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THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM HAMPTON COUNTY
Court of Common Pleas

Carmen Tevis Mullen, Circuit Court Judge

Appellate Case No. 2013-000133
Case No.: 2004CP-25-00267

Willie Homer Stephens, Guardian ad Litem for Lillian C., a minor ..... Petitioner,

v.

CSX Transportation, Inc. and the South Carolina Department of Transportation,.....Respondents.

BRIEF OF PETITIONER

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2. WHETHER THE COURT OF APPEALS ERRED IN AFFIRMING THE TRIAL COURT'S FLAWED, ERRONEOUS, AND CLEARLY PREJUDICIAL JURY CHARGE AND APPLIED THE INCORRECT STANDARD OF REVIEW.

STATEMENT OF THE CASE

Appellant Willie Homer Stephens, Guardian ad Litem for Lillian C. (hereinafter, "Stephens") filed his Summons and Complaint in the Hampton County Court of Common Pleas on April 27, 2004. The Complaint alleges negligence causes of action against CSX Transportation, Inc. (hereinafter, "CSXT") and the South Carolina Department of Transportation (hereinafter, "SCDOT") arising out of an automobile/train collision on February 3, 2004, which resulted in brain injuries to Lillian C., a minor, as set forth in various particulars. The complaint alleges *inter alia,* that the accident was caused by CSXT's failure to properly warn the Colvin vehicle at the crossing by properly sounding its horn and/or that the accident was caused by CSXT's failure to maintain its right-of-way so as to create proper sight distances at the crossing. (R. p. 14). Against SCDOT, Appellant alleges, *inter alia,* that the SCDOT failed to warn motorists of the dangerous crossing. (Id.). Each defendant generally denied the allegations of the Complaint and asserted affirmative defenses.

The case was tried in Hampton County from July 28, 2008 through August 14, 2008. The jury found for the Respondents. Stephens was granted ten (10) days to file post-trial motions and thereafter timely moved for judgment notwithstanding the verdict pursuant to Rule 50(b), SCRCP, or alternatively, a new trial pursuant to Rules 59, SCRCP. The court heard arguments on Stephens' post-trial motions on September 11, 2008, and denied these motions by written Order dated and filed March 30, 2009. (R. pp. 1-9). Stephens timely filed his Notice of Appeal on May 12, 2009. On July 25, 2012, the Court of Appeals issued its Opinion Number 5008, which affirmed the trial court's denial of Stephens' directed verdict and JNOV motions, the trial court's evidentiary rulings, and the trial court's charge to the jury. Stephens timely filed a Petition for Rehearing and

Suggestion for Rehearing En Banc on August 9, 2012. The Petition was denied by Order of the Court of Appeals on December 11, 2012. Stephens timely filed his Petition for Certiorari and this Court granted the same on September 11, 2014.

STATEMENT OF THE FACTS

Willie Homer Stephens's granddaughter, Lillian C., was twelve years old at the time of the collision of February 3, 2004. Lillian was a passenger in her mother Tonia's Ford Explorer. (R. p. 456). Lillian was riding with her mother to pick up her mother's boyfriend Carlos Terry from work. (R. p. 410). Lillian sat in the right rear passenger seat. (R. p. 456).

Tonia drove down Hill Road toward S.C. Highway 68. (R. pp. 410-411). Just before Hill Road intersects with S.C. Highway 68, there is a CSXT railroad grade crossing. (R. pp. 411-412). The railroad crossing is controlled by a stop sign and does not have gates or lights. (R. p. 411). The stop sign is 36 feet from the near rail of the railroad track. (R. p. 681). There is a stop line 117 inches, or 9.75 feet, prior to the near rail of the railroad track. (Id.) The railroad track crosses Hill Road at an 88 degree angle. (R. p. 102). Tonia stopped at the stop sign for the railroad crossing. She looked to her right and to her left. Her view was obstructed to her right due to vegetation on CSXT's right-of-way. (R. pp. 412; 415-417). She pulled forward, stopped again, and again looked to her right and her left. (R. pp. 412-413). She could see for a distance of three to four hundred feet to her right due to the vegetation in CSXT's right-of-way. (R. p. 416). After stopping the second time and not hearing or seeing a train, Mrs. Colvin pulled forward and began to cross the track. (R. pp. 412-413; 415-416; 419-420).

When Mrs. Colvin pulled forward onto the track she heard the train horn, hit the gas, and was hit by a CSXT train just before she cleared the track. (R. pp. 412-413). The train was traveling at 42 miles per hour. (R. p. 943, ll.9-20). When the vehicle was hit it

spun around and came to rest on the side of the track opposite from the stop sign where she had stopped. (R. p. 414). Lillian was slumped over in the back seat with a trickle of blood coming from her nose. (R. pp. 414; 442).

Emergency personnel responded and Lillian was air lifted from the scene to the Medical University of South Carolina. (R. p. 421-422). Lillian was combative at MUSC and flailed about. Her medical providers induced a coma. Lillian remained in a coma for approximately thirty days. (R. p. 430). During the coma, Lillian remained on a ventilator. (R. p. 431). A hole was drilled through her skull to relieve the pressure building around her brain. (Id).

When she woke from the coma, Lillian was not able to speak or walk. (R. pp. 432-434). She stayed at MUSC for approximately one month after she woke from the coma. (R. p. 433). Over the course of that month, she received speech therapy and eventually regained a great deal, but not all, of her speech. (R. pp. 433-436). She had to relearn how to feed herself. (R. pp. 434-435).

Lillian left MUSC in a wheelchair and was transferred by ambulance to Scottish Rite Children's Hospital in Atlanta, Georgia. (R. pp. 434-437). She received physical therapy, occupational therapy, and speech therapy for about a week in Atlanta before her mother requested that Lillian be allowed to return home and complete her therapy at the Colleton Regional Hospital. (R. p. 437). For the next several months, Lillian received home health care and therapy at Colleton Regional Hospital. (R. p. 443). Lillian's medical bills total $271,669.06. (R. p. 457).

When she returned home, Lillian had violent outbursts. (R. p. 438). She had episodes where she hallucinated. (R. p. 439). She constantly made inappropriate comments,

spoke without thinking, and used curse words. (R. pp. 439-441). She also had problems with bed wetting. (R. pp. 441-442). She suffered short term memory loss, impaired judgment, and an inability to concentrate. (R. pp. 446-449). She also suffers from a drop foot. (R. p. 444).

Prior to the wreck, as a twelve year old sixth grader, Lillian was in advanced classes and performed well. (R. p. 542-543). She cooperated with her teachers, behaved well in class, and paid attention to her teachers. (R. p. 542). She was able to concentrate in class. (Id). Lillian was an Honor Roll student. (R. p. 556). Following the collision, Lillian missed the remainder of her sixth grade year. (R. p. 445). When she started back to school in fall of 2005, she was placed in basic classes. (R. p. 544; pp. 582-583). Lillian struggled academically after the wreck. (R. p. 545; 557), required special accommodations, and was often confused in class. (R. pp. 545-546; p. 584).

In 2005, the Colleton County School District Department of Special Services evaluated Lillian to determine whether she was eligible to receive special education services. (R. pp. 553-567). Lillian was assessed to determine whether she had a disability that affected her educational performance. (R. p. 553). Over a period of seven months, Lillian underwent a psycho-educational evaluation. (R. p. 555). Lillian's pre-injury records were reviewed, her teachers were interviewed, she was observed in class, and she underwent several standardized tests, including an IQ test. (R. pp. 553-567). Lillian's overall IQ was in the first percentile. (R. p. 561).

The Colleton County School District Department of Special Services determined Lillian was eligible for special education services for the disability of traumatic brain

injury. (R. p. 566). An Individualized Education Plan ("I.E.P.") was developed for Lillian. (R. p. 567). Under the I.E.P., Lillian was provided with a resource teacher and a resource period every day to help her with her weak areas, such as math and writing, and to have thirty minutes a week to work individually with a physical therapist. (R. p. 571). Lillian's teachers also made special accommodations for her. She was allowed extra time on assignments and was allowed to take her work and tests home. (R. p. 584-585; 597-598). Despite her I.E.P. and special accommodations, Lillian continued to struggle academically. (R. p. 584-585; 595).

