THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM DARLINGTON COUNTY
Court of Common Pleas
Honorable J. Michael Baxley

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

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

v.

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

FINAL BRIEF OF APPELLANT

C. Mitchell Brown
William C. Wood, Jr.
Michael J. Anzelmo
Graham R. Billings
NELSON MULLINS RILEY & SCARBOROUGH LLP
1320 Main Street / 17th Floor
Post Office Box 11070 (29211-1070)
Columbia, South Carolina 29201
803.799.2000

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

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Columbia, South Carolina 29201
803.799.2000

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

Table of Contents

Table of Authorities ii

Statement of Issues on Appeal 1

Statement of the Case 2

Statement of the Facts 4

Argument 6

I. The trial court erred in holding that the sworn witness affidavit of Anthony Bernardo satisfied section 38-77-170 because it failed to provide a causative link between the accident and an unknown vehicle, was speculative, and was untimely. 6

  A. The Bernardo Affidavit was improper because it did not provide a causative link between an unknown vehicle and the accident and was speculative about the cause of the accident. 6

  B. Section 38-77-170(2) was not satisfied because the affiant did not testify at trial and the affidavits were not compliant with the statute and untimely. 12

II. The trial court erred in holding that Tucker presented sufficient evidence to create a question of fact about whether an unknown vehicle proximately caused his accident by leaving an object in the road. 16

  A. The evidence in the record that Doe inadequately strapped the bearing block is not sufficiently probative. 17

  B. There is no evidence in the record explaining how the bearing block came to be in the road by connecting it to an unknown vehicle. 19

III. There was insufficient clear and convincing evidence of recklessness to avoid JNOV as to the issue of punitive damages. 24

Conclusion 28

Table of Authorities

Page(s)

Cases

Adams v. Clarendon Cnty. Sch. Dist. No. 2,
270 S.C. 266, 241 S.E.2d 897 (1978) 14

Adkins v. Hontz,
337 S.W.3d 711 (Mo. Ct. App. 2011) 27

Attaway v. One Chevrolet 5-P Truck, Motor No. LEA 852870,
228 S.C. 559, 91 S.E.2d 270 (1956) 24

Bradley v. Doe,
374 S.C. 622, 649 S.E.2d 153 (Ct. App. 2007) 9, 10, 21

Callison v. Charleston & W.C. Ry. Co.,
106 S.C. 123, 90 S.E. 260 (1916) 24

Chakrabarti v. City of Orangeburg,
403 S.C. 308, 743 S.E.2d 109 (Ct. App. 2013) 16

Clark v. Cantrell,
339 S.C. 369, 529 S.E.2d 528 (2000) 5

Collins v. Doe,
352 S.C. 462, 574 S.E.2d 739 (2002) 12, 13, 14, 15, 16

Doe v. S. Carolina Dep't of Soc. Servs.,
407 S.C. 623, 757 S.E.2d 711 (2014) 14

Ecclesiastes Prod. Ministries v. Outparcel Associates, LLC,
374 S.C. 483, 649 S.E.2d 494 (Ct. App. 2007) 24, 25

Enos v. Doe,
380 S.C. 295, 669 S.E.2d 619 (Ct. App. 2008) 12, 15

Farmer v. Werner Transp. Co.,
152 Ind. App. 609, 284 N.E.2d 861 (1972) 22

Gilliland v. Doe,
357 S.C. 197, 592 S.E.2d 626 (2004) 8, 10, 11, 1

Gilliland v. Doe,
351 S.C. 497, 570 S.E.2d 545 (Ct. App. 2002) 8

Wausau Underwriters Ins. Co. v. Howser,
309 S.C. 269, 422 S.E.2d 106 (1992) 8

Khirieh v. State Farm Mut. Auto. Ins. Co.,
594 So. 2d 1220 (Ala. 1992) 23

Kinney v. Butcher,
131 S.W.3d 357 (Ky. Ct. App. 2004) 7

Layton v. Palmer,
309 S.W.2d 561 (Mo. 1958) 23

Mastec N. Am., Inc. v. Wilson,
325 Ga. App. 863, 755 S.E.2d 257 (2014) 27

Ex parte Morris,
367 S.C. 56, 624 S.E.2d 649 (2006) 13

Nguyen v. Uniflex Corp.,
312 S.C. 417, 440 S.E.2d 887 (Ct. App. 1994) 20

Pouzanova v. Morton,
S-14442, 2014 WL 2795894 (Alaska June 20, 2014) 26, 27

Shealy v. Doe,
370 S.C. 194, 634 S.E.2d 45 (Ct. App. 2006) 11, 12

Snow v. City of Columbia,
305 S.C. 544, 409 S.E.2d 797 (Ct. App. 1991) 23

Tuttle v. Allstate Ins. Co.,
134 Wash. App. 120, 138 P.3d 1107 (2006) 21, 22

Watson v. Ford Motor Co.,
389 S.C. 434, 699 S.E.2d 169 (2010) 10, 23

Wise v. Broadway,
315 S.C. 273, 433 S.E.2d 857 (1993) 24, 26, 27

Statutes

S.C. Code Ann. § 15-33-135 25

S.C. Code Ann. § 38-77-170 .... 2, 3, 6, 7, 8, 10, 12, 13, 14, 15, 16, 20

S.C. Code Ann. § 56-5-4100 .... 26, 27

Other Authorities

29 Am.Jur.2d *Evidence* 313 (1994) 11

Statement of Issues on Appeal

I. Whether the trial court erred in holding that the sworn witness affidavit of Anthony Bernardo satisfied section 38-77-170 because it failed to provide a causative link between the accident and an unknown vehicle, was speculative, and was untimely?

II. Whether the trial court erred in holding that Tucker presented sufficient evidence to create a question of fact about whether an unknown vehicle proximately caused his accident by leaving an object in the road?

III. Whether there was sufficient clear and convincing evidence of recklessness to avoid JNOV as to punitive damages?

Statement of the Case

Respondent Bobby Lee Tucker, Sr. ("Tucker") filed this John Doe action pursuant to S.C. Code Ann. § 38-77-170 on May 14, 2010 against Appellant John Doe, Individually, and d/b/a Doe Trucking Company ("Doe") seeking damages for personal injuries that resulted when he lost control of his tractor-trailer and struck a concrete column in the median of the road. {Compl. ¶ 3; R. 21-22}. Tucker alleged that he struck a six-hundred to seven-hundred pound steel bearing block, which had allegedly fallen off of a tractor-trailer that had passed through the area earlier in the night, causing him to lose control and crash into the concrete abutment. {Compl. ¶¶ 3-6; R. 21-23}. Tucker sought actual and punitive damages from the owner and operator of the unknown vehicle that allegedly carried the object. {Compl. ¶ 8; R. 24}. Tucker's uninsured motorist ("UM") insurance carriers answered the Complaint.

