THE STATE OF SOUTH CAROLINA
In The Supreme Court

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SC 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.

REPLY TO RETURN TO PETITION FOR WRIT OF CERTIORARI

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Introduction

The Court should grant a writ of certiorari in this matter. The effect of failing to do so will leave uncorrected a published Court of Appeals case that conflicts with the law, as handed down by this Court. The Petitioner has always maintained that the affidavit in this case was insufficient under the law. That position has never changed. Respondent's characterization of the petition as a "u-turn" is wrong. The fact that Petitioner has pointed out, in support of its position, that a review of the underlying *Gilliland* file contents shows the Court of Appeals has also made a factual error, further supports the grant of the petition.

Argument

I. This Court should prevent an abrogation of its decision in *Collins*.

Doe has maintained, at *every* instance—in its summary judgment motion, directed verdict motions, post-trial motion, initial brief to the Court of Appeals, reply brief, and petition to this Court for a writ of certiorari—that the Bernardo Affidavit fails to satisfy the causation standard of S.C. Code Ann. § 38-77-170(2), because it does not attest, whatsoever, to "what actions of the unknown driver contributed to the accident." (*See* App. 215; 259; 317; 388; 454; 511-12; 568; Pet. for Writ of Cert. at p. 9.) Rather than replying to this argument, Tucker argues that Doe has "cut a U-turn" and is arguing a different legal position from what it argued to the Court of Appeals. Tucker is wrong.

The cause of Tucker's confusion is Doe's point in its Petition for Certiorari that the Court of Appeals misinterpreted the ***facts*** of *Gilliland v. Doe*, 357 S.C. 197, 201, 592 S.E.2d 626, 628 (2004). Tucker points out that Doe understood the *Gilliland* facts at one time just as the Court of Appeals does, noting Doe initially stated in its brief to the Court

of Appeals that *Gilliland* involved an affidavit. (*See* App. 457.) Tucker then assails Doe's subsequent "rummag[ing] through the *Gilliland* file" to learn and point out to this Court that *Gilliland* did not involve a contest of an affidavit[1]. Doe has a duty of candor to point out that *Gilliland* did not involve a contest regarding the contents of an affidavit, once Doe realized that fact. That *Gilliland* did not involve such a contest further supports, as further explained below, what Doe has argued all along: that the Bernardo Affidavit's statement that the accident was caused by "something in the roadway" does not, and cannot, describe "what actions of the unknown driver contributed to the accident." *Gilliland*, 357 S.C. at 201, 592 S.E.2d at 628.

The Court of Appeals held that the Bernardo Affidavit sufficiently described "what actions of the unknown driver contributed to the accident," when supported by the plaintiff's *trial testimony*. (*See* App. 553 ("[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.").) In determining that the sufficiency of the eyewitness affidavit ***could be*** supported by *trial testimony*, the Court of Appeals analogized to *Gilliland*, in which this Court held that the eyewitness's trial testimony sufficiently corroborated the plaintiff's trial 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. 357 S.C. at 202, 592 S.E.2d at 629. The Court of Appeals incorrectly assumed that the same statements the *Gilliland* eyewitness made in trial testimony "must have been included" in the eyewitness's affidavit there. (App. 552 n.2.) Thus, because it assumed that *Gilliland* allowed an affidavit supported by trial testimony, the Court of Appeals reasoned that the Bernardo Affidavit also

[1] This was also pointed out to the Court of Appeals in Doe's rehearing petition.

satisfied the causation requirement of Section 38-77-170(2), when supported by Tucker's trial testimony. (App. 553-54.)

The Court of Appeals' determination that *Gilliland* authorizes comparing the eyewitness affidavit to the trial testimony is directly contrary to this Court's holding in *Collins v. Doe*, that Section 38-77-170(2) requires strict compliance and that trial testimony cannot be a functional equivalent to the affidavit. 352 S.C. 462, 471, 574 S.E.2d 739, 743 (2002). The Court of Appeals made a mistaken factual assumption that the *Gilliland* Court must have approved of the eyewitness *affidavit* by reference to the plaintiff's testimony at trial. We know this is a mistake after reviewing the underlying *Gilliland* file, as there was no contest there about an affidavit.