Years prior to this collision, in 2000, CSXT implemented a program to eliminate sight obstructions at railroad grade crossings. (R. p. 153; 1622; 1623). Under the program, CSXT was to clear cut all vegetation on its right- of- way at all passive railroad grade crossings for a distance of 350 feet from the roadway. (R. p. 153; 171-172; 1622; 1623). South Carolina was the top priority in the timing of the railroad grade crossing clearing program. (R. p. 156). The clearing program was to begin in South Carolina in May of 2001. (R. p. 162; p. 1624). Then it was delayed to June of 2001. (R. p. 163; p. 1625). The clearing was to be completed within 158 days of the start date. (R. p. 164, p. 1625). The start date was pushed back yet again. (R. p. 166; p. 1629). However, all passive railroad grade crossings in Hampton and Allendale Counties were to be cleared by October 9, 2001. (R. p. 167; p. 1631). The clearing program was partially completed in South Carolina in 2001, but not to CSXT's original specifications due to problems with CSXT's contractor. (R. p. 164; p. 1632). Through all of this, the Hill Road crossing was not cleared. (R. p. 184).

In 2003, CSXT hired a different contractor, DeAngelo Brothers, in an effort to finish the crossing clearing program. (R. p. 177-178; p. 1640-1641). CSXT also changed the specifications for the clearing program. (R. pp. 178-180; 1640-1642). The new specifications required that CSXT's entire right-of-way be cleared for a distance of 350 feet from the edge of the roadway. (R. pp. 178-180; p. 1642). The clearing of the right of way was then to be tapered in a straight line so that at a distance of 650 feet from the roadway all vegetation would be cleared for a distance of twenty eight (28) feet from the centerline of the track. (R. pp. 178-180; pp. 1642-1643).

The Hill Road crossing was partially cleared on September 10, 2003. (R. p. 184). However, the trees in the northwest quadrant of the crossing, the direction the train was coming from, were not cleared on September 10, 2003 due to a dispute with a landowner over ownership of the trees. (R. p. 185-186; p. 1647). On February 3, 2004, the date of the subject collision, the crossing still had not been cleared as required under CSXT's crossing program, and trees in the northwest quadrant of the crossing (the direction the train was coming from) were not cleared due to the dispute with the landowner over the trees. (R. p. 185-186; p. 1647). Trees in this quadrant were located as close as 16 feet to the near rail, which would require a motorist to get closer than 15 feet of the near rail before he or she would have an adequate view of a train approaching from the west. (R. pp. 1619-1621; pp. 200-244; p. 682).

On February 3, 2004, the date of the subject collision, the northwest quadrant had not been cleared as required under CSXT's crossing program. Also, as CSXT admitted at trial, the engineer did not sound the horn of the train for the 1,500 feet prior to the crossing as required under South Carolina law.

ARGUMENTS

The Court of Appeals' Opinion No. 5008 of July 25, 2012 affirmed the trial court's rulings on numerous issues. Reversal by this Court is warranted. The Opinion below errs in its conclusions interpreting Rule 50, SCRCP and issue preservation at the directed verdict stage. As to the issues raised concerning the erroneous and prejudicial jury charge, the partial dissent to the Opinion is correct and the fatally flawed jury instruction must be reversed.

First, the Court below misapprehended the record before it and misapplied the law of South Carolina with regard to the preservation of issues on appeal. In ruling that Stephens failed to preserve the trial court's denial of his directed verdict motion, the Opinion directly conflicts with this Court's opinion of Henderson v. St. Francis Community Hosp., 295 S.C. 441, 369 S.E.2d 652 (Ct. App. 1988). Furthermore, the Opinion's literal interpretation of the phrase "close of all the evidence" within Rule 50(b), SCRCP, is inconsistent with the plain language of Rule 50(a), SCRCP, and unsupported by South Carolina precedent. The effect of the ruling is that a new, never before established procedural rule for issue preservation has been established by the Stephens Opinion. Based on established standards, Stephens' directed verdict motions as to both the horn and vegetation theories against CSXT should be considered by this Court. As to the directed verdict and J.N.O.V. issues, reversal is necessary because the Opinion fails to give effect to the factual stipulation of the patties and the effect of that stipulation on the parties. On this issue too, the Opinion does not address or misapprehends the record, which requires a finding that the trial court erred by failing to find as a matter of law that CSXT breached the statutory duty found at S.C. Code Ann.§ 58-15-910.

Reversal is also required because the Court of Appeals chose to not address issues and arguments concerning the error-filled jury charge by considering the jury charge as a

whole. By claiming that certain jury charges need not be addressed, the Opinion simply avoided addressing the merits of a fatally flawed and confusing jury charge by which Stephens was actually prejudiced. For the reasons that follow, the Opinion below should be reversed.

I. THE COURT OF APPEALS ERRED IN AFFIRMING THE DENIAL OF STEPHENS' DIRECTED VERDICT AND J.N.O.V. MOTIONS BASED UPON MISINTERPRETATION OF PROCEDURAL RULES, EXISTING PRECEDENT, AND OF THE RECORD.

On both theories of negligence asserted against CSXT, the trial court erred in failing to direct a verdict as to CSXT's duties and the breach thereof. As to Stephens' horn sounding and vegetation sight obstruction theories, the Court of Appeals erroneously ruled that Stephens failed to preserve the issue for appeal by failing to renew his directed verdict motion "at the close of all evidence."

A. To Require Stephens to Renew His Directed Verdict Motion After Presenting Reply Evidence Misapprehends Rule 50, SCRCP, and South Carolina Precedent Addressing the Purpose of a Directed Verdict Motion; Furthermore, the Court of Appeals Created New Procedural Law for Which No Authority Existed at the Time of this Trial.

Stephens was not required to renew his directed verdict motion at the close of his own rebuttal case in order to have the issue considered through a motion for judgment notwithstanding the verdict. Neither the Court of Appeals, nor CSXT, nor the DOT, have cited any authority to support the position and ruling adopted by the Court of Appeals which requires a plaintiff to renew a directed verdict motion after he has presented reply or rebuttal testimony after the defendants have rested. In fact, Wright v. Craft, 372 S.C. 1, 640 S.E.2d 486 (Ct. App. 2006), which the Court of Appeals relied upon as authority to find waiver, actually highlights the different procedural posture of this case and the Court of Appeals' misapprehension of the requirements of directed verdict motions.

First, the plain language of Rule 50(a), SCRCP, instructs as to when, and under what circumstances, a directed verdict motion may be made: "A party who moves for a directed verdict at the close of the *evidence offered by an opponent* may offer evidence without having reserved the right to do so... ." (emphasis added). Rule 50(a), SCRCP. Thus, the plain language of the rule verifies the practice in this state, that after an opponent has presented its evidence, the other party makes its directed verdict motion.

Rule 50(b), SCRCP, states as follows:

> Whenever a motion for a directed verdict made at the *close of all the evidence* is denied or for any reason is not granted, the court is deemed to have submitted the action to the jury subject to a later determination of the legal questions raised by the motion.

Id. (emphasis added). The Court of Appeals held that the phrase "at the close of all evidence," requires a renewal of the directed verdict motion after Stephens' rebuttal testimony, though the Respondents produced no more evidence or testimony at that time. While such a literal construction of the plain meaning of the phrase "at the close of all the evidence" is appealing in its simplicity, the Court of Appeals' construction does not harmonize with the plain language of Rule 50(a), which requires that motions be made at the close "of the evidence offered by an opponent." Rule 50(a), SCRCP. Furthermore, not one South Carolina case procedurally frames Rule 50 (b)'s phrase "at the close of all evidence" as anything other than the equivalent of the close of "the evidence offered by an opponent" as stated in Rule 50(a), SCRCP.

Referring back to the lone citation to authority offered by CSXT on this point is instructive. See, Henderson v. St. Francis Community Hosp., 295 S.C. 441, 369 S.E.2d 652 (Ct. App. 1988) (reversed on other grounds). Henderson reflects precisely how our Appellate Courts historically have interpreted the phrase "the close of all evidence" under Rule 50(b).

