitness affidavit to merely corroborate trial testimony. *Id.* If the affidavit, standing alone, does not satisfy section 38-77-170(2), the plaintiff has no right to bring his case to court. *Id.*, 352 S.C. at 466, 574 S.E.2d at 741. Thus, evaluating the sufficiency of the Bernardo Affidavit by reference to trial testimony was error and should be corrected.

The rationale behind the Court's holding and reliance on the trial testimony should be reconsidered in light of its incorrect interpretation of *Gilliland v. Doe*. 357 S.C. 197, 592 S.E.2d 626 (2004). The Court correctly noted in footnote 2 of its opinion that the Supreme Court in *Gilliland* referred throughout to the witness's "testimony." *See Tucker v. Doe*, Op. No. 5041 (S.C. Ct. App. filed August 5, 2015) (Shearouse Adv. Sh.

No. 30 at 58 n.2). From that observation, the Court concluded: "[g]iven that our supreme court in *Gilliland* acknowledged that holding in *Collins*, we find the relevant witness observations discussed in *Gilliland* must have been included in the witness's affidavit." *Id.*

This Court's conclusion (with its assumptions) is incorrect. The plaintiff in *Gilliland* did not offer any affidavit. (*See* Record on Appeal, *Gilliland v. Doe*, 357 S.C. 197, 592 S.E.2d 626 (2004).) The John Doe defendant there did not challenge Gilliland's failure to satisfy the affidavit requirement in the statute.[2] Instead, the John Doe defendant in *Gilliland* argued that the trial testimony was insufficient to meet the plaintiff's burden of proof at trial to establish the involvement of an unknown vehicle in the accident. *See id.* 357 S.C. at 198, 592 S.E.2d at 626 ("At trial, Gayle 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." (emphasis added)). Accordingly, *Gilliland* proceeded to trial despite the lack of an eyewitness affidavit.

Thus, the issue before the Court in *Gilliland* was whether the eyewitness's trial testimony sufficiently corroborated the plaintiff's testimony that an unknown vehicle caused her accident such that, with all evidence viewed in the plaintiff's favor, a question of fact regarding causation existed for the jury. Indeed, the Supreme Court identified precisely that issue on appeal in its holding:

> 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.

---

[2] The Supreme Court's December 30, 2002 decision in *Collins*, establishing the rule that trial testimony cannot substitute for the statutory affidavit requirement, was subsequent to the March 8, 2000 trial in *Gilliland*.

> 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.

Gilliland, 357 S.C. at 202, 592 S.E.2d at 629. Whereas *Gilliland* concerned the sufficiency of the evidence presented at trial at directed verdict, the instant appeal concerns whether the attestations in the Bernardo Affidavit provide a sufficient causative connection between Tucker's accident and an unknown vehicle as a matter of law for plaintiff's claim to exist—regardless of the trial testimony. They do not.

Therefore, the Court's statement in its opinion that, in *Gilliland*, "the witness's testimony was insufficient to meet the *affidavit requirements* of section 38-77-170(2)" is factually incorrect. *Tucker v. Doe*, Op. No. 5041 (S.C. Ct. App. filed August 5, 2015) (Shearouse Adv. Sh. No. 30 at 58) (emphasis added). *Gilliland* was not an affidavit case. Creating a question of fact on causation for the jury at trial, with all inferences from the evidence in the plaintiff's favor, is a considerably lower burden on the plaintiff in a John Doe action than is needed to satisfy the requirement in section 38-77-170(2) that the affidavit "contain some independent evidence of an unknown vehicle's involvement in the accident." *Bradley*, 374 S.C. at 635, 649 S.E.2d at 160. The Court's reliance on the trial testimony in *Gilliland* to determine the sufficiency of the Bernardo Affidavit is, therefore, inappropriate and rehearing should be granted.

