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S.C. Supreme Court

THE STATE OF SOUTH CAROLINA  
In The Supreme Court

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,..... Petitioner.

APPENDIX VOLUME I

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THE STATE OF SOUTH CAROLINA  
In The 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.

RECORD ON APPEAL

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**SC Court of Appeals**

**RECORD ON APPEAL  
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Certificate of Counsel

2010/11/17  
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STATE OF SOUTH CAROLINA

COUNTY OF DARLINGTON

BOBBY LEE TUCKER, SR.,

Plaintiff,

v.

JOHN DOE, INDIVIDUALLY, AND  
D/B/A DOE TRUCKING COMPANY,

Defendants.

IN THE COURT OF COMMON PLEAS  
FOURTH JUDICIAL CIRCUIT  
C.A. NO.: 2010-CP-16-0315

**ORDER DENYING  
MONTGOMERY INSURANCE  
AND CANAL INSURANCE  
MOTIONS FOR SUMMARY JUDGMENT**

This matter is before the Court on the motions of Montgomery Insurance Company and Canal Insurance Company for summary judgment. These carriers provide uninsured motorist automobile coverage to the Defendant through Plaintiff's own policies of insurance.

**INTRODUCTION AND BACKGROUND**

The Complaint in this case sets forth a cause of action pursuant to the uninsured motorist statute found at South Carolina Code Ann. §38-77-170 for a tractor trailer accident that occurred on April 30, 2010, on Interstate 95 near Exit 153 in Darlington County. That cause of action alleges that while driving his 2001 Freightliner tractor-trailer southbound on I-95, Plaintiff swerved to avoid an obstruction of unexplained origin in the road, lost control of his vehicle when his left front wheel made contact with the object, and suffered extensive injuries due to the collision with both the object and the concrete bridge columns at Exit 153. The obstruction was later identified by Plaintiff's counsel as a cast iron press bearing block, a disc-shaped object standing approximately 11 inches tall and weighing approximately 700 pounds.

Plaintiff instituted this "John Doe" action against his individual and his company's uninsured motorist carriers. Both carriers then moved this Court to grant summary judgment in their favor based on the argument that Plaintiff did not comply with the requirements set forth in §38-70-170, as written and as interpreted by our Courts. For the reasons that follow, Montgomery and Canal's motions for Summary Judgment are **DENIED**.

**UNINSURED MOTORIST ACTION UNDER S.C. CODE § 38-70-170**

Under §38-70-170, Plaintiff must meet three preliminary requirements in order to bring an

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SCOTT E. STAGS  
CLERK OF COURT  
FOURTH JUDICIAL CIRCUIT  
DARLINGTON COUNTY, S.C.

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Appendix\_0005

uninsured motorist action where the other, at-fault driver/vehicle is unknown. Both Defendants concede that Plaintiff adequately complied with two of the three necessary elements under the statute [(1) timely report of accident to authorities and (3) insured not negligent in attempting to determine identity of other driver], but argue that Plaintiff failed to provide an affidavit from a witness to the accident who could properly attest to the truth of the facts thereof, as required under subitem (2) of Section 170. As such, all parties to this action agree that Plaintiff's injuries were at least in part caused by the actions of an unknown owner or operator of a vehicle, even though there was no physical contact with that unknown vehicle. That is, no party disputes that the metal object was in the roadway, and no party argues that the metal object was placed in the highway as a prank or deliberately thrown into the road by a pedestrian or by any person other than an owner/operator of a vehicle [See, *Bradley v. Doe*, 374 S.C. 622, 649 S.E.2d 153 (Ct. App. 2007)].

Subitem (2) of Section 170 specifically provides that where there is no physical contact with the unknown vehicle, the accident must have been witnessed by someone other than the owner or operator of the insured vehicle; provided, however, that witness must sign an affidavit attesting to the truth of the facts of the accident contained in the affidavit. Here, Plaintiff presented an affiant who witnessed the accident and who signed an affidavit attesting to the truth of the facts provided. As stated by our Supreme Court, "where the language of the statute is plain and unambiguous and conveys a clear and definite meaning, as here, there is no occasion for resorting to the rules of statutory interpretation, and the Court has no right to look for or impose another meaning." *Wynn v. Doe*, 255 S.C. 509 at 512, 180 S.E.2d 95 at 96 (1971).

Defendants argue that the statute requires the witness to have seen the foreign object in the road (Montgomery Mem. Supp. Summ. J. at 4) or be able to specify the actions of the unknown driver that contributed to the accident (Canal Mem. Supp. Summ. J. at 3); this construction is beyond the scope of the statute's unambiguous language. The witness must have witnessed the "accident," not the other vehicle, not the other driver, and not the foreign object. In the face of such well-defined criteria and apparent compliance, this Court has "no right to legislate the provision from the statute or to modify its application under the guise of judicial interpretation." *Davis v. Doe* 285 S.C. 338 at 341, 331 S.E.2d 352 at 354 (1985) (citing *Coker v. Nationwide Insurance Company*, 251 S.C. 175 at 182, 161 S.E.2d 175 at 178 (1968)).

Further, it is long-standing precedent that the uninsured motorist legislation is remedial in

nature, enacted for the benefit of injured persons, and is to be liberally construed so that the purpose intended may be accomplished. (See, e.g., *Franklin v. Devore*, 327 S.C. 418 at 421, 489 S.E.2d 651 at 653 (1997) (citing *Gunnels v. American Liberty Ins. Co.*, 251 S.C. 242, 161 S.E.2d 822 (1968)). Neither Defendant disputes the fact that Plaintiff was severely injured in an accident that was caused to some extent by the negligence of an unknown vehicle that dropped a 700 pound metal object in the roadway. Plaintiff provided an affidavit from a witness who viewed the accident from his own vehicle that was located directly behind Plaintiff when the accident occurred. If the purpose of the witness/affidavit requirement of subitem (2) is to prevent fraud and reduce the possibility of false claims, it cannot be argued here that this Court has proper authority to summarily dismiss Plaintiff's claim and right to recover under the uninsured motorist provision because the affiant cannot attest to the exact actions of the unknown driver or give a precise description of the unknown obstruction.

On the contrary, the witness affiant provided circumstantial evidence that was based on independent knowledge, which supported Plaintiff's version of the accident; thus, this Court finds the witness affiant comports with the requirements of subitem (2). *Gilliland v. Doe*, 357 S.C. 197, 592 S.E.2d 626 (2004) (holding that circumstantial evidence is sufficient to support driver's testimony that an unknown driver contributed to the accident and is sufficient to create a question of fact as to causation for the jury); *Shealy v. Doe*, 370 S.C. 194, 634 S.E.2d 45 (2006) (stating that in addition to the fraud prevention purpose of subitem (2), the independent witness affiant must contain independent support for his assertions and defining circumstantial evidence as something that asserts or describes something else, not proof that actually asserts or represents the proposition in question [citing 29 Am.Jur.2d Evidence 313 (1994)]); *Bradley v Doe*, 374 S.C. 622, 649 S.E.2d 153 (2007) (noting that while circumstantial evidence provided by an independent witness may be sufficient to survive summary judgment, the witness's testimony must also be based on personal observations, independently corroborating the driver's account of how the accident occurred).

#### SUMMARY JUDGMENT DENIED

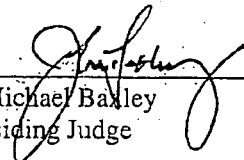
In determining whether any triable issue of fact exists, at this juncture the evidence and all inferences which can be reasonably drawn therefrom must be viewed in the light most favorable to the non-moving party. *Summer v Carpenter*, 328 S.C. 36, 492 S.E.2d 55 (1997). Here, reasonable minds cannot differ that the proximate cause of Plaintiff's accident was the

metal object lying in the roadway due to the negligence of John Doe, the unknown driver of a transport vehicle that dropped the heavy obstruction onto the interstate. As stated previously, the purpose of subitem (2) in the statute is to assure adequate proof the accident involved a second unknown vehicle, whether by physical contact or by an independent witness, which Plaintiff has provided. *Wausau Underwriters Ins. Co. v. Howser*, 309 S.C. 269 at 275, 422 S.E.2d 106 at 110 (1992) (citing *Coker*, *supra*).

Thus, in accordance with the plain language of S.C. Code §38-77-170 (2) and the persuasive precedent provided by our higher Courts, and upon the motions and oral arguments of all parties, the Court finds that Plaintiff has complied with all requirements set forth by our legislature to bring this action under the uninsured motorist provision, and hereby **DENIES** both Montgomery Insurance Company and Canal Insurance Company's motions for Summary Judgment.

**IT IS SO ORDERED.**

Dated at Hartsville, South Carolina, this 15<sup>TH</sup> day of June, 2011

  
\_\_\_\_\_  
J. Michael Bailey  
Presiding Judge

SCOTT B. SUGGS  
CLERK OF COURT/R.O.D.  
DARLINGTON COUNTY, S.C.

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| STATE OF SOUTH CAROLINA     | ) | FORM 4                       |
| COUNTY OF DARLINGTON        | ) | IN THE COURT OF COMMON PLEAS |
|                             | ) | FOURTH JUDICIAL CIRCUIT      |
| BOBBY LEE TUCKER, SR.,      | ) | C.A. NO.: 2010-CP-16-0315    |
|                             | ) |                              |
| Plaintiff,                  | ) |                              |
|                             | ) |                              |
| v.                          | ) | ORDER DENYING                |
| JOHN DOE, INDIVIDUALLY, AND | ) | MONTGOMERY INSURANCE         |
| D/B/A DOE TRUCKING COMPANY, | ) | COMPANY'S MOTION FOR         |
|                             | ) | RECONSIDERATION OF           |
| Defendants.                 | ) | DENIAL OF SUMMARY JUDGMENT   |
|                             | ) |                              |

This matter is before the Court on a Motion for Reconsideration filed by Montgomery Insurance Company (Montgomery) on June 27, 2011. Montgomery has asked this Court to reconsider its Order Denying Summary Judgment issued on June 15, 2011. For the reasons that follow, Montgomery's Motion for Reconsideration is **DENIED**.

On April 30, 2010, Plaintiff was involved in a tractor-trailer accident on Interstate 95 near Exit 153 in Darlington County. In his Complaint, Plaintiff alleges the accident resulted when he swerved to avoid a foreign object in the road, later identified as a disc-shaped cast iron block standing 11 inches tall and weighing approximately 700 pounds. Subsequently, Plaintiff instituted this action seeking coverage under the uninsured motorist statute, S. C. Code Ann. §38-77-170. This statute requires, under these circumstances, that the accident must have been witnessed by someone other than the owner or operator of the vehicle and that this witness must sign an affidavit attesting to the truth of the facts of the accident.

Montgomery argues in its reconsideration motion that Plaintiff has failed to satisfy the statutory requirements of 38-77-170 because "there is *no* evidence, either direct evidence or circumstantial evidence, that a foreign object was in the road." In the previous Order, this Court stated that the Defendants did not contest that a foreign object was in the road, and that this issue was not in dispute. Montgomery now says that statement of their position is incorrect. As a result, Montgomery claims that allowing Plaintiff's claim to go forward under these circumstances would be equivalent to allowing a plaintiff "to testify that an accident was caused by a phantom vehicle (a foreign object) without an affidavit to support the claim that such a

vehicle was present.” (Montgomery Mem. in Supp. of Motion for Reconsideration at 2). Montgomery contends that based on the holding of Shealy v. Doe, 370 S.C. 194, 634 S.E.2d 45 (Ct. App. 2006), Plaintiff’s claim should be dismissed.

After review, this Court finds that the previous Order should be confirmed, regardless of whether Montgomery admits a foreign object was in the roadway. This matter comes before this Court on a summary judgment motion, when the evidence and all inferences therefrom must be viewed in a light most favorable to the non-moving party. The affidavit of Anthony Bernardo, who witnessed the accident and signed an affidavit attesting to the truth of the facts of the accident, is sufficient at this juncture to require denial of Montgomery’s motion. Bernardo’s affidavit states that he saw the truck swerve to the left as if to avoid something in the roadway, saw the truck strike the bridge abutment, and saw that after the collision the truck was raised up as if resting on an object. Therefore, this Court finds Plaintiff has satisfied the independent witness/affidavit requirement of South Carolina Code Ann. §38-77-170(2).

Importantly, in Gilliland v. Doe, 357 S.C. 197, 592 S.E.2d 626 (2004), our Supreme Court held that circumstantial evidence provided by an independent witness that tends to support testimony that an unknown driver contributed to the accident is sufficient to create a question of fact as to causation for the jury. Likewise, in Bradley v. Doe, 374 S.C. 622, 649 S.E.2d 153 (2007), the Supreme Court noted that circumstantial evidence provided by an independent witness is sufficient to survive summary judgment, provided that the witness’s testimony is based on personal observations that corroborate the driver’s account of how the accident occurred. Because Mr. Bernardo’s testimony was based on his own personal observations and because these observations at a minimum provide circumstantial evidence that corroborates Plaintiff’s version of the events, Montgomery’s argument that the requirements of South Carolina Code Ann. §38-77-170 have not been complied with is without merit.

In conclusion, based on the plain language of S.C. Code §38-77-170(2), the precedent provided by our courts in interpreting this statute, and Anthony Bernardo’s knowledge of the accident provided in his affidavit, this Court finds that Plaintiff has complied with all the requirements necessary to pursue a claim under the uninsured motorist provision. As a result, Montgomery’s Motion for Reconsideration is hereby **DENIED**.

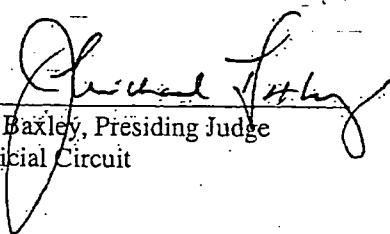
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IT IS SO ORDERED.

Dated at Hartsville, South Carolina, this 30th day of August, 2011

  
J. Michael Baxley, Presiding Judge  
Fourth Judicial Circuit

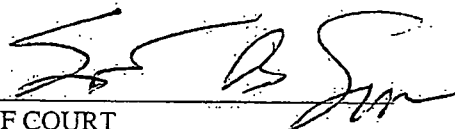
This judgment was entered on the \_\_\_\_ day of September 2011, and a copy mailed first class this \_\_\_\_ day of September, 2011 to attorneys of record or to parties as follows:

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CLERK OF COURT

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DARLINGTON COUNTY, S.C.

ROA\_0007

Appendix\_0011

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STATE OF SOUTH CAROLINA )

COUNTY OF DARLINGTON )

Bobby Lee Tucker, Sr., )

Plaintiff, )

vs. )

John Doe, individually, and d/b/a Doe  
Trucking Company, )

Defendants. )

IN THE COURT OF COMMON PLEAS  
FOURTH JUDICIAL CIRCUIT  
CASE NO.: 2010-CP-16-0315**ORDER GRANTING DEFENDANTS'  
MOTION FOR NEW TRIAL *NISI*  
*REMITTITUR* AS TO PUNITIVE  
DAMAGES AND DENYING  
REMAINING POST-TRIAL MOTIONS**

This matter is before the Court, pursuant to Rules 50 and 59, SCRCP, on Defendants John Doe and Doe Trucking Company's ("Defendants") motions for judgment notwithstanding the verdict (JNOV), new trial absolute, new trial based on the Thirteenth Juror doctrine, or, in the alternative, new trial *nisi remittitur*.

**BACKGROUND**

This lawsuit arises out of a single vehicle accident that occurred on April 30, 2010, when Plaintiff Bobby Lee Tucker, Sr. ("Plaintiff"), was driving a 2001 Freightliner tractor-trailer southbound on I-95. As Plaintiff approached Exit 153, he lost control of this tractor-trailer and struck several concrete abutments in the median, suffering grievous injuries. Plaintiff subsequently filed this John Doe action alleging that on April 30, 2010, at 12:30 AM, he was proceeding south on I-95 and that "at the same time and place the Defendant was transporting a piece of machinery and a part of machinery (a 700 pound bearing) fell from the Defendant's tractor-trailer." Plaintiff did not strike Defendants' vehicle, and no one saw an object fall from a vehicle. No one reported seeing an object in Plaintiff's lane. Plaintiff filed this uninsured motorist action pursuant to S.C. Code Ann. § 38-77-170.

TRUE CERTIFIED COPY, 1

*Scott B. Suggs*  
CLERK OF COURT/RMC  
DARLINGTON COUNTY, SC

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Appendix\_0012

At trial, Plaintiff testified that as he traveled south on I-95, a vehicle ahead of him applied its brakes and darted swiftly to the left, exposing what appeared to be an object sitting in his lane. He was unable to avoid the object and struck it. As a result of the accident, Plaintiff incurred medical bills of \$325,000.00. He was hospitalized and in physical therapy for several weeks, and suffered permanent injury.

This matter came before the Court for trial on April 15, 2013. At the conclusion of the trial, the jury returned a verdict for Plaintiff. It awarded him \$2.5 million in actual damages and \$2.5 million in punitive damages. Plaintiff made no post-trial motions. Defendants filed motions for JNOV, new trial absolute, new trial based on the thirteenth juror doctrine, or, in the alternative, new trial *nisi remittitur*.

For the reasons set forth below, the Court denies Defendants' Motion for JNOV, Motion for New Trial Absolute, Motion for New Trial under the Thirteenth Juror doctrine, and Motion for New Trial *Nisi Remittitur* as to actual damages. The Court grants Defendants' Motion for New Trial *Nisi Remittitur* as to punitive damages.

#### ANALYSIS

##### **I. Motion for Judgment Notwithstanding the Verdict (JNOV)**

Defendants assert they are entitled to a judgment notwithstanding the verdict for several reasons. They assert Plaintiff: (1) failed to satisfy the affidavit requirements of the uninsured motorist statute, S.C. Code Ann. § 38-77-170(2); (2) failed to meet his burden of proof to establish negligence on the unknown Defendant by a preponderance of the evidence; and (3) failed to meet his burden of proof to warrant an award of punitive damages. Defendants also contend the Court erred in allowing into evidence testimony of two witnesses (Mr. Harris and Mr. Vereen) over Defendants' objections.

"In ruling on motions for directed verdict and JNOV, 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 and to deny the motions where either the evidence yields more than one inference or its inference is in doubt." *Strange v. South Carolina Dept. of Highways and Public Transp.*, 314 S.C. 427, 429-30, 445 S.E.2d 439, 440 (1994).

**A. Compliance with Uninsured Motorist Statute**

Defendants originally moved for summary judgment on the basis that Plaintiff failed to comply with the requirements of S.C. Code Ann. § 38-77-170(2). This Court heard those motions and denied them. Defendants filed a motion for reconsideration which the Court also denied. At trial, Defendants reasserted the arguments raised in their previous motions. For the purpose of this Order, those arguments and this Court's orders denying them are incorporated herein. The Court again denies Defendants' Motion for JNOV based on Plaintiff's alleged failure to comply with S.C. Code Ann. § 38-77-170(2).

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**B. Plaintiff's Burden of Proof to Establish Negligence & Punitive Damages**

Defendants contend they are entitled to JNOV because Plaintiff failed to prove by a preponderance of the evidence that Defendants were negligent. They contend Plaintiff: (1) failed to call any witness – including the affiant, Anthony Bernardo – to testify that any object was in Plaintiff's lane of travel; and (2) failed to call any witness – including the affiant, Anthony Bernardo – to testify that the presence of the object caused or contributed to Plaintiff's loss of control of his tractor-trailer.

At trial, Plaintiff presented the testimony of Donald Wilson ("Mr. Wilson") by deposition. Mr. Wilson testified that at approximately 10:30 P.M. on April 29, 2010, he saw a tractor-trailer turn onto the entrance ramp of southbound I-95 at its intersection with Highway

52. This is the same ramp Plaintiff used to access southbound I-95 approximately 1.5 hours later. He testified that strapped to the back of the flatbed was an object that "looked just like" the object Plaintiff claims he later struck. R. Dean Harris, M.E., P.E. ("Mr. Harris"), testified, over Defendants' objection, that based on his analysis the object was not properly strapped down and, again over Defendants' objection, that the damage to one of Plaintiff's front tires was "consistent with" striking some object. Albert Vereen ("Mr. Vereen") testified he came to the accident scene the morning after the accident to begin the lengthy process of removing Plaintiff's truck and trailer from the concrete abutments which were in the grassy median on the left side of southbound I-95. He testified he found the object on the right shoulder of southbound I-95. Over Defendants' objection, he testified that he believed Plaintiff struck the object and gave his reasons therefor. Charlie Hayes ("Mr. Hayes") testified he found the object on the right shoulder of southbound I-95 the morning after the accident as well.

*gms*  
*4* None of the witnesses called by Plaintiff saw the object in the southbound lanes of I-95 or near the area where Plaintiff lost control of his vehicle. Mr. Vereen and Mr. Hayes are the only witnesses who saw the object on I-95. When they saw it, the object was on the right side of the road and several hundred feet south of the point where Plaintiff lost control of his vehicle. Plaintiff's expert, Mr. Harris, testified that if Plaintiff hit the heavy object, the impact would move the object only tens of feet.

Defendants further contend Plaintiff failed to prove by clear and convincing evidence that Defendants' conduct was reckless, willful and wanton. They contend that if Plaintiff has proven violation of a statute which requires loads to be properly secured, then that is all Plaintiff has proved. Defendants concede that violation of a statute is negligence *per se* and may be considered as evidence of recklessness. *Wise v. Broadway*, 315 S.C. 273, 276, 433 S.E.2d 857,

859 (1993) (citing *Daniels v. Bernard*, 270 S.C. 51, 240 S.E.2d 518 (1978)). However, they contend that, standing alone, it is not clear and convincing proof of recklessness, willfulness and wantonness.

Plaintiff concedes he has no direct evidence to corroborate his claim that the object was in his lane, that he struck the object causing him to lose control of his vehicle and propel the object south on I-95. However, Plaintiff contends the circumstantial evidence is sufficient to satisfy his burden of proof. This Court agrees with Plaintiff and, therefore, denies Defendants' Motion for JNOV on this basis.

The jury was made up of diverse personalities with various backgrounds, educational levels, and life experiences. This Court is of the opinion that it should not substitute its judgment for that of the jury. Based on the evidence presented to the jury, the Court finds that the verdict on liability and actual damages is supported by the evidence. The Court will not invade the province of the jury on these issues. The Court also believes Plaintiff satisfied his burden of proof on punitive damages. Therefore, the Court denies Defendants' Motion for JNOV on the bases that Plaintiff failed to satisfy his burden of proof as to negligence and recklessness.

**II. Motion for New Trial Based on Thirteenth Juror Doctrine**

Defendants move for a new trial based on the "thirteenth juror" doctrine. They contend that the verdict is contrary to the preponderance of the evidence. Defendants also argue that the punitive damages award was not established by clear and convincing evidence. For the reasons stated above, this motion is denied.

**III. Motion for New Trial Absolute Pursuant to Rule 59, SCRPC**

Defendants move, pursuant to Rule 59, SCRPC, for a new trial absolute on the basis that Plaintiff failed to meet his burden of proof to establish negligence by a preponderance of the

evidence. Defendants also argue that Plaintiff failed to establish punitive damages by clear and convincing evidence. For the reasons stated above, this motion is denied.

Defendants further move for a new trial absolute on the basis that the Court erred in allowing Mr. Harris to offer expert testimony. Over Defendants' objection, Mr. Harris testified that the damage to Plaintiff's vehicle was "consistent with" striking the object. The basis for Defendants' objection was that Plaintiff did not identify Mr. Harris as an expert witness who would offer such testimony. Defendants contend Mr. Harris should have been allowed to provide testimony on the issues for which he was identified, but not allowed to offer expert opinion testimony on the other issues. During oral argument they directed the Court to *Jumper v. Hawkins*, 348 S.C. 142, 558 S.E.2d 911 (Ct. App. 2001) and *Bensch v. Davidson*, 354 S.C. 173, 580 S.E.2d 128 (2003). Defendants contend they were prejudiced because this testimony was critical and they did not have an opportunity to retain an expert to respond to it. They also contend the Court erred in allowing Mr. Vereen to offer opinion testimony that he believed Plaintiff struck the object. The basis for this objection was that Mr. Vereen was a fact witness only. Plaintiff did not identify him as an expert witness nor did Plaintiff qualify him as an expert witness. At trial, the Court found that this testimony fit the parameters of Rule of Evidence 701, and admitted it into evidence. Defendants' Motion for New Trial Absolute on these bases is denied.

IV. Motion for New Trial *Nisi Remittitur* as to Actual Damages and Punitive Damages

Defendants move for a new trial *nisi remittitur* as to actual and punitive damages. They assert the jury's award was excessive. "A motion for new trial *nisi remittitur* asks the trial court, in its discretion, to reduce the verdict because it is 'merely excessive,' although not motivated by

considerations such as passion, caprice, or prejudice.” *Clark v. South Carolina Dept. of Public Safety*, 353 S.C. 291, 309, 578 S.E.2d 16, 25 (Ct. App. 2002).

**A. Actual Damages**

In this case, Plaintiff presented evidence in the form of expert opinion testimony by two doctors and his own testimony that, as a result of the accident, he sustained serious and life-threatening injuries, endured substantial and continuing pain, ongoing loss of enjoyment of life, permanent impairment, and disfigurement. Plaintiff further presented evidence of medical bills of approximately \$325,000.00 for treatment of his injuries. Based on the evidence presented to the jury, the Court finds the verdict on actual damages to be wholly supported by the evidence. Accordingly, Defendants’ Motion for New Trial *Nisi Remittitur* as to actual damages is denied.

**B. Punitive Damages**

In addressing Defendants’ Motion for New Trial *Nisi Remittitur* as to punitive damages, this Court must conduct a post-judgment review of the punitive damages award. *James v. Horace Mann Ins. Co.*, 371 S.C. 187, 638 S.E.2d 667 (2006). In reviewing an award of punitive damages, this Court must look to the following factors, identified by the Supreme Court in *Mitchell v. Fortis Ins. Co.*: (i) the degree of reprehensibility of the defendant’s actions; (ii) the ratio of the potential damages suffered by the plaintiff and the amount of the punitive damage award; and (iii) the difference between the punitive damages awarded by the jury and civil penalties authorized or imposed in similar cases. 385 S.C. 570, 587-89, 686 S.E.2d 176, 185-86 (2009).

**i. Reprehensibility**

Reprehensibility is “perhaps the most important indicium of the reasonableness of a punitive damages award.” *BMW of North America, Inc. v. Gore*, 517 U.S. 559, 565 (1996). In



evaluating reprehensibility, this Court is required to consider whether: "(i) the harm caused was physical as opposed to economic; (ii) the tortious conduct evinced an indifference to or a reckless disregard for the health or safety of others; (iii) the target of the conduct had financial vulnerability; (iv) the conduct involved repeated actions or was an isolated incident; and (v) the harm was the result of intentional malice, trickery, or deceit, rather than mere accident." *Mitchell*, 385 S.C. at 587, 686 S.E.2d at 185 (citing *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 419 (2003)).

Here, the degree of reprehensibility is minimal. Because this case involves an unknown driver, the Court must base its determination of reprehensibility on inferences from the evidence admitted at trial. To that end, the Court is able to conclude that: an unknown driver failed to appropriately secure this 700 pound bearing; did not notice the bearing had fallen from the tractor-trailer; and failed to respond or otherwise warn the appropriate authorities of this danger. While this conduct certainly qualifies as reckless, it is not intentional. Therefore, based on these inferences, as well as consideration of the elements mentioned directly above, the Court finds that the first factor – reprehensibility – weighs in favor of the Defendants and a reduction of the punitive damages award.

ii. **Ratio – Disparity Between the Actual or Potential Harm Suffered by Plaintiff and Amount of Punitive Damages Award**

The United States Supreme Court has avoided identifying a bright line, or constitutional limit, "on the ratio between harm, or potential harm, to the plaintiff and the punitive damages award." *Mitchell*, 385 S.C. at 588, 686 S.E.2d at 185. However, the Supreme Court has noted that "in practice, few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process." *Id.* With regard to this second factor,

the Court must consider: "the likelihood that the award will deter the defendant from like conduct; whether the award is reasonably related to the harm likely to result from such conduct; and the defendant's ability to pay." *Id.*

In the present case the ratio between actual damages suffered by the Plaintiff and the punitive damages is 1:1, based on the jury award of \$2.5 million dollars in actual damages and \$2.5 million dollars in punitive damages. Moreover, the effectiveness of the punitive damages award as both a punishment and deterrent is minimal given that the identity of the tortfeasor is unknown. See *Clark v. Cantrell*, 339 S.C. 369, 373-79, 529 S.E.2d 528, 533 (2000) ("[t]he purposes of punitive damages are to punish the wrongdoer and deter the wrongdoer and others from engaging in similar reckless, willful, wanton, or malicious conduct in the future."). Consequently, this second factor weighs in favor of the Defendants and a reduction in the punitive damages award.

### iii. Comparative Penalty Awards

9 The Court finds that this third and final factor also weighs in favor of the Defendants. In their supplemental memorandum, the Defendants point the Court's attention to a line of South Carolina cases that establish a pattern in which punitive damages awards have been less than accompanying actual damages awards, and in many cases, substantially less. Two of these cases involve phantom drivers whose conduct was more egregious than the present case at Bar. See *Beldon v. Doe*, 2004 WL 5392306 and *Manigault v. Doe*, 2005 WL 5791474. Thus, in light of prevailing law in this jurisdiction, and given the facts and circumstances of this case, the Court finds the punitive damages awarded by the jury to be excessive, but not motivated by improper considerations. Consequently, the Court finds it appropriate to reduce the amount of punitive damages awarded by the jury in this case, and grants Defendants' Motion for New Trial *Nisi*

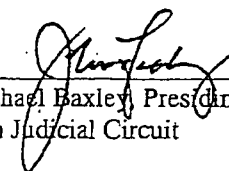
*Remittitur* as to punitive damages to the extent that the amount awarded in punitive damages shall be reduced from \$2.5 million to \$500,000. Plaintiff shall have thirty (30) days from the date of service of this Order upon him to accept the reduction or file a motion for a new trial. In the event a new trial is requested, such trial shall be on the issue of both actual and punitive damages, as required by S. C. Code Ann. 15-33-125 (1988), and the Clerk shall return this case to the jury trial roster. In the event the *nisi remittitur* is accepted, upon written notice by Plaintiff to the Clerk, the Clerk is directed to reduce the verdict enrolled in this case to the total sum of \$3,000,000, and this case shall be considered fully concluded at the trial level at that time.

#### CONCLUSION

For the foregoing reasons, it is ORDERED that Defendants' Motion for New Trial *Nisi Remittitur* as to punitive damages is GRANTED. Defendants' Motion for New Trial *Nisi Remittitur* as to actual damages, and all other post-trial motions, are DENIED.

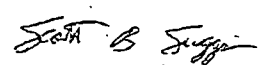
IT IS SO ORDERED.

December 16, 2013  
Darlington, South Carolina

  
J. Michael Baxley, Presiding Judge  
Fourth Judicial Circuit

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2013 DEC 18 AM 8:41  
SCOTT B. SUGGS  
CLERK OF COURT/R.C.D.  
DARLINGTON COUNTY, S.C.

TRUE CERTIFIED COPY,

  
CLERK OF COURT/RMC  
DARLINGTON COUNTY, SC

VERDICT FORM

STATE OF SOUTH CAROLINA

COUNTY OF DARLINGTON

Bobby Lee Tucker, Sr.,

Plaintiff,

v.

Joe Doe, individually, and d/b/a  
Doe Trucking Company,

Defendant.

IN THE COURT OF COMMON PLEAS  
FOURTH JUDICIAL CIRCUIT

C/A No.: 2010-CP-16-0315

1. Was the Defendant negligent?  
☒ YES - Go to Question 2  
☐ NO - Stop deliberations

2. Was the Defendant's negligence a proximate cause of the Plaintiff's injuries?  
☒ YES - Go to Question 3  
☐ NO - Stop deliberations

3. Was the Plaintiff negligent?  
☐ YES - Go to Question 4  
☒ NO - Go to Question 7

4. Was the Plaintiff's negligence a proximate cause of the Plaintiff's injuries?  
☐ YES - Go to Question 5  
☐ NO - Go to Question 7

5. Using the combined negligence that proximately caused the Plaintiff's injuries as one hundred percent (100%), what percentage of that negligence is attributable to the Plaintiff and what percentage is attributable to the Defendant? [The percentage must add up to 100%.]

Plaintiff \_\_\_\_\_%

Defendant \_\_\_\_\_%

Total 100 %

CONTINUED ON NEXT PAGE

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SCOTT B. SUGGS  
CLERK OF COURT/R.O.D.  
DARLINGTON COUNTY, S.C.

6. Was the Plaintiff's negligence greater than fifty percent?

       YES - Stop deliberations

       NO - Go to Question 7

7. Please state the amount of damages, if any, sustained by the Plaintiff. [Do not reduce the Plaintiff's total damages based on the percentage of negligence by any party. After you have answered these questions, the Judge will compute the amount of damages for which the Defendant is responsible based on the percentage of the Defendant's negligence which you have decided proximately caused the Plaintiff's injuries. You are to determine only the total amount of the Plaintiff's damages and enter that amount below.]

\$ 2,500,000.00 Actual Damages

8. With regard to Plaintiff's additional claim for punitive damages against Defendant, and if you found for the Plaintiff on question seven above, do you also unanimously find that the conduct of Defendant was reckless, willful, and/or wanton, based on clear and convincing evidence, such that punitive damages should be awarded:

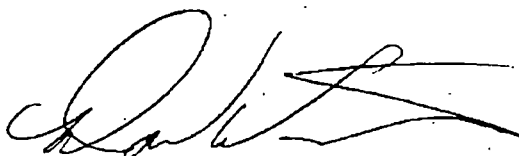
       NO.

✓

YES, and we award the additional amount of

\$ 2,500,000.00 in punitive damages against Defendant.

I certify that these decisions are the unanimous decisions of the jury.



Don W. Winburn, Foreperson

April 17, 2013

STATE OF SOUTH CAROLINA  
COUNTY OF DARLINGTON

Bobby Lee Tucker, Sr.,

Plaintiff,

Vs.

John Doe, individually, and dba Doe  
Trucking Company,

Defendants.

IN THE COURT OF COMMON PLEAS  
FOURTH JUDICIAL CIRCUIT  
C/A # 2010-CP-16-

10 CP 100315

SUMMONS FOR  
RELIEF

(Complaint, Interrogatories  
and Request for Production of  
Documents Served)

(Jury Trial Requested)

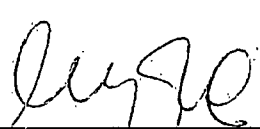
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TO THE DEFENDANTS ABOVE-NAMED:

YOU ARE HEREBY SUMMONED and required to answer the Complaint in this action, a copy of which is herewith served upon you, and to serve a copy of your Answer to said Complaint on the subscriber at 170 Courthouse Square, Post Office Box 1770, Florence, South Carolina, 29503-1770 within thirty (30) days from the service hereof, exclusive of the date of such service, and in case of the failure to do so, judgment by default will be rendered against you for the relief demanded in the Complaint.

Florence, SC  
May 14, 2010

  
WILLIAM P. HATFIELD,  
Attorney for Plaintiff  
SC Bar No. 2840  
THE HYMAN LAW FIRM, LLP  
170 Courthouse Square  
Post Office Box 1770  
Florence, SC 29503-1770  
(843) 662-5000  
wphatfield@hymanlawfirm.com

ROA\_0020

Appendix\_0024

STATE OF SOUTH CAROLINA  
COUNTY OF DARLINGTON

Bobby Lee Tucker, Sr.,

Plaintiff,

Vs.

Joe Doe, individually, and dba Doe  
Trucking Company,

Defendants.

IN THE COURT OF COMMON PLEAS  
FOURTH JUDICIAL CIRCUIT  
C/A # 2010-CP-16-\_\_\_\_\_

10 CP 180315

COMPLAINT  
(Jury Trial Requested)

SCOTT B. GIGGS  
CLERK OF COURT  
DARLINGTON COUNTY, S.C.

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The Plaintiff, complaining of the above-named Defendants alleges:

1. That the Plaintiff is a resident and citizen of the County of Darlington, State of South Carolina.
2. That the Defendant is an unknown individual who resides in South Carolina and at all times hereinafter mentioned was operating a tractor and trailer in the State of South Carolina.
3. That on or about Friday, April 30, 2010, at approximately 12:15 a.m. the Plaintiff, Bobby Lee Tucker, Sr., was driving a 2001 Freightliner tractor, belonging to Tucker Enterprises, Incorporated, bearing vehicle identification number 1FVHAHCG41PF93059 in a southerly direction on Interstate 95 in Florence County, South Carolina; at the same time and place the Defendant was transporting a piece of machinery and a part of the machinery fell from

the Defendants' tractor and trailer landing in the outside lane of Interstate 95 just north of the overpass at exit 153 also known as Honda Way; that the Plaintiff confronted with this sudden emergency, attempted evasive maneuvers but his tractor struck the metal object causing him to lose control and strike the overpass resulting in injuries and damages as more particularly hereinafter set forth.

4. That the collision between the Plaintiff's tractor and the object which fell from the Defendants' tractor and trailer was witnessed by a third party, Anthony Bernado, and an immediate report of the incident was made to the South Carolina Highway Patrol which conducted an investigation as soon thereafter as was practicable.
5. That the injuries and damages sustained by the Plaintiff were caused and occasioned by the willful, wanton, reckless, careless, negligent and unlawful conduct on the part of the Defendant in one or more of the following particulars, to-wit:
  - (a) In driving a vehicle at an excessive rate of speed, too fast for the conditions then and there existing;
  - (b) In leaving the scene of the accident with property damage and/or personal injury;
  - (c) In failure to exercise due care.



(d) In failing to secure the load.

All of the above being in violation of the laws of the State of South Carolina.

6. That as a direct and proximate cause of said negligence, wantonness, recklessness, and unlawfulness on the part of the Defendants, the Plaintiff was thrown violently in and about Plaintiff's automobile; that the Plaintiff was greatly and severely injured in and about Plaintiff's head, neck, arms, body, back, limbs, and other parts of the Plaintiff's body; that Plaintiff was rendered sick, sore, lame, disabled, bruised, and shocked thereby and continues so to be; that all of such injuries have caused Plaintiff extreme and excruciating pain continuously to this date and the Plaintiff will suffer such pain in the future; that as a direct and proximate result of the negligence of the Defendant as aforementioned the Plaintiff suffered severe bruises, lacerations, and contusions and great pain and suffering.

7. That as a direct and proximate cause of said negligence, wantonness, recklessness, and unlawfulness on the part of the Defendant:

- (a) The Plaintiff was committed to the hospital and will be required to enter the hospital in the future for long and extensive periods of time;
- (b) The Plaintiff was confined to the care and treatment of skilled physicians and nurses; that Plaintiff is presently being treated by such persons and will continue to receive treatment from them in the future;

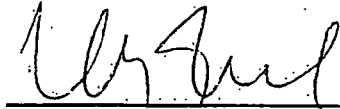
that Plaintiff has expended large sums of money for such treatment and will be obligated to expend even more money in the future for such care and treatment;

- (c) The Plaintiff was hindered and prevented, and in the future will be hindered and prevented from transacting and attending to Plaintiff's necessary and lawful affairs since the date of the collision and loss and was deprived of divers gains, profits, salaries, pleasures, advantages, and earning capacity and ability which Plaintiff would have otherwise derived and acquired;
  - (d) The Plaintiff was in the past, present, and will continue in the future to be put to great expense for medicine and drugs;
  - (e) The Plaintiff has expended large sums of money in the past and present for transportation to and from the doctor's office and hospitals and will continue to have such expenses in the future for consultations and treatment;
  - (f) The Plaintiff's previous good health has been permanently impaired.
  - (g) The Plaintiff has suffered a loss of wages and in the future will suffer a loss of wages due to the injuries received.
8. That the Plaintiff is informed and believes that he is entitled to an award of actual damages and an award of punitive damages.

1002 300000  
WHEREFORE, Plaintiff asks judgment against the Defendants for actual damages, an award of punitive damages, and the costs of this action.

Florence, SC

May 14, 2010



**WILLIAM P. HATFIELD,**

Attorney for Plaintiff

SC Bar No. 2840

**THE HYMAN LAW FIRM, LLP**

170 Courthouse Square

Post Office Box 1770

Florence, SC 29503-1770

(843) 662-5000

wphatfield@hymanlawfirm.com

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DARLINGTON COUNTY, S.C.

FILED

1 STATE OF SOUTH CAROLINA )  
2 COUNTY OF DARLINGTON ) COURT OF COMMON PLEAS  
3 ) No. 2010 CP 16 315

4 BOBBY LEE TUCKER, SENIOR )  
5 Plaintiff )

6 versus ) TRANSCRIPT OF RECORD  
7 )

8 JOHN DOE, individually, )  
9 and doing business as )  
DOE TRUCKING COMPANY )

10 Defendant )

Darlington, South  
Carolina  
April 15, 2013/  
April 17, 2013

11  
12  
13  
14 B E F O R E :

15 HONORABLE J. MICHAEL BAXLEY, Judge, and a Jury  
16

17 A P P E A R A N C E S :

18 For the Plaintiff: WILLIAM P. HATFIELD, Esq.  
HATFIELD-TEMPLE, LLP

19 For the Defendant: THOMAS J. KEAVENY, II, Esq.  
20 KEAVENY LAW FIRM

21 Reporter Present: PAMELA CARTEE  
22

23 HARRIET P. BENNETT  
24 Reporter, S. C. Court Administration  
46 Regency Oaks Drive  
25 Summerville, S.C. 29485

ROA\_0026

Appendix\_0030

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| 13 | 2 | DVD of commercial             |
| 14 | 3 | Affidavit of non-service      |
| 15 | 4 | Donald Wilson Depo            |
| 16 | 5 | Dr. Koon Depo                 |
| 17 | 6 | Dr. Myslinski Depo            |
| 18 | 7 | Jury note                     |

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1 Don't feel uncomfortable. You need to serve well  
2 and to serve capably, and you have two things that will  
3 assist you. You have the benefit of your collective ex-  
4 periences and, secondly, your ability to listen. With  
5 those two things, you will find yourselves in good shape.  
6 Now, let me speak with counsel for a moment.

7 Counsel, is there an objection to the procedures used  
8 by this Court to draw this jury or the strikes employed by  
9 the other side? What says the Plaintiff?

10 MR. HATFIELD: No, sir.

11 THE COURT: What says the Defense?

12 MR. KEAVENY: No, sir.

13 THE COURT: All right, would you come forward, coun-  
14 sel, so we can talk about scheduling information?

15 (Conference at the bench between counsel and the  
16 Court off the record)

17 THE COURT: Thank you. All right, ladies and gentle-  
18 men, we are going to release you for the morning to go  
19 and have lunch. We're going to give you a lengthy lunch.  
20 Please be back here at two o'clock so this case can get  
21 started.

22 We will let the Bailiff walk out with you and show  
23 you where your jury room is so you can come back at two  
24 o'clock to the jury room.

25 Now, please, whoever you have lunch with, whether it

1 be family members or other members of the jury, please  
2 don't discuss the case. You don't know enough about the  
3 case to have a discussion.

4 Also, please don't undertake to do any kind of in-  
5 vestigation at this time. When you come back at two o'clock  
6 we will be ready to proceed with opening statements.

7 Let me say to you that we operate this Courtroom bas-  
8 ically on business hours, and we would intend to end some-  
9 where around five o'clock, or the end of the business day.

10 You will not be put in a hotel or sequestered some-  
11 where. You are going to be home with your families, and  
12 we will see you at two o'clock.

13 (Jurors excused from Courtroom)

14 (Other matters taken up by the Court until two o'clock  
15 P.M.)

16 THE COURT: All right. We are here on the matter of  
17 Bobby Lee Tucker versus John Doe, and I am told there are  
18 some pre-trial issues that we need to take up.

19 MR. HATFIELD: Thank you, Your Honor.

20 First, as a housekeeping matter, I would move into  
21 evidence Plaintiff's Exhibits 1 through -- actually 1  
22 through 65 which have been marked and we have a list that  
23 we have handed up to the Court. They have been shared  
24 with Mr. Keaveny.

25 We do have on our exhibit list some exhibits that

35

1 that will not be received in evidence. The first is a  
2 grey bearing block. That was our Exhibit Number 61. We  
3 have substituted some photographs but we will have the  
4 bearing block. It is downstairs for the jury to view,  
5 and I think both parties would like that.

6 We would also show the tire and rim of the tractor-  
7 trailer which we will have physically present tomorrow  
8 but we also have photographs of that.

9 Then the DVD commercial on which we have a stipula-  
10 tion and I see that that will be marked as a Court's  
11 Exhibit, along with the affidavit of Mr. Bernardo.

12 THE COURT: All right. Very good. Let's check that  
13 the Court Reporter has the list you were referring to.  
14 Our Court Reporter needs to have that list to be aware of  
15 what Exhibits we have.

16 All right, is there an objection to those being ad-  
17 mitted? Any objection to those Exhibits offered by the  
18 Plaintiff?

19 MR. KEAVENY: Well, Your Honor, just a couple. I'm  
20 not sure whether it is housekeeping or just what it is.

21 First of all, Exhibit Number 63 is a DVD that we've  
22 talked about, the commercial or the advertisement in the  
23 media. We object to that coming in to evidence.

24 We understand it will be marked a Court's Exhibit  
25 but will not be coming into evidence.

1 THE COURT: And that is 63?

2 MR. KEAVENY: That's correct. That doesn't come  
3 in but will be a Court's Exhibit.

4 I don't see Mr. Bernardo's affidavit on here, so :

5 REPORTER: Number 25.

6 MR. KEAVENY: Number 25. I see it here.

7 MR. HATFIELD: It has already been filed with the  
8 Court but I would just hand this to the Court. This is  
9 the original affidavit of Mr. Bernardo. It is dated  
10 March third of 2011.

11 MR. KEAVENY: All right. It's not going into evi-  
12 dence.

13 THE COURT: It's a Court's Exhibit.

14 MR. KEAVENY: The list I have only has 63 on it. I  
15 believe 62 was designated as the tire and rim.

16 THE COURT: Sixty-one through 65 and he has these  
17 photographs of the bearing block.

18 Okay. That's 61 through 65.

19 All right, gentlemen.

20 MR. KEAVENY: I have no objection to those, Your  
21 Honor. We have had pre-trial discussion about our posi-  
22 tion on the affidavit.

23 THE COURT: Let's go back to that. Let's continue  
24 with the Exhibits. There are two Exhibits, I believe -- Ex-  
25 hibits which will be marked as Court's Exhibits, which

37

1 are 25 and 63, so we would take those off and those would  
2 be Court's Exhibits 1 and 2.

3 Do we have those that we can mark and take out of  
4 the evidence process so they won't be handed to the jury?

5 MR. HATFIELD: Yes, sir.

6 THE COURT: So they are not in that group?

7 MR. HATFIELD: They shouldn't be.

8 THE COURT: So I have the affidavit and 63 is, I  
9 believe, the DVD -- Those are Court's Exhibits 1 and 2.

10 (Discussion between counsel and the Court)

11 THE COURT: My Court Reporter says we need to talk  
12 in sequence. Let's get the Exhibits straight. Thank you.  
13 I believe we were talking among ourselves.

14 (Discussion between counsel and the Court)

15 THE COURT: Okay, 25 and 63 are Court's Exhibits 1 and  
16 2.

17 (Anthony Bernardo affidavit marked Court's Exhibit 1;  
18 DVD of commercial marked Court's Exhibit Number 2.)

19 THE COURT: We have Plaintiff's 1 through 65 on the  
20 original exhibit list; and those two exhibits have been  
21 withdrawn.

22 MR. KEAVENY: There were five photographs of the  
23 bearing block.

24 THE COURT: So we have Exhibits 1 through 24, and  
25

1 MR. HATFIELD: This would be 61, 62, 63, 64 and 65.

2 THE COURT: So then Exhibits 1 through 24 and then 26  
3 through 65. Thank you. Then Court's Exhibits 1 and 2  
4 thus far.

5 Now, you have a list apparently that shows what those  
6 Exhibits are.

7 MR. HATFIELD: Yes, sir.

8 THE COURT: And you have that as well, with the things  
9 that were substituted. All right, good.

10 Now, what about Defendant's Exhibits? Do you wish  
11 to offer those?

12 MR. KEAVENY: Not at this point, Your Honor.

13 (Following Exhibits for the Plaintiff were admitted  
14 into evidence without objection:

15 Plaintiff's 1, 2, 3, and 4, photographs of the car  
16 trailer; Plaintiff's 5, photograph of inside of car  
17 trailer; Plaintiff's 6, photograph of car trailer on  
18 crane; Plaintiff's Exhibit 7, photograph of firefighters  
19 at scene.

20 Plaintiff's Exhibits 8, 9, 10, photographs of bearing  
21 block; Plaintiff's Exhibit 11, photograph of Interstate  
22 95; Plaintiff's Exhibit 12, photograph of gouge marks

23 on highway; Plaintiff's Exhibits 13, photograph of gouge  
24 marks; Plaintiff's Exhibit 14, photograph of skid marks.

25 Plaintiff's Exhibits 15, 16, 17, 18, photographs of scene;

1 Plaintiff's Exhibits 19, 20, 21, 22, 23, 24, photographs  
2 of bearing block; Plaintiff's Exhibit 26, list of medical  
3 expenses; Plaintiff's Exhibit 27, McLeod Medical Center  
4 bill; Plaintiff's Exhibits 28 through 50, medical bills;  
5 Plaintiff's Exhibits 51, 52, x-rays; Plaintiff's Exhibits  
6 53, 54, 55, 56, 57, CT film.  
7 Also Plaintiff's Exhibit 58, emergency room records; Plain-  
8 tiff's Exhibit 59, photograph of tire and rim; Plaintiff's  
9 Exhibit 60, photograph of tire and hubcap; Plaintiff's Ex-  
10 hibits 61 through 65, photographs of bearing block.)

11 MR. HATEELD: The next issue relates to the statutory  
12 requirements. There is a time in which law enforcement  
13 agencies are contacted when an accident is witnessed by  
14 a third party, as well as whether there is negligence in  
15 failure to discover the identity of a driver of a vehicle.

16 Based on our conversation in Chambers, it is my un-  
17 derstanding that the Defendant will stipulate to number  
18 one, number three, and will also stipulate that we have  
19 provided the affidavit but that the Defendant challenges  
20 the sufficiency of the affidavit under the statute.

21 THE COURT: Is that correct, Mr. Keaveny.

22 MR. KEAVENY: That is correct. That is the stipula-  
23 tion we agreed to enter into earlier in Judge's Chambers.

24 THE COURT: And so our record will be clear, does  
25 that leave the sufficiency issue something to be determined



1 by the jury somehow, or does that leave it to be what  
2 the Defendant, in this case being you, have to show?

3 MR. KEAVENY: I believe the purpose of entering the  
4 stipulation is to preserve the objection to the stipula--  
5 tion -- to the affidavit meeting the requirements of the  
6 statute. I think that's the sole purpose.

7 One and three, it seems to me -- issues one and three  
8 contain hearsay, and the issue about the affidavit is hear-  
9 say as well.

10 Mr. Hatfield did not depose him but I understand he  
11 is not required to. Under the statute he has to submit  
12 an affidavit, and we have challenged the sufficiency of  
13 that affidavit.

14 THE COURT: Right, and then some time ago in this  
15 case, this Court ruled that the affidavit was sufficient,  
16 and thus that issue is preserved.

17 There is a Court ruling in place, so that probably  
18 at some point in time there can be an appeal of that  
19 issue. What that means is that in this trial those issues  
20 or those matters are not for the jury to be concerned  
21 with.

22 MR. HATFIELD: Right.

23 MR. KEAVENY: I agree, Your Honor, that we can bas-  
24 ically try this case without those issues.

25 THE COURT: So you then are suing a John Doe Defendant

1 and you have to put up your case to prove John Doe did  
2 damage and prove your damages, and then the Defendant  
3 has alleged comparative knowledge, and those would be  
4 issues for the jury.

5 MR. HATFIELD: That's right, sir.

6 THE COURT: Okay, and from the Defendant's perspec-  
7 tive the issue with regard to the Plaintiff's case is,  
8 number one, whether the object was in the road in the  
9 southbound lane and did Mr. Tucker strike it; did it  
10 cause Mr. Tucker to go over the shoulder of the road.

11 Those are the issues, and, of course, then there is  
12 the issue of comparative negligence. So that makes what  
13 was basically complicated a little simpler and appropri-  
14 ately outlined for the jury to determine.

15 Now, are there other issues we need to take up?

16 MR. KEAVENY: Just one other, Your Honor, and that  
17 is related to the issue of the deposition of Don Wilson.  
18 We have attempted to subpoena him every time the case was  
19 on the roster, and we have an affidavit from the process  
20 server he's been to Mr. Wilson's last known address and  
21 where he is no longer.

22 We've also checked the Charleston County Detention  
23 Center and they say he is not incarcerated.

24 MR. HATFIELD: We went into this in Chambers and I  
25 hate to get into this, but we think somebody knows where

1           This is why we are having the deposition, and, of  
2       course, it is the Court's understanding that the wit-  
3       ness is not available for this proceeding in our Court-  
4       room.

5           If the witness is not available within the statute  
6       or cannot be found, then the deposition may be used in  
7       place of that live testimony. That is what the Plaintiff  
8       has proposed to do and the Defendant does not object.

9           I believe, Mr. Hatfield, that you have reduced the  
10      relevant material to approximately -- how many minutes?

11       MR. HATFIELD: I think maybe twenty minutes or maybe  
12      a little bit longer.

13       THE COURT: All right, sir, and this is not a full  
14      deposition, but just portions of it that counsel have de-  
15      termined are relevant.

16       Now, does anyone need a break before we proceed with  
17      this? (No audible response) Very good. Then we will  
18      go ahead and read that and then take a break at that time.

19       Thank you.

20       (Whereupon, portions of the deposition of Donald  
21      Wilson were published to the jury by video deposition)

22       DONALD WILSON was sworn, after which the following  
23      questions were posed and answers given:

24      BY MR. HATFIELD:

25      Q. Mr. Wilson, my name is Bill Hatfield. Thank you for

D. WILSON DEPO

1 coming here this afternoon. Let's begin first with your  
2 -- with your full name and where you now live?

3 A. I'm Donald Wilson, Donald Lee Wilson. I live at 332  
4 Stonewall Street in Hartsville, South Carolina, in  
5 Darlington County.

6 Q. All right. What part of Darlington County is that or  
7 what -- what part is that?

8 A. That would be West Hartsville.

9 Q. Is that -- is that off of Ruby Road?

10 A. Yes, sir.

11 Q. Okay, and how long have you lived there?

12 A. Oh, Lord, probably twenty-five, thirty years.

13 Q. All right, and are you from Darlington County orig-  
14 inally?

15 A. No, sir. I was born in North Carolina, and time I  
16 got old enough to get out of North Carolina I come to  
17 South Carolina. I was fifteen years old when I come down.

18 Q. All right, and how old are you?

19 A. Fifty-six.

20 Q. And your birth date?

21 A. February the 8th, 1953.

22 Q. Okay, I understand that  
23 you're retired on disability now?

24 A. Uh huh.

25 Q. That's a yes?

D. WILSON DEPO

1 A. Yes, sir. Yes, sir.

2 Q. Okay, and, just briefly, what is the nature of your  
3 disability?

4 A. Well, I've had heart attacks and I've got arthritis  
5 in my back real bad.

6 Q. Okay. Before you retired, what did you do for a liv-  
7 ing?

8 A. Drove trucks, tractor trailer trucks.

9 Q. For how many years?

10 A. Approximately thirty years.

11 Q. All right. Let me kind of fast forward to, if you  
12 recall, a specific event on late Thursday, April 29th of  
13 this year.

14 A. Yes, sir.

15 Q. Let me ask you specifically, did you have occasion to  
16 be on the Darlington Highway, the interchange with Inter-  
17 state 95?

18 A. Yes, sir.

19 Q. Explain to the jury why you were there.

20 A. I was taking my middle son home which he has cerebral  
21 palsy, because he couldn't drive and stuff, and we stopped  
22 by the TA truck stop.

23 I seen that blue freightliner loaded with pipes and  
24 that piece that fell off on 95 there on there -- looked  
25 just like that piece.

D. WILSON DEPO

1 Q. All right. Well, let's do this. Let me show you  
2 what's Exhibit Number 1 and ask if . .

3 A. Uh huh.

4 Q. . . if you -- if you recall seeing anything like that  
5 . .

6 A. Yes, sir.

7 Q. . . on this particular evening?

8 A. Yes, sir.

9 Q. You did? All right. Now, let me ask you specifi-  
10 cally, what -- what brought your attention to the blue  
11 freightliner truck?

12 A. Because I had a blue freightliner truck. In fact, it  
13 was -- next to the last truck I drove was a blue freight-  
14 liner, and I was in a lease program and it was made up  
15 similar to mine.

16 And once you drove trucks all your life, you just  
17 love to look at them trucks.

18 Q. All right. Had you ever been to that TA, or Travel  
19 America, truck stop before?

20 A. Yes, sir.

21 Q. On how many occasions would you, say, go there?

22 A. Oh, Lord, I don't know. I can't pass it without  
23 stopping.

24 Q. Okay, so . .

25 A. And then I'm gonna get a cup of coffee.

D. WILSON DEPO

1 Q. All right, so were you on your way taking your son  
2 back home?

3 A. Yes, sir.

4 Q. Okay, and where did your son -- where does your son  
5 live?

6 A. He lives at Quinby over there on Sand Pit Road.

7 Q. Okay, and approximately what time of day or night  
8 was this?

9 A. Well, it was late in the evening, but I was stopped  
10 there at TA -- I stopped there and got a cup of coffee,  
11 and -- and I spotted that truck and I got to looking at it  
12 but -- I don't know why I didn't get the logo and stuff off  
13 the side, and I noticed all that junk on there.

14 I said, well, son, I used to haul that stuff too.

15 Q. All right.

16 A. And I said, I'll bet you a dollar to a donut he . . .

17 (Deposition stopped due to malfunction with equipment)

18 THE COURT: Counsel, do you want to take a break be-  
19 fore we finish with this witness?

20 MR. HATFIELD: Yes, sir.

21 THE COURT: All right, we'll do this. Ladies and  
22 gentlemen, please step into your jury room, and we will  
23 come back in at three o'clock. Please enjoy your break  
24 and do not discuss the case among yourselves when you are  
25 in the jury room.

1 (Jury excused from Courtroom at 2:47 P.M.)

2 THE COURT: All right, the Court will be in recess  
3 for fifteen minutes.

4 (Whereupon, the Court stood in recess until 3:00 P.M.)

5 THE COURT: Mr. Hatfield, are you ready to proceed?

6 MR HATFIELD: Yes, sir. I believe we have the mal-  
7 function corrected.

8 THE COURT: Bring in the jury.

9 (Jury returned to the Courtroom)

10 THE COURT: All right, ladies and gentlemen, please  
11 be seated. Welcome back.

12 Mr. Hatfield, please proceed.

13 (DONALD WILSON Depo Continued)

14 BY MR. HATFIELD:

15 Q After you saw that truck, did you leave and was the  
16 truck still there or . .

17 A. The truck was still there. I carried my son home  
18 and I come back. It was probably roughly ten, ten thirty,  
19 maybe eleven o'clock whenever I got -- was probably about  
20 eleven when I got home. That's what my girlfriend said  
21 anyway.

22 And I saw the truck when he come out of the TA truck  
23 stop headed out to the -- 95 -- Interstate 95 headed  
24 south.

25 Q. All right, so when -- so if it leaves the Travel



D. WILSON DEPO

1     America truck stop and pulls off the truck stop onto High-  
2     way 52, what direction would it turn, right or left?

3     A.    It would turn left.

4     Q.    Okay, and about how far was it from the Inter -- the  
5     I95 interchange?

6     A.    It was less than a mile.

7     Q.    Okay. Now, did you just continue to pass through . .

8     A.    Yeah.

9     Q.    . . . that area -- okay, and I take it that's the last  
10    time you saw that particular truck?

11    A.    Yes, sir. Well, I eyeballed him when he got in the  
12    turning lane to get on I95 south, because whenever you're  
13    retired like I am that's something you miss.

14           I don't know if it gets in your blood or what and you  
15    want to go back to doing it again, you know.

16    Q.    Did you drive local or did you drive over the road?

17    A.    Well, I . . .

18    Q.    Long haul?

19    A.    I run over the road. I've run local and I've run  
20    over the road.

21    Q.    Okay. Now, how is it that Mr. Tucker's incident came  
22    -- that you came to learn of Mr. Tucker's incident and  
23    his investigation to determine what this piece was, and,  
24    you know, where it came from?

25    A.    Well, it come on the TV there and I said, I remember

D. WILSON DEPO

1     seeing that truck hauling that thing, but I didn't know it  
2     was Mr. Tucker that run into it.

3     Q.    Okay.

4     A.    I found out later on that the piece fell off the  
5     truck and Mr. Tucker had hit it with his truck.

6     Q.    All right.

7     A.    And, well, you've got a lot of them out there running  
8     them flatbeds, and if you stop in time, man, the stuff  
9     will come off of them.

10    Q.    All right.

11    A.    Because if that metal ever starts sliding, you're in  
12    trouble.

13    Q.    All right. Now, in addition to the -- the piece that  
14    is shown in this Exhibit Number 1, what else did you or do  
15    you recall seeing on that truck?

16    A.    Pipes and rebars and stuff.

17           MR. HATFIELD: Okay, all right. That's all the questions  
18    I have.

19    BY MR. KEAVENY:

20    Q.    Mr. Wilson, my name is Tom Keaveny. I just want to  
21    talk to you a little bit more about what you've just testi-  
22    fied to. Okay?

23    A.    Yes, sir.

24    Q.    All right. You and I have never spoken before just  
25    right now. Is that right?

D. WILSON DEPO

1 A. Yes, sir.

2 Q. All right. So you'll have to bear with me if my ques-  
3 tions seem a little elementary.

4 First of all, you testified that you drove trucks  
5 like the one you've just described?

6 A. Uh huh.

7 Q. For your career, is that right?

8 A. Well, I've drove all kind of trucks but the last one  
9 I drove was a freightliner.

10 Q. Which is what this one : .

11 A. Yes, sir.

12 Q. All right.

13 A. And I was trying to buy the freightliner and it was  
14 blue in color, and I don't know, just -- you have some  
15 trucks, you know, just catches your eye like you've drove  
16 them a certain period of time and stuff.

17 And the last freightliner I drove, I think I drove it  
18 about four years -- three to four years.

19 Q. Okay, this freightliner that you saw was similar --  
20 was it similar to the last one you had driven?

21 A. Yes, sir.

22 Q. Okay. Now, I don't -- I've never driven a freight-  
23 liner so I don't honestly know much about them, but what can  
24 you tell me about the truck other than -- about this freight-  
25 liner other than that it was blue and it was a freightliner

D. WILSON DEPO

1 and it had a flatbed attached to it with some pipes and  
2 apparently something that looks like what is depicted in  
3 Exhibit Number 1. It wasn't exactly what is depicted in  
4 Exhibit 1?

5 A. Well, he had twin antennas on it, CB antennas, be-  
6 cause that's what I always run on mine, twins.

7 Q. Okay.

8 A. Because you get better reception on your CB radio and  
9 stuff, and, I don't know, it just caught my eye for some  
10 reason. The color of it and all was pretty close to the  
11 color of the one I drove.

12 Q. Okay, did you get up to -- did you look or get close  
13 to it and check it out?

14 A. I tried to look at the driver but I couldn't get  
15 close enough to see his face which he acted like he was  
16 in a hurry.

17 So I hollared at him on the radio several times there,  
18 and he never did come back. Of course, I -- I hollared  
19 for the freightliner driver heading south and, well, any  
20 time you talk to truck drivers a bunch more truck drivers  
21 come on. Which driver you talking to, driver? There's a  
22 heap of us going south.

23 I said, yeah. I said, the freightliner that's trying  
24 to get on 95 now, and he never did come back.

25 But that was pretty well basically it, I reckon.

D. WILSON DEPO

1 Q. Okay, so this conversation that you're telling me  
2 about right now is a conversation you tried to initiate  
3 with the driver of that freightliner when you were on your  
4 way back home, after having . .

5 A. Uh huh.

6 Q. . . dropped your son off, is that right?

7 A. Yes, sir.

8 Q. Okay. Now, I'm not real familiar with that intersection  
9 of 195 and 52, although I will confess that I've been  
10 through it several times.

11 (Pause in playing of deposition)

12 BY MR. KEAVENY CONTINUED:

13 Q. When you saw this freightliner for the first time on  
14 your way taking your son home, did you pull into the Truck  
15 America stop?

16 A. Yeah, I went in there and got coffee and stuff.

17 Q. Okay, did you pull into it when you passed it on the  
18 way back home too?

19 A. No.

20 Q. Okay, so when you pulled in it the first time to  
21 get your coffee -- when you pulled in it to get your coffee,  
22 you saw over there -- you saw it in the lot.

23 You're taking your son home, you pulled into the  
24 Truck America stop. You see the freightliner and you recognize  
25 it -- you see it's a blue freightliner and you're attracted

D. WILSON DEPO

1 to it because of your own personal experience with it.

2 Did you drive up to it or walk over to it and kind  
3 of check it out and get closer to it, or did you just no-  
4 tice it from a distance?

5 A. I noticed it from a distance.

6 Q. All right, and you did not walk up to it or drive up  
7 to it to check it out?

8 A. No.

9 Q. Okay.

10 A. But when you drive past one, if you've drove enough  
11 of them you can hawk them out.

12 Q. I don't doubt it. I don't doubt it. How close would  
13 you say you got to it at that -- during that time when you  
14 were there?

15 A. Well, I would probably say six, maybe ten foot.

16 Q. You were pretty close?

17 A. Yeah, because I drove right by it . .

18 Q. Okay.

19 A. . . when I pulled in.

20 Q. Okay. Now, you said that it had a flatbed attached  
21 to it, is that right?

22 A. Uh huh.

23 Q. Yes?

24 A. Yes.

25 Q. And you said that there were some pipes on it?

D. WILSON DEPO

1 A. Yeah.

2 Q. Is that right?

3 A. Yeah.

4 Q. All right, and you said that there was this object . .

5 A. Rebar and some . .

6 Q. This object that's . .

7 A. Yes, sir.

8 Q. . . depicted in Exhibit 1 on it too, is that right?

9 A. Yes, sir.

10 Q. How were they strapped down?

11 A. With the straps run across them.

12 Q. How were they strapped down?

13 A. With the straps run across them.

14 Q. Were they those nylon . .

15 A. This . .

16 Q. . . kind of straps?

17 A. Yeah, he had nylon straps and chains on his truck.

18 (Pause in playing of deposition video)

19 BY MR. KEAVENY:

20 Q. That's what I was going to ask you. (Pause)

21 When you saw it, do you remember how it was secured  
22 to the flatbed?

23 A. Yeah, it had a strap across it. A yellow strap.

24 Q. It didn't have a chain going through it?

25 A. Huh uh.

D. WILSON DEPO

1 Q. No?

2 A. No.

3 Q. Did it occur to you as you saw that -- when you saw  
4 it in that condition, did it occur to you that that could  
5 be a problem?

6 A. Yes, sir.

7 (Pause in playing of deposition)

8 BY MR. KEAVENY:

9 Q. And you tried to initiate contact with him by talking  
10 on your CB?

11 A. Yeah, because . . .

12 Q. But didn't . . .

13 A. . . I've got a CB in my camper.

14 Q. But you didn't have any success, is that right?

15 A. No, I didn't.

16 MR. HATFIELD: Your Honor, that concludes the testimony  
17 of the witness Donald Wilson.

18 THE COURT: Then if you would call your next witness,  
19 please.

20 MR. HATFIELD: We would call Roger Dean Harris.

21

22

23

24

25





MR. HARRIS ON DIRECT

1 I got a Master's Degree in mechanical engineering  
2 from the same Institution in 1992, my specialty being  
3 machine design and materials science, functions of meta-  
4 lurgistics and a fracture analyst.

5 I've been in the industry as a piping and machine  
6 designer.

7 For the past twenty-five years I have been a con-  
8 sultant.

9 Q. All right, and have there been occasions where you  
10 have offered expert testimony in the area of your exper-  
11 ience?

12 A. Yes, sir. That is part of being a consulting engi-  
13 neer. Sometimes you have to testify about your results.

14 Q. All right, and tell us again in what areas do you  
15 hold yourself out as an expert?

16 A. Primarily in machine design and materials science,  
17 fracture analysis, for example, involved with machine  
18 design and materials science.

19 MR. HATFIELD: If Your Honor please, we would move  
20 to admit Mr. Harris as an expert in those areas.

21 THE COURT: All right. Ladies and gentlemen, let  
22 me just talk to you a moment about this process, and we  
23 will then go over to the other side to see if they have  
24 a response.

25 Typically, witnesses who appear in cases are lay

81

ROA\_0056

Appendix\_0060

MR. HARRIS ON DIRECT

1 witnesses. They testify about what they saw or heard or  
2 did, but if a witness because of some training or ex-  
3 perience have knowledge in a particular specialized  
4 field, then that witness may be permitted to not only  
5 testify about what they saw or heard or did as a lay  
6 witness would do, but they can go beyond that and ex-  
7 press an opinion as to what opinion they derived from  
8 what they saw or heard or did.

9 That is the difference between an expert witness  
10 and a lay witness. Counsel has offered the witness as  
11 an expert, and so when that happens we stop right there  
12 and go to the other side to give them an opportunity  
13 to question the witness in the area of their experience;  
14 not on the merits of the testimony but just about their  
15 experience only.

16 Are there questions for the witness on those par-  
17 ticular matters?

18 MR. KEAVENY: I have none. I have no objection,  
19 Your Honor, to his testifying about those areas he has  
20 identified as his expertise.

21 THE COURT: Very good. Now, there is no objection  
22 from the other side, and let me say, ladies and gentle-  
23 men, if there are other expert witnesses who appear in  
24 the trial -- I'm not sure -- but whatever expert wit-  
25 ness is provided to you it is never given for the

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1 purpose of controlling your duty. You should weigh it  
2 as you would any other witness' testimony and give it  
3 the weight that you deem it is entitled to.

4 It is given for the purpose of assisting you in  
5 finding matters of fact that are in the purview of the  
6 expert if you find that it does assist you.

7 So with that understanding, you may proceed,  
8 counsel.

9 BY MR. HATFIELD

10 Q. Mr. Harris, when was your firm engaged to conduct  
11 an inspection of this object and to take custody of  
12 this object?

13 A. May I refer to my file?

14 Q. Yes, sir, please.

15 A. We opened our file on May 18, 2010.

16 Q. And does your file have what we call chain of evi-  
17 dence documents to establish when it came into your pos-  
18 session and from whom?

19 A. Yes, sir. Any time we collect evidence or we get  
20 evidence from someone else, we have a paper trail docu-  
21 menting when we received it, who we received it from,  
22 what we did with it.

23 And if we transfer it to someone else, we have  
24 their signature on that form.

25 Q. All right, sir, and what do your records reflect

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1 as to exactly when you took possession of this and from  
2 whom?

3 A. The record of stored materials form is dated May 20,  
4 2010, and apparently -- it looks like we released the  
5 bearing block back to someone else on June 15, 2011.

6 Q. And what were you tasked to do or what were you  
7 asked to do initially?

8 A. I was asked to try and figure out what it was, to  
9 identify the block or the object.

10 Q. And were you able to determine that?

11 A. To a certain extent but not its total identity.  
12 We were able to determine that it is a cast, probably  
13 steel, block and it was a bearing block. It was the  
14 housing for large bearings.

15 Q. Okay, and how did E D and T maintain its posses-  
16 sion and custody of this object?

17 A. Well, it was maintained under lock and key on our  
18 property during the time it was in our possession.

19 Q. All right, and did you examine this object -- pull  
20 up Exhibit 61 -- excuse me. We don't have Exhibit 61.

21 Mr. Harris, we're going to do this on a schematic  
22 so if you would step down, please.

23 A. Certainly.

24 Q. Can you identify what this is in this photograph?

25 A. Yes, sir. You don't have the entire thing there,

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1 but is almost all there. It is eighteen inches square  
2 and eleven inches tall but the corner is sliced off a  
3 little bit.

4 There is a hole in the middle of it that is eleven  
5 inches in diameter, so about two thirds of the way down  
6 through it.

7 It is made of -- we know it is iron-based or we're  
8 pretty certain it is. There is also a sleeve in the  
9 bearing here that appears to be made out of some sort of  
10 alloy. It is probably a brass sleeve which held the  
11 actual bearing.

12 Q. Now, what efforts, if any, did you take in trying  
13 to actually discover if there were any identifying mark-  
14 ings, stamps or anything on this particular object?

15 A. Well, we examined all six sides of the block indi-  
16 vidually. We used a magnifying glass and with flashlights.  
17 We had it power-washed to clean any debris off the out-  
18 side.

19 We also removed the bearing sleeve out of the block  
20 just in case there was some type of casting mark in the  
21 block that was hidden by the sleeve.

22 We found no identification marks. I also called  
23 a couple of contacts I had in the local area, such as  
24 a steel mill and a machine shop where I thought it might  
25 have originated, but they did not recognize the block.

MR. HARRIS ON DIRECT

1 Q. Okay, and what exactly is a bearing block?

2 A. Well, you have bearings whether it's on your wheel  
3 of your car or just on the leg pieces of your kitchen  
4 table, and it has some kind of housing or something to  
5 hold it.

6 It is usually a little piece of steel. In the case  
7 of a large bearing like this, the housing for the bear-  
8 ing may be a casting or cast iron or cast steel. That's  
9 what this one was.

10 Q. Okay.

11 A. You have a drive bearing which means the shaft  
12 didn't go all the way through but just was stuck into  
13 the bearing.

14 Q. And where would you typically find -- how would  
15 this object be used? It would be used in what type of  
16 business?

17 A. Something large that rotates probably slowly, such  
18 as a large turbo on a industrial piece of equipment,  
19 like a furnace. Anything where you two short shafts  
20 such as -- I would illustrate it like this, that it needs  
21 to rotate so these two shafts will be sitting in the  
22 bearings to the side and it could rotate on those bear-  
23 ings. A door hinge would be one example.

24 Q. Now, were you able to weigh the object or to calcu-  
25 late its weight based on the dimensions and what it was

1 made of?

2 A. Yes, sir. If it was solid it would weigh about  
3 seven hundred and fifty pounds. We estimated the  
4 weight at about six hundred fifty pounds since it has  
5 the hole in the center.

6 Q. All right. Now look at -- pull up Exhibit Number  
7 8, and while she's doing that, as part of your inspection  
8 were you asked to physically inspect the object  
9 to determine whether or not there were any fresh or any  
10 recently-made indentations or marks on that?

11 A. Not until relatively recently. That was not our  
12 original job.

13 Q. But at some point have you viewed photographs of  
14 this object to make that determination?

15 A. Yes, I had to do it from the photographs. When I  
16 had the actual object in my possession I took some photographs  
17 . . . (Loud noise in background)

18 Q. Would you feel more comfortable if you could step  
19 down. If you would take a look at Exhibit Number 8,  
20 and, based on your experience and training and your inspection,  
21 tell the jury whether or not you were able to  
22 -- or you can tell from that photograph if there are any  
23 markings on there consistent with being freshly made?

24 A. There are some marks on there that show up in the  
25 photo. You can see where they are. They show up better



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1 on the photographs in these areas.

2 Q. And how can you tell if that represents a fresh  
3 mark, as opposed to a mark that had been made a long time  
4 ago?

5 A. If the mark is not heavily rusted or has rust on  
6 it, or a very bright orange as opposed to dark, and the  
7 other is that when something strikes concrete, for ex-  
8 ample, there will be white deposited on it.

9 If you take a hammer head and smack it on the side  
10 you would have the hammer hit without the white deposit.

11 Q. Pull up number 10, which is a little closer view  
12 of that same object on the road side.

13 Now, looking at that, could you indicate any mark-  
14 ings on there that are consistent with fresh markings as  
15 having struck something like a concrete surface?

16 A. Actually there are here and some were actually re-  
17 cent.

18 Q. And are those the actual ones you brought with  
19 you and we printed?

20 A. Yes.

21 Q. Well, let me ask you this question. You mentioned  
22 what would likely happen to the object if it struck a  
23 concrete surface?

24 A. Yes, sir.

25 Q. Pull up Exhibit Number 12. All right, let me show

MR. HARRIS ON DIRECT

1 you this, and this again is the same. Can you tell the  
2 jury whether or not these markings as made were consist-  
3 ent with your physical inspection of that?

4 A. . .

5 MR. KEAVENY: Your Honor, I would object. I be-  
6 lieve that is outside the field of his expertise. He is  
7 a metallurgist in design and fracture analysis . .

8 THE COURT: I would sustain it as to leading. Coun-  
9 sel, you were leading the witness in leading up to the  
10 question and posing the question, so I sustain on that  
11 basis.

12 BY MR. HATFIELD:

13 Q. Let me ask the question again. Can you state whe-  
14 ther or not to a reasonable degree of metallurgical cer-  
15 tainty that the markings which are shown in this Exhibit  
16 would be consistent with being struck by an object . .

17 MR. KEAVENY: Same objection, Your Honor.

18 THE COURT: Stop there and, counsel, you are asking  
19 now whether that -- am I correct that is a marking on  
20 a roadway?

21 MR. HATFIELD: Yes, sir.

22 THE COURT: All right, has the witness been quali-  
23 fied to offer an opinion on that issue?

24 MR. HATFIELD: He is qualified as an expert in mate-  
25 rial science and metallurgy and fracture analysis.

MR. HARRIS ON DIRECT

1 I mean, I can voir dire him additionally to find  
2 out what experience he has in making that determination.

3 THE COURT: I am asking you to lay a foundation for  
4 that question.

5 BY MR. HATFIELD:

6 Q. Mr. Harris, what in your education, training and  
7 experience would allow you to determine whether or not  
8 the markings would be consistent with it being struck  
9 by this object?

10 A. . . .

11 MR. KEAVENY: Same objection.

12 THE COURT: Well, I'm going to overrule as to that  
13 question as he is trying to lay a foundation.

14 So, go ahead. You may answer, sir.

15 A. Well, first of all, my background and training is  
16 in material science. That is not just metal or concrete,  
17 and other materials are included within that training.  
18 How it behaves, for example, when it is struck by another  
19 object is part of what we are trained in and what we  
20 have to know.

21 This is what we would call a witness art, and it  
22 is something that forensic engineers use routinely to  
23 determine if something is inert when one object strikes  
24 another one; it will leave specific shaped marks when  
25 you look at marks that tie one object to another.

MR. HARRIS ON DIRECT

1 THE COURT: Very good. Based upon that, Mr. Keaveny,  
2 I'm going to overrule your objection. It is for the  
3 jury to determine what weight they give to the evidence,  
4 but your objection to its admissibility is overruled.

5 MR. HATFIELD: Thank you, Your Honor.

6 BY MR. HATFIELD:

7 Q. Let me ask the question again.

8 Based upon your education, training and exper-  
9 ience and viewing the photographs that you have talked  
10 about, specifically Number 10 and Number 12, are you  
11 able to state within a degree, a reasonable degree, of  
12 professional certainty whether this object as depicted  
13 in Number 10 made contact with what is shown in Exhibit  
14 Number 12?