In Henderson, a premises liability case, the plaintiff appealed, *inter alia,* the trial court's denial of her JNOV motion against the designer of the parking lot at issue, Snoddy & McCullough. The Court of Appeals held that the issue was not preserved for review. The Court of Appeals arrived at the conclusion because the plaintiff's motion for directed verdict was premature because when made, only two of four defendants had rested. After the remaining two defendants rested, Plaintiff failed to renew the directed verdict motion. The plaintiff, therefore, failed to make a directed verdict motion at the close of "all of the evidence," which in that case clearly meant at the close of the evidence of all opponents, or all defendants. The Court of Appeals explained:

> We need not consider this issue, however, because Henderson failed, as required by Rule 50(b) of the South Carolina Rules of Civil Procedure, to make a directed verdict motion at the close of all the evidence. (Citation omitted).
>
> Henderson made her motion for directed verdict after St. Francis and Sinine closed but before Snoddy & McCulloch presented its evidence. Henderson, however, did not renew her motion after the close of all the evidence.
>
> Clearly, Henderson's motion was premature and improper. (Citations omitted).
>
> We therefore hold that, when a plaintiff, after moving for a directed verdict at the end of the case presented by one defendant, fails to renew his motion at the close of all the evidence, he waived his right to move for judgment notwithstanding the verdict. (Citation omitted). "The rule that a judgment notwithstanding the verdict may not be granted unless the moving party moved for a directed verdict at the close of all the evidence is a strict one." (Citation omitted).
>
> In holding that a premature motion for directed verdict cannot support a motion for judgment notwithstanding the verdict, we note the trial court in no way prevented Henderson from also renewing her directed verdict motion, the trial court never suggested to Henderson that the renewal of the motion would not be necessary to preserve her rights, and the evidence offered by Snoddy & McCulloch following

> Henderson's unrenewed motion for directed verdict was neither brief nor inconsequential. (Citation omitted).

Id., 295 S.C. 441, 446-447, 369 S.E.2d 652, 655-656.

As further evidence of the Court of Appeal's flawed analysis and construction of the phrase "close of all the evidence," the Court in Henderson *did not find waiver as against the two other defendants, against whom Henderson did make timely directed motion.* If the Opinion below's strict, literal construction of the phrase "close of all evidence," were correct - as opposed to a construction of the phrase which harmonizes with Rule 50(a)'s close of evidence "offered by an opponent" – the Henderson Court would have found that JNOV was waived as to ALL defendants, because it is clear that Henderson failed to move for a directed verdict at the "close of all evidence." Tellingly, the Henderson Court unequivocally held that the "close of evidence" refers to the close of the Defendant's evidence: "We therefore hold that, when a plaintiff, *after moving for a directed verdict at the end of the case presented by one defendant, fails to renew his* motion at the close of all the evidence, he waives his right to move for judgment notwithstanding the verdict." Id. (emphasis added.)

Here, by contrast, it is undisputed that Stephens timely moved for directed verdict at the close all evidence presented by his opponents CSXT and DOT. The only additional or supplemental evidence presented at trial was rebuttal evidence of the Stephens. By moving for a directed verdict at the *close of all evidence presented by all defendants*, Stephens has preserved his motion pursuant to Rule 50(b), in accordance with Henderson.

The issues of Henderson and Rule 50 interpretation were not addressed in the Court of Appeals. However, in reaching the conclusion that Stephens was required to renew his directed verdict motion at the close of his own rebuttal/reply evidence, the Court of

Appeals cited Wright v. Craft, *supra,* and Hendrix v. E. Distribution, Inc., 316 S.C. 34, 446 S.E.2d 440 (Ct. App. 1994). Both of these cases specifically address the long-held requirement that a defendant, in order to challenge the sufficiency of evidence through a JNOV motion, must renew his directed verdict at the close of all evidence. Neither of these cases addresses any requirement that a plaintiff who submits reply testimony after a defendant rests should be required to renew the directed verdict motion made previously at the close of the defendant's evidence. There is simply no precedent for the Court of Appeals' finding of non-preservation by Stephens. The Court of Appeals instead should have addressed the arguments concerning denial of directed verdict and JNOV on the merits.

The Court of Appeals should have applied Henderson here, as its holding is most factually and procedurally similar to this case. Henderson, the only precedent cited by Respondents before the Court of Appeals to support their arguments, compels that this Court reverse the below Opinion's finding of waiver/non-preservation. There is an absolute dearth of authority which would require Stephens to renew his motion for directed verdict if reply testimony is offered at the close of all defendants' evidence. Without such direction – either by way of a procedural rule or case law applying the rules – if this Court does not reverse the ruling of waiver, based on the concepts of equity and fairness, Stephens requests a finding that the ruling on this procedural change apply prospectively only.

B. The Opinion's Holding that Stephens was Required to Renew His Motion for Directed Verdict After His Presentation of His Own Reply Evidence is an Unconstitutional Rule Change of the Existing Rule 50, SCRCP

Prior to the Opinion below, there was no rule-based or common law precedent requiring a plaintiff to renew his directed verdict motion under the procedural posture of the case. If the Court of Appeals' alteration of the procedural requirement were allowable, the

newly announced procedural requirement contravenes the constitutionally mandated process requiring submission of rules affecting practice and procedure to the Legislature. Section 4a of Article V provides:

> All rules and amendments to rules governing practice and procedure in all courts of this State promulgated by the Supreme Court must be submitted by the Supreme Court to the Judiciary Committee of each House of the General Assembly during a regular session, but not later than the first day of February during each session. Such rules or amendments shall become effective ninety calendar days after submission unless disapproved by concurrent resolution of the General Assembly, with the concurrence of three-fifths of the members of each House present and voting.

S.C. Const. Art. V, § 4a. See also, Stokes v. Denmark Emergency Medical Services, 315 S.C. 263, 266, 433 S.E.2d 850, 852 (1993) ("This section [4a] of the Constitution merely sets forth the procedure for the Court to follow when it promulgates rules and amendments.") Adoption of this new rule was also not submitted to the Rules Advisory Committee for its review and input. Rule 609, SCACR. Rule 609 authorizes the committee to make recommendations "regarding the adoption or amendment of rules governing the practice and procedure before the trial courts of this State." Rule 609(b), SCACR. However, the Committee must provide a written "explanation or analysis" for all recommendations. Id. Any Committee recommendation must be submitted to the General Assembly pursuant to Article V, Section 4a of the South Carolina Constitution, and while Rule 609 does not prevent "the Supreme Court from promulgating a rule or amendment without submitting the matter to the committee," Rule 609(d), SCACR, any rule or amendment governing the practice and procedure must nonetheless be submitted to the Legislature pursuant to S.C. Const. art. V, § 4a to be constitutional.

The purpose of Rule 609, SCACR, and S.C. Const. art. V, § 4a is to provide notice of newly proposed rules or amendments to the public, bench, and bar. Submitting

proposed rules and amendments, pursuant to section 4a, also ensures proper restraint of judicial rulemaking authority. See generally, Thomas DeWitt Rogers, III, *Practice and Procedure – The Procedural Rule-Making Power of the South Carolina Supreme Court,* 30 S.C. L.Rev. 625 (1979).[1]

At the time of the trial in this case, no rule existed requiring a plaintiff to renew his directed verdict motion after he has presented reply evidence. There was no case law requiring the renewal. To the contrary, under Henderson the language of Rule 50(b) interpreting "the close of all evidence" clearly meant at the close of an opponent's case. This Court should declare the Court of Appeals' judicially created procedural rule to be unconstitutional given that the constitutionally mandated process was not followed.

C. The Court of Appeals Erred by Ignoring the Effect of the Admissions and Formal Stipulation of CSXT with Regard to its Breach of Duty to Sound its Horn in Compliance with S.C. Code Ann, § 58-15-910.

Finally, the Opinion below ignores the effect and importance of the stipulation which was entered by the parties concerning CSXT's breach of duty to sound its horn. The Court of Appeals also failed to recognize the fact that the stipulation mirrors the statements of CSXT's counsel in opening, and indeed the entire tenor of the defense of the case on the issue of the sounding of the horn.

