The Supreme Court of South Carolina

DANIEL E. SHEAROUSE
CLERK OF COURT

BRENDA F. SHEALY
CHIEF DEPUTY CLERK

POST OFFICE BOX 11330
COLUMBIA, SOUTH CAROLINA
29211
1231 GERVAIS STREET
COLUMBIA, SOUTH CAROLINA 29201
TELEPHONE: (803) 734-1080
FAX: (803) 734-1499
www.sccourts.org

February 11, 2016

The Honorable Mylinda D. Nettles
PO Box 7
Hampton SC 29924-0007

REMITTITUR

Re: Willie Stephens v. CSX Transportation
Lower Court Case No. 2004CP2500267
Appellate Case No. 2013-000133

Dear Clerk of Court:

The above referenced matter is hereby remitted to the lower court or tribunal. A copy of the judgment of this Court along with the earlier decision of the South Carolina Court of Appeals is enclosed.

Very truly yours,

CLERK

cc: Carl H. Jacobson, Esquire
John E. Parker, Esquire
John Paul Detrick, Esquire
Grahame Ellison Holmes, Esquire
Matthew Vernon Creech, Esquire
Andrew F. Lindemann, Esquire
Ronald K. Wray, II, Esquire
J. Arthur Davison, Esquire
Thomas Edward Vanderbloemen, Esquire
James W. Purcell, Esq, Esquire
Jonathan Harmon, Esq, Esquire
Peden B. McLeod, Sr., Esquire

THE STATE OF SOUTH CAROLINA
In The Supreme Court

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

v.

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

Appellate Case No. 2013-000133

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal From Hampton County
Carmen T. Mullen, Circuit Court Judge

Opinion No. 27587
Heard March 17, 2015 – Filed November 4, 2015

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED

John Paul Detrick, John E. Parker, Grahame Ellison Holmes, Matthew Vernon Creech, all of Peters Murdaugh, Parker, Eltzroth & Detrick, P.A., of Hampton; and Carl H. Jacobson, of Uricchio, Howe, Krell, Jacobson, Toporek, Theos & Keith, P.A., of Charleston, all for Petitioner.

Ronald K. Wray, II, and Thomas Edward Vanderbloemen, both of Gallivan, White & Boyd, P.A., of Greenville; Jonathan P. Harmon, of McGuire Woods, L.L.P., of Richmond, VA; James W. Purcell of Fulcher Hagler, L.L.P., of Augusta, GA; Andrew F. Lindemann, of Davidson & Lindemann, P.A., of Columbia, and Peden B. McLeod, Sr., of McLeod, Fraser & Cone, L.L.C., of Walterboro, all for Respondents.

JUSTICE BEATTY: This negligence action arose out of a collision involving a train and an automobile at a railroad crossing. Willie Homer Stephens ("Petitioner"), as Guardian ad Litem for his minor granddaughter who suffered a traumatic brain injury while a passenger in her mother's vehicle, filed suit against CSX Transportation, Inc. ("CSX") and the South Carolina Department of Transportation ("SCDOT"). Following a jury verdict in favor of the defendants, Petitioner appealed to the Court of Appeals. The Court of Appeals affirmed, finding the trial judge did not err in admitting certain evidence, charging the jury, and in denying Petitioner's motions for a directed verdict and judgment notwithstanding the verdict ("JNOV"). *Stephens v. CSX Transp., Inc.*, 400 S.C. 503, 735 S.E.2d 505 (Ct. App. 2012). This Court granted Petitioner's request for a writ of certiorari to review the decision of the Court of Appeals. We affirm in part, reverse in part, and remand for a new trial.

I. Factual / Procedural History

CSX maintains a railroad track in Hampton County, which passes through the town of Yemassee. At issue in this case is the passive-grade crossing at Hill Road near state Highway 68. The crossing has no active traffic-control devices such as lights or gates. Vehicle traffic is controlled by a stop sign, a stop line, and a cross-buck that is similar to a "Yield" sign as it is an X-shaped sign with the words "Railroad Crossing" in black lettering.

