THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

APPEAL FROM HAMPTON COUNTY
COURT OF COMMON PLEAS

CARMEN TEVIS MULLEN, Circuit Court Judge

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S.C. Supreme Court

APPELLATE CASE NO.: 2013-000133

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

vs

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

BRIEF OF RESPONDENT
CSX TRANSPORTATION, INC.

Ronald K. Wray, II (S.C. Bar #65246)
Thomas Vanderbloemen (S.C. Bar #75784)
GALLIVAN, WHITE & BOYD, P.A.
55 Beattie Place; Suite 1200
Greenville, SC 29603
(864) 271-9580

James W. Purcell
Fulcher Hagler, LLP
P. O. Box 1477
Augusta, GA 30903-1477
(706) 724-0171

Jonathan P. Harmon
McGuire Woods, LLP
901 East Cary Street
Richmond, VA 23219-4030
(804)775-1000

Attorneys for Respondent
CSX Transportation, Inc.

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STATEMENT OF ISSUES ON APPEAL

I. Was Stephens' contention that no jury issue remained regarding some, but not all, of the elements of his negligence claim a proper basis for a directed verdict motion and, if so, did Stephens' failure to renew his directed verdict motion at the close of all the evidence bar him from moving for judgment notwithstanding the verdict?

II. Did the Court of Appeals correctly address the relevant jury charges and properly conclude that the Trial Court acted within its discretion in instructing the jury?

STATEMENT OF THE CASE

This is a railroad crossing case arising from an accident that occurred in Hampton County on February 3, 2004. Petitioner Willie Homer Stephens ("Stephens") filed this action alleging that his granddaughter, Lillian, suffered injuries in the accident and that her injuries were due to the alleged negligence of Respondents CSX Transportation, Inc. ("CSX") and South Carolina Department of Transportation ("DOT"). CSX and DOT denied these allegations. Following a three-week trial in Hampton County, the jury returned a verdict in favor of CSX and DOT. The Trial Court denied Stephens' post-trial motions. The Court of Appeals affirmed, agreeing that because Stephens had not moved for a directed verdict at the close of all the evidence at trial, he had not preserved his challenge to the jury verdict. It also rejected Stephens' arguments concerning evidentiary rulings and jury charges. This Court granted review.

On appeal to this Court, Stephens makes two primary arguments. First, even though he admits that fact issues remained concerning the proximate cause element of his negligence claim against CSX and that he did not move for directed verdict at the close of all the evidence, Stephens contends that the Court of Appeals incorrectly affirmed the Trial Court's denial of his Motion for Judgment Notwithstanding the Verdict ("JNOV"). Second, he argues that the Court of Appeals incorrectly affirmed the Trial Court's jury charges. Stephens no longer pursues his challenges to the evidentiary rulings.

For the reasons discussed below, Stephens fails to show that the Court of Appeals reached an improper result. A plaintiff is entitled to judgment as a matter of law, whether via a motion for directed verdict or a motion for JNOV, only when no fact issues remain concerning each element of his claim. But Stephens conceded both in the Trial Court and

in the Court of Appeals that fact issues remained as to the proximate cause element of his negligence claim against CSX. This concession renders it improper for any court to have granted Stephens judgment as a matter of law, and neither the Trial Court nor the Court of Appeals could have erred in failing to grant him this relief. In any event, the Trial Court and Court of Appeals correctly applied the plain language of Rule 50(b), SCRCP and the well-established precedent of this Court in ruling that a party must move for a directed verdict at the close of all the evidence in order to move for JNOV and preserve the issue for later appeal.

Finally, the Court of Appeals followed black letter law in holding that a Trial Court cannot be reversed where its instructions correctly stated the law and did not prejudice the Appellant. Stephens does not challenge the legal accuracy of any of the charges given by the Trial Court, but argues only their relevance to the issues presented. However, the jury having found no negligence by CSX or DOT, Stephens can demonstrate no prejudice from any of the charges given. This Court should affirm and allow the jury's verdict of over six years ago to stand.

STATEMENT OF THE FACTS

On the afternoon of February 3, 2004, Lillian was riding in a car with her mother, Tonia Colvin ("Colvin"), in Yemassee, South Carolina. Colvin picked up her boyfriend, Carlos Terry, at the Dixie Poly Drum plant and came to a railroad crossing at Hill Road maintained by CSX. (R. p. 410-12). Larry Biser was leaving the Dixie Poly Drum plant at the same time as Colvin and was traveling directly behind her in his truck. (R. p. 713). Biser testified that, as soon as he got in his truck, he heard the horn sounding the approach of a CSX train, and he saw and heard it as he traveled along the road leading up to the crossing. (R. p. 714). When he arrived at the crossing, knowing that he would need to wait for the train to cross, he "put [his] truck in park and shut it off." *Id.*

Other witnesses in close proximity to the crossing also testified that they heard the approaching train. Lon Hoover testified that he heard the train coming from a quarter mile away, and Patricia Griffith stated that the horn was so loud that she complained to her children about the noise. (R. pp. 263, 353-54). Undisputed evidence showed that the horn sounded at least seventeen to eighteen seconds before it reached the crossing and could be heard from two and a half miles away. (R. pp. 278-80, 294).

As the train was nearing the crossing and the crew was blowing the horn, Colvin arrived at the crossing and stopped at a stop sign. (R. p. 714). She then pulled up and stopped at a white stop line marked on the pavement and, according to Biser, "just sat there." *Id.* The train's engineer, Ned Wooden, saw Colvin "ease up to the stop bar and stop," demonstrating that she was able to see the train as well. (R. p. 806). The conductor, Calvin Cummings, also saw the Colvin vehicle stopped at the stop line. (R. p. 1564). Witnesses testified that from the stop line where Colvin stopped, the view was

unobstructed down the tracks for approximately 2,000 feet. (R. pp. 81-82). Terry, Colvin's passenger that day, admitted that from the stop line he could see the I-95 bridge, which was at least 2,000 feet down the track. (R. p. 633). The sight distance was, as the trial judge ruled, "undisputed." (R. p. 2).

Despite having clear sight distances down the track that permitted her to see the approaching train, and despite the sounding of the train's horn heard by several witnesses, Colvin suddenly drove in front of the train and her vehicle was hit. As Biser explained, "next thing I know her brake lights went out and across the tracks she went in front of the train." (R. p. 714). Even Colvin admitted that from where she stopped she believed that she could see a safe distance down the tracks such that she could safely cross ahead of an oncoming train. (R. pp. 481-83).

Miraculously, Colvin and Terry sustained only minor injuries. (R. pp. 414, 534, 618). They were treated by emergency responders, one of whom told Colvin that she smelled of alcohol. (R. p. 484). Hospital lab reports from Colvin's treatment were also positive for opiates. (R. p. 538). Colvin admitted that she had taken multiple medications that day, including Darvocet and tizanidine, had consumed alcohol, and had "potentially some other things" in her system. (R. p. 473) (admissions by Colvin). Labels on these medications warned against taking with alcohol, and Colvin acknowledged that it was a "very bad idea to take alcohol and tizanidine at or around the same time," and it was a "very bad idea" to take "alcohol and Darvocet at or around the same time." (R. p. 460-67).

Lillian was more seriously injured, requiring hospitalization. (R. pp. 429-38). Fortunately, she appears to have recovered well and her testimony suggested that she was

a teenager doing normal teenage things, like sending text messages, attending school, and having a lot of friends, including a boyfriend. (R. pp. 701-04).[1]

The jury heard considerable testimony that at the time of the accident the Hill Road crossing was a safe crossing with more than adequate sight distances. As mentioned above, numerous witnesses testified about the ability to see unobstructed for 2,000 feet down the track from the stop line, and the DOT previously had inspected the crossing and determined that it passed inspection under state law. (Supplemental Record ("S.R.") p. 35; R. pp. 711-18, 1047). Biser, who was behind Colvin at the crossing, testified that he passed over the crossing "five or six times ... a day," had never heard of an accident there, and had never thought that the crossing was unsafe. (R. pp. 711-718). Another witness stated that he was unaware of any accidents at the crossing in 40 years and he had never had a problem with trees blocking his view down the tracks. (R. pp. 72-73).

Ample evidence also was presented that the train's horn sounded prior to its approach to the crossing and alerted those in close proximity to the crossing. (R. pp. 263, 353-54). The train engineer testified that he sounded the horn at the whistle post, approximately 1,500 feet from the crossing, although the train's event recorder indicated that the horn may not have been sounded at this distance. (R. p. 809). In any event, Hoover, Griffith, and Biser all confirmed that they heard the train well before it reached

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[1] Stephens dedicates a significant portion of his brief to discussing Lillian's treatment for her injuries, but he does not claim any error by the trial court or jury with respect to any damages issues. No one disputes that Lillian was injured in the accident, but her injuries and treatment are not relevant on appeal because the Hampton County jury, after hearing three weeks of evidence, found that CSX was not liable for the accident. If these issues were relevant to the issues on appeal, the parties would have presented a more complete record on appeal containing all the evidence, but this was unnecessary in light of the jury's defense verdict.

the crossing. Stephens' expert, David Lipscomb, testified that it made no difference when or where the train horn was sounded, as notwithstanding the multiple witnesses who testified that they did, in fact, hear the horn as the train approached the crossing, Lipscomb opined that Colvin would not have heard the train horn in time to avoid the train regardless of where it was sounded. (R. pp. 324-26).

As a result, the jury had more than adequate evidence to conclude that CSX and DOT were not liable for the accident at the Hill Road crossing.

ARGUMENT

I. The Court of Appeals Was Correct in Affirming the Trial Court's Denial of Stephens' Motion for JNOV.

At trial, Stephens presented his case in chief, and CSX and DOT then presented their respective cases as defendants. After CSX and DOT rested, Stephens brought what he styled a "directed verdict motion." Pet'r's Br. 7. Despite the motion's moniker, however, Stephens did not seek a *verdict* in his favor on his negligence claim against CSX. Instead, Stephens' motion sought only to remove from the jury's consideration two elements of his negligence claim against CSX—"CSXT's duties and the breach thereof." Pet'r's Br. 8. Stephens conceded that there were jury issues as to proximate cause, and the Trial Court denied his motion. (R. pp. 1059-62).