From opening statements, CSXT admitted its failure to sound the train's whistle in conformity with S.C. Code Ann. § 58-15-910. From its opening statement, CSXT acknowledged that despite Ned Wooten's "belief" that he had blown the horn in a timely

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[1] Rogers' article in the South Carolina Law Review was based on a 1979 statute requiring rules or amendments proposed by the Supreme Court be submitted to the Legislature. Section 4a of article V, S.C. Const., adopted in 1985, mirrors, in large part, the 1979 statute.

fashion, as a party CSXT acknowledged that it failed to sound the horn in compliance with the requirements of South Carolina law:

> Now there's been a big deal made. You heard Mr. Parker talk about what he called the short whistle. And he's right. Under the law, 1500 feet before approach the crossing, the whistle is supposed to start blowing at that point in time. *There is this black box on the train... the black box tells you information about what happened, and Ned Wooden believed that when he got to 1500 feet, he was blowing at what's called the whistle post, the big post in the ground when they start blowing. He believed he did. It turned out he didn't. He was a few seconds late in blowing the horn, members of the jury, and there won't be any dispute about that.* (R. p. 46, l.21 – p. 47, l.8).
>
> I'm not suggesting that it's not important, it's very important – *he missed it by a few seconds.* (R. p. 47, ll. 17-18).

(emphasis added). By CSXT's own admission and the evidence at trial, the evidence is only susceptible of the conclusion that CSXT was negligent in the discharge of its duty to properly sound its horn at this crossing. Over and over again, as a strategic ploy (and faced with the evidence on this issue) CSXT admitted violation of the horn statute of § 58-15-910.

The Court of Appeals' finding of non-preservation as to the horn issue flies in the face of the record itself. In reaching the decision that the issues were not preserved, the Court of Appeals concluded that Stephens was not entitled to a directed verdict when: (1) in opening statements CSXT twice admitted it failed to properly sound the horn in violation of the applicable statute (R. pp. 46-47); (2) in opening statements CSXT told the jury that while the engineer "believed" he had sounded the horn on time, CSXT did not take the position that it was sounded properly (Id.); (3) in opening CSXT admitted that the "black box" event recorder showed Wooten was late sounding the horn and based on the recorder, Wooten was "a few seconds late in blowing the horn." (Id.); (4) in opening CSXT told

the jury that as to the sounding of the horn being late, "there won't be any dispute over that." (R. p. 47); and, (5) at the close of the case CSXT stipulated as to the accuracy of the event recorder, which showed the horn was blown late.

Despite CSXT's stipulation and the clear admissions of CSXT, the Court of Appeals sought to mine from the record a mere fly's speck of evidence sufficient to support the trial court's denial as to the horn issue. To do so, the Court of Appeals noted what it acknowledged to be only "weak" inference concerning the engineer's "belief" that he sounded the horn appropriately. This belief, whatever its worth in the determination of whether sufficient evidence existed to warrant the denial of a directed verdict, cannot supplant the only position taken by CSXT, that the horn was *not* sounded in accordance with the law.

Based upon the record there is no doubt that CSXT, in asserting its vigorous and successful defense of this case before the jury, *NEVER* argued or contended that it met its duties with regard to S.C. Code Ann. § 58-15-910. From opening to closing, CSXT admitted the breach. The defenses in the case were proximate cause and the comparative fault of the driver of the vehicle, Tonia Colvin. However, due to the trial court's error in failing to direct a verdict on the breach of this duty, these very issues, arguments, and defenses tried before the jury on the horn issue never even reached the jury's consideration.

Last, the finding of failure to preserve the motion for directed verdict is an unfair result when on that issue it was stipulated that the event recorder was accurate and the horn did not timely sound in compliance with the law. Even if the Opinion's analysis of waiver and issue preservation were correct, upon the entry of the stipulation at issue, ultimately

CSXT was bound by this fact and stipulation. A stipulation of fact binds the parties to the substance of the stipulation. This stipulation bound and required the trial court to charge the jury that CSXT was negligent in the discharge of its statutory duty. "When counsel enter into an agreed stipulation of fact as a basis for decision by the court, both sides will be bound by such agreed stipulation, and the court will not go beyond such stipulation to determine the facts upon which the case is to be decided." Belue v. Fetner, 251 S.C. 600, 606, 164 S.E.2d 753, 755 (1968); see also, Winchell v. Winchell, 291 S.C. 321, 353 S.E.2d 309 (Ct.App. 1987). A trial court is bound by the parties' stipulation of facts. Furthermore, as appellate courts consistently have held, a "stipulation is an agreement, admission, or concession made in judicial proceedings that is binding upon those who make them. Rutland v. South Carolina Dept. of Transportation, 390 S.C. 78, 700 S.E.2d 451 (Ct. App. 2010); Bodkin v. Bodkin, 388 S.C. 203, 694 S.E.2d 230 (Ct. App. 2010); McCrea v. City of Georgetown, 384 S.C. 328, 332, 681 S.E.2d 918, 921 (Ct. App.2009); Kirkland v. Allcraft Steel Co., Inc., 329 S.C. 389, 392, 496 S.E.2d 624, 626 (1998) (citation omitted); Corley v. Rowe, 280 S.C. 338, 312 S.E.2d 720 (Ct. App. 1984).

Applying the stipulation regarding the accuracy of the black box recorder to the case at hand, the calculation is as simple as: IF S.C. Code Ann, §58-15-910 requires a horn to be sounded at 1,500 feet, AND CSXT stipulates the black box was accurate and showed the horn sounded at 1,161 feet, THEN, CSXT violated the statute. As a matter of law, the trial court was required to direct a verdict for Stephens on the issue of duty and breach with regard to S.C. Code Ann. §58-15-910.

Parties may stipulate to facts and the trial court is bound by those facts. Here, CSXT stipulated that it failed to comply with the horn law. Throughout the entire trial,

from opening statements forward, CSXT admitted the failure and even told the jury that it would not dispute that the failure to sound the horn in accordance with the law. Despite the stipulation, the Court of Appeals erroneously affirmed the denial of directed verdict and JNOV by finding that Stephens failed to preserve the issues, rather than address the merits of the trial court's denial of directed verdict and JNOV.

To address the merits of the trial court's erroneous ruling, in its Order Denying Appellant's post-trial motions, the trial court made numerous conclusions of law to deny the motions, first, stating that "in order to direct a verdict for the Plaintiff, I would have had to find there was no jury issue on any element of the Plaintiff's negligence claim. This would have required me to find duty, breach and proximate cause as a matter of law." (R. p. 3). This logic is error because the trial court confused the issue of negligence with that of liability. See, Hinds v. Elms, 358 S.C. 581, 595 S.E.2d 855 (Ct. App. 2004). "In a personal injury action, a determination of negligence, standing alone, does not entitle a plaintiff to a favorable verdict as a matter of law." Hinds, 358 S.C. at 586, 595 S.E.2d at 858. "Liability encompasses all elements of a negligence claim, including damages proximately caused by the negligence." Id. By its admission of failure to sound the whistle according to statute, CSXT simply admitted negligence, and the Appellant was entitled to a directed verdict on that issue. The issue of proximate cause as to the whistle's contribution to the accident remained an issue to be determined by the jury. A directed verdict would have simply established the existence of a duty and the breach of that duty to sound the whistle in accordance with the law. It follows that the jury's finding that CSXT was not negligent with regard to the whistle is an inconsistent and impermissible verdict.

The trial court's same erroneous conclusions applied to Stephens' claims that CSXT negligently failed to clear the crossing for acceptable sight distances. Similar to the issues addressed above, CSXT admitted that it had failed to clear the vegetation and tree growth within its right-of-way at the subject crossing in conformity with its own rules and regulations.