On the afternoon of February 3, 2004, as Tonia Colvin drove down Hill Road towards Highway 68, a CSX train approached the crossing from her right. Colvin's boyfriend sat in the front passenger seat and her twelve-year-old daughter Lillian sat in the back seat on the right side. When Colvin reached the railroad crossing, she stopped at the stop sign and then pulled forward to the stop line. SCDOT had placed the stop sign at a distance of thirty-six feet and the stop line at

a distance of 9.75 feet from the near rail of the railroad track. Colvin testified that she did not hear or see the train before she drove onto the track. She stated that she heard the train's horn when she drove onto the track. Colvin claimed she accelerated to get out of the way, but she could not cross the track before the train struck her vehicle.

Colvin, her boyfriend, and Lillian all sustained injuries in the accident. An emergency responder testified she smelled alcohol at the accident scene. While Colvin was being treated for her injuries at the emergency room, doctors ordered a test of Colvin's blood and urine to determine whether Colvin had alcohol and/or drugs in her system. Medical records revealed that Colvin had opiates in her system and had a blood alcohol content of .018%. Although Colvin denied being impaired at the time of accident, she admitted she consumed two wine coolers the morning of the accident and had taken Darvocet, a muscle relaxer, and cough syrup with codeine.

Lillian's injuries were the most severe as she suffered a traumatic brain injury that required her to be placed in a medically induced coma for approximately one month. After she awoke from the coma, Lillian received extensive physical, occupational, and speech therapy. However, at the time of trial, Lillian still suffered intellectual, behavioral, and physical impairments.

Petitioner instituted an action for negligence against CSX and SCDOT on behalf of Lillian. With respect to CSX, Petitioner primarily alleged that CSX was negligent in failing to sound the train's horn far enough in advance of the railroad crossing and failing to remove trees and other vegetation that obstructed Colvin's view of the railroad track. As to SCDOT, Petitioner alleged that SCDOT was negligent because it failed to properly inspect the railroad crossing and installed the stop sign and the stop line at improper locations.

At trial, Petitioner presented evidence that CSX, in 2000, started a program to improve sight distances for vehicles approaching its passive-grade crossings in South Carolina by removing vegetation at crossings. Several months before the accident, CSX's clear-cutting crew attempted to cut down a line of trees adjacent to the Hill Road crossing, but they were prevented from cutting the trees until a dispute with the purported landowner, Thomas Jackson, was resolved. At the time of the accident, the crossing had been partially cleared. Contrary to Colvin's testimony, other witnesses testified that the view was unobstructed for about 2,000 feet from the stop line at the crossing. Jackson also testified that he was unaware

of any accidents at the crossing in forty years and he never had a problem with trees blocking his view down the railroad tracks.

Petitioner offered Dr. Kenneth Heathington as an expert who testified regarding the safety issues at the Hill Road crossing. While Dr. Heathington acknowledged that there were no reports of prior accidents at the crossing, he opined that CSX did not provide adequate sight distance for a motorist. Dr. Heathington further testified that the stop sign and stop line were placed at an improper distance. Ultimately, Dr. Heathington concluded that the accident would not have occurred had the defendants complied with the established standards of care. In contrast, SCDOT offered evidence that the crossing had been inspected on November 7, 2002, there was no obstruction at the time of the inspection, and the crossing met with the standards for the placement of stop signs and stop lines.

Petitioner also offered evidence that South Carolina law requires that a train's horn be sounded continuously from a distance of at least 1,500 feet from the road until the engine has crossed it.[1] CSX's counsel admitted in his opening statement that the train's engineer did not begin sounding the train's horn at the proper time. The engineer testified that he "believed" he blew the horn on time; however, the train's event recorder revealed that he did not blow the horn until the engine was 1,161 feet from the crossing.

After CSX and SCDOT presented their evidence, Petitioner moved for a directed verdict as to both defendants. With respect to CSX, Petitioner argued that he was entitled to a directed verdict because there was no issue that CSX was "negligent [in] failing to cut the crossing" and "blow the horn as required by law." Petitioner conceded that there were "issues about proximate cause."

Following the denial of his motion, Petitioner presented rebuttal evidence, which included a stipulation with CSX that the data from the train's event recorder was accurate. Petitioner then rested his case without renewing his motion for a directed verdict.