15 A. Well, first of all, I need to tell you I now know  
16 this is concrete. I did not know that before, whether it  
17 was asphalt or concrete.

18 In the concrete, that mark is consistent with a  
19 heavy square-cornered object impacting the concrete, and  
20 there is a corner on the object that is consistent with  
21 having struck that location.

22 Q. Can you show the jury the corner?

23 A. Again, I believe in this photo -- I can tell bet-  
24 ter in my photos.

25 Q. Well, let me hand to you your photos beginning with

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ROA\_0066

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MR. HARRIS ON DIRECT

1 61, so 61 through 65, so you can select the photograph  
2 that you think best illustrates contact with another ob-  
3 ject in the road?

4 A. That's why I wanted to use my photographs. You  
5 see Plaintiff's Exhibit 10 is sitting on top of the  
6 corner where it actually struck the bottom part.

7 That shows up well in this 61, right here. There  
8 is a small -- on this corner is a small area on one side  
9 which pretty well matches the other part you just have  
10 shown me.

11 Q. All right.

12 A. This is a close-up of that same area, and you can  
13 see white deposits in the impact that would not be on  
14 there if that was years old.

15 Q. What number is that?

16 A. That is Number 62. These are different areas, and  
17 this is -- the rest of these are different areas. This,  
18 for example, shows the linear scrape marks on the side  
19 of the block. This is a further distance of the same  
20 part where it was apparently in contact with a hard sur-  
21 face.

22 Q. All right. Let me also show you Exhibit Number  
23 13, and is this the same area?

24 A. Yes, sir. Looking at the photo, there is a small  
25 location that looks like something hard hit the concrete.

MR. HARRIS ON DIRECT

1 and actually fractured it or broke a hole there.

2 Q. The same question I asked you earlier today. From  
3 your training, education and experience are you able  
4 to state within a reasonable degree of professional cer-  
5 tainty whether or not this object shown in Exhibit 10  
6 more likely than not caused the hole or indentation that is  
7 shown there?

8 A. Without having taken the photographs and knowing  
9 the relationship at the time, all I can tell you is that  
10 that hole is consistent with something like that making  
11 contact and making that mark on the concrete.

12 Q. Thank you, sir.

13 Now, you mentioned that certain of these Exhibits,  
14 I believe specifically Plaintiff's 64 and 63, show what  
15 you call linear markings?

16 A. Yes, sir. There are scrape marks both here and  
17 here on two sides, and this is a close-up of those marks  
18 where you can see that something scraped down there,  
19 something hard.

20 Q. And is that consistent with this coming into con-  
21 tact with a paved surface?

22 A. It's consistent with sliding down concrete, yes.

23 Q. Okay.

24 THE COURT: What numbers are those?

25 A. Number 63 and 64.

MR. HARRIS ON DIRECT

1 THE COURT: Thank you.

2 BY MR. HATFIELD:

3 Q. Go back to Exhibit Number 9, please. Just Num-  
4 ber 8, and we looked at that earlier.

5 This is a photograph of the object that was taken  
6 at the scene of the accident.

7 If you assume for the purpose of my question, Mr.  
8 Harris, that this object was in the southbound outside  
9 lane, closest to the shoulder, and was struck by Mr.  
10 Tucker's tractor-trailer traveling at the speed limit  
11 of seventy miles per hour, what trajectory would this  
12 object likely follow?

13 MR. KEAVENY: Objection, Your Honor. I don't  
14 believe that is a proper hypothetical.

15 THE COURT: That is a trajectory issue, so I will  
16 ask you to lay a foundation on that issue.

17 MR. HATFIELD: Yes, Your Honor.

18 BY MR. HATFIELD:

19 Q. What in your experience would allow you to form-  
20 ulate an opinion as to an object's trajectory, hav-  
21 ing been struck by another moving object?

22 A. What you are describing is basic physics going  
23 all the way back to high school physics. Transfer and  
24 impact and mechanics are what mechanical engineers do  
25 every day.

MR. HARRIS ON DIRECT

1 Q. So that is what you . .

2 A. Yes, sir, that is what we're talking about.

3 THE COURT: All right, Mr. Keaveny, do you want to  
4 follow up on those questions?

5 MR. KEAVENY: No, sir. I'll do it on Cross Examina-  
6 tion.

7 THE COURT: Very good. I overrule the objection,  
8 and you may want to ask your question again, counsel.

9 BY MR. HATFIELD:

10 Q. If you assume for purposes of my question that  
11 this object is situated in the outside southbound lane  
12 of Interstate 95, on a concrete or paved surface; that  
13 it is struck by the front of Mr. Tucker's tractor-trailer  
14 traveling at the speed of approximately seventy miles  
15 per hour, what would be the likely trajectory of this  
16 object?

17 A. That would be totally dependent upon the angle  
18 that the truck and the object met.

19 If the truck met the object straight-on, then its  
20 trajectory would be straight down the road in the truck's  
21 trajectory, at least the first time.

22 Once the squarish object like this gets to start  
23 tumbling, it's more than likely going to move off and  
24 it can go in almost any direction.

25 Then its trajectory could be anywhere within that



MR. HARRIS ON DIRECT

1 hundred and eighty degree mark.

2 Q. All right, sir. Well, if this object as depicted  
3 in Number 8 came to rest in this area, would that be  
4 consistent with the hypothetical I asked?

5 A. It's near the roadway and being struck by the  
6 truck, it would go -- my estimation would be in tens  
7 of feet. It's not going to fly hundreds of feet, and  
8 it could be on the side of the roadway or it could dig  
9 in where it landed the first time.

10 You have seen footballs bounce back, and something  
11 like that could occur.

12 Q. Okay, and let me show you Exhibit 59. I will rep-  
13 resent to you that Exhibit 59 is the left front tire  
14 of Mr. Tucker's tractor, and that is the condition it  
15 appeared in immediately after the crash.

16 Can you say within a reasonable degree of engineer-  
17 ing certainty whether or not the damage that is shown  
18 on the inside rim would be consistent with striking the  
19 bearing block?

20 A. I can tell you that both from an engineering cer-  
21 tainly and personal experience, I did that with a tire  
22 myself a few weeks ago. I hit a hard square-edged ob-  
23 ject on the edge of the road. In my case, I had gone  
24 off the edge and struck it. I dented the rim exactly  
25 like that, and that's exactly what I would expect if

MR. HARRIS ON DIRECT

1 you hit a hard square-edged object.

2 It would also tell me it was sitting on the left  
3 side of the vehicle.

4 Q. Mr. Harris, if you assume that the contact occurred  
5 between the object and the tire rim as shown in Exhibit  
6 59, do you know whether or not it would leave any type  
7 of markings on the highway as far as the tire itself?

8 A. The tire leave markings on the highway?

9 Q. Yes, sir.

10 A. The rubber may leave skidmarks but the impact is  
11 not going to leave any kind of marking on the highway.

12 Q. Let me show you Exhibit Number 14. I will repre-  
13 sent this is a photograph taken the day of -- the mark-  
14 ings -- would the markings that appear in that photo-  
15 graph be consistent with what you would expect to happen  
16 if in fact there were an impact between an object and  
17 the tire and rim?

18 A. Yeah, that is one of the results, plus the tire  
19 sliding would leave skidmarks when the wheel would have  
20 locked up.

21 Q. Could the slide have caused the tire to fail as  
22 indicated there?

23 A. Yes, sir. That would explain why it is blown out  
24 on the opposite side of the impact.

25 Q. Why?

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MR. HARRIS ON DIRECT

1 A. I would have expected the tire to blow out at the  
2 impact but if it rolled around and was sheared as it's  
3 going down the highway in a flat condition, it would  
4 tear the tire that way.

5 Q. Okay. Now, let me ask you this: Do you have any  
6 experience in evaluating restraints as they are used in  
7 the trucking industry?

8 A. Yes, sir. Shall I go into that?

9 Q. Yes, sir, please.

10 A. Yes, sir. As a matter of fact, I do. I have had  
11 several cases involving the behavior of the load on a  
12 tractor trailer flat-bed in accident scenarios.

13 Q. All right.

14 MR. KEAVENY: Your Honor, I object as being beyond  
15 the scope of this witness' identification in discovery.

16 THE COURT: What do you say to that?

17 MR. HATFIELD: He was deposed.

18 MR. KEAVENY: But he was not identified as an ex-  
19 pert in this area.

20 THE COURT: Hold on one moment, please.

21 MR. KEAVENY: Yes, sir.

22 THE COURT: Mr. Hatfield, tell me what disclos-  
23 ure would you have made to Defense Counsel?

24 MR. HATFIELD: He was advised. There is no sur-  
25 prise.

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ROA\_0073

MR. HARRIS ON DIRECT

1 In Mr. Harris' deposition taken by Mr. Keaveny,  
2 he asked him questions about the nylon strapping which  
3 secured this object on the flat-bed trailer. He offered  
4 opinions about that and whether or not that was ade-  
5 quate to secure it.

6 That's what I want to ask him about.

7 THE COURT: All right. Mr. Keaveny, do you want  
8 to be heard on that?

9 MR. KEAVENY: Yes, Your Honor. I just simply asked  
10 him if a strap on the back of it would have been suffi-  
11 cient to hold the object to the flat-bed, but  
12 -- and he gave me his answer that it would not, but I  
13 did not go into great details with him about the require-  
14 ments for strapping or what requirements there were, that  
15 kind of stuff.

16 MR. HATFIELD: I don't intend to ask him about  
17 all the measures that should have been taken but only  
18 whether or not what was used was adequate.

19 THE COURT: Very good. Obviously, ladies and gen-  
20 tlement, you may have picked up from this -- in discov-  
21 ery -- well, let's back up and say it this way.

22 We don't -- in our Court system we don't ambush  
23 one another with issues that are not expected in a civil  
24 trial. Basically the issues are known and in the dis-  
25 covery process they are disclosed.

MR. HARRIS ON DIRECT

1        They are disclosed. Witnesses and testimony are  
2        disclosed. Counsel has an opportunity to question in  
3        deposition prior to the trial on issues that are ex-  
4        pected.

5        So you cannot call a witness, an expert witness,  
6        and ask something completely out of the blue for the  
7        first time because the other side has not had the oppor-  
8        tunity to investigate or be aware that that would be  
9        an issue put forth by the other party.

10       But I will overrule your objection here, Mr.  
11       Keaveny, for the limited basis that Mr. Hatfield seeks  
12       to pursue with this witness because this is an area  
13       that would have been a very obvious issue that could have  
14       been taken up in deposition and may have been taken up  
15       in deposition.

16       So I overrule the objection. Go ahead, Mr.  
17       Hatfield.

18       BY MR. HATFIELD:

19       Q.    You were present during Mr. Wilson's video depo-  
20       sition?

21       A.    Yes, sir.

22       Q.    All right, and so I want you to assume that this  
23       object was secured by a single nylon strap running  
24       across the top of the object on the rear of this flat-  
25       bed.

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ROA\_0075

Appendix\_0079

MR. HARRIS ON DIRECT

1 Do you have an opinion within a reasonable degree  
2 of professional certainty if that manner of securing this  
3 object was adequate?

4 A. No, sir, it would not be adequate. There would  
5 not be enough downward force from the shallow angle of  
6 the strap on the bottom to have any significant effect  
7 on keeping that item from sliding off the rear.

8 Q. What about the transportation or transport of the  
9 object on the rear of a flat-bed at highway speeds would  
10 cause the object to move or become dislodged from the  
11 nylon strap?

12 A. Two things would be affected. One would be acceler-  
13 ation, going over bumps, for example. Most people going  
14 over a bump -- their bodies rise up out of the seat,  
15 and a bump that hard of that flat-bed doing seventy it  
16 would easily overcome that strap.

17 Secondly, the acceleration -- you are either brake-  
18 ing or accelerating, going around a curve which would  
19 be sideways acceleration -- all of those would tend to  
20 make an object move.

21 The way you described it being held down, there  
22 would be friction between that object and the flat-  
23 bed. That doesn't do anything to add any extra downward  
24 -- the strap doesn't do anything to add extra downward  
25 force.

MR. HARRIS ON DIRECT

1 Q. And the opinions which you have given today with re-  
2 gard to your inspection of the object, the witnessed  
3 marks on the object and the road surface, the witnessed  
4 marks on the tire rim, the adequacy or inadequacy of  
5 the securing of this load, are they all stated within  
6 a reasonable degree of appropriate professional certainty  
7 based on your training, education and experience?

8 A. Yes, sir, they are.

9 Q. Thank you. That's all I have.

10 THE COURT: Cross examination.

11 MR. KEAVENY: Thank you, Your Honor.

12 CROSS EXAMINATION

13 BY MR. KEAVENY:

14 Q. Good afternoon, Mr. Harris. How are you?

15 A. Good afternoon.

16 Q. We met sometime ago in your office in Columbia,  
17 I believe. Is that right?

18 A. Yes, sir.

19 Q. Okay, and at that time we went through your re-  
20 view and evaluation of this object. Is that right?

21 A. Yes, sir. At that time you asked me questions I  
22 hadn't been asked before.

23 Q. All right, and in fact one of the first questions  
24 I asked you was what you had been asked to do. Is  
25 that right?

MR. HARRIS ON CROSS

1 A. Yes, sir. I was charged simply to identify the  
2 object.

3 Q. And you were retained in this case when?

4 A. We opened our file on May 18, 2010. It is pos-  
5 sible I was asked to look at it a day or so earlier  
6 than that.

7 Q. And this accident occurred April 30 of 2010. Is  
8 that right?

9 A. I don't recall. I began in May.

10 Q. In May? Does your file reflect that?

11 A. Yes.

12 Q. Would you look and see?

13 A. Yes, sir. My file says the date of the accident  
14 was April 30, 2010.

15 Q. So it would have been nineteen days -- three weeks  
16 earlier. Is that right?

17 A. Yes, sir.

18 Q. Did you come out to the accident site?

19 A. No, sir.

20 Q. Did you come out to see if there were any scars in  
21 the road?

22 A. No, sir.

23 Q. Did you come out to see if there were any marks  
24 on the rim of the tire you just testified to?

25 A. No, sir.

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ROA\_0078

Appendix\_0082



MR. HARRIS ON CROSS

1 Q. Did you come out and measure the portions of the  
2 block that you have testified to in order to evaluate  
3 it with the scars in the road?

4 A. No, sir. I was not aware that there were scars in  
5 the road at that time.

6 Q. So you didn't do any of this stuff that Mr.  
7 Hatfield just asked you about. Is that right?

8 A. No, sir. I had been retained for the things I've  
9 described, but I did not do anything relative to the  
10 impact marks on the road.

11 Q. Nothing relative to impact marks on the road, is  
12 that right?

13 A. Correct.

14 Q. And nothing relating to the location of impact  
15 marks on the road?

16 A. No, sir. I mean, that would be the same thing  
17 you just asked.

18 Q. Nothing regarding matching impact marks on the  
19 road with the object. Is that correct?

20 A. None of those questions were asked of me.

21 Q. Nothing with matching . .

22 A. None of it at that point.

23 Q. You were retained in May of 2010 about three  
24 weeks after the accident?

25 A. Yes.

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ROA\_0079

Appendix\_0083

MR. HARRIS ON CROSS

1 Q. And you were not asked to do any of the things  
2 you have been asked opinions about here regarding iden-  
3 tifying the object and associating it with marks in  
4 the road or marks on Mr. Tucker's tire. Is that right?

5 A. No, sir. I was asked to identify the object.  
6 That's what I had been charged with doing. I had not  
7 been asked -- I didn't know there was any question as  
8 to whether the object had fallen off a truck and was in  
9 the road.

10 Q. And that is all you were asked to do, is to try  
11 to identify the object. Is that right?

12 A. Yes. That was all they asked me to do when they  
13 sent the block.

14 Q. And that is all you had been asked to do when I  
15 took your deposition back on January 11th, is that  
16 right?

17 A. That is all I was asked to do, and when you took  
18 my deposition you asked me questions I had not been  
19 asked before.

20 Q. You had not even been given these photographs of  
21 the tire, had you?

22 A. Pardon? Excuse me?

23 Q. Had you ever seen these photographs of the tire?

24 A. No, sir, I had not.

25 Q. On January 11th when you and I talked?

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MR. HARRIS ON CROSS

1 A. No, sir, I had not.

2 Q. As a matter of fact, you had never even seen when  
3 you and I talked photographs of the object off on the  
4 right shoulder of the road, had you?

5 A. No, sir. The only photographs I had of the ob-  
6 ject were those that I took myself in my own examina-  
7 tion.

8 Q. And this mark that has been identified in the  
9 road in Exhibit 12, you have no idea where in the road-  
10 way this mark is. Is that correct?

11 A. Yes, sir. That is why I have said all I can tell  
12 you is that it is consistent with a square heavy object.

13 Q. And you didn't know until today, even today as we  
14 sit here -- do you know if this mark is still in the  
15 road today?

16 A. I don't know but I doubt it would be discerned  
17 there after two or three years.

18 Q. You don't have any idea what the dimensions of the  
19 mark are, do you?

20 A. No, sir, I do not. I have an idea that is based  
21 on the aggregate size from the photographs.

22 Q. But you never measured it or compared it with the  
23 dimensions of the block. Is that right?

24 A. No, sir. I had the dimensions.

25 Q. And that is the kind of stuff engineers do? I mean,

MR. HARRIS ON CROSS

1 those are things -- the stuff you all do, isn't it, in  
2 engineering?

3 A. Measuring is stuff in engineering if one has been  
4 asked to make the observations.

5 Q. Okay, and so as far as the mark in the road on Ex-  
6 hibit 12, not only did you not identify or try to iden-  
7 tify where this mark in the road is, you haven't tried  
8 to identify where the block was found. Is that right?

9 A. No, sir. I haven't been asked that question. I  
10 have only been asked if that block was consistent with  
11 the marking in the road.

12 Q. Or whether this marking here was relative to Mr.  
13 Tucker's vehicle. Is that right?

14 A. No, sir. I would assume someone else would tes-  
15 tify as to that. I did not take such a measurement.

16 Q. Well, regardless of Mr. Tucker's vehicle and the  
17 damage you talked about in Plaintiff's Exhibit 59, which  
18 is the tire, you understand that Mr. Tucker's vehicle,  
19 his tractor, was forced up against the concrete abut-  
20 ment with high velocity. Is that right?

21 A. I understand he struck the concrete abutment, and  
22 that is all I understand.

23 Q. Well, do you understand that, number one, he had  
24 struck the guardrail before he got to the concrete abut-  
25 ment?

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MR. HARRIS ON CROSS

1 A. No, sir.

2 Q. You don't know that?

3 A. No.

4 Q. Do you know if he struck any component parts of  
5 the guardrail before he got to the concrete abutment?

6 A. No, sir, and that has nothing to do with what I  
7 have been asked to do.

8 Q. Now, let's get down to what kinds of work had to  
9 be done in order to extricate the tractor from the con-  
10 crete abutment.

11 A. Once, again, I was not asked to investigate the  
12 extrication of this tractor from the concrete.

13 Q. Do you have any idea where -- can you come on down  
14 here?

15 On this side here -- Mr. Hatfield showed you what  
16 has been marked as Exhibit Number 14 which is a mark  
17 in the highway.

18 Do you see that?

19 A. Yes, sir.

20 Q. Do you have any idea how long this skidmark is?

21 A. No, sir. It looks like it's about fifty to sev-  
22 enty-five feet long.

23 Q. That's what you can see?

24 A. Yes, sir.

25 Q. But you don't know anything beyond what you can

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MR. HARRIS ON CROSS

1 see?

2 A. No, sir, I don't.

3 Q. You don't know where it begins?

4 A. No, sir, I don't.

5 Q. You don't what, if any, marks there are on the  
6 road in the area where the skidmarks begin?

7 A. No, sir. I haven't been asked any questions about  
8 it other than is that a skidmark.

9 Q. Do you have any idea how far the skidmark is, the  
10 beginning of where you see the skidmarks -- how far it  
11 is from where the object was found?

12 A. No, sir, I have no idea. I haven't been asked  
13 those questions.

14 Q. Do you see on Exhibit 14 on the left what appears  
15 to be the beginning of the exit ramp on I95?

16 A. I see a linear mark of something that appears to  
17 be the beginning of the exit ramp.

18 Q. Well, do you see -- it starts there at the road on  
19 the top right hand -- top left hand?

20 A. I couldn't have identified it as an exit ramp  
21 without you pointing it out.

22 Q. Well, now that I've pointed it out to you, does  
23 it appear to be that?

24 A. Yes, sir.

25 Q. Do you have any idea how far that is from the

MR. HARRIS ON CROSS

1 right overpass?

2 A. NO, sir, not without going out there and measuring  
3 it. I wasn't asked to do that.

4 Q. As I understand it, your testimony is that if this  
5 object was hit it might go some tens of feet, I believe  
6 you said. Is that correct?

7 A. That would be my guess, yes, sir.

8 Q. And let me ask you, does that not depend -- does it  
9 not depend on the nature of the contact with the object?

10 A. What's going to be definitive is the angle of the  
11 contact and it's going to be dependent on what struck it.  
12 If the tire struck it, as in this case, it would depend  
13 upon the angle. I don't know exactly what that was.

14 Q. Well, you assume that the tire struck it. The  
15 tire or this rubber disc which has a steel rim. Is  
16 that right?

17 A. Yes.

18 Q. If you assume that is what struck this object,  
19 you wouldn't expect that object to go very far at all,  
20 would you?

21 A. Yes, sir, because, first of all, when it struck  
22 the object it was the rim, a steel object on a steel  
23 object, so eighty thousand pounds going seventy miles  
24 an hour, it's going to impact a lot of energy.

25 Q. All right. How far would that force this object

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MR. HARRIS ON CROSS

1 to go?

2 A. You can only estimate the distance it could possi-  
3 bly go to put a number on that, and how much energy it  
4 scrubs off in making contact. A six hundred fifty  
5 pound object is a pretty heavy object to be struck, and  
6 so I wouldn't expect it to go hundreds of feet. I'd  
7 expect it to go tens of feet.

8 Q. Tens of feet, is that right?

9 A. Yes, sir.

10 Q. And it's possible that if Mr. Tucker was travel-  
11 ing at sixty-eight to seventy miles an hour when his  
12 truck struck this object, that Mr. Tucker's truck would  
13 have overtaken the object. Is that right?

14 A. Yes, sir. That's possible.

15 Q. Okay, and, in fact, isn't it true, sir, that when  
16 you and I were in your office you pulled out an object  
17 and kind of turned it sideways and used that in doing  
18 calculations in order to identify the length of this  
19 object. Isn't that right?

20 A. Yes, sir.

21 Q. All right, and isn't it true that if Mr. Tucker's  
22 truck struck this object when Mr. Tucker's truck is at  
23 sixty-eight to seventy miles an hour, there is going to  
24 be a very significant impact?

25 A. Yes, sir, I would call that significant.

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MR. HARRIS ON CROSS

1 Q. A violent impact, isn't that right?

2 A. The impact itself was violent.

3 Q. And, in fact, if this object were trapped under  
4 Mr. Tucker's vehicle, you would expect to see scraping  
5 along the roadway?

6 You would expect to see maybe sparks and other  
7 things, would you not?

8 A. You might see some sparks. I haven't watched a  
9 six hundred and fifty pound block flying down the high-  
10 way.

11 Q. All right, but you would expect it to make marks  
12 in the road, would you not?

13 A. I would expect it to make marks on asphalt but not  
14 on concrete. Concrete is harder than than asphalt.

15 Q. Well, we just saw some skidmarks in the road?

16 A. Yes, sir.

17 Q. And you didn't see any marks in the road as a re-  
18 sult of this object going in that direction. Is that  
19 right?

20 A. Yes, but skidmarks are rubber being left on the  
21 concrete, not damaging the concrete, not damaging the con-  
22 crete. You're not going to see those markings on the  
23 concrete.

24 Q. You wouldn't expect this seven hundred or eight  
25 hundred pound object to become airborne, would you?

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MR. HARRIS ON CROSS

1 A. It is according to what you are talking about when  
2 you say airborne, but maybe inches or feet.

3 Q. So only inches or feet, is that right?

4 A. Yes, sir, very likely, but not yards.

5 Q. And, again, you have no idea what the distance is  
6 between where Mr. Tucker lost control of his vehicle  
7 and the point where this bearing block was found under  
8 the Honda way overpass. Is that right?

9 A. Yes, that is correct. I have not seen a map or a  
10 survey.

11 Q. And you haven't been out to the accident scene to  
12 examine or look at it yourself. Is that right?

13 A. That is correct. I have not been out there, except  
14 for the fact that I drive up and down that road many  
15 times but I haven't been there for the purpose of exam-  
16 ining that scene.

17 Q. All right. Very good, and although you have indicated  
18 that you believe the object as it appears in Exhibit Num-  
19 bers 8 and 9 contains evidence of impact -- you remember  
20 you identified that earlier with Mr. Hatfield?

21 A. Yes, sir.

22 Q. Those areas?

23 A. Yes, sir.

24 Q. You have no idea how far that object got on the  
25 road from the area where it was found. Is that right?

MR. HARRIS ON CROSS

1 A. I'm not sure. I didn't understand the question as  
2 it was posed.

3 Q. We have photographs, do we not, that show the ob-  
4 ject where it was found by Mr. Vereen and Mr. Hayes?

5 A. Yes, sir.

6 Q. These are the photographs that you nor I had on  
7 January 11, 2013, when I took your deposition. Is  
8 that right?

9 A. I did not have those at that time.

10 Q. When did you get these?

11 A. I don't have them today.

12 Q. Well, when did you see them the first time?

13 A. Today.

14 Q. You have no idea -- you see where the object is,  
15 is that right?

16 A. I see it's on the shoulder of the road.

17 Q. You have no idea of where it was when it entered  
18 the road. Is that right?

19 A. You mean when it -- however it got in the road?

20 Q. However it got in the roadway, you have no idea  
21 how far from that location it was actually placed on  
22 the road?

23 A. On the road is not the shoulder -- not on the  
24 shoulder of the road. I want to make sure I'm answering  
25 the question.

MR. HARRIS ON CROSS

1 Q. Okay.

2 A. You are asking whether I know the distance from  
3 the initial impact to where the object came to rest?

4 Q. I'm asking you if you know the distance between  
5 where this object sits in this photograph here and  
6 where it came in contact with the road.

7 A. No, sir, I do not know that distance. That would  
8 require having conducted an accident survey  
9 and marked all those marks on the survey.

10 Q. So you have not done that?

11 A. No, sir, I have not done that.

12 Q. But you could have done that since you were re-  
13 tained just two or three weeks after the incident. Is  
14 that right?

15 A. Yes, sir, but until my deposition I had no idea  
16 that this object being struck in the road was in ques-  
17 tion in this case.

18 Q. Thank you very much.

19 THE COURT: All right, ladies and gentlemen. When  
20 we have a witness presented we have Direct Examination  
21 of the witness, then Cross Examination, and there can  
22 be Redirect by counsel. Counsel, is there Redirect?

23 MR. HATFIELD: Yes, sir.

24 REDIRECT EXAMINATION

25 BY MR. HATFIELD:

MR. HARRIS ON REDIRECT

1 Q. Mr. Harris, did Mr. Keaveny ask you any questions  
2 at all on examination which has caused you to change  
3 any opinion you have given to us?

4 A. No, sir.

5 Q. That's all I would have.

6 THE COURT: Is there any reason not to excuse  
7 this witness, from either side of the case?

8 MR. HATFIELD: No, sir.

9 MR. KEAVENY: No, Your Honor.

10 THE COURT: So you are excused and you are free  
11 to leave.

12 (Witness Harris excused)

13 THE COURT: Please call your next witness.

14 MR. HATFIELD: Could I have about five minutes to  
15 bring in another device?

16 THE COURT: All right, ladies and gentlemen. If  
17 you will go to your jury room we will take about a five  
18 or ten minute break. Then we will come back in and  
19 continue.

20 While you are in the jury room, do not discuss the  
21 case.

22 (Jury excused from Courtroom. The Court took a  
23 brief recess after which the matter was resumed.)

24 THE COURT: Bring in our jury.

25 (Jury returned to Courtroom at 4:16 P.M.)

1 THE COURT: All right, please call your next wit-  
2 ness.

3 MR. HATFIELD: Mr. Albert Vereen.

4 ALBERT VEREEN, being duly  
5 sworn, testified as follows:

6 DIRECT EXAMINATION

7 BY MR. HATFIELD:

8 Q. State your full name for us, please?

9 A. Albert Vereen.

10 Q. Thank you, Mr. Vereen, and thank you for coming  
11 here today.

12 Mr. Vereen, what do you do for a living?

13 A. I'm in trucking.

14 Q. And how long have you been involved in that busi-  
15 ness?

16 A. Since about 2004.

17 Q. Okay, and who do you work for?

18 A. Shepard's Trucking Company.

19 Q. Would you give the jury some idea of the type of  
20 things that you do while working for Shepard's Truck-  
21 ing?

22 A. Yes, sir. Sometimes we go and tow trucks that  
23 break down. We also give the Highway Department acci-  
24 dent help.

25 We will go out and cover whatever they have and

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MR. VEREEN ON DIRECT

1 help clean up.

2 Q. Okay.

3 A. Move trucks off the road or whatever.

4 Q. Do you clean up diesel fuel or things of that na-  
5 ture?

6 A. We will dig up the dirt and replace it with fresh  
7 dirt.

8 Q. Now, did Shepard's get a call or was it -- were  
9 you dispatched to this scene back in April of 2010?

10 A. Yes. We got a call, a service call, and in return  
11 I called a couple of other guys to come to the scene.

12 Q. All right, and, again, you went out there on be-  
13 half of Shepard's?

14 A. Yes, sir.

15 Q. Okay, and tell the jury about what time you arrived  
16 at the scene?

17 A. I'd say it was somewhere between four o'clock --  
18 between four and four thirty.

19 Q. In the morning?

20 A. Yes, sir.

21 Q. All right, and could you just describe what you saw  
22 when you arrived?

23 A. Well, when I come up on that scene I saw a couple  
24 of cars on the car carrier, and the car carrier -- it  
25 had collided with the column.

MR. VEREEN ON DIRECT

1 Q. Okay, and what -- let's do this. I'm going to  
2 ask about the object but before I do that I want to  
3 go through a series of photographs and ask if you can  
4 identify or explain to the jury what is shown on the  
5 photographs. Okay?

6 A. The truck wrapped around the pole there.

7 Q. Okay, and Exhibit Number 2?

8 A. . .

9 THE COURT: Please speak into the microphone, Mr.  
10 Vereen. We need to be sure we hear you.

11 A. The front of the truck is here.

12 Q. And Exhibit Number 3?

13 A. That's the front of the truck.

14 Q. Mr. Vereen, would you come down and step to one  
15 side. Come over here and face toward the Court Reporter  
16 and speak up.

17 Tell the jury what they're seeing in Exhibit Number  
18 3?

19 A. That's the front of the truck with the headache on  
20 -- it's wrapped around in front.

21 Q. Did you say headache?

22 A. That's where the car sat on top.

23 Q. Okay, and what is Exhibit Number 4?

24 A. That's the truck -- actually the front of the  
25 truck is behind there.

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MR. VEREEN ON DIRECT

1 Q. Okay, and this is what supports the overpass?

2 A. Yes, and the front of the truck should be out to  
3 the front.

4 Q. And Exhibit Number 5, what is that?

5 A. That's the inside of the truck.

6 Q. So that would be where Mr. Tucker was?

7 A. Yes. This is part of the dashboard.

8 Q. So Mr. Tucker was not at the scene when you arrived  
9 on the scene?

10 A. No, he had already been taken.

11 Q. Let's go to Exhibit Number 6.

12 A. That is the truck being lifted off onto the  
13 trailer.

14 Q. And you may return to the witness chair.

15 A. . .

16 Q. Now, while you were at the scene of this crash,  
17 did you discover something near the roadway?

18 A. Yes. Actually in clearing all this stuff up, we  
19 had a problem getting the truck on the tow. It was  
20 actually about an hour we waited before we could do  
21 that because the metal was wrapped around the pole so  
22 tight we couldn't pull the truck up off of it.

23 So during that time we walked back down the road-  
24 way and noticed the skidmarks in the road, some seventy-  
25 five to a hundred feet back, and the skidmarks went

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MR. VEREEN ON DIRECT

1     kinda from the inside lane into an angle almost to the  
2     column, and then ten or fifteen feet to the right is  
3     when we noticed the block of metal.

4     Q.   So is this the skidmark that you were speaking  
5     of here?

6     A.   Yes, sir.

7     Q.   Okay, and that would be looking in the direction  
8     that Mr. Tucker was coming from?   So you'd be looking  
9     north on 195?

10    A.   And he would be coming south.

11    Q.   Okay.   Pull up Number 9.   Is this the object you  
12    found, the block you found at the scene?

13    A.   Yes, that's the object we loaded.

14    Q.   All right, and where was it in relationship to  
15    Mr. Tucker's truck?

16    A.   Probably -- probably -- if Mr. Tucker's truck was  
17    where that block is, probably from the angle where the  
18    block is on the side of the road maybe thirty feet to  
19    the right.

20    Q.   Was it beyond his truck?

21    A.   Out to the side.

22    Q.   To the side?

23    A.   Yes.

24    Q.   All right, and where was it in relationship to the  
25    overpass?

MR. VEREEN ON DIRECT

1 A. It was directly -- almost under the overpass.

2 Q. So this would be the right shoulder?

3 A. Right shoulder, yes.

4 Q. So if someone had taken a picture standing here  
5 and looking back across the two lanes of 95 south,  
6 what would they see over in this area?

7 A. They would have seen the truck right there.

8 Q. About thirty feet apart?

9 A. About thirty feet.

10 Q. And what did you do, if anything, to recover that  
11 object?

12 A. We took the back of it, hoisted it onto the (in-  
13 audible) and loaded it onto the trailer.

14 Q. Could you manually lift it?

15 A. I thought it was five or six hundred pounds when  
16 I saw it because we couldn't push it -- the two of us  
17 couldn't push it out of the way.

18 Q. All right, and what were the lighting conditions  
19 when you were there?

20 A. I would say it was somewhere around six thirty in  
21 the morning. The sun had come up.

22 Q. Okay, and when you recovered that, what did you  
23 do with it? What did you do with the object?

24 A. We loaded it on a trailer and took it to the  
25 shop.

MR. VEREEN ON DIRECT

1 Q. Now, did you ever look at the front wheels and  
2 rims of the truck?

3 A. I did not.

4 Q. So if I showed you the picture of them you would  
5 not be able to identify that?

6 A. No, I wouldn't.

7 Q. Okay. Mr. Tucker was driving a car carrier?

8 A. Yes, sir.

9 Q. How far off the ground do they ride?

10 A. The car carrier is maybe eight to ten inches --  
11 when you hook up <sup>to</sup> a car carrier and actually put it in  
12 tow you actually have about six inches.

13 The car carrier is not that high, about six inches  
14 off the ground to keep the bottom from scraping. If he  
15 could have driven over the block it would have caught  
16 up with the bottom because it sits so low in the back.

17 Q. Okay. Thank you, sir. That's all I have.

18 THE COURT: All right, we will now go to ques-  
19 tions from the other side. Cross Examination.

20 CROSS EXAMINATION

21 BY MR. KEAVENY:

22 Q. Good afternoon, Mr. Vereen. How are you?

23 A. Okay.

24 Q. You and I met a while ago I think in Mr. Hatfield's  
25 Office, when I asked you about your experience out

MR. VEREEN ON CROSS

1       there at this accident scene.

2               Do you remember that?

3       A.    Uh huh.

4       Q.    All right, and I told you it was my understanding  
5       at the time that you were supposed to have found this  
6       object that was just up there on the screen under Mr.  
7       Tucker's tractor. Is that right?

8       A.    No, we didn't find it under the tractor.

9       Q.    You found it over on the right shoulder. Right?

10      A.    Right shoulder.

11      Q.    I show you what's marked -- and in fact you found  
12      it on the shoulder of the road where it is depicted  
13      in those photographs, is that right?

14      A.    Yes.

15      Q.    In fact, the photographs were taken by Mr. Hayes,  
16      is that right?

17      A.    I don't know if they were taken by him.

18      Q.    Didn't you and Mr. Hayes . . .

19      A.    He took some photos.

20      Q.    And you and Mr. Hayes worked to retrieve this ob-  
21      ject, is that right? Is that right?

22      A.    Yes. There was quite a few other people besides  
23      me and Mr. Hayes.

24      Q.    And you used a front end loader to do that, is  
25      that right?

MR. VEREEN ON CROSS

1 A. Uh huh.

2 Q. And, if you would, would you come down for me,  
3 please?

4 A. Yes.

5 Q. I'm going to have you refer to what has been marked  
6 as Plaintiff's Exhibit Number 18, and this is a photo-  
7 graph -- back up just a little bit and turn a little  
8 bit.

9 This is a photograph of the vehicle heading in the  
10 right lane or southbound on 195. is that right?

11 A. Right.

12 Q. Mr. Tucker's tractor was wrapped around not the  
13 first column but second column, is that right?

14 A. Yes.

15 Q. All right.

16 THE COURT: Counsel, your witness is backing up so  
17 you may want to reverse where you are and where he is  
18 so that he's facing back toward the Court Reporter.

19 MR. KEAVENY: Very good, Your Honor.

20 BY MR. KEAVENY:

21 Q. If you would turn your angle a little so the jur-  
22 ors can see you. There we go.

23 All right, we are talking about Exhibit Number  
24 18, and this is Mr. Tucker's truck that is wrapped around  
25 not the first but the second column. Is that right?

MR. VEREEN ON CROSS

1 A. Right.

2 Q. And Mr. Hayes took a picture of it and you and

3 Mr. Hayes retrieved the . .

4 A. Yes.

5 Q. Not in the lane?

6 A. No, on the right side.

7 Q. Not on the shoulder, but on the dirt past the  
8 shoulder?

9 A. (inaudible)

10 THE COURT: Please speak up, sir, so our  
11 Court Reporter can hear.

12 A. On the right side of the road.

13 Q. Under the overpass, is that right, as depicted on  
14 these photographs?

15 A. Uh huh.

16 Q. And in your deposition I talked to you about the  
17 skidmark that you talked about with Mr. Hatfield. Do  
18 you remember that?

19 A. Yes.

20 Q. And you indicated that you, and I think one other  
21 person maybe, walked back toward the skidmark or where  
22 the skidmark started. Is that right?

23 A. Yes.

24 Q. And you didn't find any debris in the roadway, is  
25 that right?

MR. VEREEN ON CROSS

1 A. No.

2 Q. You didn't find any debris or anything from Mr.  
3 Tucker's truck, did you?

4 A. No.

5 Q. You didn't find any marks in the roadway out there,  
6 did you?

7 A. No, but that black mark . .

8 Q. Other than the black mark you didn't find any de-  
9bris out there?

10 A. No.

11 Q. You didn't find any debris as you walked away  
12 from the accident site toward the beginning of the skid-  
13 mark?

14 A. No.

15 Q. You didn't find debris along that skidmark area,  
16 is that right?

17 A. No.

18 Q. You found no marks along the roadway?

19 A. No.

20 Q. You found no marks -- as you walked up the skid-  
21 mark you found no marks from the beginning of the skid-  
22 mark over to the right shoulder of the road?

23 A. No.

24 Q. Where the object was found?

25 A. No.



MR. VEREEN ON CROSS

1 Q. And I believe it's your testimony that you believe  
2 it was seventy-five feet to a hundred feet, is that  
3 right?

4 A. Uh huh.

5 Q. But you didn't measure it?

6 A. No.

7 Q. That's just your best estimation of it?

8 A. Right.

9 Q. When I took your deposition, you indicated that  
10 you believe Mr. Tucker lost control about two hundred  
11 feet away from the overpass. Do you recall  
12 that?

13 A. No, I don't recall that.

14 Q. Let me show you . .

15 MR. HATFIELD: I would object, Your Honor. He  
16 has not been identified as an expert.

17 THE COURT: I would overrule the objection. You  
18 may show it to him if you wish.

19 MR. KEAVENY: Let me find it.

20 THE COURT: All right.

21 BY MR. KEAVENY:

22 Q. All right, Mr. Vereen. Let me show you -- this  
23 is the original transcript of your deposition when you  
24 and I met and the Court Reporter took it down.

25 A. Yes, sir.

MR. VEREEN ON CROSS

- 1 Q. And at that time you were under oath just as  
2 you are here today?
- 3 A. Yes.
- 4 Q. And so let me refer you to page 41, and you will  
5 see on the left hand side each line has a number by  
6 it. You see that?
- 7 A. Yes, sir.
- 8 Q. All right, and there we have at line 19 you say,  
9 first, let me tell you this. Whenever I come up on  
10 the scene whatever this object he was riding on it . .
- 11 A. Uh huh.
- 12 Q. . . it is maybe two hundred feet and the truck --  
13 just right then into the pillow.
- 14 Is that right?
- 15 A. Yes, sir.
- 16 Q. At that point in time your best estimate was  
17 about two hundred feet. Is that right?
- 18 A. Right.
- 19 Q. Okay, and with regard to the object itself that  
20 you found over on the shoulder of the road, you didn't  
21 find any other objects, like any rebar. Is that right?
- 22 A. Yeah.
- 23 Q. Okay, or pipes or anything else that might have  
24 been -- may have fallen off the truck. Is that right?
- 25 A. Yes.

MR. VEREEN ON CROSS

1 Q. No wooden pallets, is that right?

2 A. No.

3 Q. No nylon straps that might have been around the  
4 area?

5 A. No, nothing like that.

6 Q. All right, and you didn't find any indication  
7 this object that you found over across I95 -- that tra-  
8 veled from the left side of I95 median over to the  
9 right side, did you?

10 A. No, we just assumed that.

11 Q. Thank you, sir.

12 THE COURT: All right, we have one more set of  
13 questions. Any Redirect, counsel?

14 MR. HATFIELD: There is.

15 THE COURT: All right.

16 REDIRECT EXAMINATION

17 BY MR. HATFIELD:

18 Q. Mr. Vereen, why did you assume that?

19 A. Well, that was the only assumption. We seen the  
20 mark and piece of metal on the shoulder, and that in my  
21 mind said that Mr. Tucker . .

22 MR. KEAVENY: Objection, Your Honor. That is  
23 speculation.

24 THE COURT: Overruled, counsel. You asked a  
25 question and got an answer, so counsel may follow up on

MR. VEREEN ON REDIRECT

1 that answer. Overruled.

2 You may go ahead, sir.

3 A. A driver is going to control a truck. They're  
4 not going to just let it drift away. If he's  
5 driving and he hit that object, he couldn't control  
6 it. If he could have controlled it then he would  
7 never have gone off of that lane.

8 Q. What effect would his striking that metal object  
9 have on Mr. Tucker's ability to control the truck?

10 A. . . .

11 MR. KEAVENY: Objection, Your Honor. That is --  
12 he is not qualified to answer that.

13 THE COURT: Just a moment, sir. Do you have a  
14 CDL?

15 WITNESS: Yes, I do.

16 THE COURT: And you drive a tow truck. Did you  
17 drive . . .

18 WITNESS: I've had a CDL since 1992.

19 THE COURT: Very good, sir. I'm going to let him  
20 go ahead and answer your last question.

21 A. He couldn't control it. I mean, if he could  
22 have controlled the spin, he never would have -- he  
23 could have half-way redirected that truck.

24 Whatever it was, when it hit the corner it was  
25 maybe twenty feet from that piling and it would have

MR. VEREEN ON REDIRECT

1     come out then where the marks stop -- it would have come  
2     out from under the truck.

3     Q.   And do you have any doubt about that?

4     A.   No, I do this all the time. I done been out to  
5     so many accidents and things like that and seen fatali-  
6     ties and all this stuff -- you know, I seen a lot of  
7     this stuff.

8     Q.   Okay, thank you, sir. That's all I have.

9           THE COURT: Do you wish to follow up?

10          MR. KEAVENY: Yes, sir.

11    RE CROSS EXAMINATION

12    BY MR. KEAVENY:

13    Q.   You didn't undertake to recreate this accident,  
14    is that right?

15    A.   No.

16    Q.   And you were called . .

17    A.   Like I told you before, I been out with the  
18    Highway Patrol to clear up from the accident. I went  
19    out and drove a truck so that he could control it.

20    Q.   And I understand that. Thank you.

21          (Brief pause in proceeding)

22    BY MR. KEAVENY:

23    Q.   As I understand it, you saw nothing in the road  
24    or no indication in the road that indicated that this  
25    object that we've been talking about traveled from the

MR. VEREEN ON RECROSS

1 left shoulder of the road over to the right shoulder.

2 A. I said what I seen, the skidmark, and that's all.

3 Q. Thank you, sir. No, I have one quick question.

4 Where is the photograph . .

5 MR. HATFIELD: I want to object. I didn't go to  
6 any photographs to use in my Redirect.

7 THE COURT: I'll allow it.

8 BY MR. KEAVENY:

9 Q. And, in fact -- if you would come down and stand  
10 over here where the Court Reporter can hear you.

11 This photograph shows the object in dirt, is  
12 that correct?

13 A. Yes.

14 Q. And the dirt would indicate -- that would indicate  
15 that the object is traveling south -- in the south  
16 lane down the road. Is that right?

17 A. Yes.

18 Q. Not collaterally across the road. Is that right?

19 A. I just saw it there beside the road.

20 Q. Thank you, sir. That's all I have.

21 THE COURT: You are free to leave if you wish,

22 Mr. Vereen. Thank you, sir.

23 (Witness excused from stand)

24 MR. HATFIELD: Your Honor, we have one short,  
25 very short witness.

1 THE COURT: Call your witness.

2 MR. HATFIELD: Mr. Hayes, would you come around,  
3 please?

4 CHARLES HAYES, being duly  
5 sworn, testified as follows:

6 DIRECT EXAMINATION

7 BY MR. HATFIELD:

8 Q. Mr. Hayes. Tell us who you are and who you work  
9 for, please?

10 A. Charles Harris and I drive a truck for Tucker En-  
11 terprises.

12 Q. That's Mr. Tucker's company?

13 A. Yes, sir.

14 Q. How long have you worked for Tucker Enterprises?

15 A. Probably about twenty-five years.

16 Q. And what do you do at Tucker?

17 A. Drive a truck.

18 Q. The same type truck Mr. Tucker would drive?

19 A. I haul whatever it is.

20 Q. But a similar truck? Car carrier?

21 A. Yes, sir.

22 Q. Okay. Now, did you have an occasion to go to  
23 the I95 at exit 153 interchange on April 30 of 2010?

24 A. Yes, sir.

25 Q. Why did you go out there?

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MR. HAYES ON DIRECT

1 A. I got a call that night or during the night and I  
2 was asleep. I had my phone off, and when I woke up  
3 the next morning I listened to the message.

4 I tried to called Bobby and I couldn't get no  
5 answer. So I called Lee at the truck stop and he told  
6 me about the accident.

7 I asked him who had the truck, was it Shepard or  
8 (inaudible) and he said he wasn't sure. So I called  
9 (inaudible) and they said we don't have it but that  
10 Shepard had it, so I went to Shepard's.

11 When I got to Shepard's I was told they hadn't  
12 towed it yet and they was still down there working on  
13 trying to get the truck.

14 So I called Lee back and told him, and he asked  
15 me would I go down there and see if I found the object  
16 that Bobby hit.

17 Q. Okay.

18 A. He said -- the officer . .

19 Q. Don't tell us what the police officer said, but  
20 you were asked to go there and what? Take some photo-  
21 graphs?

22 A. He asked me to go down there and see if I could  
23 find the object that Bobby hit.

24 Q. Who did you go with?

25 A. With my fiancée, Jonell.



MR. HAYES ON DIRECT

1 Q. And what is Jonell's last name?

2 A. Davis.

3 Q. Namath, like the football player?

4 A. Davis.

5 Q. I'm sorry. Were you present when photographs were  
6 taken at the scene? When Jonell took photographs?

7 A. Yes.

8 Q. You were with her when she was actually snapping  
9 the photographs?

10 A. Oh, yes.

11 Q. Now, let's go to -- let's look at some of the  
12 photographs. Exhibit Number 8.

13 (Brief pause in the proceeding)

14 BY MR. HATFIELD:

15 Q. Mr. Hayes, would you step down here and come over  
16 here. I'm going to show you a series of photographs,  
17 starting with Exhibit Number 8. Is that a photograph  
18 Jonell took at the scene?

19 A. Yes, sir.

20 Q. And Exhibit 9, is that a photograph Jonell took  
21 at the scene?

22 A. Yes.

23 Q. Okay, and is this a photograph of the object as  
24 depicted at the scene?

25 A. Yes, sir.

MR. HAYES ON DIRECT

1 Q. And Exhibit Number 11, is that a photograph taken  
2 at the scene?

3 A. Yes, sir.

4 Q. Is this the object in this photograph she took  
5 at the scene?

6 A. Yes.

7 Q. Same question on Exhibit 13. Were you present  
8 and is the object in the photograph?

9 A. Yes.

10 Q. And lastly, Number 14. Were you present when  
11 she took that photograph?

12 A. Yes.

13 Q. What is this mark?

14 A. That's a tire mark.

15 Q. And did you measure that or step it off?

16 A. No, sir.

17 Q. You can take your seat. Thank you, sir.

18 When you arrived and Jonell took the picture in  
19 Exhibit Number 8, tell the jury where this block was  
20 in relationship to Mr. Tucker's truck?

21 A. Where the truck came to rest -- the column that  
22 the truck was wrapped around, if you were standing  
23 there where that column, it was straight ahead up un-  
24 der that bridge.

25 Q. All right. How long had you known Bobby

MR. HAYES ON DIRECT

1 Tucker, Mr. Hayes?

2 A. I've probably known him about thirty years. I've  
3 been driving trucks for thirty-nine years.

4 Q. All right. If somebody walked up to you on the  
5 street, a stranger, and asked you to tell them about  
6 Bobby Tucker before all this -- excuse me -- before  
7 April 30th of 2010, how would you describe Mr. Tucker?

8 A. A man in good shape, like a twenty or twenty-five  
9 year old man.

10 Q. What about today? How would you describe him?

11 A. He was then a strong man. He had the mind of a  
12 computer, and now he don't. If you watch him, he can't  
13 go like he used to.

14 I used to have to almost run to keep up with the  
15 man if I were walking with him. Now lately he will  
16 tell you things over and over. If you ask him some-  
17 thing he could tell you what you asked him, and his mem-  
18 ory was good then.

19 Q. Is he the same man today that he was before this  
20 incident?

21 A. In his mind or body, no.

22 Q. Thank you. I have nothing further.

23 THE COURT: Cross examination.

24 MR. KEAVENY: Thank you, Your Honor.

25 CROSS EXAMINATION

MR. HAYES ON CROSS

1 BY MR. KEAVENY:

2 Q. Good afternoon, Mr. Hayes. We've met before?

3 A. Yes, sir.

4 Q. Not long ago, and you produced these photographs  
5 your fiancé took at that time for the first time. You  
6 remember that?

7 A. Yes, sir.

8 Q. And you indicated to me then that that object which  
9 you found was across southbound I95 on the opposite  
10 side of the road. Is that right?

11 A. Yes, sir.

12 Q. And that you didn't find any marks to indicate that  
13 that object traveled from Mr. Tucker's truck off the  
14 road to where it was. Is that right?

15 A. Yes, sir.

16 Q. You didn't see any marks?

17 A. No.

18 Q. Well, apparently you looked for other marks be-  
19 cause Mr. Hatfield went over other marks in photos?

20 A. Yes, sir. My girlfriend took all the pictures then,  
21 and I was there when she was doing it. That is what  
22 I was looking at.

23 Q. Your girlfriend didn't take any pictures of marks  
24 to indicate that the object had traveled from the area  
25 where Mr. Tucker's truck was and across the two

MR. HAYES ON CROSS

1 southbound lanes of I95?

2 A. You've got the photos.

3 Q. But to your knowledge, there are no pictures she  
4 took to indicate the object that you saw on the right  
5 shoulder of the road traveled from where Mr. Tucker's  
6 truck was over to where it was. Is that right?

7 A. I don't think it would leave a mark.

8 Q. Okay. Okay, and did you formerly tell me in your  
9 deposition that you actually -- let me back up. When  
10 you and your fiancé were looking at the road and she  
11 was taking pictures, you went back I95 to that area  
12 where you believed Mr. Tucker lost control of the truck.  
13 Is that right?

14 A. I seen a mark from the wheel from where it had --  
15 The thing was from where the mark started and it went  
16 off the median on that soft shoulder of the road and it  
17 fall like that -- I call it the emergency lane but if  
18 you look at the ridges that's where the end of the --  
19 the beginning of the emergency lane, and took off to  
20 the right, where it's at. That's where it was at.

21 Q. Okay. I'm talking about that area where you be-  
22 lieve Mr. Tucker lost control of his vehicle.

23 A. Okay.

24 Q. Up on southbound I95. Do you remember me asking  
25 you to show me on a scaled picture where you

MR. HAYES ON CROSS

1 it was that Mr. Tucker lost control of his vehicle

2 based on what you saw out there on the road?

3 A. Yes, sir.

4 Q. Okay. Let me show you this and ask if you recog-  
5 nize what you drew on that photograph?

6 A. Yes, sir.

7 Q. Okay, and the object itself was found under the  
8 overpass . .

9 A. Over the emergency lane.

10 (Counsel and witness speaking at the same time)

11 MR. KEAVENY: I would offer this as an Exhibit.

12 MR. HATFIELD: I have no objection.

13 THE COURT: That would be Defendant's . .

14 MR. KEAVENY: That is a part of the deposition.

15 THE COURT: Without objection.

16 BY MR. KEAVENY:

17 Q. Now, this is near the exit?

18 A. Yes, sir.

19 Q. And you didn't find any debris from Mr. Tucker's  
20 truck to that point, or at that exit to where you  
21 marked on the photograph? Is that right?

22 A. No, sir. I didn't see any beside the road.

23 Q. Thank you, sir.

24 THE COURT: Any Redirect?

25 MR. HATFIELD: No, sir.

1 THE COURT: Any objection to releasing the wit-  
2 ness?

3 MR. KEAVENY: No, sir.

4 MR. HATFIELD: I have no objection.

5 THE COURT: Sir, you are free to leave.

6 (Witness excused)

7 THE COURT: All right, counsel, step up for a mo-  
8 ment, please. Let's talk about scheduling.

9 (Conference at the bench between counsel and the  
10 Court)

11 THE COURT: All right, ladies and gentlemen. We  
12 are going to recess for the day, and we will start  
13 tomorrow morning at nine thirty. I'd ask you to be  
14 back in the jury room at nine thirty and we will be  
15 ready to go at that time.

16 In fact, if you come a little bit earlier -- will  
17 there be some snacks and coffee in the jury room?

18 CLERK: Yes, sir.

19 THE COURT: They will have something good for us  
20 if we come a little early.

21 Now, ladies and gentlemen, when you get home, don't  
22 discuss this case please with your loved ones. Just  
23 tell them that the Court has asked you not to do that.

24 Have a nice evening and we will remain where we  
25 are while you depart. We'll see you at nine thirty in the

1 morning.

2 Wait just a minute. Counsel has asked me to re-  
3 mind you not to undertake any investigation yourselves,  
4 as I mentioned earlier. Please don't go on the computer  
5 or look at anything about this matter or similar matters  
6 or on the street, or wherever it might be.

7 Just have a good night and come back tomorrow morn-  
8 ing. I'll ask you tomorrow morning before we start  
9 probably if you've had any discussions about the facts  
10 or have undertaken any investigation.

11 All right, have a good evening, ladies and gentle-  
12 men. Thank you.

13 (Jury excused at 4:55 P.M.)

14 (Transcription note: Reporter log shows that the  
15 Defendant's Exhibit 1, an aerial photograph, was admitted  
16 in evidence)

17 THE COURT: All right then, we'll be in recess until  
18 nine thirty in the morning.

19 (Whereupon, the Court was in recess until April 16,  
20 2013, at nine thirty A.M.)

21 THE COURT: Thank you, ladies and gentlemen. You may  
22 be seated.

23 All right, are there some issues on the deposition  
24 we need to take up?

25 MR. KEAVENY: We have worked out most everything.



1 Bill is going to publish two depositions of doctors this  
2 morning.

3 MR. HATFIELD: One is Dr. Suggs and the other is  
4 Dr. Myslinski. On Dr. Myslinski we have agreed on every-  
5 thing so that is not an issue.

6 On Dr. Suggs I believe we have agree on everything  
7 except for one objection that will be referred to as  
8 the mallet objection.

9 MR. KEAVENY: In the deposition of the Doctor  
10 Bill was asking the Doctor how a doctor would go about  
11 setting a rod in Mr. Tucker's leg.

12 Bill, of course, trying to be as graphic as he  
13 could, asked the Doctor, well, do you have to hit him  
14 with a mallet in order to do that, and the Doctor said,  
15 sometimes.

16 There is no reference to this in the particular  
17 case, and I just want to keep the graphic details out,  
18 and Bill, of course, just wants to put it in, so that  
19 is the objection.

20 That is at page 14, line 21 in the transcript,  
21 going forward.

22 THE COURT: All right. You want to be heard on  
23 that, Mr. Hatfield?

24 MR. HATFIELD: His objection was to the form of  
25 the question, and it's not . . .

1 THE COURT: I see it. Thank you.

2 Just a moment, please.

3 (Brief pause in proceeding)

4 THE COURT: While I'm thinking about this, I see we  
5 have some live witnesses. Are we taking them first?

6 MR. HATFIELD: No, sir.

7 MR. KEAVENY: Your Honor, my objection is not just  
8 that it is leading. It is leading, but he didn't say,  
9 Doctor, did you have to use a mallet when you inserted  
10 this rod in this case.

11 So it's not just the . .

12 THE COURT: All right. Out of an abundance of  
13 caution, I will sustain the objection, Mr.  
14 Hatfield, based on the fact that it is not directly  
15 tied to this case and we don't know whether one was  
16 used or not.

17 So the objection is sustained.

18 MR. HATFIELD: Another objection as to the depo-  
19 sition is on what we received this morning from coun-  
20 sel on the Doctor's deposition.

21 We always have our depositions synchronized. We  
22 examine the witness and then there is cross, but counsel  
23 has asked to include things that are not in line as far  
24 as they appear in the transcript if counsel publishes  
25 that.

1 We would have to publish those by reading it, or  
2 we would have to pull out and substitute the disc and to  
3 play from the disc after we publish our testimony.

4 THE COURT: And which witness would that be, what  
5 number witness this morning?

6 MR. HATFIELD: It would be Dr. Koon.

7 THE COURT: So that is going to come up then right  
8 away?

9 MR. HATFIELD: Yes, sir, the third witness.

10 THE COURT: All right. Counsel, do you want to re-  
11 spond to that?

12 MR. KEAVENY: Well, he can play his excerpts, his  
13 designated excerpts, and then we will do ours.

14 THE COURT: Very good. I will let you -- what that  
15 means is that we are going forward with what you have  
16 designated after what the Plaintiff has designated because  
17 they have prepared it in advance.

18 Very good. Are we ready to bring in the jury?

19 MR. HATFIELD: Your Honor, we have two additional  
20 Exhibits that counsel has agreed to, which are Exhibits  
21 66 and 67.

22 They are photographs of Mr. Tucker taken in the  
23 hospital.

24 THE COURT: All right. Then 66 and 67 are without  
25 objection in evidence for the Plaintiff.

1 (Photographs without objection entered into evidence  
2 as Plaintiff's Exhibits 66 and 67)

3 THE COURT: Please bring in our jury.

4 (Jury returned to Courtroom at 9:41 A.M.)

5 THE COURT: I told the jury we would start at  
6 nine thirty. I didn't realize we had issues of law to  
7 take up. I try to be respectful of my jurors.

8 Good morning, ladies and gentlemen. Welcome to  
9 the Courtroom. Let me ask whether there is any member  
10 of the jury panel who has had a discussion about the  
11 facts of this case with anyone?

12 If so, please raise your hand.

13 (No response from jurors)

14 Let the record reflect no one has responded, and  
15 thank you for complying with my request in that regard.

16 You will remember on yesterday we were in the  
17 Plaintiff's case. We remain there, and, Mr. Hatfield,  
18 please call your next witness.

19 MR. HATFIELD: Yes, sir. We call Trooper B. A.  
20 Suggs.

21 THE COURT: Please come forward and be sworn as a  
22 witness.

23 B. A. SUGGS, being duly  
24 sworn, testified as follows:

25 DIRECT EXAMINATION

MR. SUGGS ON DIRECT

1 BY MR. HATFIELD:

2 Q. Please state your full name for us.

3 A. My name is Bradley Allen Suggs.

4 Q. And what is your rank with the Highway Patrol?

5 A. Lance Corporal.

6 Q. Corporal Suggs, you are employed with the South  
7 Carolina Department of Public Transportation?

8 A. Yes, sir.

9 Q. And what is your position?

10 A. I am a road officer, a trooper.

11 Q. Okay, and how long have you done that?

12 A. Seven years.

13 Q. Seven years. All right. Would you just tell us  
14 something about your education, your background as a  
15 patrolman?

16 A. I started out with the South Carolina Highway  
17 Patrol at the Academy for eighteen weeks. We were  
18 trained in highway laws and accident investigation.

19 Q. All right, and looking back over your seven year  
20 history, how many accidents have you investigated if  
21 you can tell us?

22 A. I don't have a number. It has been a lot of  
23 them.

24 Q. A lot. Okay. Does Interstate 95 fall within  
25 your jurisdiction as a highway patrolman?

MR. SUGGS ON DIRECT

1 A. Yes, it does.

2 Q. And from time to time are you called upon to  
3 patrol Interstate Highway I 95?

4 A. Not any more but at that time I was.

5 Q. Typically what type of traffic do you see on 95?

6 A. Fast.

7 Q. What about commercial truck traffic?

8 A. Quite a bit, sir.

9 Q. Did you have an occasion to respond to a call on  
10 the morning of April 30, 2010, on Interstate 95?

11 A. Yes, sir.

12 Q. All right, and what time did you receive the call,  
13 and do you remember where you were when you arrived at  
14 the scene?

15 A. Not exactly. Is there any way I can see the

16 . .

17 Q. The incident report?

18 A. Yes, sir.

19 Q. I have it here.

20 A. Thank you, sir.

21 I received the call around zero thirty-eight hours,  
22 which is twelve thirty A.M. I do not remember where I  
23 was at when I received the call but I responded.

24 I did arrive at zero fifty-two hours, which is  
25 twelve fifty-two A.M.

MR. SUGGS ON DIRECT

1 Q. And at what location?

2 A. I 95 southbound at Honda way.

3 Q. Is Honda way at Exit 153?

4 A. Yes, sir.

5 Q. All right, and I assume you would have to approach  
6 it . .

7 A. I approached it southbound. Out of southbound.

8 Q. Okay, and what do you remember seeing as you ap-  
9 proached this area of the accident?

10 A. Approaching the scene, it looked like I had ten or  
11 fifteen cars in the accident. There were vehicles  
12 all over the roadway, a trailer halfway across I95, and  
13 an eighteen wheeler underneath at the column.

14 Q. Pull up Exhibit Number 1.

15 Does this refresh your memory?

16 A. Yes, sir.

17 Q. When you see this what is going through your  
18 mind?

19 A. I figured somebody was either seriously hurt or  
20 probably dead, on approaching.

21 Q. And let me show you just a few more of these --  
22 do you remember seeing this?

23 A. Yes.

24 Q. Were there any other responders on the scene when  
25 you got there?

MR. SUGGS ON DIRECT

1 A. EMS.

2 Q. So take the jury through the process of gathering  
3 all this information when you see what is before  
4 you? What do you do?

5 A. When I first arrive, my main concern is the con-  
6 dition of the driver. I don't know who the driver is.  
7 I will let EMS do whatever they can do.

8 I was looking at stuff up under the column so I  
9 was not getting in their way of getting him out.

10 So the only information I could gather was whether  
11 there were any witnesses or if there was any way I  
12 could find the registration to get information on the  
13 vehicle so I could start my report.

14 Plus, there was a trailer halfway across I 95 so  
15 we had traffic direction too.

16 Q. Did someone aid you in your . .

17 A. Yes, sir, there were a couple of other troopers  
18 who were in the area.

19 Q. Did you ever have any discussion with the driver  
20 of the tractor-trailer?

21 A. No, I did not.

22 Q. And to this day you have never talked with the  
23 driver?

24 A. No, sir.

25 Q. In the course of your investigation, did you find



MR. SUGGS ON DIRECT

1 out who was the driver of the tractor-trailer?

2 A. Yes, sir. Mr. Bobby Tucker.

3 Q. And what was he driving? What type of vehicle  
4 was he driving?

5 A. It was a 2001 Freight Liner.

6 Q. All right. Did you determine in the course of  
7 your investigation whether there was any object in or  
8 near the road?

9 A. No, sir.

10 Q. You did not?

11 A. No.

12 Q. And was that your focus at the time? Were you look-  
13 ing for anything in the roadway?

14 A. Like I said, it was a big -- it was not just the  
15 average wreck where you pull up and hit the back of  
16 somebody. It was on an interstate that was almost com-  
17 pletely blocked with cars that had come off of the  
18 car hauler.

19 There was an injured man who was very seriously in-  
20 jured.

21 So I still have got my job duties to do as far  
22 as investigate the accident. With a bad situation it  
23 is a little tougher to really concentrate on what  
24 you've got going on.

25 Q. All right. At some point later, did you have

MR. SUGGS ON DIRECT

1 a conversation with a wrecker driver or tow truck  
2 operator? who was on the scene?

3 A. Um, . . .

4 Q. I don't want you to tell us what the conversation  
5 was, but whether you had a conversation?

6 A. Would you state your question again?

7 Q. Yeah. Do you recall having a conversation -- do  
8 you ever recall having a conversation with Albert Vereen  
9 who worked for Shepard's?

10 A. That's who it was, at Shepard's. I did go to  
11 Shepard's to speak with someone there.

12 Q. All right, and then did you look at anything in  
13 particular while you were there?

14 A. There was a large metal object that they then  
15 advised me they found underneath the truck, up against  
16 the guardrail, when they removed the truck from the  
17 scene there.

18 Q. Is this the object? Is this it?

19 A. That's it.

20 Q. And in the course of your investigation, you just  
21 simply didn't see it?

22 A. Correct. That . . .

23 Q. What?

24 A. I was already -- my shift was ended at five o'clock  
25 in the morning. The truck still had not been removed

MR. SUGGS ON DIRECT

1 so they sent out troopers from the day shift to take  
2 over the scene.

3 So I was wasn't at work when they removed the  
4 truck.

5 Q. And that's when the object was found?

6 A. Yes, sir.

7 Q. Sir, that's all I have. Thank you.

8 THE COURT: You may cross examine, Mr. Keaveny.

9 MR. KEAVENY: Thank you, Your Honor.

10 CROSS EXAMINATION

11 BY MR. KEAVENY:

12 Q. Good morning, Mr. Suggs. How are you?

13 A. Okay, sir.

14 Q. I want to just talk to you a few minutes about  
15 some of the -- some of the issues that Mr. Hatfield  
16 was talking to you about.

17 As I understand your testimony, to put a little  
18 of the time-line back on it, when you came to this scene  
19 of this terrible, terrible crash . .

20 A. Uh huh.

21 Q. . . on southbound I 95, you in fact approached  
22 the scene in the same direction that Mr. Tucker had been  
23 driving, heading south on I95?

24 A. Yes, sir, that's correct.

25 Q. And as you approached that scene, it was about twelve

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1 fifty-eight, I think it was, in the morning?

2 A. Twelve fifty-two -- close.

3 Q. That -- the accident itself involved a tractor with  
4 a car hauler that was up under the concrete -- the sec-  
5 ond concrete abutment. Is that right?

6 A. Yes, sir.

7 Q. And as you approached it, how close were you able  
8 to get to the tractor-trailer?

9 A. Approximately fifty yards.

10 Q. You didn't find any debris or anything in the road  
11 down by I 95 as you approached this accident over there  
12 at the concrete abutment. Is that right?

13 A. Other than the trailer and the cars, no.

14 Q. And there were in fact two cars on the trailer  
15 that Mr. Tucker was hauling. Is that correct?

16 A. I don't know how many cars. I couldn't tell you  
17 that.

18 Q. As I understand the testimony from Mr. Vereen from  
19 Shepard's who testified yesterday, the tractor itself  
20 Mr. Tucker was operating on was around that second abut-  
21 ment. Is that . . .

22 A. According to the accident investigation that I did  
23 that day, it was under the second one.

24 Q. And when you got there, the first and paramount  
25 concern that you guys have for us when you get to one

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MR. SUGGS ON CROSS

1 of these horrible accidents is to ensure and find out  
2 how the people who are involved in it are doing. Isn't  
3 that right?

4 A. Yes, sir.

5 Q. All right, and to get help to them immediately, is  
6 that right?

7 A. Correct.

8 Q. So that was your primary concern when you got out  
9 there. Right?

10 A. Right.

11 Q. And you were relieved to know that in fact Mr. Tucker  
12 was attended to by EMS. Is that right?

13 A. Yes, sir.

14 Q. And, in fact, Mr. Tucker was being attended to by  
15 Mr. Collins who is here today. Is that right?

16 A. I don't know if he was there or not.

17 Q. But after you had done that or checked that off,  
18 seeing about people who were in the accident, and there  
19 was only one person here.

20 After you check that off, you go about the what,  
21 where, when, why and how?

22 A. Yes, sir.

23 Q. Okay. You check that off and now you're trying to  
24 figure out the other issues. First, are there any other  
25 vehicles involved. Is that right?

MR. SUGGS ON CROSS

1 A. Right.

2 Q. And there were no other vehicles involved?

3 A. No other vehicles involved.

4 Q. Secondly, what happened? Who can tell me what hap-  
5 pened?

6 But there were no witnesses?

7 A. No witnesses.

8 Q. None whatsoever?

9 A. Right.

10 Q. No one who said that they saw this accident because  
11 they were behind Mr. Tucker?

12 A. Nobody saw it.

13 Q. Nobody that said they saw it because they were along-  
14 side of him?

15 A. That's correct.

16 Q. Nobody to say they saw it because they were in front  
17 of him?

18 A. Right.

19 Q. Is that right?

20 A. Right.

21 Q. Now, I understand because I talked to you at the  
22 deposition previously that somebody did come up to you  
23 and say that they came upon the accident, and they got  
24 Mr. Tucker's wife's name and called his wife. Is that  
25 correct?

MR. SUGGS ON CROSS

1 A. Yes, sir, that's correct.

2 Q. They didn't see the accident?

3 A. They said they did not see it until the accident  
4 had taken place.

5 Q. Now, after you try to identify witnesses to see  
6 if there is anybody who can tell you what happened, you  
7 then try to determine what happened. Is that right?

8 A. That's correct.

9 Q. All right, and one of the things you would do is  
10 find out whether there were any objects in this whole  
11 area by looking at the roadway itself, to see if there  
12 is any evidence or any inclination of what happened.  
13 Isn't that right?

14 A. That's correct.

15 Q. And you did not conclude as a result of your inves-  
16 tigation on that morning that Mr. Tucker struck any for-  
17 eign object in the road. Is that right?

18 A. That's correct.

19 Q. In fact, you had no evidence whatsoever to suggest  
20 that Mr. Tucker lost control of his vehicle on that morn-  
21 ing as a result of striking any object. Is that right?

22 A. That's correct.

23 Q. Mr. Hatfield asked you if after you prepared your  
24 report you subsequently became aware of the claim that  
25 Mr. Tucker did strike an object in the road. Is that

MR. SUGGS ON CROSS

1 right?

2 A. That's correct.

3 Q. And that is what led you to Shepard's, is that  
4 right?

5 A. Yes.

6 Q. And that's where you talked to a man whose name  
7 you don't remember but who testified yesterday, Mr.  
8 Vereen?

9 You talked to a representative at Shepard's. Is  
10 that right?

11 A. Yes, sir.

12 Q. And the man that you talked to told you that he  
13 found an object under Mr. Tucker's truck when he removed  
14 the truck from the concrete abutment. Is that right?

15 A. Yes, sir.

16 Q. And this object here that Mr. Hatfield didn't put  
17 up on the screen but I will show it to you this way --  
18 this is a picture of the object that was shown to you.  
19 Is that right?

20 A. Yes.

21 Q. And Mr. Vereen told you that it was under the  
22 tractor against the concrete abutment. Is that right?

23 A. Correct.

24 Q. You never saw that object out there on the road,  
25 did you?



MR. SUGGS ON CROSS

1 A. No, sir. I did not.

2 Q. Did you ever go back out to the highway to look to  
3 see if you could find anything to show that object had  
4 been out there, that it had been under the tractor, or  
5 that it had been out on the concrete abutment under the  
6 tractor?

7 A. No, sir. I never returned to the accident scene.

8 Q. You never saw that object out there at the accident  
9 scene?

10 A. No, sir. It was at Shepard's when I first saw it.

11 Q. You weren't here yesterday when Mr. Vereen testi-  
12 fied, were you?

13 A. No, sir.

14 Q. You didn't find that object under the tractor --  
15 under Mr. Tucker's tractor against the concrete abutment  
16 on April 30 . .

17 A. No, sir.

18 Q. . . of 2010, did you?

19 A. No, sir.

20 Q. You don't know that Mr. Vereen testified from that  
21 very stand that he didn't find it under Mr. Tucker's  
22 tractor on April 30th, 2010?

23 A. Would you ask the question again, please?

24 Q. You don't know that Mr. Vereen testified from that  
25 very chair yesterday that he did not find it under the

MR. SUGGS ON CROSS

1 tractor?

2 A. I don't know what he testified to.

3 Q. You don't know that he testified that he found  
4 that object all the way across the road over by the  
5 shoulder on the right hand side of the road. Is that  
6 right?

7 A. I have no idea what he testified to.

8 Q. That's not what he told you though when you went  
9 to see him?

10 A. No, sir.

11 Q. Thank you.

12 THE COURT: Is there Redirect?

13 MR. HATFIELD: There is.

14 REDIRECT EXAMINATION

15 BY MR. HATFIELD:

16 Q. You have been testifying here from your report, is  
17 that correct?

18 A. Yes.

19 Q. And as a result of the contact at Shepard's and act-  
20 ually observing this object, did you subsequently pre-  
21 pare an amended report?

22 A. There was an amended report that was filled out with  
23 the possibility that the object that was found could have  
24 been in the roadway.

25 However, it was not completed and sent in by the

MR. SUGGS ON REDIRECT

1 DMV.

2 Q. So an amended report was prepared but it was never  
3 filed?

4 A. That's correct.

5 Q. Was there any reason for you to disbelieve Mr. Vereen,  
6 or whoever you talked to at Shepard's, that they found  
7 this object at the scene?

8 A. There was no reason to disbelieve it, no.

9 Q. Did you make any notes of your conversation with  
10 Mr. Vereen?

11 A. No, I did not.

12 Q. Can you be absolutely certain that he told you he  
13 found the object up under the abutment?

14 A. I cannot say with one hundred percent certainty, no,  
15 sir.

16 Q. Thank you, sir. That's all I have.

17 THE COURT: All right, you may follow up if you  
18 wish to.

19 RECROSS EXAMINATION

20 BY MR. KEAVENY:

21 Q. Mr. Suggs, this report you talked about, this  
22 amended report, . . .

23 A. Yes, sir.

24 Q. . . when you prepare a report, you prepare it and  
25 they file it up there in Columbia?

MR. SUGGS ON RECROSS

1 A. Yes, sir.

2 Q. You submit it to your supervisor for your super-  
3 visor to review it and sign off on it, and then it is  
4 sent to Columbia. Is that right?

5 A. Correct, sir.

6 Q. I think that's all I would have. That did not occur  
7 with regard to the second report, the amended report,  
8 that Mr. Hatfield referred to. Is that right?

9 A. That's correct.

10 Q. And back at your deposition when I talked to you  
11 about it, you didn't remember it having been done. Is  
12 that right?

13 A. At first, no, I did not.

14 Q. And so the second report, that report that you pre-  
15 pared, you prepared it and provided it to who, because  
16 it didn't come to your supervisor? You provided it to  
17 the State and provided it to who?

18 A. It was filled out as an amended report to send to  
19 Columbia.

20 Q. But it wasn't?

21 A. It was not. I discussed it with my supervisor, and  
22 we determined that it wasn't in the roadway at the time  
23 of the collision.

24 Q. Repeat that? After your discussion with your  
25 supervisor what?

MR. SUGGS ON RECROSS

1 A. . .

2 MR. HATFIELD: That would be hearsay, Your Honor.

3 THE COURT: Overruled. You may answer the question,  
4 sir.

5 BY MR. KEAVENY:

6 Q. Just say it again. Mr. Hatfield was coughing when  
7 you were giving your answer, and I don't believe the  
8 jury heard it.

9 You discussed it with your supervisor and what?

10 A. We decided that it wasn't -- we didn't have enough  
11 proof the object was in the roadway at the time.

12 Q. And so there was not an amended report submitted?

13 A. There was not, sir. It was not submitted.

14 Q. And how did Mr. Hatfield get a copy of it, or did  
15 you give it to him?

16 A. I did not.

17 Q. That's all I have. Thank you.

18 THE COURT: Do you wish to follow up with the wit-  
19 ness?

20 MR. HATFIELD: Yes, sir.

21 REDIRECT EXAMINATION

22 BY MR. HATFIELD:

23 Q. You told us you didn't go back out to the scene but  
24 you got off at five o'clock in the morning.

25 Did any other trooper from the Highway Patrol go out

MR. SUGGS ON REDIRECT

1 to the scene to discover if there were any marks in  
2 the roadway that would have been from this object that  
3 was photographed on the side of the road?

4 A. I can't tell you what any other trooper did. I did  
5 not.

6 Q. You did not?

7 A. I did not.

8 Q. So all you can tell us is what you have done and  
9 you don't know of anything else, and you just know that  
10 the object had fallen. Would you agree?

11 A. . .

12 MR. KEAVENY: I would object, Your Honor.

13 Q. Was there a follow up . .

14 THE COURT: You can't lead your witness.

15 BYMR. HATFIELD:

16 Q. Did you follow up . .

17 A. I did not.

18 Q. . . from your investigation?

19 A. I did not.

20 Q. All right.

21 A. Other than the fact that I went to Shepard's to look  
22 at the item.

23 Q. That's the only thing?

24 A. Correct.

25 Q. That's all. Thank you.

1 THE COURT: All right, is there any objection to re-  
2 leasing the witness?

3 MR. HATFIELD: No, sir.

4 MR. KEAVENY: No objection.

5 THE COURT: Thank you, Trooper Suggs.

6 (Witness excused)

7 THE COURT: Please call your next witness.

8 MR. HATFIELD: Thank you, Your Honor. We'd call  
9 Billie Collins.

10 THE COURT: Come on up to be sworn.

11 BILLIE COLLINS, being  
12 duly sworn, testified as follows:

13 DIRECT EXAMINATION

14 BY MR. HATFIELD:

15 Q. I'm going to stand a little bit closer because of  
16 your hearing situation.

17 A. Yes, sir.

18 Q. Mr. Collins, will you tell the jury your full  
19 name, please?

20 A. Billie Collins.

21 Q. And what do you do for a living?

22 A. I work as a paramedic for County EMS, and I have  
23 been there since 1990.

24 Q. What does a paramedic do?

25 A. In this State, it is an advanced EMT who is capable

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1 of starting IVs; administering cardiac medication, using  
2 a cardiac monitor; treating for minor illnesses, various  
3 illnesses and traumatic injuries.

