

THE STATE OF SOUTH CAROLINA
In the Supreme Court

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S.C. Supreme Court

APPEAL FROM HAMPTON COUNTY
Carmen Tevis Mullen, Circuit Court Judge

Case No. 2004-CP-25-0267

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

v.

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

BRIEF OF RESPONDENT
SOUTH CAROLINA DEPARTMENT OF TRANSPORTATION

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STATEMENT OF THE CASE

This is a railroad crossing case. The Petitioner Willie Homer Stephens, as the Guardian ad Litem for his granddaughter Lillian, brought suit against the Respondents CSX Transportation, Inc. ("CSX") and the South Carolina Department of Transportation ("SCDOT"). The Petitioner alleges that both CSX and SCDOT were negligent in causing an accident on February 3, 2004, at the Hill Road crossing located in Yemassee, South Carolina.

A trial was held in Hampton County beginning on July 28, 2008, before Circuit Court Judge Carmen Tevis Mullen and a jury. On August 14, 2008, after three weeks of trial, the jury returned a defense verdict in favor of both CSX and SCDOT. The jury answered special interrogatories and specifically found that neither CSX nor SCDOT were negligent. (R. 10).

The Petitioner thereafter moved for a judgment notwithstanding the verdict against CSX only as well as a new trial absolute against both Respondents. A hearing was held on September 11, 2008. Judge Mullen subsequently issued an order filed March 30, 2009, denying all post-trial motions. (R. 1-7).

The Petitioner then filed an appeal to the South Carolina Court of Appeals which issued an opinion on July 25, 2012, affirming the order of Judge Carmen Tevis Mullen denying post-trial motions and upholding the jury's verdict and the

judgment in favor of the Respondents. *See, Stephens v. CSX Transportation, Inc.*, 400 S.C. 503, 735 S.E.2d 505 (Ct. App. 2012). A subsequent petition for rehearing was denied.

STATEMENT OF FACTS

The Respondent SCDOT hereby adopts by reference and incorporates herein the "Statement of Facts" included in the brief filed by the Respondent CSX.

ARGUMENTS

I. The Court of Appeals was correct in affirming the rulings by the trial court with respect to the jury charge.

In seeking a new trial, the Petitioner raises several issues with respect to the jury charge.¹ The Petitioner argues that Judge Mullen erred in refusing to give certain requested instructions. He also complains that certain portions of the jury charge are in error.

Initially, it is instructive to consider the standard of review for jury instructions. It is well settled that "[w]hen reviewing a jury charge for alleged error, an appellate court must consider the charge as a whole in light of the evidence and issues presented at trial." *Daves v. Cleary*, 355 S.C. 216, 584 S.E.2d 423, 427 (Ct. App. 2003). "If the charge is reasonably free from error, isolated portions that might be misleading do not constitute reversible error." *Id.* "The substance of the law is what must be charged, not any particular verbiage." *Id.* "A jury charge is correct if it contains the correct definition and adequately charges the law." *Id.* Similarly stated, "[a] jury charge which is substantially correct and covers the law does not require reversal." *Stewart v. Richland Memorial Hospital*,

¹ The issues on appeal raised in Section I of the Petitioner's Brief are directed solely at the Respondent CSX. As a result, SCDOT is not addressing those issues. The same is also true with respect to the issue addressed in Sections II.A.i and II.B.iii of the Petitioner's Brief.

350 S.C. 589, 567 S.E.2d 510, 513 (Ct. App. 2002). "A confusing charge alone is insufficient to warrant reversal." *Keaton v. Greenville Hospital System*, 334 S.C. 488, 514 S.E.2d 570, 575 (1999).

"It is not error to refuse a request to charge when the substance of the request is included in the general instructions." *Brown v. Stewart*, 348 S.C. 33, 557 S.E.2d 676 (Ct. App. 2001). "Refusal to give a properly requested charge is not error if the general instructions are sufficiently broad to enable the jury to understand the law and the issues involved." *McCourt v. Abernathy*, 318 S.C. 301, 457 S.E.2d 603, 606 (1995).