At that point, Stephens did not rest his case, but instead put on additional evidence in his rebuttal case going to the topic of his previous directed verdict motion: CSX's alleged duty and breach. Despite introducing new evidence in his rebuttal case, Stephens did not renew his motion at the close of all the evidence. After the jury's verdict against him, Stephens sought judgment notwithstanding the verdict under Rule 50(b). Alluding to evidence introduced after the Trial Court denied his mid-trial motion for directed

verdict, Stephens argued the court "erred in failing to direct a verdict in favor of Plaintiff and against [CSX] on the issue of negligence" because CSX "admittedly failed to sound the horn in accordance with S.C. Code Ann. § 58-15-910" and "admittedly failed to clear the crossing in accordance with its own rules and regulations . . . ." (R. p. 38). Stephens did not explain how he could be entitled to judgment, as opposed to a new trial limited to the issues of proximate cause and, potentially, damages—which he did not request. The Trial Court denied Stephens' request for JNOV on two grounds: first, Stephens conceded that fact issues remained concerning proximate cause, and, second, Stephens had failed to move for a directed verdict at the close of all the evidence as required by Rule 50(b). (R. pp. 2-3, 1486, 1503).

On appeal, Stephens challenges the trial court's denial of his purported motions for directed verdict and JNOV and the affirmance of those decisions by the Court of Appeals. Stephens devotes much of his challenge to attacking the Trial Court and Court of Appeals' conclusion that, because he failed to move for a directed verdict at the close of all the evidence, he had not preserved this issue for JNOV or appellate review. *See* Pet'r's Br. 8-14. The balance of Stephens' challenge is focused on the Court of Appeals' refusal to consider evidence not raised by Stephens in his directed verdict motion. *See* Pet'r's Br. 14-21.

But Stephens' challenge to the decisions of the Trial Court and Court of Appeals fails out of the gate. For even if this Court accepts every argument made by Stephens, his pre- and post-verdict motions for judgment as a matter of law remain deficient on their face. As a plaintiff, in order to be entitled to judgment as a matter of law on his negligence claim against CSX, Stephens had to show that there was no genuine dispute of

fact as to *each element* of that claim. But both his directed verdict motion and his JNOV motion conceded that factual issues remained concerning the element of proximate cause. Thus, regardless of whether there were genuine disputes of fact as to duty and breach, Stephens does not, and cannot, claim that he is entitled to judgment as a matter of law on his claim against CSX.

The relief Stephens' sought—the removal of some, but not all, elements of his claim from the jury's consideration—is not *judgment*. If he wished to restrict the jury's deliberation to particular elements of the cause of action, he could have requested a jury charge to that effect. He did not, and the Trial Court's failure to give such a charge is not an issue in this appeal. Similarly, although Stephens is appealing from the denial of his request for JNOV, he never could have been entitled to that relief; the most to which he could have been entitled—assuming for present purposes that he had satisfied his obligation to move for a directed verdict at the close of all the evidence—is a new trial limited to the issues of proximate cause and, if necessary, damages. Yet he *never* sought that relief—either in his post-trial motion or in the Court of Appeals. For all of these reasons, this Court does not need to decide whether to recognize an exception to Rule 50's requirement that directed verdict motions be made at the close of all the evidence. Accordingly, if the Court issued its writ of certiorari in this case to address that issue, it may wish to consider dismissing the writ as improvidently granted.

In any event, the Trial Court and Court of Appeals were correct in holding that Stephens failed to preserve his motion for post-trial and appellate review. The plain language of Rule 50(b) requires that a directed verdict motion be made at the close of *all* the evidence in order for it to be renewed in a JNOV motion. And even if this fatal

omission were ignored, in challenging the jury's verdict in favor of CSX, Stephens may rely only on evidence raised in his directed verdict motion. Stephens' directed verdict motion, unlike his brief, *see* Pet'r's Br. 14-21, did not raise any purported admission by CSX or the stipulation concerning the train horn recorder, which had not even been introduced into evidence at the time Stephens moved for a directed verdict mid-trial.

A. Stephens was Never Entitled to Judgment as a Matter of Law.

1. As the Trial Court Correctly Recognized, Rule 50 Does Not Provide for the Relief Requested by Stephens.

Stephens' Rule 50 motions went only to the elements of duty and breach. But as the Trial Court recognized, "in order to direct a verdict for" Stephens, it "would have had to find there was no jury issue on *any element* of the [Stephens'] negligence claim. This would have required [it] to find duty, breach *and proximate cause* as a matter of law." (R. pp. 3) (emphasis added). Stephens concedes that "[i]n a personal injury action, a determination of negligence"—*i.e.*, duty and breach— "standing alone, *does not* entitle a plaintiff to a favorable verdict as a matter of law." Pet'r's Br. 18 (emphasis added) (internal quotation marks omitted). That concession—which is compelled by the plain language of Rule 50—is fatal to Stephens' appeal.

Rule 50 provides for "*judgment* as a matter of law." *RFT Mgmt. Co. v. Tinsley & Adams*, 399 S.C. 322, 332, 732 S.E.2d 166, 171 (2012); *accord* S.C. R. Civ. P. 50(b) (providing for "*judgment* entered in accordance with [a] motion for a directed verdict") (emphasis added). "Judgment," in turn, "*finally* determines the *rights* of any party." S.C. R. Civ. P. 54(a) (emphasis added). Therefore, as this Court has made clear, "[a] motion for directed verdict goes to the *entire case* and may be granted *only* when the evidence raises no issue for the jury *as to liability*." *Lane v. Gilbert Constr. Co.*, 383 S.C. 590,

595, 681 S.E.2d 879, 882 (2009) (emphasis added) (quotation marks omitted); *accord Carolina Home Builders, Inc. v. Armstrong Furnace Co.*, 259 S.C. 346, 358, 191 S.E.2d 774, 779 (1972) ("A defendant's motion for directed verdict, however, goes to the entire case and may be granted only when the evidence raises no issue for the jury as to Defendant's liability"; a motion seeking directed verdict only as to certain claimed elements of damages "is unknown to our practice, inappropriate, and was properly overruled.").[2] Because Stephens' Rule 50 motions conceded that proximate cause, and hence CSX's liability, had not been established, it could not have been error to deny them.[3]

In an attempt to overcome this bar to relief, Stephens may point to the Court of Appeals decision in *Hinds v. Elms*, 358 S.C. 581, 595 S.E.2d 855 (Ct. App. 2004), but *Hinds* provides him no shelter. At trial, the defendant in *Hinds* admitted negligence, but not proximate cause. 358 S.C. at 584, 595 S.E.2d at 857. The plaintiffs then moved, like Stephens did, "'for directed verdict" only "'on the issue of simple negligence,'" which the trial court granted. *Id.* Whether the trial court was correct to grant a "directed verdict" where questions of fact regarding proximate cause remained was not, however,

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[2] For a plaintiff, this means that "no rational trier of fact viewing the evidence most favorably to the defendant could fail to find on undisputed facts that *each element* of liability has been proven." *In re R & R Assocs. of Hampton*, 402 F.3d 257, 267 (1st Cir. 2005) (emphasis added) (quotation marks omitted).

[3] To put it another way, Rule 50 provides for a directed verdict when "the case presents *only* questions of law," S.C. R. Civ. P. 50(a) (emphasis added); but because Stephens' motion conceded that questions of *fact* remained as to the element of proximate cause, he was not entitled to a directed verdict or JNOV under Rule 50. *See Rochester Civic Theatre, Inc. v. Ramsay*, 368 F.2d 748, 752 (8th Cir. 1966) (under identical rule, refusing to review denial of motion for directed verdict by plaintiff on single element of a claim); *accord Hous. Auth. of City of Prichard v. Malloy*, 341 So. 2d 708, 709-10 (Ala. 1977).

before the Court of Appeals in *Hinds*, which was asked only whether simple negligence, without proximate cause, could establish liability. *Id.* If that question had been before it, there is little doubt that the Court of Appeals would have concluded that the directed verdict was inappropriate because, as it explained, "a determination of negligence, standing alone, does *not* entitle a plaintiff to a favorable *verdict* as a matter of law," 358 S.C. at 586, 595 S.E.2d at 857 (emphasis added), which is the only relief that Rule 50 provides, *see Carolina Home Builders*, 259 S.C. at 358, 191 S.E.2d at 779.[4]

For similar reasons, Stephens is entitled to no relief from this Court because the portion of his post-verdict motion that related to the duty and breach issues sought only JNOV. Stephens effectively concedes that he was not entitled to *that* relief, because proximate cause was an issue of fact that the jury had not even reached, much less resolved in his favor. The *most* to which Stephens could have been entitled was a new trial limited to the issues of proximate cause and, if necessary, damages. Yet he never sought *that* relief, either in his post-verdict motion or in the Court of Appeals. Accordingly, his present appeal is much ado about nothing.

2. Stephens Was Not Without Recourse; He Failed, However, to Seek It.

Stephens had the opportunity to properly present these issues to the Trial Court and preserve them for appeal, but failed to do so. Specifically, when only certain elements of a claim are "sufficiently contested," a party may request instructions that

[4] Indeed, the facts of *Hinds* demonstrate why Stephens' attempted expansion of Rule 50 should not be countenanced. The circuit court granted the plaintiffs a "directed verdict," and then the jury found for the defendant. 358 S.C. at 583, 595 S.E.2d at 856. Perhaps not surprisingly, the plaintiff complained that a directed verdict *against* the defendant was inconsistent with a later jury verdict *in favor of* the defendant. *Id.* As the Court of Appeals suggested, misusing Rule 50 in this way inevitably leads to "confusion among some members of the bar as to the distinction between ... a negligent act or omission and the concept of liability." 358 S.C. at 583, 595 n.2 S.E.2d at 856 n.2.

limit the jury's deliberation to only those elements. *Wilson v. Mar. Overseas Corp.*, 150 F.3d 1, 10 (1st Cir. 1998); *see, e.g.*, *Creech v. S.C. Wildlife & Marine Res. Dep't*, 328 S.C. 24, 36, 491 S.E.2d 571, 577 (1997) ("As best we can discern, County's complaint on appeal about the trial court's error in 'submitting the issue [of the applicability of the building code] to the jury' is a complaint about the jury charge."); *Brown v. Howell*, 284 S.C. 605, 609, 327 S.E.2d 659, 662 (Ct. App. 1985) (holding that the trial court erred by instructing jury on abandoned issue); *Baker v. Weaver*, 279 S.C. 479, 482, 309 S.E.2d 770, 771 (Ct. App. 1983) ("Instructions to the jury ... should be confined to the issues ... supported by the evidence."). Such instructions are commonplace. *See, e.g.*, *Lewis v. Sanford Med. Ctr.*, 840 N.W.2d 662, 667 (S.D. 2013) (instruction limited jury to resolving injury and proximate cause); *Wolfe v. Madison Nat'l Bank*, 352 A.2d 914, 916 (Md. 1976) (approving instruction that limited jury's deliberations to single issue of authenticity of signature); *R.J. Reynolds Tobacco Co. v. Brown*, 70 So. 3d 707, 718 (Fla. Dist. Ct. App. 2011) (jury was instructed that defective nature of cigarettes had been established and that remaining issues related to "causation, comparative fault, and damages").