4 Q. All right. Did you respond to a call at 195 at the  
5 Honda Way exit on April 30, 2010?

6 A. I did.

7 Q. All right, and do you have before you a report that  
8 was done, or do you have an independent memory or recol-  
9 lection of this particular call?

10 A. Well, when I received your subpoena it rang a bell.

11 Q. Okay.

12 A. And I was thinking about things, things that stood  
13 out about it in my recollection. The damage to the  
14 vehicle and Mr. Tucker's injuries.

15 Q. What time did you arrive on the scene?

16 A. If I can find my summary -- it would be seven min-  
17 utes to one A.M.

18 Q. All right, and was anyone with you?

19 A. My partner, Madison McCarty.

20 Q. Was there more than one ambulance or EMS unit on  
21 the scene?

22 A. I received -- our unit was the initial unit. My  
23 supervisor responded in what's known as a QRV, quick  
24 response vehicle, and he brought his medical equipment  
25 as well.



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1           If I remember correctly, the local fire department  
2 responded. Timmons ville may have sent a unit but I  
3 can't be sure about that.

4       Q.   Tell the jury basically what you did when you  
5 arrived on the scene?

6       A.   .

7       Q.   From the moment you got there until your final  
8 exit.

9       A.   Well, as we arrived, it appeared that Mr. Tucker  
10 was driving a car hauler and the first impression I  
11 had when we rode up on the scene was that I was going  
12 to need more ambulances. I then realized -- it was dark  
13 -- that they weren't occupied. They actually had been  
14 slung off the trailer he was pulling.

15      Q.   All right.

16      A.   After making our way across the median we saw  
17 the cab of the truck and saw the truck was pushed into  
18 the support column.

19           Some bystanders approached and they were passer-  
20 bys who were involved with rescue or EMS. I think they  
21 said they were from New Jersey or one of the northern  
22 areas off I95.

23           They indicated that Mr. Tucker was the only victim,  
24 the only injured person we had.

25           When I actually made it to the cab of the truck,

MR. COLLINS ON DIRECT

1 we found it to be on top of the guardrail, up off the  
2 ground, and the metal was propping it up and pressed  
3 around him.

4 I remember seeing, if I am correct, what was the  
5 engine itself several hundred feet down the road.

6 Q. Okay.

7 A. It had just been thrown clear when the front of  
8 the truck was damaged.

9 Q. All right.

10 A. I remember the oil in there was seeping out onto  
11 I95.

12 Mr. Tucker was able to talk when we gained access  
13 to him. He was looking around. He was able to talk to  
14 us and looking around. He was kind of dazed but he  
15 indicated he had hit something.

16 I was never clear on what he had hit. He had hit  
17 something on I95 that caused the accident.

18 I could feel that his femur was broken . .

19 Q. How did you determine that?

20 A. I could reach into the window and I could feel  
21 -- I had access to his upper body, his legs, his head,  
22 his arms. I could reach his left leg and he had a  
23 left femur fracture. I could reach through the window  
24 and tell it was broken.

25 Q. What is the femur?

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1 A. The large bone in your leg.

2 Q. What else did you determine at that time?

3 A. I was concerned. I could see some blood or what  
4 looked like blood or fluid in the floor, and I was afraid  
5 he had an open wound that I couldn't see at that time and  
6 that I couldn't reach, but there was no other way -- I  
7 couldn't get further into the cab to check him at that  
8 point.

9 Q. Why not?

10 A. Too much damage.

11 Q. Okay.

12 A. The only access point I had was through the open  
13 window. The rest of the cab was crushed up around  
14 him.

15 Q. Showing you Exhibit Number 7 -- do you recognize  
16 this photograph?

17 A. Yes.

18 Q. Are you in this photograph somewhere?

19 A. Well, as best I can tell, you can see what appears  
20 to be a gentleman with an EMS vest in your lower right.  
21 That. That looks to be my supervisor.

22 Q. Right there?

23 A. That is Jason Smith who was also there. It is  
24 just his left arm.

25 Q. Okay.

MR. COLLINS ON DIRECT

1 A. That other white shirt, I believe that's me.

2 Q. And the other gentlemen, what are they doing?

3 A. Well, you can see that part of the trailer actually  
4 got pushed up and around.

5 Q. Right here?

6 A. Yes. They were trying to work on the cab, and  
7 that is how much damage there was. The trailer shifted  
8 around and the cab was wrapped -- the metal was crushed  
9 and wrapped around.

10 Q. This was as you were trying to work on Mr. Tucker?

11 A. The other gentlemen on the scene, the various res-  
12 cue members, were part of the unit from Timmons ville, and  
13 possibly the Timmons ville Rescue Squad -- some of their  
14 members responded as well.

15 Q. Okay, so take us again through the process of your  
16 assessment of Mr. Tucker and what had to be done to get  
17 him out of the cab?

18 A. Well, after -- as I noted in this report, they had  
19 to cut the door away and part of the rim of the steering  
20 wheel, which we thought we were releasing enough to pull  
21 him out, but the steering column itself was holding him  
22 -- it had enough pressure to hold him to the back of the  
23 seat where the metal and everything shifted forward.

24 The steering column was in the way as well.

25 Q. Okay.

MR. COLLINS ON DIRECT

1 A. So they ended up taking what's known as a ram -- it  
2 is literally like a hydraulic jack -- they had to just  
3 push the steering column up and away of Mr. Tucker so  
4 we could finally get him out of the vehicle.

5 Q. How long did this process take?

6 A. The process took a little while longer than we would  
7 have liked it to.

8 Q. All right.

9 A. Like I said, I was trying to obtain -- when I was  
10 talking to him I was standing with one foot on the guard-  
11 rail and one foot on what was left of the trailer, leaning  
12 in that window, and if you know how high a guardrail is  
13 on I95 -- so I'm this far up and I don't have a solid  
14 surface to stand on, nor did rescue have a solid surface  
15 to use their tools.

16 When they tried to use the jaws, the cutters or the  
17 ram, they were having to balance on part of the trailer  
18 and part of the cab, part of the guardrail.

19 It was awkward, hard to do, with their instruments  
20 there.

21 Q. Okay. Could you estimate the -- how long it was  
22 to --

23 A. I arrived on the scene at seven minutes to one. I  
24 left at two thirty. All this time I was on the scene.

25 Now, if you look at my notation here, my first

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1 time talking with Mr. Tucker was at -- through the win-  
2 dow just a few moments after I arrived on the scene.  
3 At one fifteen it was still entrapped. At one thirty  
4 we had partial access to him where some of the door had  
5 been pulled away.

6 That's when I could see that he had multiple frac-  
7 tures of the left femur. His right leg was pinned by the  
8 steering column.

9 Of course, he was being squeezed between the seat  
10 and the steering wheel. Some of the spokes of steel  
11 were trying to get at him.

12 At one forty-five, the patient was finally free after  
13 using a ram to get the steering column up.

14 Q. And once he was removed from the truck, what did  
15 you do?

16 A. Actually we had rescue hold the spine board up and  
17 used a ladder to create a bridge to get him on a spine  
18 board, and we eased him down. We tried to control every-  
19 thing to try and prevent any further injury until we had  
20 him at ground level where we could complete the mobiliza-  
21 tion process.

22 We tried as best we could to clean his wounds and  
23 mobilize his fracture. We moved him to the ambulance,  
24 and as we -- once again, when we were trying to start IVs  
25 the supervisor was actually driving by the Honda Plant

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1 to the landing zone which we used to have a helicopter  
2 to fly him out.

3 Because of the length of time it took to get him  
4 from the vehicle and injuries he had, I was concerned he  
5 might have more open fractures than we knew about and  
6 his age.

7 I was concerned because at different parts of your  
8 lifetime your body responds in different manners to in-  
9 juries, and at twenty-one I would have responded to in-  
10 juries and recovery than I would have at forty-eight,  
11 which I am now.

12 Q. All right.

13 A. And then it just progresses. With his advanced  
14 age and the type of injuries, the trauma he had, I wanted  
15 him in the hospital where they could handle it.

16 Q. All right. Do you know if you were the first per-  
17 son he spoke to?

18 A. The responders on the scene actually made the nine  
19 one one call. Those were the two gentlemen who were  
20 there from New Jersey or New York or wherever they were  
21 from at the time.

22 They were actually the first ones he spoke to on  
23 the scene.

24 But from the County, I myself probably was -- myself  
25 or my partner, leaning through the window.

MR. COLLINS ON DIRECT

1 Q. And he told you again what happened?

2 A. As best I could determine, he said he struck some-  
3 thing -- the truck struck something in the road.

4 Q. Okay, and there were two gentlemen who were there  
5 who made the nine one one call?

6 A. Yes, based on what we could best determine.

7 Q. Okay.

8 A. They didn't know exactly what had taken place but  
9 they saw the accident occur and they were there and of-  
10 fered to assist. They stopped to assist.

11 Q. Did you see where they went?

12 A. They were still there when I left. When I was  
13 going to the other vehicles, they were yelling that those  
14 vehicles were empty. They were trying to tell us be-  
15 fore we could make that discovery, that they were empty.

16 They ran up and guided us to Mr. Tucker.

17 Q. Did you ever hear the name Anthony Bernardo?

18 A. I'm sorry?

19 Q. Did you hear the name of Anthony Bernardo?

20 A. No, sir. The name doesn't ring a bell.

21 Q. Okay. How were you able to determine that the  
22 fractures in his leg were open?

23 A. Well, it actually was bloody. Once the door was  
24 peeled back I could actually see blood running down his  
25 leg.



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1       So I knew we had an open wound of some kind on the  
2 leg, and once I was able to get his pants leg up and  
3 away, I could see the fractured bones going through  
4 the skin.

5 Q.   Okay, and other than the fracture to his left fe-  
6 mur, what other visible signs of injury did you note?

7 A.   The flying glass left him with some facial lacera-  
8 tions and contusions on his head. He would have actu-  
9 ally bounced around in the confines of the cab.

10       The fractured femur which I felt. The injuries  
11 to the lower leg I was able to see once the door was  
12 opened and cut his pants out of the way.

13       Once we actually had him free, it became a matter  
14 of us trying to actually package him up, get the IVs  
15 started, get him to the helicopter so we could get him  
16 up to Palmetto Richland.

17 Q.   During the entire time you were with Mr. Tucker,  
18 did he remain conscious in the road?

19 A.   He was talking. He was able to indicate what  
20 hurt and what did not when I would ask him questions.  
21 He was a little short of breath. He was pressed up  
22 against the steering wheel by the back of the seat, and  
23 he was naturally short of breath.

24       But, all in all, to be honest, with the fears I had  
25 about his injuries, I was pleased to see that he was

MR. COLLINS ON DIRECT

1 able to talk to us; that he was as well as he was.

2 Q. Thank you, sir. That's all the questions I have.

3 THE COURT: All right, now Cross Examination.

4 MR. KEAVENY: Thank you.

5 CROSS EXAMINATION

6 BY MR. KEAVENY:

7 Q. Mr. Collins, I'm going, like Mr. Hatfield, come a  
8 little closer to you. Please don't be offended.

9 A. I have a slight hearing impairment. If you are  
10 where I can see and hear, I can be here all day.

11 Q. Let me ask you this question. How long have you  
12 been doing EMS?

13 A. Well, at twenty-one I was a volunteer. I've been  
14 with the County going on twenty-three years now.

15 Q. So you've been doing it a total of twenty-six or  
16 twenty-seven years?

17 A. Yes.

18 Q. Have you ever in your life come upon a more compli-  
19 cated situation than you were faced with on that parti-  
20 cular night?

21 A. I've seen some other complicated situations, but  
22 nothing where I had to try to extricate someone from a  
23 vehicle suspended in the air. That was a new one.

24 Q. You had a man whose injuries alone were life-threat-  
25 ening or very, very serious?

MR. COLLINS ON CROSS

1 A. Yes.

2 Q. Is that right?

3 A. That's right.

4 Q. He was suspended six feet in the air because his  
5 vehicle was on top of a guardrail, is that right, and  
6 you guys had to cut away to not only address the trauma  
7 you saw with Mr. Tucker, but you had to do it under  
8 most difficult circumstances. Is that right?

9 A. Yes.

10 Q. And in the dark. Is that right?

11 A. Yes.

12 Q. And in that environment, you did as best I can tell  
13 extricate him from the cab at about one forty-five? Is  
14 that right?

15 Is that what you show there?

16 A. As I've got it noted here, we finally had full ac-  
17 cess to him at one forty-five.

18 Q. Okay, and then you all went ahead and took him right  
19 away to the parking lot area of Honda Way so that he  
20 was flown off to the hospital in Columbia.

21 Is that right?

22 A. Yes, sir. We had to mobilize him on a spine board,  
23 get him into the ambulance and address the injuries,  
24 the bleeding injuries we saw; start the IVs and we were  
25 rolling to the heli-pad. Yes.

MR. COLLINS ON CROSS

1 Q. And how many guys were out there working with Mr.  
2 Tucker that night?

3 A. . . .

4 Q. How many were on the team you were with?

5 A. We had myself and my partner and my supervisor.  
6 Fire and rescue. There may have been a dozen or so, but  
7 going in and out I couldn't tell you the exact number  
8 of them.

9 Q. I'm going to show you what has been marked pre-  
10 viously as -- is this the Court's copy or yours?

11 A. . . .

12 Q. Mr. Collins, if you would stand up so the Court Re-  
13 porter can see and hear what you say.

14 This has been marked previously as Exhibit Number  
15 18. Do you recognize it?

16 A. It looks like I95.

17 Q. And, in fact, the abutments you were discussing are the  
18 abutments here. Is that right?

19 A. It looks like it.

20 Q. And the accident between the trailer and the two cars  
21 that were on there, I think it's been testified that  
22 started at the second abutment? The second concrete  
23 abutment?

24 A. You may well be right.

25 Q. Okay, and this is a wide median here between the

MR. COLLINS ON CROSS

1 road and the grass. Is that right?

2 A. Yes.

3 Q. You've got the road, you've got the lane, you've  
4 got the shoulder, a large grassy area. You've got the  
5 abutment. Is that right?

6 A. Yes.

7 Q. And that area where the abutment is, that's where  
8 this accident ended up?

9 A. Could very well be.

10 Q. And I'm not sure, but this may have been what Mr.  
11 Hatfield showed you, Plaintiff's Exhibit Number 1-- a  
12 picture of the tractor being suspended up on the guard-  
13 rail that you had to work on. Is that right?

14 A. I believe so. That looks like the area.

15 Q. Now, after you did the work that you he described  
16 for us, you had to prepare a report, I guess. Is  
17 that right?

18 A. Yes.

19 Q. Do you have your report?

20 A. Yes, sir. I've got a copy of it.

21 Q. May I see it?

22 A. . .

23 Q. Is your report these four pages?

24 A. What we do is -- the hospital prepares what we  
25 call a PCR, a handwritten report.

MR. COLLINS ON CROSS

1 Q. Okay.

2 A. What we actually did is scribbled down really fast  
3 so they have something to work with.

4 Q. Okay.

5 A. That is saved for the flight crew, that PCR.

6 Q. Yes, sir. I understand.

7 A. This is what we actually do once we get back to  
8 the station. We use the PCR as a reference page and  
9 then I have to type everything into an electronic data-  
10 base.

11 Q. All right.

12 A. To make this report.

13 Q. So you go back to the office and you have to fill  
14 out what we see here. Is that right?

15 A. Yeah, the electronically generated form.

16 Q. That's your report?

17 A. Yes, sir.

18 MR. KEAVENY: I would like to have this marked as  
19 an Exhibit.

20 MR. HATFIELD: I have no objection.

21 THE COURT: All right. Defendant's Exhibit 2,  
22 without objection.

23 (Mr. Collins' report entered in evidence without  
24 objection as Defendant's Exhibit 2)

25 BY MR. KEAVENY:

MR. COLLINS ON CROSS

1 Q. Now, would you explain to the jury what the pur-  
2 pose of that report is?

3 A. This is the -- as I said before, the PCR is a  
4 short and fast form to highlight the care we did for  
5 the patient to inform the hospital what we actually did.  
6 This is the PCR report.

7 This one is where we fill in the blanks for State  
8 data-bases, national data-bases, federal data-bases.

9 Q. Okay.

10 A. Anything of that nature.

11 Q. And you fill this out when you get back in the of-  
12 fice?

13 A. As soon as we get back to the station.

14 Q. Now, in this report it indicates that on -- maybe  
15 at twelve forty, you guys received the call, is that  
16 right, about this accident?

17 A. We were called to the scene. Yes, sir, on that  
18 morning.

19 Q. And you were dispatched at twelve forty-four . .

20 A. Yes, sir.

21 Q. . . and arrived at the scene at twelve fifty-three?

22 A. That referral to twelve fifty-three . .

23 Q. What is that referral?

24 A. For some reason it is not showing our en route  
25 time there.

MR. COLLINS ON CROSS

- 1 Q. Okay.
- 2 A. The en route time should have been generated by
- 3 our dispatch.
- 4 Q. Okay.
- 5 A. That refers to the scene we were sent to.
- 6 Q. So according to your dispatch you arrived at the
- 7 scene at twelve fifty-three?
- 8 A. I think so, yes.
- 9 Q. And you guys did not leave the scene until two
- 10 thirty. Is that right?
- 11 A. Yes. We remained on the scene to assist the team,
- 12 the flight team. They had the apparatus, and you just
- 13 lift up and lock in the head and it pins to fit inside
- 14 the helicopter.
- 15 Q. All right, and then you have down here your avail-
- 16 able time is three fifteen?
- 17 A. Yes, sir. That's when dispatch cleared us.
- 18 Q. All right.
- 19 A. Then we headed back to our station and we would
- 20 have had to restock our gear if it needed any restock-
- 21 ing, which that night we had to restock after the
- 22 helicopter left.
- 23 Then we went back in service, back to the sta-
- 24 tion there.
- 25 Q. Mr. Hatfield asked you what Mr. Tucker told you



MR. COLLINS ON CROSS

1 about how this accident happened. Do you remember that?

2 A. Basically, all I remember hearing Mr. Tucker tell  
3 us about the accident was that something was on I95; that  
4 there was something.

5 Q. All right.

6 A. With regards to what that was, I couldn't begin to  
7 tell you.

8 Q. It's my recollection that a few minutes ago you  
9 testified that Mr. Tucker told you he hit something on I95?

10 A. That he hit something.

11 Q. And if you would turn the page of your report,  
12 please? Is it correct that was a report that you would  
13 have prepared immediately upon arriving back at your  
14 EMS department?

15 A. Yeah. He swerved to miss something that was on I95  
16 and hit the support at a high rate of speed.

17 Q. At the time you prepared this report, your recol-  
18 lection was that Mr. Tucker said he hit something that  
19 caused him to swerve to miss something. Is that right?

20 A. That's what I've got written down here.

21 Q. Thank you. That's all I have.

22 THE COURT: All right, is there any Redirect?

23 MR. HATFIELD: No, sir.

24 THE COURT: Any objection to excusing the witness?

25 (No audible response) Hearing none, sir, you are free

1 MR. HATFIELD: That concludes the playing of the  
2 deposition of Dr. Myslinski.

3 (Jury excused at 12:44 for the lunch period)

4 (The Court stood in recess until 2:15 P.M.)

5 THE COURT: All right, the jury has returned, so  
6 please bring in our jury.

7 (Jury returned to the Courtroom)

8 THE COURT: All right, ladies and gentlemen. I  
9 trust you had a nice lunch. Welcome back to the Court-  
10 room.

11 We are still in the Plaintiff's case, and you may  
12 call your next witness, Mr. Hatfield.

13 MR. HATFIELD: Thank you, Your Honor.

14 I would ask if we could mark these as Plaintiff's  
15 Exhibits 68 and 69, the x-rays that Dr. Koon has ex-  
16 plained to the jury in the deposition.

17 I think this is without objection.

18 MR. KEAVENY: It is, Your Honor.

19 THE COURT: All right. Plaintiff's Exhibits 68  
20 and 69 in evidence for the Plaintiff.

21 (Photograph of x-rays admitted without objection  
22 as Plaintiff's Exhibits 68 and 69 in evidence.)

23 MR. HATFIELD: Mr. Bobby Tucker.

24 BOBBY LEE TUCKER, being  
25 duly sworn, testified as follows:

PLAINTIFF ON DIRECT

1 THE COURT: Come around and be sworn as a wit-

2 ness.

3 DIRECT EXAMINATION

4 BY MR. HATFIELD:

5 Q. Mr. Tucker, tell us your full name?

6 A. Bobby Lee Tucker.

7 Q. Mr. Tucker, how old are you?

8 A. I'm eighty-two years old.

9 Q. When is your birthday?

10 A. February 13th.

11 Q. You are married?

12 A. Yes.

13 Q. And who is your wife?

14 A. Eunice Tucker.

15 Q. When did you and Mrs. Tucker get married?

16 A. December -- Christmas Eve of 1947.

17 Q. All right, and you have been married how many

18 years?

19 A. Sixty-five years.

20 Q. How many children do you have?

21 A. We had five.

22 Q. And grandchildren?

23 A. Well, sir, I just had another great-great grand

24 so I'll have to count them up.

25 Q. You say great-great?

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Appendix\_0165

PLAINTIFF ON DIRECT

- 1 A. Great-great. I've got I'd say about thirteen.
- 2 Q. Okay, and you live in Darlington?
- 3 A. Yes, all my life.
- 4 Q. Where did you go to school?
- 5 A. I went to school in Darlington.
- 6 Q. Do you remember Flat Nose, the tree-climbing dog?
- 7 Flat Nose?
- 8 A. Flat Nose.
- 9 Q. He went on Johnny Carson?
- 10 A. Yeah.
- 11 Q. How far did you go in school?
- 12 A. I went to grammar school.
- 13 Q. And did you stop going to school after that?
- 14 A. I did. I was staying with my grandmother, and I
- 15 was thirteen. I've been on my own since thirteen.
- 16 Q. And by going on your own, tell the jury what you
- 17 mean by that?
- 18 A. I mean, I went out and got me a job and started by
- 19 buying an ice truck.
- 20 Q. Were you able to drive when you were thirteen?
- 21 Were you able to drive an ice truck?
- 22 A. When I was thirteen years old and they paid me
- 23 Seven Dollars a week to do this job.
- 24 Q. How was it you got a driver's license when you
- 25 were thirteen?

PLAINTIFF ON DIRECT

1 A. I had to lie about my age.

2 Q. How long did you drive an ice truck?

3 A. I drove an ice truck that summer, and that was in  
4 1944.

5 Q. Is that how you first learned how to drive a truck?

6 A. That's right.

7 Q. And how long have you been driving a truck?

8 A. About sixty-nine years.

9 Q. How many miles do you think you have driven over  
10 your lifetime?

11 A. I couldn't tell you how many. I've been running  
12 one pretty much since then -- since 1948.

13 Q. Have you ever had any chargeable accidents while  
14 you were driving a tractor-trailer?

15 A. I've never had a chargeable accident.

16 Q. Okay. How did you get into the business of cars  
17 and hauling cars? And selling cars?

18 A. Well, I bought my first two cars in New York. It  
19 was two 1938 Chevrolets, and I've been trucking over forty-  
20 five years.

21 Q. All right, and at one time how many people worked  
22 for your company?

23 A. With the trucking and the cars we had about sixty-  
24 five employees.

25 Q. It's much smaller now, isn't it?

PLAINTIFF ON DIRECT

1 A. It's almost nothing now.

2 Q. Okay. The -- and what kind of trucks have you  
3 operated during that time, big trucks?

4 A. We've had flat liners and (inaudible).

5 Q. Who were some of the customers that you would haul  
6 cars for?

7 A. Well, we first started hauling for used car deal-  
8 ers, and we did work for General Motors, for three of-  
9 fices. We did work for Ford and Chrysler.

10 Q. And did you actually drive the trucks along with  
11 your other employees?

12 A. Yeah, I did. I drove but as I got older I still  
13 had to fill in.

14 Q. All right, and you had officially retired. How old  
15 were you?

16 A. I've been on social security since sixty-five.

17 Q. You haven't completely retired since then, have  
18 you?

19 A. No, I haven't.

20 Q. Do you continue to work?

21 A. I continue to work.

22 Q. When is the last time you took a vacation?

23 A. In 1960.

24 Q. What did you do or where did you go?

25 A. We went to Michigan, went to Canada. Up through the

PLAINTIFF ON DIRECT

1 mountains.

2 Q. And why no vacation since 1960?

3 A. I didn't understand.

4 Q. Why didn't you have any more vacations after 1960?

5 A. Well, I would go down to the beach and maybe stay

6 a couple of days but I guess I'm a workaholic.

7 Q. All right.

8 A. I've been working since I was five years old.

9 Q. What did you do when you were five?

10 A. My granddad was a blacksmith, and I worked -- I

11 stood on coca cold crates to turn the forge, a metal

12 forge, and he died when I was nine years old, and then I

13 had his job to work and make a little money.

14 I was going to school and I walked miles to catch a

15 bus and miles back, but I worked to almost dark. We didn't

16 have electricity at that time to get my lessons by.

17 Q. Did you live in the country?

18 A. In the country since I was five years old.

19 Q. All right. Well, let's go up to just before you

20 leave and this accident happened on this trip down to

21 Florida.

22 What truck were you driving?

23 A. I was driving a 2001 Flat Liner. A Buick

24 Flat Liner.

25 Q. And how many times had you driven it before?

PLAINTIFF ON DIRECT

- 1 A. Many times.
- 2 Q. Were you familiar with the truck?
- 3 A. Yes, I was.
- 4 Q. In what kind of mechanical condition was the truck
- 5 in?
- 6 A. The truck was in good condition.
- 7 Q. All right. The personnel file that is on record for
- 8 Tucker does not include the maintenance records for that
- 9 truck.
- 10 Do you know who did the maintenance on that truck?
- 11 A. We did.
- 12 Q. So you were able to do it in-house?
- 13 A. Yes.
- 14 Q. Did you have a commercial driver's license?
- 15 A. I did.
- 16 Q. How long have you had a commercial driver's li-
- 17 cense, Mr. Tucker?
- 18 A. A long time. Whenever they came in.
- 19 Q. Do you remember when that was?
- 20 A. I can't remember what year.
- 21 Q. That's all right. Now, when you had a commercial
- 22 driver's license, are you required to have a physical
- 23 or medical examination ever so many years?
- 24 A. Yes, every two years.
- 25 Q. And did you get examinations every two years?

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PLAINTIFF ON DIRECT

1 A. I got an examination every two years.

2 Q. Was there ever a limitation or restriction placed  
3 on driving by any doctor?

4 A. No.

5 Q. Do you wear eye-glasses?

6 A. Yes.

7 Q. And you were wearing eye-glasses when this wreck  
8 happened. Correct?

9 A. Yes.

10 Q. All right. Is that the only restriction on your  
11 driver's license, is your glasses?

12 A. That's the only restriction.

13 Q. Now, the records from Tucker's show that you -- did  
14 you have an examination with Dr. Joe Matthews at Pee  
15 Dee Health Care in June of 2010?

16 A. I did.

17 Q. All right, and do you remember at the time you had  
18 the examination -- the wreck happened in April of 2010. Do  
19 you remember when you last had an examination before then?

20 A. For my driving?

21 Q. Well, the driver's physical that is required.

22 A. I had a physical -- I had one in July with Dr.  
23 Matthews.

24 Q. Was that before -- this crash that happened in 2010,  
25 when did you have your physical?

PLAINTIFF ON DIRECT

1 A. That was with Dr. Carver.

2 Q. Okay.

3 A. I couldn't tell you the date.

4 Q. Okay, and besides Dr. Carver, did you see any  
5 other doctors to give you that physical?

6 A. No, I didn't.

7 Q. Now, you told us that you were doing kind of fill-in  
8 driving?

9 A. That's right.

10 Q. And when did you start doing the fill-in driving?

11 A. Well, I couldn't give you any date, but any time  
12 that someone else couldn't go I always went.

13 Q. At some time before, had you stopped driving full  
14 time?

15 A. Well, I hadn't been driving full time for some time  
16 then.

17 Q. So you were kind of a fill-in driver?

18 A. Yes.

19 Q. Do you remember what you were doing the day of  
20 this crash, or I guess it would be April 29th --what  
21 did you do that day?

22 A. Well, I went to my granddaughter's ballgame.

23 Q. All right.

24 A. I went to the ballgame that night and it was a late  
25 ballgame.

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ROA\_0168

Appendix\_0172

PLAINTIFF ON DIRECT

- 1 Q. Okay.
- 2 A. It was late when the ballgame was over.
- 3 Q. And what time did you leave?
- 4 A. I got to the truck stop over there at two minutes
- 5 past twelve.
- 6 Q. All right, and before you got in your truck to
- 7 drive, did you have to do any kind of inspection?
- 8 A. Yes, I did.
- 9 Q. What did you do?
- 10 A. I checked the truck.
- 11 Q. And what is that called?
- 12 A. A pre-trip inspection.
- 13 Q. And would you tell the jury what you have to do to
- 14 pre-trip a truck like that?
- 15 A. Well, you have to check all your hoses and all of
- 16 your belts. Check all your wheels and all your lights,
- 17 and then check your brakes, check the air pressure
- 18 to make sure the air pressure stays up and don't leak
- 19 down. Things like that.
- 20 Q. All right, and did your truck go through the pre-
- 21 trip inspection okay?
- 22 A. Yes.
- 23 Q. All right, and what was your destination? Where
- 24 were you heading?
- 25 A. I was heading to Jacksonville, Florida.

PLAINTIFF ON DIRECT

1 Q. What were you delivering?

2 A. I had two cars on there for Car Maxx to deliver  
3 to Jacksonville.

4 Q. And were you to go any place else before return-  
5 ing to South Carolina?

6 A. Well, if I had gotten to Jacksonville, I probably  
7 would have gone on for a load.

8 Q. And bring something back here?

9 A. Yes.

10 Q. What was your physical state on that day? How  
11 were you feeling?

12 A. Well, I was seventy-nine years old but I had a  
13 fifty year old body then. I had always worked, and  
14 most anybody who works can do that.

15 Q. Were you taking any medication?

16 A. Any what?

17 Q. Were you taking any medicines on a regular basis?

18 A. I don't take anything, any medicines at all.

19 Q. What about back before this wreck happened? Do  
20 you remember if you were taking any medicines on a  
21 regular basis?

22 A. No, sir.

23 Q. Okay, were you rested?

24 A. Yeah, I was rested.

25 Q. And are you required to keep a driver's log?

PLAINTIFF ON DIRECT

1 A. I was.

2 Q. And did you regularly keep a driver's log of the  
3 hours you would drive each day?

4 A. Yes, sir.

5 Q. And were you in compliance with Department of  
6 Transportation rules and regulations?

7 A. I was.

8 Q. Okay, and I believe the logbook is -- do you know  
9 where it is?

10 A. Well, you can't find anything in that truck.

11 Q. That's where it was last seen?

12 A. It was in the truck, yes.

13 Q. So your business is on North (inaudible) High-  
14 way. Is that where you left from?

15 A. That's where I left from.

16 Q. And tell the jury what happened when you left  
17 there. Did you stop anywhere before you got onto 95?

18 A. When I left the truck stop on 52 and 95, I stopped  
19 in there and got -- I always get me a bag of some kind  
20 of hard candy, and I got that and a cup of coffee, and  
21 when I left there it was two minutes past twelve.

22 Q. How can you be sure of the exact time?

23 A. Because when I stopped I always looked to see when  
24 I make my stop. You have to log it. It was two minutes  
25 past twelve when I left there.

PLAINTIFF ON DIRECT

- 1 Q. And tell the jury what route you took to get to  
2 I95?
- 3 A. I got back on the road and took a left and went on  
4 right down 52 and go up on the ramp at I95.
- 5 Q. What was the posted speed limit?
- 6 A. Seventy miles an hour.
- 7 Q. And how fast were you driving?
- 8 A. I set my cruise at about sixty-eight.
- 9 Q. Why did you set it below the speed limit?
- 10 A. Well, I stayed in the right lane. I don't wear my  
11 brakes out.
- 12 Q. And were you driving in the right lane?
- 13 A. The right lane.
- 14 Q. Okay, and what do you recall about the overall traf-  
15 fic on I95 that evening?
- 16 A. At that particular time, traffic weren't heavy.
- 17 Q. Why were you driving at nighttime?
- 18 A. Well, I would have left a bit earlier but I can't  
19 -- when I go down there I can't get my cars to load  
20 until nine o'clock, and I go and get them and put them  
21 on the tractor.
- 22 Q. It's just easier to do it that way?
- 23 A. Right.
- 24 Q. Okay, let's put up on the screen Exhibit Number 8.  
25 Can you see the screen from where you are?

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PLAINTIFF ON DIRECT

1 A. Not yet.

2 Q. Well, it's not up on the screen yet.

3 Now, this is looking down I95, and in the back-  
4 ground there is the overpass?

5 A. Right.

6 Q. Is that the road . . .

7 A. That's the road I was on.

8 Q. Okay, and tell us what happened, Mr. Tucker?

9 A. Well, I was in that lane and all of a sudden the  
10 car that was in front of me put their brakes on and  
11 turned the turn signal, and so I went to do the same  
12 thing because I couldn't see what was ahead.

13 And when I did, there was a car coming up and  
14 passing me and I had to run that car off the road, and  
15 time just run out.

16 I hit that thing that looked just like a cardboard  
17 box laying in the road..

18 Q. Where was it in the road?

19 A. It was in the righthand lane.

20 Q. Okay. So was it closest to the center line or next  
21 to the other line?

22 A. I would say it was closer -- maybe two foot off the  
23 center line.

24 Q. So, somewhere about here?

25 A. Yeah.

PLAINTIFF ON DIRECT

1 Q. Okay, and do you know what part of your truck had  
2 struck that object?

3 A. The left front rim.

4 Q. And when it did, what happened?

5 A. When it hit the truck come back and it took off  
6 to the left right straight into those columns.

7 Q. All right. Were you able to steer?

8 A. . .

9 Q. Could you control your truck then?

10 A. I couldn't control it at all. I had no control at  
11 all.

12 Q. All right.

13 A. That's what caused the accident. The left front  
14 tire and the rim was hit right there.

15 Q. All right, and how fast were you going when you  
16 hit this object?

17 A. I would -- I had just -- when I hit my brakes I  
18 took it off to the left and backed off the brakes, and  
19 I guess I was going probably sixty-five miles an hour.

20 Q. All right.

21 A. Sixty miles an hour -- something like that.

22 Q. All right.

23 A. Somewhere in there.

24 Q. It probably took you a couple of minutes to tell  
25 us but in real time how quickly did all of this happen?



PLAINTIFF ON DIRECT

1 A. It happened quick.

2 Q. Okay.

3 A. The other car in front of me run up on it to start  
4 with.

5 Q. All right, and was there a car on your left?

6 A. A car on my left and I had to pull over and like  
7 to collided with that car, and that's when I hit it.

8 Q. Okay.

9 A. It was just in front of me a little bit.

10 Q. Okay. You've been driving trucks for almost fifty  
11 years or more. You told us you haven't had any charge-  
12 able offenses in a tractor-trailer, and you have prob-  
13 ably driven hundreds of thousands of miles.

14 Do you know of anything else you as a professional  
15 truck driver could have done to avoid hitting that thing  
16 in the road?

17 A. No.

18 Q. Was there anything else you could have done?

19 A. I didn't want to wreck and I would rather have not  
20 hit it but I didn't want to wreck no one else -- hit  
21 into somebody else.

22 Q. Okay. So you feel your truck kind of go up in the  
23 air?

24 A. Yes.

25 Q. Tell us what's going through your mind while this

PLAINTIFF ON DIRECT

1 is going on? While this is happening?

2 A. Well, not a whole lot. When it took off to the left,  
3 and was going toward the column, I knew I was going to  
4 die.

5 Q. All right.

6 A. I'd been on the road like I say for sixty-nine years,  
7 and I knew these trucks, and when I hit that column like  
8 that it busted up and I knew with all that fuel -- two  
9 hundred and forty gallons -- that it would catch on fire  
10 and I've seen many of them that burned up.

11 And so I was pulling so hard that's what pulled  
12 all this thing up and knocked all that floorboard and  
13 stuff back on up on me.

14 And I knew I was going to die but it all settled  
15 down, and there was blood running across my lip, and I  
16 said, I'm living; I couldn't believe it.

17 And the collision threw the engine back into the  
18 tank and I knew it was hot and that if that fuel ignited  
19 from a spark that all that gasoline would go up.

20 I could not move. The best I could tell you on  
21 the way I was in that truck, there was a -- I don't want  
22 to die but I was squeezed up in there and all of a sud-  
23 den the onliest thing I could move was my arm, but the  
24 rest of me -- it had me squeezed inside.

25 Q. All right.

PLAINTIFF ON DIRECT

1 A. I couldn't move nothing else.

2 Q. Did anybody come to you before the ambulance or be-  
3 fore the patrolman?

4 A. Two guys from New York were out there. They  
5 couldn't get close to me because all of that fuel was  
6 running out there.

7 So they stood off to the side and they wanted to  
8 know how I was, and I said I only lived there about six  
9 miles and can I give you this phone number, and I give  
10 him my wife's phone number.

11 Q. And did he take the number?

12 A. He relayed the information to his partner over  
13 there because he came as close as he could in that fuel.

14 Q. All right.

15 A. And they called and got me help.

16 Q. Did you know where they came from or how they were  
17 there so quickly?

18 A. They were behind me.

19 Q. Okay. So they were behind you?

20 A. Yeah.

21 Q. Do you remember how long you were in there in that  
22 truck before anyone else came to your assistance?

23 A. Well, it seemed like forever, but I had left there  
24 at two minutes past twelve, so it was somewhere between  
25 twelve fifteen and twelve twenty when it happened.

PLAINTIFF ON DIRECT

1       Then they got me help and I was in the ambulance  
2       at one forty-five or that's what he said.

3       Q.   Okay, and while this was going on how were you feel-  
4       ing physically and emotionally?

5       What's going through your mind, and how did you feel  
6       physically?

7       A.   I didn't know whether I would live or what because  
8       I couldn't move anything -- I couldn't ever move anything  
9       and it was scary. I was afraid it would catch on fire.  
10      I was feeling if it caught on fire I would knock my  
11      brains out if I could.

12      I have always seen that when trucks burn up that  
13      people burn up in them, and that is part of what was  
14      going through my mind.

15      And when they come there I was so give out and I  
16      was clamped up with the steering wheel and all that stuff  
17      behind me. My legs were pinned and I couldn't do much  
18      but move my hands. There was no room in there.

19      I have tried since to get in that truck again, and  
20      I can't get in it.

21      Q.   Okay. The truck was towed back to your place?

22      A.   Yes, sir, it was. I don't know how in the world

23

24      Q.   Let's talk about your injuries, and can you pull  
25      up Exhibit Number 9?

PLAINTIFF ON DIRECT

1 Do you recognize that?

2 A. I do.

3 Q. Is that what you hit?

4 A. That's what I hit.

5 Q. Mr. Tucker, you've heard all the talk about whether  
6 you hit it or whether it was this or that.

7 A. Yes.

8 Q. Is there any doubt in your mind about whether your  
9 truck hit this object?

10 A. None whatsoever. I always recognize and in this  
11 Courtroom today that God had his arms around me. No man  
12 is going to survive that -- no man.

13 Q. Pull up Exhibit 59.

14 That's the left front tire?

15 A. It is.

16 Q. Is this what caused this impact with the rim?

17 A. That's -- if it had hit a piece of that tire, that  
18 tire would be blown out, but it hit the rim and it just  
19 turned that much.

20 Q. It was turned?

21 A. It hit where that rim sits.

22 Q. And what happened to the tire?

23 A. The tire was loose on the rim and it moved but the  
24 blow out would have been right there.

25 Q. Do you recognize this photograph?

PLAINTIFF ON DIRECT

1 A. I do.

2 Q. All right. What caused this to the tire?

3 A. The accident took the tire and turned it and it  
4 scrubbed the tire and wore it down, causing it to make  
5 that mark.

6 Q. The right tire?

7 A. It was the right tire.

8 Q. And so where I'm standing back here where you hit  
9 the column -- if you are standing here in this photograph  
10 the overpass is about where I'm standing?

11 A. Right.

12 Q. Okay. How much did your truck weigh?

13 A. My truck?

14 Q. Yes.

15 A. The truck weighs about forty-five thousand pounds,  
16 and I had two vehicles on the SUV and so that would  
17 be about fifty-five thousand -- somewhere around fifty-  
18 five thousand pounds.

19 Q. So twenty-five, twenty-six, maybe twenty-seven  
20 tons?

21 A. Right.

22 Q. Could you estimate how fast you were going when you  
23 struck that column? Do you remember that?

24 A. There's some pictures of it, and my tank and my  
25 speedometer, they matched up at about sixty miles -- at

PLAINTIFF ON DIRECT

1 about sixty miles an hour.

2 Q. Do you recognize this photograph?

3 A. Yeah.

4 Q. Go to Number 2.

5 A. It climbed almost to the top of that roof.

6 Q. Number 3, Number 4.

7 (Brief pause)

8 BY MR. HATFIELD:

9 Q. What is this, Mr. Tucker?

10 A. . .

11 Q. What is this?

12 A. That's the headlight. That's where the automobile  
13 sit with one in front of it.

14 Q. And where is the cab?

15 A. The cab is knocked back up -- yeah, that's the  
16 cab back up in there.

17 Q. Okay.

18 A. It knocked the cab back about four foot. That's where  
19 I was sitting.

20 Q. So this is the steering wheel and this is the col-  
21 umn here?

22 A. Yeah.

23 Q. And this is . .

24 A. All of that stuff was laying on top of me.

25 Q. Did you have your seatbelt on?

PLAINTIFF ON DIRECT

1 A. Yeah.

2 Q. All right.

3 A. They couldn't get in there to get me out. I had to  
4 push myself out.

5 Q. Do you remember the helicopter flight?

6 A. Yes, I do.

7 Q. What stands out about that?

8 A. I said that was a hell of a way to get my first  
9 helicopter ride.

10 Q. I guess it was. Tell us -- we've heard from your  
11 doctors, and they've told us medically about what was  
12 wrong with you.

13 Tell us in your words, because you're the person,  
14 what that -- what hurt?

15 What was injured from your crash?

16 A. Well, when they got me there there were two doctors  
17 in the emergency room, and one was on one side of me and  
18 one on the other.

19 And they cut between my ribs and put a tube in  
20 where I was bleeding inside, and that hurt.

21 Q. Okay.

22 A. And then my leg -- I remember all the time I was in  
23 there I said this is hurting. They put the tube in and  
24 then my leg -- they struck a nerve and I hollared on  
25 that one.



PLAINTIFF ON DIRECT

1           That's the only time I hollared but I tolerated  
2   some pain.

3   Q.   All right, and you were in the hospital for about  
4   how long?

5   A.   I think I was in intensive care about ten days,  
6   and I came to Healthsouth, and I was gone a month all-  
7   told.

8   Q.   All right. What did they do at Healthsouth?

9   A.   They had me doing different things, and I had to  
10   walk around or make laps around with the walker, and I  
11   had to do all kind of exercises.

12       They worked me hard. I tell you that.

13   Q.   And did you do what they asked you to do?

14   A.   Yeah, because I was the beneficiary there. I was  
15   the one to benefit from it.

16       I would have done three times as much.

17   Q.   All right.

18   A.   They told me at the hospital if I caught pneumonia  
19   I would not make it. I definitely wanted to make it,  
20   and I . . .

21   Q.   All right.

22   A.   . . did what they said. I'm still doing three times  
23   what they told me.

24   Q.   All right. When you left Healthsouth in Florence,  
25   Healthsouth Rehab, did you go home?

PLAINTIFF ON DIRECT

1 A. I went home.

2 Q. And how would you describe your condition then as  
3 far as whether you could take care of yourself?

4 A. Well, I lost thirty-three pounds in thirty days.

5 Q. That much weight?

6 A. That much weight.

7 Q. Okay.

8 A. With the trauma and everything that I went through,  
9 and then when I got home I thought I was having a heart  
10 attack, and I said call the rescue squad.

11 They come and it was my gallbladder, they said, and  
12 I didn't have a heart attack, so I said, well, I had  
13 something, so the next day I went and had it checked  
14 out, and they said that my gallbladder -- with the trauma  
15 I had went through I would have to have my gallbladder  
16 taken out.

17 So I had to have my gallbladder taken out.

18 Q. Okay. So you had surgery on your leg, you had a  
19 tube into your side, and do you remember having traction  
20 on your leg?

21 A. Yeah.

22 Q. Before you had your surgery?

23 A. Yeah.

24 Q. Did that hurt?

25 A. Oh, yeah.

PLAINTIFF ON DIRECT

1 Q. Okay, a broken ankle?

2 A. Yeah, and this leg here -- I still have a problem  
3 with my right leg, but I'm lucky to have it.

4 Q. All right. How long was it before you could take  
5 a step without having to lean on somebody or use a crutch  
6 or something?

7 A. Probably eight or ten months.

8 Q. Who was taking care of you?

9 A. Well, my wife was doing what she could, and I was  
10 pretty nearly taking care of myself.

11 Q. While this is going on, are you getting treatment  
12 and basically getting a little bit better each day?

13 A. Yes.

14 Q. And what were you thinking about? What was going  
15 through your mind?

16 A. What was going through my mind was my business. I  
17 wasn't there to take care of it.

18 Q. And what did you do for your pain?

19 A. The minute I come home I took one pain pill, because  
20 your head is -- you can't function on those things. I  
21 tried to be as much help in the business as I could.

22 Q. Was there a time when you were able to actually  
23 go back to your business?

24 A. I went in a wheelchair. I'd go out there in a  
25 wheelchair, and I couldn't do anything but I could kinda

PLAINTIFF ON DIRECT

1 sit there.

2 Q. And did you feel better being there?

3 A. Yeah, I felt better.

4 Q. All right.

5 A. Any time you get your mind off yourself you feel  
6 better.

7 Q. Okay. Have you been able to drive a tractor-trailer  
8 since?

9 A. I have but I had to get someone to help me. I  
10 don't trust my legs, so I don't do it no more.

11 I try to stay on top of it, but I get someone to go  
12 and do it.

13 Q. All right. Are you able to drive as you were be-  
14 fore?

15 A. What?

16 Q. Are you able to drive as you were before?

17 A. I can drive but I can't say I'm able to do what I  
18 did before, no.

19 Q. Okay. You were not in the Courtroom when your son  
20 testified?

21 A. Right.

22 Q. What I would like you to do now, Mr. Tucker, is to  
23 tell these folks what is different about your life because  
24 of these injuries you received in this crash?

25 A. Well, I used to go walk all day and it didn't bother

PLAINTIFF ON DIRECT

1 me, but I can't walk two blocks now without it bothering  
2 me. I can't function like I could.

3 I just -- I don't know. I'm just not what I used to  
4 be.

5 Q. Okay.

6 A. Like I said, your mind just -- I'm not what I used  
7 to be. I was seventy-nine years old and I expected to  
8 be doing better than I am.

9 Q. If you look back over your life before this crash  
10 happened and think about your life today, is there any-  
11 thing that you miss more than anything else?

12 A. Anything that I miss now more than anything . . .

13 Q. Yes.

14 Q. Well, I could stand up in the morning and put my  
15 socks and shoes on, and I can't do that. I miss that.  
16 That was my signal, when I can't put my socks on and --  
17 stand up and put my socks on.

18 I said I will retire -- the Lord will retire me one  
19 day. I don't think he'd give me help to sit down and  
20 do nothing.

21 Q. Okay.

22 A. I love to work and I can't do my work.

23 Q. Did the change the way you feel about yourself?

24 A. Yes, it did.

25 Q. How?

PLAINTIFF ON DIRECT

1 A. Well, I had thought I would be going strong at  
2 ninety, and I guess I don't feel like it no more.

3 Q. I've asked you a lot of questions about before and  
4 since.

5 Is there anything you would like to tell the jury  
6 about that particular evening or anything that has hap-  
7 pened to you since that you want them to know?

8 A. The only thing I know is my business has let down  
9 some, and that's because I couldn't do what I did. I had  
10 to be away from it.

11 And, you know, no one gave me anything. I had to  
12 make it from scratch, and you hate to see it go. It  
13 hurts.

14 Q. All right. Bear with me, Mr. Tucker.

15 (Brief pause)

16 BY MR. HATFIELD:

17 Q. I believe that's all I have. Mr. Keaveny may have  
18 some questions for you. Let him ask you and answer his  
19 questions. Okay?

20 A. I will.

21 THE COURT: Cross Examination.

22 CROSS EXAMINATION

23 BY MR. KEAVENY:

24 Q. Good afternoon, Mr. Tucker.

25 A. Good afternoon.

PLAINTIFF ON CROSS

1 Q. I have some questions in follow-up. I'm not going  
2 to be very long with you, but I have some questions  
3 about what Mr. Hatfield just asked you. Okay?

4 A. Okay.

5 Q. If you don't understand the questions that I ask,  
6 let me know and I'll repeat it.

7 I want to start with Exhibit Number 19. This is --  
8 I will come up to you -- this is Number 19, that photo-  
9 graph of your tire. This is your left tire?

10 A. Right.

11 Q. And you said this is where your left front tire  
12 struck what you -- when your truck struck what  
13 it struck?

14 A. Yes.

15 Q. Do you have any doubt about that?

16 A. No, I do not.

17 Q. Sir, do you remember -- I think Mr. Hatfield and  
18 I came out and took your deposition a few months after  
19 this accident in July of 2010.

20 Do you remember that?

21 A. No, sir.

22 Q. And at that time, you were asked the following  
23 question. Let me hand you your deposition. It is on  
24 page -- do we have the original deposition?

25 (Brief pause)

PLAINTIFF ON CROSS

1 BY MR. KEAVENY:

2 Q. Now, this deposition Mr. Hatfield took from you is  
3 dated July of 2010, so that would have been just a couple  
4 of months after this accident?

5 A. Right.

6 Q. I'm going to -- when I go back over there I'm going  
7 to refer to the page numbers up here and line numbers  
8 on here.

9 You want to keep that.

10 A. Yes, sir.

11 Q. Back then I asked you what part of your vehicle  
12 struck the object, and your answer at line 20.

13 A. What line?

14 Q. Line 20.

15 A. Okay.

16 Q. I'm going to read my question and we'll read your  
17 answer. Okay?

18 A. Okay.

19 Q. All right, I asked you on page 79 at line 20 I asked  
20 you what part of your vehicle struck the object, and  
21 your answer was, my left front wheel.

22 Next question, your left front wheel struck it?

23 Answer, yes.

24 Then the question, the left front wheel would be  
25 just a single tire. Is that right?



PLAINTIFF ON CROSS

1           You said, right.

2           And then the question was, what part of the wheel  
3 struck the object?     Inside part of it or outside part  
4 of it.

5           And at that time you said, I do not know.

6   A.    I didn't know that.

7   Q.    All right, and that was just three months after  
8 the accident?

9   A.    That's correct.

10   Q.   Now, Mr. Hatfield also asked you -- let me show  
11 you a photograph and he also showed you a photograph of  
12 I95 southbound.

13           Do you remember this photograph?

14   A.    Oh, yeah.

15   Q.   Now, you indicated that the object was a couple of  
16 feet from the inside of that lane -- that line that di-  
17 vides the right from the left. Is that right?

18   A.    Right.

19   Q.   Okay. The shoulder of the road is over to your  
20 right, isn't that right?

21   A.    Yes.

22   Q.   Okay, you could have moved your truck over to the  
23 right to avoid striking the object. Isn't that . . .

24   A.    I could not see that object in front of the car that  
25 I was behind.

PLAINTIFF ON CROSS

1 Q. I understand.

2 A. So I had to run the car ahead of me to the left when  
3 I cut to the left. There was a car coming up the side  
4 of me.

5 Q. You said there was a car coming up side of you so  
6 that kept you from going over to your left?

7 A. I was trying not to collide with that car when I hit  
8 it.

9 Q. You did not hit the car that was over to your  
10 left, is that right?

11 A. I didn't touch it, no.

12 Q. That's what I understand. The car that was ahead  
13 of you was -- had been ahead of you for a while because  
14 you were in the right lane.

15 Is that right?

16 A. In the right lane.

17 Q. You were traveling in the right lane, is that right?

18 A. Yes.

19 Q. And you were maintaining a safe distance between  
20 yourself and the car ahead of you, did you not?

21 A. I did.

22 Q. And so when that car -- in fact, I believe you've  
23 testified in your deposition about how much distance you  
24 left between yourself and the car in front of you.

25 You testified there was enough distance between

PLAINTIFF ON CROSS

1 you and the car ahead of you for another vehicle to come -- to  
2 pass you and even get between you and the car ahead of  
3 you.

4 Is that right?

5 A. Right.

6 Q. And so there was that much distance between you  
7 and the car ahead of you?

8 A. Right.

9 Q. When that car darted out to the left?

10 A. Yes, and you have to take into consideration that  
11 this car was also putting on brakes so you're going to  
12 be closer.

13 Q. Well, when the car started putting on brakes, did  
14 you start putting on brakes?

15 A. I tried. I touched my brake and headed out to the  
16 left but the car was coming up side of me. I was look-  
17 ing back and looking forward, and I could have run that  
18 car off the road, but I wouldn't do that.

19 Q. I'm trying to work with one issue at a time, and  
20 right now we're just talking about you following the car  
21 that was ahead.

22 As you drive down the road, as all of us drive down  
23 the road, we establish a distance between ourselves  
24 and the car ahead of us on the highway, and that's what  
25 you did.

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PLAINTIFF ON CROSS

1           Isn't that right?

2   A.   Well, when that car is putting on brakes, you get  
3 closer.

4   Q.   Well, you applied your brakes, didn't you?

5   A.   I did what I could.

6   Q.   You probably applied your brakes, the same as  
7 they are applying their brakes. So did you maintain that  
8 distance?

9   A.   I got closer to that car.

10  Q.   You have been in the Courtroom throughout the testi-  
11 mony of everybody except your son, Lee, and you know  
12 that the object that is depicted in photograph Number  
13 19 was not found under your tractor?

14  A.   . . .

15  Q.   You know that?

16  A.   It was there when I hit it and it stayed until  
17 they had to push it on the side of the street. That's  
18 what I was told.

19  Q.   Do you believe when you hit the object that you  
20 hit that it went under your tractor, or do you believe  
21 the hit propelled that object down the road?

22  A.   It could not have been under my tractor because  
23 my axle is nine inches off the ground and that thing is  
24 eleven inches. So there is only two inches up at the  
25 top from my axle.

PLAINTIFF ON CROSS

1 Q. All right.

2 A. So it couldn't get up under there.

3 Q. Okay. Let me refer you once again back to your  
4 deposition, the very page you have opened it to.

5 Are you on page 80?

6 A. Yeah.

7 Q. All right. Look at that, please, where we stopped,  
8 and at line eight.

9 Q. Which line is that?

10 A. Line eight, page 80. Do you see line eight?

11 A. . .

12 Q. The question starts, do you remember feeling your  
13 left front wheel strike the object?

14 A. . .

15 Q. Do you see that question?

16 A. Yes.

17 Q. I want you to just follow with me.

18 So the question is, starting there, line eight,  
19 do you remember feeling your left front wheel strike the  
20 object?

21 Your answer, if I remember, it shot the truck up.

22 Question, you do remember it?

23 No response.

24 Question, okay, yeah, and then a response, that  
25 piece of metal up under the truck and it carried it off

PLAINTIFF ON CROSS

1 out there on the side.

2 Question, I got you. When your truck hit the column  
3 that we've seen in the photographs, did your truck bring  
4 the object over to the columns?

5 Answer, it brought it over to it.

6 That was your answer soon after the accident, isn't  
7 it?

8 A. The object was under the truck but I was the one that  
9 was thrown and I didn't know what happened. What I told  
10 them at the hospital, I told them I saw and hit something  
11 in the road.

12 We called and got Mr. Hayes to go out there and look  
13 and see. He went out there and found that thing.

14 I did not know because I'm in the hospital and so  
15 ...

16 Q. This deposition was taken July 13, 2010. Do you  
17 recall that was the date?

18 A. ...

19 Q. This deposition that you gave, you gave on July 13,  
20 2011?

21 A. Yes.

22 Q. You remember giving your deposition?

23 A. Yeah, I remember.

24 Q. And one of the questions Mr. Hatfield asked is whe-  
25 ther you are able to give the deposition and whether or

PLAINTIFF ON CROSS

1 not you would be able to give the deposition.

2 Do you remember that?

3 A. Yes.

4 Q. And you said, yes, you could understand the ques-  
5 tions and give honest answers. Do you remember that?

6 A. . .

7 Q. Yes?

8 A. Yes, I do.

9 Q. Okay. Now, to change the subject entirely. We're  
10 going to totally change the subject from the accident.  
11 We were talking about the accident and I want to go to  
12 a different topic. Okay?

13 A. Okay.

14 Q. Here I'll take that from you.

15 A. All of this was a while ago.

16 Q. Thank you. Okay, Mr. Tucker, I'm going to change  
17 the subject and talk to you about some of the issues  
18 that Mr. Hatfield talked to you about.

19 You have been in the trucking business for -- I  
20 think you said you've been driving a truck for fifty-nine  
21 years?

22 A. Yes.

23 Q. And I know that in a number of these trucking cases  
24 that the Federal Motor Safety Act applied to the truck-  
25 ing industry.

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PLAINTIFF ON CROSS

1           You know that too, is that right?

2   A.   Oh, yeah.

3   Q.   Okay. The Federal Motor Carrier Safety Act is a  
4   law that Congress -- that the federal Congress enacted that  
5   is enforced under the laws of this State.

6           Is that right?

7   A.   . . .

8           MR. HATFIELD: Objection, Your Honor.

9           THE COURT: On what basis?

10          MR. HATFIELD: He's asking him to testify about  
11   what the law is.

12          THE COURT: The law is within the purview of the  
13   Court. Rephrase your question, please.

14          MR. KEAVENY: Thank you.

15   BY MR. KEAVENY:

16   Q.   Mr. Hatfield was asking you about regulations that  
17   apply to the trucking industry. Do you remember him  
18   asking you those questions?

19   A.   I do.

20   Q.   And the regulations he was referring to are the  
21   Federal Motor Carrier Safety Act. Is that right?

22   A.   Correct.

23   Q.   Okay, and you -- it is my understanding that  
24   you had the commercial -- the CDL ever since, I think  
25   you said, that one was required. Is that correct?



PLAINTIFF ON CROSS

1 A. That's correct.

2 Q. And, in fact, the CDLs have not always been re-  
3 quired until the federal government started requiring  
4 them in the eighties.

5 A. Yes.

6 Q. Is that right?

7 A. Yes, sir.

8 Q. Okay, and so you have had one ever since, is that  
9 right?

10 A. Correct

11 Q. Now, that regulation, that Federal Motor Carrier  
12 Safety Act regulation is massive? It's like a Bible  
13 and it's huge, is that right? It has lots of regula-  
14 tions?

15 A. Repeat it?

16 Q. Yeah, the Federal Motor Carrier Safety Act is  
17 pretty involved? It's got a lot of rules and regula-  
18 tions in it?

19 A. That's correct.

20 Q. All right, and one of them deals with what is  
21 called a driver's qualifications file. Are you familiar  
22 with that?

23 A. I am.

24 Q. Also known in the industry as the DQ file. Is that  
25 right?

PLAINTIFF ON CROSS

1 A. That's right.

2 Q. All right, and one of the things your are supposed  
3 to have in your DQ file -- you're supposed to have a lot  
4 of things in it.

5 Is that right?

6 A. Yes. That's correct.

7 Q. And one of the important things that should be in  
8 your DQ file is a medical card, right?

9 Is that right?

10 A. That's correct.

11 Q. And that is required by the federal government for  
12 the safety of trucks on the highway and the public for  
13 drivers to get a DOT physical . .

14 A. That's right.

15 Q. . . at least every two years. Is that right?

16 A. That's correct.

17 Q. And the physical is a specific physical on a card  
18 the United States Department of Transportation requires.  
19 Is that right?

20 A. That's correct.

21 Q. And as this case has gone on, I have asked your  
22 person who maintains your records, who I think is Ms.  
23 Clark but there may be two of them -- to send to me a  
24 copy of Tucker Enterprises' file showing that it has  
25 -- showing that Tucker Enterprises complied with the

PLAINTIFF ON CROSS

- 1 requirements of the Federal Motor Carrier Safety Act.  
2 Do you realize that?  
3 A. Yes.  
4 Q. You may have worked with Linda to put that stuff  
5 together, is that right?  
6 A. That's correct.  
7 Q. And I learned from your doing that that you had your  
8 DOT physicals taken by Dr. Carter starting in 2003.  
9 Is that right?  
10 A. That's correct.  
11 Q. And are those the records that I received?  
12 A. A copy, yes.  
13 Q. The first one I want to show you is this one right  
14 here, medical examination report.  
15 Do you recognize that document?  
16 A. . .  
17 Q. Is that what this is?  
18 A. It is, yes.  
19 MR. HATFIELD: I would object, Your Honor.  
20 THE COURT: For the record, go ahead and state it,  
21 please.  
22 MR. HATFIELD: Those records have not been authen-  
23 ticated. He's . . .  
24 MR. KEAVENY: We're doing that right now.  
25 MR. HATFIELD: He didn't create it.

PLAINTIFF ON CROSS

1 MR. KEAVENY: It's his signature on it.

2 MR. HATFIELD: It doesn't matter if he didn't cre-  
3 ate the record. We haven't seen the record.

4 THE COURT: Let Mr. Hatfield look at it. Show it  
5 to him.

6 (Brief pause in the proceeding)

7 MR. HATFIELD: I don't have any objection to those.  
8 I want to make it clear we don't have any objection to  
9 the authenticity of those.

10 THE COURT: All right.

11 MR. HATFIELD: We don't know if those are all of  
12 the records.

13 MR. KEAVENY: I don't know. That is what we got in  
14 response to the subpoena, and we'll give you another copy  
15 right now so you can verify that, what we are marking as  
16 . . .

17 MR. HATFIELD: It's not a question of that. Is  
18 that a response from the doctor's office? I mean, we  
19 don't know.

20 THE COURT: All right, counsel. Rather than carry  
21 on here, for the jury's benefit and all of us talking  
22 to one another, the objection has been withdrawn.

23 MR. KEAVENY: Thank you.

24 BY MR. KEAVENY:

25 Q. All right, Mr. Tucker. The DOT physicals that you

PLAINTIFF ON CROSS

1 had in Dr. Carter's office, beginning in 2003, I am  
2 showing you one dated June 15, 2003, I believe.

3 A. Yeah.

4 Q. Is that your signature down there?

5 A. It is.

6 Q. And is that your handwriting there on that document?

7 A. It is.

8 Q. Okay. Now, let's go forward here to the third page,  
9 and on that last page of the DOT physical Dr. Carter at  
10 that point signs to indicate that you satisfy the re-  
11 quirements of the physical for two years.

12 Is that right?

13 A. Yes.

14 Q. And then he signs it, and you take this and put  
15 it in the DQ file?

16 A. Yes.

17 Q. Okay, and since that physical was good for two  
18 years -- it was issued -- after he does this exam, he  
19 gives you a little card that's called a medical card,  
20 is that right, that you carry?

21 A. Right.

22 Q. And this exam was performed in June of 2003, and  
23 it would have been good until June of 2005?

24 A. Yes.

25 Q. All right, and now on June 20th of 2005 you go back

PLAINTIFF ON CROSS

1 to Dr. Carter and have another examination performed,  
2 is that right?

3 A. Yes.

4 Q. And that's your signature there, and this is all  
5 your handwriting again, is that right?

6 A. Yes.

7 Q. Okay, and at that time Dr. Carter decided that  
8 you were good for another two years?

9 A. Yes.

10 Q. So that would have been until June 20th of 2007, is  
11 that right?

12 A. Right.

13 Q. And assuming that you had another exam on June 20,  
14 it would be good for another two years, and you had another  
15 one in June of 2009. Is that right?

16 A. This is one for June of 2005 and good for two years,  
17 but there isn't another physical exam for '07 or for  
18 '09. The next exam by Dr. Carter's office is after this  
19 accident, and that is March of 2011?

20 A. Uh hm. It could have been -- Dr. Boulware was  
21 my doctor. It could have been Dr. Boulware's office.

22 Q. Well, I thought that you just told Mr. Hatfield  
23 that you had the DMV physicals done by Dr. Carter or, I  
24 think, by Dr. Matthews.

25 A. Dr. Boulware had no records on me no more. So I

PLAINTIFF ON CROSS

1 come back to Dr. Matthews for any physical that I needed  
2 to have.

3 Q. All right. This physical here, the last one before  
4 the accident, is dated June 20 of 2005, and there's not  
5 one for '07 and there's not one for '09, and if you had  
6 had one in those years it would have been good for two  
7 years. Is that right?

8 A. Yes.

9 Q. So it would have been good until June of -- June of  
10 2011, is that right?

11 A. Right.

12 Q. But you didn't need an exam in June of 2011?

13 A. There's some missing, that I don't have. At the time  
14 I went to Dr. Matthews, and I got in July a physical and  
15 a stress test and EKG and other things.

16 Q. Let me . . .

17 A. Do you have my records on that?

18 Q. I can't answer questions, but let me ask you what  
19 year that was? Not necessarily what month but what year?

20 A. The July before last.

21 Q. In July of 2009 if the accident was in April of  
22 2010?

23 A. Before this?

24 Q. Why would you have gotten -- you are indicating you  
25 would have got one in July of 2010 from Dr. Matthews?

PLAINTIFF ON CROSS

1 A. I went to Dr. Matthews but he's retired now.

2 Q. Why wouldn't you have just gone back to Dr. Carter  
3 as you had been before the accident?

4 A. Because -- I went back to Dr. Matthews. When I  
5 broke this leg I didn't have a doctor, and I went back  
6 to him and he gave me a physical but I was thinking I didn't  
7 need one before.

8 Q. Well, you've got to have a specialist or a DOT phy-  
9 sical in order to get the medical card?

10 A. . .

11 Q. You do understand the difference. Right?

12 A. Yeah, and I was in good health.

13 Q. One of the other things that the Federal Motor Carriers  
14 Safety Act requires is it requires you guys to make  
15 or keep or store records, maintenance records, on your  
16 equipment.

17 You are aware of that, is that right?

18 A. Yeah.

19 Q. In fact, under the Motor Carrier Act, you are re-  
20 quired to have an annual inspection of your equipment,  
21 is that right?

22 A. We do that, yes.

23 Q. And you are supposed to put that in a file for your  
24 equipment?

25 A. Yeah.



PLAINTIFF ON CROSS

1 Q. When we sent the subpoena to Tucker Enterprises for  
2 that file, Ms. Clark didn't have it. Do you have any  
3 reason or explanation for why Tucker Enterprises didn't  
4 have a file on the maintenance of the tractor that you  
5 were driving?

6 A. I don't know why there wasn't one in there. I know  
7 we had it because we had to show it frequently.

8 Q. Okay. Do you know why there is no file on it?

9 A. . .

10 Q. I asked for a file . .

11 A. I am wondering. My file should be there on that  
12 truck because having the driver's file and I were driving  
13 the truck -- I was driving it before that wreck and it  
14 would have been inside the truck or would have been in  
15 my file.

16 It would probably be in Benny Hall's file.

17 Q. But do you understand that the law requires that  
18 the company, Tucker Enterprises, make that file on its  
19 tractor and have that file at its office?

20 A. Yeah.

21 Q. Is that right?

22 A. Yeah.

23 Q. And Ms. Clark . .

24 A. My file on it would have been -- it would have  
25 been in my file.

PLAINTIFF ON CROSS

1 Q. Did you provide the materials that were -- did you  
2 provide Mr. Hatfield with the materials that we asked  
3 Tucker Enterprises to provide us?

4 A. Did I provide him . . .

5 Q. Yeah. At Tucker Enterprises you had the materials  
6 and you guys gathered it and then you came and gave a  
7 deposition . . .

8 A. I don't know what she gave him.

9 Q. Thank you very much. I appreciate it.

10 THE COURT: Redirect?

11 MR. HATFIELD: Yes, sir.

12 REDIRECT EXAMINATION

13 BY MR. HATFIELD:

14 Q. Mr. Tucker, you are not here today on behalf of  
15 Tucker Enterprises, are you?

16 A. Right.

17 Q. You are here today on behalf of Bobby Lee Tucker . . .

18 THE COURT: Don't lead your witness.

19 MR. HATFIELD: All right.

20 Q. Who is responsible for the day to day record keeping  
21 of Tucker Enterprises?

22 A. Whoever is in the office.

23 Q. Is that in your job responsibility to keep up with  
24 the daily records?

25 A. No, sir.

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ROA\_0208

Appendix\_0212

PLAINTIFF ON REDIRECT

1 Q. And you have actually been retired since 19 --  
2 since you were sixty-five?

3 A. Correct.

4 Q. And who was Benny Hall?

5 A. Benny Hall was a driver to drive the trucks and  
6 my file -- it would be in there. It would be in the truck  
7 Benny Hall drove.

8 Q. Okay, and nobody consulted with you about it?

9 A. No.

10 Q. All right. Now, the photograph of the tractor and  
11 the tire and rim, when was the first time you saw it?

12 A. The photograph of the tire and rim -- I guess it  
13 was -- I couldn't tell you exactly when I first saw it.

14 Q. When we were at your deposition in July of 2010,  
15 and Mr. Keaveny was asking you about that, had you seen  
16 it then?

17 A. I hadn't seen it. I didn't know where it hit at at  
18 that time.

19 Q. And so we are crystal clear on this point, whether  
20 or not Dr. Carter had a medical card on you, or Dr.  
21 Boulware or Dr. Matthews, or any other doctor you may  
22 have seen before then, what was your state of health on  
23 April 30, 2010, just before you hit that object?

24 A. My health -- I was fifty years old. I felt like  
25 it.

PLAINTIFF ON REDIRECT

1 Q. Thank you, sir. That's all I have.

2 THE COURT: Any follow-up, Mr. Keaveny?

3 MR. KEAVENY: No, thank you, Your Honor.

4 THE COURT: You may step down, Mr. Tucker.

5 WITNESS: Thank you.

6 (Witness excused from stand.)

7 THE COURT: Please call your next witness.

8 MR. HATFIELD: We would rest, Your Honor, except for

9 . . .

10 THE COURT: I couldn't hear you.

11 MR. HATFIELD: We would rest.

12 THE COURT: All right, let's stand down for about  
13 ten minutes.

14 MR. HATFIELD: Thank you, Your Honor.

15 (Jury excused from Courtroom at 3:26 P.M.)

16 (The Court stood in recess until 3:40 P.M., when  
17 the matter was continued.)

18 THE COURT: All right, any motions?

19 MR. KEAVENY: Yes, sir.

20 THE COURT: Counsel, what I would like to do during  
21 the time we take up these issues is to ask the Bailiff  
22 to instruct the jurors to elect their own Foreperson.

23 Is there any objection that?

24 MR. HATFIELD: No, sir.

25 MR. KEAVENY: No, Your Honor.

1 THE COURT: Mr. Keaveny, are there any motions  
2 now at the end of the Plaintiff's case?

3 MR. KEAVENY: Yes, sir. I would move for directed  
4 verdict.

5 First of all, I'd like to renew -- I'd like to make  
6 a directed verdict motion on the failure of the Plaintiff  
7 to satisfy the affidavit requirements of the UM Statute.

8 I made a summary judgment motion on that which the  
9 Court has denied. I understand that. I just want to  
10 make sure that I preserve that for appeal, so out of an  
11 abundance of caution I am renewing that motion at this  
12 time just in case the Court in Columbia believes that I  
13 should have.

14 THE COURT: Very good, and that, of course, is an  
15 issue that we discussed some time ago, and the Court ruled  
16 that it was sufficient.

17 I would maintain that ruling at this juncture and  
18 reaffirm that ruling, and it is preserved.

19 MR. KEAVENY: Very good.

20 THE COURT: You may proceed to your other motions.

21 MR. KEAVENY: Then the next thing I would do is move  
22 for directed verdict on the basis that the Plaintiff has  
23 failed to meet his burden of proof with regard to the  
24 allegations of negligence as set forth in Paragraph  
25 Five of the Complaint.

1        Those allegations are in driving a vehicle at an  
2        excessive rate of speed, too fast for the conditions as  
3        existed. There is no evidence of that.

4        Leaving the scene of the accident with damage or  
5        personal injury. There is no evidence of that, and  
6        then just the general allegations of negligence in fail-  
7        ing to exercise due care, which is the definition of neg-  
8        ligence.

9        So there has been no evidence of either of those  
10       allegations of negligence.

11       There has been no evidence of, number one, any ob-  
12       ject in the roadway. The Plaintiff has not met the  
13       burden of proof with regard to allegations of an object  
14       in the road.

15       As to allegations that it was left by a party in the  
16       road, there was no evidence or how long the object had  
17       been on the shoulder of the road, how it was there, why  
18       it was there.

19       Furthermore, if the jury were to return a verdict  
20       for the Plaintiff on the evidence the Plaintiff has sub-  
21       mitted, the Court would have to set it aside as being  
22       unsupported by the evidence, even taken it in the light  
23       most favorable to the Plaintiff.

24       So I would make a directed verdict motion on that  
25       basis as well.

1 THE COURT: All right. Without going -- well, with-  
2 out taking argument from the other side, the pleadings,  
3 of course, do not go to the jury, but it appears to me  
4 that the specific issues you raise probably are issues  
5 for which there is not sufficient evidence for those par-  
6 ticular claims to go forward if you persist on those par-  
7 ticular points that were raised.

8 MR. HATFIELD: Fine. I just want to be clear as  
9 to . . .

10 THE COURT: What is that? I'm sorry.

11 MR. KEAVENY: That was allegations of Five D.

12 MR. HATFIELD: Yeah, we're not making any claim for  
13 excessive speed, leaving the scene of an accident but we  
14 would still have a claim for just the duty of due care  
15 and also for failing to secure the load.

16 THE COURT: I would agree, Mr. Keaveny, that the  
17 failure of due care which, of course, is an allegation, it  
18 nevertheless encompasses other things, and there is evi-  
19 dence in this record that would be sufficient to support  
20 that same remaining -- as far as leaving the scene, as  
21 well as the -- please remind me what was the . . .

22 MR. KEAVENY: Excessive speed.

23 THE COURT: The speed -- I would grant your motion  
24 on those, and I believe basically by consent the Plain-  
25 tiff does not intend to persist in those.

1 As to your others, the general claim that is  
2 brought here by the Plaintiff, I will respectfully deny  
3 your motion.

4 The question is not for the Court to weigh evidence  
5 at this point. That's for the jury, whether it exists  
6 in the record, sufficient evidence to support the Plain-  
7 tiff's claim to make it an issue for which a jury decis-  
8 ion is needed at this juncture.

9 Of course, I am taking things in the light most  
10 favorable to the non-moving party, and, based upon that,  
11 counsel, I will deny your motion.

12 MR. KEAVENY: I understand, Your Honor.

13 I failed to include the issue of failure to secure  
14 the load, and the only reason I failed to do that is be-  
15 cause I did not see it.

16 But I would like to add that onto my motion for a  
17 directed verdict just so because there is no evidence  
18 of how or why this object came into the road.

19 I just want to make sure that is included in there.

20 THE COURT: Of course, there is circumstantial evi-  
21 dence on that issue. The fact that a truck was seen with  
22 a similar object in its load. The Court finds that to be  
23 sufficient evidence on that point to go forward for the  
24 Plaintiff.

25 Thus, as to your amended motion, the Court denies



1 it.

2 MR. KEAVENY: Then I would make a directed verdict  
3 motion as to punitive damages, Your Honor. I don't be-  
4 lieve -- I would like to make a motion for directed ver-  
5 dict on punitive damages.

6 I would cite all the earlier reasons cited but I  
7 would also say that there is no evidence, clear and con-  
8 vincing evidence, that -- of any recklessness, wilfulness,  
9 wantonness, and so I would make a motion for directed  
10 verdict on that basis as well.

11 THE COURT: What do you say to that, Mr. Hatfield?

12 MR. HATFIELD: Well, it was established through the  
13 testimony of Don Wilson and also through the expert,  
14 Dean Harris, that the load was not properly secured and  
15 as a violation of the statute it would rise to reckless-  
16 ness.

17 THE COURT: Very good. Mr. Keaveny, respectfully,  
18 it is not for the Court to weigh the evidence. The ques-  
19 tion is whether there is sufficient admissible evidence  
20 in this record, and there is a statute on securing the  
21 load, and the requirement of what happens if you lose a  
22 portion of your load.

23 That is the Plaintiff's theory and there is evidence  
24 in this record that statute has been violated in part or  
25 in whole.

1 For that reason, I would deny your motion with re-  
2 gard to that.

3 MR. KEAVENY: Finally, Your Honor, I would make a  
4 motion for directed verdict on the defense of comparative  
5 negligence.

6 The evidence has been that Mr. Tucker could have  
7 moved to the right to have avoided this object, as  
8 opposed to hitting it, if he couldn't <sup>have</sup> moved to the left  
9 hand side.

10 So I would make a motion for directed verdict as  
11 to that.

12 THE COURT: And, again, without taking argument as  
13 from the other side, I would respectfully deny that.

14 There was a question of fact as to whether the  
15 driver or Plaintiff was confronted with a sudden emergency  
16 and whether his response was reasonable, so it would not  
17 be appropriate to direct a verdict on that issue for either  
18 side.

19 That is one of the battle-grounds of the case, and it  
20 is thus reserved for the finders of the facts.

21 Any further motions at this juncture?

22 MR. KEAVENY: No, Your Honor.

23 THE COURT: Mr. Suggs, tell us who is our Foreperson?

24 MR. SUGGS: Donald Winburn, Your Honor.

25 THE COURT: Mr. Winburn, Juror 135.

1 Let's bring in the jury, please.

2 (Jury returned to Courtroom at 3:46 P.M.)

3 THE COURT: All right, ladies and gentlemen,  
4 welcome back. I trust you had a nice break.

5 Let me just tell you a little bit about what our pro-  
6 cess will be from here.

7 Plaintiff intends to publish the Exhibits which are  
8 in the record, which are right there. They are uncon-  
9 tested which means if they choose to they may do so.

10 After that is concluded, the Plaintiff will rest, and  
11 we will move then to the Defendant.

12 Mr. Keaveny tells me that most likely we can finish  
13 the testimony of the witnesses this afternoon, and, thus,  
14 we would come back tomorrow to argue and charge on the  
15 case.

16 They would make the closing arguments and I would  
17 give you the charge.

18 That is where we believe we find ourselves at this  
19 point. I tell you that for your own scheduling purposes:

20 Mr. Winburn, I know that your fellow jurors have  
21 elected you Foreperson, so congratulations for the confi-  
22 dence they have shown in you.

23 I will talk to you a little bit further and your  
24 colleagues about your role, and I thank you for your  
25 willingness to serve in that position.