"To warrant reversal for refusal to give a requested instruction, the refusal must have not only been erroneous, but prejudicial as well." *Daves v. Cleary*, 355 S.C. 216, 584 S.E.2d 423, 427 (Ct. App. 2003). "An erroneous jury instruction, however, is not grounds for reversal unless the Petitioner can show prejudice from the erroneous instruction." *Cole v. Raut*, 378 S.C. 398, 663 S.E.2d 30, 33 (2008). "An alleged error is harmless if the appellate court determines beyond a reasonable doubt that the alleged error did not contribute to the verdict." *Fairchild v. South Carolina Dept. of Transportation*, 385 S.C. 344, 683 S.E.2d 818, 822 (Ct. App. 2009). *See also, Keaton v. Greenville Hospital System*, 334 S.C. 488, 514 S.E.2d 570 (1999).

A. Discretionary Immunity Jury Charge

The Petitioner argues that Judge Mullen erred in charging discretionary immunity under Section 15-78-60(5) of the Tort Claims Act because there was no evidence to support the defense of discretionary immunity. The Court of Appeals agreed that "DOT did not present sufficient evidence to prove its discretionary act immunity." *Stephens*, 735 S.E.2d at 517. However, the Court of Appeals found no error by the trial court in giving an instruction on the defense because, in part, the Petitioner never moved for a directed verdict on that defense. *Id.* In his brief, the Petitioner does not even challenge that ruling by the Court of Appeals, and as a result, this issue is subject to being affirmed under the two-issue rule.² In addition, the Court of Appeals found no error because the Petitioner did not raise the absence of evidence of accepted professional standards as an argument before the trial court. *Id.* On these bases, the Court of Appeals was correct in finding no reversible error.

The record clearly reflects that the Petitioner never moved for a directed verdict on the basis that there was no evidence to support the discretionary immunity defense now being challenged. In the absence of a directed verdict motion, the Petitioner cannot take the position for the first time on appeal that there

² In applying the "two-issue" rule, this Court explained that "where a decision is based on more than one ground, the appellate court will affirm unless the appellant appeals all grounds because the unappealed ground will become the law of the case." *Jones v. Lott*, 387 S.C. 339, 692 S.E.2d 900, 903 (2010).

was no evidence to support the defense and that the trial court erred in charging the defense. In *Barber v. Citizens & Southern National Bank*, 268 S.C. 16, 231 S.E.2d 295 (1977), this Court ruled that the failure of a party to move for a directed verdict at trial precludes any challenge on appeal to the sufficiency of the evidence. 231 S.E.2d at 297. See also, *Evans v. Wabash Life Ins. Co.*, 247 S.C. 464, 148 S.E.2d 153 (1966); *Epting v. Brumble*, 264 S.C. 114, 212 S.E.2d 711 (1975); *Lites v. Taylor*, 284 S.C. 316, 326 S.E.2d 173 (Ct. App. 1985). In short, a directed verdict motion is required to preserve any issue regarding the sufficiency of the evidence.

By arguing on appeal that Judge Mullen erred in charging a Section 15-78-60(5) discretionary immunity defense because there was no evidence to support that defense, the Petitioner is clearly challenging on appeal the sufficiency of the evidence. He is doing so without having made a motion for directed verdict at trial, and hence, that issue is not preserved, and the Court of Appeals was correct in so holding.

Furthermore, the Court of Appeals was correct that the Petitioner's counsel did not object to the discretionary immunity charge on the basis that there was no evidence that SCDOT failed to present evidence of accepted professional standards in the placement of the stop sign or stop line. The brief discussion of the charge during the charge conference confirms that that ground was never articulated to the

trial court, and as a result, Judge Mullen had no opportunity to consider that specific objection. *See, State v. Hughes*, 336 S.C. 585, 521 S.E.2d 500 (1990) (objection to charge not preserved where different objection stated below); *State v. Sterling*, 396 S.C. 599, 723 S.E.2d 176, 186 (2012) (a party may not change his grounds of objection to the jury charge on appeal).