After charging the jury, the judge submitted to the jury a verdict form that contained special interrogatories. The first question on the form asked the jury to determine whether CSX or SCDOT was negligent. The jury answered "NO" as to

---

[1] S.C. Code Ann. § 58-15-910 (1977) (mandating that a bell and whistle be installed on locomotives and sounded at least 1,500 feet from railroad crossing).

both defendants and, as a result, did not answer any of the remaining questions on the verdict form regarding proximate cause or damages.

Petitioner filed a timely post-trial motion in which he moved for JNOV, pursuant to Rule 50(b) of South Carolina Rules of Civil Procedure,[2] on the grounds the trial judge erred in failing to direct a verdict in favor of Petitioner against CSX on the issue of negligence given CSX admittedly failed to: (1) sound the train's horn in accordance with section 58-15-910 of the South Carolina Code; and (2) clear the subject railroad crossing in accordance with its own rules and regulations. Alternatively, Petitioner moved for a new trial on the grounds the trial judge erred in: (1) declining to admit certain evidence; (2) failing to charge the jury with Petitioner's proposed instructions; and (3) charging intervening or superseding cause and inapplicable South Carolina Code provisions. After the judge denied these motions, Petitioner appealed to the Court of Appeals.

In a divided opinion, the Court of Appeals affirmed.[3] *Stephens v. CSX Transp., Inc.*, 400 S.C. 503, 735 S.E.2d 505 (Ct. App. 2012). The court unanimously affirmed the trial judge's denial of Petitioner's motions for directed verdict and JNOV on the ground the issue was not preserved for appellate review. *Id.* at 515-20, 735 S.E.2d at 512-14. The court found that Petitioner's failure to renew his directed verdict motion after he presented evidence in reply waived his right to move for JNOV. *Id.* at 520, 735 S.E.2d at 514.

---

[2] Rule 50(b) provides in pertinent part:

> Whenever a motion for a directed verdict made *at the close of all the evidence* is denied or for any reason is not granted, the court is deemed to have submitted the action to the jury subject to a later determination of the legal questions raised by the motion. A party who has moved for a directed verdict may move to have the verdict and any judgment entered thereon set aside and to have judgment entered in accordance with his motion for a directed verdict; or if a verdict was not returned, such party may move for judgment in accordance with his motion for a directed verdict.

Rule 50(b), SCRCP (emphasis added).

[3] In his appeal to this Court, Petitioner does not challenge the evidentiary rulings by the trial judge or the Court of Appeals' decision on this issue. Accordingly, we have not addressed this portion of the Court of Appeals' opinion.

The court, however, issued a divided opinion with respect to Petitioner's challenges to the trial judge's rulings involving the jury charge. *Id.* at 520-25, 735 S.E.2d at 514-17. Initially, because the jury determined that neither CSX nor SCDOT breached its duty of reasonable care, the majority found it unnecessary to address any ruling on the jury charge "unless it relates to breach of CSX's and DOT's duty of reasonable care." *Id.* at 520, 735 S.E.2d at 514. The majority rejected each of Petitioner's arguments regarding the jury charge. *Id.* at 520-25, 735 S.E.2d at 514-17.

First, the majority found no error in the judge's refusal to give Petitioner's requested jury instructions regarding a railroad company's: (1) liability for injuries occurring at crossings; and (2) duty to exercise added care when approaching and crossing an intersection where vegetation obstructs a motorist's view of an oncoming train. *Id.* at 521, 735 S.E.2d at 515. The majority concluded that the judge's charge adequately covered the substance of the proposed instructions and correctly conveyed to the jury that a motorist and a railroad must exercise due care at a railroad crossing. *Id.* at 522-23, 735 S.E.2d at 515-16.

Second, the majority held that the trial judge did not err in charging: (1) section 56-5-1010 of the South Carolina Code, which requires railroad companies to install and maintain cross-buck signs at crossings; (2) section 58-17-1390, which requires railroad companies to install and maintain signs reading "Railroad Crossing" at crossings; (3) section 56-5-1020, which prohibits unauthorized signals or other devices at crossings; and (4) section 58-15-1625, which authorizes SCDOT to close railroad crossings to public traffic when SCDOT finds the increased public safety of closing the crossing outweighs the inconvenience caused to motorists who will have to take another route. *Id.* at 523-24, 735 S.E.2d at 516. In so ruling, the majority found the charges contained accurate statements of the law and there was evidence to support the trial judge's decision to give each of them. *Id.* at 524, 735 S.E.2d at 516.