Pursuant to CSXT's rules, regulations, and standards, CSXT's entire right-of-way should be cleared for a distance of 100 feet from the edge of the roadway. (R. p. 178-180; p. 1643). The clearing of the right-of way was then to be tapered in a straight line so that at a distance of 650 feet from the roadway, all vegetation would be cleared for a distance of twenty-eight feet from the centerline of the track. (R. pp. 178-182; pp.1643- 1644). In this case, it is clear and uncontested that CSXT failed to comply with its own standards. Prior to this collision at the crossing, the evidence undisputedly showed that at certain distances back from the stop line at issue, motorists' sight lines were obstructed by vegetation and trees. (R. pp. 412-413; 415-417; pp. 58-67; pp. 688-690; p. 1025, ll.5-19). CSXT's subcontractor charged with clearing the right-of-way attempted to cut certain trees and vegetation within the right-of-way in September of 2003, but this effort was met with resistance by a local resident who believed that his family owned a portion of the right-of-way.

CSXT, within a few days of Mr. Jackson's claim of ownership to a portion of the right-of-way, had confirmed its ownership to the right-of-way. (R. p. 1647). For months, CSXT represented to Mr. Jackson that the railroad would do nothing to clear the trees. (R. pp. 50-55). However, within approximately three (3) weeks of the collision at the crossing, CSXT promptly removed the once "disputed" trees and vegetation without consultation with Mr. Jackson.

Mr. Jackson testified as to numerous photographs of the crossing which at different distances from the rail depicted the various sight obstructions caused by vegetation and trees. (R. pp. 59-65). Similarly, in describing his visit to the subject crossing the day after the accident, CSXT employee James Barton admitted that at the stop sign at the crossing, there was foliage on the right-hand side when looking towards the tracks. Barton further acknowledged that at the stop sign and pulling forward, there were trees that block a motorist's view of the tracks. (R. p. 686, l.1 – p. 690, l.11). Stephens' expert Kenneth Heathington, Ph.D., offered in depth testimony as to the sight obstructions which existed within the right-of-way maintained by the defendant and over the course of hours of testimony, catalogued in great detail the failures and omissions of CSXT to conform to their own standards. (R. pp. 97-118; pp. 132-194; p. 200, l.15-p.244, l. 22). All evidence at trial, as well as the admissions of CSXT, leads to the single conclusion that CSXT was negligent in maintaining its right-of-way at this crossing.

Despite the fact that the evidence is susceptible of only one conclusion, the trial court failed to grant a directed verdict on the simple negligence of CSXT. This was error. The Court of Appeals then found erroneously that Stephens failed to preserve the issues for review. However, again, the trial court's ruling was based upon confusion of the concept of negligence with that of liability. See, Hinds v. Elms, *supra*. The court erred in failing to direct a verdict on the simple negligence of CSXT in failing to cut this crossing under its own standards. Stephens was entitled to a directed verdict on the issue so that the only question for the jury was whether CSXT's negligence in failing to cut its right-of-way was a proximate cause of the injuries sustained by Lillian C. This Court should reverse the Court of Appeals'

finding of waiver and lack of issue preservation and on the merits, rule that the trial court should have granted Stephens' directed verdict motion as to the negligence of CSXT.

The Court of Appeals should have reached the merits of the issue and reversed the trial court rather than create a new rule concerning issue preservation that is without precedent of support in the law.

II. THE COURT OF APPEALS ERRED IN AFFIRMING THE TRIAL COURT'S FLAWED, ERRONEOUS, AND PREJUDICIAL JURY CHARGE; AND, THE OPINION FAILS TO CONSIDER THE CHARGE AS A WHOLE AND WRONGFULLY DETERMINES "BEYOND A REASONABLE DOUBT" THAT THE ERRORS DID NOT CONTRIBUTE TO THE VERDICT.

In reviewing a jury charge for alleged error, it is clear that an appellate court must consider the charge as a whole in light of the evidence and issues presented at trial. Cole v. Raut, 378 S.C. 398, 404, 663 S.E.2d 30, 33 (2008). An alleged error is harmless *only if the appellate court determines beyond a reasonable doubt that the alleged error did not contribute to the verdict.* Wells v. Halyard, 341 S.C. 234, 237, 533 S.E.2d 341, 343 (Ct. App. 2000) (emphasis added). "Ordinarily, a trial [court] has a duty to give a requested instruction that correctly states the law applicable to the issues and evidence." Fernanders v. Marks Constr. of S.C., Inc., 330 S.C. 470, 473, 499 S.E.2d 509, 510 (Ct. App. 1998). In Burns v. South Carolina Commission for Blind, the Court of Appeals held:

> If the requested charge states a sound principle of law that is applicable to the case, and not otherwise covered by the charge, refusal to charge it is error and requires a new trial. Moreover, when general instructions to the jury are insufficient to enable the jury to understand fully the law of the case and issues involved, a refusal to give a requested charge is reversible error.

Id. at 323 S.C. 77, 80,448 S.E.2d 589, 591 (Ct. App. 1994).

Below, the Court of Appeals failed – and in fact refused – to address the jury charge as a whole to determine whether Stephens is entitled to reversal. Based on any of the alleged errors individually, and certainly when considering the charge as a whole, as indicated by the dissent, the Court of Appeals could not have determined beyond a reasonable doubt that the error(s) did not contribute to the verdict.

The Court of Appeals' failure to address all of the alleged errors and to consider them in conjunction, as required, ignores the actual defenses the case was tried upon. From opening statements to the previously discussed stipulation, CSXT admitted that it did not sound its horn in compliance with South Carolina law. From opening statements forward CSXT admitted that the trees in "Quadrant A" of this crossing – the very vegetation which Stephens claims caused the dangerous sight obstruction – should have been cut in accordance with its own rules but that the trees were not cut due to the issue with the landowner issue who didn't actually own the land. Instead, CSXT defended this case on the grounds that neither of these breaches were a proximate cause of the accident. CSXT and DOT contended that the proximate cause of the accident was "unsafe choices" by the driver of the car in which young Lillian was a passenger.

Other than the Dissent, the Opinion refused to address those clearly erroneous charges that relate to this very defense, the defense of the sole negligence of a third party, the driver of the vehicle. The defense of this case was succinctly set forth by CSXT in opening, laying the groundwork for what would become the mantra of the "unsafe choice" of the driver:

> [M]embers of the jury, we believe it will be undisputed in this case that when you stop at or near that stop line, you can see down the tracks a long, long ways. And stopped at the stop line on February

> 3rd, 2004, Ms. Colvin should have seen the train; and if you saw the train, you should have waited for the train to pass and trying to cross that day was an unsafe choice.

(R. p. 45, ll. 18-24).

The Court of Appeals chose to address only the charges "that relate to CSXT and DOT's alleged breach of their duty of reasonable care" and found consideration of the other charges to be unnecessary because those "alleged errors could hardly have affected the jury's deliberations over whether CSX or DOT breached its duty of reasonable care." The Court of Appeals declined to address all allegations of error in the charge because of the jury's verdict finding that neither CSXT nor DOT breached any duty. Where CSXT so clearly admitted from opening and stipulated that it had breached its duty to sound the horn timely, the fact that the jury never reached the actual issues in the case (proximate cause defenses, negligence of Colvin) is strong proof of the utter confusion created by the jury charge. For not considering the whole of the jury charge as an appellate court must, the Opinion below should be revered, as the charges that were *not* addressed clearly show the confusing, erroneous, and prejudicial nature of the jury charge.

The analysis in the dissent in the Opinion below is correct with respect to the jury charge issues. Viewing the jury charge as a whole, and addressing all of the allegations of error raised, the cumulative, confusing charges include but are not limited to: an unbalanced scale of duties created by the erroneous "It is Always Train Time at the Crossing" charge; a factually unsupported discretionary immunity charge; erroneous blood alcohol charges with a refused charge on the required presumption of impairment statute; a host of inapplicable statutes; and, other confusing and erroneous charges addressed herein. It is

inconceivable that the Opinion concludes "beyond a reasonable doubt" that the erroneous charges did not "contribute to the verdict" and this Court, respectfully, must reverse.

A. Alleged Errors in Jury Charge Which Were Addressed by the Court of Appeals in the Opinion Below

i. Charges Related to CSXT's Duties at Crossing

The Court of Appeals erred in affirming the trial court's rejection of Stephen's two proposed charges (Requests Numbers 2 and 3), both accurate statements of the law. Appellant requested that the trial court charge as follows with respect to vegetation within its right-of-way at crossings:

> A railroad corporation has a duty to maintain its right-of-ways and highway railroad grade crossings in a reasonably safe condition. If a railroad corporation negligently allows vegetation to grow on its right-of-way adjacent to the crossing to such an extent that it obscures or obstructs the vision of the driver of a motor vehicle using the roadway, it is liable to anyone who is injured in a collision, if the obstructing vegetation contributed as a proximate cause to the collision.

