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. 2014-00134

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

v.

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

FINAL REPLY BRIEF OF APPELLANT

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

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

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

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

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

Mr. Bernardo attested that he saw Tucker's truck strike a cement pillar because it suddenly veered "*as if to avoid something in the roadway.*" {March 4, 2011 Affidavit of Anthony Bernardo ¶ 4 (emphasis added); R. p. 416}. Contrary to Tucker's assertion, Doe's challenge to the sufficiency of this statement *does* rest on the statute's text. Tucker argues that the literal text of South Carolina Code section 38-77-170(2) is satisfied where the affiant merely witnesses the accident itself and attests to it. (Brief for Respondent at 8, 13-14.) This argument ignores South Carolina precedent. The Supreme Court found that the 1987 amendment to the statute, which added the witness requirement, was intended to require that the witness provide a causal relationship sufficient to determine whether "the injury or damage arose out of the ownership, maintenance or use of the uninsured vehicle." *Howser* at 275, 422 S.E.2d at 109. The causative link required is "something less than proximate cause and something more than the vehicle being the mere site of the injury." *Id.* at 272, 422 S.E.2d at 108. After the statute was amended again in 1989 to add the requirement that the witness sign an affidavit, this Court found that the intent behind the statute was to require that the affiant "testify to more than the actual collision itself. The witness must also be able to attest to the circumstances

surrounding the accident, i.e. what actions of the unknown driver contributed to the accident." *Gilliland v. Doe*, 351 S.C. 497, 501-02, 570 S.E.2d 545, 548 (Ct. App. 2002). Even though the Supreme Court reversed this Court's decision in *Gilliland*, it approved the Court's interpretation of the statute, stating that "this analysis is consistent with *Howser* and constitutes a fair interpretation of the ambiguous fact requirement of § 38-77-170(2)." *Gilliland* at 201, 592 S.E.2d at 628. Thus, under South Carolina precedent, section 38-77-170(2) is not satisfied if the affiant merely witnesses the accident; instead, the affiant must attest to the truth of the facts of the accident, and in doing so, provide a causative link between the accident and an unknown vehicle. The Bernardo Affidavit fails to do either.

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

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

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

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

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

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

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

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

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

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

The attestation requirement of the statute reads as follows:

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

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

"The primary rule of statutory construction is to ascertain and give effect to the intent of the legislature." *Tempel v. S. Carolina State Election Comm'n*, 400 S.C. 374, 377-78, 735 S.E.2d 453, 455 (2012). While this Court may not "engraft extra requirements" to an unambiguous statute, *Cox v. Cnty. of Florence*, 337 S.C. 340, 347, 523 S.E.2d 776, 780 n.10 (1999), if the literal import of a statute leads to an absurd result or renders any of it meaningless, the court may construe the statute to avoid such a result. *Soil Remediation Co. v. Nu-Way Envtl., Inc.*, 317 S.C. 274, 276, 453 S.E.2d 253, 254-55 (Ct. App. 1994); *see also Adams v Clarendon Cnty. Sch. Dist. No. 2,* 270 S.C. 266, 272, 241 S.E.2d 897, 900 (1978) ("It is the duty of this Court to give all parts and provisions of a legislative enactment effect . . . .").

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

> Viewing the facts in the light most favorable to Plaintiff, the evidence presented at trial clearly indicates Plaintiff failed to establish by a preponderance of the evidence that Defendants breached any duty owed to Plaintiff, that Defendants were negligent, and that any act or omission on the part of Defendants proximately caused damage to Plaintiff: . . .
>
> Mr. Harris testified the object had been improperly secured to the truck (even though Mr. Harris never saw anything he could identify as Defendants' flatbed, the object on Defendant's flatbed, the manner in which any such object may have been secured to Defendants' flatbed, or any object fall from Defendants' flatbed).

{Memorandum in Support of Defendant's Post Trial Motions at 11-13; R. pp. 387-89}. Thus, Doe sufficiently raised the issue that Mr. Harris's testimony about improper strapping was not probative because he did not see the bearing block and was only answering a hypothetical. Accordingly, Doe's argument that Mr. Harris's testimony is insufficient evidence of improper strapping to survive a motion for JNOV is preserved.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

The statute at issue states, in relevant part:

> (A) No vehicle may be driven or moved on any public highway unless the vehicle is so constructed or loaded as to prevent any of its load from dropping, sifting, leaking, or otherwise escaping from the vehicle, except that sand, salt, or other chemicals may be dropped for the purpose of securing traction, and water or other substance may be sprinkled on a roadway in the cleaning or maintaining of the roadway by the public authority having jurisdiction. . . .
>
> (D) Any person operating a vehicle from which any substances or cargo, excluding water, have fallen or escaped, which would constitute an obstruction or injure a vehicle or otherwise endanger travel upon the public highway, shall make every reasonable effort to immediately cause the public highway to be cleaned of all substances and shall pay any costs for the cleaning.

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

> (a) In driving a vehicle at an excessive rate of speed, too fast for the conditions then and there existing;
> (b) In leaving the scene of the accident with property damage and/or personal injury;
> (c) In failure to exercise due care.
> (d) In failing to secure the load.

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

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

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

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

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

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

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

Conclusion

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

[*signature page attached*]

Respectfully submitted,

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October 29, 2014

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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

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

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

v.

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

CERTIFICATE OF COUNSEL

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

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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):

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