THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM DARLINGTON COUNTY
Court of Common Pleas

Honorable J. Michael Baxley

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

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

v.

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

PETITION FOR WRIT OF CERTIORARI

C. Mitchell Brown
William C. Wood, Jr.
Michael J. Anzelmo
Graham R. Billings
NELSON MULLINS RILEY & SCARBOROUGH LLP
1320 Main Street / 17th Floor
Post Office Box 11070 (29211-1070)
Columbia, SC 29201
(803) 799-2000

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

Other Counsel of Record:

Robert Norris Hill, Esquire
Law Office of Robert Hill
P.O. Box 1323
Lexington, SC 29071
(803) 520-4370

William P. Hatfield, Esquire
Hatfield Temple, LLP
P.O. Box 1770
Florence, SC 29503
(843) 662-5000

Attorneys for Respondent Bobby Lee Tucker, Sr.

Index

Certification of Counsel

The undersigned hereby certifies that Doe filed a petition for rehearing with the Court of Appeals and the Court of Appeals ruled on the petition with finality on November 19, 2015. (App. 545.)

Questions Presented for Review

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

II. Did the Court of Appeals err in concluding that Doe's argument that a statutory violation, standing alone, should not constitute evidence of recklessness to support punitive damages is unpreserved, and should the argument be considered resulting in judgment for Doe on the issue of punitive damages?

III. Did the Court of Appeals err in concluding that Tucker presented sufficient evidence of causation that the probable cause, rather than merely a possible cause, of Tucker's accident was the object falling off of Doe's truck?

Statement of the Case

Pursuant to Rule 242 of the South Carolina Appellate Court Rules, Petitioner John Doe, Individually, and d/b/a Doe Trucking Company ("Doe"), hereby petitions this Court to grant a writ of certiorari to review the Court of Appeals' opinion in *Tucker v. Doe*, Op. No. 5338 (S.C. Ct. App. filed August 5, 2015) (Shearouse Adv. Sh. No. 30 at 50). (App. 545.) For the reasons set forth below, this petition should be granted, the decision of the

Court of Appeals should be reversed, and judgment notwithstanding the verdict should be granted in favor of Doe.

This case arises out of a judgment in favor of Respondent Bobby Lee Tucker, Sr. ("Tucker"), in a John Doe action pursuant to S.C. Code Ann. § 38-77-170. On April 30, 2010 at approximately 12:15 a.m., Mr. Tucker was driving on a highway when he allegedly struck an object that had allegedly fallen from another tractor-trailer, causing him to lose control of his vehicle and crash into a concrete abutment in the median of the highway. (App. 25-26.) On May 14, 2010, two weeks after the accident, Tucker sought recovery from his uninsured motorist ("UM") insurance carriers by filing this action against Petitioner John Doe, Individually, and d/b/a Doe Trucking ("Doe"), who represented the unknown owner and operator of an unknown vehicle that allegedly caused the object to be in the road. (App. 25.) Tucker alleged that a third party, Anthony Bernardo, witnessed the accident, but no eyewitness affidavit, pursuant to S.C. Code Ann. § 38-77-170, was attached to the Complaint. (App. 26.) Tucker sought actual and punitive damages for his personal injuries resulting from the accident. (App. 28.)

On July 19, 2010, two months after the initiation of the action, Tucker filed the affidavit of Anthony Bernardo pursuant to the witness affidavit requirement of S.C. Code Ann. § 38-77-170. (App. 414.) That affidavit did not include the statutorily required language subjecting the affiant to penalty of perjury. (*See id.*) After Doe moved for summary judgment based on Tucker's failure to comply with S.C. Code Ann. § 38-77-170(2) in various respects, Tucker served a second affidavit of Anthony Bernardo that included the statutory perjury language on March 4, 2011, approximately ten months after the Complaint was filed. (App. 416.) No other witness affidavits were filed.

