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S.C. Supreme Court

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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APPEAL FROM HAMPTON COUNTY
COURT OF COMMON PLEAS

CARMEN TEVIS MULLEN, Circuit Court Judge

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APPELLATE CASE NO.: 2013-000133

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

vs

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

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# MEMORANDUM OF AUTHORITIES IN SUPPORT OF RESPONDENT'S PETITION FOR REHEARING

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CSX Transportation, Inc. ("CSXT") has petitioned for rehearing because the decision of the Court's majority raises two important issues. First, the Court's majority opinion permits 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. As a result, the opinion overlooks well-established precedent of this Court holding that a party must demonstrate prejudice from a challenged instruction in order to obtain a new trial. *See 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."). The Court's majority opinion, therefore, effectively creates a new and incorrect rule that an appellant can obtain reversal of a jury verdict and a new trial due to jury instructions that had no relevance to the jury's decision and that the jury never had to consider.

Second, the Court's majority opinion overlooks and misapprehends the law and evidence by ordering a new trial due to jury charges concerning a motorist's duties at stop lines, a motorist's duties at a railroad crossing, and the *conclusive* presumption of *non-impairment* found in a criminal statute, which had no application under the facts of this civil case. The trial court properly charged the jury on the motorist's duties, and it correctly declined to give a charge that the jury should have *conclusively presumed* that the motorist in this case was not under the influence. The trial court's charges as a whole accurately stated the law and caused no prejudice and, therefore, should not have been a reason to order a new trial.

1. An Appellate Court Cannot Reverse On The Basis Of Jury Instructions That Were Irrelevant To The Jury's Verdict

As the Court is aware, this case involves a railroad crossing accident where a motorist, Tonia Colvin, drove onto the tracks in front of an oncoming train. Plaintiff Willie Homer Stephens ("Stephens"), acting as guardian ad litem for his granddaughter who was injured in the accident, alleged that CSXT was negligent for failing to cut back vegetation at the crossing and for failing to sound the locomotive whistle at the appropriate time. The jury considered three weeks of evidence and ultimately found in

favor of CSXT. The verdict form approved by the parties asked the jury whether CSXT was negligent. The jury answered this question "No" and, therefore, did not answer any of the other questions on the form concerning causation or damages.

Because the jury found that CSXT had not been 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, who drove in front of the train. Despite the fact that the jury never had to consider these other issues, the majority opinion reversed the jury's verdict and granted a new trial because, according to the majority, a handful of charges concerning the motorist's duties and potential impairment "**may have** tainted the jury's consideration of the initial question on the special verdict form regarding negligence." Op. at 14 (emphasis added). As both the dissenting opinion by Justice Kittredge and the Court of Appeals explained, however, these issues 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.").

The Court's majority opinion, therefore, overlooks and misapprehends longstanding precedent in our courts. An appellate court may not reverse a jury's verdict on the basis of speculation that such irrelevant charges "may have tainted" the outcome, especially when those charges related to issues that are conclusively presumed not to

have been reached by the jury. Under these circumstances, the charges could not have been prejudicial, meaning that they cannot be the basis for a reversal of the jury's verdict. Our appellate courts have long followed the rule that "[a]n 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) (citing *Ellison v. Simmons*, 238 S.C. 364, 372, 120 S.E.2d 209, 213 (1961)). Necessarily, a jury charge cannot be prejudicial if it was not relevant to the issue actually decided by the jury. *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."). Indeed, it has long been the rule that an appellate court *cannot* reverse on the basis of jury charges that did not affect the jury's decision, as those charges, even if incorrect, were harmless. *See 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."); *Singletary v. Seaboard Airboard Air Line Ry. Receivers*, 88 S.C. 565, 71 S.E. 57, 59 (1911).

South Carolina has consistently followed this rule. *See, e.g., Moore v. Florence School Dist. No. 1*, 314 S.C. 335, 339, 444 S.E.2d 498, 500 (1994) (rejecting appeal by student in a § 1983 case based on an unreasonable search where the student claimed that a jury charge on consent to the search was improper and explaining that "Moore can show no prejudice from the charge on consent since School District is not liable on the § 1983 cause of action"); *Otis Elevator, Inc. v. Hardin Constr. Co. Group, Inc.*, 316 S.C.