Finally, the majority rejected Petitioner's contention that the trial judge erred in charging the jury on section 15-78-60(5) of the South Carolina Code, which immunizes governmental entities from liability for injuries caused by the "exercise of discretion or judgment by the governmental entity or employee or the performance or failure to perform any act or service which is in the discretion or judgment of the governmental entity or employee." *Id.* at 524, 735 S.E.2d at 516 (quoting S.C. Code Ann. § 15-78-60(5) (2005)). The majority agreed with Petitioner that SCDOT did not present sufficient evidence to prove its discretionary

act immunity claim. *Id.* at 525, 735 S.E.2d at 517. However, it concluded that Petitioner's argument was not preserved because Petitioner raised a different ground on appeal than at trial. *Id.* Specifically, the Court of Appeals found Petitioner failed to argue at trial that SCDOT was not entitled to the immunity defense on the basis SCDOT did not follow an acceptable professional standard in its placement of the stop sign or stop line. *Id.*

The dissent disagreed with the majority's decision regarding the alleged erroneous jury charges. *Id.* at 526-27, 735 S.E.2d at 517-18. While the dissent agreed with the majority that SCDOT failed to present sufficient evidence to entitle it to a charge on discretionary immunity, the dissent found Petitioner was prejudiced because the charge could have confused the jury. *Id.* at 526, 735 S.E.2d at 517. The dissent further found the judge erred in charging the jury on section 56-5-2930, which makes it unlawful for a person to drive a motor vehicle under the influence of alcohol or drugs, but declining to charge section 56-5-2950(G)(1), which provides that a person with a blood alcohol level of .05% or less is conclusively presumed not to be under the influence. *Id.* The dissent also found the trial judge erred in charging CSX's proposed charge, which stated that "It's Always Train Time at the Crossing." *Id.* The dissent believed this instruction could have suggested to the jury that the defendants had lesser duties of care than a motorist. *Id.* at 526, 735 S.E.2d at 518. Ultimately, the dissent would have reversed and remanded for a new trial. *Id.* at 527, 735 S.E.2d at 518.

Following the denial of his petition for rehearing and the rejection of a suggestion for rehearing *en banc*, this Court granted Petitioner's request for a writ of certiorari.

II. Discussion

A. Motions for Directed Verdict and JNOV

Petitioner contends the Court of Appeals erred in affirming the trial judge's denial of his motions for a partial directed verdict and JNOV. In support of this contention, Petitioner posits that the decision of the Court of Appeals: (1) is contrary to the provisions of Rule 50, SCRCP and is based on case law that does not apply to the procedural posture of the instant case, i.e., where a plaintiff presents rebuttal evidence; (2) constitutes an unconstitutional rule change to existing Rule 50; and (3) is incorrect in light of CSX's admission that it breached its duty to timely sound the train's horn in accordance with section 58-15-910 of the South Carolina Code.

We find the Court of Appeals correctly ruled that Petitioner was precluded from requesting JNOV because he failed to renew his motion for a directed verdict after offering evidence in rebuttal. The text of Rule 50(b) clearly requires renewal of a directed verdict motion as it states the motion should be made after "all" the evidence, which necessarily includes that presented in rebuttal. *See* Rule 50(b), SCRCP (stating, in part, "[w]henever a motion for a directed verdict made at the close of *all the evidence* is denied or for any reason is not granted, the court is deemed to have submitted the action to the jury subject to a later determination of the legal questions raised by the motion" (emphasis added)).

This interpretation is consistent with decisions in our state that require strict compliance with the rule. *See, e.g., RFT Mgmt. Co. v. Tinsely & Adams, L.L.P.*, 399 S.C. 322, 331, 732 S.E.2d 166, 170 (2012) (" 'When a party fails to renew a motion for a directed verdict at the close of all evidence, he waives his right to move for JNOV' " (quoting *Wright v. Craft*, 372 S.C. 1, 20, 640 S.E.2d 486, 496 (Ct. App. 2006))); *Henderson v. St. Francis Cmty. Hosp.*, 295 S.C. 441, 369 S.E.2d 652 (Ct. App. 1988) (holding that Rule 50(b) is strictly applied), *overruled on other grounds by* 303 S.C. 177, 399 S.E.2d 767 (1990); *cf. State v. Bailey*, 368 S.C. 39, 43 n.4, 626 S.E.2d 898, 900 n.4 (Ct. App. 2006) (stating, "[i]f a defendant presents evidence after the denial of his directed verdict motion at the close of the State's case, he must make another directed verdict motion at the close of all evidence in order to appeal the sufficiency to the evidence").[4]