The Court should issue a writ of certiorari to correct the Court of Appeals' decision in order to prevent an abrogation of this Court's holding in *Collins*. Under *Collins*, section 38-77-170(2) requires a strictly compliant affidavit that attests to "what actions of the unknown driver contributed to the accident" without support from trial testimony. *Collins*, 352 S.C. at 471, 574 S.E.2d at 743. The Court of Appeals' decision here is in direct contravention to this rule, allowing an affidavit that requires corroboration from trial testimony to be sufficient under section 38-77-170(2).

Tucker argues that Doe "next ignores the statute's history," by suggesting that the eyewitness affidavit must provide "direct evidence on causation or provide a clear answer on causation." (Return at p. 6.) Similarly, the Court of Appeals stated that Doe contends that the affidavit must "fully explain the unknown vehicle's involvement." (App. 554.) To be clear, Doe has not argued, and does not argue, that either of these extremes is required by the statute. All that is required is an affidavit from an eyewitness that

describes "what actions of the unknown driver contributed to the accident" without the need for reference to trial testimony. The Bernardo Affidavit does not offer ***any*** connection to an unknown vehicle. It only states that the accident resulted, because Tucker swerved "as if to avoid something in the roadway." (App. 420.) "Something" is not circumstantial evidence of an unknown driver or vehicle, and requiring that the affiant attest to more than "something" is not the same as requiring he or she fully explain all of the details of the accident and all of the details of the involvement of another vehicle. The Court of Appeals, thus, erred in holding that "something in the roadway" was sufficient circumstantial evidence that an unknown driver contributed to the cause of the accident, and this Court should issue a writ of certiorari to correct this error in order to prevent the undermining of the eyewitness affidavit requirement of Section 38-77-170(2).

II. Doe's argument that the *Wise v. Broadway* rule is inappropriate is preserved as an argument against substantive law, and the Court should review the decision.

Tucker argues that Doe's challenge to the *Wise v. Broadway* rule is unpreserved, citing to various cases finding that a failure to object to a procedural error rendered an argument unpreserved on appeal. (*See* Return at pp. 8-11.) Tucker also cites to several occasions in which Doe acknowledged to the trial court that the *Wise v. Broadway* rule was controlling, suggesting that these concessions also rendered the argument unpreserved. (*See id.*) Doe fully agrees that it disclosed the controlling law to the trial court, and Doe has never suggested that the *Wise v. Broadway* rule is not the law. None of Tucker's citations refute Doe's primary preservation argument: that an argument purely against binding substantive law is preserved without an objection to the trial court.

This Court has held that an argument on appeal against binding precedent is preserved despite a failure to raise it to the trial court, because raising it to the trial court would be futile. The trial court lacks authority to alter the law. *Wilkinson v. E. Cooper Cmty. Hosp., Inc.*, 410 S.C. 163, 170, 763 S.E.2d 426, 430 n.5 (2014). Courts across the country have agreed with this Court's rule in *Wilkinson*. *See, e.g.*, *Com. v. Mendes*, 974 N.E.2d 606, 611 (Mass. 2012) ("Although the defendants did not object at trial to the admission of the certificates on confrontation clause grounds, such an objection would have been futile at the time of the trial because of our decision in *Commonwealth v. Verde* . . . ." (citation omitted)); *Sanchez v. Lee*, Case No. 10 7719, 2011 WL 924859, at *33 (S.D.N.Y. Mar. 16, 2011) (Peck, Mag.); *Ex parte Hathorn*, 296 S.W.3d 570, 572 (Tex. Crim. App. 2009); *People v. Sandoval*, 161 P.3d 1146, 1154 n.4 (Cal. 2007) ("Had defendant requested a jury trial on aggravating circumstances, that request clearly would have been futile, because the trial court would have been required to follow our decision in *Black I* and deny the request."); *People v. Fike*, 577 N.W.2d 903, 906 (Mich. App. 1998) (finding that it would have been futile to object to confession that was properly admitted under substantive law); *State v. Brown*, 138 N.H. 649, 652, 644 A.2d 1082, 1084 (1994) ("We have recognized a limited exception to the preservation rule, however, when it would have been futile [for the defendant] to object under the law in effect at the time of trial." (internal quotation omitted)); *St. Pierre v. State*, 620 P.2d 1240, 1243 (Nev. 1980); *United States v. Wanger*, 426 F.2d 1360, 1360 (9th Cir. 1970); *State v. Goodyear*, 413 P.2d 566, 567-68 (Ariz. 1966). Tucker cites no cases to the contrary.