Stephens concedes that "[a]t the close of the evidence," S.C. R. Civ. P. 51, he could have requested such an instruction or objected to the instruction given to the jury, going so far as to argue that the Trial Court was "required ... to charge the jury that CSXT was negligent in the discharge of its statutory duty." Pet'r's Br., at 17. But Stephens made *no such request*. Far from requesting at the close of evidence, a "charge ... that CSXT was negligent in the discharge of its statutory duty," *id.*, Stephens requested that the jury *be instructed on duty and breach*. *See Stephens ex rel. Lillian C.*

v. CSX Transp., Inc., 400 S.C. 503, 521, 735 S.E.2d 505 (Ct. App. 2012).[5] At the same time, he *did* request that the court remove from the jury's consideration the issue of Colvin's intervening negligence, *see* Pet'r's Br., at 34—from which it fairly may be inferred that his failure to similarly request the removal of duty and breach from the jury's consideration was not the result of ignorance of the proper procedure (not that ignorance of the proper procedure would be any kind of excuse). Having proceeded as he did, Stephens may not now "assign as error" the court's submission of the issues of duty and breach to the jury. S.C. R. Civ. P. 51; *accord Keaton ex rel. Foster v. Greenville Hosp. Sys.*, 334 S.C. 488, 495 n.2, 514 S.E.2d 570, 573 n.2 (1999); *Creech*, 328 S.C. at 36, 491 S.E.2d at 577; James F. Flanagan, *South Carolina Rule of Civil Procedure* 411 (2d ed. 1996).[6]

3. <u>Stephens' Failure to Follow Proper Procedure Threatens to Prejudice CSX.</u>

a. Stephens' failure to follow proper procedure was not a mere technicality. As the Court of Appeals noted, "[t]he verdict form" submitted to the jury in this case "contained special interrogatories, which first asked whether CSX ... breached its duty of reasonable care." *Stephens*, 400 S.C. at 511, 735 S.E.2d at 509. "The jury answered [the] question[] 'No' and did not answer any of the other questions on the form." *Id.*

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[5] Even if Stephens' "directed verdict motion" were construed as a request for a jury charge, that mid-trial request was superseded by the charge he requested "[a]t the close of the evidence." Rule 51, SCRCP.

[6] Stephens cannot plausibly argue that it would have been futile to request such an instruction: after all, his arguments on appeal as to why the elements of duty and breach should not have been submitted to the jury focusing on the stipulation by the parties and other issues, *see* Pet'r's Br., at 14-21, were not presented to the Trial Court until *after* the jury's verdict, so there is no basis for speculating what the Trial Court would have done had Stephens requested that the issues be removed from the jury's consideration at the appropriate time. *See infra*, pp. 25-29.

(emphasis added). Had Stephens asked the Trial Court to instruct the jury that duty and breach had been established, the Trial Court then could have either granted that request or, at least, required the jury to address the special interrogatories in their entirety. If it had taken either approach and the jury had then answered "No" on proximate cause, Stephens' contention that he should have received a "directed verdict" on duty and breach would be moot.

Instead, Stephens seeks to be excused from this error, asking for a new trial that might otherwise have been unnecessary. *See* Pet'r's Br., at 16 (admitting that because the jury found for CSX on duty and breach, "proximate cause and the comparative fault of the driver of the vehicle … never even reached the jury's consideration"). But allowing Stephens to escape the consequences of his failure to pursue such a jury instruction would undermine the core "purpose of Rule 51's timeliness requirement," which "is to prevent unnecessary new trials because of errors the judge might have corrected if they had been brought to his attention at the proper time." *Barrett v. Orange Cnty. Human Rights Comm'n*, 194 F.3d 341, 349 (2d Cir. 1999) (citation omitted); *accord, e.g.*, *Reynolds v. Green*, 184 F.3d 589, 595 (6th Cir. 1999); *Lovell v. Nationwide Mut. Ins. Co.*, 424 S.E.2d 181, 187 (N.C. Ct. App.), *aff'd*, 435 S.E.2d 71 (N.C. 1993).

b. The threatened prejudice to CSX is heightened in this case because there was overwhelming evidence that any negligence on the part of CSX was *not* the proximate cause of injuries suffered by Stephens' granddaughter and thus any retrial would be pointless. "Proximate cause requires proof of both causation in fact and legal cause." *Bishop v. S.C. Dep't of Mental Health*, 331 S.C. 79, 88, 502 S.E.2d 78, 83 (1998). "Causation in fact is proved by establishing [that] the injury would not have occurred but

for the defendant's negligence. Legal cause is proved by establishing foreseeability." *Id.*, 331 S.C. at 89, 502 S.E.2d at 83 (internal quotation marks and citations omitted). According to Stephens, CSX was negligent in (1) failure to sound the train's horn soon enough and (2) failing to clear vegetation from its right of way. *See* Pet'r's Br., at 1. But substantial evidence showed, first, that neither of these alleged breaches of duty were "but for" causes of the accident, and, second, that even if they were, the "intervening negligence," *Bishop*, 331 S.C. at 89, 502 S.E.2d at 83, of the driver of the vehicle—Tonia Colvin—broke the causal chain between CSX's alleged negligence and the injuries suffered by Stephens' granddaughter. The evidence that any negligence by CSX could not have caused the accident is so overwhelming, in fact, that it provides an alternative basis for affirmance: no rational jury could find that Stephens carried his burden in proving proximate cause. *See* Rule 220(c), SCACR ("The appellate court may affirm any ruling, order, decision or judgment upon any ground(s) appearing in the Record on Appeal.").

Stephens' first theory of negligence is that CSX failed to sound the train horn 1500 feet before the crossing as required by law. *See* Pet'r's Br., at 15-18. Numerous witnesses, however—including one located *directly behind the Colvin vehicle at the crossing*—testified that they heard the train well in advance of the accident. (R. p. 714) (Larry Biser's testimony that "[a]s we was [sic.] approaching Highway 68, you could see —you could hear the train blowing its horn" and that he was so aware of the train and that he would have to wait for it to pass, he "put [his] truck in park and shut it off"); (R. p. 263) (Lon Hoover's testimony that he heard the train and its approach from a quarter mile away); (R. pp. 353-54) (Patricia Griffith's testimony that the horn was so loud as it

approached the crossing that she complained to her children about the noise); (R. pp. 278-80, 294) (testimony of Stephens' expert that the CSX engineer had sounded the horn *seventeen to eighteen* seconds before the collision occurred and that the horn could be heard two and a half miles away).[7] Despite all this, Colvin stopped at the stop line just a few yards from the tracks and then proceeded to attempt to cross. The evidence thus conclusively established that sounding the train's horn a few seconds earlier when it was farther away from the crossing would not have prevented the accident.

Stephens' other theory of CSX's negligence is that CSX "failed to clear the crossing for acceptable sight distances." Pet'r's Br. 19. There was overwhelming evidence, however, that from where Colvin stopped, just prior to driving over the tracks, the view was unobstructed down the tracks to the I-95 overpass located approximately 2,000 feet from the crossing and that from the stop line a motorist could easily see an approaching train free from any obstruction. For example, Yemassee Police Chief Jack Hagy, who investigated the accident, testified that when "your wheel's on the [stop] line...you could see clear all the way back to the overpass." (R. p. 370). (*See also* R. pp. 81-82) (testimony of Thomas Jackson, who lived near the crossing for years, that from the stop line a train could be seen coming from a half mile down the tracks.); (R. p. 251) (testimony by Stephens' expert Dr. Kenneth Heathington that, "[w]hen you're stopped at the stop line, you can [see to the I-95 overpass]."); (R. pp. 354-55) (testimony of Patricia Griffin, a nearby resident who had often used the crossing, that from the stop line there is

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[7] On the flip side of this, Stephens' expert, David Lipscomb, testified that notwithstanding the multiple witnesses who testified that they heard the horn as the train approached the crossing, Colvin would not have heard the train horn in time to avoid the train *regardless of where it was sounded.* (R. pp. 324-26).

no problem with sight obstructions). Even a passenger *who was in the car with Colvin on the day of the accident* admitted that from the stop line the sight lines were clear. (R. p. 633) (testimony of Carlos Terry, the front seat passenger in Colvin's vehicle, that he could see to the I-95 bridge). The evidence thus conclusively established that no amount of additional clearing by CSX could have prevented the accident.[8]

Finally, the jury heard extensive evidence that it was Tonia Colvin's poor and unsafe decisions, not any negligence by CSX, that caused the accident. For example, Larry Biser testified that both he and Colvin stopped their vehicles at the crossing as the train was approaching, but the "next thing I know her brake lights went out and across the tracks she went in front of the train." (R. p. 714). Moreover, Colvin admitted on the stand that when she got in the car on the day of the accident she had Darvocet, tizanidine, alcohol, and "potentially some other things" in her system. (R. p. 473) (admissions by Colvin). Colvin told an EMT at the scene of the accident that she had been drinking and acknowledged that the EMT told her that she smelled of alcohol. (R. p. 484). Colvin further admitted that she ignored the labels on her prescription medications that warned against taking them with alcohol, and acknowledged that it was a "very bad idea to take alcohol and tizanidine at or around the same time," just as it was a "very bad idea" to take "alcohol and Darvocet at or around the same time." (R. pp. 460-67). Evidence of Tonia Colvin's actions and impairment, combined with the evidence that an approaching train

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[8] Stephens does not dispute that this evidence existed, but instead makes a generalized claim only that "*at certain distances back* from the stop line at issue, motorists' sight lines were obstructed by vegetation and trees." Pet'r's Br., at 19 (emphasis added); *see also id.* at 20 (referring to photographs "at different distances from the rail"). But the evidence conclusively showed that Tonia Colvin stopped at the stop line before crossing the tracks, and, therefore, sight distances from points prior to the stop line are irrelevant.

could easily be seen and heard well in advance of the accident lead inexorably to only one conclusion: it was Tonia Colvin's negligence—not CSX's—that caused the accident.