(R. p. 1066, l. 5 – p. 1070, 1.21). This requested charge is based on the case of Lowery v. Seaboard Coastline R. Co., 241 S.E.2d 158 (1978). The trial court refused to charge the requested language because "it's not, clearly, from the case" and would only charge Number 2 "if you can give me a direct quote from the case and something that's applicable." (R. p. 249, ll. 10-13.) The requested charge was clearly an accurate and correct statement of the law, though not a "direct quote" as required by the trial judge.

Lowery concerned a crossing accident where the jury found that the motorist's view of the crossing was obstructed by high weeds, requiring the motorist to approach the crossing so closely that once the train was visible, the collision could not be avoided. Thus, the liability in that case was founded, in part, on the railroad's failure to clear vegetation in its right-of-way, which was a contributing proximate cause to the accident. Despite the fact that

the requested charge is not an exact, specific quote from the Lowery decision, the charge reflects the holding of that case. The notion that railroads are liable to injured parties if they fail to clear sight obstructing vegetation from its right-of-way and that failure is a proximate cause of injuries is entrenched in our jurisprudence. See also, Webb v. CSX, 364 S.C. 639, 615 S.E.2d 440 (2005). Plaintiff's second request to charge was a correct and current statement of the law. The failure to charge this request prejudiced Appellant.

Stephens' third request to charge also dealt with CSXT's duty to maintain its right-of-way clear of sight obstructions. (R. p. 1070, l. 22- p. 1073, l. 13). Stephens requested that the jury be charged that "[w]hen vegetation at a railroad crossing is such that it obstructs a motorist's view of an oncoming train, the railroad has a duty to exercise added care in the operation of timing as the train approaches and crosses the crossing." The basis for Stephens' requested charge is Gleaton v. Southern, 38 S.E.2d 710, 714 (1946), a case which dealt with a sight obstruction caused by box cars and other equipment near the crossing that caused sight obstruction at the track. Because the case dealt with sight obstructions other than vegetation and the requested charge was not a direct quote from Gleaton, the trial court refused the charge. (R. p. 1073, ll. 10-13). The requested charge is an accurate statement of the law and applicable under the facts of the case at bar. The issues of sight obstruction at the crossing and the engineer's conduct on approach of the crossing, specifically his failure to adequately sound the whistle, were the central issues in the case. Stephens was entitled to the charge requested, as it directly relates to the duty of care owed by the train in approaching the subject crossing.

The error in not charging Stephens' requests to charge numbers 2 and 3 was compounded by the trial court charging the jury that "it is the law of this state that when the vision of the motorist is obscured by unfavorable conditions, whether by reasons of

weather, atmospheric conditions or other obstructions to vision such motorist must exercise due care consistent with the increased danger occasioned by the conditions that obstruct their vision." (R. p. 1461, ll. 13-18). The jury was therefore charged that if there is a view obstruction, it is *only* the motorist's duty to exercise reasonable care. This is completely wrong; the railroad and the motorist have mutual duties to exercise due care. The railroad has a duty to provide an adequate, reasonable, and safe sight distance and the motorist has a duty to exercise reasonable care under the circumstances. Stephens was prejudiced by the failure to charge the railroad's duty to provide a safe, reasonable, and adequate sight distance free of obstructions and because the jury was instructed that care arising from sight obstructions only related to the motorist's conduct. It was error to refuse to charge this correct, applicable statement of the law. The failure to charge was prejudicial to Stephens' ability to show that the failure to properly warn by whistle was a contributing proximate cause of the collision.

In so ruling, the Court of Appeals found that substantially equivalent charges were given. This finding, however, ignores the law's requirement of "added care in the operation of its train" where there are view obstructions at crossings. This is a duty imposed in operating the train which is separate from the railroad's existing duties to maintain the crossing from vegetation which causes sight obstruction. In this case, it was admitted that the horn was not sounded at the minimal, statutorily required distance of § 58-15-910, much less sounded commiserate to a duty of "added care."

CSXT admitted throughout the trial that vegetation at this crossing in Quadrant A should have been cut. The effect of refusing Stephen's requested charges was to confuse the jury as to the mutual duties which applied to the driver of the car at this crossing and the

defendants in operating the crossing in a safe manner. To raise the degree of prejudice, over objection, the Court of Appeals affirmed that the motorist must "exercise due care consistent with the increased danger occasioned by the conditions that obstruct their vision." Therefore, the Opinion affirms a charge which established a driver's heightened duty, but refuses to find error in the failure to charge the railroad's corresponding duty of added care at a crossing with conditions which obstruct vision. Reversal is warranted.

ii. The Jury Charge on Discretionary Act Immunity as to DOT

Even where the Court of Appeals found that charges given by the trial court were erroneous and without evidentiary support as to DOT's discretionary immunity charge, the Opinion justified this as non-error by claiming that Stephens did not present certain arguments, or changed his arguments on appeal to include DOT's failure to follow professional standards in the placement of the signs.

South Carolina Code Ann. § 15-78-60(5) (Supp. 2003) provides that governmental entities are not liable for losses resulting from "the exercise of discretion or judgment by the governmental entity or employee for the performance or failure to perform any act or service which is in the discretion or judgment of the governmental entity or employee." The burden of establishing an exception to the waiver of immunity is on the governmental entity asserting the defense. Niver v. South Carolina Dept. ofHwy. & Pub. Transp., 302 S.C. 461, 395 S.E.2d 728 (Ct .App. 1990). To establish discretionary immunity, the governmental entity must prove its employees, faced with alternatives, actually weighed competing considerations and made a conscious choice. Pike v. Dept. of Transp., 343 S.C. 224, 540 S.E.2d 87 (2000). The governmental entity must show that in weighing

the competing considerations and alternatives it utilized accepted professional standards appropriate to resolve the issue before them. Id. Mere room for discretion on the part of the entity is not sufficient to invoke the discretionary immunity provision. Summer v. Carpenter, 328 S.C. 36, 492 S.E.2d 55 (1997).

In this case, no evidence supports the claim that the DOT was entitled to a charge on discretionary immunity. Numerous DOT witnesses testified as to the placement of signs at this crossing, but no witness indicated that they or the department had weighed any competing considerations as to the placement of the signs. (R. p. 996-1018; pp. 1051-1057). No witness for the DOT testified as to any conscious choice made in the placement of the stop signs or the stop line, but rather basically acknowledged that the stop sign and stop line were placed where they were simply because that is where it had been placed in the past. (Id.). It was therefore inappropriate to charge the discretionary immunity statute, and Stephens did not fail to preserve these arguments, as determined by the Court below.

The Opinion below notes that "at the charge conference, therefore, the [trial] court approached the issue believing immunity was for the jury to decide." Stephens concedes that the phrase "professional standards" is not specifically used in discussing the objection. However, with regard to the placement of the stop line at issue, this concept was engrained in Stephen's theory as evidence was presented that the placement conflicted with the requirements of the MUTCD, which supplies professional standards. Nevertheless, Stephens sufficiently objected to the charge:

> They didn't bring anybody in to testify about what they did out there. None of these people knew what they did or why they did it. They didn't call any witness to say that they exercised discretion in

> placing these signs... But these people had no knowledge. Mr. Smith testified that all he did was replace a sign that was already there, and no witness at all came into court and testified about why the sign was placed there.

(R. pp. 1118-1120). The trial court was therefore aware of Stephen's valid objection to the charge. The trial court simply erred in giving the charge, for which there is absolutely no evidentiary support. The Court of Appeals erroneously found his objection to have been waived. The charging of discretionary immunity defenses, for which the Opinion acknowledges there was an insufficient factual basis, clearly confused the jury and reversal is required.

iii. Charges Related to Signage and DOT's Authority to Close Railroad Crossings

The Opinion does address Stephen's allegations of error in the trial court's charging of three statutes pertaining to signage at crossings: S.C. Code Ann. §§ 56-5-1010 (2006), 58-17-1390 (1976) and 56-5-1020, but the Opinion affirms the charge on S.C. Code Ann. § 58-15-1625, which authorizes DOT to close crossings when DOT finds the increased public safety of closing the crossing outweighs the inconvenience caused to motorists who would be rerouted. The Court of Appeals erred in these findings.