292, 299–301, 450 S.E.2d 41, 45–46 (1994) (finding no prejudice from charge on concurring and contributing proximate cause, because the "jury expressly found Otis Elevator committed *no* acts or omissions that brought about Smith's injuries") (emphasis in original); *Poulos v. James*, 254 S.C. 156, 160–61, 174 S.E.2d 152, 155 (1970) ("[I]t is well settled that an erroneous instruction as to the measure of damages is harmless where a plaintiff has failed to establish his right to any damages whatever. The jury having found for the defendant on the issue of liability, any error or omission in the charge with respect to damages was thereby rendered harmless.").

Nor is South Carolina alone, as courts around the country refuse to reverse a jury verdict on the basis of instructions that could not have been relevant to the jury's actual decision. *See, e.g., Zia Trust, Inc. v. Aragon*, 150 N.M. 354, 258 P.3d 1146, 1154 (N.M. Ct. App. 2011) (finding instruction on independent intervening cause not an issue because the jury returned a special verdict stating that the defendant was not negligent); *Pula v. State*, 308 Mont. 122, 131, 40 P.3d 364, 370 (Mont. 2002) ("Since the jury did not consider the issue of intervening cause in reaching its verdict, we conclude that the District Court's instructions on intervening cause had no effect on the outcome of the trial."); *Corcoran v. Lovercheck*, 256 Neb. 936, 941–42, 594 N.W.2d 615, 620 (Neb. 1999) ("Where a jury, using a special verdict form, finds no negligence on the part of the defendant and, accordingly, does not reach the question of the plaintiff's contributory negligence, any error in giving a contributory negligence instruction is harmless and does not require reversal of a verdict in favor of the defendant."); *Clark v. Doe*, 119 Ohio App.3d 296, 302, 695 N.E.2d 276, 279 (Ohio Ct. App. 1997) (explaining that instructions on proximate cause and intervening and unforeseeable causes were harmless in medical

malpractice action where jury answered special interrogatory finding that defendant physician was not negligent); *Patton v. Rose*, 892 S.W.2d 410, 413 (Tenn. Ct. App. 1994) ("The jury in this case answered the specific interrogatories regarding the malpractice of each of the individual defendants in the negative. As a result, the jury did not reach the issues concerning comparative negligence. Any error with regard to these instructions did not affect the jury's verdict and constitute no ground for reversal."); *Ladeburg v. Ray*, 508 N.W.2d 694, 696 (Iowa 1993) (finding no prejudice on comparative fault charge because jury answered interrogatory stating that defendants were not at fault and, consequently, did not answer any interrogatories concerning the plaintiff's fault).

This well-established rule is precisely why the Court of Appeals properly declined to consider charges that "could hardly have affected the jury's deliberations." *Stephens*, 400 S.C. at 520, 735 S.E.2d at 514 ("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 majority opinion, however, overlooked this rule and reversed on the basis of charges that did not concern CSX's alleged negligence and, therefore, would not have been considered by the jury. Stephens contended that CSXT was negligent for failing to cut back vegetation that allegedly obstructed the view of the crossing and for failing to sound the horn properly. The jury found no negligence on these theories, and all members of this Court agree that there is no reversible error concerning that conclusion. *See* Dissenting Op. at 20 ("The Court finds no reversible error in the jury's findings of no negligence against CSX and SCDOT. . . .").

The jury charges that the majority found to compel a new trial, however, concern different matters, namely Colvin's conduct as a motorist, her duties at a stop line, her duties at a railroad crossing, and her alleged impairment due to drugs and alcohol. Charges on these issues – even if erroneous – could not have affected the jury's determination of no negligence, could not have prejudiced Stephens, and cannot be a reason to undo the jury's verdict.