Finally, the Petitioner has made no showing of any prejudice from the discretionary immunity charge. The Petitioner has argued only in a conclusory manner that the charge "clearly confused the jury." Indeed, no showing of jury confusion or prejudice has been made. Moreover, the Petitioner cannot show that the jury even reached the discretionary immunity defense. The jury concluded on the verdict form that SCDOT was not negligent. The jury did not find that SCDOT was entitled to any immunity. Consequently, the Petitioner has failed to demonstrate any prejudice resulting from the discretionary immunity charge.³

³ Because the Court has granted certiorari on this issue, the Court may revisit and is not bound by the Court of Appeals' conclusion "that DOT did not present sufficient evidence to prove its discretionary act immunity claim." Contrary to that conclusion, the record does include evidence that the SCDOT exercised discretion in the placement of the stop sign and stop line and that the exercise of that discretion was controlled by industry standards, specifically the Manual of Uniform Traffic Control Devices (MUTCD). The SCDOT witnesses including Richard F. Jenkins, Jr, Joel Smith, and Richard Reynolds explained in their testimony the factors that were considered in the placement of the stop sign and stop line. In particular, the positioning of the stop sign was affected by the presence of an access road, driveway, culvert, and fiber optic line. The witnesses explained how those physical obstructions impacted the positioning of the stop sign. (R. 1016-1018, 1052). The witnesses also offered the opinions that the placement of the stop sign and stop line were proper and in substantial compliance with the guidelines provided in the MUTCD. (R. 997-998, 1016-1018, 1040-1044, 1052). In short, this testimony was sufficient to support a jury charge on discretionary immunity.

B. Jury Charges Related to Signage and SCDOT's Authority to Close Railroad Crossings

The Petitioner also contends that Judge Mullen should not have charged the jury on several statutes addressing the placement of signage at railroad crossings and SCDOT's authority to close railroad crossings. Importantly, the Petitioner does not maintain that these charges did not accurately recite the statutory law. Instead, he complains that the statutes had no bearing on any issues at trial.

As a threshold matter, the Petitioner has not shown that he stated any objections to these charges at trial. The record clearly shows that the Petitioner raised no objection to Section 56-5-1020. (R. 1286-1288). The same is true with respect to Section 56-15-1625. That charge was specifically addressed, and the Petitioner raised no objections. (R. 1298-1301).

The preservation problems notwithstanding, the Court of Appeals correctly ruled that it was appropriate for the trial court to instruct the jury as to the duties and obligations regarding railroad crossing signage. The Petitioner's own expert raised issues regarding signage and also raised the possibility of closing the Hill Road crossing. The statutes which were charged provided the jury the legal context in which to assess such expert testimony. As the Court of Appeals correctly concluded, "the charges contain accurate statements of law, and there was evidence to support the trial court's decision to give each of them." *Stephens*, 735

S.E.2d at 516. Moreover, the Petitioner has not shown any prejudice from these instructions. Those statutes did not "create a list of requirements" for CSX, as the Petitioner now claims. In addition, the claim of "potential" jury confusion is conclusory, unsupported, and insufficient to merit a new trial.

II. The Court of Appeals was correct in declining to address issues raised to certain jury charges that could not have affected the jury's decision.

The Court of Appeals was also correct in not addressing on appeal those jury charges that did not impact the jury's decision. The jury was required to answer special interrogatories whereby the jury determined that CSX and SCDOT were not negligent. (R. 10). As a result, the Court of Appeals was correct in concluding that it is unnecessary to address the propriety of jury charges that could not have affected the jury's deliberations over whether CSX or SCDOT breached any duty of care. Nonetheless, even if the Court had addressed those jury charges, no reversible error occurred as discussed below.

