

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

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S.C. Supreme Court

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

v.

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

APPENDIX VOLUME II

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Bobby Lee Tucker, Sr. Respondent

v.

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

Respondent's Final Brief

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Summary of Argument

Bobby Tucker Sr. sued an unknown John Doe driver to recover uninsured motorist benefits. At trial, the jury heard evidence from which it could infer that Tucker crashed his truck after swerving to try to miss an improperly secured, 650 pound block that fell off Doe's flatbed on to I-95 South and sat there, without Doe's warning, for an hour and a half. Representing Doe, Tucker's insurance company agreed that Tucker suffered "grievous, grievous injury" of a kind that they do not talk about "even in the Bible." ROA 261 ll.18-23.

The jury awarded Tucker \$2.5 million in damages and \$2.5 million in punitive damages. ROA 18-19. The trial judge reviewed the evidence, ruled that it supports the compensatory award, and remitted the punitive damages award to \$500,000. ROA 8-17.

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

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

Statement of the Issues

1. Does Anthony Bernardo's affidavit satisfy § 38-77-170(2)?
2. Is there any evidence that an unknown driver injured Tucker?
3. Is there any evidence that the unknown driver was reckless?

Statement of Facts

The unknown vehicle

Around 10:00 -10:30 pm on April 29, 2010, Donald Wilson noticed a freightliner at a truck stop off of Exit 52 on I-95. ROA 43 ll.11-25, 46 ll.17-21. It caught Wilson's attention because he formerly hauled loads and had driven a similar truck. ROA 44 ll.9-17, 49 ll.4-21. The freightliner had a flatbed loaded with pipes, rebar, and what Wilson identified as an object that "looked just like" the block that Tucker later hit and that the tow truck operator found at the crash scene. ROA 43 l.23 - 44 l.8, 52 l.20 - 53 l.9, 95 l.16 - 96 l.3, 178 l.24 - 179 l.10.

The block was not chained to the flatbed through the hole in its middle but was secured with a single yellow strap running across it. ROA 53 l.21 - 54 l.2. Unlike the single-strapped block, the pipes and rebar were secured with multiple straps. ROA 53 ll.4-16. Other straps and chains remained on the truck. ROA 53 l.17.

It occurred to Wilson that using a single strap across the block could be a problem. ROA 53 l.21 - 54 l.6. He explained, "And, well, you've got a lot of them out there running them flatbeds, and if you stop in time, man, the stuff will come off of them . . . Because if that metal ever starts sliding, you're in trouble." ROA 48 ll.7-12. Tucker's expert agreed that a strap across the block was not adequate to secure it. ROA 75 l.22 - 77 l.8.

Wilson unsuccessfully tried to contact the freightliner's driver on Wilson's CB before the freightliner left the truck stop and turned on to I-95 South. ROA 46 ll.22-24, 47 ll.11-15, 54 ll.3-15.

Bobby Tucker Sr.

About the time Wilson saw the single-strapped block, Bobby Lee Tucker Sr. was at his granddaughter's ball game. ROA 168 ll.19-25. Tucker was then 79 years old with a 50 year old body, and had hauled cars as a trucker for over 45 years. ROA 163 ll.16-20, 170 ll.10-14. His last vacation was in 1960. ROA 164 ll.22-23. Throughout these decades, Tucker never had a chargeable accident. ROA 163 ll.13-15.

Tucker left his granddaughter's ball game to haul two cars to Florida. ROA 169 l.23 - 170 l.3. He was rested and ran his truck through a pre-trip inspection. ROA 169 ll.6-22, 170 ll.23-24. After the

truck passed inspection, Tucker drove to the same truck stop where Wilson saw the freightliner. ROA 171 ll.16-21. Tucker left there at 12:02 am and, like the freightliner, turned on to I-95 South. ROA 171 ll.21-25.

The crash

After getting on the interstate, Tucker stayed in the right line and set the cruise control at 68 miles per hour to keep from wearing out his brakes. ROA 172 ll.5-13. He traveled down I-95 South for 10-15 minutes when the car immediately in front of him hit its brakes and moved into the left, passing lane. As the car moved over, Tucker saw an object ahead of him in the right lane. He too hit his brakes, and tried to swerve over into the left lane, but another car blocked his path. ROA 173 ll.8-23, 175 ll.3-21, 177 ll.23-25. Tucker hit the object, lost control, and crashed into a pillar for an overpass. ROA 174 ll.1-14.

Anthony Bernardo was traveling behind Tucker and saw him “suddenly veer[] to the left as if to avoid something in the roadway and in doing so [strike] a cement pillar supporting the overpass.” ROA 416, ¶¶ 1-4. Bernardo pulled his car over so that his headlights would light the scene and waited there until the EMS and Highway Patrol arrived. ROA 416, ¶¶ 5-6, 8.

The EMS found Tucker pinned to his seat by the steering column. As the EMS was using a jack to remove the steering column from Tucker's chest, Tucker told the first responder that he had hit something in the road. ROA 144 ll.12-17, 146 l.15 - 147 l.4, 150 ll.2-3, 159 ll.8-21. When later shown a photograph of the block that "looked just like" the one Wilson saw on the flatbed, Tucker testified, "That's what I hit." ROA 178 l.24 - 179 l.10.

The 650 pound bearing block at the crash scene

The tow trucker operator who helped clean up the crash scene found the block on the right shoulder of the interstate. ROA 95 l.16 - 97 l.3. It is a 650 pound, cast-metal bearing block with a hole in its middle. ROA 60 ll.4-8, 62 ll.2-5, 306-307. The tow truck operator and another man, working together, could not budge it. ROA 97 ll.14-17. To move the block, the tow truck operator had to use a front end loader. ROA 99 l.20 - 100 l.1.

The tow truck operator also testified that the marks that he saw on the road left him "no doubt" that Tucker had hit the block. ROA 105 l.6 - 107 l.7. Tucker's expert agreed that the impact marks were consistent with the block striking the road where Tucker said the block was before he hit it, and that the scrape marks were consistent with the block

sliding down the road after being hit. ROA 304-305 (showing scrape marks). Damage to Tucker's tire rim was also consistent with striking the block. ROA 65 l.6- 68 l.23, 71 l.16 - 73 l.3

Pedestrians are not allowed where the accident occurred. Only vehicular traffic is allowed on the interstate. ROA 232 ll.9-15.

Given the block's weight, and the prohibition on pedestrians, a DOT engineer testified "I don't know of any way" that the block was where it was unless by a vehicle. ROA 232 ll.9-22, 233 ll.1-14. He added that it is "not uncommon" for objects to fall off vehicles. ROA 233 ll.1-14.

Doe did not warn about the fallen block

Doe presented evidence that he did not call 911 after the block fell off his flatbed. ROA 221 ll.3-8, 222 l.4 - 223 l.13, 226 l.22 - 227 l.6.

According to Doe, there was "[n]ot one phone call, not one call, from a passerby or from anyone else either to nine one one or to the highway patrol." ROA 262 ll.20-22.

Argument

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

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

This Court should thus affirm the judgment for what Doe described as Tucker's "grievous, grievous injury" and for the remitted punitive damages award. ROA 8-17, 261 ll.18-23.

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

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

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

Tucker's insurance company stipulated that he satisfied these two elements. ROA 38 11.11-23.

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

Doe's fight does not rest on the statute's text. The affidavit satisfies the text: Bernardo witnessed the accident and attested to it from personal knowledge. ROA 416, ¶¶ 1-6. This distinguishes cases where no one else saw the accident. *Cf. Bradley v. Doe*, 374 S.C. 622, 634, 649 S.E.2d 153, 160 (Ct.App. 2007) ("Bradley's affiants had no personal knowledge of the facts of the accident."); *Shealey v. Doe*, 370 S.C. 194, 200, 634 S.E.2d 45, 48 (Ct.App. 2006) (the "affidavits do not attest to facts they perceived.").

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

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

The Supreme Court recently reversed this Court for reading requirements into a statute that are not found in the text. *Ferguson Fire and Fabrication, Inc. v. Preferred Fire Protection, L.L.C.*, 409 S.C. 331, 762 S.E.2d 561 (2014). Doe wants the Court to repeat the same error here.

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

The Bernardo affidavit rests on his direct observation. By testifying that Tucker “suddenly veered to the left as if to avoid something in the roadway,” Bernardo described what he saw and so excluded other causes for the crash. ROA 416, ¶ 4. Tucker did not put on his turn signal and change lanes gradually, or drift over through inadvertence or sleepiness. He veered suddenly. And he did not veer suddenly because a tire blew out or from any other mechanical failure that Bernardo, traveling directly behind him, observed. Tucker instead veered suddenly as if to avoid something in the road. The inference is

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

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

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

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

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

The trial judge here rightly ruled that the Bernardo affidavit satisfies *Gilliland*. ROA 3, 6. To attack the ruling, Doe argues that the

witness in *Gilliland* saw the unknown vehicle. But this reimposes a requirement that the witness give direct evidence — the very requirement that the Court rejected when it held that circumstantial evidence works too. *Id.* at 202, 592 S.E.2d at 629.

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

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

This is how circumstantial evidence works. By definition, it proves

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

Describing how Tucker veered rests on ordinary experience, not mere speculation. It is not uncommon for objects to fall off vehicles. ROA 233 ll.1-14. Faced with these sudden obstacles, we know how we react and what the reaction looks like. From these experiences, one can infer that Tucker veered suddenly as if to avoid something in the road because there was something in the road.

The inference is not a leap. After all, the tow truck operator found the block and saw the tell-tale marks that left him "no doubt" that Tucker had hit it. ROA 95 l.16 - 97 l.3, 105 l.6 - 107 l.7.

One can also infer that the block did not get on I-95 South by itself. Unlike *Bradley*, Tucker did not hit a bag of garbage that a pedestrian could have dropped. *See Bradley*, 374 S.C. at 634, 649 S.E.2d at 160. Tucker was on an interstate, where pedestrians are not allowed, when he hit a 650 pound hunk of metal that required a front-end loader to

move. ROA 62 ll.2-5, 99 l.24 - 100 l.1, 232 ll.9-15. As the DOT engineer testified, there was no way that the 650 pound block got there without a vehicle. ROA 232 ll.9-22.

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

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

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

In overruling *Davis*, the Legislature could have required that the witness see the object or the vehicle from which the object fell. It did not. As the trial judge aptly noted, "The witness must have witnessed the 'accident,' not the other vehicle, not the other driver, and not the foreign object." ROA 2.

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

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

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

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

1. Doe's extra issues are new.

Appellants may not normally raise issues for the first time on appeal. *Johnson v. Lloyd*, 407 S.C. 610, 612, 757 S.E.2d 705, 706 (2014). The issue must instead be raised in the trial court with enough

specificity to give the trial judge notice of the argument's precise nature. *Bryant v. Waste Mgmt., Inc.*, 342 S.C. 159, 172 n. 27, 536 S.E.2d 380, 387 n. 27 (Ct.App. 2000). Requiring specificity prevents appellants from shifting grounds on appeal. *Id.*

Doe is shifting grounds here. Before now, Doe never argued that Bernardo's affidavits were untimely. Doe recounted when the affidavits were served without arguing that the statute required that they be served any earlier. ROA 383.

Before trial, Doe also conceded that the statute did not require Tucker to depose Bernardo and that the jury could hear the case without Bernardo's affidavit testimony. ROA 38 l.11 - 39 l.24. After trial, Doe argued that Bernardo's failure to testify helped show that the evidence was insufficient. ROA 10. Doe only now says that Bernardo's failure to testify at trial violated the statute.

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

2. The extra attacks are lack merit.

These brand new attacks also ignore the statute's text. Section 38-

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

This case is a poor candidate for the proposed revisions. After his accident on April 30, 2010, Tucker had three years to sue. S.C. Code § 15-3-530(5). He served Bernardo's first affidavit within three months. ROA 414-415. He served the revised affidavit within a year of the accident — and well within the time that Rule 56 gives to serve opposing affidavits. Rule 56(c), SCRCPP; ROA 416-417. After that, trial did not start for over two more years. ROA 26 (showing trial began April 15, 2013).

Had Doe said anything before now, the statute of limitations gave Tucker time to dismiss this action without prejudice and re-serve the affidavit with a new summons and complaint. Had Doe said anything before now, Tucker could have deposed Bernardo to use the deposition at trial or subpoenaed him for trial. And throughout these years, Doe knew from Bernardo's affidavits where to find him — and so had years to depose him or subpoena him for trial. As it was, however, no one believed that the statute required Bernardo to give more testimony.

ROA 39 I.10-13.

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

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

Doe next wants this Court to rule that the evidence linking the 650 pound block to the unknown vehicle is not sufficiently probative. The jury viewed the evidence differently, and specifically found that Doe caused Tucker's injuries. ROA 18. The trial judge agreed that this finding is supported by evidence. ROA 12.

In an action at law, tried to a jury, the jury gets to determine whether evidence is probative. This Court only corrects errors of law. *Manos v. Nelson, Mullins, Riley & Scarborough, LLP*, 389 S.C. 126, 140-141, 144, 697 S.E.2d 644, 652, 654 (Ct.App. 2010). In determining if there was a an error of law, the evidence — and the inferences that can be reasonably drawn therefrom — must be viewed in a light most favorable to Tucker. If any evidence yields more than one inference, the Court must affirm. *Steinke v. South Carolina Dept. Of Labor, Licensing and Regulation*, 336 S.C. 373, 386, 520 S.E.2d 142, 148 (1999).

The evidence easily yields more than one inference. Wilson saw the blue freightliner and its flatbed before it turned on to I-95 South. ROA 46 l.22 - 47 l.13. On the flatbed was a block that "looked just like" the block that Tucker later hit while driving further down I-95 South and that the tow truck operator found at the crash scene. ROA 43 l.23 - 44 l.8, 52 l.20 - 53 l.9, 95 l.16 - 96 l.13, 178 l.24 - 179 l.10. It does not take leaps to infer that the block that Wilson saw on the flatbed and the one that Tucker later hit "looked just like" each other because it was the same block.

It is as reasonable to infer that the block fell off the flatbed because it was strapped inadequately. Wilson explained that the block he saw could be a problem because it only had "a strap across it" and not a chain going through it. ROA 53 l.21 - 54 l.6. Tucker's expert opined to a reasonable degree of certainty that the strap would not keep the block from sliding off as the truck accelerated to interstate speeds and took curves in the road. ROA 75 l.19 - 77 l.8.

Doe responds by arguing that Tucker's hypothetical question to the expert did not account for the pipes and rebar. This is Doe's third unpreserved contention in that Doe never objected to the hypothetical's completeness when the question was asked. ROA 75 l.22 - 76 l.25. Even

if the basis of the opinion is incomplete, a jury can rely on expert opinions that are admitted without objection. *Hanna v. Palmetto Homes, Inc.*, 300 S.C. 535, 536-537, 389 S.E.2d 164, 165 (Ct.App. 1990).

Besides, Wilson never suggested that the pipes and rebar that he saw encircled, anchored, or concealed how the block was secured to the truck. He quite simply explained that he saw that the pipes and rebar were secured with multiple straps while the block only had a single, yellow strap running across it. ROA 52 l.25 - 53 l.17. Multiple straps may hold pipes and rebar in place as a 650 pound block slides out from under its single strap.