Courts should not engage in speculation about whether such irrelevant issues "may have tainted" the jury's consideration, as the majority did here. Such a result is contrary to the longstanding precedent of our courts, which do not speculate on whether a challenged charge might have, or could have, caused prejudice. *Cole*, 378 S.C. at 406, 663 S.E.2d at 34 (it "would be far too speculative on the part of this Court to find prejudicial error" from an erroneous assumption-of-the-risk charge without a more specific argument showing how the plaintiffs were prejudiced); *see also State v. Hunter*, 320 S.C. 85, 88, 463 S.E.2d 314, 316 (1995) ("[C]ourts should not intrude into the privacy of the jury room to scrutinize how jurors reached their verdict."); *State v. Lemire*, 406 S.C. 558, 570, 753 S.E.2d 247, 253 (Ct. App. 2013) ("The dissent finds prejudice in the jury's quick deliberation, claiming this suggests that each juror did not consider the charges as a whole. No other prejudice is identified by the dissent beyond speculation about the happenings within the jury room. There is a general rule against review of internal jury deliberation."); *Jenkins v. Few*, 391 S.C. 209, 221, 705 S.E.2d 457, 463 (Ct. App. 2010) (refusing to speculate on how the jury allocated damages); *Moore v. Moore*, 360 S.C. 241, 257, 599 S.E.2d 467, 475 (Ct. App. 2004) (same). Rather than speculating that some "taint" may have occurred with the jury, our courts should instead follow the

"almost invariable assumption of the law that jurors follow their instructions." *Richardson v. Marsh*, 481 U.S. 200, 206 (1987); *see also State v. Grovenstein*, 335 S.C. 347, 353, 517 S.E.2d 216, 219 (1999).

As Justice Kittredge's opinion correctly observes, because there was no reversible error in the jury's finding of no negligence, the Court cannot remand for a new trial because of jury charges that had no effect on that finding of no negligence. *See* Dissent, at 20 ("In sum, because the jury determined that CSX and SCDOT were not negligent, the unrelated erroneous jury instructions should not serve as a basis for granting a new trial."). To hold otherwise would effectively create a new rule permitting reversal concerning *any jury charge* – even if it had no effect on the jury's ultimate decision – as long as the Court could speculate that the charge "may have tainted" the outcome. The majority's ruling, therefore, is likely to invite a dramatic increase in appellants claiming that jury charges "may have tainted" the jury verdict even if not germane to the jury's actual decision.

Once the Court agreed that the jury's ultimate finding of no negligence should be affirmed, it was improper to order a new trial on the basis of jury charges that could not have affected this finding. For these reasons, the Court should reconsider its decision and affirm the decision below.

2. The Trial Judge's Charges Accurately Stated The Law

The majority held that the trial court erred in charging the jury concerning a motorist's duties at a stop line, her duties at a railroad crossing, and her potential impairment due to drugs and alcohol. However, the majority has overlooked and

misapprehended the relevant law and standards. Moreover, the ruling regarding stop lines would have disastrous consequences for motor vehicle safety.

A. Motorists Should Stop At Stop Lines

The majority concluded that the trial judge should not have charged S.C. Code §§ 56-5-2330 and 56-5-2740, which discuss the obligations to stop at stop signs and stop lines if they are in place, along with S.C. Code § 56-5-2715, which discusses where to stop at a railroad crossing that has a stop sign. The majority held that § 56-5-2330 and § 56-5-2740 do not apply to railroad crossings and conflict with § 56-5-2715, thereby suggesting that Ms. Colvin violated the law by stopping at the stop line installed by SCDOT.

The majority's holding is incorrect because the statutes can and should be read together and needed to be charged to provide a complete understanding of the law. 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. Of course, if SCDOT marks a road with a stop line, 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). Indeed, Police Chief Jack Hagy testified at trial without objection that this is where a motorist should stop. (R. 373).

More to the point, there is no basis for thinking that the jury was confused by these charges because, as the trial court observed, "I think you expect people to stop at a stop line." (R. p. 1304). It would be unreasonable and impractical to suggest that Colvin violated the law by stopping at the stop line installed by SCDOT merely because it

happened to be located less than 15 feet from the rails. The jury needed to be instructed that when SCDOT places a stop line in the road, motorists can and should be expected to stop there. In fact, the majority opinion effectively invites motorists to disregard stop lines on roadways if they think that the stop lines may not strictly comply with a particular statute, which raises serious public safety concerns about whether motorists can simply ignore SCDOT's signage and instructions.

Therefore, the jury needed the complete instruction on these three statutes to be able to address Stephens's argument at trial that Colvin would have violated the law by stopping at the line. These statutes are not conflicting, but complementary, and provided the jury with a complete understanding of how the law applied to this intersection. *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 the statute requiring motorists to stop no closer than 15 and no farther than 50 feet from a railroad crossing, as both were applicable).