A. Jury Charges on Sections 56-5-2330 and 56-5-2740

The Petitioner argues that Judge Mullen erred in charging the jury on Sections 56-5-2330 and 56-5-2740. The Petitioner contends in part that these statutes were inapplicable to the facts of this case because the statutes do not apply

to stop signs at railroad crossings.

Section 56-5-2330 sets forth the general duties of a motorist upon approaching a stop sign. Judge Mullen did not charge the entire statute verbatim. Instead, she simply explained that a motorist upon approaching a stop sign has a duty to stop at a clearly marked stop line. Similarly, Section 56-5-2740 explains where a motorist approaching a stop sign is required to stop. There was no error in charging these statutes.

The Petitioner further argues that Sections 56-5-2330 and 56-5-2740, which require a motorist to stop at a clearly marked stop line, conflict with Section 56-5-2715, which addresses stop signs posted at railroad crossings. Section 56-5-2715 provides in part: "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." S.C. Code Ann. § 56-5-2715. The Petitioner has not shown any inconsistency between the statutes in question. Instead, the statutes are to be read together. The clear intent of these statutes is that a motorist is required to stop where there is a clearly marked stop line. However, if there is no stop line but only a stop sign, the motorist is required to stop at the stop sign.

Furthermore, the Petitioner has not shown that this challenge to the jury charge is even properly preserved for appellate review. Rule 51, SCRCP, provides

that "[n]o party may assign as error the giving or the failure to give an instruction unless he objects thereto before the jury retires to consider its verdict, *stating distinctly the matter to which he objects and the grounds for his objection.*" Rule 51, SCRCP. (Emphasis added). Therefore, in order to preserve an objection to a jury charge, a party must "support[] those objections with distinctly-stated grounds of objections." *Bellamy v. Payne*, 304 S.C. 179, 403 S.E.2d 326, 328 (Ct. App. 1991). This is required "so that the Court is apprised of the alleged defect and the justification for the requested charge" which in turn gives the trial court the opportunity to correct or revise the charge accordingly. *Id.* "In the absence of distinctly-stated grounds of objection, appellate review of ... objections is not available." *Id.* Therefore, in order to properly preserve an objection to a jury charge, a party must articulate the objection to the trial judge. The same objection as raised at trial may be asserted on appeal. However, a party is precluded from raising a new objection or a different objection for the first time on appeal or by way of post-trial motion.

Yet, that is precisely what the Petitioner has done. At trial, the Petitioner objected to the charge on Sections 56-5-2330 and 56-5-2740 only on the basis that the statutes had "no applicability" because "it applies to an intersection where the roads intersect" and "has no relevancy to a railroad crossing." (R. 1134). The Petitioner never argued at trial, as he argues on appeal, that Sections 56-5-2330 and

56-5-2740 actually conflict with Section 56-5-2715. That argument was never made at trial but was raised for the first time in post-trial motions, which is too late. The Petitioner should be precluded from raising new objections to charges for the first time on appeal or in a motion for new trial. Consequently, SCDOT submits that part of the Petitioners' current challenge to the charge on Sections 56-5-2330 and 56-5-2740 is not even preserved for review.

B. Jury Charge on Intervening or Superseding Negligence

In Section II.B.ii of his brief, the Petitioner argues that the trial judge's jury charge on the law of intervening or superseding negligence was erroneous and warrants a new trial. This issue is not properly before this Court. This issue was not included in the petition for writ of certiorari that was filed by the Petitioner and thus is not within the scope of the writ of certiorari that was issued by this Court. Rule 242(i), SCACR, provides:

The petition may be granted or denied on any question presented. If the petition is granted, the Clerk shall notify each party or his attorney, specifying the question or questions to be considered, and the parties shall prepare briefs addressing the question(s).