On July 19, 2010, two months after the initiation of this action, Tucker filed the affidavit of Anthony Bernardo pursuant to the witness affidavit requirement of S.C. Code Ann. § 38-77-170(2) for an accident caused by an unknown vehicle without physical contact. {July 19, 2010 Affidavit of Anthony Bernardo; R. 414}. That affidavit did not include statutorily required language, so Tucker served a second affidavit of Anthony Bernardo that included the statutory language on March 4, 2011, approximately ten months after the Complaint was filed. {March 4, 2011 Affidavit of Anthony Bernardo; R. 416}.

The trial in this action commenced on April 15, 2013. {Tr. 1; R. 26}. At trial, Tucker offered testimony from eight witnesses: himself; the paramedic who first assisted Tucker after the accident; the highway patrolman who investigated the

accident; the tow truck driver that towed away his damaged truck; a truck driver who was at a truck stop about two hours before and saw a tractor-trailer carrying an object that looked similar to the one found near the accident area; another Tucker Enterprises employee who viewed the location of the accident; the doctor who treated Tucker's injuries; and a materials science expert. {Tr. 2-3; R. 27-28}. Anthony Bernardo did not testify, and no independent witnesses who testified at trial observed the accident. The plaintiff was the only eyewitness to the accident at the trial.

At trial, Doe moved for a directed verdict based on (1) the failure of Tucker to satisfy the requirements of S.C. Code Ann. § 38-77-170; (2) the failure of Tucker to meet his burden of proof to show that Doe was negligent; (3) the failure of Tucker to submit sufficient evidence such that the jury may consider punitive damages; and (4) the defense of comparative negligence. {Tr. 304-09; R. 211-16}. The trial court denied the directed verdict motions at the close of Tucker's case and again at the close of all of the evidence. {Tr. 306-09, 348-51; R. 213-16, 255-58}.

The jury returned a verdict in favor of Tucker in the amount of $2,500,000 in actual damages and $2,500,000 in punitive damages. {Verdict form; R. 18}. Doe timely filed post-trial motions for judgment notwithstanding the verdict ("JNOV"), new trial absolute, and new trial *nisi remittitur*, and on December 18, 2013, the trial court remitted the punitive damages award to $500,000 and denied the remaining motions. {Defendant's Post Trial Motions, 12/18/13 Order; R. 375-76, 8}. Doe timely served its notice of appeal on January 16, 2014. {Notice of Appeal; R. 418-419}.

Statement of the Facts

On April 30, 2010, at approximately 12:15 a.m., Bobby Lee Tucker, Sr. lost control of the tractor-trailer he was driving down Interstate 95 and struck a concrete abutment in the median of the highway. {Tr. 266-69; R. 173-76}. At the time, Tucker was driving south on I-95 from Darlington, South Carolina to deliver cars as part of his job as a part-time truck driver. {Tr. 262-63; R. 169-70}. Tucker testified that the car in front of him suddenly braked and switched lanes, and, because he could not see what was ahead of him, he decided to follow it and switch lanes. {Tr. 266; R. 173}. However, another car was in the left lane beside him and prevented him from switching lanes. {Tr. 266; R. 173}. He testified that he saw an object like a cardboard box in the road ahead of him. {Tr. 266; R. 173}. Tucker stated that he was unable to avoid the object and the left front wheel of his truck struck it, causing him to lose control of his truck, which collided with a concrete column in the median of the road supporting an overpass. {Tr. 266-69; R. 173-76}.

Tucker alleged that two men were driving behind him and stopped to assist him. {Tr. 270; R. 177}. One of them was Anthony Bernardo, who submitted the affidavit at issue. {Tr. 270; R. 177}. A paramedic, Billy Collins, assessed Tucker, who was stuck inside the damaged truck, and treated his injuries. {Tr. 168-72; R. 143-47}. Mr. Collins testified that he spoke to the two men, and they told him that they did not know "exactly what had taken place," but "they saw the accident occur." {Tr. 175; R. 150}. Mr. Collins testified that Tucker told him that he swerved to miss something in the road and hit the support, and Mr. Collins prepared his report based on that information. {Tr. 184; R. 159}.

A highway patrolman, Bradley Allen Suggs, investigated the cause of the accident and did not see any objects in or near the road. {Tr. 154-61; R. 129-36}. He found there were "no witnesses" to the accident and "nobody saw it." {Tr. 157-58; R. 132-33}. Officer Suggs found no evidence that Tucker struck an object in the road. {Tr. 158-59; R. 133-34}.[1] Thereafter, a tow truck driver who came to tow Tucker's truck, Albert Vereen, observed skid marks about seventy-five to one hundred feet behind the truck. {Tr. 120-21; R. 95-96}. Mr. Vereen also noticed an object approximately thirty feet to the right of the truck, off the right side of the road, which was approximately two hundred feet from where Tucker lost control. {Tr. 127-28; R. 102-03}. The object was a steel bearing block, approximately eighteen inches wide, eighteen inches long, eleven inches high, and estimated to weigh around six hundred and fifty pounds. {Tr. 84-87; R. 59-62}. Mr. Vereen also towed the bearing block away. {Tr. 121; R. 96}. He saw no gashes or marks in the road and no objects present in the road. {Tr. 126-27; R. 101-02}. Additionally, neither the Florence County 911 cell phone call center nor the South Carolina Department of Transportation received any calls regarding foreign objects in the road. {Tr. 313-21; R. 220-28}. Another driver who worked with Tucker, Charles Hayes, took his girlfriend to photograph the scene of the wreck, and he did not see any marks on the road, although she photographed marks in the concrete section of the road. {Tr. 137-41; R. 112-16}.

Another truck driver, Donald Wilson, testified that he stopped at a truck stop in Darlington, approximately eleven miles north of the location of the accident, sometime

[1] Officer Suggs was later informed that another witness had seen an object after the accident but Officer Suggs declined to file any amended report indicating an object caused the accident. {Tr. 164, R. 139}.

between 10:00 and 11:00 PM on April 29, 2010. {Tr. 71-72; R. 46-47}. While there, Mr. Wilson spotted a truck carrying pipes and rebar and an object that "looked just like" the bearing block. {Tr. 68-69; R. 43-44}.