The trial court charged the jury on a number of inapplicable statutes concerning the erection of signage at crossings, none of which had any bearing on issues in the trial. These inapplicable charges were on S.C. Code Ann. § 56-5-1010; § 56-5-1020; § 58-17-1390; and § 58-15-1625.

S.C. Code Ann. §56-5-1010 requires that all railroad companies "shall place and maintain at every crossing of a highway and railroad at grade standard cross-buck signs" in accordance with the MUTCD. In the case at bar, there was no issue as to whether CSXT

had erected a cross buck sign at the crossing. The required signage was present. By charging a requirement of law that had been met by CSXT, but which had no application to the facts of the case, the jury could have been led to believe that by compliance with the signage requirement, CSXT had fulfilled their duty to motorists at the crossing. The fulfillment of this signage obligation had no bearing on the questions raised at trial of whether CSXT's admitted failures concerning vegetation clearance and appropriate whistle notification were a proximate cause of the collision at issue.

Similarly, the charge of S.C. Code Ann. §56-5-1020 was inapplicable and potentially led to jury confusion. (R. p. 1451, l.17- p. 1452, l.3). Section 56-5-1020 prohibits the unauthorized placement of signs, signals, or other devices at crossings. This statute again, was irrelevant as to any issue in the trial of the case. Charging this statute created and potentially added to jury confusion concerning the obligations of the Respondents at the crossing and indicated compliance in an area which was uncontested.

Next, the court charged the jury on § 58-17-1390, which requires railroad corporations to place and maintain signs reading "Railroad Crossing" at crossings. (R. p. 1452, 1.25 – p. 1453, 1.13). Again, there was no question that the subject crossing had signage in compliance with this section and this charge was not relevant as to any issue of liability in the case.

Finally, the court charged the jury on S.C. Code Ann. § 58-15-1625, the crux of which states: "...the Department of Transportation may order legally closed and abolished as a public way, within the limits of a railroad right-of-way, a grade crossing then in existence at the time the department assumes jurisdiction of the matter, upon a finding that the enhancement of public safety resulting from such closing outweighs any inconvenience caused by increased circuitry of highway routes." (R. p. 1059, ll. 17-25). This statute is

simply inapplicable to any issue raised in the case and the charge was improper, again creating jury confusion and prejudice to the Appellant.

Taken individually and in conjunction with one another, there is question that the jury would have had to have been confused by the charging of these inapplicable statutes. Stephens was prejudiced by these charges because they created a list of requirements that had been met by CSXT – but, none of which had any bearing on the theories of negligence asserted in the trial. The list of signage statutes complied with by CSXT potentially confused the jury because the inapplicable charges rendered a false picture of compliance at the crossing, rather than addressing the theories under which Stephens proved CSXT to be negligent. CSXT's compliance with these signage statutes has absolutely nothing to do with the issues of whether CSXT properly cleared vegetation in its right-of-way or whether CSXT complied with statutory law concerning the sounding of its whistle. Because of the inapplicability of the charges addressed herein and the prejudice and confusion occasioned by the charges, a new trial should have been granted by the Court of Appeals. Rather, Stephens respectfully requests that this Court reverse the Court of Appeals.

B. Allegations of Error Which Were Not Addressed in the Opinion

i. Though the Opinion Narrowly Addressed Charges That it Viewed as Applicable to CSXT or DOT's Duty of Reasonable Care, The Court Failed to Address a Number of Alleged Errors Directly Related to Reasonable Care.

Stephens argued below that the trial court erred in charging S.C. Code Ann. § 56-5-2330 and § 56-5-2740, statutes which apply to intersecting highways, but not railroad grade crossings, and which conflict with S.C. Code Ann. § 56-5-2715 and the MUTCD. A

motorist's duty to stop at a highway grade crossing such as the one at issue is found in S.C. Code Ann. § 56-5-2715, which states:

> The Department of Transportation, and local authorities with the approval of the Department of Transportation, may designate particularly dangerous highway grade crossings of railroads and erect stop signs thereat. When such signs are erected, *the driver of any vehicle shall stop within fifty feet, but not less than fifteen feet, from the nearest rail of the railroad and shall proceed only upon exercising due care.*

(emphasis added). Id. Furthermore, the MUTCD, which the DOT is bound to follow, dictates that stop signs must be posted no closer than 15 feet from the rail, which conforms to the duties of motorists in the above statute. There is no question that this statute applies to the crossing at issue. Despite the clear application of this statute to the crossing at issue, the trial court charged the jury on two unrelated, irrelevant statutes which do not apply to railway crossings: S.C. Code Ann. §§ 56-5-2330 and 56-5-2740. Furthermore, § 56-5-2330 and the charge thereon are inapplicable to the facts of this case, as the statute does not apply to stop signs at railroad crossings. This statute should not have been charged. S.C. Code Ann. § 56-5-2740 applies to highway intersections with crosswalks, which is clearly inapplicable.

By charging two inapplicable statutes describing the driver's duties to stop in other contexts, the jury certainly could have been confused as to Colvin's duties at this crossing. In fact, Colvin was not allowed by § 56-5-2715 to stop at the stop line in place at the crossing, as the stop line at this crossing is placed approximately 9.75 feet from the near rail of the roadway, in violation of the applicable MUTCD standard. (R. p. 681). To comply with the inapplicable statutes that the trial court charged actually would require that Colvin violate the one clearly applicable statute, § 56-5-2715. It follows that the charge

of the irrelevant statutes could have confused the jury by placing upon Colvin duties which did not exist. The prejudice to Stephens is clear in that it could have led the jury to believe that if Colvin failed to meet the requirements of one of the inapplicable statutes, she had acted negligently and was the sole cause of the collision. In this case where the defense of the action centered on the claims of "unsafe actions" by Colvin, these charges confused the jury and caused prejudice to Stephen's case.

ii. The Jury Charge on the Law of Intervening or Superseding Negligence was Given in Error.

Charging the law of intervening, or superseding, negligence under the facts of this case was reversible error. Following instruction on concurring causes, the trial court charged as follows:

> An intervening cause is an independent cause which intervenes between the original wrongful act or omission and the injury, tums aside the natural sequence of events, and produces a result which would not otherwise have followed and which would not have been reasonably anticipated. It is an act of an independent agency which destroys the causal connection between the negligent act of a defendant and the wrongful injury; the independent act being the immediate cause, in which case damages are not recoverable because the original wrongful act is not the proximate cause.
>
> An intervening act of a third person, ladies and gentlemen, breaks the chain of causation and obviates the liability for the original breach of duty if it is a superseding cause and one which the original wrongdoer was not bound to anticipate as the natural or ordinary result of their acts. If subsequent to an original wrongful act or negligent act a new cause has intervened, of itself sufficient to stand as the cause of the injury, the former must be considered as too remote. However, if the character of the intervening act claimed to break the connection between the original wrongful act and the subsequent injury with [sic] such that its probable or natural consequences could reasonably have been anticipated by the original wrongdoer, the causal connection is not broken and the original wrongdoer is responsible or all the consequences resulting from the intervening act.

(R. p. 1436, l.12 - p. 1437, 1.13).

Stephens objected to this charge on the grounds that any allegations of negligence against Ms. Colvin as the driver of the vehicle in the collision were foreseeable as a matter of law, and therefore could not serve as an intervening, superseding cause. (R. p. 1303, l.3 – p. 1307, 1.4). Based on the facts presented at trial, it is absolutely foreseeable that a motorist might not stop at the stop line at the Hill Rd. crossing, as the stop line was closer than 15 feet of the near rail. It is unlawful to stop closer than 15 feet from the nearest rail. S.C. Code Ann. § 56-5-2715. Therefore, as a matter of law, these foreseeable risks cannot serve as an intervening or superseding negligent act which would sever the Respondents' wrongdoing from the resulting injuries.