1       Again, congratulations, and, counsel, you may proceed,  
2       Mr. Hatfield.

3       MR. HATFIELD: Thank you, Your Honor.

4       THE COURT: And, of course, you will have all of  
5       the Exhibits in the jury room with you.

6       MR. HATFIELD: Exhibit 1 is a photograph of the car  
7       trailer. Exhibit 2, Exhibit 3, Exhibit 4, Exhibit 5,  
8       Exhibit 6, Exhibit 7, Exhibit 8, Exhibit 9, Exhibit 10,  
9       Exhibit 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22,  
10      23, 24, 25 -- let me tell you what this is.

11      Exhibit 25 -- excuse me, this is 26. Exhibit 26 is  
12      a spread sheet of Mr. Tucker's treatment expenses, and there  
13      are several pages there.

14      You can see the total there is about Three Hundred  
15      and Twenty-five Thousand Dollars.

16      Exhibit 27 is the McLeod Regional Medical Center  
17      bill; 28 is the medical bill from the Medical University  
18      of South Carolina, the physicians' bill.

19      Twenty-nine is Palmetto Health Emergency physic-  
20      ians' bill. Next, 30, is Surgery Practice bill; 31 is Pee  
21      Dee Pathology's bill.

22      Exhibit 32 is Florence Radiological Associates' bill;  
23      33 is Palmetto Health bill; 34 McLeod Regional Medical  
24      Center bill; 35 is Carolinas Hospital System bill; 36 is  
25      bill of Dr. Phillip Chaipis of the Floyd Medical Group.

1           Number 37 is Anesthesiology Consultants of Columbia  
2 bill; 38 is Healthsouth Rehabilitation Hospital bill;  
3 39 is Columbia Heart Clinic bill; 40 is Capital City Ambu-  
4 lance bill.

5           Number 41 is County of Florence Emergency Services'  
6 bill; 42 is Bill of Dr. Orachum Sittisuntorn; Number 43  
7 is Omni Transport Systems' bill; 44 is Pee Dee Radiology  
8 Group bill.

9           Forty-five is bill of Dr. David Koon; Number 46 is  
10 Pee Dee Orthopedic Associates' bill; Number 47 is Pitts  
11 Radiology bill; 48 is Pee Dee Healthcare bill; Number 49  
12 is A One medical bill.

13          Number 50 is Anesthesiology Consultants of Florence  
14 bill; Number 51 -- and you will have the actual film as  
15 well -- is the x-ray from Palmetto Health; Number 52 is  
16 x-ray film of Palmetto Health.

17          Number 53 is a CT film from Palmetto Health Richland;  
18 the same goes for 54 and 55, 56, 57; Number 58, Palmetto  
19 Richland emergency room records; 59, Color photo of the  
20 tire and rim.

21          Number 60 is a photo of the super steel tire and the  
22 hubcap; and the remaining Exhibits are photographs -- 63  
23 is photograph by Mr. Harris of the object; 64, another  
24 photograph of the bearing block made by Mr. Harris; 62,  
25 another photograph of the block.



MR. SWEAT ON DIRECT

1 you live?

2 A. Florence County.

3 Q. And what do you do for a living?

4 A. I work at Florence County nine one one.

5 Q. And what are your responsibilities at Florence  
6 County nine one one?

7 A. I'm the operations manager, and responsible for  
8 the day to day operations of nine one one.

9 Q. And explain to the jury what that means?

10 A. Basically, I oversee four shifts that  
11 basically work the nine one one center twenty-four hours  
12 a day.

13 THE COURT: Can I get you to move a little closer  
14 to that microphone.

15 WITNESS: Sure.

16 BY MR. KEAVENY:

17 Q. And what is it that nine one one does?

18 A. Answer emergency calls from the public, as well as  
19 emergency calls for responders if they get into a situa-  
20 tion.

21 Q. When we call nine one one, how do we know where the  
22 call is going?

23 A. Once you dial nine one one from a cell phone it bas-  
24 ically goes to a tower. The tower with its programming  
25 within the tower will direct where that call goes to.

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ROA\_0221

Appendix\_0225

MR. SWEAT ON DIRECT

1 Q. So if I'm driving down I95 near Exhibit 153, and  
2 I call nine one one, would I get your operations center?

3 A. You would.

4 Q. And at my request did you search your records for  
5 any calls to nine one one from ten o'clock on April 29th  
6 of 2010 until April 30, 2010, at two in the morning?

7 A. . . .

8 Q. Did you search your records for any calls during that  
9 time period?

10 A. I did.

11 Q. What did you find?

12 A. We didn't have anything in our system.

13 Q. Okay. If any calls had come in to your system re-  
14 garding a foreign object on I95 during that time per-  
15 iod, what procedure -- what is the procedure? What would  
16 you have done?

17 A. Well, we don't have the capability or the equipment  
18 to move objects out of the highway. That is a State  
19 maintenance position.

20 We would forward those calls after hours to the  
21 Highway Patrol.

22 Q. All right, and in this time period, ten P.M. to two  
23 A.M., is that after hours?

24 A. It would be.

25 Q. And as I understand it, you had no calls at your



MR. SWEAT ON DIRECT

1 nine one one center during that time period. Is that  
2 right?

3 A. That's correct.

4 Q. If any calls had come up from travelers on I95,  
5 at mile marker 153, they would be directed to your  
6 operations center, is that right?

7 A. You lost me. Try that again?

8 Q. If any calls had -- I apologize. If any calls  
9 had come in, they would have come in to your operations  
10 center. Is that right?

11 A. If they had dialed nine one one it would have come  
12 to us. Yes, sir.

13 Q. Thank you very much.

14 THE COURT: Cross examination?

15 MR. HATFIELD: Yes, sir.

16 CROSS EXAMINATION

17 BY MR. HATFIELD:

18 Q. Mr. Sweat, . . .

19 A. Yes, sir.

20 Q. . . my cell phone service is with T-Mobile and the  
21 . . .

22 A. Yes, sir.

23 Q. . . and I have had to call T-Mobile one time, and  
24 you are saying it should have gone through your system?

25 A. I don't think I understand your question.

MR. SWEAT ON CROSS

1 Q. What I'm trying to find out is if it is your testi-  
2 mony that anyone in Florence County, if they call nine  
3 one one on a cell phone, that that is going to go through  
4 one of your phones or be routed to you?

5 A. It depends on the location the call is coming from  
6 and the tower -- how busy the tower itself is.

7 It should go to us.

8 Q. Are there times when it may not go to you?

9 A. There have been occasions that they have not,  
10 yes, sir.

11 Q. So are there circumstances where they would be re-  
12 routed someplace else?

13 A. That is probably a technical question that I could  
14 not answer. I just don't know.

15 Q. So then technically someone could be going on Inter-  
16 state 95 and make a nine one one call on their cell  
17 phone, and it may not go through the Florence tower, is  
18 that correct?

19 A. It is possible.

20 Q. And the reason I ask there was testimony earlier  
21 that two gentlemen from New York stopped and called nine  
22 one one . . .

23 A. Uh huh.

24 Q. . . and that is how the Highway Patrol arrived on  
25 first response.

MR. SWEAT ON CROSS

- 1 A. Yes, sir.
- 2 Q. And you don't have a record of that?
- 3 A. . .
- 4 Q. There is no record of that nine one one call,
- 5 is there?
- 6 A. Now, we did get nine one one calls but we do
- 7 not have anything in our system where we put a calling
- 8 tab for a response on our equipment.
- 9 Q. So people did call in during that time frame?
- 10 A. We did have five nine one one calls.
- 11 Q. Were they all for wrecks?
- 12 A. I don't have any idea. That was 2010, and I don't
- 13 know what they were.
- 14 Q. So you did have nine one one calls?
- 15 A. We had five nine one one calls during the time frame
- 16 Mr. Keaveny asked me about.
- 17 Q. Well, where are the records? Do you have the re-
- 18 cords of them?
- 19 A. I don't have them with me, no.
- 20 Q. Why not?
- 21 A. I just found out about it when I got here at one
- 22 thirty.
- 23 Q. Found out about what?
- 24 A. The timing of the records.
- 25 Q. And there is then five nine one one calls?

MR. SWEAT ON CROSS

1 A. Yes, sir.

2 Q. From that time or -- from that particular time, or  
3 you don't know?

4 A. It was all over, between ten and two. It was five  
5 records for Florence County that we transferred to the  
6 Highway Patrol.

7 That is what we . . .

8 Q. And one of them may have been related to . . .

9 A. Could have.

10 Q. . . this wreck?

11 A. It could have.

12 Q. And you don't have those with you because you just  
13 found out about it?

14 A. Yeah.

15 Q. Well, thanks very much, Mr. Sweat.

16 A. Yes, sir.

17 Q. That's all I have.

18 THE COURT: Anything in response?

19 MR. KEAVENY: Yes, Your Honor.

20 REDIRECT EXAMINATION

21 BY MR. KEAVENY:

22 Q. If any calls had been in and any of those calls  
23 were about a foreign object in the road, what would you  
24 have done with that call?

25 A. We would have relayed it to the Highway Patrol after

MR. SWEAT ON REDIRECT

1 hours, which it would have been after hours.

2 Q. You would have forwarded any such calls that came  
3 in during that time period to the Highway Patrol. Is  
4 that right?

5 A. Yes, sir.

6 Q. That's all I have. Thank you.

7 THE COURT: All right, sir. You may step down.

8 Is there any objection to releasing the witness?

9 MR. HATFIELD: No, sir.

10 MR. KEAVENY: No objection.

11 THE COURT: Have a good day.

12 (Witness excused by the Court)

13 THE COURT: Counsel, please call your next witness.

14 MR. KEAVENY: Yes, Your Honor. The Defense calls  
15 next to the stand Mr. Gilbert George.

16 THE COURT: Please come forward and be sworn.

17 GILBERT R. GEORGE, JR.,

18 being duly sworn, testified as follows:

19 DIRECT EXAMINATION

20 BY MR. KEAVENY:

21 Q. Mr. George, state your full name for the record,  
22 please.

23 A. Gilbert R. George, Junior.

24 Q. All right, and, sir, where are you from?

25 A. I'm from Latta.

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Appendix\_0231

MR. GEORGE ON DIRECT

1 Q. And is that where you live?

2 A. Yes, sir.

3 Q. What do you do?

4 A. I'm the District Maintenance Engineer with S. C. DOT.

5 Q. And what are the responsibilities of the District  
6 Maintenance Manager for DOT?

7 A. I oversee maintenance operations and road and  
8 bridge maintenance.

9 Q. All right, and do those responsibilities include the  
10 area of I95 where Exit 153 is?

11 A. Yes, sir.

12 Q. At my request, have you searched your records, the  
13 DOT records, for any calls to South Carolina DOT for any  
14 objects on I95 on the evening of April 29th to early  
15 morning of April 30?

16 A. Yes, sir, we did.

17 Q. Did you find any?

18 A. No, sir, we have no records.

19 Q. How would S. C. DOT become aware of foreign objects  
20 in the road? What is that process for any of such calls?

21 A. During normal business hours, anything from the  
22 public calling us or something from law enforcement or  
23 Emergency Medical, EMS, after hours, they come from the  
24 Highway Patrol or nine one one. Usually they call  
25 from the Highway Patrol.

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ROA\_0228

Appendix\_0232

MR. GEORGE ON DIRECT

1 Q. If nine one one in Florence County had received a  
2 call for an object in the road on the evening of April 29  
3 to early morning hours of April 30, Mr. George said --  
4 excuse me -- Mr. Sweat said they would have forwarded  
5 that call to S.C. DOT.

6 A. Yes.

7 Q. Is that normal procedure?

8 A. Yes, sir.

9 Q. What would the Highway Patrol then do?

10 A. If there was an object in the road, we have a Fore-  
11 man that is on call -- they would call whoever -- would call  
12 the Foreman who was on call in our County to respond.

13 Q. All right, and did you search your records for any  
14 such calls during this time period?

15 A. Yes, sir, we did.

16 Q. And did you receive any such calls?

17 A. No, sir, we did not.

18 Q. All right. Now, what is the responsibility of your  
19 department?

20 A. We maintain roads and bridges. Vegetation mainte-  
21 nance, sign maintenance, pavement maintenance.

22 Q. And in the area around I95 at exit marker 153 is  
23 included in your area?

24 A. Yes, sir.

25 Q. Do you have any records of any damage to that portion

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ROA\_0229

Appendix\_0233

MR. GEORGE ON DIRECT

1 of I95 where exit 153 is during this time period of  
2 March 29, 2010 -- I mean, April 29, 2010 and April 30,  
3 2010?

4 A. We had no surface repair or road work there, no,  
5 sir.

6 Q. Thank you very much.

7 Please answer any questions Mr. Hatfield may have  
8 for you.

9 THE COURT: Cross examination?

10 CROSS EXAMINATION

11 BY MR. HATFIELD:

12 Q. Were there things -- were there some things that  
13 were reported to DOT that were found on I95?

14 A. There was things, Mr. Hatfield, like couches and  
15 dead animals. Various things, yes, sir.

16 Q. All right, and things fall off a flatbed truck?

17 A. Yes.

18 Q. Is that unusual?

19 A. No, sir, it's not.

20 Q. Let me show you Exhibit Number 13, and I will rep-  
21 resent to you it is a photograph of I95 near the Honda  
22 way exit.

23 Do you see this marking in the road?

24 A. Yeah.

25 Q. What does that appear to be?



MR. GEORGE ON CROSS

1 A. It appears to be a culled out area location on the  
2 concrete.

3 Q. Tell me what that is.

4 A. Where the concrete would just break apart, crack or  
5 something.

6 Q. And that could be caused from different things?

7 A. It could be caused from traffic loading, could be  
8 caused from an object falling on it. It could be caused  
9 on the base or slabs or sub-base. Something will cause  
10 -- sometimes the base will cause a leak and the slabs  
11 lean against one another, and that can cause a crack as  
12 well.

13 Q. And that is made out of -- that stuff is concrete?

14 A. That is concrete.

15 Q. The slab is concrete, not asphalt?

16 A. Yes, sir.

17 Q. Let me show you Exhibit Number 64, and I will  
18 represent to you that that object is made of cast steel  
19 and weighs about six hundred fifty to seven hundred  
20 pounds.

21 If this object fell from the rear of a flatbed  
22 tractor trailer, could it produce -- could it produce  
23 a mark that is similar to what is shown in that photo-  
24 graph there?

25 A. In my opinion, it could. Yes, sir.

MR. GEORGE ON CROSS

1 Q. And let me show you one other photograph. All right, and  
2 and this is Exhibit 12 in evidence. This is a photograph  
3 of I95 at the Honda way exit.

4 Do you see that marking?

5 A. It's hard to tell from this but there is a discol-  
6 oration in the concrete.

7 Q. At the marker -- okay.

8 A. I mean, it is discolored, yes.

9 Q. Are pedestrians permitted access to the Interstate?

10 A. . .

11 Q. Can you just hike on the Interstate?

12 A. No.

13 Q. So only vehicular traffic is allowed on the Inter-  
14 state. Is that correct?

15 A. Yes.

16 Q. All right. If the object that Mr. Tucker claims  
17 to have hit is on the right shoulder of I95 south, and  
18 again it weighs about six hundred fifty pounds, and if  
19 pedestrian traffic is not permitted, could there be any  
20 other explanation for it getting here except by way of  
21 some vehicle?

22 A. I don't know. I don't know of any way. No, sir.

23 Q. And I95 -- is it considered heavily traveled?

24 A. Yes, sir, I think it is -- well, I won't speculate  
25 but it has heavy traffic. Yes, sir.

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Appendix\_0236

MR. GEORGE ON CROSS

1 Q. All right, and is there a lot of commercial truck  
2 traffic?

3 A. Yes.

4 Q. Going south on 95?

5 A. Yes, sir.

6 Q. And lots of flatbed trucks transporting various types  
7 of goods and things?

8 A. Yes, sir.

9 Q. And from time to time, does the DOT receive calls  
10 about things that have fallen off of tractor trailer  
11 trucks and flatbed trucks and trailers?

12 A. Yes, sir.

13 Q. That's not uncommon, is it?

14 A. No, sir.

15 Q. Thank you.

16 THE COURT: Any Redirect Examination?

17 MR. KEAVENY: Yes, sir.

18 REDIRECT EXAMINATION

19 BY MR. KEAVENY:

20 Q. But you have no record of this occurring?

21 A. No, sir, we have no record of that.

22 Q. Thank you, sir.

23 THE COURT: You may Recross examine.

24 RECROSS EXAMINATION

25 BY MR. HATFIELD:

MR. GEORGE ON RE CROSS

1 Q. And as we sit here today, almost two years after  
2 the fact -- more than two years after the fact or three  
3 years, there is still no record of that object being  
4 out on the highway, is there?

5 A. No, sir.

6 Q. And you did not clean-up?

7 A. We did no clean-up.

8 REDIRECT EXAMINATION

9 BY MR. KEAVENY:

10 Q. No recall about an object that had fallen and was  
11 in the southbound lane of I95, is that right?

12 A. Yes, sir. We did not receive any call of it.

13 Q. And you would have received a call from who?

14 A. The South Carolina Highway Patrol.

15 Q. Thank you very much.

16 THE COURT: You are free to leave.

17 WITNESS: Thank you, sir.

18 (Witness excused by the Court)

19 THE COURT: You may call your next witness.

20 MR. KEAVENY: Our next witness was going to be Ms.  
21 Barnes, a records custodian, but I am advised she is  
22 unavailable.

23 Mr. Hatfield has agreed to allow us to introduce  
24 the documents she produced to us earlier into evidence,  
25 so that is Defendant's Exhibit Number 3.

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Appendix\_0238

1 THE COURT: And has it been marked already?

2 MR. KEAVENY: It has.

3 THE COURT: Very good, then. Defendant's 3 in evi-  
4 dence without objection.

5 (Records admitted in evidence without objection as  
6 Defense Exhibit 3)

7 MR. KEAVENY: We would call to the stand at this time  
8 Douglas Lax.

9 THE COURT: Please come forward to be sworn.

10 DOUGLAS LAX, being duly  
11 sworn, testified as follows:

12 DIRECT EXAMINATION

13 BY MR. KEAVENY:

14 Q. Good afternoon, Mr. Lax.

15 A. Good afternoon.

16 Q. Please tell the jury a little bit about yourself.

17 State your name for the record?

18 A. Douglas Ray Lax, Senior.

19 Q. And where are you from, sir?

20 A. Originally North Carolina, and since 1971 living  
21 in South Carolina, mainly in Greenville. Of course, to-  
22 day I live in Summerville, South Carolina, right outside  
23 of Charleston.

24 Q. And how long have you lived in the Summerville  
25 area, sir?

MR. LAX ON DIRECT

1 A. Eighteen years.

2 Q. Are you married?

3 A. Yes.

4 Q. What is your wife's name?

5 A. Ella.

6 Q. And how long have you been married?

7 A. This May will be fifty-three years.

8 Q. Do you have any children?

9 A. Yes, we do. We have five.

10 Q. And where are they?

11 A. My oldest son is a Major in the Army. He is a  
12 Chaplain in Oklahoma, and my grandson is a Captain in the  
13 artillery in Fort Campbell, Kentucky.

14 And I have a son who is a mechanic and running a  
15 service shop in the Charleston area.

16 I have another son who coaches at Charleston  
17 Southern University and a son who coaches up at Graham,  
18 North Carolina.

19 Q. All right, and what did you do in your career?

20 A. Well, I started off in North Carolina with the De-  
21 partment of Motor Vehicles and the Highway Patrol as an  
22 instructor in their traffic violator school, and during  
23 that time I got interested in safety and, of course, I  
24 had some college, and they begged me to teach in a school  
25 in Davidson County, North Carolina, and, of course, during

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MR. LAX ON DIRECT

1 that time I met a lot of truck drivers and got interested  
2 in trucking.

3 In 1963 I started with J. B. Stevens Company in  
4 Greensboro for Ryder Carrier.

5 Q. What kind of trucking did J. B. Stevens do?

6 A. They were mainly in sheets and pillow cases and  
7 carpet. You know, garments, because they had mills all  
8 over the south.

9 Q. Textiles?

10 A. Textiles.

11 Q. And what did you do for J. B. Stevens?

12 A. I was a safety supervisor of safety personnel, qual-  
13 ifying drivers, and, of course, they sent me to North  
14 Carolina truck drivers' school.

15 When I completed that, I came back and was giving  
16 road tests and qualifying drivers.

17 Q. Can you tell the jury a little bit and briefly, be-  
18 cause I want to wrap my case up this afternoon -- I want  
19 you to briefly tell us a little bit about the different  
20 places you worked.

21 Q. Well, whenever I worked for J. B. Stevens in 1965 I  
22 started Ryder tank lines in safety, and then Chemical  
23 Leaman Tank Lines. I was with Chemical Leaman for fifteen  
24 years.

25 Then I went to work for a carrier out of Charleston,

MR. LAX ON DIRECT

1 South Carolina, to set up their safety and qualification  
2 program in 1978, and I worked there for ten years.

3 I then went to work for W. R. Grace out of Green-  
4 ville in safety and security for them. Then in 19 -- they  
5 sold the company in 1995, and I went back to Infinger for  
6 seven years.

7 Then he had cancer real bad so he sold it, and then  
8 I went to work for Florida Rock in Tanger City.

9 Q. About what point in time was that?

10 A. That was -- I was with Florida Rock when he sold the  
11 company, and they wanted me to go to Jacksonville and  
12 they, more or less, said go ahead and retire.

13 Basically, since then, I have been consulting for  
14 insurance carriers, doing audits for insurance carriers,  
15 and, of course, in 1985 I was picked by Elizabeth Dole,  
16 who was then Secretary of Transportation, to be on a regu-  
17 lation review panel.

18 Since that time, I did a lot of consulting and of  
19 teaching on the Federal Motor Carrier safety regulations.

20 Q. All right. Now, you say you were selected by  
21 Elizabeth Dole to the regulation review panel.

22 What were you asked to do for them?

23 A. That really was a group of enforcement people and  
24 industry people who worked with governors and senators  
25 from different States to get a force of people, and we

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Appendix\_0242



MR. LAX ON DIRECT

1 were to be the only people that would review federal  
2 motor carrier and state motor carrier regulations and come  
3 up with what they call uniform, trying to get all of the  
4 rules uniform throughout the United States.

5 Q. Have you served on any State committees in the State  
6 of South Carolina or any other States?

7 A. Yeah, I began over at the South Carolina Trucker's  
8 Association, on its safety council, and, of course, their  
9 safety compliance officer retired in February and they  
10 asked me to fill in for him for a few months until they  
11 could hire, whether they were going to hire one full time  
12 or not.

13 But I do a lot of compliance work, and, of course,  
14 that comes along with all of it.

15 I've been asked by the State Highway Department to  
16 be an expert witness for them on other accidents and on  
17 several other cases, but I also have served as a member  
18 of the National Truck Drivers, the American Trucking Asso-  
19 ciation's national championship.

20 I've been a member of the Safety Management Coun-  
21 cil since 1988.

22 Q. What is the National Truck Driver's National Cham-  
23 pionship?

24 A. It basically is the champions from each State.  
25 Each State has a trucking association, and they have a

MR. LAX ON DIRECT

1 state competition and then a national competition for  
2 those champions of each State, where they come together  
3 for that national competitn. There all fifty states come  
4 together.

5 Q. How many State representative does each State have?

6 A. The State has other classes, but for the national  
7 there is eight classes of drivers, like straight truck,  
8 three axle, four axle, flat bed, tank.

9 When there is a national competition they bring all  
10 the drivers. Last year we had four hundred and thirty-  
11 two drivers from all the States competing in the classes.

12 Q. So when you talk about your classes, you are talking  
13 about different types of trucks?

14 A. Yes.

15 Q. Okay, sir.

16 MR. KEAVENY: Your Honor, I would tender Mr. Lax as  
17 an expert in the area of safety in the trucking industry.

18 THE COURT: Is there an objection or are there  
19 questions for the witness?

20 MR. HATFIELD: No, Your Honor. Not yet.

21 THE COURT: Very good. Then without objection, you  
22 may proceed.

23 BY MR. KEAVENY:

24 Q. Mr. Lax, do you from time to time review matters  
25 that are in litigation?

MR. LAX ON DIRECT

1 A. Yes, I do.

2 Q. And over what period of time have you done that?

3 A. Probably fifteen years.

4 Q. And do you charge for doing that?

5 A. Yes, I do.

6 Q. And how much do you charge?

7 A. It's Fifty Dollars an hour or Two Hundred and  
8 Fifty Dollars for the day.

9 Q. All right, very good.

10 At my request, did you review the materials regard-  
11 ing the case of Bobby Lee Tucker versus John Doe?

12 A. Yes, sir, I did.

13 Q. Among that materials, did you review the responses  
14 that Tucker Enterprises provided to me?

15 A. Yes, I did.

16 Q. All right, and did you formulate opinions and con-  
17 clusions with regard to the sufficiency of the material  
18 that was provided?

19 A. There were really a lot of incomplete material in  
20 those files. The Federal Motor Carrier Act requires a  
21 certain application to be completed by a prospective  
22 driver, going into his previous history and, of course,  
23 his motor vehicle record, accident record, and things  
24 like that.

25 All that would be in his personnel file or DQ file,

MR. LAX ON DIRECT

1 and there was a lot of mistakes in that file. It was  
2 quite incomplete.

3 Q. Did you review the file for the presence of medical  
4 -- a medical card that covered the time period of April  
5 30, 2010?

6 A. Yes, I did.

7 Q. Did you see such a card?

8 A. No, I did not.

9 Q. Should he have had such a card?

10 A. Yes, he should have.

11 Q. Can you express to the jury why it is important un-  
12 der the Federal Motor Carrier Safety Act for drivers to  
13 have a medical card?

14 A. The main purpose is to make sure that they are qual-  
15 ified physically to do the job of driving the truck on  
16 the road.

17 For years actually -- the motor carrier regulations  
18 started in 1935, and since that time -- of course, they  
19 have changed over the years.

20 The last big change in 1964 -- in 2004, excuse me.  
21 In 1964 they really started pushing the physical aspect,  
22 which is basically whether someone is basically physically  
23 qualified to do the job.

24 Q. And is the failure to have such a card a violation  
25 of the statute?

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Appendix\_0246

MR. LAX ON DIRECT

1 A. Yes, it is.

2 Q. Did you find any evidence -- well, let me ask you  
3 this.

4 Did you review the records of Dr. Carter?

5 A. Yes, I did.

6 Q. Did you see any evidence that Mr. Tucker had a med-  
7 ical exam during this time period from Dr. Carter?

8 A. No, I did not.

9 Q. Did you form an opinion as to whether or not Mr.  
10 Tucker met the requirements of the Federal Motor Carrier  
11 Safety Act on the evening of April 29 and 30 of 2010?

12 A. There was no evidence of that in the records.

13 Q. Thank you very much.

14 That's all the questions I have. Please answer any  
15 questions Mr. Hatfield may have.

16 THE COURT: Cross Examination?

17 MR. HATFIELD: Yes, sir, there is.

18 CROSS EXAMINATION

19 BY MR. HATFIELD:

20 Q. Do you have a file in front of you?

21 A. No, sir.

22 Q. You don't?

23 A. No.

24 Q. The driver qualification file is on the employer?

25 A. Yes, sir.

MR. LAX ON CROSS

- 1 Q. Let's take a moment to get the file.
- 2 It is the responsibility to maintain the driver's
- 3 qualification file -- that's on the employer?
- 4 A. Yes, sir.
- 5 Q. It is not the driver's responsibility to do that,
- 6 is it?
- 7 A. Well, if he owns the company, it is, yes.
- 8 Q. But you don't know that, do you?
- 9 A. No.
- 10 Q. You only know that Tucker Enterprises is a licensed
- 11 motor carrier, is that correct?
- 12 A. That is correct.
- 13 Q. And Mr. Tucker is not the motor carrier, is he?
- 14 A. As far as I know, no.
- 15 Q. All right. You have not been provided with any in-
- 16 formation that he is a licensed motor carrier?
- 17 A. No.
- 18 Q. And he operates individually in a capacity as a
- 19 driver?
- 20 A. Yes, sir.
- 21 Q. Okay, so the violation or any violation you are talk-
- 22 ing about as to qualification would be a violation that
- 23 would be attributed to Tucker Enterprises. Correct?
- 24 A. . .
- 25 Q. Is that correct?

MR. LAX ON CROSS

1 A. Well, it depends on -- if he is not qualified to  
2 drive then it is his responsibility to get qualified be-  
3 fore he drives.

4 It is a dual responsibility between the carrier and  
5 the driver.

6 Q. The violation that you speak of related to the ab-  
7 sence of certain records in the driver qualification  
8 file. Is that correct?

9 A. Correct.

10 Q. All right, and, again, it was not Mr. Tucker's  
11 responsibility to see that whatever records there were or  
12 that were provided to Tucker Enterprises were exhibited  
13 in the DQ file. Isn't that so?

14 A. It is his responsibility to be qualified to drive  
15 though the piece of equipment whenever he presents him-  
16 self to the company to be dispatched. Yes, sir.

17 Q. All right, and is it Mr. Tucker's responsibility to  
18 maintain those records that are provided to the company  
19 by the driver?

20 A. No.

21 Q. So that if Mr. Tucker in fact did have a routine  
22 physical examination as required by the Federal Motor  
23 Carrier Act, and if those records were provided to the  
24 employer, that would satisfy his responsibility in his  
25 driver capacity?

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MR. LAX ON CROSS

1 A. Yes, sir.

2 Q. Okay.

3 A. With a proper examination, because the driver who  
4 has a DOT physical has to be qualified to do that. He  
5 has to know what the requirements are as far as vision  
6 and hearing and physical ability to pass the DOT physical.  
7 It's not just a normal physical.

8 There has to be completed a regular form to go in  
9 the file, and as we talked about it today, he had one  
10 in '03, he took one in '05, but there is no record of  
11 '07 or '09.

12 Q. My question though is if it was not in the file, and  
13 assuming that in fact he did have the necessary physicals  
14 and did provide it to Tucker Enterprises, then he has sat-  
15 isfied his requirements under the Federal Motor Carrier  
16 Safety Act, hasn't he?

17 A. If he did that, yes.

18 Q. All right, and that DQ file that you he reviewed, it  
19 does in fact show at two year intervals a driver physical  
20 examination on the DOT prescribed form?

21 A. Yes, sir.

22 Q. And that there are post-accident DOT-approved physi-  
23 cal forms in the file. Correct?

24 A. You mean physicals after the accident?

25 Q. Yes.

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Appendix\_0250



MR. LAX ON CROSS

1 A. Yes.

2 Q. And just so we're clear, it is the company's respon-  
3 sibility to keep the records and not the driver's respon-  
4 sibility. Isn't that so?

5 A. He has to keep his card and if they ask for it at  
6 a road-side inspection he has to present a card showing  
7 that he has completed a physical.

8 Q. And is it your position that Mr. Tucker failed to  
9 provide his medical forms to any transport police officer  
10 before April 30, 2010?

11 A. No, sir.

12 Q. Or since that day?

13 A. No, sir.

14 Q. Now, in the file -- we have heard your responses on  
15 what's not in the file. Tell the jury what actually is  
16 in the file?

17 A. . .

18 Q. The file includes the driver's driving record, is  
19 that correct?

20 A. No, sir. He has to have a completed application  
21 which shows the past driving history, and that is a re-  
22 quirement for the three years continuous employment.

23 Q. And if he had been employed and started the business  
24 back in the nineteen forties, did the regulations require  
25 an application then?

MR. LAX ON CROSS

1 A. No, sir.

2 Q. Okay.

3 A. It was required in 1971 when the Act came through,  
4 the Federal Motor Carrier Safety Act in 1971. It re-  
5 quires that every employer receive a completed applica-  
6 tion, and it has to be . . .

7 Q. If you were employed after 1971 you would complete  
8 an application?

9 A. Yes, sir. When a federal motor carrier comes in,  
10 they will look for a completed application. Yes, sir.

11 Q. Well, again, are you aware of any law by the DOT or  
12 any other law enforcement agency that was violated by .  
13 Tucker Enterprises?

14 A. No, sir.

15 Q. So you are not aware of any violation of the Federal  
16 Motor Carrier Safety Act that was cited to Tucker Enter-  
17 prises?

18 A. No, sir.

19 Q. Did you check to make certain whether there were  
20 any?

21 A. No, sir, I didn't.

22 Q. Do you have the capability of doing that?

23 A. Yes, sir, I do.

24 Q. Why didn't you do it?

25 A. I don't have his DOT number. I don't have his motor

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1 carrier number. You have to have the motor carrier num-  
2 ber to do that.

3 Q. Did you look at the logs that he provided?

4 A. Yes, sir.

5 Q. Or what we provided to Mr. Keaveny?

6 A. Yes, sir.

7 Q. Did you look at the accident report?

8 A. Yes, sir.

9 Q. Did you ask anyone for that information if it wasn't  
10 on these documents?

11 A. No, sir.

12 Q. Why not?

13 A. I was waiting to find out if he actually had a DOT  
14 number. I didn't see one.

15 I have never seen any document so far that has an  
16 ICC or a DOT number. The ICC number is the old one but  
17 the DOT number is the later one.

18 Q. Do you think that Tucker Enterprises, which has oper-  
19 ated and run tractor trailers up and down the east coast  
20 for sixty years did not have an ICC number or a DOT num-  
21 ber?

22 A. It is still possible. If you drive past the scales  
23 or dodge the checking road and take back roads -- things  
24 like that, it is.

25 There is companies out there that do that are doing

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1 that every day.

2 Q. Are you saying that Tucker Enterprises is one that  
3 does it?

4 A. No, sir.

5 Q. Sitting here today, it is not your testimony that  
6 the absence of a document in that file has anything to  
7 do with the crash?

8 A. . .

9 Q. You are not saying that, are you?

10 A. No, sir.

11 Q. Is there a two year driver record of Mr. Tucker in  
12 this DQ file?

13 A. Yes, sir.

14 Q. What's the date of it?

15 A. I'd have to look and see.

16 Q. Please do, take your time.

17 A. February third of '09. It's the South Carolina re-  
18 cord for three years.

19 Q. All right, and would you tell the jury what that re-  
20 cord reveals about his driving record?

21 A. That he received a citation for equipment use and  
22 improperly obstructed on September third of 2007, and an  
23 avoidable accident on May 7 of 2006.

24 Q. Any moving violations?

25 A. No, sir.

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1 Q. And those were related to equipment, is that correct?

2 A. Yes.

3 Q. Nothing pertaining to his driving ability, is that  
4 correct?

5 A. . .

6 Q. Correct?

7 A. Correct.

8 Q. All right. Mr. Tucker has testified he has been  
9 driving trucks for sixty-nine years; that he has never  
10 had a chargeable accident and he may have driven as many  
11 as a million miles without incident.

12 Would a driver with that record be considered by you  
13 to be a competent driver?

14 A. As far as his record is concerned, yes, sir.

15 Q. And if you were a safety manager and charged with  
16 responsibility for hiring a driver with those qualifica-  
17 tions, that driving experience, would you consider favor-  
18 ably hiring someone like that?

19 A. Provided he passed the physical examination, yes, sir,  
20 I would.

21 Q. Thank you. You told us you have been working for Mr.  
22 Keaveny for about the last fifteen years?

23 A. Right.

24 Q. Does Mr. Keaveny pay your bill? Do you send it to  
25 him or someone else?

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1 A. To Mr. Keaveny, yes.

2 Q. How many times have you come to Court to testify  
3 on behalf of Mr. Keaveny's clients?

4 A. This is, I think, the fourth time.

5 Q. In fifteen years?

6 A. In fifteen years, yes.

7 Q. And you have given depositions and . .

8 A. Yes.

9 Q. . . testified for him?

10 A. Yes.

11 Q. How many times?

12 A. With him, probably eleven -- ten or eleven times.

13 Q. What about other members of his firm?

14 A. Well, prior to the firm or originally I did two, I  
15 know.

16 Q. And when you have testified on behalf of Mr.  
17 Keaveny's clients, has your testimony been in favor of  
18 his clients?

19 A. Most of the time, yes, sir.

20 Q. Thank you, sir. That's all I have.

21 THE COURT: Anything on Redirect?

22 MR. KEAVENY: Nothing, Your Honor.

23 THE COURT: Any objection to releasing the witness?

24 MR. HATFIELD: No, sir.

25 THE COURT: Sir, you are free to leave.

1 Please watch your step as you exit, Mr. Lax.  
2 (Witness excused by the Court)  
3 THE COURT: Please call your next witness, Mr.  
4 Keaveny.  
5 MR. KEAVENY: Defense rests, Your Honor.  
6 THE COURT: Very good. Is there reply testimony?  
7 MR. HATFIELD: No, sir.  
8 THE COURT: All right. Counsel, step up and let's  
9 talk about scheduling so that we can inform the jury  
10 of how we proceed from here.  
11 (Conference at the bench between counsel and the  
12 Court off the record)  
13 THE COURT: All right, ladies and gentlemen. Then  
14 let's talk about scheduling.  
15 There is no need to begin the process of arguing and  
16 charging this afternoon. We would only run into the even-  
17 ing hour.  
18 So we'll just go home and get a good nights rest,  
19 and come back in the morning and continue that process  
20 tomorrow.  
21 Now, what I'd ask you to do is to be here at ten  
22 o'clock tomorrow. I know that sounds like banker's hours  
23 but, if you think about it, the lawyers need preparation  
24 time and the Court needs preparation time, so that they  
25 can make the closing arguments and the Court can give

1 you the charge on the law.

2 We will begin a little earlier than that to be pre-  
3 pared for you. So we will be ready for you at ten  
4 o'clock tomorrow.

5 Please be in your jury room at ten and we will be-  
6 gin the process at that time. We will go through and  
7 argue and charge and then give the case to you for delib-  
8 erations.

9 So rather than you all waiting on us, we will be then  
10 waiting on you and your determination as to how long the  
11 case will proceed from there.

12 There is no hurry whatsoever, but that will give you  
13 ample time tomorrow to complete that.

14 Now, tonight, again, I know your family will be cur-  
15 ious to know about what happened in Court today, but you  
16 should not discuss it with them until the case is over  
17 with, which will be sometime tomorrow.

18 Please don't undertake any investigation. Please  
19 keep an open mind because you have not heard the arguments  
20 of counsel nor the charge on the law.

21 Just have a nice evening and be back at ten o'clock  
22 tomorrow morning.

23 Any questions from the jury about scheduling? (No  
24 audible response)

25 We will remain where we are out of respect for you



1 as you leave.

2 Have a good day, ladies and gentlemen.

3 (Jury excused from the Courtroom)

4 THE COURT: All right, the jury is clear, and now  
5 out of the presence of the jury I will hear any motions  
6 you would have at the close of all the evidence from  
7 either side of the case.

8 MR. KEAVENY: I would renew all of the motions that  
9 I have made previously, Your Honor.

10 THE COURT: Very good, and I would respectfully,  
11 for the same reasons, deny -- the Court would deny them  
12 again.

13 Counsel, let's -- why don't we do this? Let's come  
14 to the table and go over the Exhibits and get them in  
15 order.

16 Then we will close for the day but be back here at  
17 nine thirty tomorrow morning. We will meet at nine  
18 thirty back in Chambers and have our conference.

19 MR. HATFIELD: May I make my motion as well?

20 THE COURT: Go ahead.

21 MR. HATFIELD: Just for the record, we would move  
22 for a directed verdict on the issue of negligence.

23 In the light most favorable to Mr. Doe, the evidence  
24 from Donald Wilson and from Mr. Harris' testimony is that  
25 the load or the bearing was not properly secured, which

1 is a violation of statute.

2 So we would ask for a directed verdict on the issue  
3 of Mr. Doe's negligence.

4 THE COURT: Do you want to be heard on that, Mr.  
5 Keaveny?

6 MR. KEAVENY: Your Honor, there is no testimony that  
7 this object is the object that Mr. Wilson saw. That is  
8 just an inference. It is not direct testimony of that  
9 whatsoever.

10 THE COURT: Mr. Keaveny, the case is circumstantial  
11 in that respect, and while that evidence may be sufficient  
12 for a fact-finder, the Court does not find it sufficient  
13 to take that evidence away or that issue away from the  
14 jury and enter a verdict in your favor.

15 So the motion is denied.

16 MR. HATFIELD: We would also move as an additional  
17 basis for directed verdict --- we would move to strike com-  
18 parative negligence.

19 The only evidence that we have is that the Plaintiff  
20 was traveling below the posted speed limit; that he was  
21 operating in the right hand lane of Interstate 95; that  
22 he was well rested and alert.

23 That he was confronted with a sudden emergency as  
24 was the vehicle directly traveling in front of him, and  
25 also the attendant circumstances that he took the only

1 course of action available to him, and, therefore, there  
2 is no comparative negligence on his part.

3 We don't think there is any basis in the record to  
4 show that he was negligent.

5 THE COURT: Gentlemen, of course, there is no res  
6 ipsa loquitur in South Carolina, which is something the  
7 Plaintiff must overcome, but, as well, an affirmative de-  
8 fense cannot rest on that.

9 What evidence is there, Mr. Keaveny, of negligence  
10 on the part of Mr. Tucker?

11 MR. KEAVENY: That the object that he testified he  
12 struck was just about two feet to the right of the lane  
13 divider. This road is very wide and he could have moved  
14 to the right as opposed to his ultimate destination, and  
15 he did not do that.

16 He chose not to do that, and whether he should have  
17 done that is an issue for the jury to decide.

18 THE COURT: All right. Gentlemen, the issue of sud-  
19 den emergency is not an affirmative defense or an affirm-  
20 ative issue for which there is a separate burden of  
21 proof.

22 It is just all a part of the issue of negligence in  
23 this case, and that is for the fact-finder, whether there  
24 is comparative negligence or sudden emergency.

25 This is for the jury to determine, and I find that

1 it would not be appropriate and the evidence is not such  
2 that the Court can exclude that issue from the jury from  
3 either perspective.

4 So your motion is denied, Mr. Hatfield, respect-  
5 fully, sir.

6 MR. HATFIELD: Yes, sir.

7 THE COURT: All right, then, gentlemen, we will close  
8 the record for today.

9 We have a copy of what we believe will be the charge  
10 and will review it tomorrow morning. We are in recess un-  
11 til nine thirty tomorrow. Then we will begin at ten with  
12 the jury.

13 (Whereupon, the Court stood in recess at 4:45 P.M.)

14 (The Court stood in recess until ten o'clock A.M. on  
15 April 17, 2013)

16 THE COURT: All right. Gentlemen, we had a charge  
17 conference in the back but we didn't really discuss the  
18 verdict form.

19 From your review, is there any concern or complaint?

20 MR. HATFIELD: We are fine with it, Your Honor.

21 THE COURT: From the Defendant?

22 MR. KEAVENY: No, Your Honor.

23 Oh, I'm sorry but, Your Honor, there is one that I  
24 was reminded of. On the comparative fault part and the  
25 percentages, I would just suggest that the Court write in

1 one hundred percent so the jury understands that the lines  
2 above it have to total one hundred.

3 THE COURT: All right. Any objection to that?

4 MR. HATFIELD: No, Your Honor. I won't get into  
5 that, Your Honor.

6 THE COURT: All right.

7 (Brief pause)

8 THE COURT: And this is the language that we have  
9 on whether or not negligence per se would warrant any dam-  
10 ages.

11 I intend to just insert at the appropriate place we  
12 were discussing in the charge the following language:

13 The violation of a statute does not in and  
14 of itself constitute recklessness, wilful-  
15 ness or wantonness.

16 However, it may be considered as evidence  
17 in deciding if the Defendant was reck-  
18 less, wilful or wanton in consideration  
19 of punitive damages.

20 Is there objection to that from the Defense?

21 MR. KEAVENY: No, Your Honor.

22 THE COURT: From the Plaintiff?

23 MR. HATFIELD: No, sir.

24 THE COURT: It appears to me that -- I have been  
25 informed that all the jurors are here, and is there any

1 issue further before we bring in the issue and begin the  
2 hearing of closing arguments?

3 MR. KEAVENY: No, sir.

4 MR. HATFIELD: Nothing from the Plaintiff, Your  
5 Honor.

6 THE COURT: Best wishes in this process, and please  
7 bring in the jury.

8 (Jury returned to Courtroom)

9 THE COURT: All right, ladies and gentlemen. Wel-  
10 come back to the Courtroom. I hope you had a nice even-  
11 ing, and we are now ready to proceed into the closing  
12 arguments.

13 Let me ask one last time, is there any member of  
14 the jury panel who has had a discussion<sup>on</sup> the facts concern-  
15 ing this case with anyone? If so, please raise your  
16 hand.

17 (No response)

18 Let the record reflect no one has raised their hand.  
19 Are you comfortable, ladies and gentlemen? Every-  
20 body comfortable? Okay.

21 Now, let me discuss with you closing arguments, if  
22 I may.

23 The Plaintiff bears the burden of proof on the main  
24 claim. Now, if the Defendant raises an affirmative de-  
25 fense they have the burden of proof on the defense they

1       It has been said that outside of serving our country  
2   in times of war that jury duty is the greatest service  
3   that we have as citizens, and virtually every free coun-  
4   try in the world wants to emulate the jury system that  
5   we have, and it is unique.

6       Countries call various organizations like the Amer-  
7   ican Bar Association, State Bar Associations, and ask for  
8   guidance about how we run our judicial system, and the  
9   reason that outside of serving your country in war it is  
10   one of the greatest duties we can do as citizens is be-  
11   cause it is hard.

12       You just heard Mr. Hatfield go on for forty-five min-  
13   utes about a very fine gentleman whose name is Mr. Tucker;  
14   a very fine family and his son whose name is Lee.

15       He has established a very successful company, and  
16   he had a terrible, terrible accident in the early hours  
17   of April 30th.

18       He suffered grievous, grievous injury. Many broken  
19   ribs, a leg broken in more than one place, a broken ankle  
20   - injuries that we wouldn't inflict on anybody. I mean,  
21   just think about it.

22       I mean, even in the Bible they don't talk about the  
23   kind of injuries Mr. Tucker suffered, and when Mr. Hatfield  
24   took the depositions of Dr. Koon and Dr. Myslinski, I  
25   attended those depositions and I asked those doctors questions.

1 object got all the way over here -- from here all the way  
2 over here -- hundreds of feet -- without hitting anything  
3 and without leaving a trail -- no trail.

4 So that was the task. That was the challenge on that  
5 date. That's it.

6 Let's see what the proof and the evidence was from  
7 the stand.

8 Well, Mr. Wilson was the first witness who was called  
9 to testify by video deposition. If you believe what Mr.  
10 Wilson said, then this object was dropped from the back  
11 of the truck probably around ten thirty-ish because Mr.  
12 Wilson testified that he saw the truck getting on the ramp  
13 for I95 southbound. That was around ten thirty.

14 That it traveled -- that truck traveled about eleven  
15 miles and then dropped this object in the southbound lane  
16 where it sat until about twelve twenty when Mr. Tucker  
17 came and struck it.

18 During that time, ten thirty, ten forty-five, ten  
19 fifty, until twelve twenty when Mr. Tucker struck it.

20 Not one phone call, not one call, from a passerby or  
21 from anybody else either to nine one one or to the high-  
22 way patrol.

23 We called Mr. Sweat at nine one one who said we got  
24 several calls but if we had gotten any calls about an  
25 object on the road we would have advised the Highway



1 Patrol or called Mr. George who is with DOT, the mainte-  
2 nance director or engineering director of the district.

3 The Highway Department gets that call if it comes in  
4 after hours -- no calls.

5 No evidence that this object sat in this highway for  
6 an hour and fifteen minutes -- not one call.

7 If you believe what Mr. Wilson has to say, there were  
8 pipes on the back of this truck. There was a pallet that  
9 this object sat on. There was a yellow strap that tied  
10 it down.

11 Well, where are all of those things? If this fell  
12 off the truck, where is everything else?

13 Nothing else fell off the truck. Just this. Just  
14 this.

15 Dean Harris -- he testified that he was contacted --  
16 he's an engineer, you remember, who testified that he was  
17 retained three weeks after this accident, and he was asked  
18 to do one thing and one thing only, and that was to see  
19 if he could identify the origins of this enormous object,  
20 and to analyze eventually what it was made of, and he did  
21 that.

22 But he didn't do anything else at all -- nothing. He  
23 could have come out to the scene which is what engineers  
24 do.

25 Many of you know engineers. They are what got us

1 surprising at all that that object would sit in that  
2 road for that period of time with folks dodging and get-  
3 ting around it without making a phone call, or if a call  
4 was made that somebody was off the clock.

5 The last thing we'll talk about before I sit down,  
6 and this is really important -- getting back to the burden  
7 of proof.

8 All we have to do -- all we have to do is tip those  
9 scales ever so slightly. That's all we have to do. We  
10 don't have to have a picture of the thing falling off the  
11 truck. We don't have to have an eyewitness to it.

12 We don't have to have direct evidence of, hey, I  
13 saw it. It doesn't have to be direct evidence. We don't  
14 have to have a third party come in and say they saw it too.

15 Donald Wilson knew a freight liner because he drove  
16 one, and he saw it enter the Interstate on the back, impro-  
17 perly secured on the truck. It fell right where Bobby  
18 Turker said it fell, and you remember what he said, that  
19 Mr. Tucker did all he could do to avoid it, and the De-  
20 fendant -- the Defendant is responsible. The Defendant  
21 is responsible.

22 Mr. Tucker is entitled to fair compensation at your  
23 hands.

24 Thank you.

25 THE COURT: All right, ladies and gentlemen, before

1 we have our charge on the law let's take about a ten min=  
2 ute break.

3 Go to your jury room for just a few minutes.

4 (Jury excused from Courtroom at 11:22 A.M. The Court  
5 stood in recess until 11:37 A.M., when the jury returned  
6 and the case was resumed.)

7 THE COURT: All right, ladies and gentlemen. It now  
8 appears the jury is back from their break, and we are now  
9 ready for the charge. All right.

10 Ladies and gentlemen, welcome back to the Courtroom.  
11 Now comes the point in the case where I give you the law  
12 before you retire to deliberate.

13 Before I discuss or get into the specifics, let me  
14 say to you that I appreciate the focus and attention you  
15 have given throughout this trial.

16 We all are aware that you left a busy life when you  
17 got your jury summons and came here, and now throughout  
18 this trial I have looked at you as I am looking at you  
19 now. I'm not going to stare at you and I don't want you  
20 to feel like you are being stared at, but I am looking for  
21 comfort, for focus, and I have looked at every member of  
22 this jury where you are sitting now. You have been and  
23 are sitting with focus and attention, and fully engaged  
24 in the case, as I refer to it.

25 Of course, this is both parties' one day or one time

1 in Court, and I appreciate that level of focus. To set  
2 aside your busy lives and make a decision that is just and  
3 fair to the parties.

4 You have heard the arguments of the parties and you  
5 have seen the evidence. You will have the Exhibits in  
6 this record back in the jury room when you retire to de-  
7 liberate.

8 Now I want to explain to you the law that applies to  
9 this action.

10 This is a civil action in which the Plaintiff alleges  
11 he suffered injury to his person for which the Defendant  
12 is responsible in damages.

13 Now, this is a John Doe proceeding, as we call it,  
14 which is permitted in South Carolina law. It does not in-  
15 volve the property damage to the tractor trailer or other  
16 automobiles involved. It is a personal injury claim  
17 only.

18 In his Complaint, the Plaintiff complains that he suf-  
19 fered injuries when his tractor and car carrier struck an  
20 object that was in the roadway on I95. It is alleged by  
21 the Plaintiff, and these are allegations, that the object  
22 that he struck was in the roadway through the negligence  
23 of another unknown driver of an unknown vehicle, and that  
24 is the reason it is brought as a John Doe proceeding.

25 John Doe is simply a legal form or legal name for

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1 who's a fictitious person. The Plaintiff further alleges  
2 that unknown Defendant in the operation of that unknown  
3 vehicle was negligent, reckless, wilful and wanton in the  
4 various specifications that are outlined in the Complaint;  
5 that as a consequence of one or more of the specifics of  
6 negligence he sustained personal injury; that is, the  
7 Plaintiff did, as have been outlined to you earlier in the  
8 testimony.

9 I charge you that under South Carolina law a Plain-  
10 tiff's proof cannot rest upon any presumption that arises  
11 from the mere accident or from the fact that the accident  
12 occurred in and of itself with no evidence of liability on  
13 the part of anyone.

14 The Plaintiff has the burden of proof, and the Plain-  
15 tiff must prove the specific allegations of negligence as  
16 against an unknown driver directly caused the Plaintiff's  
17 injuries.

18 Now, as I said to you when we began, under our Consti-  
19 tution, ladies and gentlemen, you are the judges of the  
20 facts, and, as I previously stated to you during the course  
21 of the trial, if you're going to determine what the facts  
22 are you are going to be the judges of the facts, and you  
23 may have witnesses who testify to seemingly inconsistent  
24 or mutually exclusive things.

25 So you must evaluate the credibility or believability

1 of those witnesses to decide what the facts are, and there  
2 is no need for me to go over, you know, the various cri-  
3 teria we discussed on Monday that you must use in judging  
4 the credibility or believability of witnesses. Remember  
5 that we do this everyday so you apply those factors in  
6 your everyday lives, and you do that here in the Courtroom.

7 Let me say that when you go to establish the facts;  
8 that is, to determine what the facts are, you can believe  
9 as much or as little of any witness' testimony you think is  
10 proper.

11 You can believe the testimony of one witness against a  
12 whole group of witnesses, or do just the opposite. You  
13 can believe a part of what a witness says and completely  
14 disbelieve the rest.

15 The fact that certain testimony is not contradicted  
16 does not mean you must accept it as true and undisputed,  
17 because you must judge the credibility and believability  
18 of the witness.

19 Remember, ladies and gentlemen, that throughout this  
20 process you have but one objective, and that is to seek  
21 and find the truth, regardless of from which witness or of  
22 which side of the case it may come.

23 There are two types of evidence in cases such as this.  
24 There is direct evidence and there is circumstantial evi-  
25 dence.

1 Direct evidence is testimony of a witness about what  
2 that witness saw or heard or did. It's direct testimony.  
3 Circumstantial testimony or circumstantial evidence is in-  
4 direct; that is, it is proof of a set or chain of facts  
5 that may indicate the existence of yet another fact.

6 Now, in your deliberations you should consider all of  
7 the evidence, both direct and circumstantial. The law does  
8 not require a greater degree of one type of evidence over  
9 the other, but you are to give equal weight to both, and  
10 it is up to you to determine how much weight to give to  
11 any evidence.

12 Now, you also heard testimony of witnesses who claim  
13 to have special knowledge or skill or training or education  
14 in a particular field, or perhaps a particular profession  
15 or occupation, and they came in and give their opinions as  
16 an expert in the matters in which they are skilled.

17 Of course, as I said when we had our first expert wit-  
18 ness appear, in deciding what weight to give to the opin-  
19 ions you should consider the qualifications and the credi-  
20 bility of the experts, the reason given for their opinion;  
21 that is, the basis of their opinion.

22 You should determine their credibility and believabil-  
23 ity as you would do with any other witness. You are not  
24 bound by any expert opinion that is given to you here in  
25 the Court, but you give it what weight, if any, you deem

1 it is entitled to.

2 Now, the Constitution which makes you the judges of the  
3 facts makes me the judge of the law. Just like you know  
4 from living in a small county or a small community, there is  
5 a lot of bad information out on the street about what the  
6 law is on any particular given subject.

7 So I am going to ask you to please set aside any pre-  
8 conceived notions you may have coming into the Courtroom --  
9 it might even be a better idea under the circumstances, but  
10 you must accept the law as I give it to you because I have  
11 researched this thoroughly and gone over the matter with  
12 counsel as well.

13 You are to apply the law to the facts as you find them,  
14 and if you do that will permit you to reach a verdict that  
15 is just and true.

16 Now, to state a cause of action against a Defendant,  
17 the law requires the Plaintiff to set out in the Plaintiff's  
18 Complaint three essential things, and this is what the three  
19 claims are.

20 Number one, that a particular Defendant was negligent  
21 in one or more ways stated in the Complaint.

22 Number two, that the Plaintiff was personally injured,  
23 and, number three, that the negligence of the particular  
24 Defendant was the proximate cause -- that word is not approx-  
25 imate but proximate -- of the Plaintiff's injuries and

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1 damages, and I will tell you that in the Plaintiff's Com-  
2 plaint they set out those three potential claims.

3 Let's talk about them briefly but I want to first ex-  
4 plain what is meant by the term negligence. This is a word  
5 we have heard all of our lives.

6 Negligence means that a person did not use the same  
7 amount of care that a person of ordinary reason and prudence  
8 should exercise in the same circumstances.

9 The word careless basically means the same thing.

10 It can be said that a negligent person has done some-  
11 thing that a reasonable person would not have done if the  
12 person was faced with the same situation, or that person  
13 failed to do something a reasonable person would have done,  
14 or both.

15 Now, if you determine that the Unknown Defendant in  
16 this case was negligent; in other words, the Plaintiff has  
17 met the burden of proving that that party was negligent,  
18 the Plaintiff is still not entitled to a verdict unless you  
19 further find that the unknown Defendant's negligence was  
20 the proximate cause of the Plaintiff's injuries and dam-  
21 ages.

22 Let me define the words proximate cause. The words  
23 proximate cause of an injury means something that produces  
24 a natural chain of events that brings about injury.

25 In other words, proximate cause is the direct cause,

1 without which the injury would not have occurred.

2 Now, foreseeability of some injury for one's negli-  
3 gence is necessary to it being a proximate cause of an  
4 injury for which a recovery is sought.

5 To be the direct cause of a Plaintiff's injury or  
6 damage, it must be reasonably foreseeable that a Defendant's  
7 negligence would cause injury to another.

8 Now, in order to establish responsibility for negli-  
9 gence, it is not necessary that the person who is charged  
10 with negligence should have contemplated the particular  
11 act that occurred or particular injury that resulted from  
12 that act.

13 It is just sufficient that that person should have  
14 foreseen that it would probably cause some injury to some-  
15 thing or someone, and that such an injury would be a natural  
16 and probable consequence of that negligence.

17 You may not award damages for any injury or  
18 damage which the Plaintiff may have suffered or may now be  
19 suffering unless it is established by the greater weight  
20 of the evidence that the injury or condition was proximately  
21 caused by the actions of the Defendant.

22 If you find that the Plaintiff met the burden of proof  
23 for negligence and proximate cause against the unknown De-  
24 fendant, then it is your duty to determine what type and  
25 extent of injuries to the Plaintiff were proximately caused

1 by the Defendant's negligence, and thus to what damages the  
2 Plaintiff is entitled.

3 Now, let's talk a little bit about burden of proof.

4 Mr. Foreman and ladies and gentlemen of the jury, as I've  
5 discussed with you before, the fact that some accident or  
6 collision occurred alone does not permit the jury to con-  
7 clude the Plaintiff is automatically entitled to damages  
8 against the unknown Defendant.

9 The Plaintiff has the burden of proving his damages  
10 in his case, and he must meet the burden of proof of his  
11 claims by what is called the preponderance or the greater  
12 weight of the evidence.

13 I will tell you that those terms mean the same thing,  
14 but the preponderance of the evidence may be defined as  
15 meaning that the facts sought to be proven are more likely  
16 true than not.

17 That is preponderance of the evidence, that the facts  
18 sought to be proved are more likely true than not.

19 The greater weight of the evidence is the same thing;  
20 but I can show you an example of what the weight of the  
21 evidence means.

22 We can probably all see in our minds the Lady Justice.  
23 She's blindfolded, and she has a set of scales in her  
24 hands, and those scales are even. Those scales in the be-  
25 ginning are even.

1 In the beginning of the case that is where the scales  
2 were. Now we're at the end of the case, and if the scales  
3 remain even or tip even ever so slightly in favor of the  
4 Defendant, the Plaintiff has failed to meet the burden of  
5 proof.

6 If those scales should tip, even if it is ever so  
7 slightly again, in favor of the Plaintiff, then the Plain-  
8 tiff has met the burden of proof, and your verdict to some  
9 extent should be for the Plaintiff.

10 Now, ladies and gentlemen, in your jury room you prob-  
11 ably have noticed there is not a set of scales to go back  
12 in there and weigh the evidence, but I would say to you  
13 that is obvious since it is a mental process.

14 I would also say in that process that the evidence  
15 that weighs with you is evidence that convinces you of its  
16 truth, and regardless of from which witness or from which  
17 side of the case that evidence may come.

18 I have talked about what the Plaintiff has to set out,  
19 and now let's talk about the Defendant's Answer, because  
20 the Defendant filed an Answer to the Plaintiff's Complaint  
21 in this case.

22 It is what is called a general denial, and in that gen-  
23 eral denial the Defendant admitted that an accident or an  
24 incident occurred, but denied responsibility for that  
25 accident.

1 That joined the issues for trial, and I will tell you  
2 that the Defendant also raised what we call an affirmative  
3 defense to the Plaintiff's claim, and the defense raises  
4 the issue of comparative negligence. That is what we call  
5 the defense raised by the Defendant.

6 By raising the defense, the Defendant alleges that  
7 the Plaintiff's sole negligence proximately caused or con-  
8 tributed to the Plaintiff's own injuries.

9 In this defense, if you find the Defendant is negli-  
10 gent you must then decide whether the Plaintiff was also  
11 negligent, because the Defendant has asserted that affirm-  
12 ative defense.

13 Again, this was pled by the Defendant. The Defendant  
14 has the burden of proof on the issue of comparative negli-  
15 gence and must prove the affirmative defense by the prepond-  
16 erance or greater weight of the evidence, the same level  
17 of proof the Plaintiff must have on its main claim.

18 The Defendant must prove by the greater weight or the  
19 preponderance of the evidence that the Plaintiff breached  
20 the duty of care that proximately caused the Plaintiff's  
21 own injuries.

22 Again, the same law I told you about burden of proof  
23 applies to the Defendant in the comparative negligence  
24 affirmative defense as it does to the Plaintiff's claim.

25 Now, on comparative negligence, if you find that --

1 just think about the claim. So you are comparing allegedly  
2 the negligence of both parties, and that is why we call it  
3 comparative negligence.

4 On comparative negligence, if you find that both par-  
5 ties; that is, the negligence of the Plaintiff and the  
6 Defendant, proximately caused the Plaintiff's injuries, well,  
7 then, you have to determine how much negligence the Plain-  
8 tiff contributed to its own injury and how much of the De-  
9 fendant's negligence contributed to the Plaintiff's injur-  
10 ies.

11 In deciding the percentages of negligence of the Plain-  
12 tiff and Defendant, consider among other things, number  
13 one, whether each party's conduct was only inadvertent or  
14 if it was engaged with an awareness of danger.

15 Number two, the magnitude of the risk created by  
16 each party's conduct, the number of persons endangered and  
17 the possible severity of injuries.

18 Number three, the significance of the goal that each  
19 party was trying to reach and the need to achieve the goal  
20 in that manner at the time the incident occurred, or each  
21 party's capability and ability to recognize and eliminate  
22 the risks that are involved.

23 The particular circumstances that confront each party  
24 at the time the incident occurred. The existence of an  
25 emergency to make a quick decision.

1 was not greater than fifty percent, then you determine --  
2 the verdict form will ask you to determine the specific  
3 percentages of negligence to attribute to each party.

4 Once you do this calculation, then you determine the  
5 total amount of damages that the Plaintiff is entitled to,  
6 without applying any percentage calculations.

7 After you have answered this and returned your ver-  
8 dict form then the Court will compute the damages. The  
9 Court will do the math applying the percentages to the  
10 amount of damages you have found, and the judgment, the  
11 overall judgment, will be reduced by the percentage of  
12 negligence attributable to the Plaintiff.

13 Let's talk about the specific law in this case. The  
14 operator of a motor vehicle under South Carolina law is re-  
15 quired to use the same care that would be used by a  
16 person with ordinary reason and prudence if that person  
17 was in the same vehicle at the same time and place and in  
18 the same circumstances.

19 I further charge you that the driver of an automobile  
20 has a duty to keep a proper lookout for other vehicles on  
21 the roadway, which requires a driver to watch attentively  
22 so that person is able to see an object in the roadway.

23 I further charge you that the driver of an automobile  
24 also has a duty to keep that automobile under proper con-  
25 trol so that the driver can slow down, stop or turn the

1 automobile to avoid colliding with other vehicles, with  
2 pedestrians and objects lawfully on the roadway.

3 I further charge you that South Carolina law, Section  
4 56-5-4100 of the Code is entitled preventing escape of  
5 materials loaded on vehicles, cleaning escaped substances  
6 on highway, and it reads as follows:

7 No vehicle may be driven on any public highway unless  
8 the vehicle is so constructed or loaded as to pre-  
9 vent any of his load from dropping, shifting, leak-  
10 ing or escaping from the vehicle, except that sand,  
11 salt or other chemicals may be dropped for securing  
12 traction, and water or other substance may be  
13 sprinkled on a roadway in the cleaning or maintain-  
14 ing of the roadway by the public authority having  
15 jurisdiction.

16 Any person operating a vehicle from which any  
17 substance or cargo, excluding water, have fallen  
18 or escaped which could constitute an obstruction  
19 or injure a vehicle or otherwise endanger travel  
20 upon the public highways shall make every reason-  
21 able effort to immediately cause the public high-  
22 way to be cleaned of such substances and shall  
23 pay any costs for cleaning.

24 All right, let's also discuss the law in what we call  
25 any emergency situations.



1       I charge you that under South Carolina law a driver  
2 who by the negligence of another and not by his own neg-  
3 ligence is suddenly faced with an emergency, and they are  
4 called upon to act instantly to avoid a collision or injury,  
5 is not guilty of negligence if he makes a choice that a  
6 person of ordinary prudence placed in such a position might  
7 make even though he did not make the wisest choice.

8       In other words, when a motorist is suddenly placed  
9 in an emergency situation through no fault of his own and  
10 is compelled to act suddenly to avoid a collision it is  
11 not negligence if he makes a choice that a person of ordinary  
12 reason and prudence might make if placed in the same emergency  
13 situation.

14       The conduct of one who has without fault of his own  
15 been confronted with a sudden emergency must be judged in  
16 the light of the emergency and not by what hindsight might  
17 show to have been safer or more prudent course for him to  
18 follow.

19       The law necessarily makes allowance for errors of judg-  
20 ment on the part of a person who has been confronted with a  
21 sudden emergency even though it might afterwards appear that  
22 his injury could have been avoided if he had pursued a differ-  
23 ent course, provided he acted reasonably in light of the  
24 emergency.

25       I should say, provided that the driver acted reasonably

1 in light of the emergency.

2 In order for the law of sudden emergency to apply,  
3 it must be shown that the person was confronted with an  
4 emergency or what appeared to be an emergency, an emergency  
5 not caused or contributed to by the Plaintiff, and that in  
6 meeting the emergency the person who was a person of reason-  
7 able prudence might have acted under the same or similar  
8 circumstances.

9 The sudden emergency doctrine is intended to protect  
10 the driver who while acting with due care suddenly finds  
11 himself in an emergency situation due to the wrongful acts  
12 of another.

13 The doctrine of sudden emergency does not apply when  
14 a party's own negligence creates the very emergency in which  
15 he finds himself.

16 Persons who have to act in the face of sudden emer-  
17 gency are not to be judged in light of later events but are  
18 to be judged under the circumstances which surround him at  
19 the time and by what a person of ordinary prudence would  
20 have been likely to do under the same conditions.

21 Let's talk about damages. If the determination is made  
22 that the Plaintiff is entitled to a verdict against a Defen-  
23 dant, your responsibility then is to decide how much money  
24 the Plaintiff ought to receive for the injuries proximately  
25 caused by the Defendant.

1 We call that award damages, and there are two types  
2 of damages that are requested in this case. There are actual  
3 damages and punitive damages.

4 Actual damages are intended to compensate a party for  
5 the actual losses and harm proximately caused by the Defen-  
6 dant's negligence.

7 On the other hand, punitive damages are intended to  
8 punish the Defendant, in order to deter others from similar  
9 conduct.

10 Let's talk about actual damages first. In this case  
11 the Plaintiff has requested actual damages, and actual dam-  
12 ages are intended to compensate an injured party; that is,  
13 actual damages should as much as possible put the Plaintiff  
14 in the same position that he or she was in before the acci-  
15 dent as best as monetary damages can accomplish this.

16 The universal principle of actual damages is that an  
17 injured party should receive compensation equal to his or  
18 her loss. Nothing more, nothing less.

19 In other words, actual damages are for actual losses,  
20 expenses that a Plaintiff suffers because of the Defendant's  
21 actions.

22 Actual damages for a Plaintiff who has been personally  
23 injured include the following: Medical charges or medical  
24 care costs related to the injury and other expenses related  
25 to the injury; suffering caused by or due to the injury;

1 the loss of enjoyment of life; agony or mental anguish suf-  
2 fered because of bodily injury; disfigurement and impairment,  
3 permanent impairment of physical condition.

4 Now let's talk about some of these. Where it refers  
5 to health care costs, the Plaintiff is entitled to recover  
6 the health care costs that you determine to be both reason-  
7 able and necessary.

8 While the actual amount charged and incurred may be  
9 considered by you, you are not bound by that amount. You  
10 must find such sum as is reasonable and necessary under  
11 the circumstances.

12 As with all other facts in the case, the Plaintiff  
13 must prove his actual damages by the greater weight of  
14 the evidence.

15 Now, let's talk about pain and suffering. Pain and  
16 suffering is separate and distinct from losses such as --  
17 or damages such as loss of enjoyment of life, medical bills  
18 or other applicable damages.

19 Damages for pain and suffering are unliquidated, ladies  
20 and gentlemen. They are indeterminate in character. In  
21 everyday terms this means that the amount a jury can award  
22 for pain and suffering has not been predetermined nor is  
23 there a set figure or standard whereby it can be determined.  
24 There is no market price for pain and suffering, and we all  
25 know that.

1        Rather, the assessment of an unliquidated damage for  
2 pain and suffering rests within the sound discretion of you,  
3 the jury. That amount is left to your judgment.

4        Now, let's talk about permanent impairment. In this  
5 case, the Plaintiff has requested damages for permanent im-  
6 pairment of physical condition and alleges such permanent  
7 impairment.

8        In evaluating the Plaintiff's permanent disability or  
9 impairment, it is up to you to decide based on the evidence  
10 the extent of such disability or impairment as a result of  
11 these injuries.

12       Permanent disability or disability doesn't relate to  
13 our jobs or the work place. Because an individual leaves  
14 their job, the permanent impairment limitations do not auto-  
15 matically stop. They go home with that individual. He  
16 takes them with him.

17       Therefore, in evaluating permanent impairment or dis-  
18 ability, you should consider all aspects of the Plaintiff's  
19 life, and this means things such as the ability to carry  
20 out his normal chores or activity, the enjoyment of leisure  
21 or recreation, social functions, etcetera.

22       There is no set measure for this type of loss either,  
23 and should you determine to award damages for permanent im-  
24 pairment you should only award an amount that is fair,  
25 just and reasonable.

1 Now, if you decide that the Plaintiff is entitled to  
2 an award of damages or an award of an amount of money for  
3 future damages, it is necessary for you to decide the reasonable  
4 amount; that is, if you find that the damages are ongoing,  
5 if they haven't stopped in the past and are done with.

6 But if they are ongoing, then it is necessary for you  
7 to determine the probable life expectancy of the Plaintiff  
8 and determine any future damages that you believe may be  
9 applicable.

10 In making such a determination, the South Carolina  
11 General Assembly has a statute that advises a person  
12 of any particular age has a particular life expectancy. We  
13 call that our actuarial table.

14 The statute recognizes that a man who is eighty-two  
15 years of age has a life expectancy of approximately six  
16 point five seven years. Now, a life expectancy is merely an  
17 estimate of the normal average length of life of a person  
18 in our State at a given age, and that estimate is based on  
19 a limited rate of experience.

20 The inference that may be drawn from this is evidence  
21 -- the inference that may be drawn from the statute is evi-  
22 dence that bears on the life expectancy of the Plaintiff, in-  
23 cluding his state of health, his occupation and other things  
24 that you find applicable.

25 Remember, the principle that underlies compensation

1 for future damages is that only one civil claim can be  
2 brought as a result of an injury and only one recovery --  
3 one recovery may be had.

4 If you award future damages, you must reduce those  
5 future damages to present day value.

6 Now, I charge you that a Plaintiff may recover future  
7 damages only to the extent they are reasonably certain to  
8 result in the future and proximately caused by the De-  
9 fendant.

10 Again, all future damages must be reduced to present  
11 day value.

12 Let's talk a little bit about mental anguish. I'd  
13 charge you that a party may recover for mental anguish as  
14 brought about by bodily injury. If you find the injured  
15 party is entitled to recover damages, you may take into  
16 account anxiety or worry about the Plaintiff's condition  
17 that he suffers at the time of the accident.

18 You may also consider anxiety or worry about possible  
19 future difficulties or conditions resulting from the injur-  
20 ies the Plaintiff receives.

21 If you are satisfied to a reasonable degree of cer-  
22 tainty that the Plaintiff suffered such anxiety you may  
23 consider that. However, the Plaintiff may only recover  
24 for that mental anguish brought about by bodily injury and  
25 suffering, and in the absence of such condition there can

1 damages and then we'll move on to punitive damages. The  
2 Plaintiff has the burden of proving actual damages, just  
3 like everything else in this case, by the greater weight of  
4 the evidence.

5 I charge you that the existence or amount of damages  
6 cannot be left to conjecture or guess or speculation. It  
7 must be susceptible to ascertainment with a reasonable de-  
8 gree of certainty but this doesn't mean that the Plaintiff  
9 must prove damages to a mathematical certainty or produce  
10 the precise amount of actual damages suffered.

11 Rather, the evidence brought by the Plaintiff should  
12 be such as is sufficient to enable you, the jury, to de-  
13 termine what amount of damages are fair, just and reason-  
14 able under the circumstances, and the injured party is en-  
15 titled to be compensated in an amount as to put her or him  
16 in as near as possible in the same condition he was in  
17 prior to the injury, as far as monetary damages can do that,  
18 and remembering the universal principle of actual damages.

19 Now let's talk about punitive damages. They are dif-  
20 ferent from actual damages.

21 Actual damages are compensatory; that is, to compensate  
22 someone for the injury received.

23 Punitive damages are intended to punish a Defendant;  
24 called exemplary damages, to make an example of a Defendant  
25 for extraordinary or outrageous conduct, and to prevent the



1 Defendant and others from committing similar acts in the  
2 future.

3 Punitive damages may be awarded when the conduct of  
4 the Defendant is more than mere negligence. The evidence  
5 must establish that the Defendant's acts were beyond negli-  
6 gence, and were reckless, wilful, wanton or intentional;  
7 that there was a conscious failure to exercise due care or  
8 a conscious indifference to the rights of others, or a  
9 reckless disregard thereof.

10 I tell you that in considering punitive damages the  
11 violation of a statute does not in and of itself constitute  
12 reckless, wilfulness and wantonness.

13 However, it may be considered in deciding whether  
14 the Defendant was reckless, wilful and wanton in the con-  
15 sideration of punitive damages.

16 If you find the Defendant's conduct was intentional,  
17 wilful, wanton or reckless, and is far beyond negligence, you  
18 may award the Plaintiff punitive damages.

19 To support an award for punitive damages, the Plaintiff  
20 must prove he is entitled to that by clear and convincing  
21 evidence and consciousness of wrongdoing at the time of the  
22 conduct.

23 Now, that is different from the greater weight of the  
24 evidence. Clear and convincing is more than the preponderance  
25 or greater weight of the evidence, which must only persuade

1 you that the Plaintiff's claim is more likely true than not  
2 true.

3 Clear and convincing is not as high as used as the  
4 burden of proof in criminal cases which is beyond a reason-  
5 able doubt. Clear and convincing proof means no substantial  
6 doubt in your mind; that the evidence is not ambiguous, is  
7 not doubtful, is not equivocal or contradictory. It is  
8 convincing and it persuades you or causes you to believe in  
9 the truth. Clear and convincing establishes in your mind  
10 that not only is it probable, but that is highly probable.

11 Before awarding punitive damages, you must consider  
12 and weigh the elements which are pertinent facts of the  
13 case. You must first consider the relationship between any  
14 punitive damages and the harm that was caused.

15 Any penalty imposed should take into account the repre-  
16 hensibility of the conduct, the harm caused, the Defendant's  
17 awareness of the harm caused, the duration of or any conceal-  
18 ment of that conduct.

19 Any penalty imposed should bear a relationship to the  
20 or between the nature and extent of the conduct and the harm  
21 that was caused, including the compensatory damage award as  
22 made by you.

23 Finally, any penalty imposed should take into account  
24 as a mitigating factor any other penalty, or which may be  
25 imposed for the conduct involved including any criminal or

1 civil penalty or any other damages award arising out of  
2 the same incident.

3 You should consider whether the award and the amount  
4 of punitive damages may deprive the Defendant of any of the  
5 profits derived from the wrongful conduct or whether those  
6 improper profits should be properly paid to the Plaintiff,  
7 and, finally, any award of punitive damages must be limited  
8 to punishment and thus it may not effect an economic bank-  
9 ruptcy.

10 So to this end, the ability to pay any punitive damages  
11 should be considered. However, the economic bankruptcy factor  
12 is not a bar to an award of punitive damages.

13 Now, ladies and gentlemen, should you award both actual  
14 and punitive damages, be advised that the total verdict  
15 will be the sum of actual and punitive damages added to-  
16 gether.

17 All right. Now, ladies and gentlemen, in just a few  
18 minutes you will retire to deliberate, and I want to express  
19 to you the hope -- I know you are mindful of the importance  
20 of your responsibility in serving as jurors and in under-  
21 taking this task.

22 You are not called upon often to serve as jurors, and  
23 for that I'm sure you say, thank goodness. You may remember  
24 we talked on Monday about the fact that you cannot be called  
25 to serve more than one time in three years, and there is a

1 reason for that.

2 It is a difficult task and it requires you and I to  
3 free our minds of all outside influences while you and I  
4 are acting for the community to see that every trial here  
5 is fair and every verdict is just.

6 Now, you have probably noted that throughout this  
7 trial the presiding officer is referred to as Your Honor,  
8 and I know you have noted that. It is a title assigned  
9 to this position -- assigned to this position that I am  
10 privileged to hold. This Court is entrusted with the  
11 honor of this Community, this County, this State and this  
12 Country to see to it that every trial here is fair and  
13 the verdict is just.

14 In a few moments you are going to take possession of  
15 the honor of this Community, County, State and Nation when  
16 you go to your jury room.

17 Now, please understand that I am not telling you how  
18 to decide the case. That is not my point. It is this,  
19 that as the presiding officer in this Court it is of vital  
20 importance that I see that whatever verdict you reach is a  
21 result of you going back to your jury room, confining your  
22 consideration to the evidence that was put forward, weigh-  
23 ing that evidence fairly and impartially, and applying the  
24 law that I just gave to you.

25 When you do that, ladies and gentlemen, then you will

1 reach a verdict that is just and which is true. Everyone in  
2 this case on both sides are entitled to justice -- nothing  
3 more and nothing less, ladies and gentlemen.

4 We owe no support to any party, we owe no sympathy to  
5 any party. We have no friends to reward, no enemies here to  
6 punish.

7 Again, I am of the confirmed opinion that whatever ver-  
8 dict you reach, ladies and gentlemen, that that verdict  
9 will represent truth and justice to the parties involved.

10 Mr. Foreman, ladies and gentlemen, as I read this ver-  
11 dict form -- you will have it with you in the jury room  
12 when you retire to deliberate. It asks a series of questions.  
13 I think it asks eight questions.