That the jury was never heard on the element of proximate cause is the result of Stephens' procedural errors. It is CSX, however, that will be prejudiced if those errors are ignored. In the name of fairness and efficiency, the Court should avoid that result.

B. Stephens' Failure to Move for a Directed Verdict at the Close of All the Evidence Precludes His Challenge to the Jury's Verdict.

Even if it were permissible to grant a verdict or judgment notwithstanding the verdict notwithstanding the existence of fact issues on elements of the claim, Stephens failed to make a directed verdict motion at the close of all the evidence, and, therefore, his motion for JNOV and this Court's review of the denial of that motion are precluded by the plain language of Rule 50(b).

Rule 50(b) states that "[w]henever 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." Rule 50(b), SCRCP (emphasis added). As this Court recently confirmed, this means that "[w]hen a party fails to renew a motion for a directed verdict *at the close of all evidence*, he waives his right to move for JNOV." *RFT Mgmt.*, 399 S.C. at 331, 732 S.E.2d at 170 (emphasis added). The rule that a party may challenge a jury's verdict only if it moved for a directed verdict at the close of all evidence is well-known and universally enforced. *See, e.g.*, *Wright v. Craft*, 372 S.C. 1, 19-20, 640 S.E.2d 486, 496 (Ct. App. 2006) (explaining that the failure to renew a motion for directed verdict at the close of all the evidence "preclude[s] ... review[] [of] the denial of the motion on appeal"); *Henderson v. St. Francis Community Hosp.*, 295 S.E.

441, 369 S.E.2d 652, 655-56 (Ct. App. 1988) ("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."), *overruled on other grounds*, 303 S.C. 177, 399 S.E.2d 767 (1990); Flanagan, *supra* at 405 ("emphasiz[ing]" that "a motion for a directed verdict at the close of all the evidence is a prerequisite for a" later challenge to the jury's verdict).

Because Stephens did not make a motion for directed verdict "at the close of all the evidence" as the rule requires, the Trial Court and Court of Appeals properly concluded that he had not preserved his right to seek JNOV or appellate review of the sufficiency of the evidence.

1. <u>Stephens Argues for a Distortion of the Plain Language of the Rule.</u>

Done in by the "literal construction of the plain meaning of the phrase 'at the close of all the evidence,'" Pet'r's Br., at 9, and in contradiction of the clear case law applying that plain meaning, Stephens attempts to introduce ambiguity where none exists. To do so, Stephens focuses on an unrelated provision of Rule 50(a) in a curious argument claiming that a party seeking JNOV is required to move for directed verdict only at the close of the evidence "offered by an opponent." *Id.* According to Stephens, the rule "*requires* that [directed verdict] motions be made at the close 'of the evidence offered by an opponent,'" and therefore the phrase "close of all the evidence" in Rule 50(b) is "the equivalent of the close of 'the evidence offered by an opponent.'" *Id.* (emphasis added).

This argument fails on its face. The term "evidence offered by an opponent" in Rule 50(a) is *not* "equivalent" to the term "all the evidence" in Rule 50(b). If the authors of Rule 50 wished the varying terminology in subsections (a) and (b) to be "equivalent,"

they would have used the same language. That they used different language defeats Stephens' interpretation. *See, e.g.*, Antonin Scalia & Bryan A. Garner, *Reading Law* 171, 173 (2012) ("a material variation in terms suggests a variation in meaning," particularly in statutes "enacted at the same time and deal[ing] with the same subject"); *United States v. Molina-Gazca*, 571 F.3d 470, 474 (5th Cir. 2009) ("[V]ariations of [terms] in close proximity[] suggest[] that the terms carry different meanings.").

Further, Stephens' premise that the quoted language from subsection (a) imposes a timing requirement on the filing of a directed verdict motion is incorrect; it imposes no requirement and, therefore, need not be "harmonize[d]," Pet'r's Br., at 9, with the renewal requirement of subsection (b). The role played by the phrase on which Stephens focuses—"who moves for a directed verdict at the close of the evidence offered by an opponent"—is only to modify the subject of the sentence, "[a] party"; it says nothing about *when* a party must file a directed verdict motion. To the contrary, "all" that the quoted language "relates to is the right of a party to offer evidence if a motion for a directed verdict is denied." *William H. Porter, Inc. v. Edwards*, 616 A.2d 838, 841 (Del. 1992) (rejecting identical argument based on identical language).[9]

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[9] This reading is confirmed by the historical origins of the sentence, which first appeared in the original federal rule 50(a), enacted in 1938, and sought "to do away with the prior federal rule requiring an express reservation of the right to offer evidence." Alexander Holtzoff, *Origins and Sources of the Federal Rules of Civil Procedure*, 30 N.Y.U. L. Rev. 1057, 1076 (1955) (citing 3 Moore, Federal Practice § 3103 (1938)); *see also Fed. Life Ins. Co. v. Rumpel*, 102 F.2d 120, 124 (6th Cir. 1939) (Simons, J., dissenting) ("Rule 50 of the Rules of Civil Procedure ... now frees litigants from the tragic consequences of motions for directed verdict made without reservation."). The entire text of the federal rule was adopted in South Carolina. *See* Rule 50, SCRCP, note (1985). As this history makes clear, the purpose and effect of the sentence relied on by Stephens is to *eliminate* a requirement, not create one.

The fallacy in Stephens' interpretation is also demonstrated by the following example. If Stephens' argument that a party need only move for directed verdict at the close of his opponent's evidence were correct, then a defendant would only need to move for directed verdict at the close of the plaintiff's case and would not be required to renew his motion at the end of the trial. Obviously, this is not the rule, and our courts have regularly found waiver when parties have done just that. *See, e.g., Henderson*, 369 S.E.2d at 655-56; *Smith v. Ridgeway Chemicals, Inc.*, 302 S.C. 303, 395 S.E.2d 742, 743-44 (Ct. App. 1990)("[I]nasmuch as no motion was made for a directed verdict at the conclusion of the trial, no motion for relief as a matter of law is available after the jury verdict.").[10]

2. <u>Stephens Misreads *Henderson*.</u>

In support of his reading of Rule 50, Stephens relies solely on the Court of Appeals' decision in *Henderson*. *Henderson*, however, did not in any way—expressly or implicitly—endorse the reading of Rule 50 for which Stephens argues. In *Henderson*, a plaintiff sued three defendants: A, B, and C. After defendants A and B presented their cases, but before defendant C presented its case, the plaintiff moved for directed verdicts. *See* 295 S.C. at 446, 369 S.E.2d 655 56. The trial court denied the motion, after which

[10] At one point, Stephens concedes that courts in this state hold that the renewal of a directed verdict motion at the close of all the evidence is a prerequisite to the filing of a JNOV motion, but contends that this requirement applies only to defendants. *See* Pet'r's Br. 12. Stephens does not cite any authority for the proposition that Rule 50 operates differently for plaintiffs than it does for defendants, and there is none. As Chief Justice Toal has explained, "[a] motion for JNOV may not be granted unless the *moving party* moves for a directed verdict at the close of all the evidence." J.H. Toal, et al., *Appellate Practice in South Carolina* 74 (2d ed. 2002) (emphasis added); *accord RFT Mgmt.*, 399 S.C. at 331, 732 S.E.2d at 170 (instructing that "a *party*" must move at the close of the evidence) (emphasis added); *Henderson*, 295 S.C. at 446-47, 369 S.E.2d at 656) (holding that "a plaintiff" must "renew his motion at the close of all the evidence")

the third defendant presented its case. The plaintiff then "failed, as required by Rule 50(b) ..., to make a directed verdict motion at the close of all the evidence." 295 S.C. at 446, 369 S.E.2d 655. The jury found *for the plaintiff* as to defendants A and B, but not defendant C. The Court of Appeals held that the plaintiff could not challenge the jury's verdict as to defendant C because she failed to renew her motion for a directed verdict against C at the close of all the evidence. 295 S.C. at 446, 369 S.E.2d 655-56.

According to Stephens, the Court of Appeals "did not find waiver as against the two other defendants," even though the plaintiff "failed to move for a directed verdict" against them at the 'close of all evidence.'" Pet'r's Br., at 11 (emphasis omitted). Stephens appears to believe that the jury in *Henderson* returned verdicts in favor of all three defendants and that the plaintiff was allowed to challenge the verdicts as to defendants A and B, but not as to C. But the jury returned verdicts *in the plaintiff's favor* against defendants A and B, and, accordingly, the plaintiff *did not* challenge those verdicts. It was defendants A and B—after properly filing directed verdict motions at the close of all the evidence—who challenged those verdicts via JNOV motions, which the court granted. It was from the order granting those motions and denying the plaintiff's motion for JNOV as to defendant C that the plaintiff appealed. *See Henderson*, 295 S.C. at 443, 369 S.E.2d at 654. There was no question on appeal whether the motions made by defendants A and B were procedurally proper. *Henderson*—which confirms that the relevant language of Rule 50(b) is to be applied "strict[ly]," *see* 295 S.C. at 447, 369 S.E.2d at 656—thus provides no support for Stephens' tortured reading of Rule 50.

3. <u>Stephens Ignores the Purpose of the Requirement.</u>

The rationale of Rule 50(b)'s requirement that a motion for directed verdict be made at the close of all the evidence is that it allows the trial judge to have *all* the evidence, including testimony, documents, and stipulations, before her when deciding whether to submit the case to the jury or rule as a matter of law. As the Court of Appeals correctly explained, the "reason for the rule" is "so that the court may decide whether evidence presented after it denied the earlier motion changed the evidentiary landscape in such a way that directed verdict has now become appropriate." 735 S.E.2d at 514. Failing to follow the rule, moreover, would be extremely unfair to the Trial Court and CSX because it would prevent them from having been able to address the issue at the time of the trial. *See, e.g., Janes v. Wal-Mart Stores Inc.*, 279 F.3d 883, 887 (9th Cir. 2002) ("[F]ailing to make a motion for JMOL at the close of all the evidence may lull the opposing party into believing that the moving party has abandoned any challenge to the sufficiency of the evidence and thereby prejudice the opposing party.") (internal quotation marks omitted); *Austin-Westshore Const. Co. v. Federated Dep't Stores, Inc.*, 934 F.2d 1217, 1222 (11th Cir. 1991) ("The rationale is clearly to prevent a review of the sufficiency of the evidence when the moving party has not given notice, through a motion for a directed verdict, of objections to the legal sufficiencies of the evidence while there is still an opportunity for the opposing party to cure any defects in proof.") (internal quotation marks omitted); *Overman v. Gibson Prods. Co. of Thomasville*, 227 S.E.2d 159, 162 (N.C. Ct. App. 1976) ("The search for substantial justice and fair play dictates that a judge's ruling upon a motion for directed verdict should be made upon all of the

evidence before him."); *see also Maynard v. Travelers Ins. Co.*, 540 A.2d 1032, 1034 (Vt. 1987) ("[B]y not requiring the moving party to renew its directed verdict motion at the close of all the evidence, we would only be inviting further appeals to this Court on matters which properly belong in the Trial Court—namely, weighing and examining the evidence.").