Instead, Tucker claims that it would be unfair to the trial court to "tell a trial judge that the law is one thing and tell this Court the opposite." (Return at p. 11.) To the

contrary, it would be *more* unfair to the trial court for South Carolina law to require that a litigant make a wholly meritless objection, baiting the trial court into erring, solely for the litigant to have the law reviewed on appeal. *See* Rule 3.3, SCRPC, Rule 407, SCACR ("A lawyer shall not knowingly . . . make a false statement of fact or law to a tribunal . . . ."). Nor should South Carolina law require that a litigant object to a trial court's correct instructions, then advise the court that the objection was meritless and that the court would commit reversible error if it sustained the objection. The purpose of the futility doctrine is to avoid such procedural gimmicks, which have no relevance to the merits of the case before the trial court. *See Staubes v. City of Folly Beach*, 339 S.C. 406, 415, 529 S.E.2d 543, 547 (2000) ("This Court does not require parties to engage in futile actions in order to preserve issues for appellate review.").

South Carolina law has recognized perceived futility, as a sufficient basis for finding an argument preserved. *See State v. Pace*, 316 S.C. 71, 74, 447 S.E.2d 186, 187 (1994) (holding that argument on appeal regarding trial judge's comments regarding defense counsel's gender and conduct was preserved where "tone and tenor" of the judge's comments rendered objection futile). It would be entirely inconsistent if actual, substantive futility was unpreserved without an objection.

A failure to object to a ***misstatement*** of the law is a waiver of that error on appeal. *Smith v. City of Greenville*, 229 S.C. 252, 257, 92 S.E.2d 639, 642 (1956). Where the trial court did not err and accurately stated the law, no objection is required to preserve an argument against the law. *Wilkinson*, 410 S.C. at 170, 763 S.E.2d at 430 n.5. Doe's challenge to the *Wise v. Broadway* rule is preserved. Certiorari should be granted to correct the Court of Appeals' opinion on this point.

This Court should review the *Wise v. Broadway* rule that the 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." *Wise v. Broadway*, 315 S.C. 273, 276, 433 S.E.2d 857, 859 (1993). It is inappropriate to require the submission of punitive damages to the jury when there is no evidence in the record of willfulness or recklessness.

The record is devoid of any evidence that Doe intentionally or consciously disregarded its statutory duty to load the vehicle, such that none of the load would drop. There is some evidence that another truck only used one strap on something that "looked just like" the bearing block, but that truck also was carrying "pipes and rebar," and there is no evidence regarding the degree of restraint that would be required to properly secure this load or whether negligence or recklessness was involved. (App. 47-48, 52.) Although the trial court concluded that Doe was reckless, because he failed to warn the authorities of the danger (App. 19), the record simply does not support such a conclusion. The only evidence regarding Doe's purported failure to warn is that a single cell phone tower did not process any cell phone calls placed to the Florence County 911 call center between 10 p.m. and 2 a.m., although it did receive five other 911 calls, and the South Carolina Department of Transportation did not receive any calls. (App. 224-31.) There is no evidence regarding any calls directed through other towers, calls to other counties' 911 call centers, calls not made on a cell phone, calls to the Highway Patrol or any other authorities, or *any* other method of having an object moved. That one cell phone tower did not transfer any calls to Florence County 911 between 10 p.m. and 2 a.m. is insufficient to infer that Doe recklessly failed to warn authorities.