The trial in this action commenced on April 15, 2013. (App. 30.) Mr. Bernardo did not testify at trial. The only witness at trial who observed the accident was Plaintiff Tucker. Mr. Tucker testified that he was driving south on Interstate 95 from Darlington, South Carolina to deliver cars to Jacksonville, Florida pursuant to his job as a part-time truck driver. (App. 173-74.) Mr. Tucker testified that the car in front of him suddenly braked and switched lanes, and, because he could not see what caused the car to switch lanes, he decided to follow it. (App. 177.) Mr. Tucker testified that a car was in the lane beside him, so he was unable to switch lanes. (*Id.*) He testified that he saw an object that looked like a cardboard box in the road, but he was unable to avoid it. (*Id.*) He testified that the left front wheel of his truck struck the object, causing him to lose control of his truck, which collided with a concrete column in the median of the road supporting an overpass. (App. 177-80.)

Mr. Tucker testified that two men were driving behind him and observed the accident. (App. 181.) The paramedic who treated Mr. Tucker, Billy Collins, testified that he spoke to the two men and they told him that they did not know "exactly what had taken place," but "they saw the accident occur." (App. 154.) Mr. Collins testified that Mr. Tucker told him that he swerved to miss something in the road and hit the support. (App. 159.)

A highway patrolman, Bradley Allen Suggs, investigated the cause of the accident and did not see any objects in or near the road. (App. 133-40.) He found there were "no witnesses" to the accident and "nobody saw it." (App. 136-37.) Officer Suggs found no evidence that Tucker struck an object in the road. (App. 137-38.) A tow truck driver who later came to the scene to tow Tucker's truck, Albert Vereen, observed skid marks

about seventy-five to one hundred feet behind the truck. (App. 99-100.) Mr. Vereen also noticed an object approximately thirty feet to the right of the truck, off the right side of the road, which was approximately two hundred feet from where Tucker lost control. (App. 106-07.) The object was a steel bearing block, approximately eighteen inches wide, eighteen inches long, eleven inches high, and estimated to weigh around six hundred and fifty pounds. (App. 63-66.) Mr. Vereen also towed the bearing block away. (App. 100.) He saw no gashes or marks in the road and no objects present in the road. (App. 105-06.)

Additionally, neither the Florence County 911 cell phone call center nor the South Carolina Department of Transportation received any calls regarding foreign objects in the road. (App. 224-32.) Another driver who worked with Tucker, Charles Hayes, took his girlfriend to photograph the scene of the wreck, and he did not see any marks on the road, although she photographed marks in the concrete section of the road. (App. 116-20.)

Another truck driver, Donald Wilson, testified that he stopped at a truck stop in Darlington sometime between 10:00 and 11:00 PM on April 29, 2010. (App. 50-51.) While there, Mr. Wilson spotted a truck carrying pipes and an object that "looked just like" the bearing block. (App. 47-48.)

At trial, Doe moved for a directed verdict based on (1) the failure of Tucker to satisfy the requirements of S.C. Code Ann. § 38-77-170; (2) the failure of Tucker to meet his burden of proof to show that Doe was negligent; (3) the failure of Tucker to submit sufficient evidence such that the jury may consider punitive damages; and (4) the defense of comparative negligence. (App. 215-20.) The trial court denied the directed verdict

motions at the close of Tucker's case and again at the close of all of the evidence. (App. 217-20, 259-62.)

The jury returned a verdict in favor of Tucker in the amount of $2,500,000 in actual damages and $2,500,000 in punitive damages. (App. 22.) Doe timely filed post-trial motions for judgment notwithstanding the verdict ("JNOV"), new trial absolute, and new trial *nisi remittitur*, and on December 18, 2013, the trial court remitted the punitive damages award to $500,000 and denied the remaining motions. (App. 379.) Doe timely served its notice of appeal on January 16, 2014. (App. 422.)

The Court of Appeals issued its opinion affirming the trial court on August 5, 2015. (App. 545.) Doe timely petitioned for rehearing and rehearing en banc on September 4, 2015. (App. 562.) On November 19, 2015, the Court of Appeals denied both petitions. (App. 590.) This petition for a writ of certiorari follows.

Summary of Grounds for Certiorari

This primary issue in this appeal is whether the Court of Appeals erred in determining that the eyewitness affidavit submitted by Anthony Bernardo ("the Bernardo Affidavit") fulfills the requirements of S.C. Code Section 38-77-170, 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 caused by an unknown vehicle without physical contact. Resolution of this and the other issues on appeal by this Court is necessary to prevent a conflict between the Court of Appeals' decision and this Court's prior jurisprudence interpreting the affidavit requirement of S.C. Code Section 38-77-170.