Furthermore, the evidence confirms why the complete instruction was appropriate. 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). As noted above, Chief Hagy offered similar testimony. 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).

Moreover, any claim that Colvin was not allowed to stop at the stop line ignores the evidence in this case, which showed that she *did stop* at *both* the stop sign and the stop line. *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 charge actually benefitted Stephens by telling the jury Colvin complied with the law by stopping at the stop line.

There is nothing improper about instructing a jury about a motorist's duties to stop at stop lines, and here there was no conflict or confusion in charging these complementary instructions that were based on the evidence in the case. Moreover, and as discussed in the first section, because these charges had nothing to do with the jury's finding of no negligence as to CSXT, they cannot have prejudiced Stephens and cannot be a basis for reversal.

B. The "Train Time" Charge Accurately Stated The Law

The majority also reversed due to the trial court's instruction that it is always "train time" at a crossing, even though that charge was taken directly from language in

prior decisions of this Court. The majority ruled that this language was merely *dicta* in its prior decisions and that the charge "may have" improperly led the jury to assign a higher duty of care to Colvin or shifted the duty of care entirely to Colvin. Op. at 18. CSXT respectfully submits that the majority decision is incorrect, as the charge was a correct statement of the law drawn from this Court's prior decisions, and there were ample other charges to the jury that foreclose any speculation that the jury "may have" misunderstood Colvin's duty.

The concept that it is "always train time" at a railroad crossing has been consistently repeated in this Court's decisions and is not mere *dicta*. In *Robison v. Atlantic Coast Line R. Co.*, 179 S.C. 493, 184 S.E. 96 (1936), this Court reversed a verdict for a plaintiff whose intestate was killed in a railroad crossing accident, finding that the defendant was entitled to a directed verdict due to the intestate's own negligence at the crossing. The Court explained that "it is always train time at a railroad crossing. The law regards a railroad crossing as a place of danger. The very presence of such a crossing is notice to the person approaching or attempting to cross it of the danger of colliding with a passing engine or train." 184 S.E. at 100. Having cited this rule, the Court found that a directed verdict for the defendant was required because the decedent – who was riding on the crossbar of a bicycle and trying to beat a train – had exhibited "a failure to observe those ordinary rules which the common experience and good sense of men teach them their conduct should be governed by when approaching a railroad crossing." *Id.* at 101. The Court was squarely confronted with the duties of those who come upon a railroad crossing to be mindful of the fact that crossings are places of potential danger. Such a rule is not mere *dicta*.

Furthermore, in citing the rule, the *Robison* Court relied on this Court's opinion in *Chisolm v. Seaboard Air Line Ry.*, 121 S.C. 394, 114 S.E. 500, 502–03 (1922), where the Court explained a number of similar rules, including that a railroad grade crossing "is in itself a warning of danger" and that "[a] railroad company and a traveler on a highway crossing are charged with a mutual duty of keeping a lookout for danger, and the degree of vigilance required of both is in proportion to the known risk; the greater the danger, the greater the care required of both." 114 S.E. at 502–03. *Chisolm* further explained that railroads have a duty "to give such signals as may be reasonably sufficient, in view of the situation and surroundings, to put individuals using the highway on their guard," just as a traveler is required to "use his senses of sight and hearing to the best of his ability under the existing and surrounding circumstances," to "look and listen in both directions for approaching trains, if not prevented from so doing by the fault of the railroad company, and to the extent the matter is under his control [to] look and listen at a place and in a manner that will make the use of his senses effective." *Id.* (citations omitted). This rule was "merely a statement in the concrete of the fundamental principle of the law of negligence that—'Ordinary prudence requires every person who is in the full enjoyment of his faculties of hearing and seeing, before attempting a dangerous act or operation, to exercise them for the purpose of discovering and avoiding peril.'" *Id.* at 503 (citations omitted).