Indeed, as noted previously, even apart from a proper directed verdict motion, Stephens had other avenues to raise at trial the issue he now presses on appeal. *See supra* § I.A.2 (discussing how Stephens could have requested jury charges or a particular verdict form). For all these reasons, the Court of Appeals ruled correctly in finding that Stephens failed to preserve the issue for appeal by not moving for directed verdict at the close of all the evidence, and there is no basis to reverse on this ground.

C. CSX's Purported Admissions or Stipulations Do Not Support Overturning the Jury's Verdict.

1. Ignoring his fatal procedural errors, Stephens argues, as he did in the Court of Appeals, that admissions made by CSX at trial and a stipulation introduced during his rebuttal undermine the jury's conclusion that CSX did not breach a duty owed to Stephens' granddaughter. *See* Pet'r's Br., at 14-18. The evidence Stephens relies on was not raised in his motion for a directed verdict, however, and therefore he may not rely on it to undo the jury's verdict.

Rule 50 provides that a party may move to have a jury's verdict and judgment thereon "set aside and to have judgment entered *in accordance with* [the moving party's previous] motion for a directed verdict." S.C. R. Civ. P. 50(b) (emphasis added). Accordingly, Stephens may challenge the jury's verdict "*only* [on] the grounds raised in [his] directed verdict motion." *RFT Mgmt.*, 399 S.C. at 331, 732 S.E.2d at 170–71

(emphasis added); *accord Allegro, Inc. v. Scully*, 409 S.C. 392, 413, 762 S.E.2d 54, 65 (Ct. App. 2014) ("A motion for JNOV under Rule 50(b) ... cannot raise grounds beyond those raised in the directed verdict.").[11]

But as the Trial Court and Court of Appeals recognized, Stephens failed to rely on the same grounds in his pre- and post-verdict motions, and, in fact, *could not have relied on the same grounds*, because the stipulation he cites had not even been entered into when he made his mid-trial motion for a directed verdict. As the Trial Court explained, "I could not have erred in denying Plaintiff's motion on a basis never stated at trial and not even available to Plaintiff until the conclusion of Plaintiff's rebuttal case." R. pp. 3-4; *see Stephens*, 400 S.C. at 518–20, 735 S.E.2d at 513–14 ("By not renewing his motion, Stephens never gave the trial court an opportunity to consider whether the stipulation eliminated the conflict the court saw in the evidence as to this issue. Even if we thought the trial court was mistaken as to the ruling it did make, we have no idea how the court would have ruled in light of the stipulation.").

This identity requirement is no mere formality; it is what saves Rule 50(b) from violating the "right of trial by jury" guaranteed by the South Carolina Constitution. *See* S.C. Const. art. 1, § 14. This right prevents, among other things, "the substitution of the trial judge's findings for the verdict of the jury." *Jenkins v. Pilot Life Ins. Co.*, 186 S.C. 518, 197 S.E. 28, 30 (1938). The reason that a motion for JNOV withstands constitutional scrutiny is that, when a court denies a pre-verdict motion for a directed verdict, it is merely "reserv[ing] [its] decision on [the] motion for a directed verdict until

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[11] Stephens appears to have recognized this. His JNOV motion was premised on an argument that the Trial Court had previously "erred in failing to direct a verdict in [his] favor."

after the verdict has been rendered by the jury." *Id.*; *see RFT Mgmt.*, 399 S.C. at 331, 732 S.E.2d at 171 ("A motion for a JNOV is merely a renewal of the directed verdict motion."); 409 S.C. at 413, 762 S.E.2d at 65 ("A motion for JNOV under Rule 50(b), SCRCP is a renewal of a directed verdict motion"); *cf. Balt. & Carolina Line v. Redman*, 295 U.S. 654, 659-60 (1935) (holding that this type of reservation satisfies the Seventh Amendment to the United States Constitution); *In re Lower Lake Erie Iron Ore Antitrust Litig.*, 998 F.2d 1144, 1180 (3d Cir. 1993) (requiring "the specific grounds for a JNOV" motion to "be asserted in the motion for a directed verdict ... avoids infringement of the non-moving party's'" right to jury trial). Having reserved its decision on the pre-verdict motion, a court may not, without unconstitutionally impinging on the province of the jury, consider facts post-verdict that were not raised in the pre-verdict motion.

2. In any event, notwithstanding CSX's purported admissions and the stipulation concerning the train's data recorder, there remained sufficient questions of fact to support the denial of Stephens' JNOV motion on duty and breach.

First, while Stephens touts CSX's counsel's opening statement that the horn was not sounded at 1,500 feet and a stipulation by the parties that the train's event recorder was accurate as proving a violation of the statute (and, thus, negligence *per se*), neither contention has merit. The South Carolina whistle statute in effect at the time of this accident required that "[a] bell of at least thirty pounds' weight and a steam or air whistle" be placed on each locomotive and "such bell shall be rung <u>or</u> such whistle sounded . . . at the distance of at least five hundred yards" from the crossing. *See* S.C. Code § 58-15-910 (emphasis added). Even assuming that the parties' stipulation established that the whistle was not properly sounded, Stephens does not contend and has

pointed to no evidence showing that he proved that the bell was not rung for the statutory distance. Stephens had the burden of proving the failure both to sound the whistle and to ring the bell in order to establish a violation of the statute. *See McAbee v. Southern Ry.*, 166 S.C. 166, 164 S.E. 444, 444-445 (1932) ("The statute does not require both the ringing of the bell and the blowing of the whistle. The ringing of the bell, or sounding of the whistle, so far as the statute is concerned, is a sufficient signal of the moving or approach of the train.").

Second, Stephens argues that CSX "admitted" that it failed to clear vegetation and tree growth within its right-of-way "in conformity with its own rules and regulations," Pet'r's Br., at 19, but provides no citation to the record for any such "admission." On the contrary, Stephens' claim that CSX "violated" its internal policies was hotly contested. The jury heard considerable evidence that CSX *did not violate* its crossing clearing program, but *followed* it by peaceably resolving a dispute with a landowner who was "raising hell" about CSX's cutting of trees he thought were his. (R. p. 83).

Moreover, there was certainly no "admission" that any such violation would constitute a breach of the standard of care. Importantly, the significance in a negligence action of a defendant's compliance with internal guidelines is a *question for the jury*. *See Caldwell v. K-Mart Corp.*, 306 S.C. 27, 32, 410 S.E.2d 21, 24 (Ct. App. 1991). CSX's defense, which the evidence supported and the jury obviously accepted, was that the Hill Road crossing was *already* safe and that CSX's crossing clearing program was designed to make safe crossings even safer. *See generally* R. p. 1568 (testimony of Kelly Goedde by video deposition p. 66, ll. 2-6). Stephens' argument that CSX did not comply with the new clearing program at the Hill Road crossing was irrelevant, because Colvin stopped at

the stop line where overwhelming evidence established that her vision was completely unobstructed. Further, evidence at trial showed that the crossing had been inspected and was safe as CSX contended. (S.R. p. 35; R. pp. 711-18).

Given all of this evidence, Stephens could hardly claim that he was entitled to a "verdict" in his favor on duty and breach, even if there were some basis for granting one as to less than an entire cause of action. As a result, even had he properly presented and preserved his motions below, the Court of Appeals and the Trial Court correctly declined to disturb the jury's verdict, and this Court should affirm.

D. The Court of Appeals Did Not Make an Unconstitutional Rule Change.

Stephens also contends that the Court of Appeals' opinion constituted "an unconstitutional rule change of the existing Rule 50, SCRCP." Appellant's Brief, at 12. However, the Court of Appeals neither created nor suggested any new rule, but merely applied the plain language of the current rule. Stephens may disagree with the Court of Appeals' holding, but this does not mean that the Court of Appeals altered the South Carolina Rules of Civil Procedure. If anything, it is Stephens who is asking this Court to effect a rule change by omitting the language "at the close of *all* the evidence" from Rule 50(b), and substituting in its place his preferred language of "close of evidence offered by an opponent." This would obviously be an incorrect and unauthorized change to the rules of civil procedure.

II. The Court of Appeals Correctly Affirmed the Trial Court's Jury Charges

Stephens also raises numerous challenges to the jury charges, claiming that the Trial Court incorrectly instructed the jury and that the Court of Appeals "failed - and in fact refused" to "address the jury charge as a whole to determine whether [he] is entitled

to reversal." Pet'r's Br., at 22. Trial courts are vested with wide discretion to fashion appropriate instructions for the jury, and this Court will not reverse unless the trial court abuses that discretion. *See Clark v. Cantrell*, 339 S.C. 369, 389, 529 S.E.2d 528, 539 (2000). This Court considers the charge "as a whole in light of the evidence and issues presented at trial." *In re Estate of Pallister*, 363 S.C. 437, 451-452, 611 S.E.2d 250, 258 (2005). If the charge as a whole contains the correct definitions and adequately covers the law, there is no error. *See id.* Moreover, even an erroneous jury instruction "is not grounds for reversal unless the appellant can show prejudice from the erroneous instruction." *Cole v. Raut*, 378 S.C. 398, 405, 663 S.E.2d 30, 33 (2008).

As discussed below, this Court should affirm because the Court of Appeals properly considered only those instructis that were relevant on appeal and, even as to those it did not consider, the Trial Court properly instructed the jury.