First, the Court of Appeals' decision is directly contrary to this Court's opinion in *Collins v. Doe*, which established that the eyewitness affidavit requirement of S.C. Code § 38-77-170(2) must be strictly construed and must be satisfied without trial testimony serving as the "functional equivalent" of the affidavit. 352 S.C. 462, 471, 574 S.E.2d 739, 743 (2002). By holding that the Bernardo Affidavit complied with S.C. Code Ann. § 38-77-170 because 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," the Court of Appeals' decision is inconsistent with *Collins*'s requirement of a strictly compliant affidavit attesting to the truth of the facts of the accident, and is instead consistent with the rejected dissenting position in *Collins*. A thorough review of the procedural histories of this Court's decisions in *Collins* and *Gilliland v. Doe*, 357 S.C. 197, 592 S.E.2d 626 (2004), confirms that the Court of Appeals erred in evaluating the sufficiency of the Bernardo Affidavit by reference to the trial testimony and by analogy to *Gilliland*. The Court of Appeals' error must be corrected in order to prevent an erosion of this Court's requirement of mandatory, strict compliance with the affidavit requirement of S.C. Code § 38-77-170(2) and the undermining of the three fraud prevention purposes of the affidavit requirement, as established in *Collins*.

When the Bernardo Affidavit is reviewed without reference to the trial testimony, as *Collins* requires, it simply cannot be found to have sufficiently complied with this Court's prior jurisprudence interpreting the eyewitness affidavit requirement. This Court has required that the eyewitness "attest to the circumstances surrounding the accident, i.e., what actions of the unknown driver contributed to the accident," *Gilliland v. Doe*,

357 S.C. 197, 201, 592 S.E.2d 626, 628 (2004) (quoting *Gilliland v. Doe*, 351 S.C. 497, 501, 570 S.E.2d 545, 548 (Ct. App. 2002)). The Bernardo Affidavit fails to attest to an unknown vehicle whatsoever. If it is not corrected, the Court of Appeals' decision, finding that the Bernardo Affidavit is sufficient, will result in affidavits in future cases only containing minimal attestations without actually achieving any of the statute's purposes.

Second, the Court of Appeals erred in determining that Doe's argument against this Court's binding precedent in *Wise v. Broadway*, 315 S.C. 273, 276, 433 S.E.2d 857, 859 (1993) and subsequent authorities, was unpreserved for appellate review based on Doe's failure to sufficiently raise it to the trial court. The Court of Appeals' holding is directly contrary to this Court's recent decision in *Wilkinson v. E. Cooper Cmty. Hosp., Inc.*, in which the Court found that an argument against a binding precedential decision is preserved, despite the appellant's failure to raise it to the lower court, because raising it would be futile as the lower court lacked authority to alter the law. 410 S.C. 163, 170, 763 S.E.2d 426, 430 n.5 (2014). The Court should grant this petition for a writ of certiorari to confirm that a legal argument against precedent may be considered on appeal, despite the appellant not engaging in the futile effort of raising the argument to the trial court. This Court should then go further, revisit the *Wise v. Broadway* holding, and overrule it on the basis of the arguments of Doe before the Court of Appeals. The *Wise* rule that punitive damages must be submitted to a jury based solely on the existence of evidence of the violation of a statute should be overruled and modified with respect to strict liability statutes.

Finally, the Court of Appeals erred in determining there was sufficient probative evidence in the record to affirm the denial of Doe's motion for JNOV with respect to causation. Doe argued there is insufficient evidence in the record that an object probably, rather than merely possibly, fell from Doe's truck into the road. The ruling of the Court of Appeals affirming the trial court's order, despite the lack of evidence in the record, implicitly requires the application of *res ipsa loquitur*, which is unavailable under South Carolina law. *See Watson v. Ford Motor Co.*, 389 S.C. 434, 453, 699 S.E.2d 169, 179 (2010) (recognizing that *res ipsa loquitur* is unavailable in South Carolina). The Court should thus grant this petition for a writ of certiorari, reverse the decision of the Court of Appeals, and grant judgment in favor of Doe as a matter of law.