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

Doe's theories also seem more far fetched than the much simpler explanation about the inadequate strap. This case involves a 650 pound block that couldn't be moved without a front end loader, found where only vehicular traffic is allowed. ROA 97 ll.14-17, 99 l.20 - 100 l.1, 232

11.9-15. The jury could have thus agreed with the DOT engineer that a vehicle had to be involved. ROA 232 11.9-22.

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

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

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

A. The attack is new.

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

Before now, Doe never hinted that § 56-5-4100 is irrelevant on recklessness. When Doe moved for a directed verdict on recklessness,

the trial judge ruled "there is a statute on securing the load, and the requirement of what happens if you lose a portion of your load. . . and there is evidence in this record that statute has been violated in part or in whole." ROA 215 l.2 - 216 l.2. Doe never spoke up and said that this misapplies a strict liability statute.

Doe likewise never suggested that the court was giving the jury bad law when the court charged on § 56-5-4100 and explained that a violation "may be considered in deciding whether the Defendant was reckless[.]" ROA 259 ll.8-21, 278 ll.3-23, 287 ll.10-15, 294 ll.13-18.

Doe then submitted a trial brief which states that a statute's violation is "some evidence that the defendant acted recklessly" ROA 367, citing *Wise v. Broadway*, 315 S.C. 273, 276, 433 S.E.2d 857, 859 (1993). Doe incorporated this concession into his motion for a jnov. ROA 392, n.6.

Doe lastly never got a ruling on whether § 56-5-4100 is an irrelevant strict liability statute. The trial judge instead cited Doe's concession. ROA 11 ("Defendants concede that violation of a statute is negligence *per se* and may be considered as evidence of recklessness."). The court then reviewed the evidence and found that Doe failed to properly secure the block; failed to notice that the block had fallen off; and failed to

respond or warn the appropriate authorities of the danger. ROA 15

“[T]his conduct certainly qualifies as reckless[,]” the court concluded. *Id.*

Doe still argues that his attack is preserved because “the trial court would be required to charge South Carolina law in its current form.”

Doe’s Initial Brief, n. 9. Yet the footnote deals only with Doe’s failure to object to the jury charges. Doe does not mention his later concession that a statutory violation is indeed some evidence of recklessness or the trial court’s citation to the concession.

Futility sometimes excuses a failure to object contemporaneously.

But an appellant can’t tell the trial judge that the law is one thing and then tell this Court the exact opposite. Flip-flopping is not allowed.

Bryant, 342 S.C. at 172 n. 27, 536 S.E.2d at 387 n. 27.

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

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

For over a century, the Supreme Court has held that the causative violation of an applicable statute is evidence of recklessness. *See Callison v. Charleston & W.C. Ry. Co.*, 106 S.C. 123, 90 S.E.2d 260

(1916). Over 20 years ago, Justice Chandler considered this rule so fixed that change must come from the General Assembly or the Supreme Court on a motion to overrule precedent. *Wise*, 315 S.C. at 280, 433 S.E.2d at 861. In the decades since *Wise*, neither the General Assembly nor the Supreme Court has limited this rule. The Supreme Court recently reaffirmed it. *Fairchild v. South Carolina Dept. of Transp.*, 398 S.C. 90, 98-102, 727 S.E.2d 407, 412-413 (2012).

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

Now this inference is not mandatory. Violators remain free to convince a jury that they exercised all possible care or were at most negligent. *Fairchild*, 398 S.C. at 98, 727 S.E.2d at 411. Failing that, violators may still challenge recklessness during the trial court's post-trial review. *Id.* at 102, 727 S.E.2d at 413.

What violators may not do is say that their violation does not even

imply recklessness. *Callison* rejected that view years ago when the court held the inference is permissible because violators are conclusively presumed to know the law before they break it.

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

And unlike Kentucky, seat-belt violations are never admissible as evidence in a civil action. S.C. Code Ann. § 56-5-6540(C). This statute shows that the Legislature knows how our courts treat statutory violations in civil actions, and decided to exclude the effect of some violations without touching the century-old rule that admissible statutory violations are evidence of recklessness. Had it wanted to alter or limit the rule, the Legislature could have done so when it recently overhauled how punitive damages are pleaded and proven. S.C. Code Ann. § 15-32-510 *et. seq.* It did not.

So Doe not only wants this Court to alter a century-old rule that the

Supreme Court reaffirmed in 2012. Doe yet again wants the Court to make a change that the General Assembly has not seen fit to make.

1. Doe secured the block recklessly.

This is not the case to overthrow such a venerable rule. The trial court, for example, did not seem to rely on the statutory violation when the court concluded that Doe was reckless in failing to properly secure the 650 pound block. ROA 15. In reviewing this ruling, the same standard of review that applies to the jury's finding on causation applies to the jury's finding on recklessness.

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

Evidence beyond the statutory violation exists on Doe's recklessness in failing to secure the load. The block, for example, was not secured to the flatbed through the hole in the block's middle. ROA 306-307 (showing hole); ROA 53 l.21 - 54 l.2. Despite the other chains and straps

that were available, it was secured by a single strap running across it. ROA 53 1.17 - 54 1.6. Tucker's expert explained that the strap could not keep the bearing block from sliding off the rear of the flatbed as the truck accelerated to interstate speeds and took curves in the road. ROA 75 1.19 - 77 1.9.

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

The jury could find that this goes beyond mere inadvertence. The trial judge did. ROA 15 (concluding that the failure to appropriately secure the block was reckless).

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

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

Section 56-5-4100(D) is not a strict liability statute. Rather it requires operators to "make every reasonable effort to immediately

cause the public highway to be cleaned of such substances” once a load falls and endangers travel upon the highway. The court charged that this provision “may be considered in deciding whether the Defendant was reckless[.]” ROA 278 ll.16-23, 287 ll.10-15.

On this point, Doe presented evidence that he never called 911 about the block after it fell off of the flatbed. ROA 221 ll.3-8, 222 l.4 - 223 l.13, 226 l.22 - 227 l.5. Doe then emphasized to the jury that there was “not one phone call, not one call, from a passerby or from anyone else either to nine one one or to the highway patrol.” ROA 262 ll.20-22. Doe continued, “The Highway Department gets that call if it comes in after hours — no calls.” ROA 263 ll.3-4.

Of everyone who Doe argued failed to call, Doe was the only one statutorily required to try to get the block out of the interstate. The jury could have found that the failure to call 911 violated § 56-5-4100(D), and was in any event reckless. Again, the trial judge did. ROA 15 (finding recklessness from Doe’s “fail[ure]] to respond or otherwise warn the appropriate authorities of this danger.”).

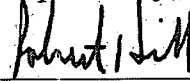
Conclusion

Doe’s disdain for circumstantial evidence does not justify reading

words into § 38-77-170(2), resolving unpreserved claims, or exceeding the standard for reviewing whether any inference or evidence supports a jury verdict. Circumstantial evidence may support a jury verdict for death. *State v. Williams*, 321 S.C. 327, 338-339, 468 S.E.2d 626, 632-633 (1996). It should also support a jury verdict for insurance benefits.

The Court should affirm.

Respectfully,

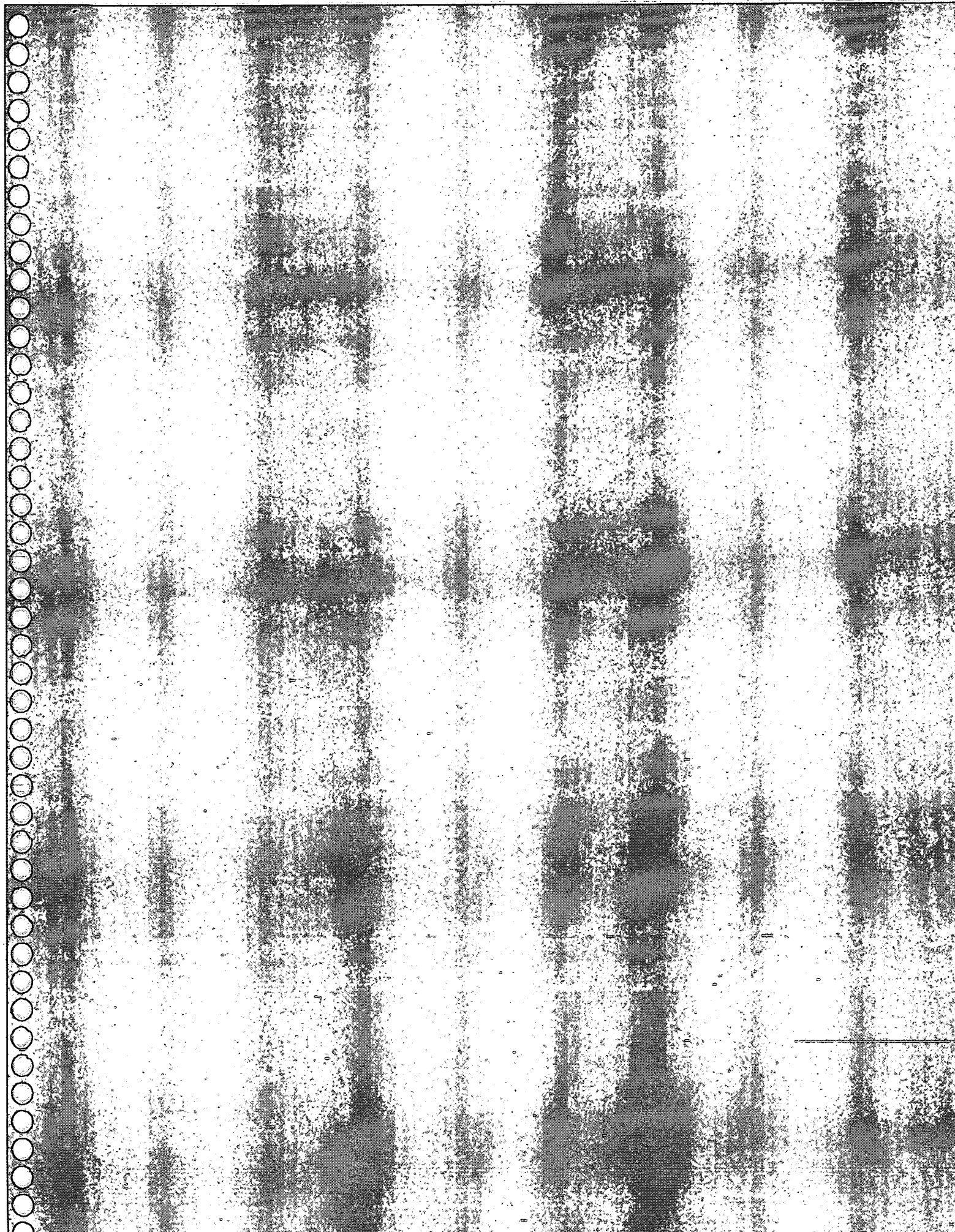


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The State of South Carolina
In the Court of Appeals

Appeal from Darlington County
Court of Common Pleas

Honorable J. Michael Baxley, Circuit Court Judge

Case No. 2010-CP-16-0315

Bobby Lee Tucker, Sr. Respondent
v.

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

Respondent's Certificate of Service

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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
Company, ... Appellant.

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SC Court of Appeals

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Argument

- I. The trial court erred in holding that the Bernardo Affidavit 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.**

Tucker failed to submit an affidavit that satisfied South Carolina Code section 38-77-170, which requires that, in any single-vehicle accident caused by an unknown vehicle, an independent witness attest to the truth of the facts of the accident. Mr. Bernardo in his Affidavit unquestionably speculated about the cause of the accident and did not provide a causative link to the unknown vehicle, as required by *Gilliland v. Doe*, 357 S.C. 197, 592 S.E.2d 626 (2004). Tucker's argument that the Bernardo Affidavit employs circumstantial evidence is unavailing. (Brief for Respondent at 10-12.) Circumstantial evidence is not the same thing as speculation. Tucker does not address how the Bernardo Affidavit provides an *evidentiary* causative link to an unknown vehicle, as required by *Gilliland*, and instead argues that there is no such requirement in the statute. (Brief for Respondent at 13-14.) However, there is. Moreover, the Bernardo Affidavit fails to satisfy the purpose of the statute because it was served too late and not reinforced by trial testimony, and allowing either would render portions of the statute meaningless.

- A. The Bernardo Affidavit was insufficient because it improperly speculated about the cause of the accident and did not provide a causative link between the accident and an unknown vehicle.**

Tucker failed to satisfy the statutory requirement to provide a witness affidavit that "attest[s] to the truth of the facts of the accident." S.C. Code Ann. § 38-77-170(2). While the independent witness affidavit may be sufficient even if it only offers circumstantial evidence, it still must provide a causative link between the accident and

the unknown vehicle. *Gilliland v. Doe*, 357 S.C. 197, 592 S.E.2d 626 (2004); *Wausau Underwriters Ins. Co. v. Howser*, 309 S.C. 269, 275, 422 S.E.2d 106, 109 (1992). The Bernardo Affidavit fails for two reasons: first, it contains speculation, not a proper factual inference based on circumstantial evidence, about the truth of the facts of the accident; second, it fails to provide a causative link to an unknown vehicle at all. Therefore, the Bernardo Affidavit is insufficient, and Doe was entitled to JNOV. Accordingly, this Court should reverse and enter judgment in favor of Doe.

Mr. Bernardo attested that he saw Tucker's truck strike a cement pillar because it suddenly veered "*as if to avoid something in the roadway.*" {March 4, 2011 Affidavit of Anthony Bernardo ¶ 4 (emphasis added); R. p. 416}. Contrary to Tucker's assertion, Doe's challenge to the sufficiency of this statement *does* rest on the statute's text. Tucker argues that the literal text of South Carolina Code section 38-77-170(2) is satisfied where the affiant merely witnesses the accident itself and attests to it. (Brief for Respondent at 8, 13-14.) This argument ignores South Carolina precedent. The Supreme Court found that the 1987 amendment to the statute, which added the witness requirement, was intended to require that the witness provide a causal relationship sufficient to determine whether "the injury or damage arose out of the ownership, maintenance or use of the uninsured vehicle." *Howser* at 275, 422 S.E.2d at 109. The causative link required 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. After the statute was amended again in 1989 to add the requirement that the witness sign an affidavit, this Court found that the intent behind the statute was to require that the affiant "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). Even though the Supreme Court reversed this Court’s decision in *Gilliland*, it approved the Court’s interpretation of the statute, stating that “this analysis is consistent with *Howser* and constitutes a fair interpretation of the ambiguous fact requirement of § 38-77-170(2).” *Gilliland* at 201, 592 S.E.2d at 628. Thus, under South Carolina precedent, section 38-77-170(2) is not satisfied if the affiant merely witnesses the accident; instead, the affiant must attest to the truth of the facts of the accident, and in doing so, provide a causative link between the accident and an unknown vehicle. The Bernardo Affidavit fails to do either.