Moreover, additional support for this interpretation may be gleaned from decisions in other state and federal jurisdictions that have adopted a rule of procedure similar in text to our state's Rule 50.[5] *See, e.g., Klavens v. Siegel*, 260 A.2d 637 (Md. 1970) (ruling that movant, by offering evidence in rebuttal, withdrew the motion for a directed verdict by the presentation of the evidence); *Spulak v. Tower Ins. Co.*, 559 N.W.2d 197, 201 (Neb. 1997) (holding that "[a]

---

[4] Petitioner contends the cited cases, particularly *Henderson*, are limited to a factual scenario where the defendant fails to renew a motion for a directed verdict after presentation of the defense case. We disagree with Petitioner's interpretation of these cases as we discern no reason, and Petitioner does not offer any, why the same rule would not be equally applicable to a plaintiff who presents evidence in rebuttal.

[5] *See* 25 S.C. Jur. *Rules of Civil Procedure* § 50.2 (2015) ("State Rule 50 substantially conforms to the pre-1991 Federal Rule.").

plaintiff who moves for a directed verdict at the close of the defendant's evidence and, upon the overruling of such motion, proceeds to introduce rebuttal evidence waives any error in the ruling on the motion" when the motion for a directed verdict is not renewed at the close of all the evidence). *See Generally* E. H. Schopler, Annotation, *Practice and Procedure With Respect to Motions for Judgment Notwithstanding or in Default of Verdict under Federal Civil Procedure Rule 50(b) or Like State Provisions*, 69 A.L.R.2d 449 (1960 & Supp. 2015) (collecting state and federal cases addressing proper procedure for procuring a ruling on a motion for JNOV). Accordingly, we affirm the Court of Appeals' interpretation of Rule 50(b) and conclude that it did not constitute a rule change.

Further, despite CSX's admission concerning the untimely sounding of the train's horn and stipulation regarding the accuracy of the data from the train's event recorder, Petitioner waived any argument that he was entitled to a partial directed verdict as to CSX's breach of its duty of reasonable care. Not only did Petitioner fail to renew his motion for a directed verdict at the close of all the evidence, but he also approved a special verdict form that asked the jury to consider *all* elements of his negligence claim, including whether CSX and SCDOT breached their respective duties of care. *See Solley v. Navy Fed. Credit Union, Inc.*, 397 S.C. 192, 214, 723 S.E.2d 597, 608 (Ct. App. 2012) ("When an appellant acquiesces to the trial court's ruling, that issue cannot be raised on appeal."); *see also Lord v. D & J Enters., Inc.*, 407 S.C. 544, 558, 757 S.E.2d 695, 702 (2014) ("To prevail on a negligence claim, a plaintiff must establish duty, breach, causation, and damages.").

B. Jury Charges

Petitioner next argues that the Court of Appeals erred in affirming the trial judge's: (1) refusal to charge Petitioner's two requested instructions regarding CSX's duty of care, (2) decision to charge discretionary immunity as to SCDOT, and (3) decision to charge three statutes pertaining to signage at railroad crossings. Additionally, Petitioner asserts the Court of Appeals erred in declining to address his challenges regarding the trial judge's decision to charge: (1) inapplicable statutes, (2) an intervening or superseding cause, (3) CSX's proposed request that "it is always train time at a railroad crossing," and (4) the criminal statute of driving under the influence.