Second, the Court erred in finding that the Bernardo Affidavit is sufficient on the grounds that it contains an attestation to the facts of Tucker's wreck, despite the fact that the affidavit contains speculation and no connection to an unknown vehicle. The affidavit mandate of section 38-77-170(2) is not satisfied merely because Mr. Bernardo

attested that he witnessed the accident. Rather, the Supreme Court has recognized that the 1989 amendment to section 38-77-170 was "to require that the independent witness provide the court with a signed affidavit." *Gilliland*, 357 S.C. at 200, 592 S.E.2d at 627-28. Accordingly, this Court has held that the statute requires that "[t]he affidavits of independent witnesses [] contain some independent evidence of an unknown vehicle's involvement in the accident." *Bradley*, 374 S.C. at 635, 649 S.E.2d at 160. As argued above, there is simply no way that "something" in the road can constitute independent evidence of an unknown vehicle's involvement.

In the opinion, the Court found *Bradley* and *Shealy v. Doe*, 370 S.C. 194, 634 S.E.2d 45 (Ct. App. 2006), distinguishable, because the affiants in those cases did not actually personally witness the accident. However, that issue is not relevant here. Mr. Bernardo's failure to provide evidence of an unknown vehicle is at issue; whether he saw the wreck itself is not.

Prior precedent establishes why mere attestation to the accident itself in the eyewitness affidavit cannot satisfy the requirements of section 38-77-170(2). Under South Carolina law, an insured may only recover on an uninsured motorist policy if the injury arose out of the ownership, maintenance, or use of an uninsured vehicle. S.C. Code Ann. § 38-77-140 and the John Doe statute allow recovery for a similarly-caused injury if the vehicle is unknown. *Howser*, 309 S.C. at 275, 422 S.E.2d at 109. The "obvious purpose" of the eyewitness affidavit, required for accidents with unknown vehicles but not uninsured vehicles, is for fraud prevention via sworn attestations from an independent third party. *Collins*, 352 S.C. at 470, 574 S.E.2d at 743. Thus, as the Supreme Court has explained, the attestation requirement protects insurers against fraud

by "assur[ing] adequate proof the accident involved a second unknown vehicle." *Howser*, 309 S.C. at 275, 422 S.E.2d at 109.

If, *arguendo*, section 38-77-170(2) only required that the eyewitness see the accident itself and not describe evidence of a connection to an unknown vehicle in the affidavit, which Doe denies, the fraud prevention purpose could not be satisfied. The insurer would be unable to determine whether the plaintiff was involved in a wreck and fraudulently claimed that another vehicle caused the wreck, because the eyewitness would not have to attest to such. To provide any level of fraud protection to the insurer, the affidavit must provide an attestation regarding the involvement of an unknown vehicle in the accident—not just the accident itself. *Collins*, 352 S.C. at 470, 574 S.E.2d at 743; *see also Bradley*, 374 S.C. at 638, 649 S.E.2d at 162 (Ct. App. 2007) (Short, J., dissenting) ("Someone other than the owner or operator of the insured vehicle simply witnessing the accident without witnessing an unknown vehicle's contribution can not logically be interpreted as entitling the owner or operator to an uninsured motorist claim. Both this court and the South Carolina Supreme Court have addressed the witnessing requirement accordingly.").

In the opinion, the Court raised the concern that, if an object fell from a vehicle at some time prior to an accident, an injured plaintiff may be unjustly prevented from recovering from his own uninsured motorist carrier if there was no single eyewitness to both the falling object and the accident. *Tucker v. Doe*, Op. No. 5041 (S.C. Ct. App. filed August 5, 2015) (Shearouse Adv. Sh. No. 30 at 61). However, the statute does not bar a plaintiff from submitting multiple eyewitness affidavits; *e.g.*, one from a witness to the accident and one from a witness to the unknown vehicle and object. Moreover, the

eyewitness to the accident could attest in the affidavit to the characteristics of the fallen object to suggest the causal relationship to the ownership, maintenance, or use of an unknown vehicle. The affidavit before the Court does not do either; it only attests to a swerve "as if" to avoid "something."