A. The Court of Appeals Properly Considered Only the Instructions Relevant on Appeal.

Stephens' threshold complaint is that the Court of Appeals erred by limiting its review to the Trial Court's jury charges on whether CSX and DOT breached their duties of care. *See* Pet'r's Br., at 23. However, the Court of Appeals adopted the proper approach because these were the only jury charges relevant to the jury's verdict. "[T]he jury resolved the case by finding that neither CSX nor DOT breached its duty of reasonable care. Because the jury's verdict on that basis made it unnecessary for the jury to reach the other issues in the case, it is not necessary that we address any ruling on the jury charge unless it relates to breach of CSX's and DOT's duty of reasonable care." *Stephens*, 735 S.E.2d at 514.

When a jury finds no breach of the standard of care by a defendant, it is unnecessary to consider charges on other issues such as proximate cause, intervening and superseding negligence of third parties, or damages, because they could not have prejudiced the appellant. *See Giles v. Lanford & Gibson, Inc.*, 285 S.C. 285, 291, 328 S.E.2d 916, 919-20 (Ct. App. 1985) ("Since the jury found constructive fraud, not negligence, the charge regarding negligence obviously had no influence on their verdict. Therefore, Lanford & Gibson were not prejudiced by the judge's instruction on this issue."); *see also Cole,* 663 S.E.2d at 33 (an erroneous jury instruction "is not grounds for reversal" unless there is prejudice). Indeed, an appellate court *cannot* reverse on the basis of jury charges that did not affect the jury's decision. *See Clark*, 529 S.E.2d at 539 ("[E]ven if the trial court erred in failing to give a requested instruction, the requesting party also must show that the error was prejudicial to warrant reversal on appeal.").

Therefore, the Court of Appeals committed no error in limiting its consideration to the charges on the duties of CSX and DOT. Nevertheless, even as to the charges that the Court of Appeals declined to consider because they were not relevant on appeal, the Trial Court properly instructed the jury and committed no reversible error.

B. The Trial Court Properly Instructed the Jury on CSX's Duties

Stephens argues that the Trial Court should have instructed the jury on the specific wording of his Requests to Charge Nos. 2 and 3, which stated:

> [Charge No. 2] 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 a driver of a motor vehicle using the roadway, [sic.] *is liable to anyone who is injured* in a collision if the obstructing vegetation contributed as a proximate cause to the collision.
>
> . . .

> [Charge No. 3 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.

(R. pp. 1066, 1071) (emphasis added).

A trial court is not required to give the *specific* wording of a party's proposed charge as long as the charge that is given properly instructs on the law as a whole. *See Proctor v. Dept. of Health & Envtl. Control*, 368 S.C. 279, 310, 628 S.E.2d 496, 513 (Ct. App. 2006) ("The substance of the law is what must be instructed to the jury, not any particular verbiage.") (citation omitted). Here, the Trial Court acted correctly because the charges Stephens requested contained either inaccurate statements of the law or were adequately covered by other parts of the instructions that were given.

As CSX explained at the charge conference, Request to Charge No. 2 included an incorrect statement of the law. Charging that a railroad is "liable to *anyone who is injured* in a collision if the obstructing vegetation contributed as a proximate cause to the collision" would strip a railroad of several of its defenses, because it would imply that a railroad could be liable "merely because there is obstructing vegetation." (R. p. 1067) (emphasis added). Stephens claimed that this proposed charge was "based" on *Lowery v. Seaboard Coastline R. Co.*, 270 S.C. 113, 241 S.E.2d 158 (1978), and "reflects" the holding of that case with regard to the duty of a railroad to maintain its right of way. Pet'r's Br., at 26. However, the requested language was nothing more than a recitation of

the plaintiff's allegations in that case[12] and, contrary to Stephens' assertion, formed no part of this Court's ruling.

Regardless, Stephens could not have been prejudiced by the Trial Court's decision not to use this specific (and incorrect) language because the Trial Court's complete charge *did* instruct the jury that a railroad "has a duty to maintain a reasonably safe grade crossing," which accurately addressed the railroad's duties and was a correct statement of the law. (R. p. 1462). *See also Koutsogiannis v. BB & T*, 365 S.C. 145, 149, 616 S.E.2d 425, 428 (2005) (explaining that an appellate court should reverse only if the refusal to give a requested charge was erroneous *and* prejudicial, which is determined by considering the charge *in its entirety*).

For the same reasons, the Trial Court committed no error in declining to charge Stephens' Request to Charge No. 3. Stephens maintains that this charge was based on *Gleaton v. Southern Ry. Co.*, 208 S.C. 507, 38 S.E.2d 710 (1946), but the language he proposed does not appear anywhere in the decision. In fact, the case did not involve "vegetation," which is the focus of Stephens' proposed charge. Even though the Trial Court correctly observed that "it's just not, clearly, from the case," it offered to give a charge "[i]f you can give me a direct quote from the case and something that's applicable," but Stephens could not do so. (R. p. 1073).

More importantly, the case does not stand for the proposition for which Stephens offered it. Stephens asserts that he wanted a charge based on *Gleaton* to address the railroad's duties, but, as that court observed, "the only [issue] involved in [*Gleaton*]

[12] "It was alleged that the collision and resulting damages were caused by the negligence and recklessness of appellant...in allowing weeds to grow on its right of way adjacent to the crossing to such height as to obstruct the vision of motorists using the roadway." *Lowery*, 270 S.C. at 114, 241 S.E.2d at 158.

embrace[d] the contention that the collision was due to decedent's sole or contributory negligence, gross negligence or willfulness." 208 S.C. at 517, 38 S.E.2d at 714.

Nevertheless, and as with Request to Charge No. 2, Stephens could not have been prejudiced by the Trial Court's refusal to charge his exact proposed wording (which did not appear in the decision), because the Trial Court's instructions included a specific charge on the railroad's duty at crossings, including that the railroad's duty "may be affected by obstructions which prevent the track from being seen as a train approaches." (R. pp. 1449, 1462). It is not error for a trial court to refuse a specific request to charge when the substance of the request is included in the general instructions. *See Burroughs v. Worsham*, 352 S.C. 382, 392, 574 S.E.2d 215, 220 (Ct. App. 2002).

Stephens contends that the effect of not giving these charges was to put all duties on the motorist, *see* Pet'r's Br., p. 27, but this position is meritless given the explicit language in the jury charges that "there is a *mutual* duty on traveler and railroad to exercise due care" and that "*[b]oth the traveler and the company are charged with the same degree of care*: the one to avoid being injured; and the other to avoid inflicting injury." (R. pp. 1462-63) (emphasis added). Stephens also argues that failing to give these charges was "prejudicial" to his claim concerning the alleged failure to sound the horn, Pet'r's Br., p. 28, but this argument is flawed for similar reasons. The Trial Court specifically instructed the jury on the statute concerning the horn and bell, (R. p. 1449), and, more importantly, Stephens' own expert stated that Colvin would not have been "alerted" to the sound of the horn in time to avoid the train regardless of when it was sounded, (R. p. 331-32). Considering "the charge as a whole in light of the evidence and

issues presented at trial," the Trial Court did not commit any reversible error. *Welch v. Epstein*, 342 S.C. 279, 311, 536 S.E.2d 408, 425 (Ct. App. 2000) (citation omitted).[13]

As the Court of Appeals properly concluded, the Trial Court's charge as a whole instructed the jury on the substance of both proposed charges, and it properly conveyed the mutual duties owed by the railroad and motorists. *See* 735 S.E.2d at 514-515. Our courts have long held that a trial court is not required to use the specific wording of a charge as long as the substance of the law is properly instructed. *See Proctor*, 368 S.C.at 310, 628 S.E.2d at 513 ("The substance of the law is what must be instructed to the jury, not any particular verbiage.") (citation omitted). Here, the Trial Court adequately and correctly charged the jury on CSX's duties, including general instructions on negligence, as well as more specific charges on a railroad's duty at crossings. Stephens complains that the charge needed to include wording about the "added care" railroads supposedly are required to exercise when there are obstructions, but the Court of Appeals correctly ruled that this concept was already implicit in the charge and was a factual issue that the parties were free to argue at closing.[14]

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[13] Stephens also asserts that CSX admitted that the vegetation in "Quadrant A" of the crossing should have been cut, but this is not a complete or fair statement of CSX's position. Pet'r's Br., at 22. The crossing was scheduled for the clearing program, but the quadrant in question was not cleared due to a landowner dispute. Nevertheless, there was still more than adequate sight distance, and the crossing was safe. CSX's position throughout the trial was that the crossing clearing program was merely an extra step in making a safe crossing even safer. *See generally* R. p. 1568 (testimony of Kelly Goedde by video deposition p. 66, ll. 2-6).

[14] Stephens' contention on appeal that CSX had an alleged duty of "added care" in the "operation" of the train due to vegetation at the crossing is also without merit, because Stephens' only argument concerning a breach of the duty of care in the "operation" of the train related to the statutory duty for sounding of the bell and whistle at the prescribed distance. Yet, this statutory duty is not modified or "added" to due to any alleged

C. The Charges Concerning Signage Rules and SCDOT's Authority to Close Crossings Were Relevant and Properly Charged.

Stephens additionally contends that the Court of Appeals erred in affirming the Trial Court's charging of statutes related to the placement of signs at railroad crossings, §§ 56-5-1010, 58-17-1390, and 56-5-1020, and to the authority of SCDOT to close railroad crossings, § 58-15-1625. As an initial matter, Stephens does not contend that the charges are legally inaccurate; nor could he, as the charges are drawn directly from South Carolina statutes.