Rule 242(i), SCACR. Once certiorari is granted, however, a petitioner is not permitted to raise new issues that were not included in the petition or allowed by this Court in the writ of certiorari.

Likewise, Rule 242(d)(2), SCACR, provides that "[o]nly those questions raised in the Court of Appeals *and in the petition for rehearing* shall be included in the petition for writ of certiorari as a question presented to the Supreme Court." Rule 242(d)(2), SCACR. (Emphasis added). *See also, Camp v. Springs Mortgage Corp.*, 310 S.C. 514, 426 S.E.2d 304 (1993) (issue not preserved for appeal where the petitioner did not raise the issue in its petition for rehearing). Here, the Petitioner did not challenge the jury charge on intervening or superseding negligence in his petition for rehearing in the Court of Appeals, and on that additional basis, the issue cannot be heard on certiorari.

C. Jury Charge on Section 56-5-2930 and Refusal to Charge Section 56-5-2950(b)

The Petitioner further contends that Judge Mullen erred in charging Section 56-5-2930 because there was no evidence that Tonia Colvin was impaired. The Petitioner also argues that Judge Mullen erred in refusing to charge the presumptions of impairment set forth in Section 56-5-2950(b).

Section 56-5-2930 provides that it is unlawful for a person to operate a motor vehicle under the influence of alcohol or drugs "to the extent that the person's faculties to drive a motor vehicle are materially and appreciably impaired." S.C. Code Ann. § 56-5-2930. "A driver is 'under the influence' when ingestion of drugs or alcohol results in the impairment of the driver's faculties,

impairs the driver's ability to operate the vehicle with reasonable care, or impairs the driver's ability to drive as a prudent driver would operate the vehicle." *Kennedy v. Griffin*, 358 S.C. 122, 595 S.E.2d 248, 251 (Ct. App. 2004).

The Petitioner claims to have objected to the charge of Section 56-5-2930. That is not the case. The Petitioner did not oppose charging Section 56-5-2930 but requested only that the Court provide an additional explanation that it is not unlawful for a person to drink and drive or take medication and drive where the motorist is not impaired by the alcohol or medication. (R. 1230-1232). Judge Mullen agreed and charged the requested language in conjunction with her charge of Section 56-5-2930. (R. 1457-1458). The Petitioner therefore is precluded from challenging on appeal the charge of Section 56-5-2930. *See, Vaughn v. City of Anderson*, 300 S.C. 55, 386 S.E.2d 297 (Ct. App. 1989) (failure to object to jury charge waives any alleged error in the charge).

Additionally, there is sufficient evidence in the record to support the charge of Section 56-5-2930. The Petitioner fully concedes that there is evidence of alcohol and drug use by Tonia Colvin prior to the accident. Colvin testified that she consumed one or two wine coolers while doing housework shortly before the accident. (R. 422-423). She also admitted to having taken the pain medication Darvocet and a muscle relaxer Tizanidine prior to the accident. (R. 427). Colvin further admitted to having taken codeine cough syrup although she later questioned

whether it may have been children's cough syrup. (R. 470-472). Colvin agreed that each of these medications was combined with alcohol and was in her system at the time of the accident. (R. 473). She further admitted that the medications came with warnings not to take with alcohol. (R. 461-464). Colvin had also gotten a new prescription for hydrocodone which she admitted was a narcotic pain medication "more powerful than Darvocet." (R. 467-468). Colvin testified that she had not taken hydrocodone prior to the accident, but in her earlier deposition she admitted that she did not remember. Upon being impeached with her deposition testimony, Colvin agreed that she was not "a hundred percent sure" whether she had taken hydrocodone. (R. 468-470).