Moreover, Tucker had many opportunities to bring the affidavit in compliance with section 38-77-170(2), yet chose not to do so. Tucker knew the eyewitness who purportedly could have attested to a link between the alleged object and an unknown vehicle - Donald Wilson, the truck driver who observed a truck carrying an object that "looked just like" the object later found near the road. (Tr. 68, R. 43.) Doe first raised the insufficiencies in the Bernardo Affidavit in its motion for summary judgment filed January 18, 2011, merely eight months after the complaint was filed.[3] (*See* Mot. for Summ. J., R. 308; *see also* Mem. in Support of Mot. for Summ. J., R. 310.) However, Tucker declined to submit any further affidavits, despite the passage of twenty-seven months between Doe's motion notifying Tucker of the failings of the affidavit and trial—and with the knowledge that *Collins* barred supplementing the affidavit with trial testimony. Tucker was put on early notice that the affidavit of Bernardo was insufficient, yet chose to rely on the trial court's denial of summary judgment and belief the trial court would uphold that ruling . Tucker was correct about the trial court, but this Court should reverse the trial court, as the trial court committed error in finding the affidavit sufficient.

[3] Doe's motion for summary judgment on the failure of the Bernardo Affidavit to satisfy section 38-77-170(2) was denied based on the same incorrect application of *Gilliland* as in the opinion, further demonstrating the need to rehear the opinion to provide clarity to trial courts on the affidavit requirement of section 38-77-170(2). (6/15/11 Order Den. Mot. for Summ. J. at p. 3, R. 3.)

The Court also failed to consider the speculative nature of the Bernardo Affidavit and should grant rehearing to do so. Section 38-77-170(2) explicitly requires the "*truth* of the *facts* of the accident," not speculation. S.C. Code Ann. § 38-77-170(2) (emphasis added). Speculation about the cause of the swerve, "as if" to avoid "something," cannot suffice.

Even assuming that Mr. Bernardo's testimony is circumstantial evidence rather than simply speculation, it must have "sufficient probative value to constitute the basis for a legal inference." *Shealy v. Doe*, 370 S.C. 194, 204, 634 S.E.2d 45, 50 (Ct. App. 2006). Moreover, that legal inference must establish the causal connection between the accident and the vehicle with "reasonable certainty." *Bradley*, 374 S.C. at 635, 649 S.E.2d at 160. A swerve "as if" to avoid "something" cannot make it reasonably certain or establish a legal inference that an unknown vehicle caused Tucker's accident, and the speculation in the Bernardo Affidavit also renders it noncompliant with section 38-77-170(2).

Contrary to the statements in the opinion, Doe does not contend that "the Affidavit itself must *fully explain* the unknown vehicle's involvement in the accident." *Tucker v. Doe*, Op. No. 5041 (S.C. Ct. App. filed August 5, 2015)(emphasis added) (Shearouse Adv. Sh. No. 30 at 59). Nor does Doe contend that the statute requires that "a witness affidavit describe both (1) the accident and (2) the manner in which the object in the road came from the unknown vehicle." *Id.* at 61. Instead, Doe contends that Tucker must submit an eyewitness affidavit containing at least some evidence that Tucker's accident arose out of the ownership, maintenance, or use of an unknown vehicle. *Bradley*, 374 S.C. at 635, 649 S.E.2d at 160. The Bernardo Affidavit cannot meet even

this minimal threshold to establish some level of causation, because it contains no evidence of an unknown vehicle at all. A swerve "as if" to avoid "something" simply cannot establish with any reasonable certainty that an unknown vehicle caused Tucker's accident. Therefore, the Bernardo Affidavit cannot satisfy section 38-77-170(2), and trial testimony cannot substitute for the affidavit.