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 of Appeals found that the Bernardo Affidavit complied with the requirements of South Carolina Code Section 38-77-170 because 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." This holding directly contravenes this Court's holding in *Collins v. Doe* barring the use of trial testimony as the "functional equivalent" for satisfying the mandatory eyewitness affidavit requirement. 352 S.C. 462, 471, 574 S.E.2d 739, 743 (2002).

S.C. Code Section 38-77-170 provides 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. To satisfy section 38-77-170(2), an independent witness 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); *see also Gilliland v. Doe*, 357 S.C. 197, 201, 592 S.E.2d 626, 628 (2004) (approving of Court of Appeals' interpretation requiring that the independent witness "attest to the circumstances surrounding the accident, i.e., what actions of the unknown driver contributed to the accident."). The Bernardo Affidavit altogether fails to do so.

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.

(App. 416.) This affiant fails to attest to the involvement of an unknown vehicle whatsoever. "Something in the roadway" could be anything, including a dead animal, tree branch, or anything else unrelated to an automobile. The observed sudden veering 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 caused the "something" to be in the road. The Bernardo Affidavit does not attest to how the actions of an unknown driver proximately caused the accident.

The only way that the Court of Appeals could have attempted to determine that "something" in the roadway could have been caused to be there by an unknown vehicle is by reference to Mr. Tucker's testimony at trial. Indeed, the Court of Appeals affirmatively acknowledges that it premised its holding that the Bernardo Affidavit was sufficient *on* the trial testimony. *See Tucker v. Doe*, Op. No. 5338 (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." (emphasis added)).

This Court has expressly held that the eyewitness ***affidavit*** must strictly comply with the statute, which cannot be functionally substituted for by trial testimony. *Collins*, 352 S.C. at 471, 574 S.E.2d at 743. In *Collins*, this Court rejected the use of trial testimony as the "functional equivalent" of the sworn affidavit, noting that the statutory requirement of an ***affidavit*** attesting to the truth of the facts of the accident is clear and unambiguous. *Id.*, 352 S.C. at 470, 574 S.E.2d at 743. The Court recognized three purposes of the statutory affidavit requirement that cannot be replaced by trial testimony:

(1) fraud prevention; (2) providing evidence to the insurer that the insured has a good faith basis for making a claim; and (3) providing notice of information relating to the validity of the claim to the insurer. *Id.*, 352 S.C. at 469-70, 574 S.E.2d at 743. The Court concluded by recognizing that S.C. Code Section 38-77-170 is a strict compliance statute, and providing an affidavit "attesting to the truth of the facts of the accident" is mandatory. *Id.*, 352 S.C. at 471, 574 S.E.2d at 743. Without strict compliance with S.C. Code Section 38-77-170, a plaintiff has no right of action against his UM insurance carrier. *Id.*, 352 S.C. at 466, 574 S.E.2d at 741.

The statute and *Collins* make no allowance for an eyewitness affidavit that is deficient but later is corroborated and supplemented by future trial testimony from the plaintiff. A vague affidavit saying "something in the roadway" caused the accident does not demonstrate to the insurer that the plaintiff made a good faith claim, nor does it provide sufficient facts allowing the insurer to investigate the unknown vehicle. The Court of Appeals' holding that the Bernardo Affidavit's attestations sufficiently corroborated Tucker's trial testimony effectively adopts Chief Justice Toal's dissent in *Collins*, arguing that trial testimony should serve as the "functional equivalent" of the witness affidavit because it prevents fraud more effectively than the affidavit.[1] *Collins*, 352 S.C. at 472, 574 S.E.2d at 744. (Toal, C.J., dissenting). This dissenting position was rejected by this Court. Hence, the Court of Appeals' decision must be reversed to prevent inconsistency in South Carolina's jurisprudence on this point.

[1] Unlike the eyewitness in *Collins*, Mr. Bernardo did not testify, and there was no independent eyewitness testimony at trial.