To support the sufficiency of the Bernardo Affidavit, Tucker relies on a comparison to the affidavit in *Gilliland*, which was based on circumstantial evidence. (Brief for Respondent at 9-13.) In *Gilliland*, the affiant testified that she saw the lights of two cars as the cars came around a curve and that, after the accident, she saw the lights of the car “arc through a field” as if it were making a U-turn. *Gilliland* at 198-99, 592 S.E.2d at 627. The Supreme Court held that this circumstantial evidence sufficiently “attest[ed] to the truth of the facts of the accident” to create a question of fact as to causation. *Id.* at 202, 592 S.E.2d at 629. Two distinctions from *Gilliland* demonstrate both insufficiencies of the Bernardo Affidavit.

First, the Bernardo Affidavit speculates about the cause of the accident, and in doing so, does not attest to the truth of the facts of the accident. The affiant in *Gilliland* witnessed the headlights of an unknown vehicle near the accident and then saw the unknown vehicle’s lights arc as if it were turning from the scene, thereby creating an

evidentiary inference that this unknown nearby vehicle *caused* the accident. On the other hand, the only thing that Mr. Bernardo saw was Tucker's vehicle swerve and impact with a pillar. There is nothing in the Bernardo Affidavit of any evidentiary value as to the *cause* of Tucker's swerve. Rather, Mr. Bernardo says it was "as if" Tucker's vehicle was attempting to avoid an object in the road. {March 4, 2011 Affidavit of Anthony Bernardo ¶ 4; R. p. 416}. This is not a statement that leads to an evidentiary inference of anything. Instead, it is a speculative guess by Mr. Bernardo.

The affiant in *Gilliland* saw the cause (the proximate unknown vehicle and its actions) and deduced the effect (the accident); whereas here, Mr. Bernardo saw the effect (the swerve and impact) and speculated about their cause. As Tucker correctly states, circumstantial evidence is a fact or chain of facts that leads to conclusions, and *Gilliland* involved a factual conclusion inferred from the facts perceived by the affiant. (Brief for Respondent at 11-12.) However, Mr. Bernardo did not attest to any facts leading to an inference about the cause of the swerve—he was instead impermissibly speculating. See *State v. Salisbury*, 343 S.C. 520, 524, 541 S.E.2d 247, 249 n.1 (2001) ("Circumstantial evidence immediately establishes collateral *facts* from which the main fact may be inferred, and is typically characterized by inference or presumption." (emphasis added)); *Shealy v. Doe*, 370 S.C. 194, 204, 634 S.E.2d 45, 50 (Ct. App. 2006) ("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."). Mr. Bernardo's *theory* about why Tucker may have swerved is *not* attesting to "the truth of the facts of the accident."

Second, even if it were permissible to speculate that an object in the road caused the accident, the Bernardo Affidavit still fails because it does not provide any link between an unknown vehicle and the cause of the accident to satisfy the statute. See *Gilliland* at 201, 592 S.E.2d at 628; *Howser* at 275, 422 S.E.2d at 109, *supra*. In *Gilliland*, the affiant attested to seeing headlights of an unknown vehicle near the accident, then again as they turned away from the accident. Thus, the affiant could attest to the inference that it was an unknown vehicle that caused the accident. On the other hand, Mr. Bernardo did not attest to seeing an object in the road (or an object at all), and he did not mention in any way that an unknown vehicle dropped the object or was implicated in the accident at all. Hence, even if Mr. Bernardo's speculation about what caused the swerve was sufficient to suggest that an object may have been in the road, the Bernardo Affidavit still does not provide *any* causative link between the object in the road and an unknown vehicle that could satisfy *Howser* and *Gilliland*.

The Bernardo Affidavit is comparable to the witness affidavits in *Bradley*, which were insufficient for this reason. *Bradley v. Doe*, 374 S.C. 622, 649 S.E.2d 153 (Ct. App. 2007). In *Bradley*, an affiant saw the object in the road, then about fifteen minutes later, saw a vehicle drop another similar-looking object a quarter-mile away, but did not see the accident itself. *Id.* at 624, 649 S.E.2d at 155. This Court found that there was insufficient evidence providing a causative link between the accident and an unknown vehicle. *Id.* at 634, 649 S.E.2d at 160. Here, Mr. Bernardo saw the accident, but he did not see an object dropped by a vehicle into the road or see the unknown vehicle, and he did not attest to the existence of either. Thus, the Bernardo Affidavit could not have

provided a causative link between the accident and an unknown vehicle to satisfy *Gilliland* and *Howser*.

South Carolina courts have historically required strict compliance with the requirements of section 38-77-170(2). *Collins v. Doe*, 352 S.C. 462, 467, 574 S.E.2d 739, 741 (2002); *Enos v. Doe*, 380 S.C. 295, 313, 669 S.E.2d 619, 628 (Ct. App. 2008). The legislature has determined that the appropriate method to prevent fraud is to require an independent witness affidavit, and this Court is bound to enforce the legislature's decision. *See Clo-Car Trucking Co. v. Cliffure Estates of S. Carolina, Inc.*, 282 S.C. 573, 578, 320 S.E.2d 51, 54 (Ct. App. 1984) (stating that the failure to apply a statute where necessary is a usurpation of the functions of the General Assembly). Even though a directed verdict based on the failure to provide a satisfactory independent witness affidavit would vacate the verdict and prevent Tucker from recovering from Doe for his injuries, that nevertheless is the result mandated by the statute, and South Carolina courts have previously granted directed verdicts for failure to provide a sufficient independent witness affidavit. *See Bradley* at 634, 649 S.E.2d at 160 ("A plaintiff's strict compliance with the affidavit requirement is mandatory."); *see also Collins* at 471, 574 S.E.2d at 743 (reinstating a trial court's directed verdict against plaintiff for failure to file a sufficient independent witness affidavit); *Enos* at 313, 669 S.E.2d at 628 (affirming directed verdict against plaintiff for failure to file a sufficient independent witness affidavit). Accordingly, this Court should reverse the decision of the trial court and enter judgment in favor of Doe because Tucker failed to provide a satisfactory independent witness affidavit pursuant to South Carolina Code section 38-77-170(2).

- B. Section 38-77-170(2) was not satisfied because Mr. Bernardo did not testify at trial and the Bernardo Affidavit was untimely, and enforcing these requirements prevents the statute from being rendered meaningless.

Tucker contends that Doe is attempting to create non-textual requirements to section 38-77-170(2) by arguing that the purposes behind the independent witness affidavit requirement were not satisfied since Mr. Bernardo did not testify at trial and the Bernardo affidavit was untimely. (Brief for Respondent at 8-9, 16.) However, the enumerated purposes behind the affidavit requirement and the statutory disclaimer would be thwarted if Tucker is able to proceed with an untimely-served affidavit and without the trial testimony of Mr. Bernardo. Doe is not attempting to create new statutory requirements but is instead attempting to prevent the existing language from being rendered meaningless.

The attestation requirement of the statute reads as follows:

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*; . . .

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 (emphasis added). The Supreme Court has recognized that the attestation requirement of section 38-77-170(2), as opposed to the affidavit filing requirement, is “arguably ambiguous,” and applied statutory construction maxims to assist in its interpretation. *Gilliland v. Doe*, 357 S.C. 197, 201, 592 S.E.2d 626, 628 (2004).

“The primary rule of statutory construction is to ascertain and give effect to the intent of the legislature.” *Tempel v. S. Carolina State Election Comm’n*, 400 S.C. 374, 377-78, 735 S.E.2d 453, 455 (2012). While this Court may not “engraft extra requirements” to an unambiguous statute, *Cox v. Cnty. of Florence*, 337 S.C. 340, 347, 523 S.E.2d 776, 780 n.10 (1999), if the literal import of a statute leads to an absurd result or renders any of it meaningless, the court may construe the statute to avoid such a result. *Soil Remediation Co. v. Nu-Way Envtl., Inc.*, 317 S.C. 274, 276, 453 S.E.2d 253, 254-55 (Ct. App. 1994); *see also 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 . . .”).

The Supreme Court has enumerated three purposes behind the independent witness affidavit requirement: fraud prevention, evidence to the insurer of a good faith claim, and notice. *Collins v. Doe*, 352 S.C. 462, 469-70, 574 S.E.2d 739, 743 (2002). If the attestation requirement is satisfied merely by a signature on an affidavit without the need for cross-examination at trial, there would be no guarantee that the affiant is an independent witness or is attesting to the truth of the facts of the accident. Similarly, the statutory disclaimer, explicitly added and required by the legislature, would be meaningless if there were no way to elicit testimony to question whether the statements in

the affidavit were false. Without testimony from the affiant under oath, the affidavit would simply not be trustworthy or verifiable, and the fraud prevention purpose of the statute would be frustrated. Therefore, Doe was entitled to JNOV because the legislative intent behind section 38-77-170 requires trial testimony from the affiant.

The remaining two purposes, evidence to the insurer of a good faith claim and notice, likewise would be foiled if a witness affidavit could be served months after the complaint is filed. Without a contemporaneous affidavit, the insurer would be required to litigate against its own insured and expend significant time and costs to investigate a claim that otherwise could have been quickly paid. The second Bernardo Affidavit was filed ten months after the Complaint was served—after Doe had litigated this action to summary judgment. As such, it was untimely, counteracting the purposes of section 38-77-170. Therefore, the Bernardo Affidavit was insufficient to satisfy the statute, and Doe was entitled to JNOV. Accordingly, the Court should reverse the decision of the trial court and enter judgment in favor of Doe.

C. Doe's argument that the purposes of the independent witness affidavit requirement were not satisfied by the Bernardo Affidavit is preserved.

Tucker contends that Doe's argument that the purposes of South Carolina Code section 38-77-170(2) were not satisfied are unpreserved for appellate review. (Brief for Respondent at 14.) However, Doe has always maintained that the statute was not satisfied. In Doe's memorandum in support of its post-trial motions, Doe specifically noted that the Bernardo Affidavit was not filed with the Complaint as part of its argument that the Bernardo Affidavit was insufficient. {Memorandum in Support of Defendant's Post Trial Motions at 7; R. p. 383}. Doe also argued that Tucker produced no witnesses who saw any object in the road or observed Plaintiff striking any object in the road. {*Id.*

at 12; R. p. 388}. These issues were raised sufficiently clearly such that they were “reasonably understood” by the trial court. *Malloy v. Thompson*, ___ S.C. ___, 762 S.E.2d 690, 692 (2014).

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.

Tucker failed to meet the elements of negligence because he failed to offer probative evidence that the bearing block was improperly strapped and failed to offer any evidence suggesting that the probable cause of the bearing block purportedly being in the road was that it fell from an unknown vehicle. Tucker argues that inferences should be made in his favor, and that the “simpler explanation” is that it must have fallen from a vehicle because it is too heavy for a person to lift and was found in an area where pedestrians are not legally allowed to walk. (Brief for Respondent at 19-20.) This argument employs an impermissible *res ipsa loquitur* inference. JNOV should thus have been entered in favor of Doe.

A. The evidence in the record that the bearing block was inadequately strapped is not sufficiently probative to avoid JNOV.

The only evidence in the record regarding whether the degree of strapping that an unknown vehicle used was sufficient is the response to the incomplete hypothetical posed to Mr. Harris, Tucker’s expert. Mr. Harris testified that, if the bearing block was secured by a single nylon strap across the top of the object, it would not be adequate. {Tr. 98-101; R. pp. 73-76}. However, this hypothetical is immaterial to the evidence in the record. The only evidence in the record about how an unknown vehicle secured its load came from Mr. Wilson, who testified that he saw a truck carrying an object that “looked just like” the bearing block, along with strapped-down pipes and rebar. {Tr. 73, 78-79;

R. pp. 48, 53-54}. There is no evidence about whether the truck bed was partially enclosed, how it was loaded, or whether the object was surrounded such that the bearing block would have not needed any strapping whatsoever. Mr. Harris did not view the particular truck to determine how the object was loaded or how the truck bed held its load. Instead, in response to a hypothetical asking about only one strap on a theoretical truck, Mr. Harris said that such hypothetical strapping would not be adequate. While the trial court was required to accept all reasonable inferences in the light most favorable to Tucker, inferring that Mr. Harris's testimony is probative on the evidence in the record is unreasonable. In short, Mr. Harris's testimony proved nothing about the actual unknown vehicle and the way its load was secured. Accordingly, the trial court erred in denying Doe's motion for JNOV.

B. There is no evidence in the record that the probable cause of the bearing block being in the road was falling from an unknown vehicle.

Tucker argues that the assumption may be made that the bearing block was dropped on the road because it was inadequately strapped because that is a "simpler explanation" than any of the other "far-fetched" possibilities for how the bearing block could have come to rest in the road. (Brief for Respondent at 19-20.) However, South Carolina law does not recognize *res ipsa loquitur*, so Tucker, not Doe, had the burden to establish that his causative explanation for how the object came to be in the road was the most probable one, not just a possible one. *See Nguyen v. Uniflex Corp.*, 312 S.C. 417, 420, 440 S.E.2d 887, 889 (Ct. App. 1994) (finding that the plaintiff failed to carry his burden on causation where there was no evidence in the record that the alleged cause of a fire was the probable cause); *see also Watson v. Ford Motor Co.*, 389 S.C. 434, 453, 699 S.E.2d 169, 179 (2010) (stating that South Carolina law does not recognize *res ipsa*

loquitur). Because Tucker failed to present any evidence of probability, it cannot be inferred for him. See *Poliakoff v. Shelton*, 193 S.C. 398, 8 S.E.2d 494, 499 (1940) (affirming a directed verdict for failure to show causation, stating that the court cannot infer why baggage fell off of a rack because *res ipsa loquitur* is not available in South Carolina and there are any number of possible causes).

In *Bradley*, this Court held that the affiant's testimony that he saw a vehicle a quarter-mile away from the accident carrying an identical object to the one that was in the road was insufficient evidence of causation because presuming a link between the accident and vehicle would have been "mere speculation." *Bradley v. Doe*, 374 S.C. 622, 634, 649 S.E.2d 153, 160 (Ct. App. 2007). Similarly, Mr. Wilson's testimony that he saw a vehicle two hours before the accident carrying an object that "looked just like" the object that was found beside the road fails to establish a sufficient causal link between that unknown vehicle and Tucker's collision. {Tr. 68-69; R. pp. 43-44}. There is no evidence in the record that an unknown vehicle probably—rather than possibly—dropped the bearing block into the road, and inferring that it had to come from a vehicle *because* it is heavy and was in the road where pedestrians are not legally allowed is impermissibly applying *res ipsa loquitur*.

Tucker is not required to disprove every possible explanation, but he must still provide actual evidence that an unknown vehicle probably dropped the object in the road. See *Nguyen* at 420, 440 S.E.2d at 889 (stating that causation "must be based on probabilities not mere possibilities"). Tucker failed to do this, so Doe was entitled to JNOV.

C. Doe's argument that there is insufficient probative evidence that the bearing block was improperly strapped to avoid JNOV is preserved.

Tucker contends that Doe's argument that Tucker failed to present probative evidence that Doe failed to properly strap the object is unpreserved because Doe did not object at trial to Mr. Harris's testimony. (Brief for Respondent at 18-19.) In making this assertion, Tucker misconstrues Doe's argument. Doe argues that Mr. Harris's testimony is irrelevant. In its post-trial motion, Doe expressly raised this issue:

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 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: . . .

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).

{Memorandum in Support of Defendant's Post Trial Motions at 11-13; R. pp. 387-89}.