Argument

I. The trial court erred in holding that the sworn witness affidavit of Anthony Bernardo satisfied section 38-77-170 because it failed to provide a causative link between the accident and an unknown vehicle, was speculative, and was untimely.

Section 38-77-170 of the South Carolina Code imposes requirements that a plaintiff must satisfy before a John Doe action may be maintained against his own uninsured motorist insurer. In the case of an accident without physical contact with the unknown vehicle, the accident must have been witnessed by someone other than the owner or operator of the insured vehicle and the witness must sign an affidavit attesting to the truth of the facts of the accident. Because the affidavit submitted here failed to satisfy these requirements, the trial court erred in denying Doe's motion for JNOV.[2]

A. The Bernardo Affidavit was improper because it did not provide a causative link between an unknown vehicle and the accident and was speculative about the cause of the accident.

Tucker failed to satisfy the statutory requirement that a witness affidavit "attest[] to the truth of the facts of the accident." Therefore, Doe was entitled to JNOV, and this Court should reverse.

Section 38-77-170 states, in relevant part:

> If the owner or operator of any motor vehicle which causes bodily injury or property damage to the insured is

[2] The trial court had previously denied Doe's summary judgment motion based on the same grounds. {Tr. 304; R. 211; Order denying Summary Judgment, R. 1}.

> unknown, there is no right of action or recovery under the uninsured motorist provision, unless: . . .
>
> (2) the injury or damage was caused by physical contact with the unknown vehicle, or the accident must have been witnessed by someone other than the owner or operator of the insured vehicle; provided however, the witness must sign an affidavit attesting to the truth of the facts of the accident contained in the affidavit[.] . . .
>
> The following statement must be prominently displayed on the face of the affidavit provided in subitem (2) above: A FALSE STATEMENT CONCERNING THE FACTS CONTAINED IN THIS AFFIDAVIT MAY SUBJECT THE PERSON MAKING THE FALSE STATEMENT TO CRIMINAL PENALTIES AS PROVIDED BY LAW.

S.C. Code Ann. § 38-77-170. Tucker's collision with the concrete abutment was not caused by physical contact with an unknown vehicle. Tucker filed an affidavit by Anthony Bernardo ("the Bernardo Affidavit"). {March 4, 2011 Affidavit of Anthony Bernardo; R. 416}. The Bernardo Affidavit stated, in relevant part relating to the witnessing of the accident:

> 2. On Friday, April 30, 2010 I was traveling to Florida with Dan Falenza in my 1998 Dodge Durango automobile.
>
> 3. I was traveling in the outside southbound lane of Interstate 95 in Florence County, South Carolina, following a truck pulling a car carrier at a distance of approximately 150 feet.
>
> 4. As I approached exit 153, the truck and car carrier suddenly veered to the right as if to avoid something in the roadway and in doing so struck a cement pillar supporting the overpass.

{March 4, 2011 Affidavit of Anthony Bernardo; R. 416}.[3]

The Bernardo Affidavit fails to satisfy section 38-77-170 for several reasons. First, the Bernardo Affidavit does not suggest that the driver of an unknown vehicle proximately caused the accident. This Court has stated that a requirement of section 38-77-170(2) is that "the witness must testify to more than the actual collision itself. The witness must also be able to attest to the circumstances surrounding the accident, *i.e.* what actions of the unknown driver contributed to the accident." *Gilliland v. Doe*, 351 S.C. 497, 501-02, 570 S.E.2d 545, 548 (Ct. App. 2002) *rev'd on other grounds,* 357 S.C. 197, 592 S.E.2d 626 (2004).[4] Additionally, the affiant does not swear to the existence of an object in the roadway. Instead, the affiant swears that the plaintiff "veered" suddenly "as if" attempting to avoid an object in the roadway. {March 4, 2011 Affidavit of Anthony Bernardo ¶ 4; R. 416}. The reasons why a driver might suddenly change direction or "veer" are innumerable. Hence, the "as if" portion of the affidavit is merely speculation.[5] The affiant also does not swear to a witnessing of any

[3] The affidavit also provides that Tucker, after the accident, told the affiant "something was in the road." *Id.* at ¶ 6. This part of the affidavit is only a restatement of something said by Tucker and does not satisfy the statute.

[4] The Supreme Court approved of this analysis despite reversing this Court's decision in *Gilliland*. *See Gilliland v. Doe*, 357 S.C. 197, 201, 592 S.E.2d 626, 628 (2004) ("In the case at hand, the Court of Appeals held that the witness must 'be able to attest to the circumstances surrounding the accident, i.e., what actions of the unknown driver contributed to the accident.' We agree that this analysis is consistent with *Howser* [*Wausau Underwriters Ins. Co. v. Howser*, 309 S.C. 269, 422 S.E.2d 106 (1992)] and constitutes a fair interpretation of the ambiguous fact requirement of § 38-77-170(2)." (internal citation omitted)).

[5] Similarly, the affiant's statement at ¶ 7, *id.*, that the cab of the truck was "raised up as if on top of something," is speculation regarding the condition of the truck *after* the accident, not proof of an object actually being in the roadway and causing the accident involving the plaintiff. Further, Paramedic Collins testified when he got to the scene that the cab of the truck was on top of the guardrail and up off the ground. {Tr. 169,

object in the road, does not swear to any description of an object in the road (or off the road), nor how any object came to be in the roadway. The affidavit just does not demonstrate how any unknown driver proximately caused the accident.

Bradley v. Doe, 374 S.C. 622, 649 S.E.2d 153 (Ct. App. 2007) establishes the deficiencies in the Bernardo Affidavit. In *Bradley*, the plaintiff allegedly swerved to avoid a trash bag in the road, lost control, and hit a tree. Another driver who passed by later saw a garbage bag in the road and heard a vehicle hit it. *Id.* at 624, 649 S.E.2d at 154-55. A third driver swerved to avoid the bag, then saw a street sweeper truck further down the road drop a similar-looking trash bag into the road. *Id.* at 624, 649 S.E.2d at 155. The drivers submitted affidavits detailing the above.

This Court found that the other drivers' affidavits were insufficient because they only provided evidence of the accident and evidence of an unknown vehicle, then required a speculative inference of the connection between the two. *Id.* at 633-34, 649 S.E.2d at 160. The Court stated that "[t]he fact that three people saw the bag of trash in the same roadway does not implicate involvement of another vehicle. Testimony that a sweeper truck a quarter-mile down the roadway dropped a similar trash bag likewise fails to establish a sufficient causal link between the sweeper truck and Bradley's collision." *Id.* Instead, this Court held that the affidavit "must contain some independent evidence of an unknown vehicle's *involvement* in the accident." *Id.* at 634-35, 649 S.E.2d at 160 (emphasis added).