The statutory affidavit requirement is not a mere technicality. Instead, it is the method by which the General Assembly struck a fair balance between expanding coverage for injured parties through relaxing the physical contact requirement for John Doe actions, while still protecting insurers, by allowing them an opportunity to evaluate potentially fraudulent claims. *Collins v. Doe*, 352 S.C. 462, 466, 574 S.E.2d 739, 741 (2002); *Shealy v. Doe*, 370 S.C. 194, 201, 634 S.E.2d 45, 49 (Ct. App. 2006). The Court's opinion renders the affidavit requirement imposed by the general assembly meaningless. Therefore, rehearing should be granted to correct these errors regarding interpretation of section 38-77-170(2).

II. The Court's holding that Doe's argument, that a statutory violation, standing alone, should not constitute evidence of recklessness to support punitive damages, is unpreserved should be reheard, because Doe made a directed verdict motion that there was no evidence of recklessness in the record to support punitive damages despite the evidence of the statutory violation.

The Court held that Doe's argument, that a statutory violation should not be sufficient evidence of recklessness to require the submission of punitive damages to the jury was unpreserved for appellate review. *See Tucker v. Doe*, Op. No. 5041 (S.C. Ct. App. filed August 5, 2015) (Shearouse Adv. Sh. No. 30 at 65). The opinion overlooked the denial of Doe's directed verdict motion, which preserved Doe's argument for appellate review. Additionally, the Court misconstrued Doe's arguments in opposition to

his being required to object to the subsequent jury instructions and conceding the applicability of the *Wise v. Broadway* rule. The Court should rehear its opinion to correct these misapprehensions.

Doe moved for a directed verdict on Tucker's claim that Doe negligently failed to secure its load, because there was no evidence of how or why the object came to be in the road, which the trial court denied. (Tr. 307, R. 214.) Doe next moved for directed verdict as to punitive damages for this reason and because there was no evidence of recklessness, willfulness, or wantonness in the record. (Tr. 308, R. 215.) Doe's directed verdict motion necessarily required consideration of whether the alleged statutory violation was evidence of recklessness in the record to support punitive damages, and the trial court denied the motion on that exact basis, stating that the potential statutory violation provided the evidence of recklessness in the record for punitive damages to go to the jury. (*Id.*) In its motion for judgment notwithstanding the verdict ("JNOV") regarding punitive damages, which the Court denied, Doe argued that "[b]y itself, the violation of a statute does not warrant a finding of reckless, willful or wanton conduct." (Def.'s Mem. in Support of Post-Trial Motions at 17, R. 393.) At that point, Doe's position was preserved. *See Fettler v. Gentner*, 396 S.C. 461, 469, 722 S.E.2d 26, 30 (Ct. App. 2012) ("Once a party moves for a directed verdict on an issue, and that motion is denied, the party is not required to object again to the subsequent jury instruction regarding that issue" for the issue to be preserved.).

However, the Court found that Doe's argument on appeal was unpreserved, because "Doe never asserted that the violation of section 56-5-4100 should not be evidence of recklessness because that statute is a strict liability statute." *Tucker v. Doe*,

Op. No. 5041 (S.C. Ct. App. filed August 5, 2015) (Shearouse Adv. Sh. No. 30 at 66). The difference between the oral directed verdict motion Doe made at trial and the argument that the opinion suggests would have preserved the issue for appeal is a distinction that is immaterial and semantic only. Doe's argument was preserved.

Nothing more was required of Doe to preserve its argument for appeal after its directed verdict motion was denied. Had Doe objected to the trial court's subsequent jury instruction and the trial court had sustained the objection, the trial court would have committed reversible error. *See Berberich v. Jack*, 392 S.C. 278, 285, 709 S.E.2d 607, 611 (2011) ("An appellate court will not reverse the trial court's decision regarding jury instructions unless the trial court committed an abuse of discretion. An abuse of discretion occurs when the trial court's ruling is based on an error of law or is not supported by the evidence."). The law does not require that Doe make a futile objection to jury instructions, directly contrary to the law the trial court was required to follow, after the trial court had explicitly applied the challenged principle of law to reject Doe's directed verdict motion on that basis. *See Fettler v. Gentner*, 396 S.C. 461, 469, 722 S.E.2d 26, 31 (Ct. App. 2012) ("This [c]ourt does not require parties to engage in futile actions in order to preserve issues for appellate review." (quotation omitted)); *see also City of Columbia v. Myers*, 278 S.C. 288, 289, 294 S.E.2d 787, 788 (1982) ("[I]t would be both futile and nonsensical for counsel to request curative instructions from a trial court which has already ruled an argument to be proper."). If this Court were "to insist that an exception be taken to save the point for appeal, the unhappy result would be that we would encourage defense counsel to burden district courts with repeated assaults on then settled principles out of hope that those principles will be later overturned, or out of