"An appellate court will not reverse the trial court's decision regarding jury instructions unless the trial court committed an abuse of discretion." *Cole v. Raut*, 378 S.C. 398, 404, 663 S.E.2d 30, 33 (2008). "An abuse of discretion occurs when

the trial court's ruling is based on an error of law or is not supported by the evidence." *Id.*

"A trial court must charge the current and correct law." *In re Estate of Pallister*, 363 S.C. 437, 451, 611 S.E.2d 250, 258 (2005). "Ordinarily, a trial judge has a duty to give a requested instruction that correctly states the law applicable to the issues and evidence." *Ross v. Paddy*, 340 S.C. 428, 437, 532 S.E.2d 612, 617 (Ct. App. 2000). However, jury instructions should be confined to the issues made by the pleadings and supported by the evidence. *Baker v. Weaver,* 279 S.C. 479, 482, 309 S.E.2d 770, 771 (Ct. App. 1983). "A trial court's refusal to give a properly requested charge is reversible error only when the requesting party can demonstrate prejudice from the refusal." *Pittman v. Stevens,* 364 S.C. 337, 340, 613 S.E.2d 378, 380 (2005).

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." *Keaton ex rel. Foster v. Greenville Hosp. Sys.,* 334 S.C. 488, 497, 514 S.E.2d 570, 575 (1999) (citations omitted). "If, as a whole, the charges are reasonably free from error, isolated portions which might be misleading do not constitute reversible error." *Id.* "This holistic approach to jury instructions is linked to the principle of appellate procedure that '[a]n error not shown to be prejudicial does not constitute grounds for reversal.' " *Ardis v. Sessions*, 383 S.C. 528, 532, 682 S.E.2d 249, 250 (2009) (quoting *Brown v. Pearson,* 326 S.C. 409, 417, 483 S.E.2d 477, 481 (Ct. App. 1997)).

1. Issues Addressed by the Court of Appeals

a. Trial Judge's Refusal to Charge Proposed Jury Instructions

We find Petitioner cannot demonstrate that the trial judge erred in refusing to charge his Nos. 2 and 3 proposed instructions.[6] Although the judge's charge did

---

[6] Petitioner's proposed instruction No. 2 states:

> A railroad corporation has a duty to maintain its right-of-ways and highway railroad grade crossings in a reasonable safe condition. If a railroad corporation negligently allows vegetation to grow on its right-of-way adjacent to the crossing to such an extent that it obscures or obstructs the vision of the driver of a motor vehicle using the roadway, it is liable to anyone who is injured in a collision, if the

not include the particular verbiage requested by Petitioner, the charge adequately covered the substance of Petitioner's proposed instructions.

In terms of proposed instruction No. 2, the trial judge fully explained the elements of negligence. The judge also expressly instructed the jury that "a railroad corporation has a duty to maintain a reasonably safe grade crossing," which accurately addressed the railroad's duty and was a correct statement of the law. As to proposed instruction No. 3, the judge charged the jury that a railroad corporation must use "reasonable and ordinary caution to prevent accidents at such crossing, and this degree of care may be affected by obstructions which prevent the track from being seen as a train approaches."

Further, we reject Petitioner's assertion that the trial judge's refusal to give his proposed instructions effectively placed the duty of care only on the motorist. Contrary to Petitioner's claim, the judge instructed the jury that a motorist and a railroad corporation have a mutual duty to exercise reasonable care at a railroad crossing. Specifically, the judge charged that "there is a mutual duty on [the] traveler and [the] 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." Consequently, we agree with the Court of Appeals that the trial judge did not err in refusing to charge Petitioner's requested instructions.

Nevertheless, even assuming error, we discern no prejudice to Petitioner as each party's respective duty of care was accurately conveyed to the jury. *See Chisolm v. Seaboard Air Line Ry.*, 121 S.C. 394, 401, 114 S.E. 500, 503 (1922) ("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.").

---

obstructing vegetation contributed as a proximate cause to the collision.

Petitioner's proposed instruction No. 3 states:

> When vegetation at a railroad crossing is such that it obstructs a motorist's view of an oncoming train, the railroad has a duty to exercise added care in the operation of timing of its train as the train approaches and crosses the crossing.

b. Discretionary Immunity

Petitioner asserts the Court of Appeals erred in affirming the trial judge's charge on section 15-78-60(5) of the South Carolina Code, which immunizes governmental entities from liability for injuries caused by "the exercise of discretion or judgment by the governmental entity or employee or the performance or failure to perform any act or service which is in the discretion or judgment of the governmental entity or employee."[7] Petitioner contends the ruling was inconsistent because the Court of Appeals unanimously found that SCDOT failed to present sufficient evidence to entitle it to a jury charge on discretionary immunity, yet still concluded there was no reversible error since Petitioner changed his argument on appeal to include SCDOT's failure to follow professional standards in the placement of the signs at the Hill Road crossing. Petitioner concedes that the phrase "professional standards" was not specifically used in objecting to the discretionary immunity charge; however, he maintains the objection was sufficient to preserve the issue for appellate review.