Like the affidavits in *Bradley*, the Bernardo Affidavit provides no causative link to an unknown vehicle's *involvement* in Tucker's accident because it merely speculates

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R. 144}. This would certainly be one explanation for the affiant's speculation about the cab being "raised up."

about a potential cause of the accident with no connection whatsoever to an unknown vehicle. Even assuming, *arguendo*, that Tucker's swerve was in fact caused by an object, and even assuming, *arguendo*, that the object was in the road, the mere presence of an object in the road, standing alone, does not implicate an unknown vehicle; to presume that an object could only be in the road because of another vehicle would be impermissible *res ipsa loquitur*. *Watson v. Ford Motor Co.*, 389 S.C. 434, 452-53, 699 S.E.2d 169, 179 (2010) (holding that *res ipsa loquitur* is not available under South Carolina law and a plaintiff must affirmatively prove every element by direct or circumstantial evidence). Instead, in order to satisfy the statutory requirements, the Bernardo Affidavit was required to link the accident to the specific object, then the specific object to an unknown vehicle, in order to connect the entire causative chain between the accident and the actions of an unknown vehicle. It did not, and as a result, the trial court erred in failing to grant judgment notwithstanding the verdict in favor of Doe.

Second, the Bernardo Affidavit also fails because the affiant is required to attest to the "*truth* of the *facts* of the accident." S.C. Code Ann. § 38-77-170(2) (emphasis added). Critically, the Bernardo Affidavit did not attest to the true facts of the accident; instead, Mr. Bernardo guessed about why he *thought* the accident occurred. For that reason, the Bernardo Affidavit is even more speculative than the one in *Bradley*.

An affidavit containing circumstantial evidence will be sufficient to satisfy the requirements of section 38-77-170(2) only if it leads to the conclusion of why the accident occurred with "reasonable certainty." *Gilliland v. Doe*, 357 S.C. 197, 202,

592 S.E.2d 626, 629 (2004). The circumstantial evidence must have "sufficient probative value to constitute the basis for a legal inference, not for mere speculation." *Shealy v. Doe*, 370 S.C. 194, 204, 634 S.E.2d 45, 50 (Ct. App. 2006). The circumstantial evidence must "*assert*[] *or describe*[] *something else,* from which the trier of fact may either (1) reasonably infer the truth of the proposition . . . or (2) at least reasonably infer an increase in the probability that the proposition is in fact true . . . ." *Id.* at 204-05, 634 S.E.2d at 50-51 (emphasis in original) (citing 29 Am.Jur.2d *Evidence* 313 (1994)). The Bernardo affidavit does not satisfy these requirements.

Our Supreme Court's interpretation of a John Doe affidavit containing circumstantial evidence illuminates the insufficiency of the Bernardo Affidavit. In *Gilliland*, the witness attested that she saw "the lights of an unknown car that was turning around and fleeing the scene of the accident." *Gilliland* at 202, 592 S.E.2d at 629. The Supreme Court held that the attestation of these independent events sufficiently corroborated the plaintiff's testimony about why the accident occurred, which was that an unknown car was driving closely behind her and caused her to speed up and lose control. *Id.* Contrarily, the Bernardo Affidavit provided that "the truck and car carrier suddenly veered to the right *as if to avoid something in the roadway* and in doing so struck a cement pillar supporting the overpass." {March 4, 2011 Affidavit of Anthony Bernardo at ¶ 4; R. 416 (emphasis added)}. Such a statement merely described Mr. Bernardo's speculation regarding why the swerve occurred. The Bernardo Affidavit did not assert or describe any facts that would make Tucker's version of the events any more likely than some other scenario for why Tucker suddenly "veered."

South Carolina "courts have historically required strict compliance with section 38–77–170(2)." *Enos v. Doe*, 380 S.C. 295, 313, 669 S.E.2d 619, 628 (Ct. App. 2008). While "the result is lamentable to the injured party," the statute mandates that a plaintiff may not recover from his UM insurer if the statute's requirements are not strictly satisfied. *Shealy v. Doe*, 370 S.C. 194, 201, 634 S.E.2d 45, 49 (Ct. App. 2006). The Bernardo Affidavit failed to satisfy section 38-77-170 because it did not provide a causative link between the accident and an unknown vehicle, and it relied on speculation as to the cause of the accident. For these reasons, the trial court erred in failing to grant judgment notwithstanding the verdict to Doe. This Court should reverse the decision of the trial court.

B. Section 38-77-170(2) was not satisfied because the affiant did not testify at trial and the affidavits were not compliant with the statute and untimely.

The affidavit requirement of section 38-77-170(2) mandates independent verification of accidents that were allegedly caused by an unknown vehicle but lack any physical evidence of contact with the unknown vehicle. Our Supreme Court has held that this requirement exists for three purposes: (1) fraud prevention; (2) providing evidence to the insurer that the insured has a good faith basis for making a claim; and (3) providing notice of information relating to the validity of the claim to the insurer. *Collins v. Doe*, 352 S.C. 462, 469-70, 574 S.E.2d 739, 743 (2002). The Bernardo Affidavit fails to satisfy each of these purposes. First, the only witness to the accident that testified at trial was Tucker. Mr. Bernardo did not testify, and no other eyewitnesses were offered at trial in his place. As a result, Tucker improperly recovered for injuries sustained in the accident despite not providing the testimony of an

additional witness, in contravention of the anti-fraud purpose of section 38-77-170. Second, because the first Bernardo Affidavit failed to contain statutorily required language and the second Bernardo Affidavit with the required language was not submitted until ten months after the action was initiated, the statutory purpose of notice to the insurer was not satisfied. For this same reason, and because even the second version of the affidavit fails to meet the statutory requirements as set forth in argument I.A., above, there was insufficient evidence of a good faith basis for the insured to make a claim. Both versions of the Bernardo Affidavit were thus improper, and the court should have granted Doe's motion for JNOV.

The first and "obvious" purpose of the statute is fraud prevention. *Collins* at 470, 574 S.E.2d at 743. If a plaintiff is required to find an eyewitness to submit an affidavit attesting to the truth of the facts of the accident, then the potential for the plaintiff to fraudulently invent a story to recover for his damages is minimized. *Id.* However, this purpose would be nullified if the statute was satisfied by the mere filing of an affidavit that was not required to be supported through testimony under oath at trial.