The rationale behind the Court of Appeals' holding and decision to refer to the trial testimony is evident in light of its incorrect interpretation of this Court's decision in *Gilliland v. Doe*, 357 S.C. 197, 592 S.E.2d 626 (2004). In footnote 2 of its opinion, the Court of Appeals correctly noted that this Court in *Gilliland* referred throughout its opinion to the witness's "testimony." *See Tucker v. Doe*, Op. No. 5338 (S.C. Ct. App. filed August 5, 2015) (Shearouse Adv. Sh. No. 30 at 58 n.2). From that observation, the Court of Appeals 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.*

The Court of Appeals' conclusion (with its assumptions) is incorrect. The plaintiff in *Gilliland* did not offer any eyewitness affidavit. (*See* Record on Appeal, *Gilliland v. Doe*, 357 S.C. 197, 592 S.E.2d 626 (2004).) However, the John Doe defendant in *Gilliland* did not challenge Gilliland's failure to provide an eyewitness affidavit. At the time that *Gilliland* was tried, on or around March 8, 2000, this Court had not yet issued its decision in *Collins*, which firmly established that the affidavit requirement was mandatory and could not be replaced by trial testimony.[2] Accordingly, *Gilliland* proceeded to trial, despite the lack of an eyewitness affidavit, and the John Doe defendant in *Gilliland* argued that the *trial testimony* was insufficient to meet the plaintiff's burden of proof 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)).

---

[2] This Court issued its opinion in *Collins* on December 30, 2002.

Accordingly, the issue on appeal 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, this Court identified precisely that as the 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. 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.

Thus, *Gilliland* was simply not an affidavit case, and the requirements to satisfy the affidavit mandate of Section 37-77-170 were not at issue. *Gilliland* does not abrogate *Collins* or otherwise authorize the use of trial testimony to supplement the missing elements of an eyewitness affidavit. Whereas *Gilliland* concerned the sufficiency of the evidence presented at trial, the instant appeal concerns an entirely distinct issue: whether the Bernardo Affidavit strictly complies with the affidavit requirement of S.C. Code Section 38-77-170. It does not.

Therefore, the Court of Appeals' reliance on *Gilliland* as purportedly authorizing it to evaluate whether the statutory affidavit requirement was satisfied by comparing the Bernardo Affidavit to the corroborative trial testimony is inappropriate. The Bernardo Affidavit must be evaluated standing alone. The Court of Appeals' decision comparing the Bernardo Affidavit to Mr. Tucker's trial testimony must be corrected in light of

Collins' requirement of strict compliance with the affidavit requirement of Section 38-77-170, without reference to trial testimony.

Without reference to the trial testimony, there is no way to find that the Bernardo Affidavit sufficiently attested to the involvement of an unknown vehicle. The affidavit offered no connection to an unknown vehicle, and it even speculates to the cause of the accident. The affidavit mandate of Section 38-77-170(2) is not satisfied merely because Mr. Bernardo attested that he witnessed the accident itself. *See Bradley v. Doe*, 374 S.C. 622, 638, 649 S.E.2d 153, 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."). There is no way that a veer, caused "as if" there was "something" in the road, can constitute attestations of the true facts of an unknown vehicle's involvement in Tucker's accident, as the Court of Appeals' decision finds.

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 insurance carriers by allowing them an opportunity to evaluate potentially fraudulent claims. *Collins*, 352 S.C. at 466, 574 S.E.2d at 741. The Court of Appeals' opinion renders the affidavit requirement imposed by the General Assembly meaningless and conflicts with this Court's holding in *Collins*, requiring strict compliance with the requirement of an affidavit attesting to the "truth of the facts of the

accident." This Court should issue a writ of certiorari to correct these errors regarding the interpretation of section 38-77-170(2).

II. The Court of Appeals erred in concluding that Doe's argument that a statutory violation, standing alone, should not constitute evidence of recklessness to support punitive damages is unpreserved, and the argument should be considered resulting in judgment for Doe on the issue of punitive damages.