This Court has relied on the rule – and not as *dicta* – in several other decisions as well. For example, in *Hicks v. Atl. Coast Line R. Co.*, 187 S.C. 301, 197 S.E. 819 (1938), the Court affirmed the grant of non-suit because the plaintiff's intestate "did not heed the warning signal of a railroad crossing in his pathway, nor look for a train on it, 'where it is

always train time.'" *Hicks*, 197 S.E. at 822–23 (quoting *Robison*). Similarly, in *Breeden v. Rockingham R. Co.*, 193 S.C. 220, 8 S.E.2d 366 (1940), the Court reversed a trial court that denied non-suit and directed verdict to a defendant where the driver who was struck at the crossing exhibited gross negligence. The Court reiterated that "[i]t is the duty of a traveler, upon the approach to a railroad crossing of which he is aware, to use due care to observe the approach of trains at said crossing for, as stated in *Robison* . . . 'it is always train time at a railroad crossing.'" 8 S.E.2d at 368. A federal court applying South Carolina law has also referred to this Court's decisions in stating the rule. *See Hawkins v. S. Ry. Co.*, 45 F.R.D. 459, 462 (D.S.C. 1968) ("In reviewing these facts, this 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.") (citing *Robison* and *Hicks*).

Therefore, this rule is not *dicta*, but has been well-established in our case law. If this Court is going to announce a change to the rule and declare that it no longer applies, the Court should do so prospectively, not by reversing a trial court whose charge properly relied on this Court's precedent.

Moreover, the charge about "train time" may not be considered in a vacuum. To the contrary, this Court has held repeatedly that the propriety of a charge must be evaluated in the context of the instructions as a whole. *See, e.g., Ardis v. Sessions*, 383 S.C. 528, 682 S.E.2d 249, 250 (2009) (quoting *Keaton ex. rel. Foster v. Greenville Hosp. Sys.*, 334 S.C. 488, 497, 514 S.E.2d 570, 575 (1999)) ("When an appellate court reviews an alleged error in a jury charge, it 'must consider the court's jury charge as a whole in light of the evidence and issues presented at trial. If, as a whole, the charges are

reasonably free from error, isolated portions which might be misleading do not constitute reversible error.'"); *Sulton v. HealthSouth Corp.*, 400 S.C. 412, 416, 734 S.E.2d 641, 643 (2012) ("A jury charge is correct if, when the charge is read as a whole, it contains the correct definition and adequately covers the law."). Here, the "train time" charge did not stand alone. The trial court *also 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, as the jury was properly charged on the issue.

C. The Trial Court's Charge On Impairment Accurately Stated The Law, And Charging The "Compulsory" Inference Of No Impairment From A Criminal Statute Would Have Confused The Jury And Deprived CSXT Of An Important Defense

The majority concluded that the trial court should not have charged S.C. Code § 56-5-2930 concerning operating a vehicle under the influence of drugs, alcohol, or both, *without also charging* the "conclusive" presumption of *non-impairment* found in S.C. Code § 56-5-2950(b)(1) when the driver's blood alcohol concentration is five one-hundredths of one percent or below. Even had the jury reached these issues, the trial court's charge was proper under the circumstances of this case, and it would have been confusing and misleading to charge a civil jury on a "conclusive" presumption of *non-impairment* found in that particular criminal statute.[1]

[1] 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, CSXT cites to this provision as S.C. Code Ann. § 56-5-2950(b).

The trial court properly instructed 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 because *he agreed to it in the trial court* 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) (Stephens's counsel: "I agree – I agree with that.").

Although Stephens has contended that there was no evidence of impairment, this contention is belied by the record and, in any event, would have been for the jury to decide had it not pretermitted the issue by finding no negligence on the part of the defendants. 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). She also admitted that she told an EMT that she had been drinking and that the EMT said that she smelled of alcohol. (R. p. 484); *see also* R. pp. 460–67 (Colvin's admissions concerning ignoring warning labels advising of dangers of mixing alcohol and her medications). As also noted above, hospital lab reports were positive for opiates, which could have come from the medications or the "other things" she admitted taking. (R. p. 538). Tellingly, and perhaps to soften the blow of such evidence, 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).

The jury could properly infer that this combination of alcohol and medications impaired Colvin given that she inexplicably pulled in front of an oncoming train on a clear day when witnesses all around her heard and saw the train coming. *Cf. 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, 511–12, 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"). As this Court has explained in a similar context:

> *It is well settled that one may be under the influence as contemplated by the traffic laws without being drunk or passed out, or even intoxicated.* One violates the traffic statute if he partakes of alcohol to the extent that he cannot drive a motor vehicle with reasonable care, or if he cannot drive as a prudent driver would operate a vehicle. *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.*

*Dixon v. Weir Fuel Co.*, 251 S.C. 74, 82, 160 S.E.2d 194, 197 (1968) (emphasis added). Faced with this record, Stephens cannot argue that there was no evidence from which the jury could find impairment or that it was improper to charge the jury on this issue.