fear that failure to object might subject counsel to a later charge of incompetency." *United States v. Scott*, 425 F.2d 55, 57-58 (9th Cir. 1970) *overruled on other grounds by United States v. Keys*, 133 F.3d 1282 (9th Cir. 1998); *see also United States v. Grant*, 489 F.2d 27, 29 (8th Cir. 1973).

The opinion states that Doe conceded the applicability of *Wise v. Broadway* in its Post-Judgment Punitive Damage Review Memorandum and that "Doe now urges this court to depart from a legal principle he himself cited and never contested at trial." *Tucker v. Doe*, Op. No. 5041 (S.C. Ct. App. filed August 5, 2015) (Shearouse Adv. Sh. No. 30 at 66). However, the recognition of existing precedent of the South Carolina Supreme Court in requesting a constitutional review of the *amount* of punitive damages awarded by the jury is not a concession of the earlier point Doe preserved by way of directed verdict motion. The post-trial motion that again raised Doe's current argument was Doe's motion for JNOV. (Def.'s Mem. in Support of Post-Trial Motions at 17, R. 393.). Therefore, the finding that Doe's argument was unpreserved was error and rehearing should be granted.

III. The Court's holding that Tucker presented sufficient evidence of causation should be reconsidered, because there is no evidence in the record that the object "probably" caused Tucker's accident by actually falling off of Doe's truck.

Finally, the Court should grant rehearing, because it failed to apply the principle of South Carolina law that, for there to be a question of fact regarding causation such that the denial of motions for directed verdict and JNOV is appropriate, the evidence in the record must be based on "based on probabilities not mere possibilities." *Nguyen v. Uniflex Corp.*, 312 S.C. 417, 420, 440 S.E.2d 887, 889 (Ct. App. 1994). Where the

plaintiff's injuries "may be as reasonably attributed to an act for which [the defendant] is not liable as to one for which it is liable," the plaintiff has failed to meet his burden of proof on causation and judgment in favor of the defendant is appropriate. *Harris v. Rose's Stores, Inc.*, 315 S.C. 344, 346-47, 433 S.E.2d 905, 907 (Ct. App. 1993). Tucker failed to present any evidence that Doe "probably" caused the object to be in the road, so the question of causation should have been decided in Doe's favor as a matter of law.

The Court misconstrued the evidence in the record in its determination that Tucker presented sufficient evidence to deny Doe's motions for directed verdict and JNOV. *See Tucker v. Doe*, Op. No. 5041 (S.C. Ct. App. filed August 5, 2015) (Shearouse Adv. Sh. No. 30 at 64-65) ("In contrast, Tucker presented evidence the bearing block caused his accident after it was inadequately secured in the bed of a blue freightliner and *consequently fell into the road.*" (emphasis added)). There is no evidence in the record that an object probably fell from Doe's truck into the road absent the application of *res ipsa loquitur*. Tucker failed to meet his obligation to establish that the object falling off of Doe's truck "most probably took place," so the trial court should have granted a directed verdict in favor of Doe. *See Anderson v. Green Bull, Inc.*, 322 S.C. 268, 272, 471 S.E.2d 708, 711 (Ct. App. 1996) (finding that the trial court erred in failing to grant motions for directed verdict and JNOV where the record contained no evidence from which the jury could conclude the theorized cause of the injury "most probably took place"). This Court should grant rehearing to correct this issue.