Affidavits "generally constitute inadmissible hearsay," and if a witness is not required to testify regarding the statements made in the affidavit, the affidavit cannot be challenged. *Ex parte Morris*, 367 S.C. 56, 64, 624 S.E.2d 649, 653 (2006). Our Supreme Court has rejected the argument that trial testimony could replace the affidavit requirement of section 38-77-170, noting that a function of the witness affidavit is that it provides the defendant an opportunity to cross-examine the witness at trial regarding the affidavit statements. *Collins* at 470, 574 S.E.2d at 743. The Court has thus

implied that the affiant would testify at trial. Allowing a witness to submit an affidavit without having to testify at trial would result in the witness being immune from cross-examination in contravention of section 38-77-170. If an affidavit were sufficient and actual testimony not required at trial, the defendant would be resigned to the same situation as if the statute did not exist—the only admissible evidence at trial regarding what actually occurred would the plaintiff's uncorroborated and unverifiable testimony.

Furthermore, the statutorily required language incentivizes affiants to tell the truth because "she may be subject to criminal penalties for providing untrue information." *Id.* If the affiant is not required to testify at trial to satisfy the statute, then there would be no reliable way to determine the veracity of the affiant's story because no eyewitnesses other than the plaintiff would testify. Thus, the threat of criminal penalties against the affiant would be meaningless if there was no way for inconsistencies in the affidavit to be exposed. Such a construction would render the statutorily required language without effect. *See Doe v. S. Carolina Dep't of Soc. Servs.*, 407 S.C. 623, 634, 757 S.E.2d 711, 717 (2014) ("This Court will not construe a statute in a way which leads to an absurd result or renders it meaningless."); *Adams v. Clarendon Cnty. Sch. Dist. No. 2*, 270 S.C. 266, 272, 241 S.E.2d 897, 900 (1978) ("It is the duty of this Court to give all parts and provisions of a legislative enactment effect . . . ."). Because no independent witnesses to the accident testified at trial, the trial court erred in denying Doe's motion for JNOV.

In addition, the revised Bernardo Affidavit, submitted nearly ten months after the commencement of this suit, was untimely. While section 38-77-170 does not expressly state a period of time in which the witness affidavit must be filed, the

remaining two purposes of the affidavit requirement explained in *Collins* compel a finding that the affidavit should be filed early in the action, not just at any point before summary judgment.

First, the statutory purpose that an insurer will be provided with tangible evidence to determine if there is a good faith basis for making the UM claim is only relevant if a proper affidavit is filed early in the action. Otherwise, the insurer will have had to conduct significant investigation, discovery, and defense without evidence of whether the insured is making a claim in good faith. Second, without a proper affidavit early in the action, the insurer will be without notice of information corroborating the plaintiff's version of events. The insurer would have to litigate against its insured while lacking any knowledge of the identity of the mandatory eyewitness. While the original witness affidavit in this action was filed two months after the Complaint, it did not fulfill the statutory requirement that the affiant swear under penalty of perjury, and did not have the level of trustworthiness required by the statute. The second Bernardo Affidavit was not filed until ten months after the Complaint was served. As such, it was untimely.

Thus, Tucker failed to comply with all of the purposes of section 38-77-170. While interpreting section 38-77-170, this Court recognized that "[a] statute as a whole must receive a practical, reasonable, and fair interpretation consonant with the purpose, design, and policy of the lawmakers . . . [t]he real purpose and intent of the lawmakers will prevail over the literal import of the words." *Enos v. Doe*, 380 S.C. 295, 304, 669 S.E.2d 619, 623 (Ct. App. 2008) (citations omitted). The practical, reasonable, and fair interpretation of this statute consistent with the purpose, design, and policy of

the lawmakers is that it requires that the affiant file his affidavit contemporaneously with the Complaint and that independent accident witness trial testimony be submitted. Therefore, the affidavit and trial proof here was insufficient to satisfy the statute, and Doe was entitled to JNOV because of this insufficiency. Accordingly, the Court should reverse the decision of the trial court and enter judgment in favor of Doe.

II. The trial court erred in holding that Tucker presented sufficient evidence to create a question of fact about whether an unknown vehicle proximately caused his accident by leaving an object in the road.

Section 38-77-170 only allows a plaintiff to recover from his UM insurance carrier through a John Doe action if an unknown vehicle caused the accident. S.C. Code Ann. § 38-77-170. Thus, in order to recover from Doe on his cause of action for negligence, Tucker was required to prove that an unknown driver failed to appropriately secure the bearing block, the failure of which proximately caused Tucker's accident. *See Chakrabarti v. City of Orangeburg*, 403 S.C. 308, 314, 743 S.E.2d 109, 112 (Ct. App. 2013) (stating elements of negligence). As an initial matter, as set forth above, Tucker cannot substitute trial testimony for the statutory affidavit requirement. *Collins, supra,* at 470, 574 S.E.2d at 743. If the affidavit is insufficient and fails to satisfy the statute, the action should be dismissed. Assuming *arguendo* that one could do so, however, Tucker nevertheless failed to meet his burden of proof because there is insufficient probative evidence showing that an unknown vehicle caused the bearing block to be in the road such that it could cause Tucker's accident. For these reasons, insufficient evidence existed to create a jury question, and the trial court erred in denying Doe's motion for JNOV.

A. The evidence in the record that Doe inadequately strapped the bearing block is not sufficiently probative.

The evidence that Tucker presented regarding how Doe strapped the bearing block was insufficient as a matter of law to create a reasonable inference that Doe negligently dropped the bearing block from an unknown vehicle onto the roadway, which object then in turn caused Tucker's accident. To show that Doe inadequately secured the bearing block, Tucker presented the deposition testimony of Mr. Wilson, a truck driver who was on the road on the night of the accident. Mr. Wilson stated that, as he pulled in to the truck stop two hours before the time of the accident, he saw a truck six or ten feet away that caught his eye. {Tr. 71, 77; R. 46, 52}. Mr. Wilson testified that the truck he saw carried an object on it that "looked just like" the bearing block. {Tr. 68-69; R. 43-44}. The truck also carried pipes, according to Mr. Wilson. {Tr. 68-69; R. 43-44}. Mr. Wilson stated:

> Q. Let me ask you specifically, did you have occasion to be on the Darlington Highway, the interchange with Interstate 95?
> A. Yes, sir.
> Q. Explain to the jury why you were there.
> A. I was taking my middle son home which he has cerebral palsy, because he couldn't drive and stuff, and we stopped by the TA truck stop. I seen that blue freight liner loaded with pipes and that piece that fell off on 95 there on there -- looked just like that piece.
> Q. All right. Well, let's do this. Let me show you what's Exhibit Number 1 and ask if . . .
> A. Uh huh.
> Q. . . . if you -- if you recall seeing anything like that . . .
> A. Yes, sir.
> Q. . . . on this particular evening?
> A. Yes, sir.