Thus, Doe sufficiently raised the issue that Mr. Harris's testimony about improper strapping was not probative because he did not see the bearing block and was only answering a hypothetical. Accordingly, Doe's argument that Mr. Harris's testimony is insufficient evidence of improper strapping to survive a motion for JNOV is preserved.

III. There was insufficient clear and convincing evidence of recklessness to avoid JNOV as to the issue of punitive damages.

Punitive damages are improper because there is no clear and convincing evidence in the record that Doe was reckless other than a violation of South Carolina Code section 56-5-4100(A), a strict liability statute. To the extent that such a result is mandated by

Wise v. Broadway, 315 S.C. 273, 433 S.E.2d 857 (1993), it should be overruled by the Supreme Court.

- A. **There is no evidence of recklessness in the record other than the alleged statutory violation, so requiring the submission of punitive damages to the jury is inappropriate.**

There is no evidence of recklessness in the record other than the alleged statutory violation, and contrary to Tucker's assertion that the violation of a statute has been evidence of recklessness for over a century, South Carolina law was not clear on the issue in the past. (Brief for Respondent at 23.) There had been two inconsistent lines of cases—one holding that a statutory violation *could be* evidence of recklessness, the other holding that it *is*—which arose out of differing interpretations of *Callison v. Charleston & W. C. Ry. Co.*, 106 S.C. 123, 90 S.E. 260 (1916), which were not reconciled until *Wise v. Broadway*, 315 S.C. 273, 276, 433 S.E.2d 857, 859 (1993).

The paragraph at issue in *Callison* is as follows:

The failure of a railroad company to give the signals required by statute at a public crossing is negligence per se; moreover, it is sufficient to warrant a reasonable inference of recklessness, willfulness, or wantonness, and therefore sufficient to carry that issue to the jury. No doubt, in some instances, it may be the result of mere inadvertence; if so, it would be negligence only; but, when the positive command or prohibition of a statute is violated or disobeyed, it is deemed sufficient to require submission to the jury of the question whether, under all the circumstances, it was the result of mere inadvertence, or of indifference to the rights of those who travel the highways, or a conscious failure to be careful for their safety. The reason upon which the rule is based is that, when anything is commanded or prohibited by legislative authority, every one is conclusively presumed to know it and is bound to act accordingly, and, the matter having been brought to his attention in such a solemn and impressive way, his violation or disobedience cannot be entirely excused, and therefore it amounts, at the least, to negligence; and, while it may be negligence only, it is also

enough to warrant a reasonable inference that it was due to indifference to the command or prohibition, or to a conscious disregard thereof, and of the rights of those intended to be safeguarded thereby. True, the facts and circumstances may repel such an inference, but it is for the jury to decide whether they do or not, unless the evidence is susceptible of but one inference.

Callison v. Charleston & W.C. Ry. Co., 106 S.C. 123, 90 S.E. 260, 262 (1916). In *Cabbage v. Roos*, 181 S.C. 188, 186 S.E. 794 (1936), the Supreme Court recognized that *Callison* “expressly held” that the mere violation of a statute, without any other evidence of recklessness in the record, did not require the submission of recklessness to the jury. See also *Wideman v. Hines*, 117 S.C. 516, 109 S.E. 123, 128 (1921). Thus, a line of cases holding that a statutory violation *may* constitute evidence of recklessness developed from *Callison*. See, e.g., *Carraway v. Pee Dee Block, Inc.*, 275 S.C. 511, 514, 273 S.E.2d 340, 342 (1980) (“The causative violation of an applicable statute constitutes negligence per se and *may be* evidence of reckless or willful conduct.” (emphasis added)); *Jumper v. Goodwin*, 239 S.C. 508, 515, 123 S.E.2d 857, 860 (1962) (“The violation of an applicable statute is negligence per se and is *ordinarily* evidence of willfulness which may be considered by the jury, together with all of the other circumstances in the case, in determining whether a party was only negligent or was willful.” (emphasis added)). As recently as 1993, this Court recognized that the law in South Carolina was that a statutory violation does not inevitably constitute evidence of recklessness. *Ravan v. Greenville Cnty.*, 315 S.C. 447, 458, 434 S.E.2d 296, 303 (Ct. App. 1993) (citing *Rhodes v. Lawrence*, 279 S.C. 96, 97, 302 S.E.2d 343, 344 (1983); *Tant v. Dan River, Inc.*, 289 S.C. 325, 326, 345 S.E.2d 495, 496 (1986)).

However, a second line of cases developed out of *Callison*, interpreting it as holding that a statutory violation is evidence of recklessness. See, e.g., *Daniels v. Bernard*, 270 S.C. 51, 55, 240 S.E.2d 518, 520 (1978); *Still v. Blake*, 255 S.C. 95, 102, 177 S.E.2d 469, 473 (1970); *Ford v. Atl. Coast Line R. Co.*, 169 S.C. 41, 168 S.E. 143, 179-80 (1932). These two lines of cases were not reconciled until 1993, when the Supreme Court relied on the latter line of cases to hold that a statutory violation invariably is evidence of recklessness without mention of the former. *Wise v. Broadway*, 315 S.C. 273, 276, 433 S.E.2d 857, 859 (1993). The rule followed in *Wise* has been followed in every case since then. See, e.g., *Fairchild v. S. Carolina Dep't of Transp.*, 398 S.C. 90, 101, 727 S.E.2d 407, 413 (2012).

However, the adoption of the *per se* rule was not without dispute. In *Cooper by Cooper v. Cnty. of Florence*, 306 S.C. 408, 412 S.E.2d 417 (1991), the Supreme Court held that the violation of a statute is evidence of recklessness. *Id.* at 411, 412 S.E.2d at 419. Then-Justice Toal dissented, stating that the majority misinterpreted precedent and expressed concern that the decision took the determination of whether there is evidence of recklessness in the record other than the statutory violation out of the trial court's hands in cases such as this one:

To hold as the majority does would mean that a directed verdict in practically any motor vehicle accident case (where statutes govern almost every aspect of driving) would be virtually impossible to obtain, regardless of the facts. Furthermore, a trial judge would be required, where the letter of a statute has been violated, to submit a charge to the jury on punitive damages, regardless of whether it appeared to him/her that the defendant was not reckless/willful. In my view, the majority overrules *Cubbage* by its interpretation of our law.

Id. at 415, 412 S.E.2d at 421 (Toal, J., dissenting) (citing *Cabbage v. Roos*, 181 S.C. 188, 186 S.E. 794, 796 (1936)). In *Wise*, Justice Toal again dissented, reiterating the same concerns about the requirement that any statutory violation serve as evidence of recklessness. *Wise v. Broadway*, 315 S.C. 273, 280-82, 433 S.E.2d 857, 861-62 (1993) (Toal, J., dissenting). Chief Justice Toal's concerns were correct, and, respectfully, *Wise v. Broadway* was wrongly decided.

Tucker asserts that, even without the statutory violation, evidence that a truck viewed two hours earlier, which used one strap on something that "looked just like" the bearing block, is sufficient to impute recklessness to Doe. (Brief for Respondent at 25-26). However, there is no evidence regarding the degree of restraint that would be required to properly secure the actual bearing block, nor is there any evidence about what degree of strapping would be reckless rather than merely negligent. Moreover, there is no evidence that Doe even caused the bearing block to be in the road. Rather than pointing to such evidence in the Record, Tucker hypothesizes that Doe consciously decided not to sufficiently secure the bearing block. (Brief for Respondent at 26.) There is no evidence suggesting that Doe acted recklessly, willfully, or wantonly, other than if the strapping statute was violated and *Wise* mandates such a finding. Accordingly, the trial court erred in denying Doe JNOV on punitive damages, and to the extent *Wise v. Broadway* and similar cases require a contrary result, they should be overruled.

B. Reliance on section 56-5-4100(D) as an alternative statutory violation providing evidence of recklessness to support the submission of punitive damages to the jury is inappropriate.

Tucker argues that the submission of punitive damages to the jury was also appropriate because the jury could have found that Doe negligently violated South

Carolina Code section 56-5-4100(D) by failing to call 911 to have the allegedly dropped load cleaned off of the road. (Brief for Respondent at 20, 26.) There is no evidence in the record to support a finding that Doe violated section 56-5-4100(D). Accordingly, a violation of section 56-5-4100(D) is not an alternative ground to affirm the award of punitive damages.

The statute at issue states, in relevant part:

(A) No 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, except that sand, salt, or other chemicals may be dropped for the purpose of securing traction, and water or other substance may be sprinkled on a roadway in the cleaning or maintaining of the roadway by the public authority having jurisdiction. . . .

(D) Any person operating a vehicle from which any substances 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.

S.C. Code Ann. § 56-5-4100. However, until Tucker's response brief, he has not advanced a violation of subsection (D) as alternative evidence of recklessness to support punitive damages. In the Complaint, Tucker alleged that Doe was negligent in four particulars:

- (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.

{Compl. ¶ 5; R. pp. 22-23}. At trial, Tucker abandoned grounds (a) through (c), and Doe was granted a directed verdict on those allegations. {Tr. 304-306; R. pp. 211-13}. The trial court denied Doe's directed verdict motion based on insufficient evidence of recklessness to support punitive damages, stating that "there is a statute on securing the load, and the requirement of what happens if you lose a portion of your load. That is the Plaintiff's theory and there is evidence in the record that statute has been violated in part or in whole." {Tr. 308; R. p. 215}. Tucker did not present evidence that Doe failed to call 911 or otherwise attempted to have the highway cleaned. The only evidence in the record about 911 calls was offered by Doe to show that the Florence County 911 cell phone call center did not receive any calls from one cell phone tower regarding foreign objects in the road on the night of the accident. {Tr. 313-320; R. pp. 220-27}. However, the call center received five 911 calls that night, and there is no evidence in the record regarding any 911 calls from other counties, calls that went through other cell phone towers, calls from land-line phones, or any other method through which Doe could have attempted to have the road cleared if it dropped the bearing block other than calling 911. {Tr. 317-319; R. 224-26}. This potential statutory violation was simply not developed at any point before Tucker asserted it in his appeal brief. There is insufficient evidence in the record to submit the issue of punitive damages to the jury based on a finding that Doe could have violated section 56-5-4100(D), and as a result, a violation of that statute cannot serve as an additional sustaining ground for punitive damages.

C. Doe's argument that there is insufficient evidence of recklessness in the record other than the statutory violation is preserved.

Tucker contends that Doe's argument that there is insufficient evidence of recklessness to avoid JNOV is unpreserved for appellate review. (Brief for Respondent

at 14.) Doe raised this issue at directed verdict and in post-trial motions, so it is preserved.

First, Doe moved for a directed verdict on the lack of evidence of recklessness in the record, which was denied. {Tr. 308; R. p. 215}. “Once a party moves for a directed verdict on an issue, and that motion is denied, the party is not required to object again to the subsequent jury instruction regarding that issue” for the issue to be preserved. *Fettler v. Gentner*, 396 S.C. 461, 469, 722 S.E.2d 26, 30 (Ct. App. 2012). Moreover, the trial court would have erred had it not instructed the jury on the current state of the law, *Broyhill v. Resolution Mgmt. Consultants, Inc.*, 401 S.C. 466, 475, 736 S.E.2d 867, 872 (Ct. App. 2012), so Doe was not required to object to the jury instructions on punitive damages or otherwise argue that the law is what it is not. *Fettler* at 469, 722 S.E.2d at 30 (stating that parties do not have to “engage in futile actions in order to preserve issues for appellate review”). Subsequently, in its post-trial motions, Doe specifically argued that “the violation of a statute does not warrant a finding of reckless, willful or wanton conduct” and that “there must be some evidence” of recklessness to submit punitive damages to the jury. {Memorandum in Support of Defendant’s Post Trial Motions at 16-17; R. p. 393}. Accordingly, Doe’s argument that a statutory violation, standing alone, should not be sufficient evidence of recklessness to require submission of punitive damages to the jury is preserved.

Contrary to Tucker’s characterizations, Doe does not argue that section 56-5-4100 is “irrelevant” on recklessness, is not “[f]lip-flopping,” and was not required to “suggest[] that the court was giving the jury bad law.” (Brief for Respondent at 21-22.) Doe admits, and admitted throughout this action, that South Carolina law currently holds that

a statutory violation is evidence of recklessness such that punitive damages must be submitted to the jury and that it is arguing against precedent. *Wise v. Broadway*, 315 S.C. 273, 276, 433 S.E.2d 857, 859 (1993). The mere recognition of the current state of the law is not a concession of a disputed factual issue that would prevent appellate review. *See, e.g., State v. Benton*, 338 S.C. 151, 157, 526 S.E.2d 228, 231 (2000) (finding that a concession of a disputed fact issue rendered review of that issue unpreserved). Otherwise, appellate review would not be available for any argument against precedent unless the appellant attempted to mislead the trial court by contesting correct statements of the law. Doe's argument that the violation of a statute, standing alone, should be insufficient evidence of recklessness to require the submission of punitive damages to the jury is preserved.

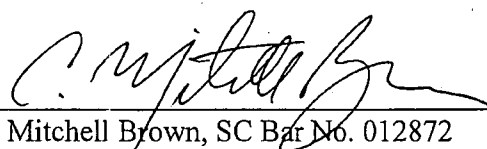
Conclusion

Based on the above, the Court should reverse the decision of the trial court and grant judgment in favor of Doe.

[signature page attached]

Respectfully submitted,

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October 29, 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,

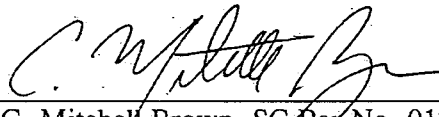
v.

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

CERTIFICATE OF COUNSEL

The undersigned hereby certifies that the Final Reply Brief of Appellant
complies with Rule 211(b), SCACR.

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OCT 29 2014

SC Court of Appeals

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
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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:

Final Reply Brief of Appellant

Counsel Served:

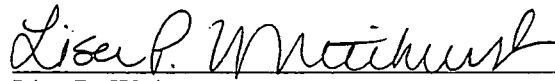
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RECEIVED

OCT 29 2014

SC Court of Appeals

Robert Hill, Esquire
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Post Office Box 1323
Lexington, SC 29071



Lisa P. Whitehurst
Administrative Assistant

October 29, 2014

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Bobby Lee Tucker, Sr., Respondent,

v.

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

Appellate Case No. 2014-000134

Appeal From Darlington County
J. Michael Baxley, Circuit Court Judge

Opinion No. 5338
Heard June 3, 2015 – Filed August 5, 2015

AFFIRMED

C. Mitchell Brown, William C. Wood, Jr., Michael J.
Anzelmo, and Graham Ross Billings, all of Nelson
Mullins Riley & Scarborough, LLP, of Columbia; and
Thomas J. Keaveny II, of Charleston, for Appellant.

Robert Norris Hill, of Law Office of Robert Hill, of
Lexington, and William P. Hatfield, of Hatfield Temple,
LLP, of Florence, for Respondent.