Charging the jury on the theory of intervening and superseding negligence when unsupported by the facts was error and reversal is required.

iii. The Charge of CSXT's Request to Charge No. 45, which Stated "It is Always Train Time at the Crossing," Warrants Reversal, Because the Charge Misstates the Respective Duties of Motorists and the Railroad at Crossings.

The trial court improperly charged the jury as follows:

> Ladies and gentlemen, I further charge you it is the law of this state it has been well said that it is always train time at a railroad crossing. The law regards a railroad crossing as a place of danger. The very presence of such a crossing is notice to the person approaching or attempting to cross it of the danger of colliding with a passing engine or train.

(R. p. 1460). This language is taken from the 1936 case of Robison v. Atlantic Coast LineR. Co., 184 S.E. 96, 100 (1936). First, the charged language is taken from pure *dicta* and is not, in fact, the holding of the case. As charged, this language implies a higher duty upon motorists at crossings than required. At any crossing a motorist has the duty to drive as a reasonably prudent person would. However, as given, the court's charge

elevates the duties of the motorist above that of a railroad, which is inappropriate. The error in charging the jury that it is "always train time" at a railroad crossing was compounded by the trial court's failure to charge Appellant's Request to Charge No. 9, which would have instructed the jury correctly that "a driver of a motor vehicle is under no absolute duty to stop, look, and listen before going on the track unless the exercise of ordinary care and prudence under all the surrounding facts and circumstances require the adoption of such course." (R. pp. 1078-1079).

The trial court's instruction, as given, placed a higher duty on the motorist than on the railroad when under the law the duties are mutual. This was an incorrect charge on the law and the charge prejudiced the Appellant. Therefore, reversal is warranted.

iv. The Dissent Correctly Concluded that the Jury Charges' Errors Regarding Impairment Levels, Presumptions of Impairment, and the DOT's Immunity from Criminal Activities of a Third Person Requires Reversal.

The jury's verdict stated that neither CSXT nor DOT breached any duty. Consistent with the "unsafe choices" defense presented by the Respondents to the jury, the jury therefore found the driver of the car, Colvin, to be the sole negligent actor which produced the accident. Despite this, the Court of Appeals refused to address the clearly erroneous charges related to Colvin's alleged impairment, her inability to rebut the erroneous charge, and DOT's purported immunity from "criminal" acts of third parties.

During trial, Tonia Colvin admitted that in a period of five to five and one half hours prior to the accident, she had consumed one or two wine coolers. (R. pp. 422-433). Ms. Colvin also testified that on the day of the accident she had taken her prescriptions for Darvocet and tizanidine, which she had taken for years due to her disk herniations. (R. pp. 426-429). Colvin testified that she took these prescriptions on a daily basis and

during the course of her prescription use had never suffered any side effects from the medication. (Id.). During the course of emergency treatment following the accident, Ms. Colvin's blood alcohol content was measured to be .018, or 18 milligrams percent. (R. pp. 519-532). A drug screen performed during her emergency treatment found her presumptively positive for opiates. (Id.). The only evidence adduced at trial concerning this finding was that it stemmed from her prescription medication. (R. p. 665). Other than the admissions of Ms. Colvin that she consumed one or two wine coolers that day, absolutely no evidence was presented at trial, whether direct, circumstantial, or in the form of inferences, that she was in any way impaired at the time of this collision.

Through various stages of the trial, Stephens lodged objections at the charging of this statute. (R. p. 1408, l.12 - p. 1411, l.17.) Nevertheless, the trial court charged the jury on the driving under the influence criminal statute as follows:

> Ladies and gentlemen, under South Carolina law, again, Subsection 56-5-2930, it is unlawful... for a person to drive a motor vehicle in any one of the following situations: if that person is under the influence of alcohol to the extent that the person's faculties to drive are materially and appreciably impaired; if that person is under the influence of any other drug or combination of other drugs or substances, including prescription medication or narcotics, which cause impairment to the extent that the person's faculties to drive are materially and appreciably impaired; or if that person is under the combined influence of alcohol and any other drugs, or drugs or substances, including prescription medication or narcotics, which cause impairment to the extent that the person's faculties to drive are materially and appreciably impaired.
>
> Ladies and gentlemen, I charge you that driving under the influence, under Subsection 56-5-2930, which I just read to you, has been interpreted to mean that a person shall not operate a motor vehicle while under the influence of certain substances which materially and appreciably impair the mental and physical faculties of the operator; or, stated another way, the impairment due to drinking of alcohol

> must be to such a degree that it adversely affects the ability of the driver to operate the vehicle safely on the highways of the state.
>
> I charge you, ladies and gentlemen, that it is not against the law of South Carolina to drink and/or use drugs and drive. A person is guilty of driving under the influence only if their abilities are impaired by alcohol and/or drugs to such an extent that their driving is materially affected and they are thereby unable to safely operate an automobile.

(R. p. 1452).

To compound the error in charging § 56-5-2930 when there was no evidence of impairment, the trial court refused to charge S.C. Code Ann.§ 56-5-2950(b).This statute states that when the driver of a vehicle registers below .05 blood alcohol concentration, "it is conclusively presumed that the person was not under the influence of alcohol." Id. The evidence at trial showed that Tonia had taken her prescription medication at 6:30 that morning and may have taken another Darvocet approximately 5 hours before the collision. The jury could have therefore considered that the prescription medication did not cause any impairment, but that alcohol could have. Although CSXT argued that the charge of § 56-5-2950 was inappropriate because it did not consider the mixture of alcohol and prescription medication, the jury was still entitled to learn the law concerning alcohol concentration.

Stephens was prejudiced by the jury being charged on the criminal statute concerning impaired driving and then the jury being precluded from learning that by Colvin's blood alcohol level, she was presumptively *not* impaired by alcohol under S.C. Code Ann. § 2950. (R. p. 1337, 1.5-p. 1350, 1.7). The failure to charge the jury on correct, applicable law concerning the presumption of impartment deprived the jury of the ability to understand one of the central issues in this case, the driving and decisions of Ms. Colvin at

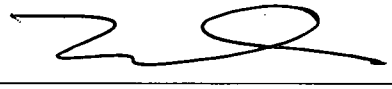
the subject crossing. "When general instructions to the jury are insufficient to enable the jury to understand fully the law of the case and issues involved, a refusal to give a requested charge is reversible error." Fernanders, 323 S.C. at 80, 448 S.E.2d at 591 (Ct. App. 1994).

Additionally, the trial court charged the jury that the SCDOT was immune from liability pursuant to S.C. Code Ann. § 15-78-60(20) for the criminal actions of third persons. This charge was in error and again, should have been addressed when considering the jury charge as a whole, by the Court of Appeals. By charging the criminal driving under impairment statute when there was no evidence of impairment and Colvin was never charged with any crime, the failure to allow Colvin to rebut impairment by presentation of Section 56-5-2950 confused the jury and prejudiced Stephens. Much to the prejudice of Stephens, the charge given and refusal of § 56-5-2950 impermissibly led the jury to infer that the DOT could not be liable for its omissions because "criminal activities" had been committed by Ms. Colvin.

CONCLUSION

The Court of Appeals Opinion below requires reversal. On each issue addressed herein, the Court below made erroneous rulings and reversal is appropriate and required.

Respectfully submitted,



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October 13, 2014
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S.C. Supreme Court

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM HAMPTON COUNTY
Court of Common Pleas

Carmen Tevis Mullen, Circuit Court Judge

Appellate Case No. 2013-000133
Case No.: 2004CP-25-00267

Willie Homer Stephens, Guardian ad Litem for Lillian C., a minor ..... Petitioner,

v.

CSX Transportation, Inc. and the South Carolina Department of Transportation,.....**Respondents.**

Proof of Service

This is to certify that I, *Tammy M. Lee,* with the Law Firm of PETERS, MURDAUGH, PARKER, ELTZROTH &DETRICK, PA, Attorneys for the Appellant, have this date mailed via the U.S. Postal Service with first class postage prepaid, a true and correct copy of the within *Brief of Appellant* to the following

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