{Tr. 68-69; R. 43-44}. Mr. Wilson stated that "pipes and rebars and stuff" were also on the truck. {Tr. 73; R. 48}. Mr. Wilson testified that objects in the truck's load were secured with "nylon straps and chains" across them. {Tr. 78; R. 53}. He stated that the object that "looked just like" the bearing block was secured with "a strap across it" and that it did not have a chain going through it. {Tr. 78-79; R. 53-54}. Mr. Wilson answered affirmatively when asked whether it "could be a problem." {Tr. 79; R. 54}.

Tucker then presented his expert, Mr. Harris, who gave his opinion on whether a single strap across this bearing block would be adequate to secure the object:

> Q. All right, and so I want you to assume that this object was secured by a single nylon strap running across the top of the object on the rear of this flatbed. Do you have an opinion within a reasonable degree of professional certainty if that manner of securing this object was adequate?
> A. No, sir, it would not be adequate. There would not be enough downward force from the shallow angle of the strap on the bottom to have any significant effect on keeping that item from sliding off the rear.
> Q. What about the transportation or transport of the object on the rear of a flat-bed at highway speeds would cause the object to move or become dislodged from the nylon strap?
> A. Two things would be affected. One would be acceleration, going over bumps, for example. Most people going over a bump -- their bodies rise up out of the seat, and a bump that hard of that flat-bed doing seventy it would easily overcome that strap. Secondly, the acceleration -- you are either braking or accelerating, going around a curve which would be sideways acceleration -- all of those would tend to make an object move. The way you described it being held down, there would be friction between that object and the flat-bed. That doesn't do anything to add any extra downward -- the strap doesn't do anything to add extra downward force.

{Tr. 98-101; R. 73-76}. The question posed to Tucker's expert is not probative of whether Doe adequately secured the bearing block on the truck Mr. Wilson saw because the hypothetical question excluded portions of Mr. Wilson's testimony about the truck's overall cargo or how the truck's overall load was secured.[6] The hypothetical did not account for the pipes and rebar[7] loaded in the truck, which may have encircled the object, anchored it on all sides, or concealed chains securing the object to the truck. Tucker's expert did not view the truck at the truck stop, how the object was strapped on that truck with other objects on the truck, or the accident site to determine the conditions. {Tr. 103; R. 78}. The hypothetical plaintiff's counsel thus used with his expert represented the selective application of a beneficial portion of Mr. Wilson's testimony in a vacuum, and for that reason, it was not probative of how Doe's load was secured while on the road.[8] Because Tucker offered no probative evidence regarding whether Doe negligently secured its load, the trial court erred in denying Doe's motion for JNOV.

B. There is no evidence in the record explaining how the bearing block came to be in the road by connecting it to an unknown vehicle.

To provide a chain of proximate causation, Tucker was required to show that (1) the bearing block was inadequately secured on the unknown vehicle; (2) the negligent strapping on the unknown vehicle caused the bearing block to be in the road; and (3)

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[6] While Tucker's counsel asked the expert to confirm he was "present during Mr. Wilson's video deposition," {Tr. 98; R. 73}, Tucker's counsel nevertheless asked the expert a hypothetical with limited information in its predicate.

[7] No pipes or rebar were found in the roadway or off the roadway anywhere. {Tr. 129; R. 104}.

[8] Mr. Wilson's statement that the single strap on the bearing block "could be a problem" is not probative of anything in particular except an undefined possibility and is also merely his speculation as a lay witness. {Tr. 79; R. 54}.

the bearing block was in the road, causing the accident. There is insufficient evidence regarding these elements and thus, there is no right of recovery under section 38-77-170. Accordingly, the trial court erred in denying Doe's motion for JNOV.

There is no evidence in the record explaining how this bearing block came to be in the road. There are other potential reasons why this bearing block could have come to rest in the road other than from being dropped from an unknown vehicle. For instance, the bearing block could have broken off of construction equipment, been dropped off of the nearby overpass, been pushed into the road by several individuals, lifted off of a vehicle and deposited in the road, or had its straps unfastened by a third party. None of these possibilities would be the result of the negligence of the driver or owner of the unknown vehicle. There is no direct or circumstantial evidence in the record suggesting or disproving any of these possibilities—or any other one that could be imagined. Instead, presupposing that the object was dropped inappropriately shifts the burden to the defendant to disprove. "Although causation may be established by circumstantial evidence, and is usually a question for the jury, it nonetheless must be based on probabilities not mere possibilities." *Nguyen v. Uniflex Corp.*, 312 S.C. 417, 419-20, 440 S.E.2d 887, 889 (Ct. App. 1994) (citations omitted). Because Tucker did not offer any evidence supporting the probability that the bearing block was dropped into the road, the trial court should have granted Doe JNOV.

For comparison, our Supreme Court has held that there was evidence of causation between the unknown vehicle and the accident where a witness testified to *contemporaneously* seeing both the collision and an unknown vehicle leaving the scene. *Gilliland v. Doe*, 357 S.C. 197, 202, 592 S.E.2d 626, 629 (2004) (emphasis added).

Contrarily, here, no witness testified to a causative connection between Tucker's accident and an unknown vehicle. Instead, the facts here are analogous to those in *Bradley*. In *Bradley*, no witnesses saw the accident, but one witness saw a bag in the road at the location of the accident and subsequently saw a truck drop a similar bag onto the road. *Bradley v. Doe*, 374 S.C. 622, 624, 649 S.E.2d 153, 155 (Ct. App. 2007). While viewing the evidence in favor of the plaintiff, this Court stated that "[t]estimony that a sweeper truck a quarter-mile down the roadway dropped a similar trash bag likewise fails to establish a sufficient causal link between the sweeper truck and Bradley's collision." *Id.* at 633-34, 649 S.E.2d at 160. Although the plaintiff in *Bradley* offered evidence of an unknown vehicle and evidence of an accident, the plaintiff was still required to offer sufficient evidence of a link between the two. Presuming a link between the accident and sweeper truck, without any evidence of causation, would have been "mere speculation." *Id.* at 634, 649 S.E.2d at 160. Similarly, here, Mr. Wilson's testimony that he saw a truck carrying an object (among other items) that "looked just like" the bearing block some two hours before fails to establish a sufficient causal link between that truck and Tucker's collision. {Tr. 68-69; R. 43-44}.