THOMAS, J.: John Doe, individually, and d/b/a Doe Trucking Company (collectively referred to as Doe), argues the circuit court erred in denying Doe's motions for directed verdict and judgment notwithstanding the verdict (JNOV) because (1) the sworn witness affidavit of Anthony Bernardo failed to satisfy the requirements of section 38-77-170(2) of the South Carolina Code (2015), (2) Respondent Bobby Lee Tucker, Sr. failed to present sufficient evidence to create a

question of fact about whether an unknown vehicle proximately caused his accident by leaving an object in the road, and (3) the evidence of recklessness was insufficient to sustain an award of punitive damages. We affirm.

II. FACTS/PROCEDURAL HISTORY

On April 30, 2010, at approximately 12:15 a.m., Tucker lost control of the tractor-trailer he was driving southbound on Interstate 95 (I-95) and struck a concrete column in the median of the highway. Tucker, a part-time truck driver, had been driving from Darlington, South Carolina, to deliver cars to Jacksonville, Florida. He testified he was driving in the right lane on cruise control at about sixty-eight miles per hour when the car in front of him braked and switched lanes. Because Tucker could not see what was ahead, he decided to follow the car and switch lanes; however, a passing car in the left lane prevented him from being able to switch. At that point, Tucker observed an object "that looked just like a cardboard box" lying in the right lane, approximately two feet from the center line. He was unable to avoid the object and the truck's left front rim struck it, causing him to lose control of the truck, which collided with a concrete column in the median of the road supporting an overpass.

According to Tucker, two men from New York stopped to assist him. One of those men was Bernardo, who submitted an affidavit (the Affidavit) attesting to the following, in pertinent part:

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.

A paramedic, Billie Collins, assessed Tucker, who was stuck inside the crushed cab of the truck, and treated his injuries. Collins spoke to the two men who had stopped to help Tucker. They "didn't know exactly what had taken place but they saw the accident occur." According to Collins, Tucker claimed "[h]e swerved to miss something that was on I-95 and hit the support [column]."

A highway patrolman, Bradley Suggs, arrived at the accident scene at 12:52 a.m. Suggs testified he did not notice any objects in the road at the crash site, and he was unaware at the time that Tucker had struck an object in the road. Later, Suggs was informed that another witness found an object near the crash site.

Albert Vereen arrived between 4:00 a.m. and 4:30 a.m. to tow the wrecked tractor-trailer. Vereen testified he "walked back down the roadway and noticed the skidmarks in the road, some seventy-five to a hundred feet back, and the skidmarks went kinda from the inside lane into an angle almost to the column, and then ten or fifteen feet to the right is when we noticed the block of metal." The block, which Vereen estimated was "five or six hundred pounds," was too heavy for two men to lift and had to be loaded into Vereen's trailer using a front-end loader. Vereen testified he had no doubt the crash resulted from Tucker striking the block and consequently losing control of his truck. At trial, Tucker identified the block as the object he hit and testified he had no doubt his truck struck the block.

During the trial, Tucker's expert, Roger Harris, identified the block as a steel bearing block, approximately eighteen inches square, eleven inches tall, and estimated to weigh 650 pounds. Harris, an expert in machine design, material science, metallurgy, and fracture analysis, also testified that marks in the road at

the crash site were "consistent with something like [the bearing block] making contact and making that mark on the concrete." He further explained the scrape marks on the bearing block were consistent with sliding down concrete. According to Harris, the damage on the inside rim of Tucker's left front tire was consistent with striking the block. Harris also stated that, in his estimation, the bearing block could have traveled "tens of feet" had it been struck by Tucker's tractor-trailer traveling at a speed of approximately seventy miles per hour.

Earlier that same night between 10:00 p.m. and 11:00 p.m., truck driver Donald Wilson noticed a blue freightliner truck at a truck stop at the junction of Highway 52 and I-95. Wilson also observed the freightliner turn onto I-95 South. The truck caught Wilson's attention because he had previously driven a blue freightliner. The freightliner's flatbed was loaded with pipes, rebar, and an object that "looked just like" the bearing block that was located near the crash site.

Wilson explained that the block was secured in the flatbed by a yellow nylon strap but did not have a chain going through the middle of the block, which he recognized "could be a problem." He also stated "you've got a lot of them out there running them flatbeds, and if you stop in time, man, the stuff will come off of them. . . . Because if that metal ever starts sliding, you're in trouble." Harris testified without objection that a single nylon strap running across the top of the bearing block would not be adequate to secure the block in the flatbed. He explained the block would easily overcome the strap as the truck accelerated to interstate speeds, and he stated maneuvering turns in the road would cause the object to move in the flatbed.

According to Gilbert George, a District Maintenance Engineer with the South Carolina Department of Transportation (SCDOT), it is not unusual for objects to fall off a flatbed truck. George also examined a picture of a mark in the road at the crash scene and testified the bearing block could have made the mark had it fallen from a flatbed. He further testified that, because the object weighed 650 pounds and was located in an area where pedestrian traffic is not permitted, he could only assume this object came to be on I-95 South by way of a vehicle.

Tucker filed this "John Doe" action on May 14, 2010, seeking actual damages, punitive damages, and costs from the operator of the unknown vehicle that allegedly carried the bearing block. Tucker's uninsured motorist insurance carriers answered the complaint on behalf of Doe.

On July 14, 2010, Tucker filed Bernardo's affidavit pursuant to the witness affidavit requirement of section 38-77-170(2) of the South Carolina Code (2015) for an accident caused by an unknown vehicle without physical contact. Because that affidavit did not include statutorily required language, on March 3, 2011, Tucker served a second affidavit that included the statutory language.¹

The trial in this action began on April 15, 2013. Bernardo did not testify at trial, and no witness aside from Tucker testified to observing the accident. At the close of Tucker's case, Doe moved for a directed verdict based on Tucker's failure to (1) satisfy the affidavit requirements of section 38-77-170(2), (2) satisfy the plaintiff's burden of proof for negligence, and (3) present sufficient evidence such that the jury could consider punitive damages. Doe also moved for a directed verdict based on the defense of comparative negligence. The circuit court denied these motions at this point in the trial and again at the close of all of the evidence.

The jury returned a verdict in favor of Tucker and awarded him \$2.5 million in actual damages and \$2.5 million in punitive damages. Doe filed post-trial motions for JNOV, new trial absolute, and new trial *nisi* remittitur, and on December 16, 2013, the circuit court remitted the punitive damages award to \$500,000 and denied the remaining motions. This appeal followed.

ISSUES ON APPEAL

- I. Did the circuit court err in denying Doe's motions for directed verdict and JNOV because Bernardo's sworn witness affidavit failed to satisfy the requirements of section 38-77-170(2) of the South Carolina Code (2015)?
- II. Did the circuit court err in denying Doe's motions for directed verdict and JNOV because Tucker failed to present sufficient evidence to create a

¹ During oral argument, Doe took issue with the fact that Bernardo's second affidavit indicated Tucker's truck veered to the left, while Bernardo's first affidavit stated the truck veered to the right. This point was never raised or ruled upon in the circuit court and Doe never addressed this issue in his appellate briefs. Thus, this issue is not preserved for appellate review. *See Wilder Corp. v. Wilke*, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998) ("It is axiomatic that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial judge to be preserved for appellate review."); *Bochette v. Bochette*, 300 S.C. 109, 112, 386 S.E.2d 475, 477 (Ct. App. 1989) (noting an appellant may not use oral argument as a vehicle to argue issues not argued in the appellant's brief).

question of fact about whether an unknown vehicle proximately caused his accident by leaving an object in the road?

- III. Did the circuit court err in denying Doe's JNOV motion as to punitive damages because the evidence of recklessness was insufficient?

STANDARD OF REVIEW

"When reviewing the denial of a motion for directed verdict or JNOV, this Court must employ the same standard as the trial court by viewing the evidence and all reasonable inferences in the light most favorable to the nonmoving party." *Welch v. Epstein*, 342 S.C. 279, 299, 536 S.E.2d 408, 418 (Ct. App. 2000). "The trial court must deny the motions when the evidence yields more than one inference or its inference is in doubt." *Id.* at 300, 536 S.E.2d at 418. "This Court will reverse the trial court only when there is no evidence to support the ruling below." *Id.* "When considering directed verdict and JNOV motions, neither the trial court nor the appellate court has authority to decide credibility issues or to resolve conflicts in the testimony or evidence." *Id.* at 300, 536 S.E.2d at 419.

LAW/ANALYSIS

I. Witness Affidavit Requirement of Section 38-77-170(2)

Doe contends Bernardo's sworn witness affidavit did not satisfy section 38-77-170(2) of the South Carolina Code (2015) because it failed to suggest the driver of the unknown vehicle proximately caused the accident and the affiant did not swear to the existence of an object in the roadway. We disagree.

We find the Affidavit satisfied the requirements of section 38-77-170(2), which states in relevant 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 . . .

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

"Section 38-77-170(2) is clear on its face." *Bradley v. Doe*, 374 S.C. 622, 629, 649 S.E.2d 153, 157 (Ct. App. 2007). "It expressly requires that someone other than the owner or operator of the insured vehicle witness the accident." *Id.* "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." *Id.* (internal quotation marks omitted).

In *Gilliland v. Doe*, our supreme court provided 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.

357 S.C. 197, 199-200, 592 S.E.2d 626, 627 (2004). Our supreme court further stated in *Collins v. Doe*:

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

352 S.C. 462, 466, 574 S.E.2d 739, 741 (2002) (emphasis omitted).

In *Gilliland*, our supreme court determined 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. 357 S.C. at 200, 592 S.E.2d at 628. The court held 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 201, 592 S.E.2d at 628 (internal quotation marks omitted).

Applying the analysis in *Gilliland*, we hold the Affidavit complied with section 38-77-170(2). In *Gilliland*, the petitioner was leaving a grocery store when two men waved at her from a pick-up truck. *Id.* at 198, 592 S.E.2d at 627. As she drove from the store, the men began to pursue her vehicle and "rode her bumper" for a two-mile stretch. *Id.* The petitioner sped up in a frightened attempt to get away from the truck, and as she accelerated she lost control of her car, ran off the road, and hit a tree. *Id.* She testified the truck never made contact with her car and the men "backed off" once she began to lose control. *Id.*

During the accident, a witness was stopped at a nearby intersection. *Id.* The witness testified she saw the lights of two cars as the cars came around a curve.² *Id.* at 198-99, 592 S.E.2d at 627. She also testified that after the accident, she saw the lights of the car behind the petitioner's "arc through a field" as if it were making a U-turn. *Id.* at 199, 592 S.E.2d at 627. This court described the witness's testimony regarding the accident as:

² Our supreme court noted the issue in *Gilliland* concerned whether the witness's testimony met the requirements of section 38-77-170(2). 357 S.C. at 201, 592 S.E.2d at 628. Throughout the opinion, the court referred to the witness's "testimony." Pursuant to our supreme court's decision in *Collins v. Doe*, a plaintiff cannot substitute trial testimony for the statutory affidavit requirement. 352 S.C. at 471, 574 S.E.2d at 743. Given that our supreme court in *Gilliland* acknowledged that holding in *Collins*, we find the relevant witness observations discussed in *Gilliland* must have been included in the witness's affidavit.

[The witness] testified that Gilliland's car "came around the curve and come [sic] almost completely around the curve and then it just kind of went straight into a tree and a ditch." [The witness] also testified she saw the headlights of another vehicle shining on Gilliland's bumper just before Gilliland ran off the road.

Gilliland v. Doe, 351 S.C. 497, 499, 570 S.E.2d 545, 546-47 (Ct. App. 2002) (second alteration by court), *rev'd*, 357 S.C. 197, 592 S.E.2d 626 (2004).

This court held the witness's testimony was insufficient to meet the affidavit requirements of section 38-77-170(2). *Id.* at 502, 570 S.E.2d at 548. Our supreme court reversed, holding the testimony of this witness provided circumstantial evidence that supported the petitioner's testimony that an unknown driver contributed to her accident and therefore satisfied section 38-77-170(2). *Gilliland*, 357 S.C. at 202, 592 S.E.2d at 629.

Here, Bernardo attested to the following in the Affidavit, in pertinent part:

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

Bernardo witnessed the accident here in a manner similar to the witness in *Gilliland*. The witness in *Gilliland* offered no explanation as to if or how an unknown driver caused the accident. *Id.* at 198-99, 592 S.E.2d at 627. Instead, the witness merely described observing headlights of two cars as the cars came around a curve, and after the accident, the witness saw the lights of the car behind Gilliland's "arc through a field" as if it were making a U-turn. *Id.* Here, Bernardo described how Tucker "suddenly veered to the left as if to avoid something in the roadway and in doing so struck a cement pillar supporting the overpass." While this statement did not provide direct evidence as to the involvement of an unknown driver, it amounted to sufficient circumstantial evidence that supported Tucker's testimony and the other evidence in the record suggesting an unknown driver

contributed to the accident. *See id.* at 202, 592 S.E.2d at 629 ([T]he [witness's] testimony . . . contained circumstantial evidence that supports Petitioner's testimony that an unknown driver contributed to her accident."); *id.* ("[The witness'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. . . . *We believe that the record includes sufficient circumstantial evidence* for the jury to find the requisite causation necessary to satisfy § 38-77-170(2)." (emphasis added)); *id.* ("[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." (internal quotation marks omitted)); *id.* at 199, 592 S.E.2d at 627 (stating the issue in *Gilliland* was whether the witness's testimony met the requirements of section 38-77-170(2)).

At oral argument, Doe essentially contended the Affidavit itself must fully explain the unknown vehicle's involvement in the accident. This argument attempts to impose requirements beyond the plain language of section 38-77-170(2). The Affidavit satisfies the requirement that the accident be "witnessed by someone other than the owner or operator of the insured vehicle" who "sign[ed] an affidavit attesting to the truth of the facts of the accident contained in the affidavit." § 38-77-170(2); *see also Ferguson Fire & Fabrication, Inc. v. Preferred Fire Prot., L.L.C.*, 409 S.C. 331, 339, 762 S.E.2d 561, 565 (2014) (reversing this court for reading requirements into a statute that were not present in the text of the statute itself). Furthermore, as explained above, this argument does not comport with our supreme court's holding in *Gilliland*.

Doe asserts that under *Bradley v. Doe*, 374 S.C. 622, 649 S.E.2d 153 (Ct. App. 2007), the Affidavit is deficient. In that case, Bradley swerved to avoid an object in the road, lost control of his vehicle, veered off the road, and struck a tree. *Id.* at 624, 649 S.E.2d at 154. About fifteen minutes later, a witness drove past Bradley, turned his vehicle around, and headed toward the accident scene. *Id.* The witness observed a "large white garbage can bag" in the lane in which Bradley had previously been traveling. *Id.* While helping Bradley, the witness saw another passing vehicle strike and drag the garbage bag down the road. *Id.* at 624, 649 S.E.2d at 155. Bradley's son and daughter subsequently arrived and noted the trash bag and trash scattered on the roadway. *Id.* Another witness who drove home minutes before Bradley stated he saw a large trash bag in the middle of the road. *Id.* That witness claimed he narrowly avoided the bag and continued driving about

another quarter-mile when he encountered a "white street sweeper's truck," which "drop[ped] another similar trash bag onto the public roadway." *Id.*

This court held none of the above-mentioned witnesses could satisfy the affidavit requirement of section 38-77-170(2) because "none of the affiants actually saw Bradley swerve to avoid a trash bag in the road and collide with the tree." *Id.* at 633, 649 S.E.2d at 159. None of Bradley's affiants had personal knowledge of the facts of the accident, and their observations before and after the accident did not establish with reasonable certainty a causal connection between Bradley's injury and an unknown vehicle. *Id.* at 634-35, 649 S.E.2d at 160. The court noted "[a] plaintiff's strict compliance with the affidavit requirement is mandatory." *Id.* at 634, 649 S.E.2d at 160. Ultimately, the court concluded "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." *Id.* at 635, 649 S.E.2d at 160.