The Court also found that Doe's objection to Tucker's materials science expert, Dean Harris, was unpreserved. However, at trial, Doe objected to Tucker's question to Mr. Harris regarding Mr. Harris's experience in evaluating restraints as used in the

trucking industry as being outside the scope of Mr. Harris's identification as an expert. (Tr. 98-99, R. 73-74.) The trial court overruled the objection. (Tr. 100, R. 75.) Thus, the Court should grant rehearing to consider the lack of probative evidence in the record regarding the breach element of Tucker's negligence claim.

Conclusion

For the reasons set forth above, the Petition for Rehearing should be granted. Failing that, the Petition for Rehearing En Banc should be granted. The Court should issue a revised opinion, reversing the decision of the trial court and granting judgment notwithstanding the verdict in favor of Doe.

Respectfully submitted,

NELSON MULLINS RILEY & SCARBOROUGH LLP

By: _____

C. Mitchell Brown, SC Bar No. 012872
E-Mail: mitch.brown@nelsonmullins.com
William C. Wood, Jr., SC Bar No. 015111
E-Mail: bill.wood@nelsonmullins.com
Michael J. Anzelmo, SC Bar No. 72933
E-Mail: michael.anzelmo@nelsonmullins.com
Graham R. Billings, SC Bar No. 101117
E-mail:graham.billings@nelsonmullins.com
1320 Main Street / 17th Floor
Post Office Box 11070 (29211-1070)
Columbia, SC 29201
(803) 799-2000

Attorneys for Appellant John Doe, Individually, and d/b/a Doe Trucking Company

Columbia, South Carolina

Sept. 4, 2015

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

RECEIVED
SEP 04 2015
SC Court of Appeals

APPEAL FROM DARLINGTON COUNTY
Court of Common Pleas
J. Michael Baxley, Circuit Court Judge

Case No. 2010-CP-16-0315
Appellate Case No. 2014-000134

Bobby Lee Tucker, Sr., ... Respondent,

v.

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

PROOF OF SERVICE

I, the undersigned Administrative Assistant of the law offices of Nelson Mullins Riley & Scarborough LLP, attorneys for Appellant, do hereby certify that I have served all counsel in this action with a copy of the pleading(s) hereinbelow specified by mailing a copy of the same by United States Mail, postage prepaid, to the following address(es):

Pleadings:

Petition for Rehearing

Counsel Served:

William P. Hatfield, Esquire
Hatfield Temple, LLC
170 Courthouse Square
Post Office Box 1770
Florence, SC 29503

Robert N. Hill
Law Offices of Robert Hill
P.O. Box 51
Newberry, SC 29108

Lisa P. Whitehurst

Lisa P. Whitehurst
Administrative Assistant

September 4, 2015

Nelson Mullins

Nelson Mullins Riley & Scarborough LLP
Attorneys and Counselors at Law
1320 Main Street / 17th Floor / Columbia, SC 29201
Tel: 803.799.2000 Fax: 803.255.9025
www.nelsonmullins.com

C. Mitchell Brown
Tel: 803.255.9595
Fax: 803.255.9025
mitch.brown@nelsonmullins.com

September 4, 2015

The Honorable Jenny Abbott Kitchings
Clerk of Court
SC Court of Appeals
1220 Senate Street
Columbia, SC 29201

RE: Bobby Lee Tucker, Sr. v. John Doe, individually, and d/b/a Doe Trucking Company
Civil Action No. 2010-CP-16-0315
Appellate Case No. 2014-000134
Our File No. 00350/01708

Dear Ms. Kitchings:

Enclosed please find the original and seven copies of a Petition for Rehearing in regard to the above-referenced matter. We would ask that you file the original and return a clocked-in copy to us via our courier. Also enclosed is our check in the amount of $25.00 as the required filing fee.

With kind regards, I remain

Sincerely yours,

C. Mitchell Brown

CMB:lpw
Enclosure
cc: William P. Hatfield, Esquire
Robert N. Hill, Esquire
Thomas J. Keaveny II, Esquire