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S.C. Supreme Court

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

APPEAL FROM HAMPTON COUNTY
COURT OF COMMON PLEAS

CARMEN TEVIS MULLEN, Circuit Court Judge

APPELLATE CASE NO.: 2013-000133

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

vs

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

**PETITION FOR REHEARING OF
RESPONDENT CSX TRANSPORTATION, INC.**

Pursuant to Rule 221(a), SCACR, CSX Transportation, Inc. ("CSXT") petitions for rehearing of the decision of this Court filed November 4, 2015. CSXT respectfully submits that the Court overlooked or misapprehended the following points, more completely discussed below and in the memorandum filed in support of this petition:

1. The Court's majority opinion misapprehends or overlooks the fact that the effect of the ruling in this case will be to permit an appellant to obtain a new trial on the basis of jury charges that, according to the jury's own verdict, were not relevant to the issues the jury decided. Based on the verdict form agreed upon by *all* parties and submitted without objection, the jury in this case, after hearing 17 days of testimony and numerous witnesses, was asked to first answer the question of whether CSXT was

negligent. In answering that question “No,” the jury—assuming, as we must, that it followed its instructions—focused exclusively on CSXT’s conduct and did not consider the alleged negligence of the motorist, Tonia Colvin. *See Richardson v. Marsh*, 481 U.S. 200, 206 (1987) (noting the “almost invariable assumption of the law that jurors follow their instructions”); *see also State v. Grovenstein*, 335 S.C. 347, 353, 517 S.E.2d 216, 219 (1999) (same).

The Court’s opinion misapprehends or overlooks the fact that because the jury found that CSXT was not negligent, it had no reason to consider other issues, including proximate cause, intervening and superseding causes, damages or, perhaps most importantly, any duties and actions of Colvin. As the dissenting opinion by Justice Kittredge and the majority opinion of the Court of Appeals explained, the issues relating to Ms. Colvin’s conduct were separate from the issue of whether CSXT was negligent in the first instance and could not be a basis for reversal. *See Dissent*, at 20 (“The jury’s findings of no negligence against CSXT and SCDOT preclude such speculation.”); *Stephens ex rel. Lillian C. v. CSX Transp., Inc.*, 400 S.C. 503, 520, 735 S.E.2d 505, 514 (Ct. App. 2012) (“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.”).

This Court’s reversal based on the possibility that irrelevant charges “may have” tainted the jury’s deliberations is contrary to the long-standing rule that jurors are presumed to have followed the trial court’s instructions and fails to afford the respect for jury verdicts that this Court’s precedents mandate. *See Erickson v. Jones Street Publishers, L.L.C.*, 368 S.C. 444, 480, 629 S.E.2d 653, 672 (2006) (“A jury’s resolution

of factual issues in a law case is binding on trial and appellate courts.”); *see also Sapp v. Wheeler*, 402 S.C. 502, 512, 741 S.E.2d 565, 571 (Ct. App. 2013) (quoting *Camden v. Hilton*, 360 S.C. 164, 174, 600 S.E.2d 88, 93 (Ct. App. 2004)) (“appellate court must uphold a jury verdict if it is possible to reconcile its various features. . . . Furthermore, ‘a jury verdict should be upheld when it is possible to do so and carry into effect the jury’s clear intention.’”).

Similarly, the Court’s reversal of a jury verdict based on a possibility that the jury charges found by the Court to have been erroneous “may have” tainted the jury’s deliberations overlooks well-established precedent of this Court holding that a party must demonstrate actual prejudice from a challenged instruction in order to obtain a new trial. *See, e.g., Cole v. Raut*, 378 S.C. 398, 405, 663 S.E.2d 30, 33 (2008); *see also Clark v. Cantrell*, 339 S.C. 369, 390, 529 S.E.2d 528, 539 (2000) (“[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.”); *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.”).