At the accident scene, the attending EMT noted a "strong odor of alcohol." (R. 1573). Following the accident at the hospital, the attending physician ordered a blood-alcohol test and drug screen. Allison Schaffer, a registered nurse at Hampton County Hospital, testified that typically physicians do not order such tests and agreed that such tests are not conducted unless there appears to be a need. (R. 537). The blood-alcohol test which was conducted more than three hours after the accident revealed a 0.018 blood-alcohol level. (R. 531). The drug screen was positive for opiates. (R. 538).

Despite the overwhelming evidence of alcohol and drug use prior to the accident, the Petitioner contends that there is no evidence of impairment. While

Tonia Colvin denied impairment, there exists circumstantial evidence of impairment that would make the issue a jury question. The use of alcohol and prescription medication is undisputed, and specifically the mixing of alcohol and drugs. The jury was also presented with eyewitness testimony that Colvin stopped for the train, was able to see and hear the approaching train, and then tried to cross the tracks to beat the train. (R. 714). As Judge Mullen observed, "I think based on circumstantial evidence this jury could conclude that she saw the train, she decided to go and she thought she could either get past it or beat it in some way and that she pulled out." (R. 1219). Hence, there is circumstantial evidence that would lead a jury to believe that Colvin was operating the motor vehicle in an impaired state.

Judge Mullen's decision to charge the jury that it is unlawful to operate a motor vehicle in an impaired state is supported by the decision in *Gulledge v. McLaughlin*, 328 S.C. 504, 492 S.E.2d 816 (Ct. App. 1997). In *Gulledge*, the plaintiff objected to the admission of evidence of the decedent's blood alcohol content. The plaintiff argued "that no evidence indicated Gulledge either was acting in an intoxicated manner or smelled of alcoholic beverages. In fact, [plaintiff] points out that the ambulance personnel who transported Gulledge specifically testified they did not observe anything that would indicate Gulledge had been drinking." 492 S.E.2d at 819. Nonetheless, the Court found no error in

the admission of the blood alcohol content. The Court concluded that a jury could have found the decedent was drinking by the proximity of empty "fresh" beer cans and a cooler. Significantly, the Court also found that "the circumstances of this accident also provide some corroborating evidence that Gullede was driving while under the influence of intoxicants." *Id.* The Court thus determined that the blood-alcohol content "when combined with the beer cans, the cooler, and the circumstances of the accident, were sufficient for the jury to conclude that Gullede was impaired from alcohol consumption." 492 S.E.2d at 820.

The evidence in the present case is as compelling as in *Gullede*. Here, there is no dispute that Tonia Colvin had ingested alcohol *and* prescription medication prior to the accident. Moreover, as in *Gullede*, the circumstances of the accident provide circumstantial evidence that Colvin was impaired. Therefore, if the admission of the decedent's blood-alcohol content was proper in *Gullede*, certainly it was appropriate to charge the jury in the case at bar that it is unlawful for a motorist to drive while impaired. Contrary to the Petitioner's contention, there was sufficient evidence to charge Section 56-5-2930 to the jury.

The Petitioner further argues that Judge Mullen erred in failing to charge Section 56-5-2950 and specifically subsection (b) which provided as follows:

In the criminal prosecution for a violation of Section 56-5-2930, 56-5-2933, or 56-5-2945 relating to driving a vehicle under the influence of alcohol, drugs, or a combination of alcohol and drugs, the alcohol

concentration at the time of the test, as shown by chemical analysis of the person's breath or other body fluids, gives rise to the following:

- (1) 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.

* * * * *

The provisions of this section 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).⁴ The Petitioner contends that, because Tonia Colvin's blood-alcohol content was less than five one-hundredths of one percent, he was entitled to a charge that she is presumed not to be under the influence of alcohol.