We agree with Petitioner that his objection was sufficient to preserve the issue for appellate review as Petitioner clearly challenged the judge's instruction on discretionary immunity at the charge conference and cited section 15-78-60(5) in his post-trial motion. *See Buist v. Buist*, 410 S.C. 569, 574-75, 766 S.E.2d 381, 383-84 (2014) ("While a party is not required to use the exact name of a legal doctrine in order to preserve the issue, the party nonetheless must be sufficiently clear in framing his objection so as to draw the court's attention to the precise nature of the alleged error." (citations omitted)).

Although we disagree with the Court of Appeals' error preservation analysis, we agree with its ultimate conclusion to affirm the trial judge. However, we reach this decision on a different basis than the Court of Appeals. Unlike the Court of Appeals, we find SCDOT did in fact present evidence that entitled it to a charge on discretionary immunity.

"To establish discretionary immunity, the governmental entity must prove that the governmental employees, faced with alternatives, actually weighed competing considerations and made a conscious choice." *Pike v. S.C. Dep't of Transp.*, 343 S.C. 224, 230, 540 S.E.2d 87, 90 (2000). "Furthermore, the governmental entity must show that in weighing the competing considerations and

---

[7] S.C. Code Ann. § 15-78-60(5) (2005).

alternatives, it utilized accepted professional standards appropriate to resolve the issue before them." *Id.* (citation omitted).

SCDOT pled the affirmative defense of discretionary immunity in its Answer and offered evidence at trial to support this defense. Specifically, SCDOT witnesses Richard Jenkins, Joel Smith, and Richard Reynolds identified the factors that were considered in the placement of the stop sign and stop line. These witnesses also testified how the positioning of the stop sign was affected by the presence of an access road, driveway, culvert, and fiber optic lines. Additionally, these witnesses opined that the placement of the stop sign and stop line was proper and in substantial compliance with the guidelines provided by the Manual of Uniform System of Traffic-Control Devices ("MUTCD").

Finally, we note that Petitioner has not raised any challenge to the other discretionary immunity provisions charged by the trial judge, which included sections 15-78-60(13) and 15-78-60(15).[8] Thus, even assuming error, we cannot definitively determine that Petitioner was prejudiced because the jury may have based its decision on one of these unchallenged provisions and not section 15-78-60(5). *Cf. Anderson v. Short*, 323 S.C. 522, 476 S.C. 475 (1996) (stating that where a trial judge's 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).

c. Statutes Involving Signage and SCDOT's Authority to Close Railroad Crossings

Petitioner argues that the Court of Appeals erred in affirming the trial judge's decision to charge statutes related to the placement of signs at railroad crossings[9]

---

[8] S.C. Code Ann. § 15-78-60(13) (2005) (immunizing governmental entities for liability of a loss resulting from regulatory inspection powers or functions); *id.* § 15-78-60(15) (immunizing governmental entities for liability of a loss resulting from the absence or malfunction of warning devices unless it is not corrected within reasonable time after actual or constructive notice).

[9] *See* S.C. Code Ann. § 56-5-1010 (2006) (requiring railroad companies operating in South Carolina to place and maintain cross-buck signs at crossing of highway and railroad); *id.* § 56-5-1020 (prohibiting placement of unauthorized signs, signals, or traffic-control devices in view of any highway); *id.* § 58-17-1390 (1977) (requiring railroad corporation to maintain signs at crossings with public roads).

and the authority of SCDOT to close unsafe railroad crossings.[10] Petitioner claims these statutes should not have been charged as they were inapplicable and created confusion for the jury.

We agree with the Court of Appeals that the challenged jury instructions correctly stated the law and were applicable to the issues and evidence presented at trial. Sections 56-5-1010 and 58-17-1390 regarding a railroad company's duties to install certain signs at crossings were relevant because Petitioner alleged that CSX was negligent "[i]n maintaining an unreasonably hazardous and unsafe crossing" and "[i]n failing to maintain adequate warning devices at the crossing."