We find *Bradley* distinguishable from the present case because Bernardo, unlike any of the affiants in *Bradley*, actually witnessed the accident. Bernardo observed Tucker swerving as if to avoid an object in the roadway and then colliding with the concrete column. This satisfies the affidavit requirement of section 38-77-170(2). Additionally, because the Affidavit is based upon Bernardo's personal knowledge, this case is distinguishable from *Shealy v. Doe*, 370 S.C. 194, 200, 634 S.E.2d 45, 48 (Ct. App. 2006), in which this court held two affidavits failed to satisfy section 38-77-170(2) because the affiants did not attest to facts they perceived but merely restated the perceptions of the vehicle's operator.

Doe points to the language in *Bradley* that "affidavits of independent witnesses must contain some independent evidence of an unknown vehicle's involvement in the accident." 374 S.C. at 635, 649 S.E.2d at 160. Here, Bernardo observed Tucker "[veer] to the left as if to avoid something in the roadway," but Bernardo did not swear to the actual existence of an object in the roadway or attest to the manner in which such an object arrived in the roadway. In certain instances, such as *Bradley* and the case at hand, a witness could not observe the object falling from the unknown vehicle because the object fell at some time prior to the accident. In such cases, if it was required that a witness affidavit describe both (1) the accident and (2) the manner in which the object in the road came from the unknown vehicle, a plaintiff would effectively be barred from recovery when the unknown vehicle exits the scene before the fallen object causes the accident. This court could have taken such a position in *Bradley* but did not and instead focused on the fact the

witnesses did not observe the swerving and the collision. *Id.* at 633, 649 S.E.2d at 159.

In *Wausau Underwriters Insurance Co. v. Howser*, 309 S.C. 269, 275, 422 S.E.2d 106, 109-10 (1992), our supreme court indicated section 38-77-170(2) required an independent witness to attest to facts that provide at least some causal connection between an unknown driver and the accident. "The Court [in *Howser*] 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." *Gilliland*, 357 S.C. at 200, 592 S.E.2d at 628. "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 201, 592 S.E.2d at 628 (quoting *Howser*, 309 S.C. at 272, 422 S.E.2d at 108). "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." *Id.* Hence, the Affidavit satisfied section 38-77-170(2) even though it did not, by itself, provide a clear answer to the question of proximate cause.

Doe next contends section 38-77-170(2) required Bernardo to testify at trial. This issue is not preserved for appellate review. At trial, Doe admitted "[Tucker] did not depose [Bernardo] but I understand he is not required to. Under the statute he has to submit an affidavit, and we have challenged the sufficiency of the affidavit." Thus, Doe conceded Tucker was not required to do anything more than submit an affidavit to satisfy section 38-77-170(2). *See City of Greer v. Humble*, 402 S.C. 609, 614, 742 S.E.2d 15, 18 (Ct. App. 2013) (stating an issue conceded in the trial court cannot be argued on appeal). Nowhere at trial did Doe contest Tucker's failure to call Bernardo as a witness. In his post-trial motions memorandum, Doe mentioned that "Plaintiff produced no witnesses who saw any object in the road let alone any witness who observed Plaintiff striking any object in the road."

However, this statement pertained to Doe's argument that the evidence of negligence was insufficient, not that Bernardo was required to testify under section 38-77-170(2). Only on appeal has Doe advanced that position; accordingly, this issue is not preserved for review. *See Wilder Corp. v. Wilke*, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998) ("It is axiomatic that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial judge to be preserved for appellate review.").

Doe further asserts the revised Affidavit, which was submitted nearly ten months after the commencement of the suit, was untimely. We find this argument is not

preserved for review because it was never raised to or ruled upon by the circuit court. *See id.* ("It is axiomatic that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial judge to be preserved for appellate review.").

II. Sufficiency of the Evidence

Doe further asserts Tucker failed to present sufficient evidence to create a question of fact about whether an unknown vehicle proximately caused his accident by leaving an object in the road. We disagree.

On the same evening as Tucker's accident, Wilson observed a blue freightliner truck at a truck stop at the junction of Highway 52 and I-95, and he witnessed the freightliner turn onto I-95 South. On the freightliner's flatbed was a block that "looked just like" the bearing block that Tucker testified he hit while driving down I-95 South. A tow truck operator located the block near the crash scene. Wilson explained the block he observed in the flatbed had a yellow nylon strap across it but did not have a chain going through the middle of the block. He recognized at the time this "could be a problem," and he explained objects can slide off flatbed trucks due to deceleration.

Harris testified as an expert in machine design, material science, metallurgy, and fracture analysis. Harris testified without objection that a single nylon strap running across the top of the bearing block would not be adequate to secure the block in the flatbed. He explained the block would easily overcome the strap as the truck accelerated to interstate speeds, and he stated maneuvering turns in the road would cause the object to move in the flatbed. Doe never argued at trial that Harris's testimony on this topic was improperly based on hypotheticals. *See Cantrell v. Carruth*, 250 S.C. 415, 421, 158 S.E.2d 208, 211 (1967) (noting testimony received without objection becomes competent and its sufficiency is for the jury); *Holroyd v. Requa*, 361 S.C. 43, 60, 603 S.E.2d 417, 426 (Ct. App. 2004) ("Failure to object to the introduction of evidence at the time the evidence is offered constitutes a waiver of the right to have the issue considered on appeal."); *Hanna v. Palmetto Homes, Inc.*, 300 S.C. 535, 536-37, 389 S.E.2d 164, 165 (Ct. App. 1990) (holding even if the basis of the opinion is incomplete, a jury can rely on a witness's opinion that is admitted without objection). Likewise, Doe's argument that Harris's expert testimony was not probative is not preserved for review because Doe never made that contention at trial. *See Holroyd*, 361 S.C. at 60, 603 S.E.2d at 426 ("Failure to object to the introduction of evidence at the time

the evidence is offered constitutes a waiver of the right to have the issue considered on appeal.").

Gilbert George, a District Maintenance Engineer with SCDOT, admitted on cross-examination it is not unusual for objects to fall off a flatbed truck. He also examined a picture of a mark in the road at the crash scene and testified the bearing block could have made the mark if it fell from a flatbed. He further testified that, because the bearing block weighed 650 pounds and was located in an area where pedestrian traffic is not permitted, he could only assume the block came to be on I-95 South by way of a vehicle.

Viewing the evidence in the light most favorable to Tucker, we find he presented sufficient evidence to deny the motions for directed verdict and JNOV. *See Welch*, 342 S.C. at 299, 536 S.E.2d at 418 ("When reviewing the denial of a motion for directed verdict or JNOV, this Court must employ the same standard as the trial court by viewing the evidence and all reasonable inferences in the light most favorable to the nonmoving party."); *id.* at 300, 536 S.E.2d at 418 ("The trial court must deny the motions when the evidence yields more than one inference or its inference is in doubt."); *id.* ("This Court will reverse the trial court only when there is no evidence to support the ruling below."); *id.* at 300, 536 S.E.2d at 419 ("When considering directed verdict and JNOV motions, neither the trial court nor the appellate court has authority to decide credibility issues or to resolve conflicts in the testimony or evidence.").

Doe correctly asserts South Carolina does not recognize *res ipsa loquitur*. *See Watson v. Ford Motor Co.*, 389 S.C. 434, 453 n.7, 699 S.E.2d 169, 179 n.7 (2010) ("*Res ipsa loquitur* is a rebuttable presumption that the defendant was negligent where an accident is one which ordinarily does not occur in the absence of negligence."); *Snow v. City of Columbia*, 305 S.C. 544, 555 n.7, 409 S.E.2d 797, 803 n.7 (Ct. App. 1991) (noting that because South Carolina does not recognize *res ipsa loquitur*, a plaintiff is required to prove affirmatively each element of his cause of action). However, Tucker did not rely on *res ipsa loquitur* to prove Doe was negligent, and he put forth circumstantial evidence the bearing block caused his accident because it was inadequately strapped in the flatbed of the blue freightliner and consequently fell into the road. *See Chakrabarti v. City of Orangeburg*, 403 S.C. 308, 314, 743 S.E.2d 109, 112 (Ct. App. 2013) ("A plaintiff must prove three elements to recover on a claim for negligence: (1) a duty of care owed by the defendant to the plaintiff; (2) a breach of that duty by a negligent act or omission; and (3) damage proximately resulting from the breach.").

Doe alleges this case is analogous to *Tuttle v. Allstate Insurance Co.*, in which the Washington Court of Appeals concluded the trial court properly granted Allstate summary judgment because Tuttle offered no evidence her collision with a wheel and tire was an accident caused by a phantom vehicle. 138 P.3d 1107, 1113 (Wash. Ct. App. 2006). However, in *Tuttle*, no witness could attribute the tire in the roadway to a particular vehicle or explain how the tire might have come from a vehicle, and therefore, Tuttle provided no evidence to support an inference a driver negligently caused the wheel and tire to be in the road. *Id.* at 1111-12. In contrast, Tucker presented evidence the bearing block caused his accident after it was inadequately secured in the bed of a blue freightliner and consequently fell into the road. Hence, *Tuttle* is distinguishable from the present case.

In his brief, Doe contends the facts of *Bradley* are analogous to the case at hand and establish Tucker failed to present sufficient evidence to create a question of fact for the jury. However, the only issue in *Bradley* was whether the petitioner's affidavits complied with section 38-77-170(2). *See Bradley*, 374 S.C. at 633, 649 S.E.2d at 159 ("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)."). Furthermore, as previously discussed, we find this case distinguishable from the facts of *Bradley*. Therefore, the circuit court did not err in denying Doe's motions for directed verdict and JNOV based on the sufficiency of the evidence.

III. Punitive Damages

Doe argues punitive damages should not have been submitted to the jury because Tucker presented no evidence Doe acted recklessly, willfully, or wantonly. Doe acknowledges that a violation of a statute constitutes evidence of recklessness or willfulness under South Carolina law; however, Doe contends that principle of law should not apply when a statute is a strict liability law and may be violated regardless of the intent of the defendant. Doe maintains 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. We find Doe did not preserve this argument for appeal.

At the close of Tucker's case, Doe motioned for a directed verdict on the ground that "there is no clear and convincing evidence . . . of any recklessness, willfulness, [or] wantonness." The circuit court denied that motion on the basis that evidence Doe violated section 56-5-4100 of the South Carolina Code constituted evidence of recklessness. *See S.C. Code Ann. § 56-5-4100(A)* (2006) (prohibiting the driving

or moving of a vehicle on a 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"). Doe never asserted the violation of section 56-5-4100 should not be evidence of recklessness because that statute is a strict liability statute. *See Wilder Corp.*, 330 S.C. at 76, 497 S.E.2d at 733 ("It is axiomatic that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial judge to be preserved for appellate review."). Before charging the jury, the circuit court specifically asked the parties if they agreed with language in the charge that the violation of a statute "may be considered as evidence in deciding if the Defendant was reckless, [willful], or wanton in consideration of punitive damages." Doe informed the court he had no objection to that language. The circuit court later charged the jury on punitive damages without objection from either party. *See Vaughn v. City of Anderson*, 300 S.C. 55, 60, 386 S.E.2d 297, 300 (Ct. App. 1989) ("Failure to object to the charge at trial waives any alleged error in the charge."). In his "Post-Judgment Punitive Damage Review Memorandum," Doe cited *Wise v. Broadway* for the proposition that "[v]iolation of a statute does not constitute recklessness, willfulness, and wantonness *per se*, but is some evidence that the defendant acted recklessly, willfully, and wantonly." 315 S.C. 273, 276, 433 S.E.2d 857, 859 (1993) (emphasis added). Doe now urges this court to depart from a legal principle he himself cited and never contested at trial. *See Humble*, 402 S.C. at 614, 742 S.E.2d at 18 (stating an issue conceded in the trial court cannot be argued on appeal); *Gurganious v. City of Beaufort*, 317 S.C. 481, 488, 454 S.E.2d 912, 916 (Ct. App. 1995) (holding a party may not present one ground at trial and then change his theory on appeal; the same ground argued on appeal must have been argued at trial).

Doe contends it would have been futile to argue against precedent to the circuit court because the circuit court is required to charge South Carolina law in its current form. Therefore, he maintains he was not required to raise his argument on punitive damages to the circuit court. *See Fetter v. Gentner*, 396 S.C. 461, 469, 722 S.E.2d 26, 31 (Ct. App. 2012) (noting appellate courts do not require parties to engage in futile actions in order to preserve issues for appellate review). However, he has provided no authority for the proposition that an argument against precedent is preserved for appellate review when the argument was never raised at trial and the precedent was conceded. Instead, "an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial judge to be preserved for appellate review." *S.C. Dep't of Transp. v. First Carolina Corp.* of S.C., 372 S.C. 295, 301, 641 S.E.2d 903, 907 (2007) (internal quotation marks omitted). As such, Doe's argument on punitive damages is not preserved for appeal.

CONCLUSION

For all of the foregoing reasons, the decision of the circuit court is

AFFIRMED.

KONDUROS and GEATHERS, JJ., concur.

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

RECEIVED
SEP 04 2015
SC Court of Appeals

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

v.

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

PETITION FOR REHEARING AND REHEARING EN BANC

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

Introduction

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

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

First, this holding is contrary to binding precedent of our Supreme Court unequivocally establishing that the eyewitness affidavit mandated by section 38-77-170(2) must be sufficient *on its own*. *Collins v. Doe*, 352 S.C. 462, 471, 574 S.E.2d 739, 743 (2002). The panel essentially relies on *Gilliland v. Doe*, 357 S.C. 197, 592 S.E.2d 626 (2004) as a means to avoid the holding in *Collins*. This is error. *Gilliland* did not involve the issue of the sufficiency of an eyewitness affidavit. No affidavit appears in the record in *Gilliland*, and the relevant issue on appeal in *Gilliland* was whether the trial testimony of the “independent witness” created a question of fact for the jury at directed verdict. *Id.*, 357 S.C. at 202, 592 S.E.2d at 629¹. Here, without reliance on the trial testimony, the Bernardo Affidavit simply cannot be determined to have sufficiently “attest[ed] to the unknown vehicle’s involvement in the accident.” *Wausau Underwriters Ins. Co. v. Howser*, 309 S.C. 269, 275, 422 S.E.2d 106, 109 (1992).

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

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

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

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

Argument

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

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

The Bernardo Affidavit states, in relevant part:

3. I was traveling in the outside southbound lane of Interstate 95 in Florence County, South Carolina, following a truck pulling a car carrier at a distance of approximately 150 feet.

4. As I approached exit 153, the truck and car carrier suddenly veered to the right as if to avoid something in the roadway and in doing so struck a cement pillar supporting the overpass.