An analogous case showing the failure of proof of causation here is *Tuttle v. Allstate Ins. Co.*, 134 Wash. App. 120, 138 P.3d 1107 (2006). In *Tuttle*, the plaintiff collided with a tire in the road and attempted to recover from her UM insurer for an accident caused by an unknown vehicle. A firefighter stated that she saw a wheel and tire leaning up near the guardrail near the collision site, and it appeared to the firefighter that the plaintiff's vehicle hit that tire. However, the plaintiff did not know

whether someone had deliberately rolled the tire into the road or if it had fallen from a vehicle, and no evidence was offered as to how an unknown vehicle put the tire in the road. The court granted summary judgment against the plaintiff, stating:

> But here, Tuttle had no evidence of how the tire and wheel got into the roadway. And the mere presence of the tire in the roadway does not create a reasonable inference that the accident was caused by the phantom driver's negligence. It is entirely plausible that the tire came off a moving truck because it was negligently installed by someone—either the driver or a third party. If a third party negligently installed the wheel then Tuttle has no claim against the owner or operator of the vehicle and, thus, no UIM claim. It is also entirely plausible that the wheel and tire was a spare on a large truck and came loose from its fastenings. If so, it is possible that the truck driver was negligent in failing to inspect the wheel and tire fastenings. But it is also possible that a reasonable inspection would not have revealed any problem with the fastenings. In short, Tuttle provided no evidence that would support an inference that the truck driver or owner negligently caused the wheel and tire to be in her lane of travel.

Id. at 128, 138 P.3d at 1111-12.

Thus, even if a witness could testify to the object being near the road and the plaintiff's vehicle hitting it, the plaintiff still may not reach a jury if there is no evidence explaining how the object in the road came to be there due to the negligence of a vehicle. Here, Tucker offered no evidence that Doe negligently caused the bearing block to be in Tucker's lane of travel by dropping it, so the trial court erred in denying Doe's motion for JNOV.

Further, South Carolina courts do not engage in *res ipsa loquitur*. In similar object-in-road cases elsewhere, the missing causative leap from an object being in the road to the negligence of a vehicle has been made through such a presumption. *See,*

e.g., *Khirieh v. State Farm Mut. Auto. Ins. Co.*, 594 So. 2d 1220 (Ala. 1992) (holding that the fact that a truck bench seat was in the road was sufficient to apply *res ipsa loquitur* to find that a person was negligently operating a motor vehicle, causing the truck bench seat to be in the road, and thus, the plaintiff could recover from her UM insurer); *Farmer v. Werner Transp. Co.*, 152 Ind. App. 609, 615, 284 N.E.2d 861, 865 (1972) (holding that a collision with an air conditioning unit in the road was insufficient to reach a *res ipsa loquitur* presumption because the plaintiff did not show exclusive control of the unit by the defendant); *Layton v. Palmer*, 309 S.W.2d 561, 564 (Mo. 1958) (finding that hay bales falling from a vehicle onto a highway was sufficient for a jury to apply *res ipsa loquitur* to find that bales of hay would not ordinarily fall into the road without negligent loading of the hay on a vehicle). However, as stated, *res ipsa loquitur* is unavailable under South Carolina law. *Watson v. Ford Motor Co.*, 389 S.C. 434, 453, 699 S.E.2d 169, 179 (2010). Instead, a plaintiff is required to prove every element by affirmative evidence, including causation. *Snow v. City of Columbia*, 305 S.C. 544, 555, 409 S.E.2d 797, 803 n.7 (Ct. App. 1991).

Here, there is no affirmative evidence suggesting that the improper securing of the bearing block caused it to fall into the road, and that is just one possibility explaining what occurred. The testimony from the Department of Transportation representative, Mr. George, that only vehicular traffic may legally be on the highway and that the Department of Transportation sometimes receives calls about objects that had fallen off of trucks, is not evidence of what occurred in this instance. {Tr. 325; R. 232}. Further, the truck driver, Mr. Wilson, did not see any object fall from a vehicle,

nor did he testify that the object that "looked just like" the bearing block appeared as if it would imminently fall off that vehicle.

In order to survive a directed verdict, the evidence "must lead to the conclusion with a reasonable certainty and have sufficient probative value as to constitute a basis for a legal inference and not mere speculation." *Attaway v. One Chevrolet 5-P Truck, Motor No. LEA 852870*, 228 S.C. 559, 563, 91 S.E.2d 270, 271-72 (1956). Tucker offered no evidence that the bearing block fell into the road because Doe negligently secured it. Accordingly, the trial court erred in denying Doe's motion for JNOV.

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

Under South Carolina law, the violation of a statute proximately causing the harm to the plaintiff "constitutes negligence *per se* and is evidence of recklessness and willfulness, requiring the submission of the issue of punitive damages to the jury." *Wise v. Broadway*, 315 S.C. 273, 276, 433 S.E.2d 857, 859 (1993). The rationale behind this rule is that "every one is conclusively presumed to know [the law] and is bound to act accordingly," and thus, the statutory violation was the result of an intentional or conscious disregard of the law and the defendant's legal duties. *Callison v. Charleston & W.C. Ry. Co.*, 106 S.C. 123, 90 S.E. 260, 262 (1916). However, this rationale breaks down with respect to strict liability statutes—because even if a defendant acts with the intent to comply with its legal duties and takes appropriate precautions to do so, the statute can still be violated.

"[W]hen only one reasonable inference can be deduced from the evidence, the question becomes one of law for the court to determine." *Ecclesiastes Prod. Ministries*

v. Outparcel Associates, LLC, 374 S.C. 483, 491, 649 S.E.2d 494, 498 (Ct. App. 2007). Here, there is no evidence that Doe acted recklessly, willfully or wantonly. However, because the violation of a statute constitutes evidence of recklessness or willfulness under South Carolina law, punitive damages were nevertheless submitted to the jury—and were awarded. *Wise* at 276, 433 S.E.2d at 859. While this result may be suitable when the defendant negligently, recklessly, or intentionally breached its statutory duty, it is inappropriate where a statute is a strict liability law and may be violated regardless of the intent of the defendant, even with no other evidence of negligence.

