

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

RECEIVED
DEC 14 2015
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 TransportationRespondents.

**CSX’S REPLY IN FURTHER SUPPORT
OF PETITION FOR REHEARING**

As CSX explained in its petition for rehearing, the Court’s majority opinion overlooked and misapprehended the law by improperly permitting a party to obtain a new trial on the basis of jury charges that could not have had any effect on the jury’s verdict. The “may have tainted” standard for reversal that the majority employed in this case is a drastic departure from this Court’s long-standing precedent requiring a showing of actual prejudice before reversing a jury verdict. *See e.g., Cole v. Raut*, 378 S.C. 398, 405, 663 S.E.2d 30, 33 (2008) (“An erroneous jury instruction . . . is not grounds for reversal unless the appellant can show prejudice from the erroneous instruction.”) (citing *Ellison v. Simmons*, 238 S.C. 364, 372, 120 S.E.2d 209, 213 (1961)). Here, the jury’s answer of

“No” to the special interrogatory question whether CSXT was negligent eliminates any possibility of actual prejudice to Stephens and required affirmance of the jury’s verdict.

In his return to the Petition for Rehearing, Stephens argues that the Court was “obligated” to reverse because the “charge as a whole” contained errors that were not harmless “beyond a reasonable doubt.” Stephens’s Return, at 2. However, Stephens confuses the issues and misstates the governing law. Although an appellate court should consider a jury charge as a whole, necessarily the only parts of a charge that are relevant on appeal are those that were relevant to the jury’s decision. The errors the Court believed to exist in the charge concerned motorist Tonia Colvin’s duties and her impairment and, therefore, had no relevance to the jury’s decision that CSX was not negligent in the first instance. These alleged errors could not have prejudiced Stephens and should not have been a basis for reversal. *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.”).

Furthermore, in arguing that these charges were not harmless “beyond a reasonable doubt,” Stephens urges the Court to follow an incorrect rule. As the South Carolina Department of Transportation (“SCDOT”) explains in its reply, this Court has previously concluded that the “beyond a reasonable doubt” standard is not applicable in a civil case. *See SCDOT Reply*, at 2-3 (citing *Fairchild v. South Carolina Department of Transportation*, 398 S.C. 90, 327 S.E.2d 407 (2012)). In *Fairchild*, this Court agreed

with the argument that the “beyond a reasonable doubt” reference is “a criminal standard that is not applicable” in a civil case. *Fairchild*, 327 S.E.2d at 414 n.5.

Regardless of Stephens’s misplaced argument, this Court should never reverse by speculating that a charge with no relevance to the jury’s decision somehow “may have tainted” it. This has never been the rule in our courts and would create hopeless unpredictability and undermine the sanctity of a jury’s verdict. Tellingly, the case Stephens cites for the “beyond a reasonable doubt” argument, *Wells v. Halyard*, 341 S.C. 234, 533 S.E.2d 341 (Ct. App. 2000), itself cited for that proposition a case where the Court of Appeals refused to reverse even though the charge on driving under the influence “may possibly have confused the jury,” because “a confusing charge alone is insufficient to warrant reversal.” *State v. Kerr*, 330 S.C. 132, 144, 498 S.E.2d 212, 218 (Ct. App. 1998).


In the present appeal, all members of this Court agreed with the decision of the Court of Appeals that there was no reversible error in the jury’s findings of no negligence by CSX. Because the allegedly erroneous jury charges had nothing to do with the theories of negligence asserted by Stephens, those charges could not have been 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.”).

In short, this case involves a jury’s specific finding of no negligence following a three-week trial, having heard testimony from dozens of witnesses, resulting in the compilation of a lengthy record containing substantial evidence supporting the verdict. There has never been any finding that the jury was not properly charged on the elements of negligence as they applied to CSXT. Thus, the jury having been properly charged on negligence, answering “No” to the question of CSXT’s negligence, and presuming, as we must, that the jury followed the trial court’s instructions, there is no basis to disturb the jury’s verdict in this case. CSXT urges the Court to follow its long-standing precedent requiring a showing of actual prejudice and giving deference to jury verdicts, especially one based on special interrogatories agreed to by all parties. *See Bass v. South Carolina Dep’t of Social Serv.*, S.C. Sup. Ct. Op. No. 27593 (Dec. 2, 2015) (in case argued same date as this appeal, this Court affirmed the long-standing rule requiring that “on appeal, ‘the jury’s verdict must be upheld unless no evidence reasonably supports the jury’s findings’”) (citing *Horry Cnty. v. Laychur*, 315 S.C. 364, 434 S.E.2d 259 (1993)).

For these reasons and those set forth in CSX’s original petition, this Court should grant the petition for rehearing and affirm the decision below upholding the jury verdict. Alternatively, rather than create a new rule of law that drastically undermines the sanctity of jury verdicts, this Court should dismiss the writ of certiorari as improvidently granted.

(SIGNATURE LINE ON NEXT PAGE)

Respectfully submitted,


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 CSX Transportation, Inc.

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

RECEIVED

DEC 14 2015

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.Appellant,

vs

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

PROOF OF SERVICE


The undersigned, an attorney in this matter for the Respondent, CSX Transportation, Inc., certifies that I have this 14th day of December, 2015, served copies of Respondent, CSX Transportation, Inc.'s, Reply in further Support of Petition for Rehearing 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:

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. Carl H. Jacobson
Uricchio, Howe, Krell, Jacobson, Toporek,
Theos & Keigh, P.A.
P. O. Box 399
Charleston, SC 29402-0399

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

bcc: Mr. Jonathan P. Harmon (via email)
Mr. James W. Purcell (via email)
Ms. Erin O'Brien (via email)
Mr. Jason Peak (via email)
Mr. Evan Tager (via email)
Mr. Thomas Vanderbloemen (via email)