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

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

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

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

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

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

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

We now hold that the testimony of Gayle Norris contained circumstantial evidence that supports Petitioner’s testimony that an unknown driver contributed to her accident.

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

Norris's testimony that she saw the lights of an unknown car that was turning around and fleeing the scene of the accident sufficiently corroborates Petitioner's testimony creating a question of fact as to causation for the jury.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

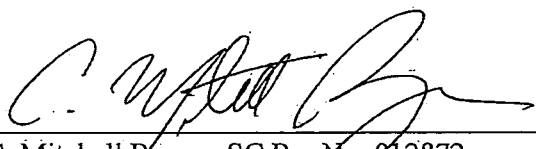
trucking industry as being outside the scope of Mr. Harris's identification as an expert. (Tr. 98-99, R. 73-74.) The trial court overruled the objection. (Tr. 100, R. 75.) Thus, the Court should grant rehearing to consider the lack of probative evidence in the record regarding the breach element of Tucker's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

Conclusion

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

Respectfully submitted,

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Columbia, South Carolina

Sept. 4, 2015

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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

RECEIVED

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

SEP 04 2015

SC Court of Appeals

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

v.

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

PROOF OF SERVICE

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

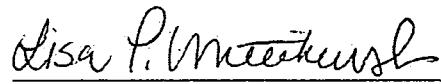
Pleadings:

Petition for Rehearing

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September 4, 2015

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9.10.15

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September 8, 2015

South Carolina Court of Appeals
P.O. Box 11629
Columbia, SC 29211

Re: Bobby Lee Tucker v. John Doe
Appellate Case No. 2014-000134

Dear Clerk of Court:

The Appellant's Petition for Rehearing was due last Friday, September 4, 2015. Please let the Court know that the Respondents do not intend to file a Return unless one is requested.

The panel was Judges Thomas, Konduros, and Geathers.

My best,



Robert Hill

cc: William P. Hatfield, Esq.
Graham R. Billings, Esq.
Michael J. Anzelmo, Esq.
C. Mitchell Brown, Esq.
William C. Wood, Jr., Esq.
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NOV 17 2015

SC Court of Appeals

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November 17, 2015

Hand Delivered

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

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

Dear Ms. Kitchings:

Pursuant to Rule 208(b)(7), SCACR, the Appellant hereby files this supplemental citation letter. The decision of the South Carolina Supreme Court in *Wilkinson v. E. Cooper Cmty. Hosp., Inc.*, 410 S.C. 163, 170, 763 S.E.2d 426, 430 n.5 (2014) is hereby brought to the attention of the Court. This decision relates to the preservation argument on pages 19-21 of Appellant's reply brief and pages 12-15 of Appellant's petition for rehearing and rehearing *en banc*. A copy of this decision is attached hereto for the Court's convenience.

With kind regards, I remain

Sincerely yours,



C. Mitchell Brown

CMB:grb

Enclosure

cc: William P. Hatfield, Esquire
Robert N. Hill, Esquire

With offices in the District of Columbia, Florida, Georgia, Massachusetts, New York, North Carolina, South Carolina, Tennessee and West Virginia

410 S.C. 163
Supreme Court of South Carolina.

Vicki L. WILKINSON, Appellant,

v.

EAST COOPER COMMUNITY HOSPITAL,
INC., d/b/a East Cooper Regional Medical
Center, Carolina Plastic Surgery Institute, PA,
and Thomas X. Hahm, M.D., Respondents.
Appellate Case No. 2012-213464.

Oct. 3, 2014. | Rehearing Denied Oct. 3, 2014.

Synopsis

Background: Patient filed medical malpractice suit against plastic surgeon, surgeon's professional association, and hospital. The Circuit Court, Charleston County, R. Markley Dennis, Jr., J., dismissed complaint with prejudice as untimely filed, 2012 WL 9046979, and then denied reconsideration. Patient appealed. Patient's motion to certify appeal to the Supreme Court was granted.

Holdings: The Supreme Court, Beatty, J., held that:

[1] notice of intent to file suit (NOI) tolled three-year limitations period governing suit;

[2] patient had 60 days to file complaint after mediator determined that mediation had failed;

[3] separate case numbers assigned upon filing of NOI and then upon filing complaint did not convert patient's case into two separate lawsuits requiring two separate medical expert affidavits; and

[4] once patient filed medical expert affidavit within 45 days of filing NOI, patient did not have to re-file medical expert affidavit with complaint.

Reversed and remanded.

Pléicones, J., filed dissenting opinion and dissented on denial of rehearing.

West Headnotes (6)

[1] **Appeal and Error**

↔ Extent of Review Dependent on Nature of Decision Appealed from

Appeal and Error

↔ Striking out or dismissal

On appeal from the dismissal of a case for the failure to state a claim on which relief can be granted, an appellate court applies the same standard of review as the trial court: the court will construe the complaint in a light most favorable to the nonmovant and determine if the facts alleged and the inferences reasonably deducible from the pleadings would entitle the plaintiff to relief on any theory of the case. Rules Civ.Proc., Rule 12(b)(6).

2 Cases that cite this headnote

[2] **Appeal and Error**

↔ Extent of Review Dependent on Nature of Decision Appealed from

The appellate court may sustain the dismissal of a complaint for the failure to state claim on which relief could be granted when the facts alleged in the complaint do not support relief under any theory of law. Rules Civ.Proc., Rule 12(b)(6).

Cases that cite this headnote

[3] **Limitation of Actions**

↔ Pendency of Action or Other Proceeding

Patient filed medical expert affidavit in support of medical malpractice claims within 45 days of notice of intent to file suit (NOI), and thus, NOI tolled three-year limitations period governing suit against plastic surgeon, surgeon's professional association, and hospital. Code 1976, §§ 15-3-545(A), 15-36-100(C)(1), 15-79-125(A).

2 Cases that cite this headnote

[4] **Alternative Dispute Resolution**

⇒ Compulsory mediation; mediation as condition precedent

Patient who filed notice of intent to file suit (NOI) for medical malpractice against plastic surgeon, surgeon's professional association, and hospital, which tolled running of three-year limitations period, and who complied with statutorily mandated pre-litigation mediation, had 60 days to file complaint after mediator determined that mediation had failed. Code 1976, §§ 15-3-545(A), 15-79-125.

Cases that cite this headnote

[5] **Health**

⇒ Affidavits of merit or meritorious defense; expert affidavits

Assignment of case number when patient filed pre-suit notice of intent to file suit (NOI) against plastic surgeon, surgeon's professional association, and hospital, followed by assignment of different case number when she subsequently filed complaint for medical malpractice after unsuccessful pre-litigation mediation, did not convert patient's case into two separate lawsuits requiring two separate medical expert affidavits. Code 1976, §§ 15-36-100(B), 15-79-125.

Cases that cite this headnote

[6] **Health**

⇒ Affidavits of merit or meritorious defense; expert affidavits

Once patient filed medical expert affidavit within 45 days of filing notice of intent to file suit (NOI) for medical malpractice against plastic surgeon, surgeon's professional association, and hospital, patient did not have to re-file medical expert affidavit with complaint. Code 1976, §§ 15-36-100(B), 15-79-125.

1 Cases that cite this headnote

Attorneys and Law Firms

****427** Robert H. Hood, James Bernard Hood, Harry Cooper Wilson, III, and Deborah Harrison Sheffield, all of Hood Law Firm, L.L.C., of Charleston; Daniel Simmons McQueeney, Jr., Kathleen Fowler Monoc, and Lindsay Kathryn Smith-Yancey, all of Pratt-Thomas Walker, P.A., of Charleston, for Respondents.

John S. Nichols, of Bluestein Nichols Thompson & Delgado, L.L.C., of Columbia, and Daniel Nathan Hughey, of Hughey Law Firm, L.L.C., of Mt. Pleasant, for Appellant.

Andrew A. Mathias, of Nexsen Pruet, L.L.C., of Greenville, for Amicus Curiae, South Carolina Hospital Association.

***165 ORDER**

The petitions for rehearing are denied. This Court does, however, substitute the attached amended majority opinion for the majority opinion previously filed in this matter. The amended opinion deletes the last sentence of the second paragraph on page nine of the original majority opinion.

/s/JEAN H. TOAL, C.J.

/s/DONALD W. BEATTY, J.

****428** /s/JOHN KITTREDGE, J.

/s/KAYE G. HEARN, J.

/s/FOR THE COURT

I would grant the petitions for rehearing.

/s/COSTA M. PLEICONES, J.

/s/FOR THE COURT

JUSTICE BEATTY:

In this medical malpractice case, Vicki Wilkinson appeals the circuit court's order dismissing her civil action with prejudice based on the motions filed by East Cooper Community Hospital, Inc. ("East Cooper"), Carolina Aesthetic Plastic Surgery Institute, P.A. ("Carolina Aesthetic Plastic Surgery"), and Dr. Thomas Hahn (collectively "Respondents"). Wilkinson ***166** asserts the court erred

in finding: (1) the statute of limitations was not tolled because she failed to file an expert witness affidavit contemporaneously with her Notice of Intent to File Suit ("NOI") pursuant to section 15-79-125 of the South Carolina Code;¹ and (2) she failed to file her Complaint within the applicable statute of limitations given she did not contemporaneously file an expert witness affidavit with the Complaint or within forty-five days thereafter in accordance with section 15-36-100(C).²

*167 This appeal requires the Court to review the decision of the Court of Appeals in *Ranucci v. Crain*, 397 S.C. 168, 723 S.E.2d 242 (Ct.App.2012) ("*Ranucci I*"), which held the pre-litigation filing requirement for a medical malpractice case found in section 15-79-125 incorporates only the parts of section 15-36-100 that relate to the preparation and content of an expert's affidavit. Recently, we reversed *Ranucci I*, holding that section 15-79-125(A) incorporates section 15-36-100 in its entirety. *Ranucci v. Crain*, 409 S.C. 493, 763 S.E.2d 189 (2014) ("*Ranucci II*"). Therefore, we hold that Wilkinson could invoke section 15-36-100(C)(1), which extended the time for filing the expert witness affidavit with her NOI and tolled the applicable statute of limitations. However, because the analysis in *Ranucci II* was confined to the dismissal of the pre-litigation NOI, it is not dispositive since the instant case involves the **429 next procedural step in medical malpractice litigation. Specifically, we must analyze whether Wilkinson's failure to file an expert witness affidavit with her Complaint warranted the dismissal of her civil action. We hold the circuit court erred in dismissing Wilkinson's civil action as the expert affidavit filed with the NOI satisfied the statutory requirements of section 15-36-100 and, thus, it was not necessary to file a second expert affidavit in the same civil action. Accordingly, we reverse the circuit court's order and remand the case for further proceedings.

I. Factual/Procedural History

On September 4, 2008, Wilkinson was admitted to East Cooper to undergo reconstructive breast surgery performed by Dr. Hahm. Following the surgery, Wilkinson experienced complications throughout 2008 that required additional medical procedures.

*168 On September 1, 2011, Wilkinson filed an NOI pursuant to section 15-79-125 against Respondents and several other defendants, which was designated as Case No.

2011-CP-10-6306.³ Because the statute of limitations was due to expire within a short period of time, Wilkinson did not include an expert witness affidavit with the NOI, but stated that she would file one at a later date. On October 5, 2011, Wilkinson filed the affidavit of Dr. John D. Newkirk, a board certified plastic surgeon.

On January 25, 2012, five days after an unsuccessful attempt at pre-litigation mediation, Wilkinson filed a Complaint against the defendants named in the NOI, which was designated as Case No. 2012-CP-10-0558. Wilkinson did not file an expert affidavit with the Complaint nor did she reference the NOI or otherwise explain why she did not file an expert affidavit with the Complaint.

Respondents separately answered and moved to dismiss pursuant to Rule 12(b)(6) of the South Carolina Rules of Civil Procedure on the ground the statute of limitations had expired. Citing *Ranucci I*, East Cooper asserted the NOI did not toll the three-year statute of limitations⁴ because Wilkinson failed to contemporaneously file an expert affidavit with the NOI pursuant to section 15-79-125. Therefore, East Cooper argued that Wilkinson's Complaint, which was filed four months after the expiration of the statute of limitations, should be dismissed. Alternatively, even if the statute of limitations did not expire on September 4, 2011, East Cooper claimed Wilkinson's failure to file an expert affidavit with her Complaint or within forty-five days thereafter violated section 15-36-100 and warranted dismissal. In a separate memorandum *169 in support of their motion to dismiss, Respondents Carolina Aesthetic Plastic Surgery and Dr. Hahm reiterated the arguments raised by East Cooper.

Wilkinson filed a memorandum in opposition to Respondents' motions. Because Respondents engaged in pre-litigation mediation and did not move to dismiss the NOI during the pre-litigation proceedings, Wilkinson maintained Respondents waived any argument regarding her NOI and the expiration of the statute of limitations. Additionally, Wilkinson asserted the failure to file an expert affidavit with her Complaint did not warrant dismissal as Respondents were already in possession of the previously filed affidavit of Dr. Newkirk.

After a hearing, the circuit court granted Respondents' motions to dismiss with prejudice. Based on *Ranucci I*, the court found that Wilkinson: (1) failed to file an expert affidavit contemporaneously with her NOI as required by section 15-79-125 and, thus, the statute of limitations was not tolled; and (2) failed to file an expert affidavit

contemporaneously with her Complaint or within forty-five days thereafter as required by section 15-36-100. The court rejected Wilkinson's contention that Respondents' participation in statutorily mandated pre-litigation mediation **430 waived their right to challenge the NOI. The court also found the exception codified in section 15-36-100(C)(1), which extends the time for filing an expert affidavit with the Complaint, was inapplicable because Wilkinson did not provide any explanation as to why the expert affidavit was not filed and, in any event, failed to file an expert affidavit within forty-five days of filing her Complaint.

Following the circuit court's denial of her motion for reconsideration, Wilkinson appealed to the Court of Appeals. This Court granted Wilkinson's motion to certify the appeal pursuant to Rule 204(b) of the South Carolina Appellate Court Rules.

II. Standard of Review

[1] [2] "On appeal from the dismissal of a case pursuant to Rule 12(b)(6), an appellate court applies the same standard of review as the trial court." *Rydde v. Morris*, 381 S.C. 643, 646, 675 S.E.2d 431, 433 (2009). "That standard requires the Court to construe the complaint in a light most favorable to *170 the nonmovant and determine if the facts alleged and the inferences reasonably deducible from the pleadings would entitle the plaintiff to relief on any theory of the case." *Id.* (internal quotations omitted). The Court may sustain the dismissal when "the facts alleged in the complaint do not support relief under any theory of law." *Flateau v. Harrelson*, 355 S.C. 197, 202, 584 S.E.2d 413, 416 (Ct.App.2003).