Instead, Stephens claims that the statues were not relevant to the dispute. However, as the Court of Appeals explained, these statutes all related to Stephens' claims. *See* 735 S.E.2d at 516. The first two statutes, which concern a railroad company's duties to install certain signs at crossings, were relevant because Stephens alleged that CSX was negligent "in maintaining an unreasonably hazardous and unsafe crossing" and "in failing to maintain adequate warning devices at the crossing." *Id.* The third statute, which prohibits unauthorized signs, signals, or other devices at crossings, was relevant because Stephens' expert testified that active traffic-control devices - which, under the statute, required DOT approval - would have made the crossing safer. *See* 735 S.E.2d at 516. The final statute, which gives DOT the authority to close crossings, was relevant because it was necessary to inform the jury that CSX lacked authority to close the crossing without DOT's permission. *Id.*

Contrary to Stephens' argument, the evidence at trial actually *required* the Trial Court to charge these statutes so that the jury could understand what CSX's obligations were

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obstructions at the crossing. *See* S.C. Code § 58-15-910. In any event, the jury was charged on the statutory duty, so there was no prejudice.

and what CSX could not do. For example, Stephens' expert testified that in his opinion the Hill Road crossing was unsafe and that the only way to remedy the danger presented by the crossing was to adopt one of three options: (1) flag the crossing; (2) install gates and lights; or (3) close the crossing. (R. pp. 216-17). Confusingly, and despite his expert's explicit testimony on this issue, Stephens later argued to the Trial Court (but not to the jury) that he was not contending that CSX had an obligation to put up gates and lights, but just an overall duty to warn. (R. pp. 1395-98) (Stephens' counsel in bench conference outside of presence of jury: "There's no statute requiring them to put up gates and lights."). However, Stephens had already presented evidence improperly suggesting that CSX *did* have obligations concerning gates and lights or even closing the crossing. (R. pp. 216-217). The jury also heard evidence from Stephens' expert and others concerning the safety of the crossing and the location of stop signs, cross bucks, and stop lines. *Id.*

In light of Stephens' evidence and approach at trial, the Trial Court needed to instruct the jury on precisely what CSX's obligations actually were concerning traffic control devices at the crossing. The charges, therefore, did not create any of the confusion Stephens claims, but prevented it. In fact, failing to give these charges would have prejudiced CSX. The Trial Court committed no reversible error in charging the jury on accurate law that applied to the issues and facts presented to the jury.

D. The Court of Appeals Correctly Rejected Stephens' Claims Concerning Jury Charges on Motorist Duties, Intervening and Superseding Negligence, and Impairment

Finally, Stephens addresses four remaining areas of the jury charges that he claims the Court of Appeals should have considered on the merits and that should have required a new trial. As explained above and by the Court of Appeals, Stephens'

arguments on these points – which concern a motorist's duties at stops signs and at railroad crossings, intervening and superseding negligence, and impairment – were legally irrelevant on appeal in light of the jury's determination. *See* 735 S.E.2d at 514. Even if Stephens' challenges were relevant on appeal, the Trial Court properly instructed the jury and the Court of Appeals properly affirmed.

1. The Charges Concerning Stop Signs Were Correct.

Stephens does not dispute the legal accuracy of the charges concerning a motorist's duties at stop signs, which are taken directly from the statutes, but claims that they did not apply and "conflicted" with S.C. Code § 56-5-2715, which the Trial Court also charged. These statutes, however, were directly relevant to the evidence, and there is nothing "conflicting" about them. More importantly, given the substantial evidence before the Trial Court that Colvin violated each statute, there could not have been any prejudice.

The Trial Court's charge based on S.C. Code § 56-5-2330 stated the general and unassailable rule that "every driver of a vehicle approaching a stop sign shall stop at a clearly marked stop line" and that, after having stopped, "the driver shall yield the right-of-way to any traffic that is so close as to constitute an immediate hazard during the time when such driv[er] is moving across or within the intersection." (R. p. 1452). S.C. Code § 56-5-2740 contains a similar and straightforward rule that "[e]very driver of a vehicle approaching a stop sign shall stop before entering the crosswalk on the near side of the intersection or ... in the event there is no crosswalk, shall stop at a clearly marked stop line, but, if none, then at the point nearest the intersecting highway where the driver has a view of approaching traffic on the intersecting highway before entering the intersection

except when directed to proceed by a police officer or traffic-control signal." (R. p. 1452). There is nothing improper about instructing a jury about a motorist's duties to stop at stop lines and watch for oncoming traffic.

Stephens argues that these charges conflicted with the charge based on S.C. Code § 56-5-2715, which states that the DOT or local authorities with the approval of the DOT "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." (R. pp. 1448-49). Stephens interprets this statute to mean that Colvin was "not allowed by § 56-5-2715 to stop at the stop line" at this crossing because it was less than 15 feet from the rail. Pet'r's Br., at 32.

Stephens' interpretation – the implication of which is that Colvin was legally required to proceed past the stop line *without* stopping for a plainly visible approaching train – is self-evidently wrong and § 56-5-2715 requires no such thing. To the contrary, § 56-5-2715 requires a driver to proceed from a stop sign at a rail crossing "only upon exercising due care." "[E]xercising due care," in turn, quite sensibly requires compliance with §§ 56-5-2330 and 56-5-2740, which instruct drivers to stop at stop lines and yield to oncoming hazards. DOT marked this crossing with both a stop sign and, closer to the track, a stop line. A witness from the DOT testified that it is not uncommon to have a stop sign followed by a stop line farther ahead to indicate a proper location to stop, and that DOT's manuals permit placing them separately. (R. pp. 1021-23). The jury heard evidence that, when marking this crossing with a stop sign, DOT had to consider the presence of underground cables, a ditch, and a pipe and a desire not to block Mr.

Jackson's neighboring driveway. (R. pp. 1017-18). The stop line, therefore, was placed closer to the track. According to the DOT witness, any motorist stopping at this line "would have been fine looking down the track," and it was reasonable to assume that a motorist would stop there or, at a minimum, verify that there was not an oncoming train before crossing, as required by §§ 56-5-2330 and 56-5-2715. (R. pp. 1025, 1046). The jury also heard testimony that the crossing had passed DOT inspections and was safe. (S.R. p. 35; R. pp. 711-18, 1047).

This evidence demonstrates how the various statutes the Trial Court charged can and should be read together. Sections 56-5-2330 and 56-5-2740 discuss the obligations to stop at stop lines if they are in place, while section 56-5-2715 discusses where to stop at a crossing that has a stop sign but no stop line directing the motorist where to stop. If a stop line is present, then the motorist would obviously be in compliance with the law by stopping there. *See* S.C. Code Ann. §§ 56-5-2330 and 56-5-2740 (discussing stopping at stop lines). These statutes are therefore not conflicting, but complementary. *See Henning v. Union Pac. R.R. Co.*, 530 F.3d 1206, 1221-22 (10th Cir. 2008) (finding "no instructional errors" in trial court's charging of both the Oklahoma stop line statute and its statute providing for a stop no closer than 15 and no farther than 50 feet from a railroad crossing, as both were applicable). As the Trial Court observed, "I think you expect people to stop at a stop line." (R. p. 1304).

Moreover, Stephens' argument that Colvin was not allowed to stop at the stop line ignores the evidence in this case, which showed that Tonia Colvin *did stop* at *both* the stop sign and the stop line in this case. *See, e.g.*, R. p. 714 (testimony of Larry Biser that Colvin stopped first at the stop sign, then pulled up to the stop line and "just sat there");

R. p. 806 (testimony of Ned Wooden who saw Colvin "ease up to the stop bar and stop")). Rather than yielding or exercising due care after stopping, however, she darted out into the path of the train. *See* R. p. 714 ("next thing I know her brake lights went out and across the tracks she went in front of the train"). Accordingly, the instruction caused Stephens no prejudice.

2. The Court Did Not Err in Charging the Law of Intervening and Superseding Negligence.

Stephens contends that the Trial Court should not have charged the jury on intervening and superseding negligence. Stephens did not object to the legal accuracy of the charge, but asserted only that it did not apply to this case. According to Stephens, it was supposedly foreseeable that Colvin would *not* stop at the stop line, and thus intervening or superseding negligence did not apply. Pet'r's Br., at 34.

However, as noted above, the jury heard evidence that, *despite* stopping at the stop sign and stop line, where she would have been able to see for 2,000 feet down the track, she failed to yield and exercise due care. The Trial Court's charge was proper because it would not have been foreseeable for Colvin to act in violation of the statutes and her other duties as a motorist. *See, e.g.*, R. p. 1304 ("I think you expect people to stop at a stop line."). To the extent that Stephens disagrees about where Colvin stopped, this dispute was a proper one to leave for the jury with a correct charge on the law, which the Trial Court provided.

Moreover, the issue of Colvin's intervening and superseding negligence went well beyond the issue of the stop line, as there was considerable evidence that Colvin had consumed alcohol, had taken drugs that should not be mixed with alcohol, smelled of alcohol, and showed poor judgment by driving directly in front of an oncoming train on a

clear day when witnesses all around her heard and saw the train coming. *See infra* § II.D.4. Therefore, the Trial Court's decision to give the charge was not based just on the stop line issue. (R. p. 1304) ("I don't think it is foreseeable that she would be drinking and using, you know, narcotics, and on the road. I don't think that's foreseeable, or at least shouldn't be."). The Trial Court did not err in charging the jury on intervening and superseding negligence, and Stephens can show no prejudice by the Trial Court's charge on this well-accepted South Carolina law.

3. The Trial Court Properly Instructed the Jury on Applicable Language from the Case Law.

Stephens also argues with the Trial Court's charge that "it is always train time at a crossing," contending that this language "implies a higher duty upon motorists at crossings than required." Pet'r's Br., p. 34. However, the language of the charge comes straight from well settled South Carolina law. *See Peagler v. Atlantic Coast Line R.R. Co.*, 234 S.C. 140, 107 S.E.2d 15, 22 (1959) ("We are not unmindful of the principles long established by this court that *it is 'always train time at a railroad crossing'* and that one approaching must make use of his senses, to the best of his ability under the circumstances, to ascertain the presence or approach of a train and do so in time and place, so far as is reasonably within his control, to be effective . . . .") (emphasis added); *Robison v. Atlantic Coast Line R. R.*, 179 S.C. 493, 184 S.E. 96, 100 (1936) ("It has been well said that *it is always train time at a railroad crossing*.") (emphasis added); *Hawkins v. Southern Ry. Co.*, 45 F.R.D. 459, 462 (D.S.C. 1968) ("[T]his court is mindful of the rule that *'it is always train time at a railroad crossing'* and that a vehicle driver, or pedestrian, going on or near railroad tracks must observe due care, or as otherwise stated reasonable care, when attempting to cross.") (emphasis added).

This Court has repeatedly endorsed the practice of using language in jury charges taken directly from appellate decisions that illustrate the principles of law at issue. *See Sumter Trust Co. v. Holman*, 134 S.C. 412, 132 S.E. 811, 814 (1926) ("It was not improper for the court to use cases, decided by this court, for the purpose of illustrating to the jury principles of law applicable to the case on trial; and a trial judge is permitted even to read from such cases the law as announced by this court, when it is applicable to the case being tried."); *Richardson v. Northwestern R.R. Co.*, 131 S.C. 57, 126 S.E. 397, 399 (1924) ("It is well to give the statement in the language of the appellate court, written after supposedly mature deliberation, rather than an offhand paraphrase announced in the rush of a trial.").