Judge Mullen did not abuse her discretion in refusing to charge Section 56-5-2950(b). She explains her reasoning as follows in her order denying post-trial motions:

Plaintiff contends I should have charged Section 56-5-2950. This statute was discussed at length at trial. By its very wording, the statute applies only in criminal prosecutions. Thus, to use it in a civil proceeding, where the burden of proof is the preponderance of the evidence and not beyond a reasonable doubt, would have been

⁴ Effective February 10, 2009, Section 56-5-2950(b) has been re-codified as Section 56-5-2950(G).

inappropriate. Further, the statute refers to presumptions regarding blood alcohol level, whereas evidence in this case showed Ms. Colvin had combined the use of both alcohol and prescription drugs. Additionally, Plaintiff can show no prejudice given that I did charge, at Plaintiff's request, that it is not unlawful in this State to drink and drive, it is only unlawful to drive while impaired or under the influence. Thus, I correctly refused the requested charge.

(R. 7). Most importantly, as Judge Mullen concluded, the charge would have been confusing to a jury given that the evidence did not concern only alcohol consumption. Instead, it is undisputed that Colvin ingested a combination of alcohol and prescriptions drugs. The presumptions set forth in Section 56-5-2950(b) pertain to alcohol use only. Thus, the presumptions have no applicability or relevance given that Colvin's impairment was not based on the use of alcohol alone. Thus, if the trial court had charged the jury on Section 56-5-2950(b), that could have likely resulted in jury confusion. Judge Mullen avoided that confusion by correctly refusing to charge Section 56-5-2950(b), while at the same time making certain that the jury understood that it is not unlawful to drink alcohol and then drive, only that it is unlawful to drive while impaired.

Moreover, even if this Court were to conclude that Judge Mullen erred in charging Section 56-5-2930 or refusing to charge Section 56-5-2950(b), the Petitioner must still show prejudice. This aspect of the charge was directed solely at the issues of Tonia Colvin's fault and proximate cause. The charge does not

implicate the threshold question of whether SCDOT or CSX was negligent. By response to special interrogatories, the jury concluded that both SCDOT and CSX were not negligent. (R. 10). The jury never reached the issue of proximate cause. Consequently, given the jury's deliberative process as ascertained from the verdict form, the Petitioner has not shown any prejudice from this portion of the jury instructions.

Finally, the Petitioner cannot show prejudice because he was able to present evidence as to the meaning and effect of Tonia Colvin's blood-alcohol content. The Petitioner elicited testimony from Allison Schaffer that the 0.018 result was a "negative" result. (R. 531). Schaffer also offered the opinion that the blood-alcohol content was not above the "legal limit." (R. 538). Thus, the record included evidence by which the jury understood the implications of the 0.018 blood-alcohol content.

In sum, the Petitioner has not shown that Judge Mullen committed reversible error in charging Section 56-5-2930 or refusing to charge Section 56-5-2950(b). The Petitioner has not shown that Judge Mullen's reasoning constitutes an abuse of discretion nor has the Petitioner demonstrated any prejudice given that the jury concluded that neither SCDOT nor CSX was negligent.

D. Section 15-78-60(20) Sovereign Immunity Jury Charge

As a corollary to the Petitioner's challenge to the Section 56-5-2930 portion of the charge, the Petitioner also argues that Judge Mullen erred in charging a sovereign immunity defense under Section 15-78-60(20) of the Tort Claims Act. The Petitioner argues that there is no evidence of any criminal conduct to which Section 15-78-60(20) applies.

This issue is, however, not preserved for appellate review. Just as he has done with the Section 15-78-60(5) discretionary immunity defense, the Petitioner is improperly attempting to use a challenge to the jury instructions as a means to challenge the sufficiency of the evidence supporting an affirmative defense. The record again clearly shows that the Petitioner never moved for a directed verdict on any affirmative defense including the Section 15-78-60(20) sovereign immunity defense. Thus, he did not seek a proper ruling at trial on the sufficiency of the evidence supporting that defense. He is thereby precluded from raising that issue on appeal. *See, Barber v. Citizens & Southern National Bank*, 268 S.C. 16, 231 S.E.2d 295 (1977) (as discussed in Section I.A above).