2. The majority opinion incorrectly orders a new trial due to jury charges concerning a motorist’s duties at stop lines, misapprehending and overlooking the important public safety issue introduced by the holding that motorists are not permitted to stop at a stop line placed by SCDOT at a railroad crossing. Evidence at trial reflected that SCDOT places the stop line at the location it determines a motorist should stop to

have the best view of the potential hazard of an approaching train and Chief of Police Jack Hagy testified without objection that the stop bar is the place where a motorist is supposed to stop. (R. 373). There are many railroad crossings in this state like the Hill Road crossing with stop lines placed by SCDOT to indicate where a motorist should stop. By holding that the stop line statute does not apply, and that it would be illegal for a motorist to stop there, the majority opinion introduces the potential for motorists to disregard the stop line and stop at a place at which it might not be best to see or observe an approaching train. By contrast, the trial court's instruction provided a complete instruction on the motorist's duties at a crossing where there is both a stop sign and stop line, was consistent with the evidence at trial, the charge was not prejudicial to Stephens, and in light of the testimony from witnesses at trial that Colvin stopped at the stop line and that this is where she was supposed to stop, actually benefitted Stephens by instructing the jury that her stop at the stop line was proper.

3. The majority's finding of error in the trial court's "train time" charge misapprehends and overlooks the fact that this very language appears in numerous opinions of this Court and is not merely *dicta*. Rather, the trial court specifically charged 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). Therefore, the majority's belief that the "train time" instruction "may have" caused the jury to misunderstand Colvin's duty at the crossing is misplaced and speculative, given the instructions as a whole. The trial court properly instructed the jury and there was no prejudice to Stephens in the charges.

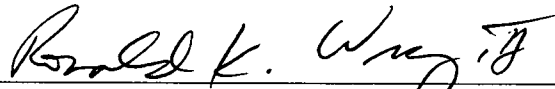
4. The Court's finding of error in failing to charge the presumption that Ms. Colvin was not impaired by alcohol confuses the "conclusive" presumption of *non-impairment* from alcohol use found in S.C. Code § 56-5-2950(b)(1), which applies in criminal prosecutions where the state must prove guilt beyond a reasonable doubt, with the burden of proof in this civil case where Colvin admitted to combining the use of alcohol and drugs. Colvin's admissions made the issue of her impairment a question of fact for the jury, which is why the trial court properly charged the jury on the law of impairment and, at Stephens's request, also charged that it is not unlawful to drink and drive, but it is only unlawful for motorists 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).

However, in the face of this charge, the trial court was not also required to instruct the jury on the presumption of *non-impairment* found in the criminal statutes. Indeed, based on the evidence presented and the law, charging the jury that it was required to "conclusively presume" that Ms. Colvin was *not* impaired at the time of the accident would have been confusing and improper, and would have deprived CSXT of an important defense in this case. Furthermore, the majority's opinion on this issue conflicts with this Court's previous decision in *Lee v. Bunch*, 373 S.C. 654, 647 S.E.2d 197 (2007), where it approved of the introduction of evidence of intoxication in civil cases even where the alcohol concentration would have required a conclusive presumption of non-impairment under the criminal statute, because there, as in this case, there was other evidence from which a jury could have found impairment. *See* 647 S.E.2d at 199-200 (explaining that expert testimony concerning alcohol concentration at time of accident

and other evidence tended to show carelessness and that alcohol affected the ability to safely operate the motorcycle); *see also* R. p. 473 (admissions by Colvin that she had Darvocet, tizanidine, alcohol, and “potentially some other things”); R. p. 714 (statement by motorist behind Colvin that “next thing I know her brake lights went out and across the tracks she went in front of the train”).

WHEREFORE, CSXT respectfully requests that its petition for rehearing be granted, that this Court withdraw its prior opinion and substitute an opinion consistent with the requests made by CSXT herein, and that the Court of Appeals’ decision and the jury’s verdict in this case be affirmed. CSXT’s memorandum of authorities sets forth additional discussion of why the petition should be granted and this relief ordered.

Respectfully submitted,



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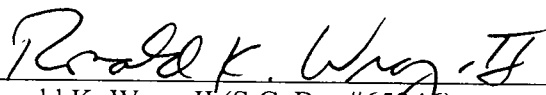
The undersigned, an attorney in this matter for the Respondent, CSX Transportation, Inc., certifies that I have this 19th day of November, 2015, served copies of Respondent, CSX Transportation, Inc.'s, Petition for Rehearing and Memorandum in Support upon counsel for the Appellant and counsel for Respondent, South Carolina Department of Transportation by causing them to be deposited in the United States Mail, first-class postage prepaid, addressed to:

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