Yet, these facts did not also entitle Stephens to a charge that the jury was *required* to *conclusively presume* non-impairment just because the blood *alcohol* concentration was 0.018. If anything, such a charge would have confused the jury as to why the evidence of drugs and alcohol had even been introduced or volunteered by Stephens in the first place. Such a charge would also have effectively been an instruction to the jury *requiring* it to find that Colvin was *not* under the influence of alcohol and thus was *not* impaired, prejudicially denying CSXT an important defense in the case. As discussed above, however, there was ample evidence in the record that Colvin had consumed not just alcohol, but narcotics that, when combined with alcohol, could have impaired her judgment. Charging the *conclusive presumption* would have taken this entire issue away from the jury, even though Colvin herself agreed 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).

Indeed, the majority's opinion 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. In *Lee*, this Court affirmed the trial court's decision to admit evidence of a blood alcohol concentration of 0.036% because there was also other evidence tending to show 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). There, the motorist charged with impairment "admitted drinking shortly before the accident and there was

additional proof of impairment, albeit by inference," *id.*, and the same is true here, where Colvin admitted she had Darvocet, tizanidine, alcohol, and "potentially some other things" in her system, and where she pulled out in front of a train despite evidence of warnings and clear sight lines. (R. p. 473) (admissions by Colvin).

In any event, the plain language of the criminal statute confirms that it does not apply here. By its own terms, the conclusive presumption in § 56-5-2950(b) applies only "in a criminal prosecution for a violation of Section 56-5-2930, 56-5-2933, or 56-5-2945," S.C. Code Ann. § 56-5-2950(b), not in a civil case under these circumstances. Such a conclusive presumption undoubtedly makes sense in a criminal prosecution, where the State must prove beyond a reasonable doubt that the person was "under the influence." This presumption reflects the legislature's policy judgment that, when only alcohol is involved and the level is below the specified amount, the State will be unable to meet this high burden of proof. These circumstances and the statute's presumption are not implicated when, as here, a jury was presented with considerable evidence in a civil case that a driver who pulled in front of a train had consumed alcohol *in combination with narcotics*.[2]

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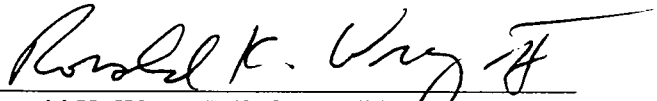
[2] In *Hartfield v. Getaway Lounge & Grill, Inc.*, 388 S.C. 407, 417, 697 S.E.2d 558, 563 (2010), a case affirming a plaintiff's verdict against a tavern that overserved a customer, this Court explained that a different "permissive inference" in § 56-5-2950(b) (applying if the blood alcohol level is over 0.10) could be charged. However, that case involved a specific type of tort claim against a tavern, where the remedy was "predicated on the criminal statutes," such that it was "permissible for a trial judge to charge on the permissive inference of intoxication under our criminal statutes." *Id.* The present case did not involve such a tort claim based on criminal statutes or a "permissive" inference. Rather, Stephens sought a *conclusive* presumption of *non-impairment*, even though there was evidence of narcotics being combined with alcohol in addition to other evidence of impairment.

Furthermore, 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) (emphasis added). As a result, the presumption in S.C. Code Ann. § 56-5-2950(b), which concerns solely the issue of "not being under the influence of alcohol" and only in criminal prosecutions, would not have applied in this civil case and would have confused the jury.

Nor can Stephens show any prejudice given that the trial court did charge, at Stephens' request, "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. pp. 1457-58). Considering the charges as a whole, as this Court's precedents require, the trial court committed no error. And more importantly, as noted previously, the issue of Colvin's potential impairment had nothing to do with Stephens's claims that CSXT was negligent for allegedly failing to cut vegetation or properly sound its horn. Because the jury found no negligence on these claims, any jury charges on the issue of Colvin's impairment, even if incorrect, would not have been prejudicial and cannot serve as the basis for granting a new trial. *See supra* § I.

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 jury's verdict in this case be affirmed.

Respectfully submitted,



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