On appeal, Doe argued that a statutory violation, standing alone, should not be sufficient evidence of recklessness to require the submission of punitive damages to the jury, in contravention to this Court's rule in *Wise v. Broadway* and its progeny. *See Wise v. Broadway*, 315 S.C. 273, 276, 433 S.E.2d 857, 859 (1993) ("The causative violation of a statute constitutes negligence *per se* and is evidence of recklessness and willfulness, requiring the submission of the issue of punitive damages to the jury."). The statute found to be violated by Doe in this action is S.C. Code Section 56-5-4100(A), which provides that "[n]o vehicle may be driven or moved on any public highway unless the vehicle is so constructed or loaded as to prevent any of its load from dropping, sifting, leaking, or otherwise escaping from the vehicle." S.C. Code Ann. § 56-5-4100(A). Under this strict liability statute, if any of a vehicle's load drops while in transit, then the vehicle necessarily was not loaded as to prevent the load dropping, even if there is no evidence in the record that the vehicle was loaded recklessly or even negligently. Thus, any time a load drops from a vehicle, the statute is violated, and the *Wise v. Broadway* rule *requires* that the operator of the vehicle be subjected to possible punitive damages at the hands of the jury, no matter how prudent and reasonable the operator acted in loading the vehicle.

The Court of Appeals found that Doe failed to preserve for appellate review its challenge to the binding *Wise v. Broadway* rule 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. 5338 (S.C. Ct. App. filed August 5, 2015) (Shearouse Adv. Sh. No. 30 at 65-66). The Court of Appeals' holding is contrary to this Court's prior jurisprudence, and a writ of certiorari should be issued to reverse the decision of the Court of Appeals on this issue as well.

"This Court does not require parties to engage in futile actions in order to preserve issues for appellate review." *Staubes v. City of Folly Beach*, 339 S.C. 406, 415, 529 S.E.2d 543, 547 (2000). It is futile for a party to ask a trial court to contravene binding precedent because the trial court lacks authority to alter the law. *See Wilkinson v. E. Cooper Cmty. Hosp., Inc.*, 410 S.C. 163, 170, 763 S.E.2d 426, 430 n.5 (2014) (finding that an argument against binding precedent is preserved, despite the appellant's failure to raise it to the lower court, because raising it would be futile as the lower court lacked authority to alter the law).

In this case, the trial court would have erred had it not instructed the jury on the current state of the law, 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. *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."). Similarly, 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 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.").

Regardless, contrary to the Court of Appeals' holding, Doe sufficiently preserved the issue for appellate review by futilely objecting. 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. (App. 219.) 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. (*Id.*) 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." (App. 397.) Nothing more was required of Doe to preserve its argument for appeal.

This Court should go further and grant a writ of certiorari to review the *Wise v. Broadway* decision. Requiring the submission of punitive damages to the jury for a violation of a strict liability statute, with no other evidence of recklessness in the record,

is contrary to the purposes behind punitive damages, which are "to punish the wrongdoer and deter the wrongdoer and others from engaging in similar reckless, willful, wanton, or malicious conduct in the future." *Clark v. Cantrell*, 339 S.C. 369, 378, 529 S.E.2d 528, 533 (2000). If there is no evidence that Doe engaged in reckless, willful, wanton, or malicious conduct, yet still violated a strict liability statute like the one at issue here, there is no conduct to punish or deter. It is inappropriate for a statutory violation, standing alone, to serve as sufficient evidence of recklessness to require submission of punitive damages to the jury. *See Wise v. Broadway*, 315 S.C. at 282, 433 S.E.2d at 862 (Toal, J., dissenting) (stating that the rule equates negligence per se with recklessness per se and turns every minor accident and fender bender into a punitive damages case).

Further, the South Carolina legislature has made the determination that a plaintiff must prove its entitlement to punitive damages by clear and convincing evidence. S.C. Code Ann. § 15-33-135. Allowing a plaintiff to prove the violation of a statute by a preponderance of the evidence—yet then allowing the violation of that statute to serve as evidence of recklessness—bypasses the heightened burden of proof to seek punitive damages required by South Carolina law. Respectfully, *Wise v. Broadway* was wrongfully decided, and the Court should grant a writ of certiorari to review that decision.

III. The Court of Appeals erred in concluding that Tucker presented sufficient evidence of causation that the probable cause, rather than merely a possible cause, of Tucker's accident was the object falling off of Doe's truck.