III. Discussion

A. Arguments

Initially, Wilkinson challenges the propriety of *Ranucci I* and urges this Court to reverse the decision of the Court of Appeals.⁵ If the Court reverses *Ranucci I*, Wilkinson claims her NOI tolled the statute of limitations and, therefore, neither the NOI nor the Complaint should have been dismissed as untimely. However, even if her Complaint is deemed deficient based on her failure to contemporaneously file an expert affidavit, she contends any deficiency did not mandate dismissal. Rather, she asserts any dismissal under section 15-36-100(C)(1) is permissive given the statute states that a plaintiff's Complaint is "subject to dismissal for failure

to state a claim." (Emphasis added.) Because dismissal is not statutorily mandated, Wilkinson claims the appropriate remedy would be for her to be given an opportunity to cure any defect as the Court permitted a plaintiff to file an amended Complaint after the expiration of the statute of limitations in *Spence v. Spence*, 368 S.C. 106, 628 S.E.2d 869 (2006).⁶

*171 Alternatively, Wilkinson maintains her Complaint was not deficient as it stated facts sufficient to support a cause of action and Respondents were already in possession of the expert affidavit that was filed with the NOI. Thus, because Respondents were not prejudiced by the alleged deficiency, Wilkinson claims dismissal was not the appropriate sanction.

B. Application of *Ranucci II* as to the Sufficiency of the NOI

Recently, this Court reversed *Ranucci I*. **431 *Ranucci v. Crain*, 409 S.C. 493, 763 S.E.2d 189 (2014) ("*Ranucci II*"). In so ruling, we held that section 15-79-125(A) incorporates section 15-36-100 in its entirety. Thus, we ruled that a medical malpractice claimant may invoke section 15-36-100(C)(1), which permits the claimant to file an expert witness affidavit within forty-five days after filing the NOI. *Id.*

[3] In the instant case, Wilkinson filed the NOI on September 1, 2011 in compliance with section 15-79-125(A). S.C.Code Ann. § 15-79-125(A) (Supp.2013). Because the statute of limitations was due to expire within a short period of time, Wilkinson did not include an expert witness affidavit with the NOI, but stated that she would file one at a later date. Pursuant to section 15-36-100(C)(1), Wilkinson had an additional forty-five days to supplement her NOI with an expert affidavit. *Id.* § 15-36-100(C)(1). Wilkinson acted within the statutorily designated time period as she filed the affidavit of Dr. Newkirk on October 5, 2011. As a result, Wilkinson's properly filed NOI tolled "all applicable statutes of limitations" pursuant to section 15-79-125(A). Accordingly, the circuit court erred in finding that Wilkinson's NOI was not sufficient to toll the statute of limitations.

*172 [4] After the NOI was properly filed, the parties strictly adhered to the pre-litigation procedures outlined in section 15-79-125. Specifically, the parties engaged in discovery and participated in mediation within the statutorily mandated 120-day time period. *Id.* § 15-79-125(B) ("After the Notice of Intent to File Suit is filed and served, all named

parties may subpoena medical records and other documents potentially related to the medical malpractice claim pursuant to the rules governing the service and enforcement of subpoenas outlined in the South Carolina Rules of Civil Procedure. Upon leave of court, the named parties also may take depositions pursuant to the rules governing discovery outlined in the South Carolina Rules of Civil Procedure.”); *id.* § 15–79–125(C) (“Within ninety days and no later than one hundred twenty days from the service of the Notice of Intent to File Suit, the parties shall participate in a mediation conference unless an extension for no more than sixty days is granted by the court based upon a finding of good cause.”).

Following the failed mediation attempt on January 20, 2012, Wilkinson initiated her civil action by filing a timely summons and complaint on January 25, 2012, as required by section 15–79–125(E). *Id.* § 15–79–125(E) (“If the matter cannot be resolved through mediation, *the plaintiff may initiate the civil action by filing a summons and complaint* pursuant to the South Carolina Rules of Civil Procedure. The action must be filed: (1) *within sixty days after the mediator determines that the mediation is not viable, that an impasse exists, or that the mediation should end*; or (2) prior to expiration of the statute of limitations, *whichever is later.*” (emphasis added)). Consequently, Wilkinson complied with the pre-litigation requirements and timely initiated her civil action.

C. Dismissal of Civil Action with Prejudice

Having found that Wilkinson timely initiated her civil action, the question becomes whether the Complaint was sufficient to comply with the requirements of section 15–36–100 as Wilkinson never supplemented this pleading with an expert affidavit.

[5] As a threshold matter, we disagree with any contention that the clerk of court’s assignment of separate Common Pleas case numbers to the NOI and the Complaint converted Wilkinson’s *173 medical malpractice case into two civil cases that required two expert affidavits. The assignment of a different case number to the pre-litigation pleadings and the litigation pleadings is of no consequence because they both comprise a single medical malpractice claim. *See Fisher v. Pelstring*, 817 F.Supp.2d 791, 807 n. 8 (D.S.C.2011) (analyzing procedures for initiating medical malpractice claims and stating “[s]ection 15–79–125 also does not include any language indicating that the case number under which a Notice of Intent is served on a defendant must be the same

as the case number assigned to the complaint served on that defendant if a civil action is ultimately initiated”).

****432 [6]** Once Wilkinson initiated the civil action, the proceedings continued to be governed by section 15–36–100. Significantly, section 15–36–100(B) states:

Except as provided in Section 15–79–125, in an action for damages alleging professional negligence against a professional licensed by or registered with the State of South Carolina and listed in subsection (G) or against any licensed health care facility alleged to be liable based upon the action or inaction of a health care professional licensed by the State of South Carolina and listed in subsection (G), the plaintiff must file as part of the complaint an affidavit of an expert witness which must specify at least one negligent act or omission claimed to exist and the factual basis for each claim based on the available evidence at the time of the filing of the affidavit.

S.C.Code Ann. § 15–36–100(B) (Supp.2013) (emphasis added). As we interpret this provision, the plain language of the first sentence expressly exempts a medical malpractice claimant from filing a second expert affidavit as one has already been filed with the NOI pursuant to section 15–79–125.

Such a construction harmonizes the two statutes and is consistent with the intent of the legislature to create a unique pre-litigation period of discovery and mandatory mediation via section 15–79–125 in order to filter out frivolous claims at the earliest stage in medical malpractice cases. However, this procedure does not create two separate cases. Rather, the plaintiff must properly initiate the claim with the NOI and attempt to resolve the case within a short timeframe. If the parties fail to resolve the case through mediation, the case *174 almost immediately progresses as a customary professional negligence action. Thus, to require a second expert affidavit at the litigation stage in the proceeding leads to an absurd result as the plaintiff’s claim has not changed during the pre-litigation proceedings. This conclusion, however, does not obviate the need for a plaintiff to offer additional expert testimony as it may be necessary to withstand a defendant’s motion for summary judgment or to support the claim at trial.⁷

Finally, such an interpretation is consistent with the Court’s decisions to permit medical malpractice cases to proceed on the merits rather than to affirm unwarranted dismissals based on technical noncompliance with the medical malpractice

statutes. See *Ross v. Waccamaw Cmty. Hosp.*, 404 S.C. 56, 744 S.E.2d 547 (2013) (concluding that failure to timely complete the pre-litigation mediation process as required by section 15–79–125 does not divest the trial court of subject matter jurisdiction or mandate dismissal); *Grier v. AMISUB of S.C., Inc.*, 397 S.C. 532, 725 S.E.2d 693 (2012) (holding that the pre-litigation expert affidavit, which is filed pursuant to section 15–79–125, must specify at least one negligent act or omission and the factual basis for each claim, but does not need to include an opinion as to proximate cause and, therefore, medical malpractice claimant's case could proceed as the pre-litigation affidavit was sufficient).

Based on the foregoing, we hold the circuit court erred in granting Respondents' motions to dismiss as Wilkinson's Complaint was timely and sufficient to properly initiate a civil action for medical malpractice. In view of our decision, it is unnecessary to address Wilkinson's remaining argument that she should be permitted to supplement her Complaint with an expert affidavit based on *Spence*. See *Futch v. McAllister Towing of Georgetown, Inc.*, 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (holding an appellate court need not review remaining *175 issues when its determination of a prior issue is dispositive of the appeal).

Having reversed *Ranucci I*, we hold Wilkinson could invoke section 15–36–100(C)(1), **433 which extended the time for filing the expert witness affidavit with her NOI and tolled the statute of limitations. As a result, Wilkinson timely filed her Complaint. Moreover, Wilkinson was not required to file a second expert witness affidavit in order to properly initiate her civil action because the affidavit filed with her NOI was sufficient for statutory compliance. Accordingly, we reverse the decision of the circuit court and remand the case for further proceedings.

REVERSED AND REMANDED.

TOAL, C.J., KITTREDGE and HEARN, JJ., concur.
PLEICONES, J., dissenting in a separate opinion.

JUSTICE PLEICONES:

I respectfully dissent. Appellant failed to file an expert witness affidavit contemporaneously with her Notice of Intent to File Suit as mandated by S.C.Code Ann. § 15–79–125(A) (Supp.2013). I would therefore affirm the circuit court's decision. See *Ranucci v. Crain*, 409 S.C. 493, 763 S.E.2d 189 (2014) (Pleicones, J., dissenting).

IV. Conclusion

All Citations

410 S.C. 163, 763 S.E.2d 426

Footnotes

1 Section 15–79–125 provides, in part, as follows:

Prior to filing or initiating a civil action alleging injury or death as a result of medical malpractice, *the plaintiff shall contemporaneously file a Notice of Intent to File Suit and an affidavit of an expert witness, subject to the affidavit requirements established in Section 15–36–100*, in a county in which venue would be proper for filing or initiating the civil action.... *Filing the Notice of Intent to File Suit tolls all applicable statutes of limitations.*

S.C.Code Ann. § 15–79–125(A) (Supp.2013) (emphasis added).

2 Section 15–36–100 provides in relevant part:

(B) *Except as provided in Section 15–79–125*, in an action for damages alleging professional negligence against a professional licensed by or registered with the State of South Carolina and listed in subsection (G) or against any licensed health care facility alleged to be liable based upon the action or inaction of a health care professional licensed by the State of South Carolina and listed in subsection (G), *the plaintiff must file as part of the complaint an affidavit of an expert witness* which must specify at least one negligent act or omission claimed to exist and the factual basis for each claim based on the available evidence at the time of the filing of the affidavit.

(C)(1) *The contemporaneous filing requirement of subsection (B) does not apply to any case in which the period of limitation will expire, or there is a good faith basis to believe it will expire on a claim stated in the complaint, within ten days of the date of filing and, because of the time constraints, the plaintiff alleges that an affidavit of an expert could not be prepared. In such a case, the plaintiff has forty-five days after the filing of the complaint to supplement the pleadings with the affidavit.*

....

(D) This section does not extend an applicable period of limitation, except that, if the affidavit is filed within the period specified in this section, the filing of the affidavit after the expiration of the statute of limitations is considered timely and provides no basis for a statute of limitations defense.

....

(F) If a plaintiff fails to file an affidavit as required by this section, and the defendant raises the failure to file an affidavit by motion to dismiss filed contemporaneously with its initial responsive pleading, the complaint is not subject to renewal after the expiration of the applicable period of limitation unless a court determines that the plaintiff had the requisite affidavit within the time required pursuant to this section and the failure to file the affidavit is the result of a mistake. The filing of a motion to dismiss pursuant to this section shall alter the period for filing an answer to the complaint in accordance with Rule 12(a), South Carolina Rules of Civil Procedure.

S.C.Code Ann. § 15–36–100(B), (C)(1), (D), (F) (Supp.2013) (emphasis added).

- 3 In addition to Respondents, Wilkinson named Tenet Healthcare Corp. ("THC") and Tenet Healthsystem Medical, Inc. ("THMI") as defendants. On April 18, 2012, Wilkinson entered into a consent order with THC and THMI to dismiss the case as to them without prejudice. Thus, THC and THMI are not parties to this appeal.
- 4 See S.C.Code Ann. § 15–3–545(A) (2005) (providing that a medical malpractice case "must be commenced within three years from the date of the treatment, omission, or operation giving rise to the cause of action or three years from date of discovery or when it reasonably ought to have been discovered, not to exceed six years from date of occurrence, or as tolled by this section").
- 5 East Cooper asserts Wilkinson failed to preserve this issue for appellate review because she did not raise it to the circuit court. This assertion is without merit. Because the circuit court was **bound** to follow *Ranucci I*, it would have been futile for Wilkinson to challenge the propriety of *Ranucci I* as the circuit court had no authority to alter the decision of the Court of Appeals.
- 6 In support of this proposition, Wilkinson relies on *Spence*, wherein this Court found that when a Complaint is dismissed under Rule 12(b)(6), "the dismissal generally is without prejudice" and "[t]he plaintiff in most cases should be given an opportunity to file and serve an amended complaint." *Spence*, 368 S.C. at 129, 628 S.E.2d at 881. The Court explained:

When a plaintiff is not given the opportunity to file and serve an amended complaint, but is left with no choice but to appeal after dismissal of her case with prejudice, an appellate court which affirms the dismissal may modify the lower court's order to find the dismissal is without prejudice. *When the statute of limitations has expired, the appellate court may in its discretion impose a reasonable period of time in which to amend the complaint.* An appellate court should follow this procedure when the plaintiff presents additional factual allegations or a different theory of recovery which, taken as true in a well-pleaded complaint, may state a claim upon which relief may be granted.

Id. at 130, 628 S.E.2d at 881–82 (emphasis added).
- 7 Although East Cooper references decisions from other jurisdictions to support the contention that a second affidavit is required, its reliance on these cases is misplaced as the underlying state statutes are distinctly different from our state's medical malpractice statutes. Moreover, our research did not reveal any state statutes that were identical to those in this state. Thus, even though cases from other jurisdictions involving medical malpractice may provide guidance as to policy or theory, the text of the underlying statutes is not similar enough to be dispositive in the instant case.



rec'd 11/23/2015
00350/0708

The South Carolina Court of Appeals

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November 19, 2015

Mr. C. Mitchell Brown, Esquire
PO Box 11070
Columbia SC 29211

Re: Bobby Lee Tucker v. John Doe
Appellate Case No. 2014-000134

Dear Counsel:

Enclosed is a copy of an order of the panel denying your petition for rehearing. Your petition for rehearing en banc was distributed to the judges, but it has been rejected. See Rule 219, SCACR.

Very truly yours,

V. Claire Allen, Deputy

CLERK

cc: Michael J. Anzelmo, Esquire
William C. Wood, Jr., Esquire
Thomas J. Keaveny, II, Esquire
William P. Hatfield, Esquire
Robert Norris Hill, Esquire
Graham Ross Billings, Esquire

The South Carolina Court of Appeals

Bobby Lee Tucker, Sr., Respondent,

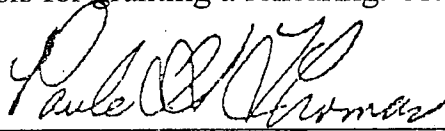
v.

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

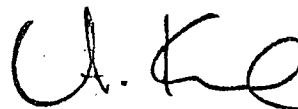
Appellate Case No. 2014-000134

ORDER

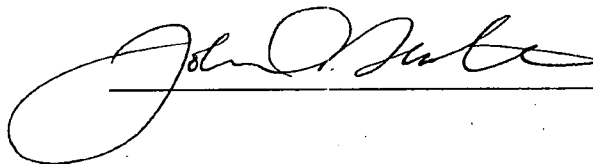
After careful consideration of the petition for rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing. Accordingly, the petition for rehearing is denied.



J.



J.



J.

Columbia, South Carolina

FILED

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November 19, 2015

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