Requiring the submission of punitive damages to the jury for a violation of a strict liability statute with no other evidence of recklessness is contrary to the purpose behind punitive damages. "The purposes of punitive damages are to punish the wrongdoer and deter the wrongdoer and others from engaging in similar reckless, willful, wanton, or malicious conduct in the future." *Clark v. Cantrell*, 339 S.C. 369, 378, 529 S.E.2d 528, 533 (2000). If the defendant did not engage in reckless, willful, wanton, or malicious conduct, yet still violated a statute, there would be no conduct to punish or deter. Thus, it is inappropriate for a strict liability statutory violation, standing alone, to serve as sufficient evidence of recklessness to require submission of punitive damages to the jury. Further, the South Carolina legislature has made the determination that a plaintiff must prove its entitlement to punitive damages by clear and convincing evidence. S.C. Code Ann. § 15-33-135. Allowing a plaintiff to prove the violation of a statute by a preponderance of the evidence—yet then allowing the

violation of that statute to serve as evidence of recklessness—bypasses the heightened burden of proof to seek punitive damages required by South Carolina law.

The statute in this matter provides that "[n]o vehicle may be driven or moved on any public highway unless the vehicle is so constructed or loaded as to prevent any of its load from dropping, sifting, leaking, or otherwise escaping from the vehicle." S.C. Code Ann. § 56-5-4100(A). This statute is of a strict liability nature. If any of a vehicle's load drops while in transit, then the vehicle was not loaded as to prevent the load dropping. Thus, any time a load drops from a vehicle, the statute is violated, and South Carolina law *requires* that the person driving the vehicle be subjected to possible punitive damages at the hands of the jury, no matter how prudent and reasonable the driver acted in loading the vehicle. This result is inappropriate.

Instead, a statutory violation should not serve as evidence of recklessness requiring submission of punitive damages to the jury unless there is some evidence in the record, other than the mere statutory violation, that the defendant acted with conscious disregard of its statutory duties to the plaintiff. Such a rule avoids the situation where a faultless fender-bender requires the jury to consider punitive damages. *See Wise v. Broadway* at 282, 433 S.E.2d at 862 (Toal, J., dissenting). It also avoids the outcome created by this circular statute—if a spill occurs, then the care that the defendant used was *per se* not sufficient, and the jury must consider punitive damages even if there is no evidence in the record that the defendant was not absolutely careful otherwise. As such, some other jurisdictions recognize that a violation of a strict liability statute is insufficient, standing alone, to mandate the consideration of punitive damages. *See, e.g.*, *Pouzanova v. Morton*, S-14442, 2014 WL 2795894 (Alaska June

20, 2014) (holding that the running of a stop sign did not require submission of punitive damages to the jury because there was insufficient evidence of recklessness other than the statutory violation); *Mastec N. Am., Inc. v. Wilson*, 325 Ga. App. 863, 867, 755 S.E.2d 257, 260 (2014) (stating that, in cases involving automobile collisions, punitive damages are authorized only when there is a "pattern or policy" of dangerous driving); *Adkins v. Hontz*, 337 S.W.3d 711, 723 (Mo. Ct. App. 2011) (holding that, under Kansas law, the failure to require a child to wear a seatbelt despite a strict liability seatbelt statute did not support punitive damages because there was no evidence of wantonness in the record); *Kinney v. Butcher*, 131 S.W.3d 357, 358 (Ky. Ct. App. 2004) (holding that the violation of a strict liability speeding statute did not require submission of punitive damages to the jury because it was merely ordinary negligence).

Here, the record is devoid of any evidence that Doe intentionally or consciously disregarded its statutory duty to load the vehicle such that none of the load would drop. There is no evidence regarding the degree of restraint that would be required to properly secure this bearing block. There is some evidence that another truck only used one strap on something that "looked just like" the bearing block, but that truck also was carrying "pipes and rebar." {Tr. 68-69, 73; R. 43-44, 48}. The minimal evidence is insufficient to show that Doe consciously or recklessly disregarded his statutory duty to adequately strap his load. A finding that the bearing block came off of Doe's vehicle (based on speculation) and thus that section 56-5-4100 was violated—standing alone—should be insufficient evidence of recklessness or willfulness to support a jury award of punitive damages as a matter of law. Hence, the trial court erred in

failing to grant Doe JNOV on punitive damages. Because *Wise v. Broadway*, *supra*, and similar cases require a contrary result, they should be overruled.[9]

Conclusion

Based on the above, the Court should reverse the decision of the trial court and grant judgment in favor of Doe. Failing that, the Court should reverse the decision of the trial court and grant Tucker a new trial absolute. Finally, the Court should reverse the decision of the trial court and grant judgment in favor of Doe on punitive damages.

Respectfully submitted,

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

October 29, 2014

[9] Doe did not object to the jury charge of the trial court regarding this issue. {Tr. 352, R. 259}. However, the trial court would be required to charge the South Carolina law in its current form, so any such objection would have been futile. Doe did move for directed verdict and JNOV as to punitive damages, which Doe believes sufficiently preserves this issue for appeal.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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

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

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

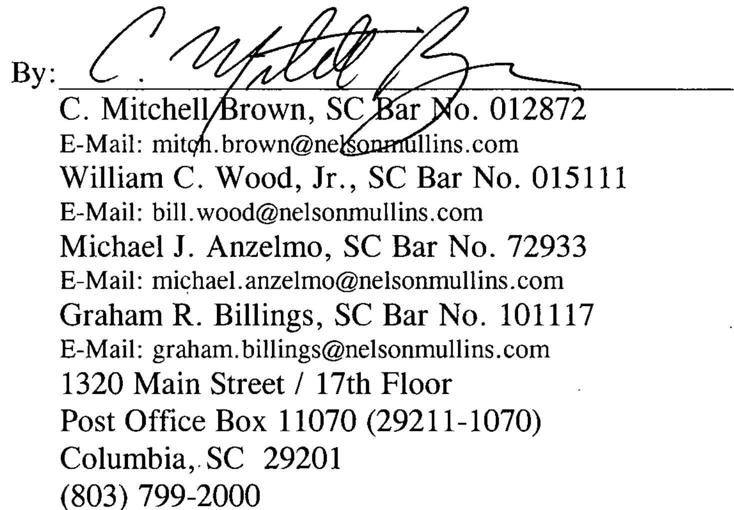
v.

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

CERTIFICATE OF COUNSEL

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

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

Columbia, South Carolina

10/29, 2014

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OCT 29 2014
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PROOF OF SERVICE

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

Pleadings:

Final Brief of Appellant

Counsel Served:

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

RECEIVED
OCT 29 2014
SC Court of Appeals

Robert Hill, Esquire
Law Offices of Robert Hill
Post Office Box 1323
Lexington, SC 29071

Lisa P. Whitehurst
Administrative Assistant

October 29, 2014