Finally, this Court should review the Court of Appeals' holding that there was sufficient evidence of causation in the record to deny Doe's motions for directed verdict and JNOV. The Court of Appeals' holding is at odds with the principle of South

Carolina law that the evidence of causation in the record must be "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).

There is no link in the record for the crucial causal step: an object leaving Doe's truck and ending in the road. There is any number of explanations for an object coming to be in the road, only one of which is the possibility that it was dropped from Doe's truck due to improper strapping. Presupposing that the object was dropped by Doe inappropriately shifts the burden to Doe to disprove. Tucker failed to present evidence showing that the probable cause of the object being in the road was Doe dropping it. As a result, the Court of Appeals erred in failing to reverse the decision of the trial court to grant judgment in favor of Doe.

In similar object-in-road cases elsewhere, the missing causative leap from an object ending in the road to the cause being the negligence of a vehicle has been made through *res ipsa loquitur*. *See, e.g.*, *Khirieh v. State Farm Mut. Auto. Ins. Co.*, 594 So. 2d 1220 (Ala. 1992) (holding that the fact that a truck bench seat was in the road was sufficient to apply *res ipsa loquitur* to find that a person was negligently operating a motor vehicle, causing the truck bench seat to be in the road, and thus, the plaintiff could recover from her UM insurer); *Farmer v. Werner Transp. Co.*, 284 N.E.2d 861, 865 (Ind. App. 1972) (holding that a collision with an air conditioning unit in the road was

insufficient to reach a *res ipsa loquitur* presumption because the plaintiff did not show exclusive control of the unit by the defendant); *Layton v. Palmer*, 309 S.W.2d 561, 564 (Mo. 1958) (finding that hay bales falling from a vehicle onto a highway was sufficient for a jury to apply *res ipsa loquitur* to find that bales of hay would not ordinarily fall into the road without negligent loading of the hay on a vehicle). However, *res ipsa loquitur* is not available under South Carolina law, and Tucker was required to prove every element, including causation, by affirmative evidence, even if circumstantial. *Watson v. Ford Motor Co.*, 389 S.C. 434, 453, 699 S.E.2d 169, 179 (2010).

Thus, the Court of Appeals erred in failing to reverse the trial court and in failing to grant judgment notwithstanding the verdict in favor of Doe on the issue of causation.

Conclusion

For the foregoing reasons, this Court should issue a writ of certiorari to reverse the decision of the Court of Appeals and grant judgment notwithstanding the verdict in favor of Doe.

Respectfully submitted,

NELSON MULLINS RILEY & SCARBOROUGH LLP

By: _____

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

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

Columbia, South Carolina
December 21, 2015

THE STATE OF SOUTH CAROLINA
In The Supreme Court

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

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

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

v.

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

PROOF OF SERVICE

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

Pleadings:

Petition for Writ of Certiorari

Counsel Served:

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

Robert N. Hill
Law Offices of Robert Hill
Post Office Box 1323
Lexington SC 29071-1323

Lisa P. Whitehurst
Administrative Assistant

December 21, 2015

Nelson Mullins

Nelson Mullins Riley & Scarborough LLP
Attorneys and Counselors at Law
1320 Main Street / 17th Floor / Columbia, SC 29201
Tel: 803.799.2000 Fax: 803.256.7500
www.nelsonmullins.com

Graham R. Billings
Tel: 803.255.9724
graham.billings@nelsonmullins.com

December 21, 2015

The Honorable Daniel E. Shearouse
Clerk of Court
South Carolina Supreme Court
1231 Gervais 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 Mr. Shearouse:

Enclosed please find the original and seven copies of a Petition for Writ of Certiorari in regard to the above-referenced matter. We would ask that you file the original and return a clocked-in copy to us via our courier. Also enclosed are two copies of the Appendix and our check in the amount of $100.00 as the required filing fee.

By copy of this letter to the Clerk of the Court of Appeals and counsel of record, we are serving them with a copy of the Petition.

Very truly yours,

Graham R. Billings

GRB:lpw
Enclosures
cc: The Honorable Jenny Abbott Kitchings
William P. Hatfield, Esquire
Robert N. Hill, Esquire