14 The questions are designed to sort of help you through  
15 it in a process by which you reach a decision in the case.

16 The first question of you is, was the Defendant negli-  
17 gent. That's the very first question because if you find  
18 the Defendant was not negligent, and the answer to that is  
19 no, then you stop your deliberations, because there will be  
20 no award for the Plaintiff if you find the Defendant was not  
21 negligent in this case.

22 The question, was the Defendant negligent -- there are  
23 two answers to that. There's a yes or no, but when I have  
24 two answers I can't give them to you at the same time if  
25 you think about it or put it on the page. There is no priority

1 here -- one is listed in front of the other.

2 If you answer yes unanimously, Mr. Foreman, then you  
3 check that block and go to question two, which I'll talk  
4 about in a moment.

5 If the answer is no, stop deliberations because you're  
6 done.

7 If the answer is yes, it says go to question two, and  
8 question number two is, was this negligence a cause of the  
9 Plaintiff's injuries, and it has the same answers, yes or no,  
10 and then it asks you about whether the Plaintiff was negli-  
11 gent.

12 If you answer yes or no, it tells you which question to  
13 proceed to, and if you find that both parties have been  
14 negligent it asks you to, using the combined negligence,  
15 which would be one hundred percent, to compare the negli-  
16 gence of the parties.

17 Then it asks you to state the damages that the Plain-  
18 tiff is entitled to, if you find he is entitled to damages.

19 Now, let me say one more time, if you find both par-  
20 ties were negligent -- and I'm not suggesting or saying  
21 what you should find -- I'm simply saying in the event  
22 that happens and you find the Defendant has proved the  
23 defense of comparative negligence, then you assign percent-  
24 ages to both parties for negligence.

25 Then when you go to decide the amount of damages

1 under number seven, you award the total amount of damage.  
2 You don't apply percentage but the Court will do the math  
3 when the jury has completed the process.

4 Then the very last question asks you whether you be-  
5 lieve by clear and convincing evidence that the Plaintiff is  
6 entitled to punitive damages, and that, of course, is a  
7 decision for which you will make a determination of whether  
8 the Defendant was reckless, wilful and/or wanton, and make  
9 a determination based on what you have found the evidence  
10 to be as to whether you award punitive damages.

11 Again, if you do award punitive damages there were two  
12 things I would say to you about that. Number one is please  
13 remember, as I said earlier, the total judgment enrolled for  
14 the Plaintiff is the addition of those sums; that is, they  
15 are added together, and that is the judgment that is en-  
16 rolled.

17 Now, the last thing I will say to you about that is  
18 this. I will let you go back to the jury room and take a  
19 break for a moment while we go over the evidence and get  
20 the verdict form in order.

21 We will bring everything back to you, and when we  
22 bring it to you we will ask that you begin deliberations  
23 and only then.

24 The reason we need you to wait is if I discover some-  
25 thing else I need to bring you out and tell you about before

1 you deliberate, then I'll have to do that.

2 (Go out for just a moment and enjoy your break, and  
3 then we will send this in and you may begin your delibera-  
4 tions.

5 When our Clerk comes back to bring the evidence in, he  
6 will discuss lunch issues with you as well. I don't want  
7 you to think we've forgotten about lunch.

8 So we will remain where we are while you return to the  
9 jury room.

10 (Jury excused from Courtroom at 12:18 P.M.)

11 THE COURT: All right, the door is closed and the jury  
12 is clear.

13 Outside of the presence of the jury, are there ob-  
14 jections to the charge or exceptions to it by the Plain-  
15 tiff?

16 MR. HATFIELD: No, sir.

17 THE COURT: By the Defendant?

18 MR. KEAVENY: No, Your Honor.

19 THE COURT: All right, please come up and review the  
20 evidence one more time and the verdict form. Then we will  
21 send it all in to the jury room.

22 (Jury was instructed to commence deliberations at  
23 12:20 P.M.)

24 THE COURT: Mr. Suggs, I did not tell the jury that  
25 once they reach a verdict, they knock on the door. I'm



1           sure you will tell them that. Thank you.

2           THE COURT: Let's do this before we stand down. Let  
3 me say this to the Plaintiff. The Defendant, of course,  
4 is an unknown individual. If the Defendant was here, I would  
5 say the same thing to the Defendant.

6           I'm sure you prefer being someone else than in this  
7 Courtroom, but I am in this Courtroom everyday. It's  
8 where I work.

9           I have watched hundreds of cases being tried, and I  
10 have to say to you this case has been well tried. You have  
11 observed counsels' civility toward one another. This case  
12 is one that could have resulted in finger-pointing and an  
13 issue raised over every single thing so that it would have  
14 taken days or weeks to try it, which would have prevented  
15 us being able to interact with the jury in an efficient and  
16 positive way, but that didn't happen.

17          It didn't happen because of the way you all conducted  
18 yourselves in the Courtroom and, of equal importance, the  
19 way the lawyers handled the case for both parties.

20          Speaking to the Plaintiff, you made a good choice of  
21 counsel, and this is the strength of our system. It is  
22 -- the case is in the hands of the jury, and we don't know  
23 what the verdict will be. But both of these men are  
24 competent and professional lawyers as you have seen here in  
25 the Courtroom.

1       So whatever the result is, no one should have a doubt  
2   that their side wasn't well represented. There have been  
3   excellent lawyers in this case, who have done a tremendous  
4   job, and I commend you both for that.

5       We will stand down awaiting the jury.

6       (Whereupon, the Court stood in recess until 2:05 P.M.)

7       THE COURT: All right, we are all in place in the case  
8   of Tucker versus John Doe.

9       We are advised the jury has their verdict. Thus we  
10   will bring the jury in and publish our verdict.

11      Anything for our record before we bring in the jury,  
12   from the Plaintiff?

13      MR. HATFIELD: No, sir.

14      THE COURT: From the Defendant?

15      MR. KEAVENY: No, Your Honor.

16      THE COURT: All right, then please bring in the jury.

17      (Jury returned to the Courtroom)

18      THE COURT: All right, ladies and gentlemen. Welcome  
19   to the Courtroom.

20      We are advised you have reached a verdict. Mr. Winborn,  
21   is it correct that you have a verdict?

22      FOREMAN: Yes, sir.

23      THE COURT: Would you please give the verdict form to  
24   our Clerk?

25      (Foreman of jury complying with request)

1 THE COURT: Thank you. Let the record reflect that  
2 the verdict form is appropriately filled out, and it is  
3 signed by the Foreperson.

4 Mr. Clerk, please publish the verdict.

5 CLERK: Yes, sir. Case Number 2010 CP 16 0315, Bobby  
6 Tucker, Senior, Plaintiff, versus John Doe, individually  
7 and doing business as Doe Trucking, Defendant.

8 Question one, was the Defendant negligent, and the re-  
9 sponse is yes.

10 Question two, was the Defendant's negligence the prox-  
11 imate cause of the Plaintiff's injuries, and the response  
12 is yes.

13 Question three, was the Plaintiff negligent. The re-  
14 sponse is no.

15 Actual damages awarded by the jury, Two Million Five  
16 Hundred Thousand Dollars.

17 Do you find the conduct of the Defendant was reckless,  
18 wilful or wanton based upon clear and convincing evidence,  
19 and the response of the jury was yes, and we award the sum  
20 of Two Million Five Hundred Thousand Dollars against the  
21 Defendant.

22 I certify the decisions are unanimous decisions of  
23 the jury, and it is signed by the Foreperson, Donald  
24 Winburn, on April 17, 2013.

25 If this is your verdict, will you so signify by the

1 raising of your right hand for me.

2 THE COURT: Thank you, and let's let the record reflect,  
3 Madam Court Reporter, that each of the jurors raised their  
4 hand in response to that.

5 Now, are there motions for which a jury response will  
6 be necessary?

7 First, from the Plaintiff?

8 MR. HATFIELD: No, sir.

9 THE COURT: And from the Defendant?

10 MR. KEAVENY: I would just ask the Clerk to poll the  
11 jury, Your Honor.

12 THE COURT: All right, ladies and gentlemen. Either  
13 party has the right to request that the jury be polled, and  
14 the process of polling the jury is as follows:

15 Each of your names will be called individually. When  
16 your name is called, please stand. We will ask you two  
17 questions, and the questions will be similar to this: Was  
18 this your verdict, and the second question will be is it  
19 still your verdict.

20 Please follow our Clerk's instructions.

21 CLERK: Okay, I'll begin with the Foreperson. Mr. Winburn,  
22 was this the verdict you reached in the jury room?

23 MR. WILBURN: Yes, sir.

24 CLERK: Is it your verdict now?

25 MR. WINBURN: Yes, sir.

1 CLERK: Larosha Dubose, was this the verdict you  
2 reached in the jury room?

3 MS. DUBOSE: Yes.

4 CLERK: Is it your verdict now?

5 MS. DUBOSE: Yes.

6 CLERK: Thank you. Timothy Dionne, was this  
7 the verdict you reached in the jury room?

8 MR. DIONNE: Yes, sir.

9 CLERK: Is it your verdict now?

10 MR. DIONNE: Yes, sir.

11 CLERK: Janice House, was this the verdict that you  
12 reached in the jury room?

13 MS. HOUSE: It is.

14 CLERK: Is it your verdict now?

15 MS. HOUSE: Yes, sir.

16 CLERK: Brian Wallace, was this the verdict you have  
17 reached in the jury room?

18 MR. WALLACE: Yes, sir.

19 CLERK: Is it your verdict now?

20 MR. WALLACE: Yes, sir.

21 CLERK: Avis Petrotta, was this the verdict you reached  
22 in the jury room?

23 MS. PETROTTA: Yes.

24 CLERK: Is it your verdict now?

25 MS. PETROTTA: Yes, sir.

1 CLERK: Michelle Anderson, was this the verdict you  
2 reached in the jury room?

3 MS. ANDERSON: Yes, sir.

4 THE COURT: And is it your verdict now?

5 MS. ANDERSON: Yes.

6 CLERK: Philip Bush, was this the verdict you reached  
7 in the jury room?

8 MR. BUSH: Yes, sir.

9 CLERK: And is it your verdict now?

10 MR. BUSH: Yes, sir.

11 CLERK: Tamekia Owens, was this the verdict you reached  
12 in the jury room?

13 MS. OWENS: Yes.

14 CLERK: And is it your verdict now?

15 MS. OWENS: It is.

16 CLERK: Sandy Lawson, was this the verdict you reached  
17 in the jury room?

18 MS. LAWSON: Yes.

19 CLERK: And is it your verdict now?

20 MS. LAWSON: It is.

21 CLERK: Chris Russell, was this the verdict you  
22 reached in the jury room?

23 MS. RUSSELL: Yes.

24 CLERK: And is it your verdict now?

25 MS. RUSSELL: Yes.

1 CLERK: Daniel Lamonds, was this the verdict you reached  
2 in the jury room?

3 MR. LAMONDS: Yes.

4 CLERK: And is it your verdict now?

5 MR. LAMONDS: Yes, sir.

6 CLERK: Thank you. The jurors names were all called.

7 THE COURT: All right, the jury was polled and answered  
8 in the affirmative to both questions.

9 Are there further matters now for which a jury re-  
10 sponse would be necessary?

11 MR. HATFIELD: No, Your Honor.

12 MR. KEAVENY: No, sir.

13 (Whereupon, the jury was excused by the Court, after  
14 the following colloquy with the Court)

15 THE COURT: Let me answer a question for you that  
16 I suspect is in your minds, and that is, where are the  
17 funds paid for when the Defendant is a John Doe Defendant.

18 We deal with insurance issues almost everyday, and so  
19 you may not be as familiar with how insurance policies work  
20 in South Carolina, but when you buy insurance you buy not  
21 only liability which covers someone else if you hit them  
22 and it is your fault. That is to provide coverage for them.

23 You also provide coverage which is called UM, which  
24 means uninsured motorist coverage, and UIM which is under-  
25 insured motorist coverage.

1       UM coverages, uninsured motorist, also covers what  
2 we call John Doe proceedings where there may be a  
3 phantom vehicle or an uninsured person who has caused the  
4 accident.

5       On Mr. Tucker's truck, and perhaps on any personal  
6 vehicles he may have, he would have UM. That is uninsured  
7 coverage, which will be responsive to this verdict.

8       Now, there may be several coverage levels or coverages  
9 which are available that are in certain increments, and that  
10 remains to be seen as far as how much of the verdict will  
11 be collected.

12       That is not within the province of this Court today,  
13 which was to assess damages and determine whether there was  
14 liability on the unknown driver, and you have done that.

15       (Jury excused)

16       THE COURT: Now, outside the presence of the jury  
17 are there motions for which a Court response would be neces-  
18 sary, and if you wish to review the verdict form I will  
19 show it to you?

20       What says the Plaintiff?

21       MR. HATFIELD: No, Your Honor.

22       THE COURT: What says the Defense?

23       MR. KEAVENY: Yes, Your Honor. I would ask the Court  
24 for the post judgment review on punitive damages set forth  
25 in the Fordace case.



1 THE COURT: That has generally been done in the past and  
2 I have taken argument on that, yes, sir.

3 I will be glad to take that argument now, if you wish,  
4 or if you wish to do this by memoranda or brief I will give  
5 you ten days for that opportunity.

6 What do you say to that, Mr. Keaveny?

7 MR. KEAVENY: I would like the ten days to do that,  
8 and also, Your Honor, to make my other motions.

9 THE COURT: All right, and what I would ask is that  
10 within ten days the Plaintiff submit reasons for which you  
11 believe, evidentiary and legal, that the punitive award would  
12 be supported.

13 I would ask the Defendant to do the same thing, as to  
14 why they believe such an award would not be supported.

15 The Court will then thereafter make the decision, and  
16 also make any decision on post-trial motions which the De-  
17 fense may maintain. The Plaintiff as well if you have any.

18 Thank you.

19 -----END OF REQUESTED TRANSCRIPT OF RECORDS-----

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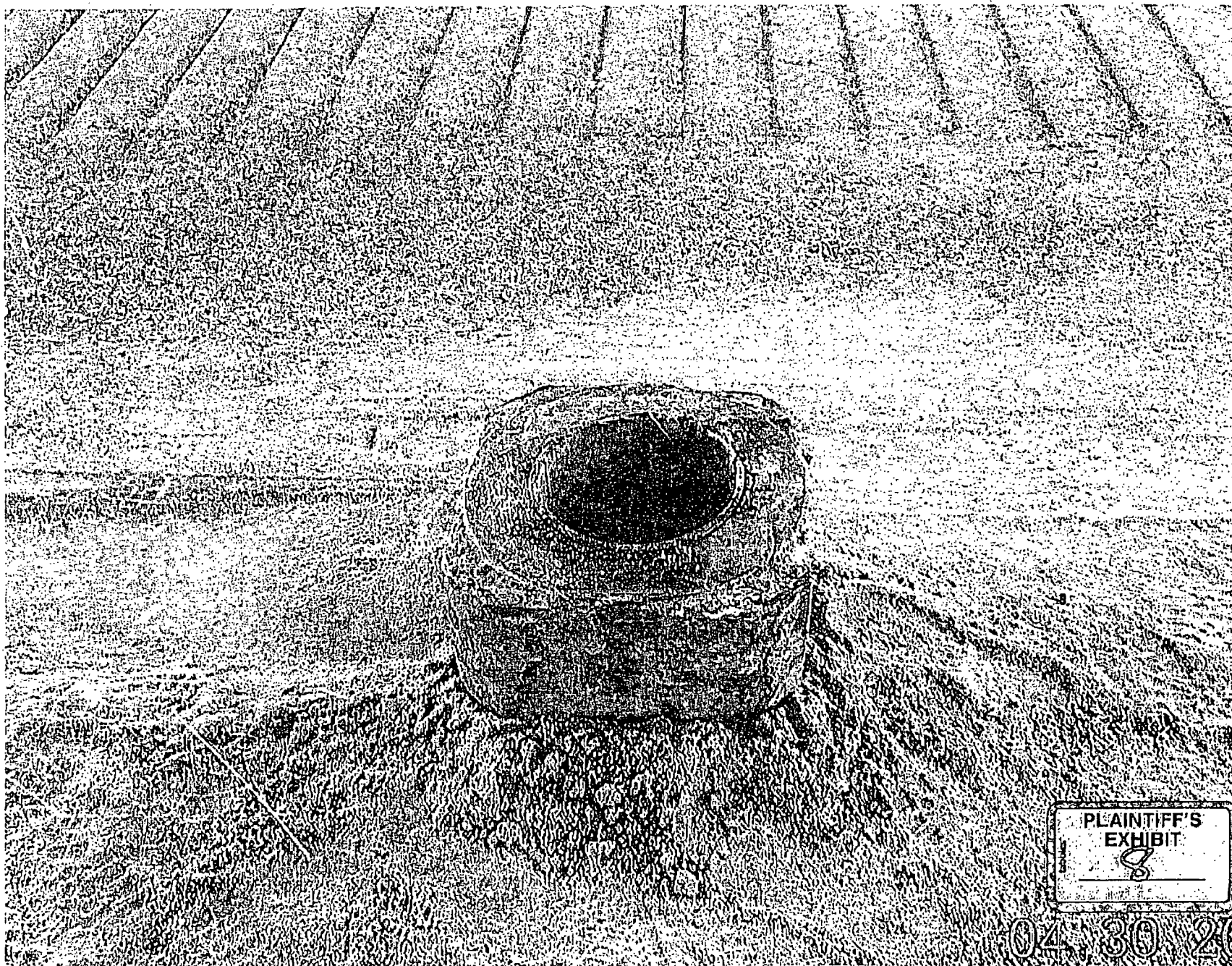
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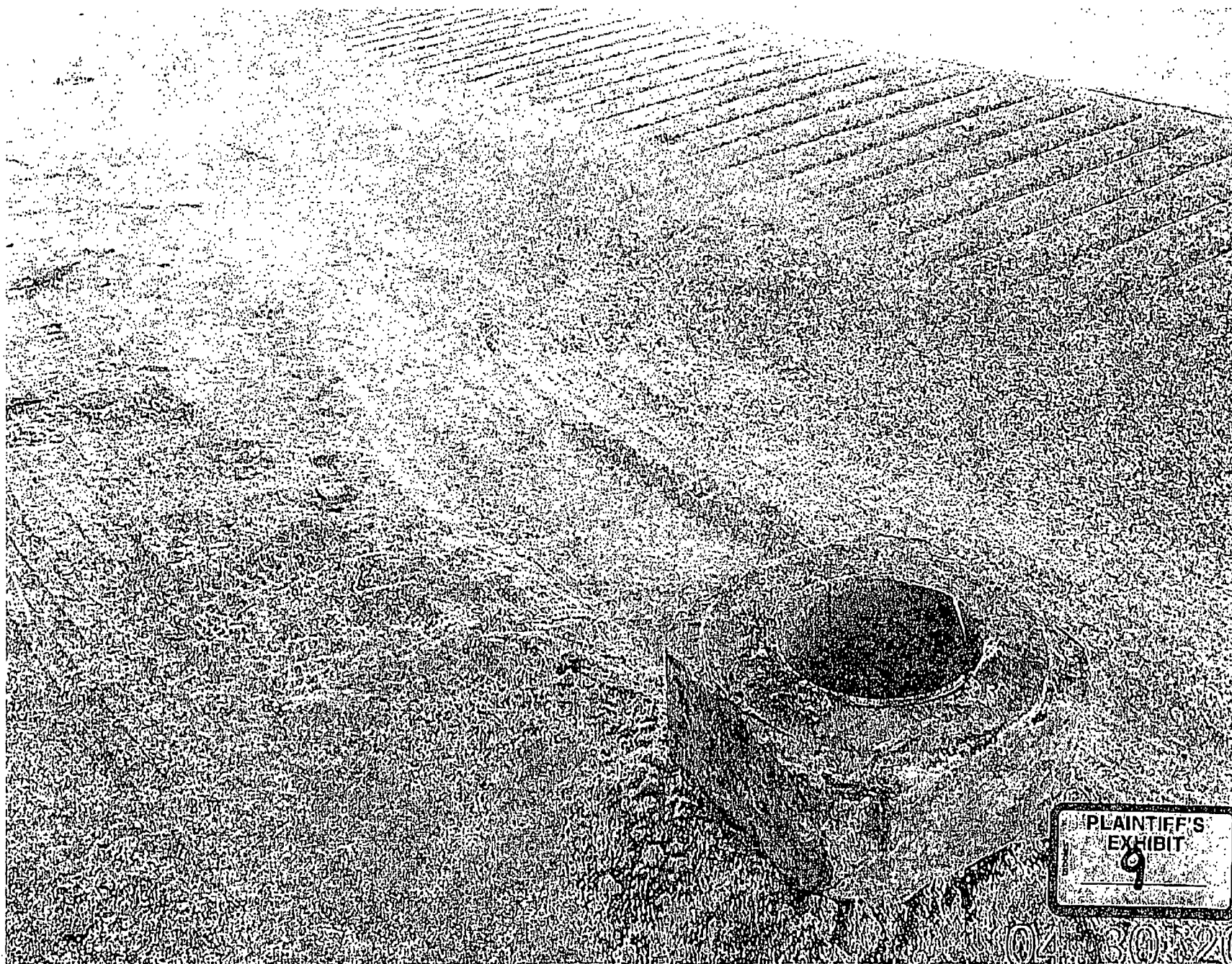
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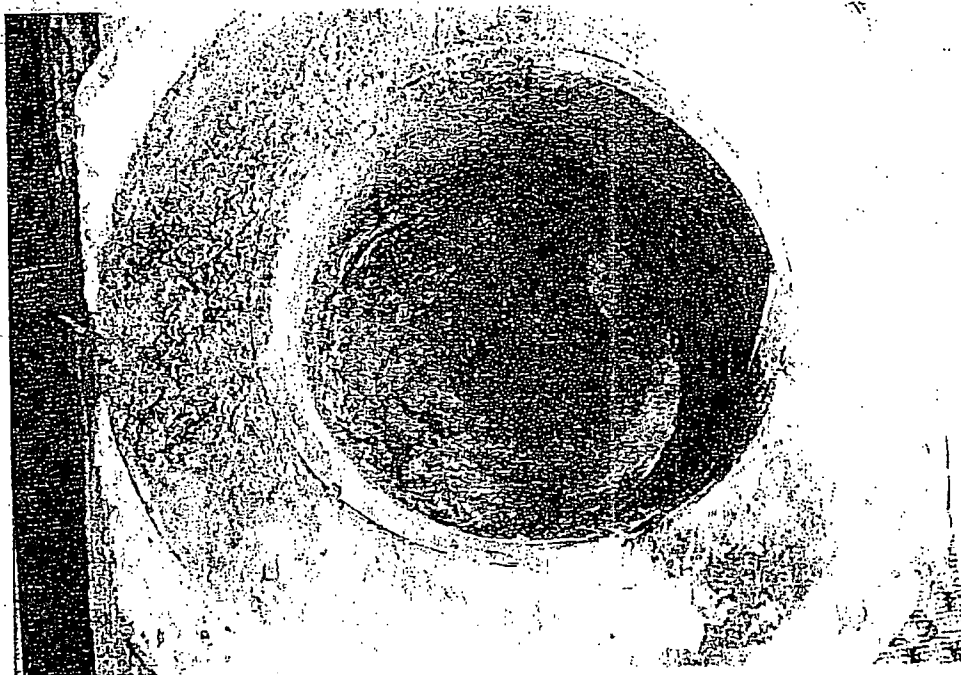
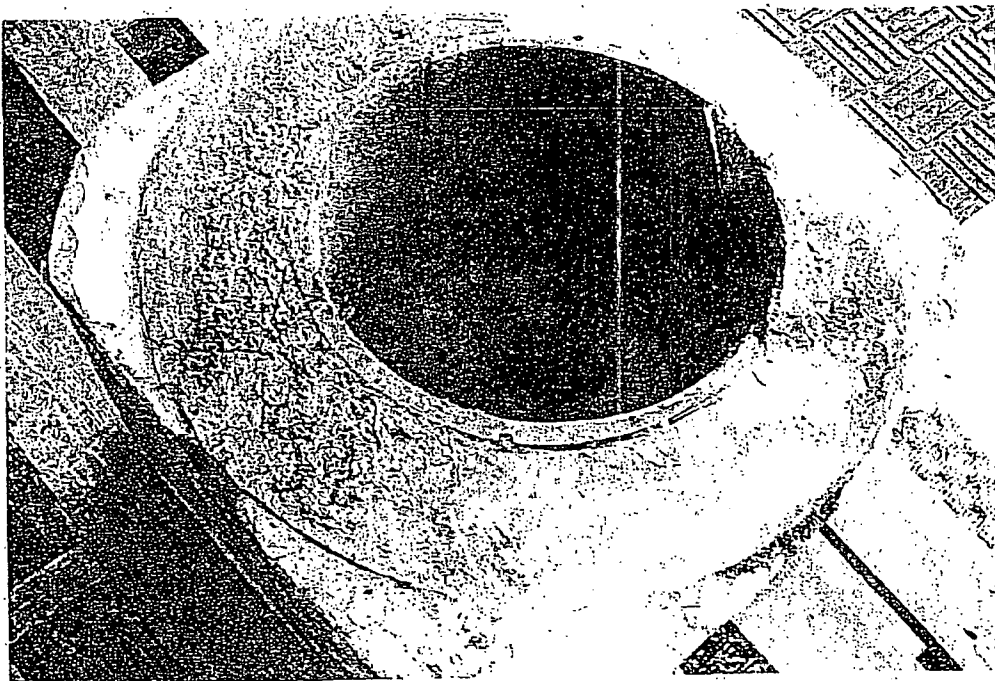
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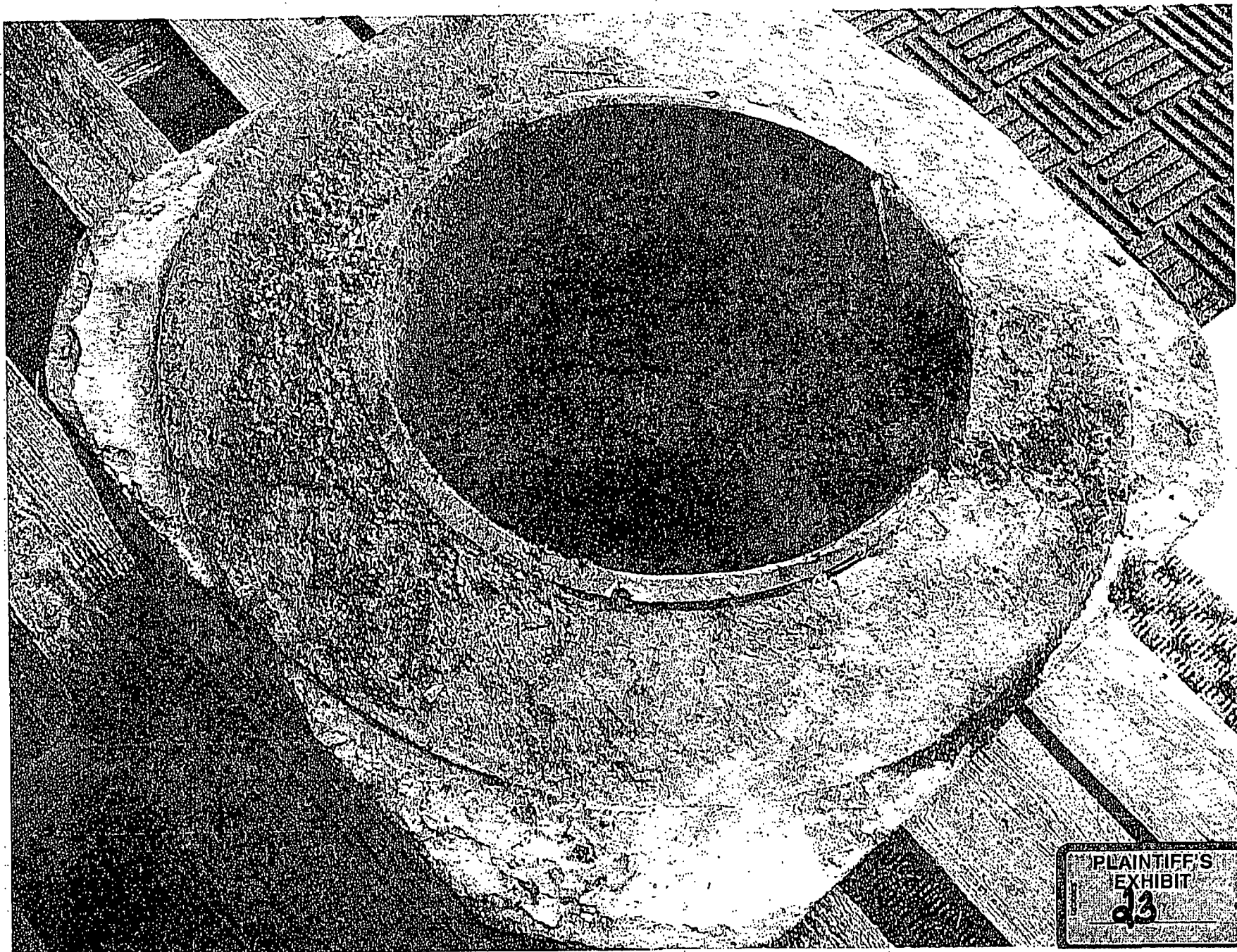
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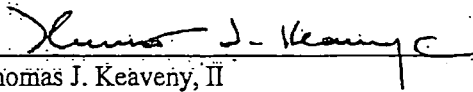
ROA\_0307



Defendant.

**NOTICE OF MOTION AND  
MOTION FOR SUMMARY JUDGMENT**

FILED  
2011 JAN 18 AM 10:50  
CLERK OF COURT/R.O.D.  
DARTMOUTH COUNTY, N.C.



Thomas J. Keaveny, II  
(S.C. Bar No.: 03308)  
Keaveny Law Firm LLC  
445 Folly Road  
Charleston, SC 29412  
Telephone: 843.225.2820  
Facsimile: 843.225.2823  
Email: [tkeaveny@keavenylawfirm.com](mailto:tkeaveny@keavenylawfirm.com)

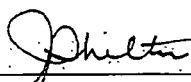
ATTORNEY FOR DEFENDANT

January 14, 2011  
Charleston, South Carolina

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the foregoing Motion for Summary Judgment has been served upon opposing counsel by hand delivery or by mailing a copy properly addressed with sufficient postage affixed thereto this 14th day of January, 2011.

KEAVENY LAW FIRM LLC

BY:   
Jennifer Shelton, Paralegal

2011 JAN 18 AM 10:50  
CLERK OF COURT/R.O.D.  
DARLINGTON COUNTY, S.C.

FILED

Page 2 of 2

ROA\_0309

Appendix\_0313

Defendant.

MEMORANDUM IN SUPPORT OF  
MOTION FOR SUMMARY JUDGMENT

Mr. Tucker filed this uninsured motorist action on May 14, 2010 seeking compensation for injuries he suffered on April 30, 2010. Defendants have filed motions for summary judgment due to Mr. Tucker's failure to satisfy the requirements of the uninsured motorist statute (S.C. Code Ann. § 38-77-170) which our Appellate Courts have repeatedly held must be construed strictly. Mr. Tucker is unable to provide an affidavit which independently verifies the presence of the object which Mr. Tucker claims he struck while driving south on I-95.

April 30, 2010 at approximately 12:15 a.m. Mr. Tucker was driving a 2001 Freightliner tractor south on I-95 from Florence to Florida. It is undisputed that as he approached Exit 153 (also known as Honda Way) he lost control of his tractor trailer and struck several concrete abutments in the median. It is also undisputed that Mr. Tucker suffered grievous injuries as a result of the accident.



Mr. Tucker filed this action against John Doe individually and d/b/a Doe Trucking Company. He alleges that on April 30, 2010 he was proceeding south on I-95 and that "at the same time and place the Defendant was transporting a piece of machinery and a part of the machinery fell from the Defendant's tractor"<sup>1</sup> (Exhibit "A"). He claims that the object landed in his lane.<sup>2</sup> He further claims that he was confronted with a sudden emergency<sup>3</sup>, that he attempted evasive maneuvers<sup>4</sup> but he was unable to avoid striking the object<sup>5</sup> and that as a result, he lost control of his vehicle<sup>6</sup> and struck the abutment<sup>7</sup>. Finally, he claims that "the collision between the Plaintiff's tractor and the object which fell from this Defendant's tractor and trailer was witnessed by a third party, Anthony Bernardo, and an immediate report of the incident was made to the South Carolina Highway Patrol."<sup>8,9</sup>

Plaintiff did not file an affidavit of a witness when he filed his Complaint on May 14, 2010. On July 19, 2010, Plaintiff's counsel provided Defendants' counsel with an affidavit which was signed by Anthony Bernardo on July 14, 2010 (Exhibit "C").<sup>10</sup> Last Friday (March 4, 2011) Plaintiff's counsel provided Defendants with a second affidavit signed by Mr. Bernardo on that same day (Exhibit "C").

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<sup>1</sup> Paragraph 3 of Plaintiff's Complaint

<sup>2</sup> *Id*

<sup>3</sup> *Id*

<sup>4</sup> *Id*

<sup>5</sup> *Id*

<sup>6</sup> *Id*

<sup>7</sup> *Id*

<sup>8</sup> Paragraph 4 of Plaintiff's Complaint

<sup>9</sup> Officer Suggs of the S.C. Highway Patrol investigated this accident (Exhibit "B"). He did not mention the presence of a foreign object in the roadway.

<sup>10</sup> Note: The affidavit does not contain the language required §38-77-170: Furthermore, it does not verify the presence of a foreign object in the roadway.

## LEGAL ARGUMENT

### AFFIDAVITS FAIL TO SATISFY REQUIREMENTS OF SC CODE ANN. § 38-77-170

S.C. Code Ann. § 38-77-170 very clearly and succinctly sets forth the requirements which must be met in or to sue or recover under an uninsured motorist provision when the owner or operator of motor vehicle causing injury or damage is unknown. The statute 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 on his behalf has reported the accident to some appropriate police authority within a reasonable time, under all the 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; (emphasis added);
- (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.

The following statement must be prominently displayed on the face of the affidavit provided in subitem (2) above: A FALSE STATEMENT CONCERNING THE FACTS CONTAINED IN THIS AFFIDAVIT MAY SUBJECT THE PERSON MAKING THE FALSE STATEMENT TO CRIMINAL PENALTIES AS PROVIDED BY LAW.

Our appellate courts have repeatedly held that the statute, and particularly Sections 35-77-170(2), "is clear on its face": Bradley v. Doe, 374 S.C. 622, 629, 649 SE 2<sup>nd</sup> 153, 157 (Ct. App. 2007). Judge Ralph King Anderson, writing for the court, referred to Criterion Insurance Company v. Hoffman, 258 S.C. 282, 188 SE 2<sup>nd</sup> 459 (1972) and stressed the historical reasoning for the strict compliance requirement:

The right to sue and collect from one's own liability insurance carrier in case of a loss caused by a hit-and-run driver or other driver an uninsured automobile is a creature of the legislature. Except for the statute, and endorsements required, no right exists to recover from one's own insurance carrier. One must look to the terms of the uninsured motorist statute and policy endorsements and comply therewith to get the benefit of law...

It is the province of the lawmakers to create a right of action, to provide for process and to declare the procedure for collecting from one's own insurance carrier...

The terms of the statute...are clear and not ambiguous. This being true, there is no room for construction and we are required to apply the statute according to its literal meaning. Most courts take a liberal view when dealing with the question of coverage; however, the procedural obligation that the insured must discharge in order to recover, since they are prescribed by statute, are viewed by the courts as mandatory, and strict compliance with them is a prerequisite to recover.

Bradley, at 158.

The statute provides that in order to recover uninsured motorist benefits, the accident must have been witnessed by someone other than the owner or operator of the vehicle and that witness must attest to the truth of the facts of the accident. Collins v. Doe, 352 S.C. 462, 574 S.E. 2<sup>nd</sup> 739 (2002); Shealy v. Doe, 370 S.C. 154, 634 S.E. 2<sup>nd</sup> 45 (Ct. App. 2006). Mr. Tucker has not produced an affidavit from any witness who saw a foreign object in the road. Mr. Bernardo does not say he saw one. The police officer who investigated the accident did not note the presence of a foreign object in the road and importantly, no other motorist on I-95 reported the presence of a foreign object in the road before or after Mr. Tucker's accident.

The facts of Bradley v. Doe are remarkably similar to the case of sub judice. There, Mr. Bradley was traveling on College Park Road in Ladson, South Carolina at approximately 3:00 a.m. He claimed that he swerved to avoid an object in his lane. He lost control of his vehicle, veered off the road and struck a tree. The presence of a garbage bag in the road, which Mr. Bradley claims he

swerved to avoid, was verified by several witnesses: Mr. Bradley, Mr. Bradley's son, and a United States Air Force Lieutenant Colonel. In fact, a friend of Mr. Bradley's (Thomas Bosley) drove home on the same road just moments before Mr. Bradley and he saw a large trash bag in the middle of the same lane Mr. Bradley was in when he swerved to avoid the bag. Mr. Bosley missed hitting the bag. He also testified that approximately one quarter-mile further down the road he encountered a street sweeper's truck drop another trash bag similar to the one he saw earlier in the road.

Doe moved for summary judgment because no one independently witnessed the accident. That is, no one saw Mr. Bradley swerve to avoid the bag which other people saw in the road before and after Mr. Bradley's accident. Judge Diane Goodstein granted Doe summary judgment. The Court of Appeals affirmed. The Court of Appeals held that "Bradley was the only witness to the accident. None of the affiants actually saw Bradley swerve to avoid a trash bag in the road.... The fact that three people saw the bag of trash in the same roadway does not implicate involvement of another vehicle." Bradley at 633, 159.

The same is true in this case, neither Mr. Bernardo nor Mr. Wilson saw any object in the road either before or after the accident. In his affidavit of March 4, 2010, Mr. Bernardo tries to say he saw Mr. Tucker swerve to avoid an object in the road, but he does not say that. In fact, he says "the truck and car carrier suddenly veered to the left as if to avoid something in the roadway and in doing so struck a concrete pillar supporting the overpasses"<sup>11</sup> (see Exhibit "D"). This is really nothing more than saying he saw Mr. Tucker lose control of his vehicle and go off the road. Mr. Bernardo never identifies anything in the road either before or after the accident which would explain why Mr.

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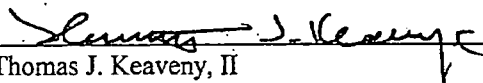
<sup>11</sup> Paragraph 4 of Bernardo affidavit dated March 4, 2011. It must also be noted that the investigating officer's report (Exhibit "D") makes no mention of any objects in the roadway.

Tucker left the road. His March 4, 2011 affidavit does not even identify or discuss the object which Mr. Tucker claims he swerved to avoid. Therefore, Mr. Tucker, like Mr. Bradley, fails to satisfy the requirements of the statute.<sup>12</sup>

### CONCLUSION

For the reasons stated above, Defendants respectfully ask this court to grant their motions for summary judgment.

Respectfully submitted,

  
Thomas J. Keaveny, II  
(S.C. Bar No.: 03308)  
Keaveny Law Firm LLC  
445 Folly Road  
Charleston, SC 29412  
Telephone: 843.225.2820  
Facsimile: 843.225.2823  
Email: [tkeaveny@keavenylawfirm.com](mailto:tkeaveny@keavenylawfirm.com)

**ATTORNEY FOR MONTGOMERY  
INSURANCE COMPANY, UIM  
CARRIER**

March 7<sup>th</sup>, 2011  
Charleston, South Carolina

---

<sup>12</sup> The court specifically noted the testimony that a sweeper truck a quarter-mile down the road dropped a similar trash bag failed to establish a sufficient causal link between the sweeper truck and the accident. The same is true of Mr. Wilson's testimony. There is no evidence, circumstantial or direct, that the object he claims to have seen on a different Highway (Hwy. 52) before Mr. Tucker's accident was in the road, that Mr. Tucker struck it, or that Doe Trucking is responsible for it being there.

STATE OF SOUTH CAROLINA  
COUNTY OF DARLINGTON

Bobby Lee Tucker, Sr.,

Plaintiff,

Vs.

John Doe, individually, and dba Doe  
Trucking Company,

Defendants.

IN THE COURT OF COMMON PLEAS  
FOURTH JUDICIAL CIRCUIT

C/A # 2010-CP-16-

10 CP 160315

SUMMONS FOR  
CLERK OF COURT  
RECEIVED  
CLERK OF COURT  
FOURTH JUDICIAL CIRCUIT  
DARLINGTON COUNTY, S.C.

(Complaint, Interrogatories  
and Request for Production of  
Documents Served)

(Jury Trial Requested)

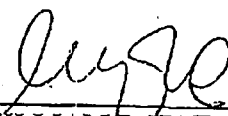
FILED

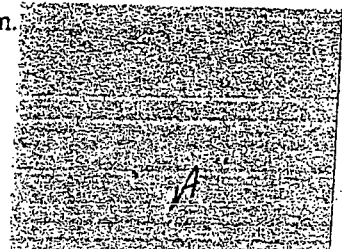
MAY 14 AM 10:41

TO THE DEFENDANTS ABOVE-NAMED:

YOU ARE HEREBY SUMMONED and required to answer the Complaint in this action, a copy of which is herewith served upon you, and to serve a copy of your Answer to said Complaint on the subscriber at 170 Courthouse Square, Post Office Box 1770, Florence, South Carolina, 29503-1770 within thirty (30) days from the service hereof, exclusive of the date of such service, and in case of the failure to do so, judgment by default will be rendered against you for the relief demanded in the Complaint.

Florence, SC  
May 14, 2010

  
WILLIAM P. HATFIELD,  
Attorney for Plaintiff  
SC Bar No. 2840  
THE HYMAN LAW FIRM, LLP  
170 Courthouse Square  
Post Office Box 1770  
Florence, SC 29503-1770  
(843) 662-5000  
wphatfield@hymanlawfirm.



ROA\_0316

STATE OF SOUTH CAROLINA  
COUNTY OF DARLINGTON

Bobby Lee Tucker, Sr.,

Plaintiff,

Vs.

Joe Doe, individually, and dba Doe  
Trucking Company,

Defendants.

IN THE COURT OF COMMON PLEAS  
FOURTH JUDICIAL CIRCUIT  
C/A # 2010-CP-16-

10 CP 160315

FILED  
MAY 14 2010  
CLERK OF COURT  
DARLINGTON COUNTY, S.C.

COMPLAINT

(Jury Trial Requested)

The Plaintiff, complaining of the above-named Defendants alleges:

1. That the Plaintiff is a resident and citizen of the County of Darlington, State of South Carolina.
2. That the Defendant is an unknown individual who resides in South Carolina and at all times hereinafter mentioned was operating a tractor and trailer in the State of South Carolina.
3. That on or about Friday, April 30, 2010, at approximately 12:15 a.m. the Plaintiff, Bobby Lee Tucker, Sr., was driving a 2001 Freightliner tractor, belonging to Tucker Enterprises, Incorporated, bearing vehicle identification number 1FVHAHCG41PF93059 in a southerly direction on Interstate 95 in Florence County, South Carolina; at the same time and place the Defendant was transporting a piece of machinery and a part of the machinery fell from

ROA\_0317

Appendix\_0321

the Defendants' tractor and trailer landing in the outside lane of Interstate 95 just north of the overpass at exit 153 also known as Honda Way; that the Plaintiff confronted with this sudden emergency, attempted evasive maneuvers but his tractor struck the metal object causing him to lose control and strike the overpass resulting in injuries and damages as more particularly hereinafter set forth.

4. That the collision between the Plaintiff's tractor and the object which fell from the Defendants' tractor and trailer was witnessed by a third party, Anthony Bernado, and an immediate report of the incident was made to the South Carolina Highway Patrol which conducted an investigation as soon thereafter as was practicable.
5. That the injuries and damages sustained by the Plaintiff were caused and occasioned by the willful, wanton, reckless, careless, negligent and unlawful conduct on the part of the Defendant in one or more of the following particulars, to-wit:
  - (a) In driving a vehicle at an excessive rate of speed, too fast for the conditions then and there existing;
  - (b) In leaving the scene of the accident with property damage and/or personal injury;
  - (c) In failure to exercise due care.



(d) In failing to secure the load.

All of the above being in violation of the laws of the State of South Carolina.

6. That as a direct and proximate cause of said negligence, wantonness, recklessness, and unlawfulness on the part of the Defendants, the Plaintiff was thrown violently in and about Plaintiff's automobile; that the Plaintiff was greatly and severely injured in and about Plaintiff's head, neck, arms, body, back, limbs, and other parts of the Plaintiff's body; that Plaintiff was rendered sick, sore, lame, disabled, bruised, and shocked thereby and continues so to be; that all of such injuries have caused Plaintiff extreme and excruciating pain continuously to this date and the Plaintiff will suffer such pain in the future; that as a direct and proximate result of the negligence of the Defendant as aforementioned the Plaintiff suffered severe bruises, lacerations, and contusions and great pain and suffering.
7. That as a direct and proximate cause of said negligence, wantonness, recklessness, and unlawfulness on the part of the Defendant:
  - (a) The Plaintiff was committed to the hospital and will be required to enter the hospital in the future for long and extensive periods of time;
  - (b) The Plaintiff was confined to the care and treatment of skilled physicians and nurses; that Plaintiff is presently being treated by such persons and will continue to receive treatment from them in the future;

that Plaintiff has expended large sums of money for such treatment and will be obligated to expend even more money in the future for such care and treatment;

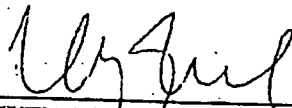
- (c) The Plaintiff was hindered and prevented, and in the future will be hindered and prevented from transacting and attending to Plaintiff's necessary and lawful affairs since the date of the collision and loss and was deprived of divers gains, profits, salaries, pleasures, advantages, and earning capacity and ability which Plaintiff would have otherwise derived and acquired;
  - (d) The Plaintiff was in the past, present, and will continue in the future to be put to great expense for medicine and drugs;
  - (e) The Plaintiff has expended large sums of money in the past and present for transportation to and from the doctor's office and hospitals and will continue to have such expenses in the future for consultations and treatment;
  - (f) The Plaintiff's previous good health has been permanently impaired.
  - (g) The Plaintiff has suffered a loss of wages and in the future will suffer a loss of wages due to the injuries received.
8. That the Plaintiff is informed and believes that he is entitled to an award of actual damages and an award of punitive damages.

10 Q 150315

WHEREFORE, Plaintiff asks judgment against the Defendants for actual damages, an award of punitive damages, and the costs of this action.

Florence, SC

May 14, 2010

  
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|                                                                                                                                                                             |              |                                        |                                                                 |                                                                           |                                                                           |                                                 |                                                     |                                                                                                                                                                                                                                                                                                                                                                                                     |                                                               |                                                       |                           |                                                                                                                                                                                                                                                                                                                                                                                                     |                            |                                  |  |                |  |  |  |                          |  |  |  |                 |  |  |  |
|-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------|--------------|----------------------------------------|-----------------------------------------------------------------|---------------------------------------------------------------------------|---------------------------------------------------------------------------|-------------------------------------------------|-----------------------------------------------------|-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|---------------------------------------------------------------|-------------------------------------------------------|---------------------------|-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|----------------------------|----------------------------------|--|----------------|--|--|--|--------------------------|--|--|--|-----------------|--|--|--|
| D.P.R. USE ONLY                                                                                                                                                             |              |                                        |                                                                 | SOUTH CAROLINA<br>TRAFFIC COLLISION REPORT FORM                           |                                                                           |                                                 |                                                     | # Of Units<br>1                                                                                                                                                                                                                                                                                                                                                                                     |                                                               | Amended - Action Copy of Original Report<br>Corrected |                           | Notified<br>0038                                                                                                                                                                                                                                                                                                                                                                                    |                            | Armed<br>0032                    |  |                |  |  |  |                          |  |  |  |                 |  |  |  |
| 10046659                                                                                                                                                                    |              |                                        |                                                                 | Page # 1                                                                  |                                                                           |                                                 |                                                     | Form 01-2001                                                                                                                                                                                                                                                                                                                                                                                        |                                                               |                                                       |                           |                                                                                                                                                                                                                                                                                                                                                                                                     |                            |                                  |  |                |  |  |  |                          |  |  |  |                 |  |  |  |
| Date<br>4/30/2010                                                                                                                                                           | Time<br>0030 | County<br>21                           | Interstate 4-Secondary<br>2-US Primary 3-County<br>3-BC Primary | Collision Location (RL # / Name)<br>8 95                                  |                                                                           |                                                 |                                                     | Main 6-Connection<br>2-Alternate 7-Business<br>5-Spur                                                                                                                                                                                                                                                                                                                                               |                                                               | Miles: 4.0                                            |                           | Dir: N E<br>S W                                                                                                                                                                                                                                                                                                                                                                                     |                            | Near City or Town of<br>FLORENCE |  |                |  |  |  |                          |  |  |  |                 |  |  |  |
| Lane # / Dir.<br>N / NE<br>SW                                                                                                                                               |              | Distance Offset<br>25                  | Direction<br>N E<br>S W                                         | 1-Interstate 4-Secondary<br>2-US Primary 3-County<br>3-BC Primary 6-Other |                                                                           | Base Intersection (RL # / Name)<br>83/HONDA WAY |                                                     | Main 6-Connection<br>2-Alternate 7-Business<br>5-Spur 9-Other                                                                                                                                                                                                                                                                                                                                       |                                                               | ASRU code                                             |                           | MAP Grid                                                                                                                                                                                                                                                                                                                                                                                            |                            |                                  |  |                |  |  |  |                          |  |  |  |                 |  |  |  |
| RR Id.<br>N1A                                                                                                                                                               |              | From<br>N E 1- Entrance<br>S W 2- Exit | Ramp Only<br>N E<br>S W                                         | To<br>N E 1- Entrance<br>S W 2- Exit                                      | 1-Interstate 4-Secondary<br>2-US Primary 3-County<br>3-BC Primary 6-Other |                                                 | Second Intersection (RL # / Name)<br>451/PENIEL RD. |                                                                                                                                                                                                                                                                                                                                                                                                     | Main 6-Connection<br>2-Alternate 7-Business<br>5-Spur 9-Other |                                                       | Latitude<br>34° 06' 4220" |                                                                                                                                                                                                                                                                                                                                                                                                     | Longitude<br>79° 54' 3510" |                                  |  |                |  |  |  |                          |  |  |  |                 |  |  |  |
| A-360562 Driver/Pedestrian's Full Name<br>TUCKER - BOBBY LEE                                                                                                                |              |                                        |                                                                 |                                                                           |                                                                           |                                                 |                                                     | A-360563 Driver/Pedestrian's Full Name                                                                                                                                                                                                                                                                                                                                                              |                                                               |                                                       |                           |                                                                                                                                                                                                                                                                                                                                                                                                     |                            |                                  |  |                |  |  |  |                          |  |  |  |                 |  |  |  |
| Unit # 1 Sex M Race W Street 207 TIERLER ST.<br>Birth Date 2-13-A21 City, State, & Zip DARTMINGTON SC 29532                                                                 |              |                                        |                                                                 | Unit # 1 Sex M Race W Street<br>Birth Date City, State, & Zip             |                                                                           |                                                 |                                                     | State Driver's License # Insurance Company                                                                                                                                                                                                                                                                                                                                                          |                                                               |                                                       |                           | State Driver's License # Insurance Company                                                                                                                                                                                                                                                                                                                                                          |                            |                                  |  |                |  |  |  |                          |  |  |  |                 |  |  |  |
| Year 2001 Body TR Vehicle Make FREIGHT VIN # 1FVHANCG4H1PF93059                                                                                                             |              |                                        |                                                                 | Year Body Vehicle Make VIN #                                              |                                                                           |                                                 |                                                     | State Year License Plate # Owner's D.L. #                                                                                                                                                                                                                                                                                                                                                           |                                                               |                                                       |                           | State Year License Plate # Owner's D.L. #                                                                                                                                                                                                                                                                                                                                                           |                            |                                  |  |                |  |  |  |                          |  |  |  |                 |  |  |  |
| Home Telephone (843) 393-6449 Owner's Full Name TUCKER - BOBBY LEE, JR.                                                                                                     |              |                                        |                                                                 | Home Telephone ( ) Owner's Full Name                                      |                                                                           |                                                 |                                                     | Bus. Telephone ( ) Street                                                                                                                                                                                                                                                                                                                                                                           |                                                               |                                                       |                           | Bus. Telephone ( ) Street                                                                                                                                                                                                                                                                                                                                                                           |                            |                                  |  |                |  |  |  |                          |  |  |  |                 |  |  |  |
| Contributed To Collision No City, State, & Zip FLORENCE SC 29501                                                                                                            |              |                                        |                                                                 | Contributed To Collision No City, State, & Zip                            |                                                                           |                                                 |                                                     | Estimated Speed 70 C.D.L. Reg. Yes No TBS Reg. Yes No Air/Org Info (see back) Yes No                                                                                                                                                                                                                                                                                                                |                                                               |                                                       |                           | Estimated Speed 70 C.D.L. Reg. Yes No TBS Reg. Yes No Air/Org Info (see back) Yes No                                                                                                                                                                                                                                                                                                                |                            |                                  |  |                |  |  |  |                          |  |  |  |                 |  |  |  |
| A-360564 Driver/Pedestrian's Full Name                                                                                                                                      |              |                                        |                                                                 | A-360564 Driver/Pedestrian's Full Name                                    |                                                                           |                                                 |                                                     | State Year License Plate # Owner's D.L. #                                                                                                                                                                                                                                                                                                                                                           |                                                               |                                                       |                           | State Year License Plate # Owner's D.L. #                                                                                                                                                                                                                                                                                                                                                           |                            |                                  |  |                |  |  |  |                          |  |  |  |                 |  |  |  |
| Unit # 1 Sex M Race W Street<br>Birth Date City, State, & Zip                                                                                                               |              |                                        |                                                                 | Unit # 1 Sex M Race W Street<br>Birth Date City, State, & Zip             |                                                                           |                                                 |                                                     | Home Telephone ( ) Owner's Full Name MAY 11, 2001                                                                                                                                                                                                                                                                                                                                                   |                                                               |                                                       |                           | Home Telephone ( ) Owner's Full Name                                                                                                                                                                                                                                                                                                                                                                |                            |                                  |  |                |  |  |  |                          |  |  |  |                 |  |  |  |
| State Driver's License # Insurance Company                                                                                                                                  |              |                                        |                                                                 | State Driver's License # Insurance Company                                |                                                                           |                                                 |                                                     | Contributed To Collision Yes No City, State, & Zip                                                                                                                                                                                                                                                                                                                                                  |                                                               |                                                       |                           | Contributed To Collision Yes No City, State, & Zip                                                                                                                                                                                                                                                                                                                                                  |                            |                                  |  |                |  |  |  |                          |  |  |  |                 |  |  |  |
| Year Body Vehicle Make VIN #                                                                                                                                                |              |                                        |                                                                 | Year Body Vehicle Make VIN #                                              |                                                                           |                                                 |                                                     | Estimated Speed 70 C.D.L. Reg. Yes No TBS Reg. Yes No Air/Org Info (see back) Yes No                                                                                                                                                                                                                                                                                                                |                                                               |                                                       |                           | Estimated Speed 70 C.D.L. Reg. Yes No TBS Reg. Yes No Air/Org Info (see back) Yes No                                                                                                                                                                                                                                                                                                                |                            |                                  |  |                |  |  |  |                          |  |  |  |                 |  |  |  |
| Dir. of Travel: Unit 1: N (S) E W Unit 2: N S E W Unit 3: N S E W                                                                                                           |              |                                        |                                                                 | Dir. of Travel: Unit 1: N (S) E W Unit 2: N S E W Unit 3: N S E W         |                                                                           |                                                 |                                                     | Unit 1 Dam. Unit 2 Dam. Unit 3 Dam. Prop. Dam. 1 Prop. Dam. 2                                                                                                                                                                                                                                                                                                                                       |                                                               |                                                       |                           | Unit 1 Dam. Unit 2 Dam. Unit 3 Dam. Prop. Dam. 1 Prop. Dam. 2                                                                                                                                                                                                                                                                                                                                       |                            |                                  |  |                |  |  |  |                          |  |  |  |                 |  |  |  |
|                                                                                                                                                                             |              |                                        |                                                                 |                                                                           |                                                                           |                                                 |                                                     | \$ 20,000.00 \$ 1000.00 \$ N1A<br>Property Owner/Witness DEPT. OF TRANSPORTATION Property Owner/Witness N1A<br>Address 3018 E PALMETTO ST FLORENCE Address<br>State Zip Phone State Zip Phone<br>SC 29506 843-611-4715<br>Photo: (Describe What Happened (Refer to Units by Number))<br>(VIN) UNIT #1 WAS TRAVELING SOUTH ON<br>I-95, TRAVELED OFF THE ROADWAY LEFT,<br>AND STRUCK A BRIDGE COLUMN. |                                                               |                                                       |                           | \$ 20,000.00 \$ 1000.00 \$ N1A<br>Property Owner/Witness DEPT. OF TRANSPORTATION Property Owner/Witness N1A<br>Address 3018 E PALMETTO ST FLORENCE Address<br>State Zip Phone State Zip Phone<br>SC 29506 843-611-4715<br>Photo: (Describe What Happened (Refer to Units by Number))<br>(VIN) UNIT #1 WAS TRAVELING SOUTH ON<br>I-95, TRAVELED OFF THE ROADWAY LEFT,<br>AND STRUCK A BRIDGE COLUMN. |                            |                                  |  |                |  |  |  |                          |  |  |  |                 |  |  |  |
| NOTES: THE TRAFFIC STOP REPORTING OFFICER'S ONLY AND IS A REFLECTION OF THE OFFICER'S OBSERVATION OF THE COLLISION. NO WARRANTY IS MADE AS TO THE FACTUAL ACCURACY THEREOF. |              |                                        |                                                                 |                                                                           |                                                                           |                                                 |                                                     |                                                                                                                                                                                                                                                                                                                                                                                                     |                                                               |                                                       |                           |                                                                                                                                                                                                                                                                                                                                                                                                     |                            |                                  |  |                |  |  |  |                          |  |  |  |                 |  |  |  |
| Investigating Officer's Name SUGGS - B.A.                                                                                                                                   |              |                                        |                                                                 | Rank SGT                                                                  |                                                                           |                                                 |                                                     | Badge # 639                                                                                                                                                                                                                                                                                                                                                                                         |                                                               |                                                       |                           | Code 470600                                                                                                                                                                                                                                                                                                                                                                                         |                            |                                  |  | Date 4-30-2010 |  |  |  | Reviewed By C. R. Borden |  |  |  | Ref'd 101060749 |  |  |  |

## Appendix 0326

| Unit | Date of Birth | Sex | Race | HU | Best | R/S/D | A/A | E/E | LAU | Tras | Name           | Street Address | Zip Code |
|------|---------------|-----|------|----|------|-------|-----|-----|-----|------|----------------|----------------|----------|
| 1    | 2-13-1979     | m   | w    | 3  | 01   | 13    | 712 | 1   | 2   | 11   | DRIVER UNIT #1 |                |          |

| Race                 | A - Asian/Pacific Islander | W - Caucasian | 0 - Other | U - Unknown | Injury Status      | 2 - Non-incapacitating | 3 - Incapacitating | 4 - Fatal | 5 - Possible | 6 - Not Injured | 7 - Not Applicable | 8 - Unknown | 9 - Unknown |
|----------------------|----------------------------|---------------|-----------|-------------|--------------------|------------------------|--------------------|-----------|--------------|-----------------|--------------------|-------------|-------------|
| 1 - African American |                            |               |           |             | 1 - Possible       |                        |                    |           |              |                 |                    |             |             |
| 2 - Hispanic         |                            |               |           |             | 2 - Not Injured    |                        |                    |           |              |                 |                    |             |             |
| 3 - American Indian  |                            |               |           |             | 3 - Incapacitating |                        |                    |           |              |                 |                    |             |             |
| 4 - Other            |                            |               |           |             | 4 - Fatal          |                        |                    |           |              |                 |                    |             |             |
| 5 - Unknown          |                            |               |           |             | 5 - Possible       |                        |                    |           |              |                 |                    |             |             |
| 6 - Not Injured      |                            |               |           |             | 6 - Not Injured    |                        |                    |           |              |                 |                    |             |             |
| 7 - Not Applicable   |                            |               |           |             | 7 - Not Applicable |                        |                    |           |              |                 |                    |             |             |
| 8 - Unknown          |                            |               |           |             | 8 - Unknown        |                        |                    |           |              |                 |                    |             |             |
| 9 - Unknown          |                            |               |           |             | 9 - Unknown        |                        |                    |           |              |                 |                    |             |             |

| Sequence of Events               | Mail Order, 10-30-00, 24-00 of Financial Responsibility, 10-30-00, 10-30-00, 10-30-00 | Sequence of Events               | Mail Order, 10-30-00, 24-00 of Financial Responsibility, 10-30-00, 10-30-00, 10-30-00 |
|----------------------------------|---------------------------------------------------------------------------------------|----------------------------------|---------------------------------------------------------------------------------------|
| 1 - Not Trapped                  | 1 - Not Trapped                                                                       | 1 - Not Trapped                  | 1 - Not Trapped                                                                       |
| 2 - Estimated (Mechanical Means) | 2 - Estimated (Mechanical Means)                                                      | 2 - Estimated (Mechanical Means) | 2 - Estimated (Mechanical Means)                                                      |
| 3 - Free (non-mech)              | 3 - Free (non-mech)                                                                   | 3 - Free (non-mech)              | 3 - Free (non-mech)                                                                   |
| 4 - Not Applicable               | 4 - Not Applicable                                                                    | 4 - Not Applicable               | 4 - Not Applicable                                                                    |
| 5 - Unknown                      | 5 - Unknown                                                                           | 5 - Unknown                      | 5 - Unknown                                                                           |

| Vehicle Type                | 1 - Full Size Van | 2 - Motorcycle | 3 - School Bus | 4 - Automobile | 5 - Mini Van | 6 - Animal Drawn Veh | 7 - Passenger Bus | 8 - Pickup Truck | 9 - Sport Utility | 10 - Animal (Ridden) | 11 - Other | 12 - Truck Tractor | 13 - Motorcycle | 14 - Pedestrian | 15 - Unk. (Hd and Run Only) |
|-----------------------------|-------------------|----------------|----------------|----------------|--------------|----------------------|-------------------|------------------|-------------------|----------------------|------------|--------------------|-----------------|-----------------|-----------------------------|
| 1 - Full Size Van           |                   |                |                |                |              |                      |                   |                  |                   |                      |            |                    |                 |                 |                             |
| 2 - Motorcycle              |                   |                |                |                |              |                      |                   |                  |                   |                      |            |                    |                 |                 |                             |
| 3 - School Bus              |                   |                |                |                |              |                      |                   |                  |                   |                      |            |                    |                 |                 |                             |
| 4 - Automobile              |                   |                |                |                |              |                      |                   |                  |                   |                      |            |                    |                 |                 |                             |
| 5 - Mini Van                |                   |                |                |                |              |                      |                   |                  |                   |                      |            |                    |                 |                 |                             |
| 6 - Animal Drawn Veh        |                   |                |                |                |              |                      |                   |                  |                   |                      |            |                    |                 |                 |                             |
| 7 - Passenger Bus           |                   |                |                |                |              |                      |                   |                  |                   |                      |            |                    |                 |                 |                             |
| 8 - Pickup Truck            |                   |                |                |                |              |                      |                   |                  |                   |                      |            |                    |                 |                 |                             |
| 9 - Sport Utility           |                   |                |                |                |              |                      |                   |                  |                   |                      |            |                    |                 |                 |                             |
| 10 - Animal (Ridden)        |                   |                |                |                |              |                      |                   |                  |                   |                      |            |                    |                 |                 |                             |
| 11 - Other                  |                   |                |                |                |              |                      |                   |                  |                   |                      |            |                    |                 |                 |                             |
| 12 - Truck Tractor          |                   |                |                |                |              |                      |                   |                  |                   |                      |            |                    |                 |                 |                             |
| 13 - Motorcycle             |                   |                |                |                |              |                      |                   |                  |                   |                      |            |                    |                 |                 |                             |
| 14 - Pedestrian             |                   |                |                |                |              |                      |                   |                  |                   |                      |            |                    |                 |                 |                             |
| 15 - Unk. (Hd and Run Only) |                   |                |                |                |              |                      |                   |                  |                   |                      |            |                    |                 |                 |                             |

| Vehicle Use Code         | 1 - Personal | 2 - Military | 3 - Fire Fighting | 4 - Ambulance | 5 - Farm Use | 6 - Farm Use | 7 - Logging | 8 - Driver Training | 9 - Transport Passengers | 10 - Police | 11 - Other | 12 - Construction/Maint | 13 - Transport Property | 14 - Government | 15 - Pedestrian |
|--------------------------|--------------|--------------|-------------------|---------------|--------------|--------------|-------------|---------------------|--------------------------|-------------|------------|-------------------------|-------------------------|-----------------|-----------------|
| 1 - Personal             |              |              |                   |               |              |              |             |                     |                          |             |            |                         |                         |                 |                 |
| 2 - Military             |              |              |                   |               |              |              |             |                     |                          |             |            |                         |                         |                 |                 |
| 3 - Fire Fighting        |              |              |                   |               |              |              |             |                     |                          |             |            |                         |                         |                 |                 |
| 4 - Ambulance            |              |              |                   |               |              |              |             |                     |                          |             |            |                         |                         |                 |                 |
| 5 - Farm Use             |              |              |                   |               |              |              |             |                     |                          |             |            |                         |                         |                 |                 |
| 6 - Farm Use             |              |              |                   |               |              |              |             |                     |                          |             |            |                         |                         |                 |                 |
| 7 - Logging              |              |              |                   |               |              |              |             |                     |                          |             |            |                         |                         |                 |                 |
| 8 - Driver Training      |              |              |                   |               |              |              |             |                     |                          |             |            |                         |                         |                 |                 |
| 9 - Transport Passengers |              |              |                   |               |              |              |             |                     |                          |             |            |                         |                         |                 |                 |
| 10 - Police              |              |              |                   |               |              |              |             |                     |                          |             |            |                         |                         |                 |                 |
| 11 - Other               |              |              |                   |               |              |              |             |                     |                          |             |            |                         |                         |                 |                 |
| 12 - Construction/Maint  |              |              |                   |               |              |              |             |                     |                          |             |            |                         |                         |                 |                 |
| 13 - Transport Property  |              |              |                   |               |              |              |             |                     |                          |             |            |                         |                         |                 |                 |
| 14 - Government          |              |              |                   |               |              |              |             |                     |                          |             |            |                         |                         |                 |                 |
| 15 - Pedestrian          |              |              |                   |               |              |              |             |                     |                          |             |            |                         |                         |                 |                 |

| Vehicle Attachment       | 1 - Utility Trailer | 2 - Towed Motor Vehicle | 3 - Other Trailer | 4 - Utility Trailer | 5 - Farm Trailer | 6 - Petroleum Tanker | 7 - Flat Bed | 8 - Mobile Home | 9 - Trailer w/boat | 10 - Lowboy Trailer | 11 - Twin Trailers | 12 - Semi-Trailer | 13 - Camper Trailer | 14 - Autocarrier Trailer | 15 - Other |
|--------------------------|---------------------|-------------------------|-------------------|---------------------|------------------|----------------------|--------------|-----------------|--------------------|---------------------|--------------------|-------------------|---------------------|--------------------------|------------|
| 1 - Utility Trailer      |                     |                         |                   |                     |                  |                      |              |                 |                    |                     |                    |                   |                     |                          |            |
| 2 - Towed Motor Vehicle  |                     |                         |                   |                     |                  |                      |              |                 |                    |                     |                    |                   |                     |                          |            |
| 3 - Other Trailer        |                     |                         |                   |                     |                  |                      |              |                 |                    |                     |                    |                   |                     |                          |            |
| 4 - Utility Trailer      |                     |                         |                   |                     |                  |                      |              |                 |                    |                     |                    |                   |                     |                          |            |
| 5 - Farm Trailer         |                     |                         |                   |                     |                  |                      |              |                 |                    |                     |                    |                   |                     |                          |            |
| 6 - Petroleum Tanker     |                     |                         |                   |                     |                  |                      |              |                 |                    |                     |                    |                   |                     |                          |            |
| 7 - Flat Bed             |                     |                         |                   |                     |                  |                      |              |                 |                    |                     |                    |                   |                     |                          |            |
| 8 - Mobile Home          |                     |                         |                   |                     |                  |                      |              |                 |                    |                     |                    |                   |                     |                          |            |
| 9 - Trailer w/boat       |                     |                         |                   |                     |                  |                      |              |                 |                    |                     |                    |                   |                     |                          |            |
| 10 - Lowboy Trailer      |                     |                         |                   |                     |                  |                      |              |                 |                    |                     |                    |                   |                     |                          |            |
| 11 - Twin Trailers       |                     |                         |                   |                     |                  |                      |              |                 |                    |                     |                    |                   |                     |                          |            |
| 12 - Semi-Trailer        |                     |                         |                   |                     |                  |                      |              |                 |                    |                     |                    |                   |                     |                          |            |
| 13 - Camper Trailer      |                     |                         |                   |                     |                  |                      |              |                 |                    |                     |                    |                   |                     |                          |            |
| 14 - Autocarrier Trailer |                     |                         |                   |                     |                  |                      |              |                 |                    |                     |                    |                   |                     |                          |            |
| 15 - Other               |                     |                         |                   |                     |                  |                      |              |                 |                    |                     |                    |                   |                     |                          |            |

| Action Prior to Impact    | (Vehicle) | (Non-motorist) | (Vehicle)                 | (Non-motorist) |
|---------------------------|-----------|----------------|---------------------------|----------------|
| 1 - Backing               |           |                | 1 - Backing               |                |
| 2 - Changing Lane         |           |                | 2 - Changing Lane         |                |
| 3 - Entering Traffic Lane |           |                | 3 - Entering Traffic Lane |                |
| 4 - Leaving Traffic Lane  |           |                | 4 - Leaving Traffic Lane  |                |
| 5 - Making U-Turn         |           |                | 5 - Making U-Turn         |                |
| 6 - Movement/Maneuvering  |           |                | 6 - Movement/Maneuvering  |                |
| 7 - Overtaking/Passing    |           |                | 7 - Overtaking/Passing    |                |
| 8 - Other                 |           |                | 8 - Other                 |                |
| 9 - Unk.                  |           |                | 9 - Unk.                  |                |
| 10 - Working              |           |                | 10 - Working              |                |

| Weather Condition                 | 1 - Clear (No adverse conditions) | 2 - Cloudy | 3 - Fog, Smog, Smoke | 4 - Snow | 5 - Rain | 6 - Sleet, Hail | 7 - Blowing Sand | 8 - Severe Crosswinds | 9 - Other | 10 - Unk. |
|-----------------------------------|-----------------------------------|------------|----------------------|----------|----------|-----------------|------------------|-----------------------|-----------|-----------|
| 1 - Clear (No adverse conditions) |                                   |            |                      |          |          |                 |                  |                       |           |           |
| 2 - Cloudy                        |                                   |            |                      |          |          |                 |                  |                       |           |           |
| 3 - Fog, Smog, Smoke              |                                   |            |                      |          |          |                 |                  |                       |           |           |
| 4 - Snow                          |                                   |            |                      |          |          |                 |                  |                       |           |           |
| 5 - Rain                          |                                   |            |                      |          |          |                 |                  |                       |           |           |
| 6 - Sleet, Hail                   |                                   |            |                      |          |          |                 |                  |                       |           |           |
| 7 - Blowing Sand                  |                                   |            |                      |          |          |                 |                  |                       |           |           |
| 8 - Severe Crosswinds             |                                   |            |                      |          |          |                 |                  |                       |           |           |
| 9 - Other                         |                                   |            |                      |          |          |                 |                  |                       |           |           |
| 10 - Unk.                         |                                   |            |                      |          |          |                 |                  |                       |           |           |

| Light Condition                 | 1 - Daylight | 2 - Dark (Lighting Unspecified) | 3 - Dark (Street Lamp Not Lit) | 4 - Dark (No lights) |
|---------------------------------|--------------|---------------------------------|--------------------------------|----------------------|
| 1 - Daylight                    |              |                                 |                                |                      |
| 2 - Dark (Lighting Unspecified) |              |                                 |                                |                      |
| 3 - Dark (Street Lamp Not Lit)  |              |                                 |                                |                      |
| 4 - Dark (No lights)            |              |                                 |                                |                      |

| Location Type              | 1 - Freeway | 2 - Four-way Intersection | 3 - T-intersection | 4 - Four-way Intersection | 5 - T-intersection | 6 - Four-way Intersection | 7 - T-intersection | 8 - Four-way Intersection | 9 - T-intersection | 10 - Four-way Intersection | 11 - T-intersection | 12 - Four-way Intersection | 13 - T-intersection | 14 - Four-way Intersection | 15 - T-intersection |
|----------------------------|-------------|---------------------------|--------------------|---------------------------|--------------------|---------------------------|--------------------|---------------------------|--------------------|----------------------------|---------------------|----------------------------|---------------------|----------------------------|---------------------|
| 1 - Freeway                |             |                           |                    |                           |                    |                           |                    |                           |                    |                            |                     |                            |                     |                            |                     |
| 2 - Four-way Intersection  |             |                           |                    |                           |                    |                           |                    |                           |                    |                            |                     |                            |                     |                            |                     |
| 3 - T-intersection         |             |                           |                    |                           |                    |                           |                    |                           |                    |                            |                     |                            |                     |                            |                     |
| 4 - Four-way Intersection  |             |                           |                    |                           |                    |                           |                    |                           |                    |                            |                     |                            |                     |                            |                     |
| 5 - T-intersection         |             |                           |                    |                           |                    |                           |                    |                           |                    |                            |                     |                            |                     |                            |                     |
| 6 - Four-way Intersection  |             |                           |                    |                           |                    |                           |                    |                           |                    |                            |                     |                            |                     |                            |                     |
| 7 - T-intersection         |             |                           |                    |                           |                    |                           |                    |                           |                    |                            |                     |                            |                     |                            |                     |
| 8 - Four-way Intersection  |             |                           |                    |                           |                    |                           |                    |                           |                    |                            |                     |                            |                     |                            |                     |
| 9 - T-intersection         |             |                           |                    |                           |                    |                           |                    |                           |                    |                            |                     |                            |                     |                            |                     |
| 10 - Four-way Intersection |             |                           |                    |                           |                    |                           |                    |                           |                    |                            |                     |                            |                     |                            |                     |
| 11 - T-intersection        |             |                           |                    |                           |                    |                           |                    |                           |                    |                            |                     |                            |                     |                            |                     |
| 12 - Four-way Intersection |             |                           |                    |                           |                    |                           |                    |                           |                    |                            |                     |                            |                     |                            |                     |
| 13 - T-intersection        |             |                           |                    |                           |                    |                           |                    |                           |                    |                            |                     |                            |                     |                            |                     |
| 14 - Four-way Intersection |             |                           |                    |                           |                    |                           |                    |                           |                    |                            |                     |                            |                     |                            |                     |
| 15 - T-intersection        |             |                           |                    |                           |                    |                           |                    |                           |                    |                            |                     |                            |                     |                            |                     |

| Contributing Factors                | 1 - Medical Related | 2 - Aggressive Operation of Vehicle | 3 - Overcorrecting/Over-steering | 4 - Swerving to Avoiding Object | 5 - Wrong Side or Wrong Way | 6 - Under the Influence | 7 - Vision Obscured (Within Unit) | 8 - Improper Lane Usage/Change | 9 - Other Improper Action | 10 - Unk. |
|-------------------------------------|---------------------|-------------------------------------|----------------------------------|---------------------------------|-----------------------------|-------------------------|-----------------------------------|--------------------------------|---------------------------|-----------|
| 1 - Medical Related                 |                     |                                     |                                  |                                 |                             |                         |                                   |                                |                           |           |
| 2 - Aggressive Operation of Vehicle |                     |                                     |                                  |                                 |                             |                         |                                   |                                |                           |           |
| 3 - Overcorrecting/Over-steering    |                     |                                     |                                  |                                 |                             |                         |                                   |                                |                           |           |
| 4 - Swerving to Avoiding Object     |                     |                                     |                                  |                                 |                             |                         |                                   |                                |                           |           |
| 5 - Wrong Side or Wrong Way         |                     |                                     |                                  |                                 |                             |                         |                                   |                                |                           |           |
| 6 - Under the Influence             |                     |                                     |                                  |                                 |                             |                         |                                   |                                |                           |           |
| 7 - Vision Obscured (Within Unit)   |                     |                                     |                                  |                                 |                             |                         |                                   |                                |                           |           |
| 8 - Improper Lane Usage/Change      |                     |                                     |                                  |                                 |                             |                         |                                   |                                |                           |           |
| 9 - Other Improper Action           |                     |                                     |                                  |                                 |                             |                         |                                   |                                |                           |           |
| 10 - Unk.                           |                     |                                     |                                  |                                 |                             |                         |                                   |                                |                           |           |

| Roadway                               | 1 - Debris | 2 - Non-highway Work | 3 - Obstruction in Roadway | 4 - Road Surface Condition (L, W, H) | 5 - Road Surface Condition (L, W, H) | 6 - Road Surface Condition (L, W, H) | 7 - Road Surface Condition (L, W, H) | 8 - Road Surface Condition (L, W, H) | 9 - Road Surface Condition (L, W, H) | 10 - Road Surface Condition (L, W, H) | 11 - Road Surface Condition (L, W, H) | 12 - Road Surface Condition (L, W, H) | 13 - Road Surface Condition (L, W, H) | 14 - Road Surface Condition (L, W, H) | 15 - Road Surface Condition (L, W, H) |
|---------------------------------------|------------|----------------------|----------------------------|--------------------------------------|--------------------------------------|--------------------------------------|--------------------------------------|--------------------------------------|--------------------------------------|---------------------------------------|---------------------------------------|---------------------------------------|---------------------------------------|---------------------------------------|---------------------------------------|
| 1 - Debris                            |            |                      |                            |                                      |                                      |                                      |                                      |                                      |                                      |                                       |                                       |                                       |                                       |                                       |                                       |
| 2 - Non-highway Work                  |            |                      |                            |                                      |                                      |                                      |                                      |                                      |                                      |                                       |                                       |                                       |                                       |                                       |                                       |
| 3 - Obstruction in Roadway            |            |                      |                            |                                      |                                      |                                      |                                      |                                      |                                      |                                       |                                       |                                       |                                       |                                       |                                       |
| 4 - Road Surface Condition (L, W, H)  |            |                      |                            |                                      |                                      |                                      |                                      |                                      |                                      |                                       |                                       |                                       |                                       |                                       |                                       |
| 5 - Road Surface Condition (L, W, H)  |            |                      |                            |                                      |                                      |                                      |                                      |                                      |                                      |                                       |                                       |                                       |                                       |                                       |                                       |
| 6 - Road Surface Condition (L, W, H)  |            |                      |                            |                                      |                                      |                                      |                                      |                                      |                                      |                                       |                                       |                                       |                                       |                                       |                                       |
| 7 - Road Surface Condition (L, W, H)  |            |                      |                            |                                      |                                      |                                      |                                      |                                      |                                      |                                       |                                       |                                       |                                       |                                       |                                       |
| 8 - Road Surface Condition (L, W, H)  |            |                      |                            |                                      |                                      |                                      |                                      |                                      |                                      |                                       |                                       |                                       |                                       |                                       |                                       |
| 9 - Road Surface Condition (L, W, H)  |            |                      |                            |                                      |                                      |                                      |                                      |                                      |                                      |                                       |                                       |                                       |                                       |                                       |                                       |
| 10 - Road Surface Condition (L, W, H) |            |                      |                            |                                      |                                      |                                      |                                      |                                      |                                      |                                       |                                       |                                       |                                       |                                       |                                       |
| 11 - Road Surface Condition (L, W, H) |            |                      |                            |                                      |                                      |                                      |                                      |                                      |                                      |                                       |                                       |                                       |                                       |                                       |                                       |
| 12 - Road Surface Condition (L, W, H) |            |                      |                            |                                      |                                      |                                      |                                      |                                      |                                      |                                       |                                       |                                       |                                       |                                       |                                       |
| 13 - Road Surface Condition (L, W, H) |            |                      |                            |                                      |                                      |                                      |                                      |                                      |                                      |                                       |                                       |                                       |                                       |                                       |                                       |
| 14 - Road Surface Condition (L, W, H) |            |                      |                            |                                      |                                      |                                      |                                      |                                      |                                      |                                       |                                       |                                       |                                       |                                       |                                       |
| 15 - Road Surface Condition (L, W, H) |            |                      |                            |                                      |                                      |                                      |                                      |                                      |                                      |                                       |                                       |                                       |                                       |                                       |                                       |

| Non-Motorist | 1 - Pedestrian | 2 - Bicyclist | 3 - Horse | 4 - Other | 5 - Unk. |
|--------------|----------------|---------------|-----------|-----------|----------|
|              |                |               |           |           |          |

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RECEIVED JUL 19 2010

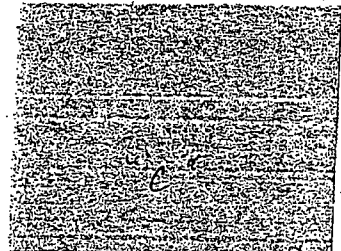
STATE OF NEW YORK )

COUNTY OF SUFFOLK )

) AFFIDAVIT OF ANTHONY BERNARDO  
) PURSUANT TO § 38-77-170 (S.C. CODE OF  
) LAWS) (2002)

PERSONALLY APPEARED before me, Anthony Bernardo, who, being duly sworn  
deposes and says:

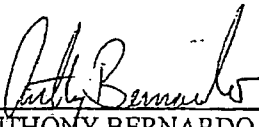
1. That I am Anthony Bernardo and I reside at 12 Rose Street, Hauppauge, New York, 11788.
2. On Friday, April 30, 2010 I was traveling to Florida with Dan Falenza in my 1998 Dodge Durango automobile.
3. I was traveling in the outside southbound lane of Interstate 95 in Florence County, South Carolina, 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.
5. I pulled over into the inside lane and turned around in the median so my vehicle's headlights would illuminate the accident scene.
6. When I reached the cab of the truck it was wrapped around the column and the driver, an elderly white male, who I later learned was Bobby Lee Tucker, Sr., stated that something was in the road. He remained conscious until EMS arrived on scene.
7. When I looked at the truck cab it was raised up as if it was on top of something.
8. When the South Carolina Highway Patrol trooper arrived I gave him my contact information and told him what I had observed.