Tucker adds several other facts, not in the record, demonstrating why there is evidence of recklessness, making it inappropriate to review the *Wise v. Broadway* rule: that Doe "had to know" that he had a large object that would be dangerous if it fell, yet did not strap the object through its hole in the middle. (Return at p. 12.) There is nothing in the record about Doe's knowledge, or the knowledge he "had to" have had. Other than the plaintiff's self-serving testimony, there is no evidence that the object was ever in the road, and there is no evidence, whatsoever, that Doe caused the object to be in the road. There was only one inference to take from the evidence offered at trial—that, without the evidence of a statutory violation, Doe was not reckless, as a matter of law.

As then-Justice Toal stated in her dissent in *Cooper by Cooper v. Cnty. of Florence*,

> 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.

306 S.C. 408, 415, 412 S.E.2d 417, 421 (1991) (Toal, J., dissenting) (citing *Cubbage v. Roos*, 181 S.C. 188, 186 S.E. 794, 796 (1936)). This result happened here; in a case devoid of any evidence that Doe actually caused the object to purportedly be in the road, punitive damages were awarded solely because of evidence of a statutory violation. This Court should, thus, issue a writ of certiorari to review the *Wise v. Broadway* rule.

III. This Court should issue a writ of certiorari to correct the Court of Appeals' error in holding that Tucker presented sufficient evidence at trial that Doe caused the object to be in the road.

Finally, because there was insufficient evidence that Doe caused the object to be in the road, without the impermissible application of *res ipsa loquitur*, the Court of Appeals erred in affirming the decision of the trial court to deny Doe's directed verdict motion. This Court should issue a writ of certiorari to correct this error to prevent an erosion of the bar on the use of *res ipsa loquitur* under South Carolina law.

There is no evidence that any allegedly improper strapping by Doe caused an object to be in the road. Mr. Tucker's testimony that he hit an object in the road and Mr. Wilson's testimony that he saw an object on a truck that he considered to be improperly strapped down is still missing a causative connection: that Doe caused the object to be in the road. Because Tucker failed to present evidence of causation, it cannot be inferred under South Carolina law. *Watson v. Ford Motor Co.*, 389 S.C. 434, 453, 699 S.E.2d 169, 179 (2010).

McQuillen v. Dobbs, cited by Tucker, demonstrates the difference between permissible inferences made from circumstantial evidence and impermissible speculation based on *res ipsa loquitur*. 262 S.C. 386, 392, 204 S.E.2d 732, 735 (1974). In *McQuillen*, the defendant's testimony that a fire was roaring up a home's stovepipe supported the inference that the fire was caused by a fire in the stovepipe, which could "only" have been caused by an excessive amount of fuel, which could "only" have been entered through control devices on the furnace or the outside tank. *Id.* There was no excess fuel in the outside tank, supporting the inference that a malfunction in the control

valve, which had been improperly maintained, caused the fire. *Id.* Such is the proper use of inferences where only one conclusion could be derived from circumstantial evidence.

A plaintiff is required to prove every element by affirmative evidence, including causation. *Snow v. City of Columbia*, 305 S.C. 544, 555, 409 S.E.2d 797, 803 n.7 (Ct. App. 1991). "Although causation may be established by circumstantial evidence, and is usually a question for the jury, it nonetheless must be based on probabilities not mere possibilities." *Nguyen v. Uniflex Corp.*, 312 S.C. 417, 419-20, 440 S.E.2d 887, 889 (Ct. App. 1994) (citations omitted). Presupposing that the object was dropped inappropriately shifts the burden to the defendant to disprove. *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). The Court should issue a writ of certiorari to correct the Court of Appeals' error and reaffirm that *res ipsa loquitur* is not available under South Carolina law.

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.

[*signature page attached*]

Respectfully submitted,

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PROOF OF SERVICE

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

Pleadings:

Petitioner's Reply to Respondent's Return to the Petition for Writ of Certiorari

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