The State of South Carolina
In the Court of Appeals

Appeal from Darlington County
Court of Common Pleas

Honorable J. Michael Baxley

Case # 2010-CP-16-0315
Appellate Case # 2014-000134

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 ll.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 it 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 at160. 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), SCRCP; 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 l.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

ll.9-15. The jury could have thus agreed with the DOT engineer that a vehicle had to be involved. ROA 232 ll.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. at172 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 is 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 l.17 - 54 l.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 l.19 - 77 l.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 Rule 211(b) Certificate

I certify that the Respondent's Final Brief complies with Rule 211(b), SCACR, with three exceptions. The Final Brief omits: (1) the addendum included in the Initial Brief; (2) the reference to an addendum in the Initial Brief's Table of Contents; and (3) the reference to an addendum in the Initial Brief in footnote 1 on page 9. The Respondent has pending a motion for the Court to accept the Final

Brief with these changes and to accept this Rule 211(b), SCACR,

Certificate.

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I certify that I, Robert N. Hill, am co-counsel for the Respondent and that I on October 24, 2014 served the Respondent's Final Brief by first class mail, sufficient postage prepaid, addressed to:

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