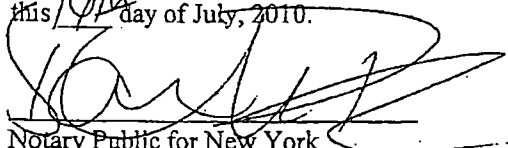
ROA\_0324

Appendix\_0328

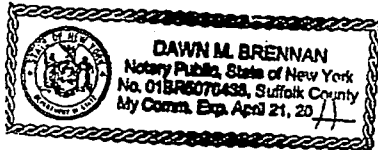
The affiant sayeth nothing more.

  
\_\_\_\_\_  
ANTHONY BERNARDO

Sworn to and subscribed before me  
this 14<sup>th</sup> day of July, 2010.

  
\_\_\_\_\_  
Notary Public for New York

My Commission expires: \_\_\_\_\_



ROA\_0325

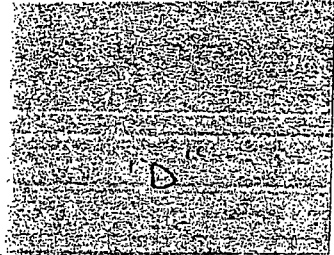
Appendix\_0329

STATE OF NEW YORK )  
COUNTY OF SUFFOLK ) AFFIDAVIT OF ANTHONY BERNARDO  
PURSUANT TO § 38-77-170 (S.C. CODE OF  
LAWS) (2002)

PERSONALLY APPEARED before me, Anthony Bernardo, who, being duly sworn  
deposes and says:

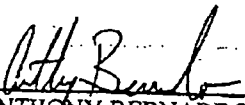
1. That I am Anthony Bernardo and I reside at 12 Rose Street, Hauppauge, New York, 11788.
2. On Friday, April 30, 2010 I was traveling to Florida with Dan Valenza in my 1998 Dodge Durango automobile.
3. I was traveling in the outside southbound lane of Interstate 95 in Florence County, South Carolina, 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 left as if to avoid something in the roadway and in doing so struck a cement pillar supporting the overpass.
5. I pulled over into the inside lane and turned around in the median so my vehicle's headlights would illuminate the accident scene.
6. When I reached the cab of the truck it was wrapped around the column and the driver, an elderly white male, who I later learned was Bobby Lee Tucker, Sr., stated that something was in the road. He remained conscious until EMS arrived on scene.
7. When I looked at the truck cab it was raised up as if it was on top of something.
8. When the South Carolina Highway Patrol trooper arrived I gave him my contact information and told him what I had observed.

A FALSE STATEMENT MADE CONCERNING THE FACTS CONTAINED IN THIS  
AFFIDAVIT MAY SUBJECT THE PERSON MAKING THE FALSE STATEMENT TO  
CRIMINAL PENALTIES AS PROVIDED BY LAW.

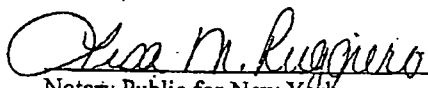




The affiant sayeth nothing more.

  
ANTHONY BERNARDO

Sworn to and subscribed before me  
this 3rd day of March, 2011.

  
Notary Public for New York  
My Commission expires: \_\_\_\_\_

LISA M. RUGGIERO  
NOTARY PUBLIC-STATE OF NEW YORK  
No. 01804188671  
Qualified in Suffolk County  
My Commission Expires January 08, 2015

ROA\_0327

Appendix\_0331

**§ 38-77-170. Conditions to sue or recover under uninsured motorist provision when owner or operator of motor vehicle causing injury or damage is unknown.**

Archive

South Carolina Statutes

Title 38. Insurance

Chapter 77. AUTOMOBILE INSURANCE

Article 3. MANDATE TO WRITE AND INSURANCE COVERAGE

Current through 2011 Act No. 1

**§ 38-77-170. Conditions to sue or recover under uninsured motorist provision when owner or operator of motor vehicle causing injury or damage is unknown**

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 the 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.

The following statement must be prominently displayed on the face of the affidavit provided in subitem (2) above: A FALSE STATEMENT CONCERNING THE FACTS CONTAINED IN THIS AFFIDAVIT MAY SUBJECT THE PERSON MAKING THE FALSE STATEMENT TO CRIMINAL PENALTIES AS PROVIDED BY LAW.

**Bradley v. Doe, 374 S.C. 622, 649 S.E.2d 153 (S.C.App. 2007)**

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649 S.E.2d 153 (S.C.App. 2007)

374 S.C. 622

Ernest Lamar BRADLEY and Esther K. Bradley, Appellants,

v.

John DOE and AccuSweep, Inc., Respondents.

No. 4274.

Court of Appeals of South Carolina.

July 6, 2007

Submitted May 9, 2007.

Rehearing Denied Aug. 27, 2007.

Certiorari Granted June 12, 2008.

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Donald Higgins Howe and Walter Bilbro, Jr. , of Charleston, for Appellants.

Margaret Helen Fanning, of Charleston, for Respondents.

ANDERSON , J.

[374 S.C. 623] Ernest Lamar Bradley (Bradley) appeals the trial court's decision granting John Doe (Doe) summary judgment on Bradley's claim for recovery under his uninsured motorist coverage.<sup>[1]</sup> Bradley (1) contends the trial court erred in finding no one independently witnessed Bradley's accident, and (2) maintains independent witnesses existed to provide circumstantial evidence that an unknown vehicle caused the accident. We affirm.<sup>[2]</sup>

**[374 S.C. 624] FACTUAL/PROCEDURAL BACKGROUND**

On December 18, 2002, Bradley left the Waffle House restaurant at approximately 3:00 a.m. and began driving home. After traveling less than one-quarter mile on College Park Road in Ladson, South Carolina, Bradley swerved to avoid an object in the northbound lane. Bradley lost control of his vehicle, veered off the road, and struck a tree.

Bradley telephoned his son, whom he left minutes earlier at the Waffle House, to come and assist him. After summoning his son Bradley walked to the side of the road and began signaling for help with a flashlight. At about 3:15 a.m., United States Air Force Lieutenant Colonel Clifton Douglas, Jr. drove passed Bradley, turned his vehicle around, and headed toward the accident scene. When Douglas returned in the northbound lane he saw a "large white garbage can bag" in the middle of his lane. Douglas parked his vehicle, approached Bradley, and

<http://aol.lawwriter.net/CaseView.aspx?code=SC&DocId=15524&Tid=9/5-8/5-1000/2-16> 6/17/2010

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observed that Bradley was bleeding from a head laceration. While helping Bradley, Douglas heard another passing vehicle strike and drag the garbage bag down the road. Bradley's son and daughter subsequently arrived and noted the trash bag and trash scattered on the roadway.

Bradley's friend, Thomas Bosley, had been with Bradley at the Waffle House. As Bosley drove home on College Park Road minutes before Bradley, he saw "a large trash bag in the middle of the [northbound] lane," less than one-quarter mile from the restaurant. Bosley claimed he narrowly avoided the garbage bag and continued driving about another quarter-mile on College Park Road when he encountered a "white street sweeper's truck." Bosley observed this truck "drop another similar trash bag onto the public roadway." He learned the next morning about Bradley's accident.

Bradley brought this action against his insurer to collect under the uninsured motorist provision of his policy. The insurer represented Doe as the unknown driver. Doe moved for summary judgment arguing Bradley failed to satisfy the statutory requirement for recovery under the uninsured policy provision because no one independently witnessed Bradley's accident. The trial court granted Doe's summary judgment [374 S.C. 625] motion and denied Bradley's motion to alter or amend the judgment.

**STANDARD OF REVIEW**

In reviewing the grant of a motion for summary judgment, the appellate court applies the same standard of review as the trial court under Rule 56, SCRPC. *Pye v. Estate of Fox*, 369 S.C. 555, 563, 633 S.E.2d 505, 509 (2006). Summary judgment is proper when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Rule 56(c), SCRPC ("The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."); *Madison ex rel. Bryant v. Babcock Center, Inc.*, 371 S.C. 123, 134, 638 S.E.2d 650, 655 (2006); *Houck v. State Farm Fire & Cas. Ins. Co.*, 366 S.C. 7, 11, 620 S.E.2d 326, 329 (2005); *Pittman v. Grand Strand Entm't, Inc.*, 363 S.C. 531, 536, 611 S.E.2d 922, 925 (2005); *B & B Liquors, Inc. v. O'Neil*, 361 S.C. 267, 270, 603 S.E.2d 629, 631 (Ct.App.2004). In determining whether any triable issues of fact exist, the evidence and all reasonable inferences therefrom must be viewed in the light most favorable to the non-moving party; *Medical Univ. of South Carolina v. Arnaud*, 360 S.C. 615, 619, 602 S.E.2d 747, 749 (2004); *Rife v. Hitachi Constr. Mach. Co., Ltd.*, 363 S.C. 209, 213, 609 S.E.2d 565, 567 (Ct.App.2005).

The party seeking summary judgment has the burden of clearly establishing the absence of a genuine issue of material fact. *Jones v. State Farm Mut. Auto. Ins. Co.*, 364 S.C. 222, 228, 612 S.E.2d 719, 722 (Ct.App.2005) (citing *McCall v. State Farm Mut. Auto. Ins. Co.*, 359 S.C. 372, 376, 597 S.E.2d 181, 183 (Ct.App.2004)). Once the party moving for summary judgment meets the initial burden of showing an absence of evidentiary support for the opponent's case, the opponent cannot simply rest on mere allegations or denials contained in the pleadings. *Id.* citing *Regions Bank v. Schmauch*, 354 S.C. 648, 660, 582 S.E.2d 432, 438 (Ct.App.2003). Rather, the nonmoving party must come forward with specific facts showing there is a genuine issue for trial. [374 S.C. 626] *Jones*, 364 S.C. at 228, 612 S.E.2d at 722 (citation omitted). The purpose of summary judgment is to expedite disposition of cases which do not require the services of a fact finder. *Id.* "Summary judgment is a drastic remedy which should be cautiously invoked so that a litigant is not improperly deprived of a trial on disputed factual issues." *BPS, Inc. v. Worthy*, 362 S.C. 319, 326, 608 S.E.2d 155, 159 (Ct.App.2005).

**LAW/ANALYSIS**

Bradley asserts the trial court erred in granting Doe's summary judgment motion. Specifically, Bradley urges that he satisfied the independent witness requirement in section 38-77-170(2) of the South Carolina Code of Laws by providing testimony from independent

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<http://aol-lawriter.net/CaseView.aspx?cod=SC&DocId=155248&Index=0450%5a102%2a16> 6/17/2010

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witnesses regarding circumstantial evidence of an unknown driver's negligence. We disagree.

### **I. Requirements of S.C.Code Ann. § 38-77-170**

Section 38-77-170 establishes the conditions under which an insured may recover uninsured motorist coverage when the owner or operator of the motor vehicle causing injury or damage is unknown:

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 the 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.

S.C.Code Ann. § 38-77-170 (2002) (emphasis added).

Where there is no physical contact with a vehicle driven by an unknown motorist, someone other than the owner or operator [374 S.C. 627] of the insured vehicle must have witnessed the accident and attest to the facts of the accident in a signed affidavit. *See Wausau Underwriters Insurance Company v. Howser*, 309 S.C. 269, 274-75, 422 S.E.2d 106, 110 (1992) (holding "no physical contact with the unknown vehicle is necessary when a witness other than the owner or driver of the insured vehicle is available to attest to the facts of the accident." ).

### **II. Rules of Statutory Construction**

The primary rule of statutory construction is to ascertain and give effect to the intent of the legislature. *Mid-State Auto Auction of Lexington, Inc. v. Altman*, 324 S.C. 65, 69, 476 S.E.2d 690, 692 (1996) ; *Shealy v. Doe*, 370 S.C. 194, 199, 634 S.E.2d 45, 48 (Ct.App.2006) . The first question of statutory interpretation is whether the statute's meaning is clear on its face. *Wade v. Berkeley County*, 348 S.C. 224, 229, 559 S.E.2d 586, 588 (2002) ; *Eagle Container Co., LLC v. County of Newberry*, 366 S.C. 611, 622, 622 S.E.2d 733, 738 (Ct.App.2005) ( *cert. granted* January 31, 2007).

When a statute's language is plain and unambiguous, and conveys a clear and definite meaning, the rules of statutory interpretation are not needed, and this Court has no right to impose another meaning. *Catawba Indian Tribe of South Carolina v. State*, 372 S.C. 519, 525, 642 S.E.2d 751, 754 (2007) ; *see Vaughn v. Bernhardt*, 345 S.C. 196, 198, 547 S.E.2d 869, 870 (2001) . "[T]he words of the statute must be given their plain and ordinary meaning without resorting to subtle or forced construction to limit or expand the statute's operation." *Mun. Ass'n of S.C. v. AT&T Communications of S. States, Inc.*, 361 S.C. 576, 580, 606 S.E.2d 468, 470 (2004) ; *see also Miller v. Doe*, 312 S.C. 444, 447, 441 S.E.2d 319, 321 (1994) ("In determining the meaning of a statute, the terms used therein must be taken in their ordinary and popular meaning, nothing to the contrary appearing." ).

The legislature's intent should be ascertained primarily from the plain language of the statute. *Jones v. State Farm Mut. Auto. Ins. Co.*, 364 S.C. 222, 230, 612 S.E.2d 719, 723 (Ct.App.2005) (citing *State v. Landis*, 362 S.C. 97, 102, 606 S.E.2d 503, 506 (Ct.App.2004) ; *Stephen v. Avins Const. Co.*, 324 S.C. 334, 339, 478 S.E.2d 74, 77 (Ct.App.1996) ). What a legislature says in the text of a statute is considered the best [374 S.C. 628] evidence of the legislative intent or will. *Jones*, 364 S.C. at 230, 612 S.E.2d at 723 (citing *Bayle v. South Carolina Dept. of Transp.*, 344 S.C. 115, 122, 542 S.E.2d 736, 740 (Ct.App.2001) ). The language must be read in a sense which harmonizes with its subject matter and accords with its general purpose. *Jones*, 364 S.C. at 230, 612 S.E.2d at 723 (citing

*Hitachi Data Sys. v. Leatherman*, 309 S.C. 174, 178, 420 S.E.2d 843, 846 (1992) ). The court's primary function in interpreting a statute is to ascertain the intent of the General Assembly. *Smith v. South Carolina Ins. Co.*, 350 S.C. 82, 87, 564 S.E.2d 358, 361 (Ct.App.2002) . "Once the legislature has made [a] choice, there is no room for the courts to impose a different judgment based upon their own notions of public policy." *South Carolina Farm Bureau Mut. Ins. Co. v. Mumford*, 299 S.C. 14, 19, 382 S.E.2d 11, 14 (Ct.App.1989) .

If the language of an act gives rise to doubt or uncertainty as to legislative intent, the construing court may search for that intent beyond the borders of the act itself. *State v. Morgan*, 352 S.C. 359, 367, 574 S.E.2d 203, 207 (Ct.App.2002) . "Statutes, as a whole, must receive practical, reasonable, and fair interpretation, consonant with the purpose, design, and policy of lawmakers." *Collins Music Co., Inc. v. IGT*, 365 S.C. 544, 550, 619 S.E.2d 1, 3 (Ct.App.2005) (quoting *TNS Mills, Inc. v. South Carolina Dep't of Revenue*, 331 S.C. 611, 624, 503 S.E.2d 471, 478 (1998) ). Courts will reject a statutory interpretation which would lead to a result so plainly absurd that it could not have been intended by the legislature or would defeat the plain legislative intention. *Jones*, 364 S.C. at 230, 612 S.E.2d at 723 (citing *Unisun Ins. Co. v. Schmidt*, 339 S.C. 362, 368, 529 S.E.2d 280, 283 (2000) ; *Kiriakides v. United Artists Communications, Inc.*, 312 S.C. 271, 275, 440 S.E.2d 364, 366 (1994) ). A court should not consider a particular clause in a statute as being construed in isolation, but should read it in conjunction with the purpose of the whole statute and the policy of the law. See *Hinton v. South Carolina Dept. of Prob., Parole and Pardon Servs.*, 357 S.C. 327, 333, 592 S.E.2d 335, 338 (Ct.App.2004) ; *Doe v. Roe*, 353 S.C. 576, 580, 578 S.E.2d 733, 735-36 (Ct.App.2003) .

### III. Interpretation of S.C.Code Ann § 38-77-170

"The issue of interpretation of a statute is a question of law for the court." [374 S.C. 629] *Catawba Indian Tribe*, 372 S.C. at 519, 642 S.E.2d at 754 (citing *Charleston County Parks & Recreation Comm'n v. Somers*, 319 S.C. 65, 67, 459 S.E.2d 841, 843 (1995) ("The determination of legislative intent is a matter of law." )).

Section 38-77-170 (2) is clear on its face. It expressly requires that someone other than the owner or operator of the insured vehicle witness the accident. "The plain language of § 38-77-170 (2) requires that where the accident involves no physical contact between the insured's vehicle and the unidentified vehicle, the accident 'must have been witnessed by someone other than the owner or operator of the insured vehicle' and the 'witness must sign an affidavit attesting to the truth of the facts of the accident contained therein.'" *Collins v. Doe*, 352 S.C. 462, 470, 574 S.E.2d 739, 744 (2002) .

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.

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.

*Shealy v. Doe*, 370 S.C. 194, 202, 634 S.E.2d 45, 49 (Ct.App.2006) cert. pending (citing *Gilliland v. Doe*, 357 S.C. 197, 199-200, 592 S.E.2d 626, 627-28 (2004) ).

The legislature again amended the statute in 1989, and added the sworn affidavit requirement. The statute at large effecting this most recent amendment provides that the act is "to amend section 38-77-170 relating to the requirements to recover under the uninsured motorist provisions when the at-fault party is unknown, so as to require a witness to the accident to sign an affidavit attesting to the truth of the facts about the accident and to provide a warning statement to be displayed on the affidavit." Act No. 148, 1989 S.C. Acts 439.

*Collins*, 352 S.C. at 466, 574 S.E.2d at 741 .

In *Collins*, our supreme court concluded that "[t]he legislature unambiguously required

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that a plaintiff seeking to recover [374 S.C. 630] against her uninsured motorist coverage for the negligence of an unknown John Doe driver strictly comply with the plain language of the statute." 352 S.C. at 466, 574 S.E.2d at 741. In order to avoid colliding with vehicle driven by an unknown driver, Collins swerved and collided with another vehicle. *Id.* at 464-65, 574 S.E.2d at 740. She sustained injuries and sought recovery under her uninsured policy provision. *Id.* Although Collins did not produce a witness-signed affidavit at trial, she produced a witness at trial who testified the unknown driver caused Collins' collision. *Id.* Collins argued the witness' testimony satisfied the statutory requirements under section 38-77-170 (2). *Id.*

Citing *Criterion Ins. Co. v. Hoffmann*, 258 S.C. 282, 188 S.E.2d 459, (1972), the *Collins* court reiterated the historical reasoning underlying the strict compliance requirement:

The right to sue and collect from one's own liability insurance carrier in case of a loss caused by a hit-and-run driver or other driver of an uninsured automobile is a creature of the legislature. Except for the statute, and endorsements required, no right exists to recover from one's own insurance carrier. One must look to the terms of the uninsured motorist statute and policy endorsements and comply therewith to get the benefit of law....

It is the province of the lawmakers to create a right of action, to provide for process and to declare the procedure for collecting from one's own insurance carrier....

The terms of the statute ... are clear and not ambiguous. This being true, there is no room for construction and we are required to apply the statute according to its literal meaning. Most courts take a liberal view when dealing with the question of coverage; however, the procedural obligations that the insured must discharge in order to recover, since they are prescribed by statute, are viewed by the courts as mandatory, and strict compliance with them is a prerequisite to recover.

*Collins*, 352 S.C. at 467-68, 574 S.E.2d at 741-42 (quoting *Criterion*, 258 S.C. at 290-92, 188 S.E.2d at 462-63).

The court held strict compliance was mandatory and reversed the court of appeals' ruling that testimony at trial was the "functional equivalent" of a signed affidavit. [374 S.C. 631] *Collins*, 352 S.C. at 471, 574 S.E.2d at 743. "The statute makes no provision for the functional equivalent of an affidavit." *Id.* Consequently, the court declined to create an exception in the statute where none previously existed. *Id.*

In *Gilliland v. Doe*, our supreme court considered "to what extent an independent witness must testify about the causal connection between the unknown vehicle and the accident ..." in order to comply with section 38-77-170 (2). 357 S.C. at 200, 592 S.E.2d at 628. Gilliland crashed into a tree after being run off the road by an unknown vehicle. *Id.* at 198, 592 S.E.2d at 627. A witness waiting to enter the same roadway saw Gilliland crash, but did not see the unknown vehicle. *Id.* However, before the accident the witness did observe two sets of oncoming headlights. *Id.* After Gilliland's crash the witness noticed the second set of headlights "arcing through a field," as if making a u-turn and leaving the accident scene. *Id.*

Addressing the requirement that an independent witness must attest to "the truth of the facts of the accident," the *Gilliland* court agreed with the court of appeals' interpretation 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." *Id.* at 200, 592 S.E.2d at 628. The court concluded the witness's attestation provided circumstantial evidence supporting Gilliland's testimony "that an unknown driver contributed to her accident." *Id.* at 202, 592 S.E.2d at 629. Specifically, the court determined the witness, in addition to observing the accident, "saw the lights of an unknown car that was turning around and fleeing the scene of the accident." *Id.* (citing *Marks v. Indus. Life & Health Ins. Co.*, 212 S.C. 502, 505, 48 S.E.2d 445, 446 (1948)) ("The 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,

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which must themselves be proven lead to the conclusion with reasonable certainty." )).

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In contrast to the holding in *Collins*, the *Gilliland* court reasoned the "fact requirement in section 38-77-170 (2) was 'arguably ambiguous' and 'therefore, a strict interpretation ... would undermine the statute's purpose.'" *Gilliland*, 357 S.C. at 201, 592 S.E.2d at 628. The plaintiff in [374 S.C. 632] *Shealy v. Doe*, 370 S.C. 194, 200, 634 S.E.2d 45, 48 (2006), attempted to broaden *Gilliland* by urging that evidence other than the personal observations of an independent eye witness might satisfy section 38-77-170 (2). In *Shealy*, two men riding in a truck bed were thrown from the vehicle and injured when the driver swerved suddenly to allegedly avoid hitting an unknown vehicle. *Id.* at 196, 634 S.E.2d at 46. Shealy submitted an affidavit stating the driver of the truck told him he swerved to avoid colliding with an unknown vehicle. *Id.* at 197, 634 S.E.2d at 46. We held Shealy's affidavit did not satisfy the independent witness requirement under section 38-77-170 (2). *Id.* at 198, 634 S.E.2d at 47.

Shealy asserted section 38-77-170 (2) did not require the witness's affidavit to be based on personal knowledge. This court concluded that argument directly contravened the language of the statute:

Shealy submitted affidavits of two people who apparently did not witness the accident; their affidavits do not attest to facts they perceived, but merely restate the perceptions of the vehicle's operator. Thus Shealy produced no evidence that someone other than [ ], the operator of the insured vehicle, witnessed the accident. [The] affidavits do not comply with th[e] express directive [in section 38-77-170 (2)].

*Id.* at 200, 634 S.E.2d at 48.

We reasoned that

Shealy's interpretation of section 38-77-170 (2) would totally eviscerate the statute's efficacy as it would allow an owner or operator to inform any third-party of the facts of the accident and have that third-party swear out an affidavit as to the owner or operator's version of the events. In *Collins*, our supreme court elucidated that the "obvious purpose" of the affidavit requirement of section 38-77-170 (2) is "fraud prevention." Shealy's reading of the statute would circumvent the fraud-preventing function of subsection (2), rendering that section meaningless.

*Id.* at 200-201, 634 S.E.2d at 48-49 (internal citation omitted).

Relying on *Gilliland*, Shealy maintained the affiants provided circumstantial evidence of the accident sufficient to comply with section 38-77-170 (2). *Id.* at 201, 634 S.E.2d at 49. We [374 S.C. 633] distinguished *Gilliland*, explaining the affidavits Shealy submitted, unlike those in *Gilliland*, did not contain circumstantial evidence based on independent personal knowledge that supported the driver's version of the accident. *Id.* at 205, 634 S.E.2d at 51. At best, Shealy's affidavits merely repeated the driver's account of what happened and did not independently corroborate the driver's version of the accident. *Id.*

The purpose of section 38-77-120(2) is to prevent fraud. Concomitantly, the affidavit of the independent witness must contain some independent evidence that an unknown vehicle was involved in the accident. Shealy failed to satisfy the statute's mandate; thus, the court properly granted summary judgment.

*Id.*

#### IV. The Factual Record

The sole issue for consideration in the case *sub judice* is whether the circumstantial evidence provided by Bradley's affiants complies with the statutory mandate in section 38-77-170(2). We hold it does not.

Bradley relies on *Gilliland* in maintaining that circumstantial evidence provided by independent witnesses is sufficient to survive summary judgment. 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. The witness's testimony, based on her personal observations, independently corroborated *Gilliland*'s account of how that accident occurred.

Here, Bradley was the only witness to the accident. None of the affiants actually saw Bradley swerve to avoid a trash bag in the road and collide with the tree. By Bradley's

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own testimony, he initially thought it was an injured dog lying in the road that caused him to veer off and lose control. The fact that three people saw the bag of trash in the same roadway does not implicate involvement of another vehicle. Testimony that a sweeper truck a quarter mile down the roadway dropped a similar trash bag likewise fails to establish [374 S.C. 634] a sufficient causal link between the sweeper truck and Bradley's collision.

Our courts have historically required strict compliance with section 38-77-170 (2). *Collins v. Doe*, 352 S.C. 462, 470, 574 S.E.2d 739, 743 (2002) Where the accident involves no physical contact between the insured's vehicle and the unknown vehicle, the accident "must have been witnessed by someone other than the owner or operator of the insured vehicle" and the witness must sign an affidavit attesting to the truth of the facts of the accident contained therein. *Id.* "Under the rules of statutory interpretation, use of words such as 'shall' or 'must' indicates the legislature's intent to enact a mandatory requirement." *Id.*

A plaintiff's strict compliance with the affidavit requirement is mandatory. In *Collins*, the court held trial testimony was not the functional equivalent of an affidavit and did not satisfy the affidavit requirement. In *Shealy*, witnesses' affidavits based on third-party communication rather than on personal knowledge of how the accident occurred failed to meet the affidavit requirement. Contrastively, in *Gilliland*, the independent witness's personal observations of the accident corroborated Gilliland's own account of the facts surrounding her accident and complied with the affidavit requirement.

"For circumstantial evidence to be sufficient to warrant the finding of a fact, the circumstances must lead to the conclusion with reasonable certainty and must have sufficient probative value to constitute the basis for a legal inference, not for mere speculation." *Shealy v. Doe*, 370 S.C. 194, 205, 634 S.E.2d 45, 51 (Ct.App.2006) . Bradley's affiants had no personal knowledge of the facts of the accident. Their observations before and after the accident did not establish with [374 S.C. 635] reasonable certainty a causal connection between Bradley's injury and an unknown vehicle. The affidavits of independent witnesses must contain some independent evidence of an unknown vehicle's involvement in the accident. Bradley failed to comply with the statute's mandate.

**CONCLUSION**

We rule the affidavits submitted by Bradley did not raise a genuine issue of material fact as to whether Bradley's collision resulted from involvement with an unknown vehicle. The trial court properly granted Doe's summary judgment motion.

Accordingly, the trial court's decision is

**AFFIRMED.**

KITTREDGE, J., concurs.

SHORT, J. dissents in a separate opinion.

SHORT, J. (dissenting).

I would reverse the order granting summary judgement and for that reason, I respectfully dissent. I adopt the majority's facts and standard of review, but I disagree with the analysis and would find as follows.

Section 38-77-170 of the South Carolina Code dictates the "conditions to sue or recover under uninsured motorist provision when owner or operator of motor vehicle causing injury or damage is unknown" and states:

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

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police authority within a reasonable time, under all the 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 [374 S.C. 636] 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.

The record fails to include any allegation that Bradley failed to comply with the first or third elements of the above statutory requirement. However, Doe claims Bradley failed to meet either of the two possible prongs set forth in the statute's second requirement. I will address these requirements individually.

The first possible manner in which the second requirement could be met would be to offer proof that the unknown vehicle contacted the insured's vehicle during the accident. Bradley does not allege any contact was made with another vehicle, but he noted in his affidavit that he believed he had made contact with the garbage bag prior to veering off the road. The trial court correctly applied South Carolina case law in finding that even if this contact had occurred, it would not constitute physical contact with the unknown vehicle as required by the statute. *See Wynn v. Doe*, 255 S.C. 509, 180 S.E.2d 95 (1971) (holding a motorcyclist's contact with a very slick and dangerous chemical substance on the highway, such having been dumped or spilled there by an unknown vehicle, did not constitute physical contact with the unknown vehicle); *See also Davis v. Doe*, 285 S.C. 538, 331 S.E.2d 352 (1985) (holding a wheel bearing which had dislodged from an unknown vehicle and broken through the insured's windshield did not constitute physical contact with the unknown vehicle).

The above noted *Davis* opinion, while noting the physical contact requirement was instituted to prevent fraudulent claims, invited the legislature to change this strict physical contact requirement should they find such a change to be "advisable." 285 S.C. at 541, 331 S.E.2d at 354. Perhaps in response to this invitation, the legislature, in a 1987 amendment, added a second means by which an insured could satisfy the statutory requirements for recovery.<sup>[4]</sup> *See [374 S.C. 637] Wausau Underwriters Insurance Company v. Howser*, 309 S.C. 269, 275, 422 S.E.2d 106, 109 (1992). This second prong (Witness Prong) requires that a witness to the accident other than the owner/operator of the insured vehicle must attest in a signed affidavit to the facts of the accident.

While it is clear an item which has fallen from an unknown vehicle and struck an insured's vehicle can not satisfy the physical contact element of the statutory requirement, I see no reason why it could not satisfy the Witness Prong. The wisdom behind not allowing the physical contact requirement to be satisfied by contact with something which has fallen off a vehicle is evident. A vehicle owner or operator who sought to defraud could easily refer to any item as having dislodged from an unknown vehicle and struck his vehicle while leaving the insurance company without a means to determine otherwise. However, I fail to see how an independent witness observing an item falling from a vehicle would not be permitted to satisfy the Witness Prong of the statutory requirement. I can discern no difference between a vehicle owner or operator who crashes in evasion of an item which has fallen off a vehicle and a vehicle owner or operator who crashes in evasion of the vehicle itself. Both situations result in an unknown vehicle causing bodily injury and/or property damage to the insured. In either instance, the same protection against fraud would apply in that a witness other than the vehicle owner or operator would have to submit an affidavit attesting to the events which caused the accident.

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Having established the applicability of the statute, I now seek to determine its satisfaction.

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Doe urges this court to construe the statute strictly. He argues the statute's language "the accident must have been witnessed" dictates that the affidavits of only those who have seen the accident itself are permitted. I find such a strict construction of the statute would undermine the statute's purpose. In fact, our state Supreme Court has recognized ambiguities in § 38-77-170 (2) and has urged a liberal construction. [374 S.C. 638] *Howser*, 309 S.C. at 275, 422 S.E.2d at 110; *Gilliland v. Doe*, 357 S.C. 197, 201, 592 S.E.2d 626, 628 (2004).

I believe the intent of the language "the accident must have been witnessed" is to direct that the witness must have observed the factors leading to the accident. 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 *Shealy v. Doe*, this court found that two men who had been thrown from the back of a swerving pick-up truck were not entitled to recover under the driver's uninsured motorist policy. 370 S.C. 194, 634 S.E.2d 45 (2006). The affidavits submitted by these two men stated that the driver of the pick-up truck told them that he had swerved to avoid colliding with an unknown vehicle. *Id.* at 197, 634 S.E.2d at 46. This court held these affidavits "do not attest to facts they perceived, but merely restate the perceptions of the vehicle's operator." *Id.* at 200, 634 S.E.2d at 48. Additionally, this court stated that the affidavits were from two people who apparently did not witness the accident. *Id.* Clearly, these two men thrown from the truck witnessed the accident itself. In fact, there was no accident until they were thrown from the truck and landed on the roadway. Thus, this court was clearly construing "witnessing the accident" to mean "witnessing the events leading to the accident."

In *Gilliland v. Doe*, Gilliland, after crashing into a tree and sustaining significant injuries, alleged she was run off the road by an unknown vehicle. 357 S.C. at 198, 592 S.E.2d at 627. No one other than Gilliland witnessed the unknown vehicle. Another driver, Gayle Norris, was waiting to enter the roadway when she observed Gilliland round a curve in the road and crash. *Id.* at 198-99, 592 S.E.2d at 627. Norris never saw a second vehicle, but did observe two sets of headlights, and observed the second set of headlights "arcing through a field" as if the second vehicle was making a u-turn and leaving the accident scene. *Id.*

[374 S.C. 639] The *Gilliland* court entertained an analysis of whether circumstantial evidence could be used to satisfy the independent witness requirement. If Norris's witnessing the accident alone were enough, then the Court would not have performed an analysis to determine if circumstantial evidence was appropriate evidence to be used in documenting the events leading to the accident. Further, the Supreme Court agreed with this court's earlier characterization of the § 38-77-170 (2) requirement. Both courts found that the independent witness must "be able to attest to the circumstances surrounding the accident, i.e. what actions of the unknown driver contributed to the accident." *Id.* at 201, 592 S.E.2d at 628 (quoting *Gilliland v. Doe*, 351 S.C. 497, 501-02, 570 S.E.2d 545, 548 (Ct.App.2002)). The Supreme Court found this analysis "constitutes a fair interpretation of the ambiguous fact requirement of § 38-77-170 (2)." *Gilliland*, 357 S.C. at 201, 592 S.E.2d at 628.

I find the critical query in these matters is not whether an independent witness has observed the actual accident itself, but rather it is whether an independent witness has observed evidence of an unknown vehicle causing bodily injury or property damage to the insured. To find otherwise could create absurd results. One could reasonably foresee an independent witness who clearly observes an unknown vehicle create a hazard but be prevented from attesting to these facts because just prior to the accident he lost sight of the vehicles as they rounded a bend in the road. In situations where an independent

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witness observes evidence of an unknown vehicle's contribution to the accident, I fail to see the necessity of observing the accident itself. This is especially true in light of the purpose of § 38-77-170 (2). This statute was enacted to protect insured drivers from damages caused by unknown drivers while maintaining safeguards against fraudulent claims. *Gilliland*, 357 S.C. at 199, 592 S.E.2d at 627. Our Supreme Court has instructed that legislative intent must be construed only after reading each of the statutes contained in the same act together. *Burns v. State Farm Mut. Auto. Ins. Co.*, 297 S.C. 520, 522, 377 S.E.2d 569, 570 (1989). This court has noted "the uninsured motorist legislation is remedial in nature, enacted for the benefit of injured persons, and is to be liberally construed so that the purpose intended may be accomplished." [374 S.C. 640] *Franklin v. Devore*, 327 S.C. 418, 421, 489 S.E.2d 651, 653 (Ct.App.1997). Having established this interpretation of the witness requirement, I next endeavor to ascertain the propriety of using

circumstantial evidence to establish the events leading to the accident.

While none of the affiants utilized by Bradley observed the actual accident itself, Bradley attempts to rely upon the circumstantial evidence created by their observations. As noted above, the South Carolina Supreme Court, in the *Gilliland* opinion, undertook an analysis of whether circumstantial evidence could be used to satisfy the independent witness requirement of § 38-77-170 (2). The Court found "[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." *Gilliland*, 357 S.C. at 202, 592 S.E.2d at 629 (emphasis added) (quoting *Marks v. Indus. Life & Health Ins. Co.*, 212 S.C. 502, 505, 48 S.E.2d 445, 446 (1948)). The Court held that Norris's statements regarding seeing two sets of headlights and what appeared to be an unknown vehicle making a u-turn were supportive of Gilliland's testimony and contained circumstantial evidence which created "a question of fact as to causation for the jury." *Gilliland*, 357 S.C. at 202, 592 S.E.2d at 629. The jury's verdict in favor of Gilliland was reinstated. *Id.*

Lastly, I recognize temporal and spatial restrictions exist when seeking to utilize circumstantial evidence. One can reasonably foresee attempts to utilize circumstantial evidence which was gathered a significant amount of time or distance from the accident itself, and I note these instances must be addressed under the peculiar facts of each individual accident. In this matter, both Bosley and Bradley stated they left Waffle House shortly after 3 a.m. Bosley stated he drove approximately one-quarter of a mile, swerved to avoid a large trash bag in the road, and then observed a street sweeper truck drop a similar garbage bag onto the road about one-quarter of a mile from the first trash bag. Bradley stated he swerved to avoid the same first trash bag Bosley had seen and crashed his vehicle only minutes after Bosley had left the Waffle House. Shortly after the accident, at approximately 3:15 a.m., Lieutenant Colonel Douglas also observed the large [374 S.C. 641] trash bag in the road when he stopped to assist Bradley. All of these events took place over a maximum time period of less than fifteen minutes and the second trash bag was dropped approximately one-quarter of a mile from the accident. I find this evidence falls within temporal and spatial requirements.

The closeness in time between Bosley's and Douglas's observations of the trash bag on the road and the time of Bradley's accident, and the closeness in time and proximity between the accident and Bosley's observation of the street sweeper truck dropping a similar trash bag onto the roadway are relevant. These circumstances elevate the notion of an unknown driver contributing to Bradley's accident from mere speculation to plausible circumstantial evidence. Accordingly, I find this circumstantial evidence is sufficient to create a question of fact for the jury as to the issue of causation. Viewing the evidence and all reasonable inferences that may be drawn from such evidence in the light most favorable to Bradley, I find sufficient

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circumstantial evidence exists to warrant a trial in this matter.

Notes:

[1] Ernest Bradley is joined by his wife Ester as "Appellants," and John Doe is joined by Accusweep, Inc. as "Respondents." However, for purposes of this appeal, we refer only to Ernest Bradley and John Doe.

[2] We decide this case without oral argument pursuant to Rule 215, SCACR.

[3] Bradley does not argue that hitting the trash bag constituted physical contact with the unknown vehicle. However, even if the trash bag did, in fact, fall from the sweeper truck, Bradley's collision with it would not meet section 38-77-170's physical contact requirement. Our supreme court has held the physical contact requirement is not met when a plaintiff's vehicle collides with an unattached portion of an unknown vehicle. See *Wynn v. Doe*, 255 S.C. 509, 180 S.E.2d 95 (1971); *Davis v. Doe*, 285 S.C. 538, 331 S.E.2d 352 (1985).

[4] A subsequent 1989 amendment to § 38-77-170, instituted the requirement to prominently display on the face of the affidavit the specific language "A FALSE STATEMENT CONCERNING THE FACTS CONTAINED IN THIS AFFIDAVIT MAY SUBJECT THE PERSON MAKING THE FALSE STATEMENT TO CRIMINAL PENALTIES AS PROVIDED BY LAW."

**Collins v. Doe, 352 S.C. 462, 574 S.E.2d 739 (S.C. 2002)**

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574 S.E.2d 739 (S.C. 2002)

352 S.C. 462

Leatrice Williams COLLINS, Respondent,

v.

John DOE, Petitioner.

No. 25571.

Supreme Court of South Carolina

Dec. 30, 2002.

Heard June 12, 2002.

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Harry C. Wilson, Jr., of Lee, Erter, Wilson, James, Holler & Smith, of Sumter, for petitioner.

Ronnie A. Sabb, of Kingstree, for respondent.

Justice PLEICONES:

The Court granted certiorari to consider the Court of Appeals' decision in *Collins v. Doe*, 343 S.C. 119, 539 S.E.2d 62 (Ct.App.2000). The Court of Appeals held that for purposes of S.C.Code Ann. § 38-77-170(2) (Supp.2001), a witness's sworn trial testimony is the functional equivalent of a sworn affidavit. We reverse.

**FACTS/PROCEDURAL BACKGROUND**

Respondent sued an unidentified driver, Petitioner John Doe ("Doe"), after she was involved in an automobile collision with another vehicle. Respondent was traveling on Highway 301 in Clarendon County. At the point where 301 intersects with Highway 521, an automobile driven by Doe failed to yield the right of way to Respondent. To avoid a collision with Doe, Respondent took evasive action, and in so doing, collided with the vehicle of Joanne Calvin.

Respondent's vehicle never made contact with Doe's vehicle. Respondent suffered injuries in the accident, and sought to recover damages under the uninsured motorist coverage provided by her automobile insurance policy.

Respondent sued Doe and the case went to trial. After Respondent presented her case, Doe moved for directed verdict. The basis for Doe's motion was Respondent's failure to produce an affidavit of a witness, as prescribed by S.C. Code Ann. § 38-77-170(2) (Supp.2001). <sup>[1]</sup> Although Respondent did not produce a witness-signed affidavit, at trial she produced a witness who testified that a vehicle driven by Doe caused the accident. Respondent argued the witness's testimony satisfied the requirements of § 38-77-170(2).

The trial court found that Respondent's failure to produce an affidavit was fatal to her cause of action, and granted Doe's directed verdict motion. The Court of Appeals reversed, holding the witness's trial testimony was the functional equivalent of a sworn affidavit. We granted Doe's petition for certiorari.

#### ISSUE

Did the Court of Appeals err in determining that a witness's testimony at trial is the functional equivalent of the affidavit required by § 38-77-170(2)?

#### ANALYSIS

Doe contends the Court of Appeals erred in reversing the circuit court. We agree.

Where a statute's language is plain and unambiguous, and conveys a clear and definite meaning, there is no occasion for

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employing rules of statutory interpretation and the Court has no right to look for or impose another meaning. *City of Columbia v. American Civil Liberties Union of S.C., Inc.*, 323 S.C. 384, 475 S.E.2d 747 (1996). Where the terms of the statute are clear, the court must apply those terms according to their literal meaning. *Id.*

The legislature unambiguously required that a plaintiff seeking to recover against her uninsured motorist coverage for the negligence of an unknown John Doe driver strictly comply with the plain language of the statute. The current statute is titled " *Conditions to sue or recover under uninsured motorist provision when owner or operator of motor vehicle causing injury or damage is unknown.*" (Emphasis supplied).

Our General Assembly first enacted a John Doe statute in 1963. The statute as first enacted required "physical contact with the unknown vehicle" before the plaintiff could recover. See Act No. 312, 1963 S.C. Acts 535.

In 1987, the General Assembly relaxed the physical contact requirement, and amended the John Doe statute to provide that a plaintiff has no right of action or recovery unless "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." Act No. 166, 1987 S.C. Acts 1122. Under the 1987 amendment, a witness-sworn affidavit was not

required.

The legislature again amended the statute in 1989, and added the sworn affidavit requirement. The statute at large effecting this most recent amendment provides that the act is "to amend section 38-77-170 relating to the requirements to recover under the uninsured motorist provisions when the at-fault party is unknown, ~~and to require a witness to the accident to sign an affidavit attesting to the truth of the facts about the accident~~ and to provide a warning statement to be displayed on the affidavit." Act No. 148, 1989 S.C. Acts 439 (emphasis supplied).

As written, section 38-77-170 contains requirements necessary to support a plaintiff's "right of action." Black's defines "right of action" as:

1. The right to bring a specific case to court. 2. A right that can be enforced by legal action; a chose in action. Cf. cause of action.

*Black's Law Dictionary* 1324 (Bryan A. Garner ed., 7th ed, West 1999). Without a sworn affidavit, a plaintiff has no right of action. In other words, without the affidavit, she has no right to bring her case to court.

This Court has historically required strict compliance with the statute allowing an insured to sue her own insurer where damages are caused by an unknown driver. In *Criterion Ins. Co. v. Hoffmann*, 258 S.C. 282, 188 S.E.2d 459 (1972), an insured sued his insurer seeking to recover against the uninsured motorist coverage of his policy. The statute<sup>[2]</sup> required that service of process be accomplished by delivering a copy of the summons and complaint to the insurance commissioner. The insured delivered to the insurance commissioner a copy of the summons, but not a copy of the complaint. The Court affirmed the trial court's ruling that the insured could not recover because he failed to comply with the statutory provisions regarding service of process. The Court remarked:

The right to sue and collect from one's own liability insurance carrier in case of a loss caused by a hit-and-run driver or other driver of an uninsured automobile is a creature of the legislature. Except for the statute, and endorsements required, no right exists to recover from one's own insurance carrier. One must look to the terms of the uninsured motorist statute and policy endorsements and comply therewith to get the benefit of law....

It is the province of the lawmakers to create a right of action, to provide for process and to declare the procedure for collecting from one's own insurance carrier....

~~The terms of the statute are clear and not ambiguous. This being true, there is no room for construction and we are required to apply the statute according to~~

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~~its literal meaning.~~ Most courts take a liberal view when dealing with the question of coverage; however, the procedural obligations that the insured must discharge in order to recover, since they are prescribed by statute, are viewed by the courts as mandatory, and strict compliance with them is a prerequisite to recover.

*Id.* at 290-92, 188 S.E.2d at 462-63.

This Court held that proof of physical contact, a requirement contained in the predecessor statute to Section 38-77-170, was a condition precedent to a plaintiff's right of action against an unknown John Doe defendant. *See Wynn v. Doe*, 255 S.C. 509, 180 S.E.2d 95 (1971).

In *Wynn v. Doe*, the plaintiff brought suit against unknown motorist John Doe after the plaintiff drove her motorcycle through a slippery substance on the highway and crashed. The plaintiff sued the unknown driver of the vehicle responsible for laying the substance on the highway. The plaintiff admitted that there had been no physical contact between her motorcycle and the unknown driver's vehicle.

The John Doe statute under consideration in *Wynn* provided that:

If the owner or operator of any motor vehicle which causes bodily injury or property damage to the insured be unknown, there shall be no right of action or recovery under the uninsured motorist provision, unless ...

(2) The injury or damage was caused by physical contact with the unknown vehicle.

S.C.Code Ann. § 46-750.34 (Supp. 1970). [3] The trial court granted judgment in favor of the defendant, holding that the plaintiff had failed to state a cause of action because there had been no physical contact between the unknown vehicle and the plaintiff's motorcycle. This Court agreed, and strictly construed the statute:

The right to recover for the negligence of an unknown motorist is determined, under the plain terms of Section 46-750.34(2), by whether or not the injury was caused by physical contact with the unknown vehicle.... In the words of the statute, there is 'no right of action or recovery under the uninsured motorist provision, unless \* \* \* the injury or damage was caused by physical contact with the unknown vehicle.' The statute makes proof of physical contact a *condition precedent* in any case for the recovery of damages caused by an unknown driver and vehicle. *There are no exceptions to this rule* .... It being agreed that there was no physical contact between the unknown vehicle and the motorcycle operated by the appellant, the absence of any such physical contact is *fatal to her cause of action*.

The appellant contends that since there was actual and physical contact with the chemical substance dumped or spilled onto the public highway by an unidentified and unknown vehicle, such meets the 'physical contact' requirement of Section 46-750.34(2) of the Code. This contention is of no consequence because here the indispensable element of 'physical contact with the unknown vehicle' is absent and, therefore, to adopt the view advanced by the appellant would defeat the clear and unambiguous legislative intent expressed in the statute....

*Wynn v. Doe*, at 511-12, 180 S.E.2d at 96 (emphasis supplied; citations omitted).

Courts have likewise required strict compliance with the current version of the John Doe statute. In *Morehead v. Doe*, 324 S.C. 559, 479 S.E.2d 817 (Ct.App.1996), the plaintiff did not report the accident to the appropriate police authority until eight months after the accident. The trial court ruled that the plaintiff's belated report satisfied § 38-77-170 (1). The Court of Appeals reversed, reasoning that:

The report to a police authority must be made, as the statute requires, 'within a reasonable time.' ... Indeed, because a person is presumed to know the law ..., Morehead is presumed to have known on July 21, 1989, the date of the accident, she had no right of action unless she reported



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the accident to an appropriate police authority within a reasonable time.

The fact that [the insurer] possessed the same information that Morehead reported to the police authority is also of no significance. By not reporting the accident far earlier, Morehead deprived [the insurer] of meaningful police assistance in investigating the accident and identifying the at-fault motorist....

*Id.* at 562-63, 479 S.E.2d at 818-19 (citation omitted).

In this case, the Court of Appeals held that the purpose of the sworn affidavit requirement is served where a witness testifies at trial. We disagree. We discern three purposes for the sworn affidavit requirement. The obvious purpose, fraud prevention, is seemingly served by the Court of Appeals' conclusion. By offering sworn trial testimony, the witness subjects herself to the criminal penalties for perjury. However, the statute reflects that the legislature's chosen vehicle for fraud prevention under these circumstances is a sworn affidavit prominently displaying the prescribed disclaimer. The disclaimer alerts the affiant that she may be subject to criminal penalties for providing untrue information. The affidavit also allows the defendant, at trial, to cross examine the witness regarding the statement. The Court of Appeals' holding forecloses the defendant's ability to conduct cross examination regarding the witness's statement in the affidavit.

In addition, the affidavit constitutes tangible evidence that the insured has a good faith basis for making the claim.

Finally, the sworn affidavit requirement fulfills a *discovery* function: Providing, upon request, the defendant-insurer with information relating to the validity of the plaintiff's case. <sup>(4)</sup> Without the affidavit, and without the opportunity to interview the witness, the insurer is deprived of valuable factual information with which to assess and evaluate the claim.

The plain language of § 38-77-170 requires that where the accident involves no physical contact between the insured's vehicle and the unidentified vehicle, the accident "must have been witnessed by someone other than the owner or operator of the insured vehicle" and the "witness must sign an affidavit attesting to the truth of the facts of the accident contained therein." The statute further prescribes a disclaimer and provides that the disclaimer "must be prominently displayed on the face of the affidavit." Under the rules of statutory interpretation, use of words such as "shall" or "must" indicates the legislature's intent to enact a mandatory requirement. See e.g., *In re Matthews*, 345 S.C. 638, 550 S.E.2d 311 (2001); *South Carolina Police Officers Retirement Sys. v. Spartanburg*, 301 S.C. 188, 391 S.E.2d 239 (1990); *Starnes v. South Carolina Dept. of Public Safety*, 342 S.C. 216, 535 S.E.2d 665 (Ct.App.2000).

A plaintiff's strict compliance with the affidavit requirement is mandatory. The Court of Appeals excused this mandatory requirement where the plaintiff offers up a "functional equivalent" of an affidavit. The statute makes no provision for the functional equivalent of an affidavit.

#### CONCLUSION

The Court of Appeals' holding creates an exception where none previously existed. Both this Court and the

Court of Appeals have held that strict compliance with § 38-77-170 is a prerequisite to maintaining a cause of action under that statute. The plain language of the statute supports this conclusion. Because Respondent failed to produce a sworn witness affidavit as mandated by § 38-77-170(2), we REVERSE the decision of the Court of Appeals.

MOORE and WALLER, JJ., concur. TOAL, C.J., dissenting in a separate opinion in which BURNETT, J., concurs.

Chief Justice TOAL dissenting:

I respectfully dissent. In my view, the majority's opinion ignores the clear intent of the legislature by holding that sworn testimony

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by an eye-witness is not the functional equivalent of a sworn affidavit for purposes of S.C. Code Ann. § 38-77-170 (2) (Supp. 2001). Section 38-77-170 governs when a motorist can recover under an uninsured motorist provision when the at-fault motorist is unknown.

Originally, an action for recovery against an unknown driver was permitted only when the damages were caused by physical contact with the unknown driver. See Act No. 312, 1963 S.C. Acts 535. As the majority points out, the General Assembly relaxed the physical contact requirement in 1987 by allowing an action to proceed when the accident was "witnessed by someone other than the owner or operator of the vehicle." Acts No. 166, 1987 S.C. Acts 1122. In 1989, the General Assembly amended the statute again, adding the sworn affidavit requirement. Act No. 148, 1989 S.C. Acts 439.

The majority reasons that a sworn affidavit accomplishes three objectives: fraud prevention, meaningful cross-examination, and prior notice to the insurer for purposes of claim evaluation. I agree wholeheartedly that the legislature intended for the sworn affidavit requirement to prevent fraudulent claims. However, I disagree that the legislature also intended for the affidavit to allow for more effective cross-examination of the witness at trial or for it to serve a notice function.

The ability to cross-examine a witness effectively at trial does not depend on having a prior statement of the witness. If anything, a witness's testimony at trial should be deemed *more*, not less, reliable than a statement in a sworn affidavit. Further, as the majority points out in footnote 4, the statute requires separately that the insured report the accident to the police within a reasonable time period after the accident. This provision ensures that the defendant-insurer gets information collected by the police, valuable to the assessment of the insured's claim, in a timely manner. S.C. Code Ann. § 38-77-170(1); See *Morehead v. Doe*, 324 S.C. 559, 479 S.E.2d 817 (Ct.App. 1996). I respectfully disagree with the majority's conclusion that the affidavit is intended to serve as an *additional* form of notice to the insurer.

In conclusion, I believe that the legislature intended for the sworn affidavit to prevent motorists from filing fraudulent claims, and sworn testimony, by an eye-witness at trial, ensures against fraud even more effectively than the sworn affidavit. Therefore, I would **AFFIRM** the Court of Appeals' finding that sworn testimony is the functional equivalent of a sworn affidavit for purposes of S.C. Code Ann. § 38-77-170(2).

BURNETT, J., concurs.

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Notes:

[1] S.C.Code Ann. § 38-77-170 is entitled:

Conditions to sue or recover under uninsured motorist provision when owner or operator of motor vehicle causing injury or damage is unknown.

The statute 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 the 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.

The following statement must be prominently displayed on the face of the affidavit provided in subitem (2) above: A FALSE STATEMENT CONCERNING THE FACTS CONTAINED IN THIS AFFIDAVIT MAY SUBJECT THE PERSON MAKING THE FALSE STATEMENT TO CRIMINAL PENALTIES AS PROVIDED BY LAW.

(Emphasis supplied).

[2] S.C.Code Ann. § 46-750.35 (1962).

[3] In 1987, the legislature renumbered the John Doe statute and placed it in its current section, § 38-77-170. Act No. 155, 1987 S.C. Acts 385.

[4] ~~The Court of Appeals recognized that requiring the insured to notify the police within a reasonable time after the accident (codified at § 38-77-170(n)) provided the defendant insurer with information valuable to its assessment of the claim. See Morehead, supra.~~

<http://aol.lawriter.net/CaseView.aspx?scd=SC&DocId=13692&Index=%5c%5cnewdata%5...> 3/6/2011

**ROA\_0346**

**Appendix\_0350**

**Gilliland v. Doe, 357 S.C. 197, 592 S.E.2d 626 (S.C. 2004)**

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592 S.E.2d 626 (S.C. 2004)

357 S.C. 197

Angel Ann Brown GILLILAND, Petitioner,

v.

John DOE, an unknown motorist, Respondent.

No. 25777.

Supreme Court of South Carolina

Jan. 27, 2004.

Heard Dec. 3, 2003.

Bryan D. Ramey, of Bryan D. Ramey & Associates, P.A., of Piedmont and John S. Nichols, of Bluestein & Nichols, of Columbia, for Petitioner.

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

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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 (Cl.App.2002). Petitioner seeks this Court's review of that ruling.

<http://aol.lawriter.net/CaseView.aspx?scd=SC&DocId=14104&Index=%5c%5c192%2e16...> 4/14/2011

ROA\_0347

Appendix\_0351

**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 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. Dept 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.

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

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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. *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 an unknown vehicle. *Gilliland*, 351 S.C. at 498, 570 S.E.2d at 546. We find

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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.

**Shealy v. Doe, 370 S.C. 194, 634 S.E.2d 45 (S.C.App. 2006)**

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634 S.E.2d 45 (S.C.App. 2006)

370 S.C. 194

Jason SHEALY, Appellant,

v.

John DOE, Respondent.

No. 4128.

Court of Appeals of South Carolina

June 26, 2006

Heard June 15, 2006.

Rehearing Denied Aug. 25, 2006.

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Ralph Shealy Kennedy, Jr., and Robert M. Cook, II, both of Batesburg-Leesville, for Appellant.

David Cooper Cleveland, Thomas J. Keaveny, II, and Bob J. Conley, all of Charleston, for Respondent.

ANDERSON, J.

Jason Shealy appeals the trial court's order dismissing his claim for uninsured motorist (UM) coverage, arguing the trial court erred in (1) finding Shealy failed to comply with the witness affidavit requirement of South Carolina Code Annotated section 38-77-170 (2002); and (2) refusing to treat a letter from Safeco Insurance Company as an admission against interest. We affirm.

**FACTUAL/PROCEDURAL BACKGROUND**

On June 7, 2003, Eddie Bolin was driving a pickup truck owned by Dale Leaphart. Shealy and Ronald Cromer

sat in the bed of the truck. Bolin swerved abruptly, throwing Shealy and Cromer from the truck. Shealy sustained serious injuries, including a fractured skull. Bolin later explained to Shealy and the police that he swerved to avoid hitting an unknown vehicle.

Shealy filed a complaint against the unknown driver, John Doe, to recover against Safeco, Leaphart's UM carrier. Shealy submitted an affidavit, which he attached and incorporated into the complaint. The affidavit states:

Personally appeared before me, Jason Shealy, who being duly sworn deposes and says as follows:

That he is Jason Shealy and that on or about June 7, 2003, he was a passenger in a pickup truck being driven by Eddie Bolin and, upon information and belief, owned by Dale Leaphart. That the pickup truck was being driven on Highway 391 near Batesburg-Leesville, South Carolina. That Eddie Bolin sharply, unexpectedly and suddenly swerved the truck near the entrance to Leaphart Acres, throwing the affiant and another passenger from the bed of the truck onto the roadway. **That the day following the incident the affiant was told by Eddie Bolin that an unknown vehicle and driver had come onto the roadway in the path of the truck causing Eddie Bolin to sharply and unexpectedly maneuver the truck he was driving to avoid a collision.**

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A FALSE STATEMENT CONCERNING THE FACTS CONTAINED IN THIS AFFIDAVIT MAY  
SUBJECT THE PERSON MAKING THE FALSE STATEMENT TO CRIMINAL PENALTIES AS  
PROVIDED BY LAW.

(Emphasis added.)

Doe moved to dismiss Shealy's action or, alternatively, to change venue. At the motions hearing, Shealy submitted the affidavit of Ronald Cromer, which contains identical language to Shealy's affidavit. In addition, Shealy submitted a letter from Safeco to his attorney. The letter explained:

[Safeco has] remained consistent in the lack of negligence and lack of liability of Mr. Eddie Bolin, the driver of the automobile in which your client was occupying [sic]. Mr. Bolin's lack of negligence is due to the phantom vehicle which pulled out in front of him and caused the accident....

Shealy argued the letter was an admission against interest.

The trial court granted Doe's motion to dismiss, recognizing its consideration of Cromer's affidavit and Safeco's letter converted Doe's motion to dismiss into one for summary judgment. The court held Shealy failed to comply with the witness affidavit requirement of section 38-77-170(2). Shealy filed a motion to reconsider, which the trial court denied.

#### STANDARD OF REVIEW

<http://aol.lawwriter.net/CaseView.aspx?scd=SC&DocId=15167&Index=%5c%5cnewdata%5...> 3/6/2011

ROA\_0353

Appendix\_0357

Pursuant to Rule 12(b)(6), SCRPC, a defendant may make a motion to dismiss a complaint for "failure to state facts sufficient to constitute a cause of action." Rule 12(b) additionally provides:

If, on a motion asserting the defense numbered (6) to dismiss for failure of the pleading to state facts sufficient to constitute a cause of action, matters outside the pleading are presented to and not excluded by the Court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56[.]

In this case, the trial court considered Cromer's affidavit and the letter from Safeco before granting Doe's motion to dismiss. Accordingly, we review the trial court's order as if it were an appeal from a grant of summary judgment.

When reviewing a grant of summary judgment, the appellate court applies the same standard which governs the trial court under Rule 56(c), SCRPC: summary judgment is proper when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. *Houck v. State Farm Fire & Cas. Ins. Co.*, 366 S.C. 7, 11, 620 S.E.2d 326, 329 (2005); *Pittman v. Grand Strand Entm't, Inc.*, 363 S.C. 531, 611 S.E.2d 922 (2005); *B & B Liquors, Inc. v. O'Neil*, 361 S.C. 267, 603 S.E.2d 629 (Ct.App.2004); see Rule 56(c), SCRPC ("The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."). In determining whether any triable issues of fact exist, the evidence and all reasonable inferences therefrom must be viewed in the light most favorable to the non-moving party. *Helms Realty, Inc. v. Gibson-Wall Co.*, 363 S.C. 334, 611 S.E.2d 485 (2005); *Medical Univ. of South Carolina v. Arnaud*, 360 S.C. 615, 602 S.E.2d 747 (2004); *Rife v. Hitachi Constr. Mach. Co., Ltd.*, 363 S.C. 209, 609 S.E.2d 565 (Ct.App.2005).

#### LAW/ANALYSIS

##### I. Witness Affidavit Requirement

Shealy argues the trial court erred in holding the affidavits he submitted were insufficient to satisfy section 38-77-170(2) of the South Carolina Code Annotated (2002). We disagree.

Section 38-77-170 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

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reasonable time, under all the 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.

The following statement must be prominently displayed on the face of the affidavit provided in subitem (2) above: A FALSE STATEMENT CONCERNING THE FACTS CONTAINED IN THIS AFFIDAVIT MAY SUBJECT THE PERSON MAKING THE FALSE STATEMENT TO CRIMINAL PENALTIES AS PROVIDED BY LAW.

S.C.Code Ann. § 38-77-170 (2002) (emphasis added). "An insured cannot recover uninsured motorist coverage unless the three conditions under § 38-77-170 are met." *Miller v. Doe*, 312 S.C. 444, 446, 441 S.E.2d 319, 320 (1994).

The primary rule of statutory construction is to ascertain and give effect to the intent of the legislature. *Mid-State Auto Auction of Lexington, Inc. v. Altman*, 324 S.C. 65, 69, 476 S.E.2d 690, 692 (1996). The first question of statutory interpretation is whether the statute's meaning is clear on its face. *Wade v. Berkeley County*, 348 S.C. 224, 229, 559 S.E.2d 586, 588 (2002); *Eagle Container Co., LLC v. County of Newberry*, 366 S.C. 611, 622, 622 S.E.2d 733, 738 (Cl.App.2005).

When a statute's language is plain and unambiguous, and conveys a clear and definite meaning, the rules of statutory interpretation are not needed, and this Court has no right to impose another meaning. See *Vaughn v. Bernhardt*, 345 S.C. 196, 198, 547 S.E.2d 869, 870 (2001). "[T]he words of the statute must be given their plain and ordinary meaning without resorting to subtle or forced construction to limit or expand the statute's operation." *Mun. Ass'n of S.C. v. AT & T Communications of S. States, Inc.*, 361 S.C. 576, 580, 606 S.E.2d 468, 470 (2004); see also *Miller*, 312 S.C. at 447, 441 S.E.2d at 321 ("In determining the meaning of a statute, the terms used therein must be taken in their ordinary and popular meaning, nothing to the contrary appearing.").

Section 38-77-170(2) is clear on its face. It expressly requires that someone other than the owner or operator of the insured vehicle witness the accident. As stated in *Wausau Underwriters Insurance Company v. Howser*, 309 S.C. 269, 275, 422 S.E.2d 106, 110 (1992), "no physical contact with the unknown vehicle is necessary when a witness other than the owner or driver of the insured vehicle is able to attest to the facts of the accident." (Emphasis added.) See also *Collins v. Doe*, 352 S.C. 462, 470, 574 S.E.2d 739, 744 (2002) ("The plain language of § 38-77-170 requires that where the accident involves no physical contact between the insured's vehicle and the unidentified vehicle, the accident must have been witnessed by someone other than the owner or operator of the insured vehicle and the witness must sign an affidavit attesting to the truth of the facts of the accident contained therein."). Shealy asserts section 38-77-170 (2) does not require the witness affidavit to be based on personal knowledge. This argument directly contravenes the language of the statute. Shealy submitted affidavits of two people who apparently did not witness the accident; their affidavits do not attest to facts they perceived, but merely restate the perceptions of the vehicle's operator. Thus, Shealy produced no evidence that someone other than Bolin, the operator of the insured vehicle, witnessed the accident. Shealy's and Cromer's affidavits do not comply with this express directive.

Shealy's interpretation of section 38-77-170(2) would totally eviscerate the statute's efficacy as it would allow an owner or operator to inform any third-party of the facts of the accident and have that third-party swear out an affidavit as to the owner or operator's version of the events. In *Collins*, our supreme court elucidated that the "obvious purpose" of

the affidavit requirement of section 38-77-170(2) is "fraud prevention." *Collins*, 352 S.C. at 470, 574 S.E.2d at 743.

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Shealy's reading of the statute would circumvent the fraud-preventing function of subsection (2), rendering that section meaningless.

According to Shealy, requiring the affiant to have witnessed the accident creates an unreasonably harsh result because a sleeping passenger or blind passenger injured by a John Doe driver might be precluded from recovery. Yet the statute indubitably bars an operator and lone occupant of a vehicle from recovery where no contact is made with the unknown driver and where no one else witnesses the accident. In both instances, the result is lamentable to the injured party, but mandated by the statute. Section 38-77-170 demonstrates a policy decision by the legislature which balances the interest of parties injured in accidents with unknown drivers, with the interest of insurance companies in preventing fraudulent claims. Where the legislature determines policy and promulgates a clear rule of law, there is no room for the courts to alter that decision.

Finally, Shealy contends the affidavits comply with *Gilliland v. Doe*, 357 S.C. 197, 592 S.E.2d 626 (2004), because the affidavits he submitted provide circumstantial evidence of the accident. In *Gilliland*, two young men in a truck were closely pursuing Angel Gilliland. As Gilliland sped up to get away from the truck, she lost control of her car and hit a tree. The truck never made contact with Gilliland's vehicle. A witness who was stopped at a nearby intersection testified that she "saw the lights of two cars as the cars came around the curve," and that "after the accident, she saw the lights of the car behind Petitioner's 'arc through the field' as if it were making a U-turn." 357 S.C. at 198-99, 592 S.E.2d at 627. A jury returned a verdict for Gilliland, but we held a witness "must testify to more than the actual collision itself. The witness must also be able to attest to the circumstances surrounding the accident, i.e. what actions of the unknown driver contributed to the accident." *Gilliland v. Doe*, 351 S.C. 497, 501-02, 570 S.E.2d 545, 548 (Ct.App.2002). Accordingly, we reversed the trial court and granted Doe's motion for a judgment notwithstanding the verdict. However, the South Carolina Supreme Court reversed and reinstated the judgment of the trial court.

The supreme court began with a historical review of the unknown driver statute:

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.

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 attesting to the unknown vehicle's involvement in the accident.

357 S.C. at 199-200, 592 S.E.2d at 627-28.

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The question for the *Gilliland* court was "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." *Id.* at 200, 592 S.E.2d at 628. The court answered the question with the following analysis:

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. *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

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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 an unknown vehicle. *Gilliland*, 351 S.C. at 498, 570 S.E.2d at 546. We find the record includes sufficient evidence that an unknown vehicle was involved in Petitioner's accident.

~~Gilliland, 357 S.C. at 199-202, 592 S.E.2d at 628-29. 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.~~

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.~~

*Gilliland*, 357 S.C. at 202, 592 S.E.2d at 629 (emphasis added).

"For circumstantial evidence to be sufficient to warrant the finding of a fact, the circumstances must lead to the conclusion with reasonable certainty and must have sufficient probative value to constitute the basis for a legal inference, not for mere speculation." *Gastineau v. Murphy*, 331 S.C. 565, 570 n. 2, 503 S.E.2d 712, 714 n. 2 (1998) (citing *Holland v. Georgia Hardwood Lumber Co.*, 214 S.C. 195, 204-05, 51 S.E.2d 744, 749 (1949)).

Circumstantial evidence means proof that does not actually assert or represent the proposition in question, **but that asserts or describes something else**, from which the trier of fact may either (1) reasonably infer the truth of the proposition, in which case the evidence is not only

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relevant under Rule 401 but is sufficient as well, or (2) at least reasonably infer an increase in the probability that the proposition is in fact true, in which case the evidence is relevant under Rule 401 (assuming that the proposition is of consequence to the determination of the action) but may not be sufficient by itself to create a question for the trier of fact to decide.

29 Am.Jur.2d *Evidence* 313 (1994) (emphasis added) (footnotes omitted).

~~Unlike in *Gilliland*, the affidavits submitted by Shealy do not contain circumstantial evidence supporting the driver's version of the accident. Shealy failed to corroborate the driver's account. In *Gilliland*, the court found the testimony of Gayle Norris contained circumstantial evidence that supports Petitioner's testimony." 357 S.C. at 202, 592 S.E.2d at 629 (emphasis added). Contradistinctively, Shealy's affidavits merely repeat the driver's account and fail to provide any support for his assertions.~~

The purpose of section 38-77-120(2) is to prevent fraud. Concomitantly, the affidavit of the independent witness must contain some independent evidence that an unknown vehicle was involved in the accident. Shealy failed to satisfy the statute's mandate; thus, the court properly granted summary judgment.



## II. Admission Against Interest

Shealy contends the trial court erred in granting summary judgment to Doe because Safeco's letter constituted an admission against interest. The trial court did not rule on this issue, and Shealy did not raise it in a Rule 59, SCRPC, motion. Therefore, this issue is not preserved. See *Noisette v. Ismail*, 304 S.C. 56, 58, 403 S.E.2d 122, 124 (1991) (finding where "the circuit court did not explicitly rule" on an argument, and no Rule 59(e) motion was made, "the issue was thus not properly before the Court of Appeals and should not have been addressed"); *Jones v. State Farm Mut. Auto. Ins. Co.*, 364 S.C. 222, 235, 612 S.E.2d 719, 726 (Ct.App.2005) ("An issue is not preserved where the trial court does not explicitly rule on an argument and the appellant does not make a Rule 59(e) motion to alter or amend the judgment."); *McCall v. State Farm Mut. Auto. Ins. Co.*, 359 S.C. 372, 381, 597 S.E.2d 181, 186 (Ct.App.2004) (holding an issue must be raised to and ruled upon by the trial court to be preserved for appellate review).

Additionally, Shealy fails to cite any case law for this proposition and makes only conclusory arguments in support thereof. Thus, Shealy has abandoned this issue on appeal. See *Mulherin-Howell v. Cobb*, 362 S.C. 588, 600, 608 S.E.2d 587, 593-94 (Ct.App.2005) (noting when an appellant fails to cite any supporting authority for his position and makes conclusory arguments, the appellant abandons the issue on appeal). Accordingly, we decline to address this issue.

## CONCLUSION

We hold Shealy failed to comply with the witness affidavit requirement of section 38-77-170(2). Furthermore, Shealy failed to preserve the issue of whether Safeco's letter should be considered an admission against interest that precludes a grant of summary judgment. The trial court's order is

**AFFIRMED.**

HEARN, C.J., and GOOLSBY, J., concur.

**Wynn v. Doe, 255 S.C. 509, 180 S.E.2d 95 (S.C. 1971)**

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180 S.E.2d 95 (S.C. 1971)

255 S.C. 509

**Gloria I. WYNN, by her Guardian ad Litem, Jessie L. Wynn, Appellant,**

**v.**

**John DOE, Respondent.**

**No. 19187.**

**Supreme Court of South Carolina.**

**March 22, 1971**

James C. Sanders, of Dowling, Dowling, Sanders & Dukes, Beaufort, for appellant.

[255 S.C. 510] Ladson F. Howell, Beaufort, for respondent.

MOSS, Chief Justice:

Gloria I. Wynn, by her Guardian ad litem, the appellant herein, brought this action against 'John Doe', an unknown motorist, the respondent herein, to establish liability for personal injuries sustained by her on June 27, 1969, in an alleged automobile accident with a motorist whose identity is unknown, so as to entitle her to recover under an uninsured motorist endorsement of a liability insurance policy applicable to her. In her complaint, she alleges that while riding a motorcycle on U.S. Highway 278, she came upon a very slick and dangerous chemical substance on the highway, such having been dumped or spilled thereon by an unknown motorist at some prior time, causing her motorcycle to go out of control and turn over, inflicting personal injuries upon her.

The action here is one under Section 46-750.31 et seq., 1970 Cumulative Supplement to the South Carolina Code of [255 S.C. 511] Laws. We are here concerned with Section 46-750.34, the pertinent portion of which is as follows:

'If the owner or operator of any motor vehicle which causes bodily injury or property damage to the insured be unknown, there shall be no right of action or recovery under the uninsured motorist provision, unless

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'(2) The injury or damage was caused by physical contact with the unknown vehicle.'

Section 46-750.35 of the Code provides a remedy for the enforcement of such liability by authorizing an action against the unknown motorist in the fictional name of 'John Doe', with the right given to the insurance carrier to defend in such name. Upon the service of the complaint, a motion in the nature of a demurrer was interposed thereto by appellant's insurance carrier, Balboa Insurance Company, upon the ground that it appears upon the face of the complaint that there was no physical contact between the motorcycle operated by the appellant and that of the unknown motorist against whom liability is sought to be established, as is provided in Section 46-750.34(2) of the Code.

By his order dated October 3, 1970, The Honorable Robert W. Hayes, presiding judge, granted judgment in favor of the respondent, holding that since there was no physical contact between the motorcycle driven by the appellant and the unknown vehicle, as required by Section 46-750.34(2) of the Code, no cause of action had been stated in the complaint.

The question for decision is whether the physical contact requirement of Section 46-750.34(2) of the Code is satisfied where it is alleged that the appellant's motorcycle turned over as a result of driving upon a slick chemical substance on the highway which was allegedly spilled thereon by an unknown motor vehicle. The appellant admits that there was no physical contact between the motorcycle operated by her with an unknown motor vehicle.

[255 S.C. 512] The right to recover for the negligence of an unknown motorist is determined, under the plain terms of Section 46-750.34(2), by whether or not the injury was caused by physical contact with the unknown vehicle. Nowhere does the statute state or imply that the physical contact requirement may be met by proof that there was in fact an unknown driver and vehicle nor by proof that the unknown vehicle caused the accident. In the words of the statute, there is 'no right of action or recovery under the uninsured motorist provision, unless \* \* \* the injury or damage was caused by physical contact with the unknown vehicle.' The statute makes proof of physical contact a condition precedent in any case for the recovery of damages caused by an unknown driver and vehicle. There are no exceptions to this rule. *Coker v. Nationwide Ins. Co.*, 251 S.C. 175, 161 S.E.2d 175. It being agreed that there was no physical contact between the unknown vehicle and the motorcycle operated by the appellant, the absence of any such physical contact is fatal to her cause of action.

The appellant contends that since there was actual and physical contact with the chemical substance dumped or spilled onto the public highway by an unidentified and unknown vehicle, such meets the 'physical contact' requirement of Section 46-750.34(2) of the Code. This contention is of no consequence because here the indispensable element of 'physical contact with the unknown vehicle' is absent and, therefore, to adopt the view advanced by the appellant would defeat the clear and unambiguous legislative intent expressed in the statute. Where the language of the statute is plain and unambiguous and conveys a clear and definite meaning, as here, there is no occasion for resorting to the rules of statutory interpretation, and the court has no right to look for or impose another meaning. *Harling v. Board of Commissioners*, 205 S.C. 319, 31 S.E.2d 913.

The exception of the appellant is without merit and the judgment below is,

[255 S.C. 513] Affirmed.

LEWIS, BUSSEY, BRAILSFORD and LITTLEJOHN, JJ., concur.



STATE OF SOUTH CAROLINA )

COUNTY OF DARLINGTON )

Bobby Lee Tucker, Sr., )

Plaintiff, )

vs. )

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

Defendants. )

IN THE COURT OF COMMON PLEAS

FOURTH JUDICIAL CIRCUIT

CASE NO.: 2010-CP-16-0315

DEFENDANTS' MITCHELL V. FORTIS  
POST-JUDGMENT PUNITIVE DAMAGE  
REVIEW MEMORANDUM

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DARLINGTON COUNTY, S.C.