Nor was there any reversible error in declining to provide Stephens' Request No. 9. The substance of this charge, that a motorist "is under no *absolute* duty to stop, look and listen" at a railroad crossing, as well as the mutual duties of the motorist and railroad, were adequately covered by the charges that the Trial Court did give. (R. pp. 1460-61) (emphasis added) (charging jury that "[t]he duty of a traveler arising under the foregoing rule [to stop, look, and listen] is not an absolute one, but may be qualified by attendant circumstances"); (R. pp. 1462-63) (charging jury that "there is a *mutual* duty on traveler and railroad to exercise due care" and that "*[b]oth the traveler and the company are charged with the same degree of care*: the one to avoid being injured; and the other to avoid inflicting injury") (emphasis added). Because "[a] jury charge is correct ... when the charge ... read as a whole ... contains the correct definition and adequately covers the law," the Trial Court did not commit any reversible error. *In re Care & Treatment of Canupp*, 380 S.C. 611, 616, 671 S.E.2d 614, 616 (Ct. App. 2008).

4. The Trial Court Correctly Charged the Jury on Impairment.

Stephens contends that the Court of Appeals "refused" to address charges concerning the evidence of Colvin's impairment due to consuming drugs and alcohol prior to the collision. Pet'r's Brief, at 35. As discussed previously, it was legally unnecessary for the Court of Appeals to address these charges on appeal because they do not appear to have affected the jury's ultimate conclusion. *See* 735 S.E.2d at 514. This was the correct approach, because the verdict demonstrates that the jury determined that Stephens failed to meet his burden of proving negligence by CSX or DOT.

Regardless, even had these charges been relevant on appeal, there was no reversible error in charging them. The Trial Court acted well within its discretion in charging the jury that it is unlawful "for a person to drive a motor vehicle ... 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." (R. pp. 1456-58). Stephens cannot complain about this charge, which is based on language from S.C. Code Ann. § 56-5-2930, because *he agreed to it in the Trial Court*. Stephens incorrectly claims to have "lodged objections at the charging of this statute" at "various stages of the trial," Pet'r's Br., at 36. In fact, he agreed to the charging of the statute with the following additional language, which the Trial Court included: "that it is not against the law of South Carolina to drink and/or use drugs and drive," only to drive "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. 1232) (Plaintiff's counsel: "I agree – I agree with that."). An appellate court cannot

reverse a Trial Court on a jury charge that the appellant approved. *See Keaton ex rel. Foster v. Greenville Hosp. Sys.*, 334 S.C. 488, 495, 514 S.E.2d 570, 573-74 (1999) (objection and specific ruling on jury charge to appeal are preconditions to challenging the charge on appeal).

Furthermore, there was more than sufficient evidence in the record to support this charge, including Colvin's admission that she had consumed alcohol, prescription drugs, and "potentially some other things" that could have affected her judgment. (R. p. 473). Colvin also admitted telling an EMT that she had been drinking, that the EMT said that she smelled of alcohol, and that there were dangers in mixing alcohol and her medications. (R. p. 460-67, 484). In addition, hospital lab reports were positive for opiates, which could have come from the medications, or from the "other things" she admitted having taken. (R. p. 538). Indeed, Stephens made this an issue from the outset of the trial, volunteering to the jury that Colvin had been drinking and had taken prescription narcotics on the day of the accident. (R. p. 43).

On this record, the Trial Court was well within its discretion to give the charge and allow the jury to decide the issue. *See Dixon v. Weir Fuel Co.*, 251 S.C. 74, 160 S.E.2d 194, 197 (1968) ("So the question is not: was Roberts drunk or intoxicated? The question is: was his condition such that he could drive with due regard for others (and we might add, for himself)? If not, he breached his statutory as well as his common law duty."); *Lee v. Bunch*, 373 S.C. 654, 659, 647 S.E.2d 197, 200 (2007) ("The circumstances surrounding Bunch's version of the accident, i.e. that Lee inexplicably ran into Bunch's automobile, would be more probable if Lee was impaired."); *Gulledge v. McLaughlin*, 328 S.C. 504, 511-512, 492 S.E.2d 816, 820 (Ct. App. 1997) (explaining

that blood alcohol content, "even without further explanation, at least allowed the jury to conclude that Gulledge had alcohol in his bloodstream, and this, when combined with the beer cans, the cooler, and the circumstances of the accident, were sufficient for the jury to conclude that Gulledge was impaired from alcohol consumption").

Stephens also argues that the Trial Court should have charged the presumption in S.C. Code Ann. § 56-5-2950(b), which states that in a "criminal prosecution" for violation of S.C. Code Ann. § 56-5-2930, "if the alcohol concentration was at that time five one-hundredths of one percent or less, it is conclusively presumed that the person was not under the influence of alcohol." S.C. Code Ann. § 56-5-2950(b).[15] This charge, however, would have been confusing, because the "presumption" is inapplicable in light of Colvin's admission that she had consumed not just alcohol, but narcotics that came with a warning not to be mixed with alcohol. The statute expressly states that it "must not be construed as limiting the introduction of *any other evidence* bearing upon the question of whether or not the person was under the influence of alcohol, drugs, *or a combination of them.*" S.C. Code Ann. § 56-5-2950(b) (now S.C. Code Ann. § 56-5-2950(G)(1)) (emphasis added). As a result, the presumption in S.C. Code Ann. § 56-5-2950(b), which concerned solely the issue of "not being under the influence of alcohol" did not apply and would have confused the jury.

Stephens also cannot show any prejudice. As noted above, the Trial Court did give Stephens' requested charge "that it is not against the law of South Carolina to drink and/or use drugs and drive," only to drive "if their abilities are impaired by alcohol and/or

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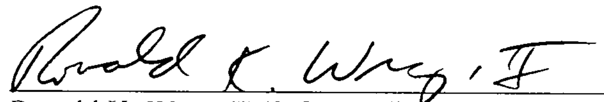
[15] Effective February 10, 2009, S.C. Code Ann. § 56-5-2950(b) was re-codified as § 56-5-2950(G)(1). So as to remain consistent with the citations in the record, CSX cites to this provision as S.C. Code Ann. § 56-5-2950(b).

drugs to such an extent that their driving is materially affected and they are thereby unable to safely operate an automobile." (R. pp. 1457-58). Moreover, and as is the case for all the charges concerning Colvin, the jury never had to reach these issues because it found no breach of duty by CSX or DOT. Considering the relevant charges as a whole, the Trial Court committed no error.

CONCLUSION

The Court should dismiss the writ as improvidently granted. Alternatively, the Court should affirm the decisions below.



Ronald K. Wray, II (S.C. Bar #65246)
Thomas Vanderbloemen (S.C. Bar #75784)
GALLIVAN, WHITE & BOYD, P.A.
55 Beattie Place; Suite 1200
Greenville, SC 29603
(864) 271-9580

James W. Purcell
Fulcher Hagler, LLP
P. O. Box 1477
Augusta, GA 30903-1477
(706) 724-0171

Jonathan P. Harmon
McGuire Woods, LLP
One James Center
901 East Cary Street
Richmond, VA 23219-4030
(804)775-1000

Attorneys for Respondent
CSX Transportation, Inc.

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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S.C. Supreme Court

APPEAL FROM HAMPTON COUNTY
COURT OF COMMON PLEAS

CARMEN TEVIS MULLEN, Circuit Court Judge

APPELLATE CASE NO.: 2013-000133

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

vs

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

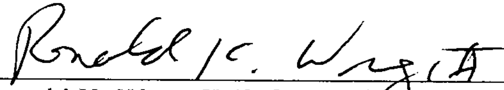
PROOF OF SERVICE

The undersigned, an attorney in this matter for the Respondent, CSX Transportation, Inc., certifies that I have this 11th day of November, 2014, served copies of Respondent, CSX Transportation, Inc.'s, Brief upon counsel for the Petitioner and counsel for Respondent, South Carolina Department of Transportation by causing them to be deposited in the United States Mail, first-class postage prepaid, addressed to:

Mr. John E. Parker
Mr. Matthew V. Creech
Peters, Murdaugh, Parker, Eltzroth & Detrick, P.A.
P.O. Box 457
Hampton, SC 29924

Mr. Peden B. McLeod
McLeod, Fraser & Cone
P. O. Drawer 230
Walterboro, SC 29488.

Mr. Andrew Lindemann
Davidson & Lindemann, P.A.
PO Box 8568
Columbia, SC 39303-8568



Ronald K. Wray, II (S.C. Bar #65246)
Thomas Vanderbloemen (S.C. Bar #75784)
GALLIVAN, WHITE & BOYD, P.A.
55 Beattie Place; Suite 1200
Post Office Box 10589
Greenville, SC 29603
(864) 271-9580

Attorneys for Respondent CSX Transportation

Ronald K. Wray
A member of the South Carolina Bar
Direct 864.271.5362
RWray@GWBlawfirm.com

Gallivan, White & Boyd, P.A.
ATTORNEYS AT LAW

55 Beattie Place, Suite 1200
Post Office Box 10589 (29603)
Greenville, South Carolina 29601
Telephone 864.271.9580
Facsimile 864.271.7502
www.GWBlawfirm.com

November 11, 2014

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S.C. Supreme Court

Daniel E. Shearouse, Clerk of Court
Supreme Court of South Carolina
PO Box 11330
Columbia, SC 29211

Re: Willie Homer Stephens v. CSX Transportation and SCDOT
Appellate Case No. 2013-000133
Case No.: 2004-CP-25-267

Dear Mr. Shearouse:

Enclosed for filing please find one original, unbound copy of Respondent CSX Transportation, Inc.'s Brief in connection with the above matter, as well as fifteen (15) bound copies of the same. I have also included an original and two copies of the Proof of Service in this matter. Please return the extra copy in the self-addressed, stamped envelope enclosed for your convenience.

By copy to all counsel of recording, I am serving them with the same.

With kind regards, I am,

Sincerely,

GALLIVAN, WHITE & BOYD, P.A.

Ronald K. Wray, II

RKW:kd
Enclosures
cc: Mr. John E. Parker (w/enclosures)
Mr. Matthew V. Creech (w/enclosures)
Mr. Peden B. McLeod (w/enclosures)
Mr. Andrew Lindemann (w/ enclosures)

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