Again, it is well settled that a directed verdict motion is required to preserve any issue regarding the sufficiency of the evidence. By arguing on appeal that Judge Mullen erred in charging a Section 15-78-60(20) sovereign immunity defense because there was no evidence to support that defense, the Petitioner is

clearly challenging on appeal the sufficiency of the evidence. He is doing so, however, without having made a motion for directed verdict at trial, and hence, that issue is not preserved, just as the Court of Appeals correctly held with respect to the discretionary immunity charge.

At any rate, SCDOT submits that the record includes evidence that could lead the jury to believe that Tonia Colvin committed the criminal act of driving under the influence in violation of Section 56-5-2930. Consequently, there exists sufficient evidence to justify an instruction on Section 15-78-60(20) immunity.

Moreover, the Petitioner has failed to show any prejudice resulted from this charge. The jury never reached any of SCDOT's affirmative defenses including immunity defenses. In responding to special interrogatories, the jury did not find that SCDOT is immune from liability. Instead, the jury concluded that SCDOT was not negligent. (R. 10). An immunity defense by definition presupposes a conditional admission of negligence or fault. *See, Rayfield v. South Carolina Dept. of Corrections*, 297 S.C. 95, 374 S.E.2d 910, 916 (1988) ("[o]ne who pleads immunity, conditionally admits the plaintiff's case, but asserts his immunity as a bar to liability"). Because the jury failed to find that SCDOT was negligent, it is clear that the jury did not even reach the immunity defenses including the Section 15-78-60(20) defense. Thus, the Petitioner has failed to demonstrate any prejudice

resulting from the charge of a Section 15-78-60(20) sovereign immunity defense.⁵


⁵ In accordance with Rule 208(b)(6), SCACR, the Respondent SCDOT adopts and incorporates herein the arguments made by the Respondent CSX to the extent not inconsistent herewith with respect to each of the Petitioner's challenges to the jury charge.

CONCLUSION

Based on the foregoing discussion and analysis, the Respondent South Carolina Department of Transportation respectfully requests that this Court affirm the decision of the South Carolina Court of Appeals which in turn affirmed the order of Judge Carmen Tevis Mullen denying post-trial motions and upholding the jury's verdict and the judgment in favor of the Respondents.

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November 17, 2014

CERTIFICATE OF COMPLIANCE

The undersigned counsel for the Respondent South Carolina Department of Transportation certifies that the Brief of Respondent South Carolina Department of Transportation complies with the Supreme Court's Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings, issued April 15, 2014.

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CERTIFICATE OF SERVICE

The undersigned employee of Davidson & Lindemann, P.A., attorneys for the Respondent South Carolina Department of Transportation, does hereby certify that service of the **Brief of Respondent South Carolina Department of Transportation** was made upon all counsel of record by placing copies in the United States Mail, first class postage prepaid, at the below listed addresses clearly indicated on said envelopes this the 17th day of November 2014:

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The Honorable Daniel E. Shearouse
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S.C. Supreme Court

RE: Willie Homer Stephens, Guardian ad Litem for Lillian C., a minor v. CSX
Transportation, Inc. and South Carolina Department of Transportation
Supreme Court Tracking Number: 2013-000133
Civil Action Number: 2004-CP-25-0267
IRF Claim Number: 14027
Our File Number: 104.8394

Dear Mr. Shearouse:

Please find enclosed for filing the original and fifteen copies of the **Brief of Respondent South Carolina Department of Transportation** with regard to the above referenced matter. Please file the original and return a clocked-in copy to me in the enclosed envelope.

By copy of this letter, I am serving copies on all counsel of record.

Thank you for your assistance in this matter.

Sincerely,

DAVIDSON & LINDEMANN, P.A.



Andrew F. Lindemann

AFL/jmb
Enclosures

The Honorable Daniel E. Shearouse
November 17, 2014
Page Two

cc: (w/ Enclosure)

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