TO: WILLIAM HATFIELD, ESQUIRE, ATTORNEY FOR PLAINTIFF

Defendants submit the following post-judgment review memorandum pursuant to the Court's request for same made on April 17, 2013.

#### FACTS

Plaintiff filed this negligence action against the unknown person and company who allegedly left a 700 pound steel bearing block in or near the southbound lanes of I-95 on or about April 29-30, 2010. At trial, Plaintiff testified he struck this bearing block which caused him to lose control of his tractor trailer and strike a bridge abutment resulting in significant injuries. Plaintiff produced evidence that the block was found in the right shoulder of the road the morning after the accident. The block was 75-200 feet south of the point where plaintiff lost control of his rig. Plaintiff failed to produce any direct evidence of how, when or why the bearing block came to be on the shoulder of I-95. A witness (Donald Wilson) testified by way of deposition which was published at trial, that he saw an object that "looked just like" [Wilson Depo. Pg. 6] bearing block on the back of a flatbed

trailer entering southbound I-95 at its intersection with Highway 52 at or about 10:30 p.m. on April 29, 2010. He further testified that the object was secured by a nylon strap. It was one of several items on the trailer. No witnesses testified where the bearing block came from, how, when or why it came to be on the right shoulder of the road. Plaintiff is the only witness who claims to have seen the bearing anywhere other than where it was found (i.e. on the shoulder of I-95). Trial lasted 2 days. After approximately 1.5 hours of deliberations, the jury returned a verdict for the Plaintiff on his cause of action for negligence. It awarded Plaintiff \$2.5 million in compensatory damages and \$2.5 million in punitive damages against the unknown truck driver and trucking company.

#### LAW AND ARGUMENT

"In order for a plaintiff to recover punitive damages, the plaintiff must present clear and convincing evidence that the defendant's conduct was willful, wanton, or in reckless disregard of the plaintiff's rights'. *Cody P. v. Bank of America, N.A.*, 395 S.C. 611, 625, 720 S.E.2d 473, 480 (Ct.App. 2011); S.C. Code Ann. § 15-33-135 (2005). Clear and convincing evidence is the highest burden of proof in a civil case and requires that the evidence produce a firm belief by the finder of fact of the allegations of the plaintiff. *Duncan v. Ford Motor Company*, 385 S.C. 119, 682 S.E.2d 877 (Ct.App. 2009). This higher burden of proof upon the plaintiff is in keeping with the concept that punitive damages are penal in nature and are, "by definition 'punishing damages' or 'private fines' levied to punish a wrongdoer for reprehensible conduct and to deter its repetition in the future". *Patterson v. I.H. Servs.*, 295 S.C. 300, 310, 368 S.E.2d 215, 221 (Ct.App. 1988). Given the heavy burden of proof upon the plaintiff seeking punitive damages, circumstantial evidence must be utilized cautiously so that the inferences drawn from it are proper and exclude all other contrary inferences. "It has been said that circumstantial evidence consists in reasoning from facts which

are known or proved, in order to establish such as are conjectured to exist, but the process is fatally vicious if the circumstance from which we seek to deduce the conclusion depends itself upon conjecture". *People v. Banks*, 146 Misc.2d 601, 606 551 N.Y.S.2d 1011, 1014 (N.Y. 1989) citing *Ruppert v. Brooklyn Heights R.R. Co.*, 154 N.Y. 90, 47 N.E. 971 (1897)

Determining whether conduct rises to the level of being willful, wanton or reckless, the court must look to whether the conduct was committed in such a manner that "a person of ordinary reason or prudence would then have been conscious of it as in invasion of the plaintiff's rights". *Cody P. v. Bank of America, N.A.* 395 S.C. 611, 720, S.E.2d 473 (Ct.App. 2011) citing *Rogers v. Florence Printing Co.*, 233 S.C. 567, 577-78, 106 S.E.2d 258, 263 (1958). Evidence of simple negligence alone will not support an award of punitive damages and such an award requires proof of a present consciousness of wrongdoing on the tortfeasor's part. *Cohen v. Allendale Coca-Cola Bottling Co.*, 291 S.C. 35, 351 S.E.2d 897 (Ct.App. 1986). Therefore, while it is necessary to find by clear and convincing evidence that punitive damages are warranted by willful, wanton or reckless conduct, it is also necessary to keep in mind the purpose of these damages is deterring future undesirable conduct. In the absence of knowledge by a tortfeasor of his conduct, it cannot be said that such conduct is willful or wanton reckless or that the imposition of punitive damages would serve the unknown conduct in the future.

Once a punitive damage award has been made, the court must conduct a post-judgment review of the award in order to determine whether the amount of the award comports with constitutional rights of due process. This review is necessary in order that the amount of the award comport with the requirements of the Due Process Clause of the Fourteenth Amendment and the Supreme Court's concern that such awards may "run wild". *Pacific Mut. Life Ins. Co. v. Hanslip*,

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499 U.S. 1, 111 S.Ct. 1032 (1991). South Carolina's three part test for this post-judgment review is stated in *Mitchell v. Fortis Ins. Co.*, 385 S.C. 570, 686 S.E.2d 176 (2009) which utilizes and expounds upon the post judgment punitive damages review factors found in *BMW of North America v. Gore*, 517 U.S. 559, 575, 116 S.Ct. 1589, 1599 (1996) and *Gamble v. Stevenson*, 305 S.C. 104, 406 S.E.2d 350 (1991).

Under the test articulated in *Fortis*, the court should first consider the *reprehensibility* of the defendant's conduct including whether, 1) the harm caused was physical as opposed to economic; 2) the tortious conduct evinced an indifference to or reckless disregard for the health or safety of others; 3) the plaintiff had financial vulnerability; 4) the conduct involved repeated actions or was an isolated incident, and; 5) the harm was the result of intentional malice, trickery, or deceit rather than mere accident. *Id.* Second, the court should consider the *ratio* of the actual or potential harm to the plaintiff to the punitive damages awarded. Third, the court should conduct a *comparative analysis* between the punitive damage award in the case before it and punitive awards in other comparable cases. *Id.* Of these factors, "perhaps the most important indicium of the reasonableness of a punitive damages award is the degree of reprehensibility of the defendant's conduct". *BMW of North America v. Gore*, 517 U.S. 559, 575, 116 S.Ct. 1589, 1599 (1996).

In this case, the punitive award should be eliminated altogether when reviewing the evidence (all circumstantial), on one hand, in light of the purpose of punitive damages on the other hand. Even if the court concludes punitive damages are appropriate, a review of the amount awarded under the factors cited in *Mitchell v. Fortis Ins. Co.* requires a significant reduction in the award.

I. No Clear and Convincing Evidence of Willful, Wanton or Reckless Conduct

In order to support an award of punitive damages, the plaintiff must show by clear and

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convincing evidence that the defendant's conduct was wilful, wanton or reckless. *Cody P. v. Bank of America, N.A.*, 395 S.C. 611, 625, 720 S.E.2d 473, 480 (Ct.App. 2011). The clear and convincing evidence of this conduct must go beyond simple negligence and provide a present proof of consciousness of the defendant's conduct. *Cohen v. Allendale Coca-Cola Bottling Co.*, 291 S.C. 35, 351 S.E.2d 897 (Ct.App. 1986). In an illustrative case, the Court of Appeals found no evidence supporting the award of punitive damages against a trucking company when a wheel separated from its truck and struck the plaintiff where there was no evidence of conscious wrongdoing by the company in inspecting and servicing its equipment. *Carier v. R.L. Jordan Oil Co.*, 301 S.C. 84, 390 S.E.2d 367 (Ct.App. 1990). While the unknown driver may run afoul of S.C. Code Ann. §56-5-4100 which provides that a failure by a vehicle operator to remove any substance or cargo dropped on the road constitutes a misdemeanor, "the violation of a statute does not constitute recklessness, willfulness and wantonness per se, but is some evidence that the defendant acted recklessly, willfully and wantonly" *Wise v. Broadway*, 315 S.C. 273, 276, 433 S.E.2d 857, 859. "It is not obligatory as a matter of law for the jury to make such a finding in every case of a statutory violation." *Id.* at 277, 433 S.E.2d at 859.

In the case currently before the court, the jury was presented with evidence regarding the existence of a bearing block in the southbound lane of I-95 at the time of the accident as well as its ultimate resting place in an area off the lanes of travel and a significant distance (75-200 feet) away from the accident scene. The bearing block did not belong on or near the road. However, how, when or why it came to be on the road is completely unknown. The only evidence regarding those issues came from the testimony of Donald Wilson. Mr. Wilson testified to seeing an object that "looked just like" [Wilson Depo. Pg. 6] the bearing block secured by a nylon strap on a flat bed trailer

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entering southbound I-95 an hour and one half before the accident. However, Mr. Wilson did not see the object fall from this or any other truck. He never saw the bearing block on I-95. Furthermore no one saw the nylon strap, the pallet or any other objects which Mr. Wilson says were on the truck in or around I-95.

The plaintiff produced no independent witness who saw the bearing block in the southbound lanes of I-95 before the accident. Plaintiff produced no witnesses and presented no evidence as to how, when or why the 700 pound block came to rest several hundred feet from where plaintiff lost control of his vehicle and on the opposite side of the road from where plaintiff's vehicle came to rest. Plaintiff has failed to produce any evidence that anyone knowingly left the bearing block in the road or that anyone recklessly, willfully or wantonly failed to secure it improperly.

According to the testimony of Mr. Wilson, the bearing block that he saw was not only strapped down, but was also one of many objects on the trailer. If this object is indeed the object which was found on the side of the road, there is simply no evidence, much less clear and convincing evidence, that the driver of that truck had any knowledge of its loss or that his failure to secure the object properly was done in a reckless, willful or wanton manner. As found in *Carter v. R.L. Jordan Oil Co.*, the failure of a truck driver to see a broken cotter pin, without more, is not the conscious disregard for the safety of others; it is, at most, an act of simple negligence. 301 S.C. 84, 390 S.E.2d 367.

None of this evidence proves directly that the unknown driver failed to secure the bearing block properly (assuming it is the one which was found on the side of the road the next day) or that he showed a conscious disregard for the safety of others. The award of punitive damages shows that there is simply too much conjecture by the jury regarding extremely circumstantial evidence of the

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nature of the unknown driver's conduct. Conjecture cannot be based upon conjecture and requires some definitive facts in order to reach a correct conclusion. At most, the actions of the unknown driver constituted simple negligence in failing to secure the load and nothing more. Simple negligence does not support an award of punitive damages. Furthermore, as the court stated in People v. Banks, "It has been said that circumstantial evidence consists in reasoning from facts which are known or proved, in order to establish such as are conjectured to exist, but the process is fatally vicious if the circumstance from which we seek to deduce the conclusion depends itself upon conjecture". 146 Misc.2d 601, 606.

## II. *Fortis* Factors

Even assuming that the award of punitive damages was appropriate, the amount must be reduced by this Court after reviewing the *Fortis* factors.

### A. Reprehensibility

The first factor to be examined; the degree of reprehensibility of the defendant's conduct, does not weigh in favor of a punitive damage award. Under *Fortis*, in considering reprehensibility, the court should consider whether:

"(I) the harm caused was physical as opposed to economic; (ii) the tortious conduct evinced an indifference to or a reckless disregard for the health or safety of others; (iii) the target of the conduct had financial vulnerability; (iv) the conduct involved repeated actions or was an isolated incident; (v) the harm was the result of intentional malice, trickery, or deceit, rather than mere accident." 385 S.C. 570, 587, 686 S.E.2d 176, 185.

#### (i) Economic versus physical harm.

Defendants do not dispute that the damages suffered by the plaintiff in this case are physical.

#### (ii) No evidence of Indifference to or a reckless disregard of health or safety.

There is no evidence at all regarding how, why or when the bearing block came to be on the

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side of the road. If the object witnessed by Mr. Wilson on the flat bed truck up the road is the bearing block in question, not only was it strapped down, but it remained there as the truck pulled away and proceeded from the truck stop towards its unknown destination. Furthermore, because the object was strapped down, the testimony of Mr. Wilson confirms that if this was indeed the object that fell from the truck, the incident was accidental and not the result of willful indifference or intentional malice on the part of the unknown truck driver.

(iii) Financial Vulnerability.

There has been no evidence presented that the plaintiff in this case has particular financial vulnerability. In fact, the plaintiff was retired at the time of the accident and therefore not suffer from the loss of employment due to the accident.

(iv) The conduct involved repeated actions or was an isolated incident.

Since there is no evidence regarding the unknown driver or his load securing procedures, there is no evidence for the jury to consider regarding whether this accident was the result of repeated actions by the unknown driver or was an isolated incident.

(v) The harm was the result of intentional malice, trickery or deceit, rather than mere accident.

There has been no evidence presented by the plaintiff to show any intention by the unknown driver to leave the bearing block on the side of the road. Indeed it is possible that the unknown driver could have moved the block out of the lanes of traffic and onto the berm in order to avoid a safety hazard. There is simply no evidence regarding his or her actions in this case.

All of these factors taken together show that the conduct of the unknown truck driver may be arguably negligent, but clearly does not show any degree of reprehensibility warranting a punitive

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damages award.

#### B. Ratio

The second factor that the court must consider in reviewing the punitive damage award under *Fortis* is the ratio of the actual or potential damages suffered by the plaintiff and the amount of the punitive damage award. While there is no bright line rule regarding the size of such a ratio between compensatory and punitive damages, due process requirements seemingly dictate that the ratio not exceed a single digit. *State Farm Mutual Automobile Ins. Co. v. Campbell*, 538 U.S. 408, 123 S.Ct. 1513 (2003). In reviewing the reasonableness of a particular ratio, a court may consider "the likelihood that the award will deter the defendant from like conduct, whether the award is reasonably related to the harm likely to result from such conduct and the defendant's ability to pay". *Mitchell v. Fortis Ins. Co.*, 385 S.C. 570, 686 S.E.2d 176 (2009).

The jury in this case awarded compensatory damages in the amount of \$2.5 million and punitive damages in the amount of \$2.5 million. Therefore, the ratio is 1:1 and is within the single digit limit contemplated by *State Farm v. Campbell*. 538 U.S. 408, 123 S.Ct. 1513 (2003). However, the instant case is unique in that the tortfeasor is unknown as it is the actual conduct by that tortfeasor which led to the bearing block coming to rest on the side of I-95. Therefore, it is improbable that a punitive damage award against Doe will deter that party from repeating the conduct which is, at best, uncertain and speculative. Further, since the conduct leading to the bearing block coming to rest on the shoulder of the road is unknown, the punitive damage award is not reasonably related to the harm likely caused by such uncertain and speculative conduct. Put simply, there is no direct evidence regarding whether the bearing block fell from a truck and, if it did, whether the acts causing it to fall constituted mere negligence or knowing and reckless conduct. An

award of punitive damages, no matter what the ratio to compensatory damages, cannot deter conduct for which the perpetrator and his methods are both unknown or form an award that is reasonably related to harm likely caused by uncertain and speculative conduct.

### C. Comparative Analysis

The third and final factor to be reviewed under the test in *Fortis* is the difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed by comparable cases. In the case of a truck driver who, while driving an overloaded truck in wet conditions admitted rear-ending the plaintiff in order to avoid contact with other vehicles, the court found for plaintiff in the amount of \$279,205.42 in compensatory damages and \$100,000 in punitive damages. *Sams v. Heritage Transport*, 2012 WL 2092149 (D.S.C. June 11, 2012). In the case of an equipment failure causing the wheel to fall off of a trailer, the court found no cause for punitive damages. In that case, the court found that a broken cotter pin ultimately caused a wheel to separate from the trailer; but, there was no evidence that the driver was aware of the broken cotter pin when he put his truck on the road. *Carter v. R.L. Jordan Oil Co.*, 301 S.C. 84, 390 S.E.2d 367 (Ct.App. 1990).

In this case, while any award of punitive damages is suspect given the lack of clear and convincing evidence of willful conduct, the comparative trucking cases cited above show that a reduction of the punitive damages award is appropriate in this case. Not only is there no evidence of willful conduct, but the evidence in this case consists of circumstantial evidence of a potential equipment failure of which the unknown driver may have had no knowledge. As in *Carter*, there has been no evidence produced that the driver knew of this potential for equipment failure when he took his truck on the road. At most, his or her action in securing the load constituted simple negligence. Therefore, the punitive damage award should be reduced or eliminated.

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Furthermore, a review of the statutory requirements for securing a motor vehicle load show that the penalties for failing to do so properly are minor. S.C. Code Ann. §56-5-4100 provides that a failure by a vehicle operator to remove any substance or cargo dropped on the road constitutes a misdemeanor with a potential fine of one hundred dollars.<sup>1</sup> While this statute does not bar claims for civil damages, it does show that the criminal penalty faced by such persons is very small and in no way comparable to the \$2.5 million penalty assessed by the jury in this case. This factor must be considered by the court in its review of the punitive damage award.

### CONCLUSION

Plaintiff has failed to prove by clear and convincing evidence that punitive damages are warranted in this case. Furthermore, the application of the review factors contained in *Mitchell v. Fortis Ins. Co.* weigh in favor of vacating or significantly reducing the \$2.5 million punitive judgment awarded in this case.

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<sup>1</sup> S.C. Code Ann. § 56-5-4100. Preventing escape of materials loaded on vehicles; cleaning the highways of escaped substances or cargo.

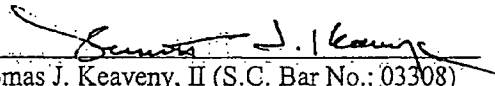
(D) Any person operating a vehicle from which any substance or cargo, excluding water, have fallen or escaped, which would constitute an obstruction or injure a vehicle or otherwise endanger travel upon the public highway, shall make every reasonable effort to immediately cause the public highway to be cleaned of all substances and shall pay any costs for the cleaning.

If the person does not make every reasonable effort to clear the public highway promptly, the Department of Transportation or any law enforcement officer may, without the consent of the owner or carrier of the substance or cargo, remove or have removed the substance from the public highway if the substance or cargo is blocking the public highway or endangering public safety... Nothing in this section bars a claim for damages.

(E) Any person who violates the provisions of subsections (B), (C) or (D), is guilty of a misdemeanor and, upon conviction, must be fined one hundred dollars.

Respectfully Submitted,

KEAVENY LAW FIRM

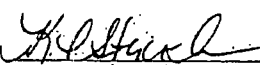
  
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COUNSEL FOR DEFENDANTS

April, 26<sup>th</sup> 2013  
Charleston, SC

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the foregoing memorandum has been served upon opposing counsel by hand delivery, email, facsimile, or by mailing a copy properly addressed with sufficient postage affixed thereto this 26<sup>th</sup> day of April, 2013.

KEAVENY LAW FIRM LLC

BY:   
Karyn L. Strickland, Paralegal

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STATE OF SOUTH CAROLINA

COUNTY OF DARLINGTON

Bobby Lee Tucker, Sr.,

Plaintiff,

vs.

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

Defendant.

) IN THE COURT OF COMMON PLEAS  
) FOURTH JUDICIAL CIRCUIT  
) CASE NO. 2010-CP-16-0315  
)  
)  
)  
)

) DEFENDANTS' NOTICE OF MOTIONS &  
) POST-TRIAL MOTIONS FOR JNOV,  
) NEW TRIAL ABSOLUTE AND/OR  
) NEW TRIAL NISI REMITTITUR  
)  
)  
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TO: WILLIAM P. HATFIELD, ATTORNEY FOR PLAINTIFF

PLEASE TAKE NOTICE ten (10) days from the filing of this motion or as soon as may be heard by the Court, Defendants John Doe, individually, and d/b/a a Doe Trucking Company (Defendants), by and through their undersigned attorneys, will move before the presiding judge of the Fourth Judicial Circuit, Darlington County, South Carolina, pursuant to Rules 50 and 59, SCRCF, for an Order in the above-referenced matter for judgment notwithstanding the verdict as to (1) Plaintiff's failure to comply with S.C. Code Ann. §38-77-170 (1976, as amended); (2) Plaintiff's failure to establish Defendants' negligence by a preponderance of the evidence; and (3) Plaintiff's failure to establish punitive damages by clear and convincing evidence. In the alternative, Defendants will move for a new trial absolute on negligence/liability and actual and punitive damages and/or new trial nisi remittitur on actual and punitive damages based on the thirteenth juror doctrine.

The grounds for Defendants' post-trial motions are set forth more particularly in Defendants' Memorandum in Support of Defendants' Post-Trial Motions attached hereto.

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Respectfully submitted,

KEAVENY LAW FIRM LLC

*Amey B Rothchild Esq for*

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*Thomas J  
Keaveny Esq.*

April 26, 2013  
Charleston, South Carolina

ATTORNEY FOR DEFENDANTS

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STATE OF SOUTH CAROLINA  
COUNTY OF DARLINGTON

Bobby Lee Tucker, Sr.,

Plaintiff,

vs.

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

Defendants.

IN THE COURT OF COMMON PLEAS  
FOURTH JUDICIAL CIRCUIT  
CASE NO. 2010-CP-16-0315  
DEFENDANTS' MEMORANDUM  
IN SUPPORT OF THEIR  
POST TRIAL MOTIONS

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DARLINGTON COUNTY, S.C.

This matter comes before the Court on Defendants John Doe, individually, and d/b/a Doe Trucking Company's (Defendants) post-trial motions for judgment notwithstanding the verdict as to (1) Plaintiff's failure to comply with S.C. Code Ann. §38-77-170 (1976, as amended); (2) Plaintiff's failure to establish Defendants' negligence by a preponderance of the evidence; and (3) Plaintiff's failure to establish punitive damages by clear and convincing evidence. In the alternative, Defendants move for a new trial absolute on negligence/liability and actual and punitive damages and/or new trial nisi remittitur on actual and punitive damages based on the thirteenth juror doctrine.

The grounds for Defendants' post-trial motions are set forth more particularly in Defendants' Memorandum in Support of Defendants' Post-Trial Motions attached hereto.

#### I. FACTUAL BACKGROUND

On April 30, 2010 at approximately 12:15 a.m., Plaintiff Bobby Lee Tucker, Sr. (Plaintiff), was driving a 2001 Freightliner tractor south on I-95 from Florence to Florida. As he approached Exit 153 (also known as Honda Way), he lost control of his tractor trailer and struck several concrete abutments in the median suffering grievous injuries.

Plaintiff filed this action against Defendants alleging in his Complaint that on April 30, 2010, he was proceeding south on I-95 and that "at the same time and place the Defendant was transporting a piece of machinery and a part of the machinery fell from the Defendant's tractor" (a 700 pound bearing). Plaintiff claims that the object landed in his lane. He further claims that he was confronted with a sudden emergency, that he attempted evasive maneuvers but he was unable to avoid striking the object and that as a result, he lost control of his vehicle and struck the abutment. Liability was contested by Plaintiff's uninsured motorist carrier.

This matter came before the Court for trial on April 15, 2013. Testimony rendered at trial is discussed below. Plaintiff submitted medical bills in the approximate amount of \$325,000.00. The jury returned a verdict in favor of Plaintiff in the amount of \$2,500,000.00 in actual damages and \$2,500,000.00 in punitive damages. These post trial motions follow.

## **II. TESTIMONY ELICITED AT TRIAL**

### **A. Plaintiff's Witnesses & Defendants' Cross-Examinations**

First, Plaintiff called Donald Wilson who testified by videotaped deposition. Mr. Wilson testified at approximately 10:30 p.m. on April 29, 2010, he saw a tractor-trailer turn onto the entrance ramp of southbound I-95 at its intersection with Highway 52. He testified that strapped to the back of the flatbed was an object "that looked just like<sup>1</sup>" the object which Mr. Tucker claims to have struck approximately 2 hours later. Mr. testified the object was improperly secured to the flatbed by a single nylon strap.

Plaintiff's second witness was R. Dean Harris, M.E., P.E., a metallurgical engineer. Mr. Harris testified he was retained three weeks after the accident to identify the object and to determine its composition. Mr. Harris concluded the object was a bearing and the object was

<sup>1</sup> Trial testimony of Donald Wilson presented by deposition dated August 12, 2010, P. 6, L. 6 - 11.

made of cast steel. Mr. Harris also testified the object weighted approximately 700 pounds. Over defense counsel's objection, Mr. Harris testified the object was not properly strapped down and the damage to one of Plaintiff's front tires was "consistent with" striking some object (again, over Defendants' objection). Mr. Harris could not state to a reasonable degree of engineering certainty the damage to Plaintiff's tire rim was caused by the object which Plaintiff claims he struck. On cross examination Mr. Harris conceded that if struck by Plaintiff, the object would have moved forward "tens" of feet. Mr. Harris further admitted that he had neither been to the scene of the accident to examine it nor did he ever attempt to reconstruct the accident in any way. Mr. Harris also admitted the object would leave marks in the road, had it been pushed or dragged from the point where Plaintiff lost control of his vehicle to where the object was found. Mr. Harris knew of no marks in the road.

Plaintiff called Albert Vereen, a tow truck operator for Shepherd's Towing. Mr. Vereen testified he came to the scene the morning after the accident to remove Plaintiff's rig from the concrete abutment at Honda Way. Mr. Vereen testified he found the bearing across southbound I-95 on the right shoulder of the road. Over defense counsel's objection, Mr. Vereen testified he believed Mr. Tucker struck the bearing. Mr. Vereen acknowledged he found no physical evidence such as scarring in the road which could link the bearing to Plaintiff's truck either at the abutment or north on I-95, to the point where Plaintiff lost control of his vehicle.

Plaintiff also called Charles Hayes, Plaintiff's employee, as a witness. Mr. Hayes testified he came to the scene the morning after the accident. He saw the bearing on the right shoulder of the road. His fiancé photographed it. Mr. Hayes also acknowledged he found no evidence linking the bearing to Plaintiff's truck across I-95 or north on I-95 where Plaintiff lost control of his truck.

Plaintiff also called Trooper Brad A. Suggs with the Highway Patrol. Trooper Suggs testified that he arrived at the scene at approximately 12:52 a.m. Trooper Suggs found no evidence supporting Plaintiff's claim he lost control of his rig as a result of striking the bearing as it sat on southbound I-95. Further, he found no evidence the bearing was ever in the southbound lane.

Plaintiff was the last witness to testify to the issue of the bearing. He testified as he traveled southbound on I-95, the vehicle ahead of him applied its brakes and darted swiftly to the left exposing what appeared to be a pasteboard box sitting in his lane. He testified he was unable to enter the left lane due to the presence of other traffic. He testified he was unable to move to the right because he did not have sufficient time to do so. Therefore, he struck the object.

Plaintiff presented the testimony of his two medical doctors who attested to Plaintiff's injuries and treatment. Plaintiff's medical bills were approximately \$325,000.00.

B. Defendant's Witnesses

Defendants presented the testimony of William Sweatt, Operations Manager of Florence County 911. Mr. Sweatt testified 911 received five calls between 10:00 p.m. on April 29, 2010 and 2:00 a.m. on April 30, 2010. He testified any calls regarding a foreign object in the road would be referred to Highway Patrol.

Defendants called Gilbert R. George, Jr., District Maintenance Engineer with the Department of Transportation. Mr. George testified he searched the records of the South Carolina Department of Transportation for the same time period. His department did not receive any calls regarding the presence of a foreign object in the southbound lane of I-95 near Honda Way exit for the period in question.

Defendants' final witness was Douglas R. Lax, Sr. Mr. Lax is an expert in trucking safety and compliance with applicable regulations. He testified he reviewed Plaintiff's driver qualifications file and other documents and concluded Plaintiff should not have been driving the night of the accident because he did not have the requisite medical card.

### III. MOTIONS FOR JUDGMENT NOTWITHSTANDING THE VERDICT PURSUANT TO RULE 50, SCRPC

Rule 50(b), SCRPC provides for judgment notwithstanding the verdict. It states that whenever a motion for directed verdict, made at the close of all the evidence, is denied for any reason or is not granted, the court is deemed to have submitted the action to the jury subject to a later determination of the legal questions raised by the motion. A party who has moved for a directed verdict may move to have the verdict and any judgment entered thereon set aside and to have judgment entered in accordance with his motion for a directed verdict. Rule 50(b), SCRPC.

Defendants hereby move for judgment notwithstanding the verdict on all of the grounds raised in their motions for directed verdict at trial including that: (1) Plaintiff failed to comply with S.C. Code Ann. §38-77-170 of the South Carolina Code of Laws; (2) Plaintiff's circumstantial evidence, even taken in the light most favorable to Plaintiff, failed to establish liability by a preponderance of the evidence; and (3) Plaintiff failed to establish by clear and convincing evidence that he was entitled to an award of punitive damages.

In ruling on motions for directed verdict and for judgment notwithstanding the verdict, the trial court must view the evidence and inferences to be drawn therefrom in the light most favorable to the non-moving party and must deny the motions if either the evidence yields more than one reasonable inference or its inferences are in doubt. Hilton Head Realty, Inc. v. Skull Creek Club, 287 S.C. 530, 339 S.E.2d 890 (Ct.App. 1986).

A. Defendant Is Entitled To Judgment Notwithstanding The Verdict Pursuant To Rule 50, SCRPC, On The Basis That Plaintiff Failed To Comply With S.C. Code Ann. §38-77-170 Of The South Carolina Code Of Laws.

Prior to trial, Defendants moved for summary judgment<sup>2</sup> on the basis that Plaintiff failed to satisfy the statutory requirements of S.C. Code Ann. §38-77-170 of the South Carolina Code of Laws; the motion was denied. Defendants renewed the motion at trial which was once again denied. Defendants respectfully submit that the trial judge erred in not granting Defendants' initial motion for summary judgment and Defendants' motions for directed verdict on this issue. As such, Defendants believe they are entitled to judgment notwithstanding the verdict as a matter of law on the basis that Plaintiff failed to comply with Section 38-77-170(2).

As noted above, Plaintiff filed this action against John Doe individually and d/b/a Doe Trucking Company. Plaintiff's Complaint alleges that on April 30, 2010 he was proceeding south on I-95 and that "at the same time and place Defendants were transporting a piece of machinery and a part of the machinery fell from Defendants' tractor" Plaintiff claims that the object landed in his lane. He further claims that he was confronted with a sudden emergency, that he attempted evasive maneuvers but he was unable to avoid striking the object and that as a result, he lost control of his vehicle and struck the abutment. Finally, he claims that "the collision between the Plaintiff's tractor and the object which fell from this Defendants' tractor

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<sup>2</sup> So as not to inundate the Court with additional paper materials, Defendants incorporate by reference as if fully repeated verbatim herein, their "Notice of Motion and Motion for Summary Judgment" which was filed on January 18, 2013, and their "Memorandum in Support of Motion for Summary Judgment" and all exhibits attached thereto which were provided to the Court. If the Court needs a copy of Defendants' "Memorandum in Support of Motion for Summary Judgment" and all exhibits thereto, Defendants will be glad to provide the Court with a copy of the same.



and trailer was witnessed by a third party, Anthony Bernardo, and an immediate report of the incident was made to the South Carolina Highway Patrol.”<sup>9</sup>

Plaintiff did not file an affidavit of a witness when he filed his Complaint on May 14, 2010. On July 19, 2010, Plaintiff's counsel provided Defendants' counsel with an affidavit which was signed by Anthony Bernardo on July 14, 2010 (Exhibit A) which did not contain the language as required by Section 38-77-170 in that it did not verify the existence of a foreign object in the roadway. On March 4, 2011, Plaintiff's counsel provided Defendants with a second affidavit signed by Mr. Bernardo on March 3, 2011 (Exhibit B).

Plaintiff's affidavits do not satisfy the requirements of Section 38-77-170(2) which states in part:

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 ...

(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; (emphasis added) ...

The following statement must be prominently displayed on the face of the affidavit provided in subitem (2) above: A FALSE STATEMENT CONCERNING THE FACTS CONTAINED IN THIS AFFIDAVIT MAY SUBJECT THE PERSON MAKING THE FALSE STATEMENT TO CRIMINAL PENALTIES AS PROVIDED BY LAW.

South Carolina appellate courts have repeatedly held that the statute, and particularly Section 35-77-170(2), “is clear on its face”. Bradley v. Doe, 374 S.C. 622, 629, 649 S.E.2d 153,

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<sup>9</sup> The investigating officer from the South Carolina Highway Patrol Investigated this accident. He did not mention the presence of a foreign object in the roadway in his report.

157 (Ct.App. 2007). Judge Ralph King Anderson, writing for the court, referred to Criterion Insurance Company v. Hoffman, 258 S.C. 282, 188 S.E.2d 459 (1972) and stressed the historical reasoning for the strict compliance requirement:

The right to sue and collect from one's own liability insurance carrier in case of a loss caused by a hit-and-run driver or other driver an uninsured automobile is a creature of the legislature. Except for the statute, and endorsements required, no right exists to recover from one's own insurance carrier. One must look to the terms of the uninsured motorist statute and policy endorsements and comply therewith to get the benefit of law...

It is the province of the lawmakers to create a right of action, to provide for process and to declare the procedure for collecting from one's own insurance carrier...

The terms of the statute...are clear and not ambiguous. This being true, there is no room for construction and we are required to apply the statute according to its literal meaning. Most courts take a liberal view when dealing with the question of coverage; however, the procedural obligation that the insured must discharge in order to recover, since they are prescribed by statute, are viewed by the courts as mandatory, and strict compliance with them is a prerequisite to recover.

Bradley, 649 S.E.2d at 158.

The statute provides that in order to recover uninsured motorist benefits, the accident must have been witnessed by someone other than the owner or operator of the vehicle and that witness must attest to the truth of the facts of the accident. Collins v. Doe, 352 S.C. 462, 574 S.E.2d 739 (2002); Shealy v. Doe, 370 S.C. 154, 634 S.E.2d 45 (Ct. App. 2006). Here, Plaintiff has not produced an affidavit from any witness who saw a foreign object in the road. Mr. Bernardo does not say he saw one. The police officer who investigated the accident did not note the presence of a foreign object in the road and importantly, no other motorist on I-95 reported the presence of a foreign object in the road before or after Plaintiff's accident.

The facts of Bradley v. Doe are remarkably similar to the case of *sub judice*. There, Mr. Bradley was traveling on College Park Road in Ladson, South Carolina at approximately 3:00 a.m. He claimed that he swerved to avoid an object in his lane. He lost control of his vehicle, veered off the road and struck a tree. The presence of a garbage bag in the road, which Mr. Bradley claims he swerved to avoid, was verified by several witnesses: Mr. Bradley, Mr. Bradley's son, and a United States Air Force Lieutenant Colonel. In fact, a friend of Mr. Bradley's (Thomas Bosley) drove home on the same road just moments before Mr. Bradley and he saw a large trash bag in the middle of the same lane Mr. Bradley was in when he swerved to avoid the bag. Mr. Bosley missed hitting the bag. He also testified that approximately one quarter-mile further down the road he encountered a street sweeper's truck drop another trash bag similar to the one he saw earlier in the road.

Doe moved for summary judgment because no one independently witnessed the accident. That is, no one saw Mr. Bradley swerve to avoid the bag which other people saw in the road before and after Mr. Bradley's accident. Judge Diane Goodstein granted Doe summary judgment. The Court of Appeals affirmed. The Court of Appeals held that "Bradley was the only witness to the accident. None of the affiants actually saw Bradley swerve to avoid a trash bag in the road ... The fact that three people saw the bag of trash in the same roadway does not implicate involvement of another vehicle." Bradley, 649 S.E.2d at 159.

The same is true in this case: neither Mr. Bernardo nor Mr. Wilson saw any object in the road either before or after the accident. In his affidavit of March 4, 2010, Mr. Bernardo tried to say he saw Plaintiff swerve to avoid an object in the road, but he did not say that. In fact, Mr. Bernardo's affidavit said "the truck and car carrier suddenly veered to the left as if to avoid something in the roadway and in doing so struck a concrete pillar supporting the overpasses.

This is nothing more than Mr. Barnard attesting that he observed Plaintiff lose control of his vehicle and go off the road. Mr. Bernardo never identified anything in the road either before or after the accident that would explain why Plaintiff left the road. Mr. Bernardo's affidavit of March 4, 2011 does not even identify or discuss the object which Mr. Tucker claims he swerved to avoid. Therefore, Plaintiff, like Mr. Bradley, failed to satisfy the requirements of the statute as a matter of law.

Viewing the affidavits and the inferences to be drawn therefrom, it is clear that the same capable of only one conclusion and/or inference and that is that Plaintiff failed to comply with Section 38-77-170 as a matter of law. As such, Defendants' trial motion for directed verdict and now his post trial motion for judgment notwithstanding the verdict should be granted on this basis. Defendants respectfully submit that failure to grant such motion given the facts is tantamount to an error of law.

B. Defendants Are Entitled To Judgment Notwithstanding The Verdict Pursuant To Rule 50, SCRPC, On The Basis That Plaintiff Failed To Establish Negligence By A Preponderance Of The Evidence And As Such The Damage Awards Should Be Stricken.

In this case, the jury's verdict that Defendants were negligent is wholly unsupported by the evidence even when considered in the light most favorable to Plaintiff. The evidence presented by Plaintiff fell woefully short of the evidentiary standard (preponderance of the evidence) needed to establish negligence. Accordingly, Defendants' motions for a directed verdict should have been granted and now, their motion for judgment notwithstanding the verdict as to liability and damages should be granted.

In an action in negligence it is incumbent upon a plaintiff to establish by a preponderance of the evidence, each of the following elements: (1) a duty of care owed by the defendant to the plaintiff; (2) a breach of that duty by a negligent act or omission; (3) damage to the plaintiff

proximately caused by the breach of duty. Nelson v. Piggly Wiggly Central, Inc., 390 S.C. 382, 701 S.E.2d 776 (Ct.App. 2010). If the plaintiff fails to prove one or more of these elements, the action will fail. Newton v. South Carolina Pub. Rys. Comm'n, 312 S.C. 107, 439 S.E.2d 285 (Ct.App. 1996), *rev'd on other grounds*, 319 S.C. 430, 462 S.E.2d 266 (1995). Where the evidence is susceptible of only one inference, it will become a matter of law for the court. Id.

Circumstantial evidence may be relied upon, but circumstances must be shown to justify an inference that the plaintiff's injuries were caused by the defendant's negligence. Legette v. Smith, 265 S.C. 573, 220 S.E.2d 429 (1975).<sup>3</sup> When circumstantial evidence is relied upon to establish negligence and ensuing liability, the plaintiff must show such circumstances as would justify that injuries were due to the negligent act on the part of the defendant and the matter may not be left to mere conjecture or speculation. Id. Where viewing the facts in the light most favorable to a plaintiff and the plaintiff has failed to make out his case, it becomes the duty of the trial judge to direct a verdict for the defendant. Id. South Carolina has not adopted the doctrine of *Res ipsa loquitur*. Id. Although causation may be established by circumstantial evidence and is usually a question for the jury, it must be based on probabilities and not mere possibilities. Nguyen v. Uniflex Corp., 312 S.C. 417, 440 S.E.2d 887 (Ct.App. 1994).

Viewing the facts in the light most favorable to Plaintiff, the evidence presented at trial clearly indicates Plaintiff failed to establish by a preponderance of the evidence that Defendants

<sup>3</sup> In Legette, a wrongful death action based on negligence, the South Carolina Supreme Court affirmed the trial judge's granting of the defendant's motion for directed verdict where the plaintiff failed to meet the burden of proof by presenting evidence creating a reasonable inference of negligence on the part of the defendant. In Legette just as in the case at bar, there was no direct evidence indicating that the defendant was negligent and the circumstantial evidence relied upon by the plaintiff to establish negligence and ensuing liability set forth by the plaintiff in Legette did not rise beyond that of conjecture or speculation.

breached any duty owed to Plaintiff, that Defendants were negligent, and that any act or omission on the part of Defendants proximately caused damage to Plaintiff:

- Plaintiff failed to establish that the 700 pound object made of cast steel was ever in the road, let alone in Plaintiff's lane of travel either before or after the accident.
- Plaintiff produced no witnesses who saw any object in the road let alone any witnesses who observed Plaintiff striking any object in the road.
- Trooper Brad A. Suggs, the investigating officer from the South Carolina Highway Patrol, testified that no one told him that there was any object in the road that contributed to or caused the accident including two (2) witnesses with whom he talked at the scene and who did not testify at trial.
- The object which Plaintiff claims was in the road was discovered on the side of the road and in fact, on the opposite side of the road from where Plaintiff's vehicle struck a concrete abutment.
- There was no evidence that the object travelled to the right shoulder of the highway as a result of Plaintiff striking it.
- R. Dean Harris, M.E., P.E., Plaintiff's own expert engineer, testified that if Plaintiff had struck the object, given the weight of the object, it could only have moved tens of feet.
- Mr. Vereen testified the object was found about 75 - 200 feet from the area where Plaintiff lost control of his truck.
- Mr. Harris testified that if Plaintiff struck the object and dragged it beneath his truck, the road would be scarred and debris from the truck would be found; neither were found.
- The evidence presented indicated there was no scarring in the road from the 700 pound object having either fallen from a flatbed to the ground or having been moved from the roadway.
- More than one witness testified that there was no evidence of any debris in the road indicating Plaintiff's truck hit, propelled or dragged the object.

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- Mr. Harris could not state to a reasonable degree of certainty that damage to one of Plaintiff's tire rims was caused by Plaintiff's impact with the object he claims to have struck.
- Albert Vereen, the tow truck operator who came to move Plaintiff's truck from the concrete abutment, testified he found the object across I-95 from Plaintiff's tractor trailer on the right shoulder of the road and that Plaintiff appeared to have lost control of his vehicle 75 - 100 feet away from where he observed the object.
- Charles Hayes, Plaintiff's employee, testified that when he visited the scene, the object was several hundred feet from where Plaintiff lost control of his vehicle and he likewise, found no scarring in the road which would tie the object to Plaintiff's tractor trailer.
- Trooper Suggs also testified that he found no evidence to indicate that Plaintiff's vehicle had stricken any object in the road which again, included a lack of scarring in the road and debris from Plaintiff's vehicle.
- No evidence was presented that establishes by a preponderance of the evidence that even if the object was in Plaintiff's lane of travel, that it came to be there as a result of having fallen from Defendants' flatbed as a result of improper securement.
- Donald Wilson testified by deposition that at approximately 10:30 p.m., he observed a truck enter the ramp on southbound I-95 and that on that truck, an object that "looks just like"<sup>4</sup> the object Plaintiff claims to have hit almost 2 hours later was secured to the back of a flatbed by a nylon strap.
- Mr. Harris testified the object had been improperly secured to the truck (even though Mr. Harris never saw anything he could identify as Defendants' flatbed, the object on Defendant's flatbed, the manner in which any such object may have been secured to Defendants' flatbed, or any object fall from Defendants' flatbed).
- No one saw what could be identified as Defendant's truck.

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<sup>4</sup> Trial testimony of Donald Wilson presented by deposition dated August 12, 2010, P. 6, L. 6-11.

- No one saw a 700 pound cast metal object fall from Defendant's flatbed or any other flatbed.
- Even if the object had been located in the road, it would have had to have been there at least 1 ½ hours according to Mr. Wilson, Plaintiff's witness, and during that time, no one called South Carolina Highway Patrol or anyone else to report any foreign object in the roadway.
- William Sweatt testified 911 received 5 calls between April 29, 2010 at 10:00 p.m. and 2:00 a.m. on April 30, 2010. Any calls about a foreign object in the road would have been forwarded to South Carolina Highway Patrol (e.g., Gilbert R. George, Jr.).
- Gilbert R. George, Jr., testified the South Carolina Highway Patrol would forward calls from 911 to the South Carolina Department of Transportation. He testified that the Department did not receive any calls regarding a foreign object in the road between April 29, 2010 at 10:00 p.m. and 2:00 a.m. on April 30, 2010.

In addition, Albert Vereen, a fact/lay witness who did not even see the accident and who was also not properly qualified to render opinion testimony, was improperly permitted to testify that it was his opinion Plaintiff struck the object.<sup>5</sup> Defendants respectfully submit that the admission of Mr. Vereen's testimony was tantamount to an error of law and his testimony should not have been considered when Defendants moved for directed verdict and now, on their motion for judgment notwithstanding the verdict.

The evidence presented at trial was completely devoid of any sufficient basis upon which a jury could reasonably conclude Plaintiff established Defendants' negligence by a

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<sup>5</sup> Defendants also submit that they are entitled to a judgment notwithstanding the verdict based on the admission of certain testimony over Defendants' Counsel's objections including: (1) allowing Mr. Harris, Plaintiff's expert metallurgist, to opine that if the object was secured by only a single nylon strap, it was secured improperly; no proper foundation as laid for this testimony, Mr. Harris was not qualified to render such opinion testimony and further, it invaded the province of the jury; and (2) allowing Mr. Vereen, a lay witness, to opine that Plaintiff struck the bearing; no proper foundation was laid for this testimony, Mr. Vereen was not qualified to render such opinion, and such testimony invaded the province of the jury.



preponderance of the evidence. Even viewing all testimony in the light most favorable to Plaintiff, Plaintiff was the only witness who testified that an object was in his lane of travel. Yet, the only bearing that was ever located was one that was on the shoulder of the road. By Plaintiff's own testimony he did not see the object long enough to have the chance to move to the right and avoid it thus, calling into doubt his ability to identify it later. Furthermore, based upon where the object was discovered, the testimony of Plaintiff's own engineer makes it impossible for the object to have been in the area of the interstate where Plaintiff lost control of his vehicle.

The evidence is susceptible of only one conclusion: the object which Mr. Vereen and Mr. Hayes found on the shoulder of the road was not on that portion of the road where Plaintiff lost control of his vehicle and did not cause Plaintiff to lose control of his vehicle. Even if the evidence was not susceptible of that one conclusion, Plaintiff clearly failed to prove by a preponderance of the evidence that the object was ever in the southbound portion of I-95 and that it caused him to lose control of his vehicle.

Given the insufficient evidentiary basis to support the verdict, the conclusion is inescapable that the verdict was the result of confusion and/or improper considerations including the fact that at the time of trial, Plaintiff, who was seriously injured, was 82 years old and a very sympathetic plaintiff, as well as the fact that there was no actual party (a corporate one in part at that) seated with Defendants' Counsel. Whereas here, Plaintiff has failed to establish Defendants were negligent by the greater weight of the evidence. Defendants are entitled to judgment notwithstanding the verdict as to liability.

C. Defendants Are Entitled To Judgment Notwithstanding The Verdict Pursuant To Rule 50, SCRPC, On The Basis That Plaintiff Failed To Establish Punitive Damages By Clear And Convincing Evidence.<sup>6</sup>

Section 15-33-135 of the South Carolina Code of Laws provides that in any civil action where punitive damages are claimed, the plaintiff has the burden of proving such damages by clear and convincing evidence. S.C. Code Ann. §15-33-135 (1976, as amended). In order for a plaintiff to recover punitive damages in a negligence action, there must be clear and convincing evidence that the defendant's conduct was willful, wanton, or in reckless disregard of the plaintiff's rights. Cohen v. Allendale Coca-Cola Bottling Co., 291 S.C. 35, 351 S.E.2d 897 (Ct.App. 1986)<sup>7</sup>(citing Lengel v. Tom Jenkins Realty, Inc., 286 S.C. 515, 334 S.E.2d 834 (Ct.App. 1985)<sup>8</sup>). Simple negligence affords no basis for an award of punitive damages. Carter v. R. L. Jordan Oil Company, Inc., 301 S.C. 84, 390 S.E.2d 367 (Ct.App. 1990)<sup>9</sup>(citing Cohen, supra). Conduct is willful, wanton, or reckless when it is committed with a deliberate intention under circumstances such that a person of ordinary prudence would consider it an invasion of another's rights. Id. It is the present consciousness of wrongdoing which justifies the assessment of punitive damages against a tortfeasor. Id.

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<sup>6</sup> Defendants incorporate by reference as if fully repeated verbatim herein, their entire "Defendants' Mitchell v. Fortis Post-Judgment Punitive Damage Review Memorandum."

<sup>7</sup> In Cohen, the defendant appealed the trial judge's denial of his motion for judgment notwithstanding the verdict and for a new trial. The South Carolina Court of Appeals reversed the judgment for punitive damages finding that there was no evidence from which it could be reasonably inferred that the defendant intended to furnish the plaintiff with a soft drink containing an insect and thus, there was simply no proof of a present consciousness of wrongdoing on the defendant's part. The appellate court found that since the award of punitive damages had no evidentiary support, the trial judge should have set it aside.

<sup>8</sup> In Lengel, the South Carolina Court of Appeals reversed an award of punitive damages finding no evidence in the record to sustain such damages reiterating that punitive damages are awarded to punish a tortfeasor but not awarded for mere negligence.

<sup>9</sup> In Carter, the South Carolina Court of Appeals reversed the judgment for punitive damages against the defendant finding that there was no evidence in the record from which to infer any conscious wrongdoing on the part of the defendant.

In this case, the Court charged the jury with S.C. Code Ann. §56-5-4100 (1976 as amended)<sup>10</sup>. While violation of a statute which creates a legal duty or standard of care in a particular situation is considered negligence *per se*, negligence *per se* is a form of ordinary negligence. Cooper v. County of Florence, 299 S.C. 386, 385 S.E.2d 44 (Ct.App. 1999), *rev'd on other grounds*, 306 S.C. 408, 412 S.E.2d 417 (1991); Cantrell v. Carruth, 250 S.C. 415, 158 S.E.2d 208 (1967); 57 Am.Jur.2d Negligence §727; *See also*, Seals by Causey v. Windburn, 314 S.C. 416, 445 S.E.2d 94 (Ct.App. 1994).

By itself, the violation of a statute does not warrant a finding of reckless, willful or wanton conduct. Cooper, *supra*. "In order for the violation of a statute to warrant a finding of willful or wanton conduct, there must be some evidence that the defendant appreciated the likelihood of the harm to the plaintiff and acted with indifference to the requirements of the statute." Cooper, 386 S.E.2d at 48, *See Tant v. Dan River, Inc.*, 289 S.C. 325, 345 S.E.2d 495 (1986)(the defendant was aware of statutory violation and resulting damage to the plaintiffs). Conduct is willful, wanton, or reckless when it is committed with a deliberate intention under circumstances such that a person of ordinary prudence would consider it an invasion of another's rights. Id. (citing Cohen, *supra*).

Here, there is absolutely no evidence that supports Plaintiff's award of punitive damages. Plaintiff failed to establish by clear and convincing evidence that Defendants acted willfully, wantonly, or in reckless disregard of Plaintiff's rights. Defendants incorporate herein, Sections

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<sup>10</sup> In summary, Section 56-5-4100 requires that any person operating a vehicle on a public highway do so in a manner so as to prevent any of its load from dropping or otherwise escaping from the vehicle. Section 56-5-4100 further states that if such cargo falls or escapes and would constitute an obstruction or injure a vehicle, or otherwise endanger travel upon the public highway, the person shall make every reasonable effort to immediately cause the public highway to be cleared of the same.

II. and III. B.,<sup>11</sup> above. First, Plaintiff presented no testimony that identified Defendants' truck as THE truck that was carrying THE bearing which Plaintiff claims to have struck. Second, there is no evidence that the object which Mr. Wilson saw is THE object which Plaintiff claims he struck. In fact, if the object which Mr. Wilson saw is the object which Plaintiff struck, then the object would have been in the road for almost 2 hours. No other vehicle struck it and the evidence is that no one called 911 or the South Carolina Department of Transportation to report such an object in the road. Third, there was no testimony that Defendants' truck was THE truck that dropped the object.

Even assuming the jury could find that Defendants violated Section 56-5-4100, there was no evidence whatsoever that any such violations constituted willful or wanton conduct on the part of Defendants. Assuming THE object that was dropped came from THE Defendants' truck and was not properly secured, there was no evidence whatsoever, let alone clear and convincing evidence from which a jury could conclude, that Defendants or their agents (1) secured the load; (2) had knowledge that any such load was not properly secured; (3) were aware that that the manner in which such load was secured was likely to cause harm to Plaintiff (or someone else); (4) were either unaware or simply did not care if the manner in which the load was secured was in violation of statute and proceeded to act in conscious disregard of Plaintiff's rights; (5) that Defendants in fact, dropped a load onto the roadway; and/or (6) that Defendants knew or did not care that they had dropped something onto the roadway and simply left it there.

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<sup>11</sup> "II. TESTIMONY ELICITED AT TRIAL," "III. MOTIONS FOR JUDGMENT NOT WITHSTANDING THE VERDICT PURSUANT TO RULE 50, SCRCP," and "B. Defendants Are Entitled To Judgment Notwithstanding The Verdict Pursuant To Rule 50, SCRCP, On The Basis That Plaintiff Failed To Establish Negligence By A Preponderance Of The Evidence And As Such, The Damage Awards Should Be Stricken."

Plaintiff has fallen woefully short of establishing he is entitled to punitive damages by clear and convincing evidence. Plaintiff has failed to establish any knowledge on the part of Defendants that they created any danger, were aware of any danger and/or acted in willful disregard of any duty that may have been owed to Plaintiff. As such, Defendants request that the trial court grant their motion for judgment notwithstanding the verdict as to Plaintiff's punitive damage award.

#### IV. MOTIONS FOR A NEW TRIAL PURSUANT TO RULE 59, SCRPC

A. Defendants are Entitled to a New Trial Absolute and in the Alternative, a New Trial Nisi Remittitur Under The Thirteenth Juror Doctrine.

Under the "Thirteenth Juror Doctrine," a trial judge may grant a new trial absolute when he finds that the evidence does not justify the verdict. Vinson v. Hartley, 324 S.C. 389, 477 S.E.2d 715 (Ct.App. 1996).<sup>12</sup> This ruling has also been termed granting of a new trial on the facts. Rivera v. Newton, 401 S.C. 402, 737 S.E.2d 193 (Ct.App. 2012).<sup>12</sup> The doctrine entitles the judge to sit, in essence, as the thirteenth juror when he finds the evidence does not justify the verdict and grant a new trial based solely upon the facts." Rivera, supra. (citing Lane v. Gilbert Constr. Co., 383 S.C. 590, 597, 681 S.E.2d 879, 883 (2009))<sup>13</sup>. As the thirteenth juror, the trial judge can hang the jury by refusing to agree to the jury's otherwise unanimous verdict. Lane, 681 S.E.2d at 597. The trial judge is not required to explain the reasons for his decision. Rivera, 737 S.E.2d at 198; Lane, 681 S.E.2d at 598. In fact, "because the result of the 'thirteenth juror' vote by the judge is a new trial rather than an adjustment to the verdict, no purpose would be

<sup>12</sup> In Rivera, the South Carolina Court of Appeals affirmed the trial court's grant of a new trial to the passenger after the jury returned a verdict for the defendant.

<sup>13</sup> In Lane, the South Carolina Supreme Court affirmed the trial court's grant of a new trial to the plaintiff where the damages could only be explained on the basis of passion, prejudice or caprice on the part of the jury and where the verdict shocked the conscience of Supreme Court.

served by requiring the trial judge to make factual findings.” Rivera, 737 S.E.2d at 198. (quoting Folkens, 387 S.E.2d at 267.

The seminal case setting forth the “thirteenth juror doctrine” is Worrell v. South Carolina Power Co., 186 S.C. 306, 195 S.E. 638 (1938). In Worrell, the Supreme Court stated:

Nor does it follow that because under the law, the trial judge is compelled to submit the issues to the jury, he cannot grant a new trial absolute. As has often been said, the trial judge is the thirteenth juror, possession the veto power to the Nth degree, and it must be presumed, recognizes and appreciates his responsibility, and exercises in the discretion vested in him with the fairness and impartiality.

Worrell, 186 S.C. at 313-314, 195 S.E. at 641. Thus, even where conflicting evidence exists on contested issues (in this case, liability), a trial judge’s decision to sit as a thirteenth juror and grant a new trial inviolable. Id. The Court has had the opportunity to reconsider the thirteenth juror doctrine on several occasions and each time, it has refused to abolish the doctrine. Folkens v. Hunt, 300 S.C. 251, 387 S.E.2d 265 (1990).

The trial judge, sitting as the thirteenth juror, is charged with the duty of seeing that justice is done and has the authority to grant new trials when he is convinced that a new trial is necessitated on the basis of the facts of the claim. Graham v. Whitaker, 282 S.C. 393, 321 S.E.2d 40 (1984). Historically, in South Carolina, the trial judges have the authority to grant a new trial when upon the judge’s finding that justice has not prevailed. Youmans ex rel. Elmore v. South Carolina Department of Transportation, 380 S.C. 263, 670 S.E.2d 1 (Ct.App. 2008)(citing Todd v. Owen Indus. Prods., Inc., 315 S.C. 34, 431 S.E.2d 596 (Ct.App. 1993)<sup>14</sup>.

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<sup>14</sup> In Todd, the South Carolina Supreme Court affirmed the trial court’s grant of a new trial to the plaintiff where the damage award was not related to anything in the evidence and the verdict was offensive and unconscionable.

Similarly, the trial judge may grant a motion for a new trial if the verdict is inconsistent and reflects the jury's confusion. Id. (citing Johnson v. Parker, 279 S.C. 132, 303 S.E.2d 95 (1983)).<sup>15</sup> See also, Johnson v. Hoechst Celanese Corp., 317 S.C. 415, 453 S.E.2d 908 (Ct.App. 1995)(under the thirteenth juror doctrine, the trial judge may grant a new trial if the judge believes the verdict is unsupported by the evidence and similarly, a new trial may be granted if the verdict is inconsistent and reflects the jury's confusion).

The trial judge's discretion in granting a new trial is "founded upon the evidence, the witnesses, the trial circumstances, the verdict and the judge's view of the circumstances ...". Fallon v. Rucks, 217 S.C. 180, 189, 60 S.E.2d 88, 92 (1950). In ruling on a new trial as the thirteenth juror, the trial judge may weigh the evidence and rely on his view of the circumstances. Id. A trial judge may grant a new trial upon the facts if the judge determines the verdict is contrary to the fair preponderance of the evidence. McEntire v. Mooreguard Exterminating Services, Inc., 353 S.C. 629, 578 S.E.2d 746 (Ct.App. 2003).

The granting of a new trial upon the facts is not the equivalent of granting a directed verdict; unlike a motion for directed verdict, the trial judge weighs the evidence under the thirteenth juror doctrine and need not view it in the light most favorable to the opposing party. McEntire, 578 S.E.2d at 748 (citing Parker v. Evening Post Publ'g. Co., 317 S.C. 236, 247, 452 S.E.2d 640, 646 (Ct.App. 1994)(the trial judge may take its own view of the evidence)). The question of whether the evidence is legally sufficient to sustain a verdict, a question of law, is distinguishable from the question of whether a fair preponderance of the evidence supports a verdict, which is a matter involving the exercise of discretion. McEntire, 578 S.E.2d at 748.

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<sup>15</sup> In Johnson, the South Carolina Supreme Court reversed the trial court's denial of the plaintiff's motion for a new trial where verdict was so confused that the jury's intent was unclear.

Stated differently, "[i]t may well be that a party's evidence makes a case for the jury while it is so outweighed by the countervailing evidence that, in the exercise of its discretion, the trial court should not hesitate to set aside the verdict in his favor." Id., 578 S.E.2d at 748. (*quoting Russell v. Pilger*, 113 Vt. 537, 37 A.2d 403, 414 (1944)).

Here, the evidence was not legally sufficient to support the jury verdict on liability or damages and as such, justice has not prevailed. Further, the jury's verdict is clearly the result of something other than the jury's dispassionate analysis of the facts of the case including confusion, sympathy, passion and/or caprice.<sup>16</sup> Not only is the finding of negligence and actual damages contrary the preponderance of the evidence but also, the punitive damage award was not clearly and convincingly established under the facts presented in this case.

B. Defendants Are Entitled to a New Trial Absolute and in the Alternative, New Trial Nisi Remittitur, Pursuant to Rule 59, SCRC.

Rule 59, SCRC, provides for the granting of a new trial in an action in which there has been a trial by jury, for any reasons for which new trials have heretofore been granted in actions at law in the courts on this State. While the grant or denial of new trial motions rests with the discretion of the trial judge, the trial judge must grant a new trial absolute if the amount of the verdict is so grossly inadequate or excessive so as to shock the conscience of the court and clearly indicates the figure reached was the result of passion, caprice, prejudice, partiality, corruption or some other improper motives ... the failure of the trial judge to grant a new trial absolute in this situation amounts to an abuse of discretion. Chapman v. Upstate RV & Marine,

<sup>16</sup> In Burke v. AnMed Health, 393 S.C. 48, 710 S.E.2d. 84 (Ct.App. 2011) the Court of Appeals stated that the trial has the power to grant a new trial absolute when the verdict is shockingly disproportionate to the injuries suffered and thus, indicates that passion, caprice, prejudice, or other considerations not reflected by the evidence affected the awarded amount. (*citing Becker v. Wal-Mart Stores, Inc.*, 339 S.C. 629, 529 S.E.2d 54 (Ct.App. 2009)).



364 S.C. 82, 610 S.E.2d 852 (Ct.App. 2005)(quoting Vinson v. Hartley, 324 S.C. 389, 404-405, 477 S.E.2d 715, 723(Ct.App. 1996)); O'Neal v. Bowles, 314 S.C. 525, 431 S.E.2d 555 (1993).

"Alternatively, the trial court may grant a new trial absolute when sitting as the thirteenth juror it concludes the jury's verdict is not supported by the evidence." Chapman, 610 S.E.2d at 856 (quoting Duncan v. Hampton Co. Sch. Dist. No. 2, 335 S.C. 535, 547, 517 S.E.2d 449, 455 (Ct.App. 1999))(emphasis added); Vinson, supra.

A "trial court's power to grant a new trial on the basis of the Court's firm belief that the verdict is clearly contrary to the weight of the evidence has ... long been regarded as an integral part of a trial by jury. In making the determination, the court weighs all the evidence ... While the Court is to respect the jury's collective wisdom and must not simply substitute its opinion for the jury's, if the trial judge is not satisfied with the verdict of a jury - he has the right - and indeed the duty - to set aside the verdict and order a new trial."

Smith v. Transworld Drilling Co., 773 F.2d 610, 613 (5th Cir. 1985)(internal citations omitted).

There can be no doubt that the trial judge has the discretionary power to grant a new trial absolute or nisi in a law case upon his disapproval of the verdict on factual grounds.

South Carolina State Highway Department v. Townsend, 265 S.C. 253, 217 S.E.2d 778 (1975)(emphasis added).

"The trial judge has alone has the power to grant a new trial nisi when he finds the amount of the verdict to be merely inadequate or excessive." O'Neal v. Bowles, supra (citing Easler v. Hejaz Temple, 285 S.C. 348, 329 S.E.2d 753 (1985)).

1. Defendants Are Entitled to a New Trial Absolute Pursuant to Rule 59, SCRPC, on the Basis that Plaintiff Failed to Meet His Burden of Proof by Establishing Defendants' Negligence by a Preponderance of the Evidence and as Such the Damages Should be Stricken.

The evidence presented at trial was devoid of any legally sufficient basis upon which a jury could reasonably conclude that Plaintiff established negligence by a preponderance of the

evidence. Given the significant lack of sufficient evidentiary basis to support the verdict, the conclusion is inescapable that the verdict including the actual damage award was the result of improper considerations including the fact that at the time of trial, Plaintiff, who was seriously injured, was 82 years old and a very sympathetic plaintiff, as well as the fact that was no actual party, including a corporate one in part at that, was seated with Defendants' Counsel. The verdict also evidences that the jury did not follow the Court's instructions with regard to the burdens of proof and the manner in which damages were to be calculated (e.g., damages must not be speculative) and is clearly the result of prejudice, bias and/or some other improper consideration.

In fact, after deliberating for about 1 ½ hours, the jury inquired of the trial judge as to whether Plaintiff would actually receive any money awarded. After being provided with an affirmative answer, the jury returned its verdict within minutes. Clearly, the jury was biased in favor of Plaintiff.<sup>17</sup>

So as not to be repetitive, Defendants incorporate fully herein, the testimony and legal arguments outlined above in "II. TESTIMONY ELICITED AT TRIAL," "III. MOTIONS FOR JUDGMENT NOTWITHSTANDING THE VERDICT PURSUANT TO RULE 50, SCRCP," and "B. Defendants Are Entitled To Judgment Notwithstanding The Verdict Pursuant To Rule 50, SCRCP. On The Basis That Plaintiff Failed to Establish Negligence By A Preponderance Of The Evidence And As Such, The Damage Awards Should Be Stricken." as the same testimony and legal arguments made therein support Defendants' motion for a new trial absolute. The arguments and testimony outlined therein provide the same basis upon which Defendants should

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<sup>17</sup> As an aside, the jury deliberations commenced around the lunch hour; the jury was neither afforded a lunch break nor provided lunch. Thus, it could be inferred that this contributed to the rendering of a less contemplative and more expeditious verdict as the jurors.

be granted a new trial absolute pursuant to Rule 59, SCRCP including that the verdict is not supported by the evidence and was clearly the result of some other improper consideration not founded on the record.

2. Defendants are Entitled to a New Trial Absolute a Pursuant to Rule 59, SCRCP On The Basis That Plaintiff Failed To Establish Punitive Damages By Clear And Convincing Evidence And As Such, The Damages Should Be Stricken.<sup>18</sup>

For the same reasons outlined above in "II. TESTIMONY ELICITED AT TRIAL," "III. MOTIONS FOR JUDGMENT NOTWITHSTANDING THE VERDICT PURSUANT TO RULE 50, SCRCP," and "III. C. Defendants Are Entitled To Judgment Notwithstanding The Verdict Pursuant To Rule 50, SCRCP, On The Basis That Plaintiff Failed To Establish Punitive Damages By Clear And Convincing Evidence" which Defendants incorporate herein, Defendants are entitled to a new trial absolute as to punitive damages.

Again, there was simply no clear and convincing evidence presented at trial that would entitle Plaintiff to an award of punitive damages and especially one as shocking to one's conscious as was the verdict rendered in this case; the verdict is simply not supported by the facts of the case. As in Cohen, a case in which the South Carolina Supreme Court reversed the trial judge and held that the verdict for punitive damages must be set aside because there was no evidence on which the issue of punitive damages could be sent to the jury and in Carter, where the South Carolina Court of Appeals reversed the judgment for punitive damages finding no evidence from which to infer conscious wrongdoing, so too, should the verdict for punitive damages be set aside here.

Even if Plaintiff established simple negligence which Defendants dispute, simple negligence is insufficient to support an award of punitive damages. As in Cohen and Carter, the

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<sup>18</sup> Defendants incorporate by reference as if fully repeated verbatim herein, their entire "Defendants' Mitchell v. Fortis Post-Judgment Punitive Damage Review Memorandum."

trial record is completely devoid of any evidence from which it could even be inferred that Defendants acted with deliberateness, intention or even knowledge or present consciousness of wrongdoing.

3. In the Alternative, Defendants Are Entitled to a New Trial Absolute and/or Nisi Remittitur on Actual and Punitive Damages Pursuant to Rule 59, SCRCP.

In the event the Court denies Defendants' motions for judgment notwithstanding the verdict and/or for a new trial absolute under Rule 59, SCRCP, Defendants respectfully request the Court grant a new trial absolute and in the alternative, nisi remittitur as to both actual and punitive damages.

A new trial nisi remittitur is one whereby a trial judge may review a jury award for excessiveness of a verdict and upon finding that the verdict was excessive so as to show passion or prejudice, the trial judge may order new trial unless the plaintiff accepts a reduction in the jury award. South Carolina State Highway Dept. v. Townsend, 266 S.C. 253, 217 S.E.2d 778 (1975)<sup>19</sup>. Such motion is founded on the contention that the verdict was not inherently unlawful but was, under the facts of the case, unduly liberal. Id. (citing Elliott v. Black River Elec. Co-op., 233 S.C. 233, 104 S.E.2d 357 (1958)); Gray v. Davis, 247 S.C. 536, 148 S.E.2d 682 (1966)).

It is not necessary that the trial judge find the verdict to be so excessive as to indicate it was the result of prejudice, caprice or passion, or other consideration not founded in the evidence; where the verdict is deemed excessive by the trial judge, in the sense that it indicates

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<sup>19</sup> In South Carolina State Highway Dept., a case involving eminent domain, the South Carolina Supreme Court held that while the jury verdict was not so excessive as to warrant the conclusion that the jury was moved by passion or prejudice, or other improper considerations, the trial court was not without the power as the thirteenth juror, to order a new trial where the court disapproved of the verdict on factual grounds even though the jury verdict was within the range of valuation expressed in evidence. The Supreme Court remanded the case to the trial judge for consideration of appellant's motion for new trial nisi because of the excessiveness of the jury award.

merely undue liberality on the part of the jury, the trial judge alone has the power and with it, the responsibility, of setting aside the verdict or reducing it by granting a new trial nisi. Young v. Warr, 252 S.C. 179, 165 S.E.2d 797(1967)<sup>20</sup>; Gray, *supra*.

When verdicts are challenged as excessive, the South Carolina Supreme Court has distinguished between those that are unduly liberal and those that are actuated by passion, caprice or prejudice. Easler v. Hejaz Temple, *supra*.

(1) The unduly liberal verdict:

Where the verdict is deemed excessive by the judge, in the sense that it indicates mere undue liberality on the part of the jury, the trial judge *alone* has the power, and with it, the responsibility of setting aside the verdict absolutely or reducing it by the granting of a new trial absolute<sup>21</sup>...

(2) The verdict is actuated by passion caprice:

It is only when the verdict is so grossly excessive and the amount awarded so shockingly disproportionate to the injuries as to indicate that the jury was moved or actuated by passion, caprice, prejudice, or other consideration not found on the evidence that it becomes the duty of the court, as well as of the trial court, to set aside the verdict absolutely<sup>22</sup>.

Easler, 329 S.E.2d at 356 (internal citations omitted). In either instance, it becomes the responsibility to grant a new trial absolute or remittitur as to damages.

The trial courts in this State have granted new trials absolute in instances where the verdict was excessive. Brinkley v. South Carolina Department of Corrections, 386 S.C. 182, 687 S.E.2d 54 (Ct.App. 2009)(South Carolina Court of Appeals affirmed trial court's grant of new trial absolute where the plaintiff was awarded \$600,000.00 and trial court found the amount to be excessive.

<sup>20</sup> In Young, the defendant filed post trial motions for a new trial absolute, a new trial nisi and judgment non obstante verdict. On appeal, the South Carolina Supreme Court affirmed the trial judge's granting of a new trial nisi and his subsequent remission of the plaintiff's damage award from \$500,000.00 to \$100,000.00.

<sup>21</sup> Emphasis added by Defendants.

<sup>22</sup> Emphasis added by Defendants.

a. Defendants Are Entitled to New Trial Absolute and/or Nisi Remittitur as to Actual Damages.<sup>23</sup>

Irrespective of whether Plaintiff established negligence on the part of Defendants by a preponderance of the evidence, Defendants submit that they are entitled to a new absolute and in the alternative, trial nisi remittitur of actual damages. Defendants do not dispute that Plaintiff was seriously injured and that he produced at trial, evidence of \$325,000.00 in medical costs. Defendants do, however, submit that the jury's award of actual damages in the amount of \$2,500,000.00 was excessive; it was not only unduly liberal but so shockingly disproportionate to the injuries as to indicate that the jury was moved or actuated by passion, caprice, prejudice, or some other consideration not found on the evidence.

Our Supreme Court, in Watson v. Wilkinson Trucking Company,<sup>24</sup> noted "the amount of a [jury's] verdict [must] bear [ ] a reasonable relationship to the character and extent of the injury sustained, [otherwise it must be set aside as] excessive."<sup>25</sup> In Young v. Warr,<sup>26</sup> our Supreme Court stated "when [a] verdict is so grossly excessive and the amount awarded so shockingly disproportionate to the injuries as to indicate ... the jury was moved or actuated by passion, caprice, prejudice, or other consideration not founded on the evidence ..., it becomes the duty of [an appellate] court, as well as of the trial court, to set aside the verdict absolutely."<sup>27</sup> As the Supreme Court noted, in O'Neal v. Bowles,<sup>28</sup>:

<sup>23</sup> So as not to be repetitive, Defendants incorporate as fully as if repeated verbatim herein, their legal and factual arguments as outlined above in this memorandum.

<sup>24</sup> Watson v. Wilkinson Trucking Company, 244 S.C. 217, 136 S.E.2d 286 (1964).

<sup>25</sup> Watson v. Wilkinson Trucking Company, 244 S.C. 217, 223, 136 S.E.2d 286, 289 (1964). See Weaver v. Lentz, 348 S.C. 672, 682, 561 S.E.2d 360, 365 (Ct.App. 2002).

<sup>26</sup> Young v. Warr, 252 S.C. 179, 165 S.E.2d 797 (1969).

<sup>27</sup> Young v. Warr, 252 S.C. 179, 187, 165 S.E.2d 797, 801 (citing Ray v. Simon, 245 S.C. 346, 140 S.E.2d 575 (1965)). See also Easler v. Hejaz Temple A.A.O.N.M.S. of Greenville, 285 S.C. 348, 329 S.E.2d 753 (Ct.App. 1985).

<sup>28</sup> O'Neal v. Bowles, 314 S.C. 525, 431 S.E.2d 555 (1993).

If the amount of the verdict is *grossly* inadequate or excessive so as to be the result of passion, caprice, prejudice, or some other influence outside the evidence, the trial judge must grant a new trial absolute. The failure of the trial judge to grant a new trial absolute in this situation *amounts to an abuse of discretion* and on appeal this Court will grant a new trial absolute.<sup>29</sup>

Here, a large portion of Plaintiff's actual medical costs were not related to treatment but rather, to diagnostic assessment and a helicopter transport. At the time of trial, Plaintiff was 82 years of age and 79 years old at the time of the accident. Based on the South Carolina Life Expectancy Tables outlined by S.C. Code Ann. §19-1-150 (1976, as amended), Plaintiff's life expectancy would have been between 6.57 and 7.98 years and thus, the amount of actual damages bears no rational or reasonable relationship to the character and extent of the damages. Not one of Plaintiff's health care providers testified that Plaintiff had any permanent impairment as a result of the accident.

Damages for pain, suffering, anguish, loss of enjoyment of life and other types of non-economic compensatory damages are not capable of being exactly and accurately determined as there is no fixed rule or standard whereby damages for them can be measured. Harper v. Bolton, 239 S.C. 541, 124 S.E.2d 54 (1962). However, the existence, causation or amount of damages cannot be left to conjecture, guess or speculation. Carlyle v. Tuomey Hospital, 305 S.C. 187, 407 S.E.2d 630 (1991); Baughman v. American Tel. and Tel. Co., 306 S.C. 101, 41 S.W.2d 537 (1991).

At trial, Plaintiff's "Medical Examination Report for Commercial Driver Fitness Determination" dated March 31, 2011, only ten months after the accident, was admitted into

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<sup>29</sup>O'Neal v. Bowles, 314 S.C. 525, 527, 431 S.E.2d 555, 556 (citing Mickle v. Blackmon, 252 S.C. 202, 166 S.E.2d 173 (1969); Zorn v. Crawford, 252 S.C. 127, 165 S.E.2d 640 (1969)) (Emphasis added).

evidence. In Plaintiff's "Medical Examination Report for Commercial Driver Fitness Determination," Plaintiff wrote, "MVA 10 months ago (April 30, 2010) Recovered fully from all injuries," (emphasis added). This conclusively establishes that any intangible damages were at best limited to that ten month period. Neither at the time of trial nor at any time in the foreseeable future could it be expected that Plaintiff was or would suffer from any emotional or physical damages as evidenced by his medical application to be re-certified to continue driving as a commercial driver.

Damages awarded must be based on the evidence and the jury's dispassionate analysis of the extent of the injuries sustained as a result of a defendant's conduct; the jury is not permitted to base an award on caprice, passion, prejudice or improper sympathy for or against any parties of the case. See Easler v. Hejaz Temple, *supra*. At trial, no party was seated with Defendants' Counsel as the defendants were uninsured motorists, one of whom was a corporate defendant. On the other hand, Plaintiff appeared as a very sympathetic grandfatherly-type witness who did sustain serious injuries and for whom the jury clearly demonstrated compassion and improper sympathy by its overly generous award of actual damages. Based on the forgoing, Defendant respectfully submits it is entitled to a new trial absolute and in the alternative, new trial nisi remittitur on the issue of actual damages.

b. Defendants Are Entitled to New Trial Absolute and in the Alternative, New Trial Nisi Remittitur as to Punitive Damages.<sup>30</sup>

Aside from the fact that Defendants contend Plaintiff failed to meet his burden of establishing that he was entitled to punitive damages based on clear and convincing evidence, Defendants submit that they are entitled to a new absolute and in the alternative, new trial nisi

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<sup>30</sup> Defendants incorporate by reference as if fully repeated verbatim herein, their entire "Defendants' Mitchell v. Fortis Post-Judgment Punitive Damage Review Memorandum."



remittitur of the jury's award of punitive damage in the amount of \$2,500,000.00. Again, so as not to be repetitive, Defendants incorporate as fully as if repeated verbatim herein, their legal and factual arguments as outlined above in this memorandum.

In RRR, Inc. v. Toggas,<sup>31</sup> the South Carolina Court of Appeals recognized a trial "court alone has the power to grant a new trial nisi when it finds the amount of the verdict to be ... excessive."<sup>32</sup> While a trial "court may not impose its will on a party by substituting its judgment for that of the jury, it may give the party an option in the way of [a] remittitur, or, in the alternative, a new trial."<sup>33</sup> In any case, a trial "court has wide discretionary power to reduce the amount of a verdict which ... is excessive."<sup>34</sup> Nevertheless, as in Holroyd v. Requa,<sup>35</sup> while "the decision to grant or deny a [new trial nisi remittitur, like a] new trial absolute ... rests in the sound discretion of the trial court, an abuse of discretion occurs if the trial court's findings are wholly unsupported by the evidence or the conclusions reached are controlled by an error of law."<sup>36</sup>

Here, the tortfeasor was unknown as was the actual conduct by that tortfeasor which led to the bearing coming to rest in the area of Interstate 95. Thus, it is improbable that a punitive damage award would deter such a party, if ever identified, from repeating conduct which at best is uncertain and speculative. Since the conduct leading to the bearing coming to rest near the road is unknown, the punitive damage award is not reasonably related to the harm likely caused

<sup>31</sup>RRR, Inc. v. Toggas, 378 S.C. 174, 662 S.E.2d 438 (Ct.App. 2008).

<sup>32</sup>RRR, Inc. v. Toggas, 378 S.C. 174, 183, 662 S.E.2d 438, 442 (citing McCourt by and Through McCourt v. Abernathy, 318 S.C. 301, 308, 457 S.E.2d 603, 607 (1995)).

<sup>33</sup>RRR, Inc. v. Toggas, 378 S.C. 174, 183, 662 S.E.2d 438, 443 (citing Jones v. Ingles Supermarkets, Inc., 293 S.C. 490, 493, 361 S.E.2d 775, 776 (Ct.App. 1987)).

<sup>34</sup>RRR, Inc. v. Toggas, 378 S.C. 174, 183, 662 S.E.2d 438, 443 (citing Daniel v. Sharpe Construction Co., 270 S.C. 687, 690, 244 S.E.2d 312, 314 (1978)).

<sup>35</sup>Holroyd v. Requa, 361 S.C. 43, 603 S.E.2d 417 (Ct.App. 2004).

<sup>36</sup>Holroyd v. Requa, 361 S.C. 43, 603 S.E.2d 417 (citing Krepps by Krepps v. Ausen, 324 S.C. 597, 607, 479 S.E.2d 290, 295 (Ct.App. 1996)).

by such uncertain and speculative conduct. The record is devoid of any direct evidence that the bearing fell from a truck let alone Defendants' truck and if it did, whether the acts causing it to fall amounted to even mere negligence or knowing and reckless conduct, the latter being a prerequisite to the award of punitive damages.<sup>37</sup> The award of punitive damages in this case cannot deter conduct for which the perpetrator and his methods are both unknown or form an award that is reasonably related to harm likely caused by uncertain and speculative conduct.

It is difficult to compare the punitive damage award here with comparable cases given the attenuated relationship between Defendants and not only Plaintiff's injury but also more importantly, the complete lack of any evidence of any willful, wanton or reckless conduct by Defendants. However, in a case involving equipment failure causing a wheel to separate from a trailer, the South Carolina Court of Appeals found that there was insufficient evidence of the trailer's owner of conscious wrongdoing so as to support a cause for punitive damages. Carter v. R.L. Jordan Oil Co., *supra*.

In this case, while any award of punitive damages is highly suspect given the lack of clear and convincing evidence of willful conduct, the comparative trucking case cited above shows that at a minimum, a reduction of the punitive damages award is appropriate in this case. There was no evidence that the unknown Defendants' were aware of how the bearing may have been secured, that the bearing may have been dropped or had engaged in similar past conduct. There could be no evidence of Defendants' wealth or ability to pay since the Defendants were unknown which makes the award of punitive damages even more arbitrary and capricious in this case.

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<sup>37</sup> There was also insufficient circumstantial evidence to establish the same and at best, it gave rise to nothing more than conjecture and speculation.

Given the facts of this particular case and the complete absence of any evidence of conscious wrongdoing, the punitive damage award was not only under the facts, grossly excessive such that it shocks one conscious, unduly liberal and demonstrative of the jury having been motivated by other considerations including passion, caprice, prejudice and sympathy. Plaintiff's injuries were serious, and given Plaintiff's testimony, the jury clearly was inflamed by his injuries and was partial to his sympathetic presentation. Based on the forgoing, Defendant respectfully submits a new absolute and in the alternative, new trial nisi remittitur on the issue of punitive damages.

#### V. CONCLUSION

Based on the forgoing, Defendants John Doe, individually, and d/b/a a Doe Trucking Company respectfully request that the Court issue an Order granting the relief requested herein and for such other and further relief as the Court deems appropriate.

Respectfully submitted,

KEAVENY LAW FIRM LLC

  
Thomas J. Keaveny, II, Esquire  
(S.C. Bar No. 3308)  
1634 Ashley River Road  
Charleston, SC 29412  
Telephone: 843.225.2820  
Facsimile: 843.225.2823  
Email: [tkeaveny@keavenylawfirm.com](mailto:tkeaveny@keavenylawfirm.com)

ATTORNEY FOR DEFENDANTS

April 26, 2013  
Charleston, South Carolina

FILED  
2013 APR 30 AM 11:59  
SCOTT B. SUGGS  
CLERK OF COURT/R.O.D.  
CHARLINGTON COUNTY, S.C.

RECEIVED JUL 19 2010

STATE OF NEW YORK )

COUNTY OF SUFFOLK )

) AFFIDAVIT OF ANTHONY BERNARDO  
) PURSUANT TO § 38-77-170 (S.C. CODE OF  
) LAWS) (2002)

PERSONALLY APPEARED before me, Anthony Bernardo, who, being duly sworn  
deposes and says:

1. That I am Anthony Bernardo and I reside at 12 Rose Street, Hauppauge, New York, 11788.
2. On Friday, April 30, 2010 I was traveling to Florida with Dan Falenza in my 1998 Dodge Durango automobile.
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.
5. I pulled over into the inside lane and turned around in the median so my vehicle's headlights would illuminate the accident scene.
6. When I reached the cab of the truck it was wrapped around the column and the driver, an elderly white male, who I later learned was Bobby Lee Tucker, Sr., stated that something was in the road. He remained conscious until EMS arrived on scene.
7. When I looked at the truck cab it was raised up as if it was on top of something.
8. When the South Carolina Highway Patrol trooper arrived I gave him my contact information and told him what I had observed.

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SCOTT B. SUGGS  
CLERK OF COURT/R.O.D.  
DARLINGTON COUNTY, S.C.

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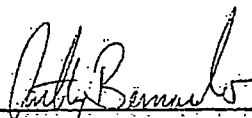
EXHIBIT

A

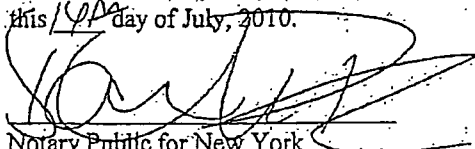
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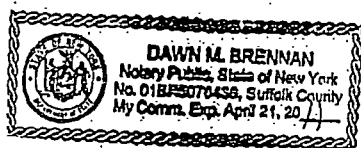
Appendix\_0414

The affiant sayeth nothing more.

  
ANTHONY BERNARDO

Sworn to and subscribed before me  
this 14th day of July, 2010.

  
Notary Public for New York  
My Commission expires: \_\_\_\_\_



2013 APR 30 AM 11:59  
SCOTT B. SUGGS  
CLERK OF COURT/R.O.  
DARLINGTON COUNTY, S.C.

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Appendix\_0415

STATE OF NEW YORK )

COUNTY OF SUFFOLK )

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A FALSE STATEMENT MADE CONCERNING THE FACTS CONTAINED IN THIS  
AFFIDAVIT MAY SUBJECT THE PERSON MAKING THE FALSE STATEMENT TO  
CRIMINAL PENALTIES AS PROVIDED BY LAW.

EXHIBIT

B

ROA\_0412

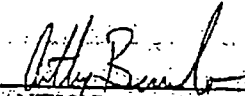
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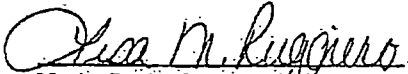
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SCOTT B. SUGGS  
CLERK OF COURT/ROA.D.S.C.  
BERKLEY COUNTY, S.C.

The affiant sayeth nothing more.

  
ANTHONY BERNARDO

Sworn to and subscribed before me  
this 3rd day of March, 2011.

  
Notary Public for New York  
My Commission expires: \_\_\_\_\_

LISA M. RUGGIERO  
NOTARY PUBLIC-STATE OF NEW YORK  
No. 01806158671  
Qualified in Suffolk County  
My Commission Expires January 08, 2015

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SCOTT B. SUGGS  
CLERK OF COURT/R.O.D.  
DARLINGTON COUNTY, S.C.

FILED

ROA\_0413

Appendix\_0417

STATE OF NEW YORK )

COUNTY OF SUFFOLK )

AFFIDAVIT OF ANTHONY BERNARDO  
✓ PURSUANT TO § 38-77-170 (S.C. CODE OF  
LAWS) (2002)

PERSONALLY APPEARED before me, Anthony Bernardo, who, being duly sworn  
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8. When the South Carolina Highway Patrol trooper arrived I gave him my contact information and told him what I had observed.

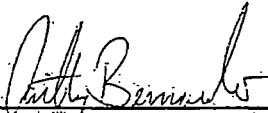
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STATE OF SOUTH CAROLINA  
FLORENCE COUNTY, S.C.  
J. M. 1000

ROA\_0414

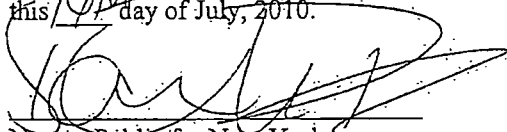
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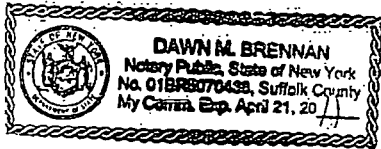


The affiant sayeth nothing more.

  
ANTHONY BERNARDO

Sworn to and subscribed before me  
this 19 day of July, 2010.

  
Notary Public for New York  
My Commission expires: \_\_\_\_\_



FILED  
2010 JUL 19 PM 12:18  
CLERK OF COURT  
DALLINGTON COUNTY, S.C.

ROA\_0415

Appendix\_0419

STATE OF NEW YORK

COUNTY OF SUFFOLK

)  
)  
)  
)

AFFIDAVIT OF ANTHONY BERNARDO  
PURSUANT TO § 38-77-170 (S.C. CODE OF  
LAWS) (2002)

PERSONALLY APPEARED before me, Anthony Bernardo, who, being duly sworn  
deposes and says:

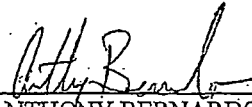
1. That I am Anthony Bernardo and I reside at 12 Rose Street, Hauppauge, New York, 11788.
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3. I was traveling in the outside southbound lane of Interstate 95 in Florence County, South Carolina, following a truck pulling a car carrier at a distance of approximately 150 feet.
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A FALSE STATEMENT MADE CONCERNING THE FACTS CONTAINED IN THIS  
AFFIDAVIT MAY SUBJECT THE PERSON MAKING THE FALSE STATEMENT TO  
CRIMINAL PENALTIES AS PROVIDED BY LAW.

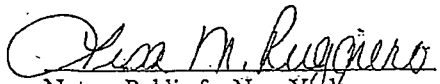
ROA\_0416

Appendix\_0420

The affiant sayeth nothing more.

  
ANTHONY BERNARDO

Sworn to and subscribed before me  
this, 3rd day of March, 2011.

  
Notary Public for New York  
My Commission expires: \_\_\_\_\_

LISA M. RUGGIERO  
NOTARY PUBLIC-STATE OF NEW YORK  
No. 01806158671  
Qualified in Suffolk County  
My Commission Expires January 03, 2015

ROA\_0417

Appendix\_0421

THE STATE OF SOUTH CAROLINA  
In The Court of Appeals

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

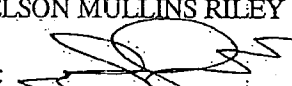
Case Nos. 2010-CP-16-0315

John Doe, Individually, and d/b/a Doe Trucking  
Company, ..... Appellant,  
v.  
Bobby Lee Tucker, Sr., ..... Respondent.

NOTICE OF APPEAL

John Doe, individually, and d/b/a Doe Trucking Company appeals the Order of the Honorable J. Michael Baxley filed December 18, 2013 and the Form 4 Judgment dated January 10, 2014, (attached as Exhibits A and B). Appellant received written notice of entry of the Judge Baxley Order of December 18<sup>th</sup> on December 20, 2013.

NELSON MULLINS RILEY & SCARBOROUGH LLP

By: 

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Attorneys for Appellant

Columbia, South Carolina

January 16, 2014

ROA\_0418

Appendix\_0422

FILED  
2014 JAN 17 PM 1:10  
SCOTT B. SUGGS  
CLERK OF COURT  
DARLINGTON COUNTY, S.C.

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Attorneys for Respondent

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Keaveny Law Firm LLC  
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Attorneys for Appellant

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2014 JAN 17 PM 1:10

SCOTT B. SUGGS  
CLERK OF COURT/ROD  
DARLINGTON COUNTY, S.C.

# EXHIBIT A

(Order of the Honorable J. Michael Baxley filed December 18, 2013)

FILED

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SCOTT B. SUGGS  
CLERK OF COURT/K.O.D.  
DARLINGTON COUNTY, S.C.

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Appendix\_0424

700-633

RECEIVED DEC 20 2013

FILED

2014 JAN 17

STATE OF SOUTH CAROLINA

COUNTY OF DARLINGTON

Bobby Lee Tucker, Sr.,

Plaintiff,

vs.

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

Defendants.

IN THE COURT OF COMMON PLEAS  
FOURTH JUDICIAL CIRCUIT  
CASE NO.: 2010-CP-16-0315  
CLERK OF COURT/RMC  
DARLINGTON COUNTY, S.C.

ORDER GRANTING DEFENDANTS'  
MOTION FOR NEW TRIAL *NISI*  
*REMITTITUR* AS TO PUNITIVE  
DAMAGES AND DENYING  
REMAINING POST-TRIAL MOTIONS

This matter is before the Court, pursuant to Rules 50 and 59, SCRPC, on Defendants John Doe and Doe Trucking Company's ("Defendants") motions for judgment notwithstanding the verdict (JNOV), new trial absolute, new trial based on the Thirteenth Juror doctrine, or, in the alternative, new trial *nisi remittitur*.

### BACKGROUND

This lawsuit arises out of a single vehicle accident that occurred on April 30, 2010, when Plaintiff Bobby Lee Tucker, Sr. ("Plaintiff"), was driving a 2001 Freightliner tractor-trailer southbound on I-95. As Plaintiff approached Exit 153, he lost control of this tractor-trailer and struck several concrete abutments in the median, suffering grievous injuries. Plaintiff subsequently filed this John Doe action alleging that on April 30, 2010, at 12:30 AM, he was proceeding south on I-95 and that "at the same time and place the Defendant was transporting a piece of machinery and a part of machinery (a 700 pound bearing) fell from the Defendant's tractor-trailer." Plaintiff did not strike Defendants' vehicle, and no one saw an object fall from a vehicle. No one reported seeing an object in Plaintiff's lane. Plaintiff filed this uninsured motorist action pursuant to S.C. Code Ann. § 38-77-170.

TRUE CERTIFIED COPY,

*Scott B. Suggs*  
CLERK OF COURT/RMC  
DARLINGTON COUNTY, SC

At trial, Plaintiff testified that as he traveled south on I-95, a vehicle ahead of him applied its brakes and darted swiftly to the left, exposing what appeared to be an object sitting in his lane. He was unable to avoid the object and struck it. As a result of the accident, Plaintiff incurred medical bills of \$325,000.00. He was hospitalized and in physical therapy for several weeks, and suffered permanent injury.

This matter came before the Court for trial on April 15, 2013. At the conclusion of the trial, the jury returned a verdict for Plaintiff. It awarded him \$2.5 million in actual damages and \$2.5 million in punitive damages. Plaintiff made no post-trial motions. Defendants filed motions for JNOV, new trial absolute, new trial based on the thirteenth juror doctrine, or, in the alternative, new trial *nisi remittitur*.

For the reasons set forth below, the Court denies Defendants' Motion for JNOV, Motion for New Trial Absolute, Motion for New Trial under the Thirteenth Juror doctrine, and Motion for New Trial *Nisi Remittitur* as to actual damages. The Court grants Defendants' Motion for New Trial *Nisi Remittitur* as to punitive damages.

#### ANALYSIS

##### I. Motion for Judgment Notwithstanding the Verdict (JNOV)

Defendants assert they are entitled to a judgment notwithstanding the verdict for several reasons. They assert Plaintiff: (1) failed to satisfy the affidavit requirements of the uninsured motorist statute, S.C. Code Ann. § 38-77-170(2); (2) failed to meet his burden of proof to establish negligence on the unknown Defendant by a preponderance of the evidence; and (3) failed to meet his burden of proof to warrant an award of punitive damages. Defendants also contend the Court erred in allowing into evidence testimony of two witnesses (Mr. Harris and Mr. Vereen) over Defendants' objections.



"In ruling on motions for directed verdict and JNOV, 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 and to deny the motions where either the evidence yields more than one inference or its inference is in doubt." *Strange v. South Carolina Dept. of Highways and Public Transp.*, 314 S.C. 427, 429-30, 445 S.E.2d 439, 440 (1994).

#### A. Compliance with Uninsured Motorist Statute

Defendants originally moved for summary judgment on the basis that Plaintiff failed to comply with the requirements of S.C. Code Ann. § 38-77-170(2). This Court heard those motions and denied them. Defendants filed a motion for reconsideration which the Court also denied. At trial, Defendants reasserted the arguments raised in their previous motions. For the purpose of this Order, those arguments and this Court's orders denying them are incorporated herein. The Court again denies Defendants' Motion for JNOV based on Plaintiff's alleged failure to comply with S.C. Code Ann. § 38-77-170(2).

#### B. Plaintiff's Burden of Proof to Establish Negligence & Punitive Damages

Defendants contend they are entitled to JNOV because Plaintiff failed to prove by a preponderance of the evidence that Defendants were negligent. They contend Plaintiff: (1) failed to call any witness – including the affiant, Anthony Bernardo – to testify that any object was in Plaintiff's lane of travel; and (2) failed to call any witness – including the affiant, Anthony Bernardo – to testify that the presence of the object caused or contributed to Plaintiff's loss of control of his tractor-trailer.

At trial, Plaintiff presented the testimony of Donald Wilson ("Mr. Wilson") by deposition. Mr. Wilson testified that at approximately 10:30 P.M. on April 29, 2010, he saw a tractor-trailer turn onto the entrance ramp of southbound I-95 at its intersection with Highway

52. This is the same ramp Plaintiff used to access southbound I-95 approximately 1.5 hours later. He testified that strapped to the back of the flatbed was an object that "looked just like" the object Plaintiff claims he later struck. R. Dean Harris, M.E., P.E. ("Mr. Harris"), testified, over Defendants' objection, that based on his analysis the object was not properly strapped down and, again over Defendants' objection, that the damage to one of Plaintiff's front tires was "consistent with" striking some object. Albert Vereen ("Mr. Vereen") testified he came to the accident scene the morning after the accident to begin the lengthy process of removing Plaintiff's truck and trailer from the concrete abutments which were in the grassy median on the left side of southbound I-95. He testified he found the object on the right shoulder of southbound I-95. Over Defendants' objection, he testified that he believed Plaintiff struck the object and gave his reasons therefor. Charlie Hayes ("Mr. Hayes") testified he found the object on the right shoulder of southbound I-95 the morning after the accident as well.

gms  
4  
None of the witnesses called by Plaintiff saw the object in the southbound lanes of I-95 or near the area where Plaintiff lost control of his vehicle. Mr. Vereen and Mr. Hayes are the only witnesses who saw the object on I-95. When they saw it, the object was on the right side of the road and several hundred feet south of the point where Plaintiff lost control of his vehicle. Plaintiff's expert, Mr. Harris, testified that if Plaintiff hit the heavy object, the impact would move the object only tens of feet.

Defendants further contend Plaintiff failed to prove by clear and convincing evidence that Defendants' conduct was reckless, willful and wanton. They contend that if Plaintiff has proven violation of a statute which requires loads to be properly secured, then that is all Plaintiff has proved. Defendants concede that violation of a statute is negligence *per se* and may be considered as evidence of recklessness. *Wise v. Broadway*, 315 S.C. 273, 276, 433 S.E.2d 857,

859 (1993) (citing *Daniels v. Bernard*, 270 S.C. 51, 240 S.E.2d 518 (1978)). However, they contend that, standing alone, it is not clear and convincing proof of recklessness, willfulness and wantonness.

Plaintiff concedes he has no direct evidence to corroborate his claim that the object was in his lane, that he struck the object causing him to lose control of his vehicle and propel the object south on I-95. However, Plaintiff contends the circumstantial evidence is sufficient to satisfy his burden of proof. This Court agrees with Plaintiff and, therefore, denies Defendants' Motion for JNOV on this basis.

The jury was made up of diverse personalities with various backgrounds, educational levels, and life experiences. This Court is of the opinion that it should not substitute its judgment for that of the jury. Based on the evidence presented to the jury, the Court finds that the verdict on liability and actual damages is supported by the evidence. The Court will not invade the province of the jury on these issues. The Court also believes Plaintiff satisfied his burden of proof on punitive damages. Therefore, the Court denies Defendants' Motion for JNOV on the bases that Plaintiff failed to satisfy his burden of proof as to negligence and recklessness.

## II. Motion for New Trial Based on Thirteenth Juror Doctrine

Defendants move for a new trial based on the "thirteenth juror" doctrine. They contend that the verdict is contrary to the preponderance of the evidence. Defendants also argue that the punitive damages award was not established by clear and convincing evidence. For the reasons stated above, this motion is denied.

## III. Motion for New Trial Absolute Pursuant to Rule 59, SCRPC

Defendants move, pursuant to Rule 59, SCRPC, for a new trial absolute on the basis that Plaintiff failed to meet his burden of proof to establish negligence by a preponderance of the

evidence. Defendants also argue that Plaintiff failed to establish punitive damages by clear and convincing evidence. For the reasons stated above, this motion is denied.

Defendants further move for a new trial absolute on the basis that the Court erred in allowing Mr. Harris to offer expert testimony. Over Defendants' objection, Mr. Harris testified that the damage to Plaintiff's vehicle was "consistent with" striking the object. The basis for Defendants' objection was that Plaintiff did not identify Mr. Harris as an expert witness who would offer such testimony. Defendants contend Mr. Harris should have been allowed to provide testimony on the issues for which he was identified, but not allowed to offer expert opinion testimony on the other issues. During oral argument they directed the Court to *Juniper v. Hawkins*, 348 S.C. 142, 558 S.E.2d 911 (Ct. App. 2001) and *Bensch v. Davidson*, 354 S.C. 173, 580 S.E.2d 128 (2003). Defendants contend they were prejudiced because this testimony was critical and they did not have an opportunity to retain an expert to respond to it. They also contend the Court erred in allowing Mr. Vereen to offer opinion testimony that he believed Plaintiff struck the object. The basis for this objection was that Mr. Vereen was a fact witness only. Plaintiff did not identify him as an expert witness nor did Plaintiff qualify him as an expert witness. At trial, the Court found that this testimony fit the parameters of Rule of Evidence 701, and admitted it into evidence. Defendants' Motion for New Trial Absolute on these bases is denied.

IV. Motion for New Trial *Nisi Remittitur* as to Actual Damages and Punitive Damages

Defendants move for a new trial *nisi remittitur* as to actual and punitive damages. They assert the jury's award was excessive. "A motion for new trial *nisi remittitur* asks the trial court, in its discretion, to reduce the verdict because it is 'merely excessive,' although not motivated by

considerations such as passion, caprice, or prejudice." *Clark v. South Carolina Dept. of Public Safety*, 353 S.C. 291, 309, 578 S.E.2d 16, 25 (Ct. App. 2002).

**A. Actual Damages**

In this case, Plaintiff presented evidence in the form of expert opinion testimony by two doctors and his own testimony that, as a result of the accident, he sustained serious and life-threatening injuries, endured substantial and continuing pain, ongoing loss of enjoyment of life, permanent impairment, and disfigurement. Plaintiff further presented evidence of medical bills of approximately \$325,000.00 for treatment of his injuries. Based on the evidence presented to the jury, the Court finds the verdict on actual damages to be wholly supported by the evidence. Accordingly, Defendants' Motion for New Trial *Nisi Remittitur* as to actual damages is denied.

**B. Punitive Damages**

In addressing Defendants' Motion for New Trial *Nisi Remittitur* as to punitive damages, this Court must conduct a post-judgment review of the punitive damages award. *James v. Horace Mann Ins. Co.*, 371 S.C. 187, 638 S.E.2d 667 (2006). In reviewing an award of punitive damages, this Court must look to the following factors, identified by the Supreme Court in *Mitchell v. Fortis Ins. Co.*: (i) the degree of reprehensibility of the defendant's actions; (ii) the ratio of the potential damages suffered by the plaintiff and the amount of the punitive damage award; and (iii) the difference between the punitive damages awarded by the jury and civil penalties authorized or imposed in similar cases. 385 S.C. 570, 587-89, 686 S.E.2d 176, 185-86 (2009).

**i. Reprehensibility**

Reprehensibility is "perhaps the most important indicium of the reasonableness of a punitive damages award." *BMW of North America, Inc. v. Gore*, 517 U.S. 559, 565 (1996). In

evaluating reprehensibility, this Court is required to consider whether: "(i) the harm caused was physical as opposed to economic; (ii) the tortious conduct evinced an indifference to or a reckless disregard for the health or safety of others; (iii) the target of the conduct had financial vulnerability; (iv) the conduct involved repeated actions or was an isolated incident; and (v) the harm was the result of intentional malice, trickery, or deceit, rather than mere accident." *Mitchell*, 385 S.C. at 587, 686 S.E.2d at 185 (citing *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 419 (2003)).

Here, the degree of reprehensibility is minimal. Because this case involves an unknown driver, the Court must base its determination of reprehensibility on inferences from the evidence admitted at trial. To that end, the Court is able to conclude that: an unknown driver failed to appropriately secure this 700 pound bearing; did not notice the bearing had fallen from the tractor-trailer; and failed to respond or otherwise warn the appropriate authorities of this danger. While this conduct certainly qualifies as reckless, it is not intentional. Therefore, based on these inferences, as well as consideration of the elements mentioned directly above, the Court finds that the first factor – reprehensibility – weighs in favor of the Defendants and a reduction of the punitive damages award.

ii. **Ratio – Disparity Between the Actual or Potential Harm Suffered by Plaintiff and Amount of Punitive Damages Award**

The United States Supreme Court has avoided identifying a bright line, or constitutional limit, "on the ratio between harm, or potential harm, to the plaintiff and the punitive damages award." *Mitchell*, 385 S.C. at 588, 686 S.E.2d at 185. However, the Supreme Court has noted that "in practice, few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process." *Id.* With regard to this second factor,

the Court must consider: "the likelihood that the award will deter the defendant from like conduct; whether the award is reasonably related to the harm likely to result from such conduct; and the defendant's ability to pay." *Id.*

In the present case the ratio between actual damages suffered by the Plaintiff and the punitive damages is 1:1, based on the jury award of \$2.5 million dollars in actual damages and \$2.5 million dollars in punitive damages. Moreover, the effectiveness of the punitive damages award as both a punishment and deterrent is minimal given that the identity of the tortfeasor is unknown. See *Clark v. Cantrell*, 339 S.C. 369, 378-79, 529 S.E.2d 528, 533 (2000) ("[t]he purposes of punitive damages are to punish the wrongdoer and deter the wrongdoer and others from engaging in similar reckless, willful, wanton, or malicious conduct in the future."). Consequently, this second factor weighs in favor of the Defendants and a reduction in the punitive damages award.

### iii. Comparative Penalty Awards

9. The Court finds that this third and final factor also weighs in favor of the Defendants. In their supplemental memorandum, the Defendants point the Court's attention to a line of South Carolina cases that establish a pattern in which punitive damages awards have been less than accompanying actual damages awards, and in many cases, substantially less. Two of these cases involve phantom drivers whose conduct was more egregious than the present case at Bar. See *Beldon v. Doe*, 2004 WL 5392306 and *Manigault v. Doe*, 2005 WL 5791474. Thus, in light of prevailing law in this jurisdiction, and given the facts and circumstances of this case, the Court finds the punitive damages awarded by the jury to be excessive, but not motivated by improper considerations. Consequently, the Court finds it appropriate to reduce the amount of punitive damages awarded by the jury in this case, and grants Defendants' Motion for New Trial *Nisi*.

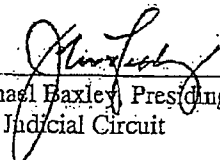
*Remittitur* as to punitive damages to the extent that the amount awarded in punitive damages shall be reduced from \$2.5 million to \$500,000. Plaintiff shall have thirty (30) days from the date of service of this Order upon him to accept the reduction or file a motion for a new trial. In the event a new trial is requested, such trial shall be on the issue of both actual and punitive damages, as required by S. C. Code Ann. 15-33-125 (1988), and the Clerk shall return this case to the jury trial roster. In the event the *nisi remittitur* is accepted, upon written notice by Plaintiff to the Clerk, the Clerk is directed to reduce the verdict enrolled in this case to the total sum of \$3,000,000, and this case shall be considered fully concluded at the trial level at that time.

#### CONCLUSION

For the foregoing reasons, it is ORDERED that Defendants' Motion for New Trial *Nisi Remittitur* as to punitive damages is GRANTED. Defendants' Motion for New Trial *Nisi Remittitur* as to actual damages, and all other post-trial motions, are DENIED.

IT IS SO ORDERED.

December 16, 2013  
Darlington, South Carolina

  
J. Michael Haxley, Presiding Judge  
Fourth Judicial Circuit

2013 DEC 18 AM 8:41  
FILED  
SCOTT B. SUGGS  
CLERK OF COURT/R.C.D.  
DARLINGTON COUNTY, S.C.

TRUE CERTIFIED COPY,

  
CLERK OF COURT/RMC  
DARLINGTON COUNTY, SC



## **EXHIBIT B.**

**(Form 4 Judgment dated January 10, 2014)**

**ROA\_0431**

**Appendix\_0435**

STATE OF SOUTH CAROLINA  
COUNTY OF DARLINGTON  
IN THE COURT OF COMMON PLEAS

FORM 4

JUDGMENT IN A CIVIL CASE

CASE NO. 2010-CP-16-0315

Bobby Lee Tucker, Sr.

John Doe, individually, and d/b/a Doe Trucking

PLAINTIFF(S)

Company

DEFENDANT(S)

Submitted by:

Attorney for: ☐ Plaintiff ☐ Defendant  
or  
☐ Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

- ☐ JURY VERDICT: This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- ☒ DECISION BY THE COURT: This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered. ☒ See Page 2 for additional information.
- ☐ ACTION DISMISSED (CHECK REASON): ☐ Rule 12(b), SCRCP; ☐ Rule 41(a), SCRCP (Vol. Nonsuit); ☐ Rule 43(k), SCRCP (Settled); ☐ Other
- ☐ ACTION STRICKEN (CHECK REASON): ☐ Rule 40(j), SCRCP; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other
- ☐ DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):  
☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☐ See attached order (formal order to follow) ☒ Statement of Judgment by the Court: See Page 2 for text of decision finalizing acceptance of remittitur by Plaintiff and granting judgment.

ORDER INFORMATION

This order ☒ ends ☐ does not end the case.  
Additional Information for the Clerk:

| INFORMATION FOR THE JUDGMENT INDEX                                                                                                                                                                        |                                                           |                                                          |
|-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-----------------------------------------------------------|----------------------------------------------------------|
| Complete this section below when the judgment affects title to real or personal property or any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below. |                                                           |                                                          |
| Judgment in Favor of<br>(List name(s) below)                                                                                                                                                              | Judgment Against<br>(List name(s) below)                  | Judgment Amount To Be Enrolled<br>(List amount(s) below) |
| Bobby Lee Tucker, Sr.                                                                                                                                                                                     | John Doe, individually, and d/b/a<br>Doe Trucking Company | \$3,000,000.00                                           |
|                                                                                                                                                                                                           |                                                           | \$                                                       |
|                                                                                                                                                                                                           |                                                           | \$                                                       |
| If applicable, describe the property, including tax map information and address, referenced in the order:                                                                                                 |                                                           |                                                          |

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. Note: Title abstractors and researchers should refer to the official court order for judgment details.

Circuit Court Judge

2121  
Judge Code

01/10/14  
Date

ROA\_0432

Appendix\_0436

For Clerk of Court Office Use Only

This judgment was entered on the \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_ and a copy mailed first class or placed in the appropriate attorney's box on this \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_ to attorneys of record or to parties (when appearing pro se) as follows:

ATTORNEY(S) FOR THE PLAINTIFF(S)

William P. Hatfield, Esquire  
Hatfield Temple, LLC  
170 Courthouse Square  
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ATTORNEY(S) FOR THE DEFENDANT(S)

Thomas J. Keaveny, II, Esquire  
Keaveny Law Firm, LLC  
1634 Ashley River Road  
Charleston, South Carolina 29407

\_\_\_\_\_  
CLERK OF COURT

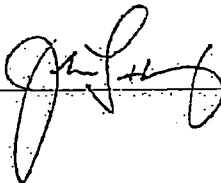
Court Reporter:

ADDITIONAL INFORMATION REGARDING DECISION BY THE COURT AS REFERENCED ON  
PAGE 1.

On December 16, 2013, this Court issued an Order Granting Defendants' Motion for New Trial *Nisi Remittitur* as to Punitive Damages and Denying Remaining Post-Trial Motions ("Order"). The Court reduced the punitive damages amount awarded by the jury, \$2.5 million dollars, to \$500,000.00, and further ordered that Plaintiff shall have thirty (30) days from the date of service of the Order to either accept the reduced amount or file a motion for a new trial. By letter dated January 9, 2014, copy of which is attached hereto, counsel for Plaintiff has accepted the reduced punitive damages award and has not moved for a new trial. As a result, this Court now enters judgment in this case in the aggregate amount of \$3 million dollars, \$2.5 million dollars for actual damages and \$500,000.00 for punitive damages for Plaintiff jointly against the Defendants.

IT IS SO ORDERED.

\_\_\_\_\_  
Circuit Court Judge



2121  
Judge Code

01/10/14  
Date

FILED  
JAN 16 PM 12:15  
SCOTT A. SUGGS  
CLERK OF COURT  
DARLINGTON COUNTY, S.C.

ROA\_0433

Appendix\_0437



**HATFIELD TEMPLE, LLP**  
ATTORNEYS

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January 9, 2014

**VIA FACSIMILE (843-393-6871)**

Honorable Scott B. Suggs  
County of Darlington Clerk of Court  
Post Office Box 1177  
Darlington, SC 29540-1177

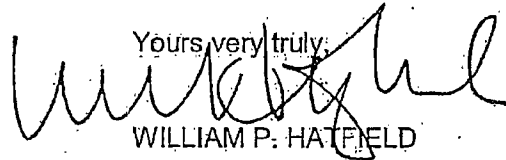
Re: Bobby Lee Tucker, Sr. vs.  
John Doe, individually, and  
d/b/a Doe Trucking Company  
C/A # 2010-CP-16-0315  
Our File # 2010117 J

Dear Mr. Suggs:

We have received Judge Baxley's Order denying Defendants' post-trial motions with the exception of the motion to remit punitive damages. Judge Baxley has reduced the punitive damage award from \$2,500,000 to \$500,000. After conferring with Mr. Tucker, he has declined to request a new trial and will accept the remitted amount as the judgment to be entered in this case. By a copy of this letter to Thomas J. Keaveny, II, Esquire, I am providing him with a copy of my communication with your office and also providing a copy to Judge Baxley via email.

With kindest regards, I am

Yours very truly,



WILLIAM P. HATFIELD

WPH:slh

cc: Mr. Bobby Lee Tucker, Sr.  
Thomas J. Keaveny, II, Esquire (via email)  
Honorable J. Michael Baxley (via email)

ROA\_0434

Appendix\_0438

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. 2014-00134

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

v.

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

CERTIFICATE OF COUNSEL

The undersigned certifies that the Record on Appeal contains all material  
proposed to be included by any of the parties and not any other material.

NELSON MULLINS RILEY & SCARBOROUGH LLP

By:  .....  
C. Mitchell Brown, SC Bar No. 012872  
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William C. Wood, Jr., SC Bar No. 015111  
E-Mail: bill.wood@nelsonmullins.com  
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Columbia, SC 29201  
(803) 799-2000

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

Columbia, South Carolina  
October 10, 2014

THE STATE OF SOUTH CAROLINA  
In The 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:

Record on Appeal

Counsel Served:

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

**RECEIVED**

OCT 29 2014

**SC Court of Appeals**

**RECEIVED**

OCT 10 2014

**SC Court of Appeals**

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

*Lisa P. Whitehurst*

Lisa P. Whitehurst  
Administrative Assistant

October 10, 2014

RECEIVED

2014 OCT 10

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.

FINAL BRIEF OF APPELLANT

C. Mitchell Brown  
William C. Wood, Jr.  
Michael J. Anzelmo  
Graham R. Billings  
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Attorneys for Appellant John Doe, Individually, and d/b/a Doe Trucking Company

RECEIVED

OCT 29 2014

SC Court of Appeals



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### Statement of Issues on Appeal

- I. Whether the trial court erred in holding that the sworn witness affidavit of Anthony Bernardo satisfied section 38-77-170 because it failed to provide a causative link between the accident and an unknown vehicle, was speculative, and was untimely?
- II. Whether the trial court erred in holding that Tucker presented sufficient evidence to create a question of fact about whether an unknown vehicle proximately caused his accident by leaving an object in the road?
- III. Whether there was sufficient clear and convincing evidence of recklessness to avoid JNOV as to punitive damages?

### Statement of the Case

Respondent Bobby Lee Tucker, Sr. ("Tucker") filed this John Doe action pursuant to S.C. Code Ann. § 38-77-170 on May 14, 2010 against Appellant John Doe, Individually, and d/b/a Doe Trucking Company ("Doe") seeking damages for personal injuries that resulted when he lost control of his tractor-trailer and struck a concrete column in the median of the road. {Compl. ¶ 3; R. 21-22}. Tucker alleged that he struck a six-hundred to seven-hundred pound steel bearing block, which had allegedly fallen off of a tractor-trailer that had passed through the area earlier in the night, causing him to lose control and crash into the concrete abutment. {Compl. ¶¶ 3-6; R. 21-23}. Tucker sought actual and punitive damages from the owner and operator of the unknown vehicle that allegedly carried the object. {Compl. ¶ 8; R. 24}. Tucker's uninsured motorist ("UM") insurance carriers answered the Complaint.

On July 19, 2010, two months after the initiation of this action, Tucker filed the affidavit of Anthony Bernardo pursuant to the witness affidavit requirement of S.C. Code Ann. § 38-77-170(2) for an accident caused by an unknown vehicle without physical contact. {July 19, 2010 Affidavit of Anthony Bernardo; R. 414}. That affidavit did not include statutorily required language, so Tucker served a second affidavit of Anthony Bernardo that included the statutory language on March 4, 2011, approximately ten months after the Complaint was filed. {March 4, 2011 Affidavit of Anthony Bernardo; R. 416}.

The trial in this action commenced on April 15, 2013. {Tr. 1; R. 26}. At trial, Tucker offered testimony from eight witnesses: himself; the paramedic who first assisted Tucker after the accident; the highway patrolman who investigated the

accident; the tow truck driver that towed away his damaged truck; a truck driver who was at a truck stop about two hours before and saw a tractor-trailer carrying an object that looked similar to the one found near the accident area; another Tucker Enterprises employee who viewed the location of the accident; the doctor who treated Tucker's injuries; and a materials science expert. {Tr. 2-3; R. 27-28}. Anthony Bernardo did not testify, and no independent witnesses who testified at trial observed the accident. The plaintiff was the only eyewitness to the accident at the trial.

At trial, Doe moved for a directed verdict based on (1) the failure of Tucker to satisfy the requirements of S.C. Code Ann. § 38-77-170; (2) the failure of Tucker to meet his burden of proof to show that Doe was negligent; (3) the failure of Tucker to submit sufficient evidence such that the jury may consider punitive damages; and (4) the defense of comparative negligence. {Tr. 304-09; R. 211-16}. The trial court denied the directed verdict motions at the close of Tucker's case and again at the close of all of the evidence. {Tr. 306-09, 348-51; R. 213-16, 255-58}.

The jury returned a verdict in favor of Tucker in the amount of \$2,500,000 in actual damages and \$2,500,000 in punitive damages. {Verdict form; R. 18}. Doe timely filed post-trial motions for judgment notwithstanding the verdict ("JNOV"), new trial absolute, and new trial *nisi remittitur*, and on December 18, 2013, the trial court remitted the punitive damages award to \$500,000 and denied the remaining motions. {Defendant's Post Trial Motions, 12/18/13 Order; R. 375-76, 8}. Doe timely served its notice of appeal on January 16, 2014. {Notice of Appeal; R. 418-419}.

### Statement of the Facts

On April 30, 2010, at approximately 12:15 a.m., Bobby Lee Tucker, Sr. lost control of the tractor-trailer he was driving down Interstate 95 and struck a concrete abutment in the median of the highway. {Tr. 266-69; R. 173-76}. At the time, Tucker was driving south on I-95 from Darlington, South Carolina to deliver cars as part of his job as a part-time truck driver. {Tr. 262-63; R. 169-70}. Tucker testified that the car in front of him suddenly braked and switched lanes, and, because he could not see what was ahead of him, he decided to follow it and switch lanes. {Tr. 266; R. 173}. However, another car was in the left lane beside him and prevented him from switching lanes. {Tr. 266; R. 173}. He testified that he saw an object like a cardboard box in the road ahead of him. {Tr. 266; R. 173}. Tucker stated that he was unable to avoid the object and the left front wheel of his truck struck it, causing him to lose control of his truck, which collided with a concrete column in the median of the road supporting an overpass. {Tr. 266-69; R. 173-76}.

Tucker alleged that two men were driving behind him and stopped to assist him. {Tr. 270; R. 177}. One of them was Anthony Bernardo, who submitted the affidavit at issue. {Tr. 270; R. 177}. A paramedic, Billy Collins, assessed Tucker, who was stuck inside the damaged truck, and treated his injuries. {Tr. 168-72; R. 143-47}. Mr. Collins testified that he spoke to the two men, and they told him that they did not know "exactly what had taken place," but "they saw the accident occur." {Tr. 175; R. 150}. Mr. Collins testified that Tucker told him that he swerved to miss something in the road and hit the support, and Mr. Collins prepared his report based on that information. {Tr. 184; R. 159}.



A highway patrolman, Bradley Allen Suggs, investigated the cause of the accident and did not see any objects in or near the road. {Tr. 154-61; R. 129-36}. He found there were "no witnesses" to the accident and "nobody saw it." {Tr. 157-58; R. 132-33}. Officer Suggs found no evidence that Tucker struck an object in the road. {Tr. 158-59; R. 133-34}.<sup>1</sup> Thereafter, a tow truck driver who came to tow Tucker's truck, Albert Vereen, observed skid marks about seventy-five to one hundred feet behind the truck. {Tr. 120-21; R. 95-96}. Mr. Vereen also noticed an object approximately thirty feet to the right of the truck, off the right side of the road, which was approximately two hundred feet from where Tucker lost control. {Tr. 127-28; R. 102-03}. The object was a steel bearing block, approximately eighteen inches wide, eighteen inches long, eleven inches high, and estimated to weigh around six hundred and fifty pounds. {Tr. 84-87; R. 59-62}. Mr. Vereen also towed the bearing block away. {Tr. 121; R. 96}. He saw no gashes or marks in the road and no objects present in the road. {Tr. 126-27; R. 101-02}. Additionally, neither the Florence County 911 cell phone call center nor the South Carolina Department of Transportation received any calls regarding foreign objects in the road. {Tr. 313-21; R. 220-28}. Another driver who worked with Tucker, Charles Hayes, took his girlfriend to photograph the scene of the wreck, and he did not see any marks on the road, although she photographed marks in the concrete section of the road. {Tr. 137-41; R. 112-16}.

Another truck driver, Donald Wilson, testified that he stopped at a truck stop in Darlington, approximately eleven miles north of the location of the accident, sometime

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<sup>1</sup> Officer Suggs was later informed that another witness had seen an object after the accident but Officer Suggs declined to file any amended report indicating an object caused the accident. {Tr. 164, R. 139}.

between 10:00 and 11:00 PM on April 29, 2010. {Tr. 71-72; R. 46-47}. While there, Mr. Wilson spotted a truck carrying pipes and rebar and an object that “looked just like” the bearing block. {Tr. 68-69; R. 43-44}.

### Argument

- I. The trial court erred in holding that the sworn witness affidavit of Anthony Bernardo satisfied section 38-77-170 because it failed to provide a causative link between the accident and an unknown vehicle, was speculative, and was untimely.**

Section 38-77-170 of the South Carolina Code imposes requirements that a plaintiff must satisfy before a John Doe action may be maintained against his own uninsured motorist insurer. In the case of an accident without physical contact with the unknown vehicle, the accident must have been witnessed by someone other than the owner or operator of the insured vehicle and the witness must sign an affidavit attesting to the truth of the facts of the accident. Because the affidavit submitted here failed to satisfy these requirements, the trial court erred in denying Doe’s motion for JNOV.<sup>2</sup>

- A. The Bernardo Affidavit was improper because it did not provide a causative link between an unknown vehicle and the accident and was speculative about the cause of the accident.**

Tucker failed to satisfy the statutory requirement that a witness affidavit “attest[] to the truth of the facts of the accident.” Therefore, Doe was entitled to JNOV, and this Court should reverse.

Section 38-77-170 states, in relevant part:

If the owner or operator of any motor vehicle which causes bodily injury or property damage to the insured is

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<sup>2</sup> The trial court had previously denied Doe’s summary judgment motion based on the same grounds. {Tr. 304; R. 211; Order denying Summary Judgment, R. 1}.

unknown, there is no right of action or recovery under the uninsured motorist provision, unless: . . .

(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[.] . . .

The following statement must be prominently displayed on the face of the affidavit provided in subitem (2) above: A FALSE STATEMENT CONCERNING THE FACTS CONTAINED IN THIS AFFIDAVIT MAY SUBJECT THE PERSON MAKING THE FALSE STATEMENT TO CRIMINAL PENALTIES AS PROVIDED BY LAW.

S.C. Code Ann. § 38-77-170. Tucker's collision with the concrete abutment was not caused by physical contact with an unknown vehicle. Tucker filed an affidavit by Anthony Bernardo ("the Bernardo Affidavit"). {March 4, 2011 Affidavit of Anthony Bernardo; R. 416}. The Bernardo Affidavit stated, in relevant part relating to the witnessing of the accident:

2. On Friday, April 30, 2010 I was traveling to Florida with Dan Falenza in my 1998 Dodge Durango automobile.

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.

{March 4, 2011 Affidavit of Anthony Bernardo; R. 416}.<sup>3</sup>

The Bernardo Affidavit fails to satisfy section 38-77-170 for several reasons. First, the Bernardo Affidavit does not suggest that the driver of an unknown vehicle proximately caused the accident. This Court has stated that a requirement of section 38-77-170(2) is that “the witness must testify to more than the actual collision itself. The witness must also be able to attest to the circumstances surrounding the accident, *i.e.* what actions of the unknown driver contributed to the accident.” *Gilliland v. Doe*, 351 S.C. 497, 501-02, 570 S.E.2d 545, 548 (Ct. App. 2002) *rev’d on other grounds*, 357 S.C. 197, 592 S.E.2d 626 (2004).<sup>4</sup> Additionally, the affiant does not swear to the existence of an object in the roadway. Instead, the affiant swears that the plaintiff “veered” suddenly “as if” attempting to avoid an object in the roadway. {March 4, 2011 Affidavit of Anthony Bernardo ¶ 4; R. 416}. The reasons why a driver might suddenly change direction or “veer” are innumerable. Hence, the “as if” portion of the affidavit is merely speculation.<sup>5</sup> The affiant also does not swear to a witnessing of any

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<sup>3</sup> The affidavit also provides that Tucker, after the accident, told the affiant “something was in the road.” *Id.* at ¶ 6. This part of the affidavit is only a restatement of something said by Tucker and does not satisfy the statute.

<sup>4</sup> The Supreme Court approved of this analysis despite reversing this Court’s decision in *Gilliland*. See *Gilliland v. Doe*, 357 S.C. 197, 201, 592 S.E.2d 626, 628 (2004) (“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.’ We agree that this analysis is consistent with *Howser* [*Wausau Underwriters Ins. Co. v. Howser*, 309 S.C. 269, 422 S.E.2d 106 (1992)] and constitutes a fair interpretation of the ambiguous fact requirement of § 38-77-170(2).” (internal citation omitted)).

<sup>5</sup> Similarly, the affiant’s statement at ¶ 7, *id.*, that the cab of the truck was “raised up as if on top of something,” is speculation regarding the condition of the truck *after* the accident, not proof of an object actually being in the roadway and causing the accident involving the plaintiff. Further, Paramedic Collins testified when he got to the scene that the cab of the truck was on top of the guardrail and up off the ground. {Tr. 169,

object in the road, does not swear to any description of an object in the road (or off the road), nor how any object came to be in the roadway. The affidavit just does not demonstrate how any unknown driver proximately caused the accident.

*Bradley v. Doe*, 374 S.C. 622, 649 S.E.2d 153 (Ct. App. 2007) establishes the deficiencies in the Bernardo Affidavit. In *Bradley*, the plaintiff allegedly swerved to avoid a trash bag in the road, lost control, and hit a tree. Another driver who passed by later saw a garbage bag in the road and heard a vehicle hit it. *Id.* at 624, 649 S.E.2d at 154-55. A third driver swerved to avoid the bag, then saw a street sweeper truck further down the road drop a similar-looking trash bag into the road. *Id.* at 624, 649 S.E.2d at 155. The drivers submitted affidavits detailing the above.

This Court found that the other drivers' affidavits were insufficient because they only provided evidence of the accident and evidence of an unknown vehicle, then required a speculative inference of the connection between the two. *Id.* at 633-34, 649 S.E.2d at 160. The Court stated that "[t]he fact that three people saw the bag of trash in the same roadway does not implicate involvement of another vehicle. Testimony that a sweeper truck a quarter-mile down the roadway dropped a similar trash bag likewise fails to establish a sufficient causal link between the sweeper truck and Bradley's collision." *Id.* Instead, this Court held that the affidavit "must contain some independent evidence of an unknown vehicle's *involvement* in the accident." *Id.* at 634-35, 649 S.E.2d at 160 (emphasis added).

Like the affidavits in *Bradley*, the Bernardo Affidavit provides no causative link to an unknown vehicle's *involvement* in Tucker's accident because it merely speculates

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R. 144}. This would certainly be one explanation for the affiant's speculation about the cab being "raised up."

about a potential cause of the accident with no connection whatsoever to an unknown vehicle. Even assuming, *arguendo*, that Tucker's swerve was in fact caused by an object, and even assuming, *arguendo*, that the object was in the road, the mere presence of an object in the road, standing alone, does not implicate an unknown vehicle; to presume that an object could only be in the road because of another vehicle would be impermissible *res ipsa loquitur*. *Watson v. Ford Motor Co.*, 389 S.C. 434, 452-53, 699 S.E.2d 169, 179 (2010) (holding that *res ipsa loquitur* is not available under South Carolina law and a plaintiff must affirmatively prove every element by direct or circumstantial evidence). Instead, in order to satisfy the statutory requirements, the Bernardo Affidavit was required to link the accident to the specific object, then the specific object to an unknown vehicle, in order to connect the entire causative chain between the accident and the actions of an unknown vehicle. It did not, and as a result, the trial court erred in failing to grant judgment notwithstanding the verdict in favor of Doe.

Second, the Bernardo Affidavit also fails because the affiant is required to attest to the "*truth of the facts of the accident.*" S.C. Code Ann. § 38-77-170(2) (emphasis added). Critically, the Bernardo Affidavit did not attest to the true facts of the accident; instead, Mr. Bernardo guessed about why he *thought* the accident occurred. For that reason, the Bernardo Affidavit is even more speculative than the one in *Bradley*.

An affidavit containing circumstantial evidence will be sufficient to satisfy the requirements of section 38-77-170(2) only if it leads to the conclusion of why the accident occurred with "reasonable certainty." *Gilliland v. Doe*, 357 S.C. 197, 202,

592 S.E.2d 626, 629 (2004). The circumstantial evidence must have “sufficient probative value to constitute the basis for a legal inference, not for mere speculation.” *Shealy v. Doe*, 370 S.C. 194, 204, 634 S.E.2d 45, 50 (Ct. App. 2006). The circumstantial evidence must “*assert[] or describe[] something else*, from which the trier of fact may either (1) reasonably infer the truth of the proposition . . . or (2) at least reasonably infer an increase in the probability that the proposition is in fact true . . . .” *Id.* at 204-05, 634 S.E.2d at 50-51 (emphasis in original) (citing 29 Am.Jur.2d *Evidence* 313 (1994)). The Bernardo affidavit does not satisfy these requirements.

Our Supreme Court’s interpretation of a John Doe affidavit containing circumstantial evidence illuminates the insufficiency of the Bernardo Affidavit. In *Gilliland*, the witness attested that she saw “the lights of an unknown car that was turning around and fleeing the scene of the accident.” *Gilliland* at 202, 592 S.E.2d at 629. The Supreme Court held that the attestation of these independent events sufficiently corroborated the plaintiff’s testimony about why the accident occurred, which was that an unknown car was driving closely behind her and caused her to speed up and lose control. *Id.* Contrarily, the Bernardo Affidavit provided that “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.” {March 4, 2011 Affidavit of Anthony Bernardo at ¶ 4; R. 416 (emphasis added)}. Such a statement merely described Mr. Bernardo’s speculation regarding why the swerve occurred. The Bernardo Affidavit did not assert or describe any facts that would make Tucker’s version of the events any more likely than some other scenario for why Tucker suddenly “veered.”

South Carolina "courts have historically required strict compliance with section 38-77-170(2)." *Enos v. Doe*, 380 S.C. 295, 313, 669 S.E.2d 619, 628 (Ct. App. 2008). While "the result is lamentable to the injured party," the statute mandates that a plaintiff may not recover from his UM insurer if the statute's requirements are not strictly satisfied. *Shealy v. Doe*, 370 S.C. 194, 201, 634 S.E.2d 45, 49 (Ct. App. 2006). The Bernardo Affidavit failed to satisfy section 38-77-170 because it did not provide a causative link between the accident and an unknown vehicle, and it relied on speculation as to the cause of the accident. For these reasons, the trial court erred in failing to grant judgment notwithstanding the verdict to Doe. This Court should reverse the decision of the trial court.

**B. Section 38-77-170(2) was not satisfied because the affiant did not testify at trial and the affidavits were not compliant with the statute and untimely.**

The affidavit requirement of section 38-77-170(2) mandates independent verification of accidents that were allegedly caused by an unknown vehicle but lack any physical evidence of contact with the unknown vehicle. Our Supreme Court has held that this requirement exists for three purposes: (1) fraud prevention; (2) providing evidence to the insurer that the insured has a good faith basis for making a claim; and (3) providing notice of information relating to the validity of the claim to the insurer. *Collins v. Doe*, 352 S.C. 462, 469-70, 574 S.E.2d 739, 743 (2002). The Bernardo Affidavit fails to satisfy each of these purposes. First, the only witness to the accident that testified at trial was Tucker. Mr. Bernardo did not testify, and no other eyewitnesses were offered at trial in his place. As a result, Tucker improperly recovered for injuries sustained in the accident despite not providing the testimony of an



additional witness, in contravention of the anti-fraud purpose of section 38-77-170. Second, because the first Bernardo Affidavit failed to contain statutorily required language and the second Bernardo Affidavit with the required language was not submitted until ten months after the action was initiated, the statutory purpose of notice to the insurer was not satisfied. For this same reason, and because even the second version of the affidavit fails to meet the statutory requirements as set forth in argument I.A., above, there was insufficient evidence of a good faith basis for the insured to make a claim. Both versions of the Bernardo Affidavit were thus improper, and the court should have granted Doe's motion for JNOV.

The first and "obvious" purpose of the statute is fraud prevention. *Collins* at 470, 574 S.E.2d at 743. If a plaintiff is required to find an eyewitness to submit an affidavit attesting to the truth of the facts of the accident, then the potential for the plaintiff to fraudulently invent a story to recover for his damages is minimized. *Id.* However, this purpose would be nullified if the statute was satisfied by the mere filing of an affidavit that was not required to be supported through testimony under oath at trial.

Affidavits "generally constitute inadmissible hearsay," and if a witness is not required to testify regarding the statements made in the affidavit, the affidavit cannot be challenged. *Ex parte Morris*, 367 S.C. 56, 64, 624 S.E.2d 649, 653 (2006). Our Supreme Court has rejected the argument that trial testimony could replace the affidavit requirement of section 38-77-170, noting that a function of the witness affidavit is that it provides the defendant an opportunity to cross-examine the witness at trial regarding the affidavit statements. *Collins* at 470, 574 S.E.2d at 743. The Court has thus

implied that the affiant would testify at trial. Allowing a witness to submit an affidavit without having to testify at trial would result in the witness being immune from cross-examination in contravention of section 38-77-170. If an affidavit were sufficient and actual testimony not required at trial, the defendant would be resigned to the same situation as if the statute did not exist—the only admissible evidence at trial regarding what actually occurred would be the plaintiff's uncorroborated and unverifiable testimony.

Furthermore, the statutorily required language incentivizes affiants to tell the truth because "she may be subject to criminal penalties for providing untrue information." *Id.* If the affiant is not required to testify at trial to satisfy the statute, then there would be no reliable way to determine the veracity of the affiant's story because no eyewitnesses other than the plaintiff would testify. Thus, the threat of criminal penalties against the affiant would be meaningless if there was no way for inconsistencies in the affidavit to be exposed. Such a construction would render the statutorily required language without effect. *See Doe v. S. Carolina Dep't of Soc. Servs.*, 407 S.C. 623, 634, 757 S.E.2d 711, 717 (2014) ("This Court will not construe a statute in a way which leads to an absurd result or renders it meaningless."); *Adams v. Clarendon Cnty. Sch. Dist. No. 2*, 270 S.C. 266, 272, 241 S.E.2d 897, 900 (1978) ("It is the duty of this Court to give all parts and provisions of a legislative enactment effect . . . ."). Because no independent witnesses to the accident testified at trial, the trial court erred in denying Doe's motion for JNOV.

In addition, the revised Bernardo Affidavit, submitted nearly ten months after the commencement of this suit, was untimely. While section 38-77-170 does not expressly state a period of time in which the witness affidavit must be filed, the

remaining two purposes of the affidavit requirement explained in *Collins* compel a finding that the affidavit should be filed early in the action, not just at any point before summary judgment.

First, the statutory purpose that an insurer will be provided with tangible evidence to determine if there is a good faith basis for making the UM claim is only relevant if a proper affidavit is filed early in the action. Otherwise, the insurer will have had to conduct significant investigation, discovery, and defense without evidence of whether the insured is making a claim in good faith. Second, without a proper affidavit early in the action, the insurer will be without notice of information corroborating the plaintiff's version of events. The insurer would have to litigate against its insured while lacking any knowledge of the identity of the mandatory eyewitness. While the original witness affidavit in this action was filed two months after the Complaint, it did not fulfill the statutory requirement that the affiant swear under penalty of perjury, and did not have the level of trustworthiness required by the statute. The second Bernardo Affidavit was not filed until ten months after the Complaint was served. As such, it was untimely.

Thus, Tucker failed to comply with all of the purposes of section 38-77-170. While interpreting section 38-77-170, this Court recognized that "[a] statute as a whole must receive a practical, reasonable, and fair interpretation consonant with the purpose, design, and policy of the lawmakers . . . [t]he real purpose and intent of the lawmakers will prevail over the literal import of the words." *Enos v. Doe*, 380 S.C. 295, 304, 669 S.E.2d 619, 623 (Ct. App. 2008) (citations omitted). The practical, reasonable, and fair interpretation of this statute consistent with the purpose, design, and policy of

the lawmakers is that it requires that the affiant file his affidavit contemporaneously with the Complaint and that independent accident witness trial testimony be submitted. Therefore, the affidavit and trial proof here was insufficient to satisfy the statute, and Doe was entitled to JNOV because of this insufficiency. Accordingly, the Court should reverse the decision of the trial court and enter judgment in favor of Doe.

**II. The trial court erred in holding that Tucker presented sufficient evidence to create a question of fact about whether an unknown vehicle proximately caused his accident by leaving an object in the road.**

Section 38-77-170 only allows a plaintiff to recover from his UM insurance carrier through a John Doe action if an unknown vehicle caused the accident. S.C. Code Ann. § 38-77-170. Thus, in order to recover from Doe on his cause of action for negligence, Tucker was required to prove that an unknown driver failed to appropriately secure the bearing block, the failure of which proximately caused Tucker's accident. *See Chakrabarti v. City of Orangeburg*, 403 S.C. 308, 314, 743 S.E.2d 109, 112 (Ct. App. 2013) (stating elements of negligence). As an initial matter, as set forth above, Tucker cannot substitute trial testimony for the statutory affidavit requirement. *Collins, supra*, at 470, 574 S.E.2d at 743. If the affidavit is insufficient and fails to satisfy the statute, the action should be dismissed. Assuming *arguendo* that one could do so, however, Tucker nevertheless failed to meet his burden of proof because there is insufficient probative evidence showing that an unknown vehicle caused the bearing block to be in the road such that it could cause Tucker's accident. For these reasons, insufficient evidence existed to create a jury question, and the trial court erred in denying Doe's motion for JNOV.

- A. The evidence in the record that Doe inadequately strapped the bearing block is not sufficiently probative.

The evidence that Tucker presented regarding how Doe strapped the bearing block was insufficient as a matter of law to create a reasonable inference that Doe negligently dropped the bearing block from an unknown vehicle onto the roadway, which object then in turn caused Tucker's accident. To show that Doe inadequately secured the bearing block, Tucker presented the deposition testimony of Mr. Wilson, a truck driver who was on the road on the night of the accident. Mr. Wilson stated that, as he pulled in to the truck stop two hours before the time of the accident, he saw a truck six or ten feet away that caught his eye. {Tr. 71, 77; R. 46, 52}. Mr. Wilson testified that the truck he saw carried an object on it that "looked just like" the bearing block. {Tr. 68-69; R. 43-44}. The truck also carried pipes, according to Mr. Wilson. {Tr. 68-69; R. 43-44}. Mr. Wilson stated:

Q. Let me ask you specifically, did you have occasion to be on the Darlington Highway, the interchange with Interstate 95?

A. Yes, sir.

Q. Explain to the jury why you were there.

A. I was taking my middle son home which he has cerebral palsy, because he couldn't drive and stuff, and we stopped by the TA truck stop. I seen that blue freight liner loaded with pipes and that piece that fell off on 95 there on there -- looked just like that piece.

Q. All right. Well, let's do this. Let me show you what's Exhibit Number 1 and ask if . . .

A. Uh huh.

Q. . . . if you -- if you recall seeing anything like that . . .

A. Yes, sir.

Q. . . . on this particular evening?

A. Yes, sir.

{Tr. 68-69; R. 43-44}. Mr. Wilson stated that "pipes and rebars and stuff" were also on the truck. {Tr. 73; R. 48}. Mr. Wilson testified that objects in the truck's load were secured with "nylon straps and chains" across them. {Tr. 78; R. 53}. He stated that the object that "looked just like" the bearing block was secured with "a strap across it" and that it did not have a chain going through it. {Tr. 78-79; R. 53-54}. Mr. Wilson answered affirmatively when asked whether it "could be a problem." {Tr. 79; R. 54}.

Tucker then presented his expert, Mr. Harris, who gave his opinion on whether a single strap across this bearing block would be adequate to secure the object:

Q. All right, and so I want you to assume that this object was secured by a single nylon strap running across the top of the object on the rear of this flatbed. Do you have an opinion within a reasonable degree of professional certainty if that manner of securing this object was adequate?

A. No, sir, it would not be adequate. There would not be enough downward force from the shallow angle of the strap on the bottom to have any significant effect on keeping that item from sliding off the rear.

Q. What about the transportation or transport of the object on the rear of a flat-bed at highway speeds would cause the object to move or become dislodged from the nylon strap?

A. Two things would be affected. One would be acceleration, going over bumps, for example. Most people going over a bump -- their bodies rise up out of the seat, and a bump that hard of that flat-bed doing seventy it would easily overcome that strap. Secondly, the acceleration -- you are either braking or accelerating, going around a curve which would be sideways acceleration -- all of those would tend to make an object move. The way you described it being held down, there would be friction between that object and the flat-bed. That doesn't do anything to add any extra downward -- the strap doesn't do anything to add extra downward force.

{Tr. 98-101; R. 73-76}. The question posed to Tucker's expert is not probative of whether Doe adequately secured the bearing block on the truck Mr. Wilson saw because the hypothetical question excluded portions of Mr. Wilson's testimony about the truck's overall cargo or how the truck's overall load was secured.<sup>6</sup> The hypothetical did not account for the pipes and rebar<sup>7</sup> loaded in the truck, which may have encircled the object, anchored it on all sides, or concealed chains securing the object to the truck. Tucker's expert did not view the truck at the truck stop, how the object was strapped on that truck with other objects on the truck, or the accident site to determine the conditions. {Tr. 103; R. 78}. The hypothetical plaintiff's counsel thus used with his expert represented the selective application of a beneficial portion of Mr. Wilson's testimony in a vacuum, and for that reason, it was not probative of how Doe's load was secured while on the road.<sup>8</sup> Because Tucker offered no probative evidence regarding whether Doe negligently secured its load, the trial court erred in denying Doe's motion for JNOV.

**B. There is no evidence in the record explaining how the bearing block came to be in the road by connecting it to an unknown vehicle.**

To provide a chain of proximate causation, Tucker was required to show that (1) the bearing block was inadequately secured on the unknown vehicle; (2) the negligent strapping on the unknown vehicle caused the bearing block to be in the road; and (3)

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<sup>6</sup> While Tucker's counsel asked the expert to confirm he was "present during Mr. Wilson's video deposition," {Tr. 98; R. 73}, Tucker's counsel nevertheless asked the expert a hypothetical with limited information in its predicate.

<sup>7</sup> No pipes or rebar were found in the roadway or off the roadway anywhere. {Tr. 129; R. 104}.

<sup>8</sup> Mr. Wilson's statement that the single strap on the bearing block "could be a problem" is not probative of anything in particular except an undefined possibility and is also merely his speculation as a lay witness. {Tr. 79; R. 54}.

the bearing block was in the road, causing the accident. There is insufficient evidence regarding these elements and thus, there is no right of recovery under section 38-77-170. Accordingly, the trial court erred in denying Doe's motion for JNOV.

There is no evidence in the record explaining how this bearing block came to be in the road. There are other potential reasons why this bearing block could have come to rest in the road other than from being dropped from an unknown vehicle. For instance, the bearing block could have broken off of construction equipment, been dropped off of the nearby overpass, been pushed into the road by several individuals, lifted off of a vehicle and deposited in the road, or had its straps unfastened by a third party. None of these possibilities would be the result of the negligence of the driver or owner of the unknown vehicle. There is no direct or circumstantial evidence in the record suggesting or disproving any of these possibilities—or any other one that could be imagined. Instead, presupposing that the object was dropped inappropriately shifts the burden to the defendant to disprove. “Although causation may be established by circumstantial evidence, and is usually a question for the jury, it nonetheless must be based on probabilities not mere possibilities.” *Nguyen v. Uniflex Corp.*, 312 S.C. 417, 419-20, 440 S.E.2d 887, 889 (Ct. App. 1994) (citations omitted). Because Tucker did not offer any evidence supporting the probability that the bearing block was dropped into the road, the trial court should have granted Doe JNOV.

For comparison, our Supreme Court has held that there was evidence of causation between the unknown vehicle and the accident where a witness testified to *contemporaneously* seeing both the collision and an unknown vehicle leaving the scene. *Gilliland v. Doe*, 357 S.C. 197, 202, 592 S.E.2d 626, 629 (2004) (emphasis added).



Contrarily, here, no witness testified to a causative connection between Tucker's accident and an unknown vehicle. Instead, the facts here are analogous to those in *Bradley*. In *Bradley*, no witnesses saw the accident, but one witness saw a bag in the road at the location of the accident and subsequently saw a truck drop a similar bag onto the road. *Bradley v. Doe*, 374 S.C. 622, 624, 649 S.E.2d 153, 155 (Ct. App. 2007). While viewing the evidence in favor of the plaintiff, this Court stated that "[t]estimony that a sweeper truck a quarter-mile down the roadway dropped a similar trash bag likewise fails to establish a sufficient causal link between the sweeper truck and Bradley's collision." *Id.* at 633-34, 649 S.E.2d at 160. Although the plaintiff in *Bradley* offered evidence of an unknown vehicle and evidence of an accident, the plaintiff was still required to offer sufficient evidence of a link between the two. Presuming a link between the accident and sweeper truck, without any evidence of causation, would have been "mere speculation." *Id.* at 634, 649 S.E.2d at 160. Similarly, here, Mr. Wilson's testimony that he saw a truck carrying an object (among other items) that "looked just like" the bearing block some two hours before fails to establish a sufficient causal link between that truck and Tucker's collision. {Tr. 68-69; R. 43-44}.

An analogous case showing the failure of proof of causation here is *Tuttle v. Allstate Ins. Co.*, 134 Wash. App. 120, 138 P.3d 1107 (2006). In *Tuttle*, the plaintiff collided with a tire in the road and attempted to recover from her UM insurer for an accident caused by an unknown vehicle. A firefighter stated that she saw a wheel and tire leaning up near the guardrail near the collision site, and it appeared to the firefighter that the plaintiff's vehicle hit that tire. However, the plaintiff did not know

whether someone had deliberately rolled the tire into the road or if it had fallen from a vehicle, and no evidence was offered as to how an unknown vehicle put the tire in the road. The court granted summary judgment against the plaintiff, stating:

But here, Tuttle had no evidence of how the tire and wheel got into the roadway. And the mere presence of the tire in the roadway does not create a reasonable inference that the accident was caused by the phantom driver's negligence. It is entirely plausible that the tire came off a moving truck because it was negligently installed by someone—either the driver or a third party. If a third party negligently installed the wheel then Tuttle has no claim against the owner or operator of the vehicle and, thus, no UIM claim. It is also entirely plausible that the wheel and tire was a spare on a large truck and came loose from its fastenings. If so, it is possible that the truck driver was negligent in failing to inspect the wheel and tire fastenings. But it is also possible that a reasonable inspection would not have revealed any problem with the fastenings. In short, Tuttle provided no evidence that would support an inference that the truck driver or owner negligently caused the wheel and tire to be in her lane of travel.

*Id.* at 128, 138 P.3d at 1111-12.

Thus, even if a witness could testify to the object being near the road and the plaintiff's vehicle hitting it, the plaintiff still may not reach a jury if there is no evidence explaining how the object in the road came to be there due to the negligence of a vehicle. Here, Tucker offered no evidence that Doe negligently caused the bearing block to be in Tucker's lane of travel by dropping it, so the trial court erred in denying Doe's motion for JNOV.

Further, South Carolina courts do not engage in *res ipsa loquitur*. In similar object-in-road cases elsewhere, the missing causative leap from an object being in the road to the negligence of a vehicle has been made through such a presumption. *See*,

e.g., *Khirieh v. State Farm Mut. Auto. Ins. Co.*, 594 So. 2d 1220 (Ala. 1992) (holding that the fact that a truck bench seat was in the road was sufficient to apply *res ipsa loquitur* to find that a person was negligently operating a motor vehicle, causing the truck bench seat to be in the road, and thus, the plaintiff could recover from her UM insurer); *Farmer v. Werner Transp. Co.*, 152 Ind. App. 609, 615, 284 N.E.2d 861, 865 (1972) (holding that a collision with an air conditioning unit in the road was insufficient to reach a *res ipsa loquitur* presumption because the plaintiff did not show exclusive control of the unit by the defendant); *Layton v. Palmer*, 309 S.W.2d 561, 564 (Mo. 1958) (finding that hay bales falling from a vehicle onto a highway was sufficient for a jury to apply *res ipsa loquitur* to find that bales of hay would not ordinarily fall into the road without negligent loading of the hay on a vehicle). However, as stated, *res ipsa loquitur* is unavailable under South Carolina law. *Watson v. Ford Motor Co.*, 389 S.C. 434, 453, 699 S.E.2d 169, 179 (2010). Instead, a plaintiff is required to prove every element by affirmative evidence, including causation. *Snow v. City of Columbia*, 305 S.C. 544, 555, 409 S.E.2d 797, 803 n.7 (Ct. App. 1991).

Here, there is no affirmative evidence suggesting that the improper securing of the bearing block caused it to fall into the road, and that is just one possibility explaining what occurred. The testimony from the Department of Transportation representative, Mr. George, that only vehicular traffic may legally be on the highway and that the Department of Transportation sometimes receives calls about objects that had fallen off of trucks, is not evidence of what occurred in this instance. {Tr. 325; R. 232}. Further, the truck driver, Mr. Wilson, did not see any object fall from a vehicle,

nor did he testify that the object that “looked just like” the bearing block appeared as if it would imminently fall off that vehicle.

In order to survive a directed verdict, the evidence “must lead to the conclusion with a reasonable certainty and have sufficient probative value as to constitute a basis for a legal inference and not mere speculation.” *Attaway v. One Chevrolet 5-P Truck, Motor No. LEA 852870*, 228 S.C. 559, 563, 91 S.E.2d 270, 271-72 (1956). Tucker offered no evidence that the bearing block fell into the road because Doe negligently secured it. Accordingly, the trial court erred in denying Doe’s motion for JNOV.

**III. There was insufficient clear and convincing evidence of recklessness to avoid JNOV as to the issue of punitive damages.**

Under South Carolina law, the violation of a statute proximately causing the harm to the plaintiff “constitutes negligence *per se* and is evidence of recklessness and willfulness, requiring the submission of the issue of punitive damages to the jury.” *Wise v. Broadway*, 315 S.C. 273, 276, 433 S.E.2d 857, 859 (1993). The rationale behind this rule is that “every one is conclusively presumed to know [the law] and is bound to act accordingly,” and thus, the statutory violation was the result of an intentional or conscious disregard of the law and the defendant’s legal duties. *Callison v. Charleston & W.C. Ry. Co.*, 106 S.C. 123, 90 S.E. 260, 262 (1916). However, this rationale breaks down with respect to strict liability statutes—because even if a defendant acts with the intent to comply with its legal duties and takes appropriate precautions to do so, the statute can still be violated.

“[W]hen only one reasonable inference can be deduced from the evidence, the question becomes one of law for the court to determine.” *Ecclesiastes Prod. Ministries*

*v. Outparcel Associates, LLC*, 374 S.C. 483, 491, 649 S.E.2d 494, 498 (Ct. App. 2007). Here, there is no evidence that Doe acted recklessly, willfully or wantonly. However, because the violation of a statute constitutes evidence of recklessness or willfulness under South Carolina law, punitive damages were nevertheless submitted to the jury—and were awarded. *Wise* at 276, 433 S.E.2d at 859. While this result may be suitable when the defendant negligently, recklessly, or intentionally breached its statutory duty, it is inappropriate where a statute is a strict liability law and may be violated regardless of the intent of the defendant, even with no other evidence of negligence.

Requiring the submission of punitive damages to the jury for a violation of a strict liability statute with no other evidence of recklessness is contrary to the purpose behind punitive damages. “The purposes of punitive damages are to punish the wrongdoer and deter the wrongdoer and others from engaging in similar reckless, willful, wanton, or malicious conduct in the future.” *Clark v. Cantrell*, 339 S.C. 369, 378, 529 S.E.2d 528, 533 (2000). If the defendant did not engage in reckless, willful, wanton, or malicious conduct, yet still violated a statute, there would be no conduct to punish or deter. Thus, it is inappropriate for a strict liability statutory violation, standing alone, to serve as sufficient evidence of recklessness to require submission of punitive damages to the jury. Further, the South Carolina legislature has made the determination that a plaintiff must prove its entitlement to punitive damages by clear and convincing evidence. S.C. Code Ann. § 15-33-135. Allowing a plaintiff to prove the violation of a statute by a preponderance of the evidence—yet then allowing the

violation of that statute to serve as evidence of recklessness—bypasses the heightened burden of proof to seek punitive damages required by South Carolina law.

The statute in this matter provides that “[n]o vehicle may be driven or moved on any public highway unless the vehicle is so constructed or loaded as to prevent any of its load from dropping, sifting, leaking, or otherwise escaping from the vehicle.” S.C. Code Ann. § 56-5-4100(A). This statute is of a strict liability nature. If any of a vehicle’s load drops while in transit, then the vehicle was not loaded as to prevent the load dropping. Thus, any time a load drops from a vehicle, the statute is violated, and South Carolina law *requires* that the person driving the vehicle be subjected to possible punitive damages at the hands of the jury, no matter how prudent and reasonable the driver acted in loading the vehicle. This result is inappropriate.

Instead, a statutory violation should not serve as evidence of recklessness requiring submission of punitive damages to the jury unless there is some evidence in the record, other than the mere statutory violation, that the defendant acted with conscious disregard of its statutory duties to the plaintiff. Such a rule avoids the situation where a faultless fender-bender requires the jury to consider punitive damages. *See Wise v. Broadway* at 282, 433 S.E.2d at 862 (Toal, J., dissenting). It also avoids the outcome created by this circular statute—if a spill occurs, then the care that the defendant used was *per se* not sufficient, and the jury must consider punitive damages even if there is no evidence in the record that the defendant was not absolutely careful otherwise. As such, some other jurisdictions recognize that a violation of a strict liability statute is insufficient, standing alone, to mandate the consideration of punitive damages. *See, e.g., Pouzanova v. Morton*, S-14442, 2014 WL 2795894 (Alaska June

20, 2014) (holding that the running of a stop sign did not require submission of punitive damages to the jury because there was insufficient evidence of recklessness other than the statutory violation); *Mastec N. Am., Inc. v. Wilson*, 325 Ga. App. 863, 867, 755 S.E.2d 257, 260 (2014) (stating that, in cases involving automobile collisions, punitive damages are authorized only when there is a “pattern or policy” of dangerous driving); *Adkins v. Hontz*, 337 S.W.3d 711, 723 (Mo. Ct. App. 2011) (holding that, under Kansas law, the failure to require a child to wear a seatbelt despite a strict liability seatbelt statute did not support punitive damages because there was no evidence of wantonness in the record); *Kinney v. Butcher*, 131 S.W.3d 357, 358 (Ky. Ct. App. 2004) (holding that the violation of a strict liability speeding statute did not require submission of punitive damages to the jury because it was merely ordinary negligence).

Here, the record is devoid of any evidence that Doe intentionally or consciously disregarded its statutory duty to load the vehicle such that none of the load would drop. There is no evidence regarding the degree of restraint that would be required to properly secure this bearing block. There is some evidence that another truck only used one strap on something that “looked just like” the bearing block, but that truck also was carrying “pipes and rebar.” {Tr. 68-69, 73; R. 43-44, 48}. The minimal evidence is insufficient to show that Doe consciously or recklessly disregarded his statutory duty to adequately strap his load. A finding that the bearing block came off of Doe’s vehicle (based on speculation) and thus that section 56-5-4100 was violated—standing alone—should be insufficient evidence of recklessness or willfulness to support a jury award of punitive damages as a matter of law. Hence, the trial court erred in

failing to grant Doe JNOV on punitive damages. Because *Wise v. Broadway, supra*, and similar cases require a contrary result, they should be overruled.<sup>9</sup>

### Conclusion

Based on the above, the Court should reverse the decision of the trial court and grant judgment in favor of Doe. Failing that, the Court should reverse the decision of the trial court and grant Tucker a new trial absolute. Finally, the Court should reverse the decision of the trial court and grant judgment in favor of Doe on punitive damages.

Respectfully submitted,

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October 29, 2014

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<sup>9</sup> Doe did not object to the jury charge of the trial court regarding this issue. {Tr. 352, R. 259}. However, the trial court would be required to charge the South Carolina law in its current form, so any such objection would have been futile. Doe did move for directed verdict and JNOV as to punitive damages, which Doe believes sufficiently preserves this issue for appeal.



THE STATE OF SOUTH CAROLINA  
In The 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

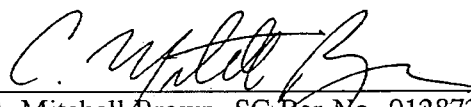
Bobby Lee Tucker, Sr., ..... Respondent,  
v.  
John Doe, Individually, and d/b/a Doe Trucking  
Company, ..... Appellant.

CERTIFICATE OF COUNSEL

The undersigned hereby certifies that the Final Brief of Appellant complies with  
Rule 211(b), SCACR.

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**SC Court of Appeals**

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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:

Final Brief of Appellant

Counsel Served:

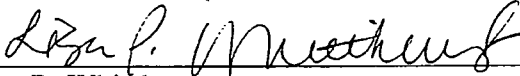
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