Section 56-5-1020, which prohibits unauthorized signs, signals, or other devices at crossings, was relevant because Dr. Heathington opined that the Hill Road crossing could have been made safer with the installation of active traffic-control devices. Thus, section 56-5-1020, informed the jury that CSX could not legally install active traffic-control devices without SCDOT's authorization. Finally, section 58-15-1625, which authorizes the SCDOT to close unsafe railroad crossings, was relevant to inform the jury that CSX could not of its own accord close the Hill Road crossing.

2. Issues Not Addressed by the Court of Appeals

We conclude the Court of Appeals erred in restricting its analysis only to those jury charge issues related to the breach of CSX's and SCDOT's duty of reasonable care. As will be discussed, we find that portions of the judge's charge were erroneous and may have tainted the jury's consideration of the initial question on the special verdict form regarding negligence, particularly where CSX admitted that the train engineer failed to timely sound the train's horn in accordance with section 58-15-910 of the South Carolina Code.[11]

---

[10] *See* S.C. Code Ann. § 58-15-1625 (Supp. 2005) (authorizing SCDOT to eliminate unsafe railroad crossings).

[11] Throughout the appellate proceedings, CSX has argued that there was conflicting evidence as to whether it breached its duty of reasonable care. As a result, CSX maintains that there is evidence to support the jury's determination that it was not negligent. We believe this argument is disingenuous given the admission of CSX's counsel during opening statements that the train's engineer failed to timely sound the train's horn in accordance with section 58-15-910 and the

a. Statutes Concerning a Driver's Duty to Stop

Petitioner contends the trial judge erred in charging sections 56-5-2330[12] and 56-5-2740[13] concerning a driver's duties at stop signs on intersecting highways because these statutes are inapplicable and conflict with the judge's instruction on section 56-5-2715,[14] which specifically addresses a driver's duty to stop at a railroad crossing that SCDOT has deemed particularly dangerous.

We agree with Petitioner that the trial judge erred in charging sections 56-5-2330 and 56-5-2740. Without dispute, these statutes were irrelevant as neither governs a driver's duty to stop at a railroad crossing. The statutes also conflict with

---

stipulation regarding the accuracy of the data from the train's event recorder. Although CSX did not concede that it breached its duty of reasonable care, the admission of counsel and the stipulation clearly equate to a finding of negligence per se, i.e., breach of duty. *See Fairchild v. S.C. Dep't of Transp.*, 398 S.C. 90, 727 S.E.2d 407 (2012) (recognizing that the violation of an applicable statute constitutes negligence per se). However, as acknowledged by Petitioner, there remained questions of fact as to proximate cause and damages.

[12] *See* S.C. Code Ann. § 56-5-2330(b) (2006) (providing requirements for motorists when they approach a stop sign and stating in part that "every driver of a vehicle approaching a stop sign *shall stop at a clearly marked stop line* but, if none, then at the point nearest the intersecting roadway where the driver has a view of approaching traffic on the intersecting roadway before entering it" (emphasis added)).

[13] *Id.* § 56-5-2740 (providing requirements for motorists when they approach a stop sign at a crosswalk and stating, in part, that "[e]very driver of a vehicle approaching a stop sign shall stop before entering the crosswalk on the near side of the intersection or, in the event there is no crosswalk, shall stop at a clearly marked stop line but, if none, then at the point nearest the intersecting highway where the driver has a view of approaching traffic on the intersecting highway before entering the intersection").

[14] *Id.* § 56-5-2715 (authorizing SCDOT to designate "particularly dangerous" railroad crossings and erect stop signs thereat and stating that "[w]hen 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*" (emphasis added)).

the directive of section 56-5-2715 that a driver "shall stop within fifty feet, but not less than fifteen feet, from the nearest rail of the railroad." Had Colvin complied with the general provisions of sections 56-5-2330 and 56-5-2740 and stopped at the stop line, which was located 9.75 feet from the near rail of railroad track, she would have violated the fifteen-foot limit mandated by section 56-5-2715. Given this conflict, we believe the jury could have been confused as to which statutory provisions governed Colvin's duty to stop at the railroad crossing. If the jury applied sections 56-5-2330 and 56-5-2740, it may have deemed Colvin negligent for violating section 56-5-2715. *See Fairchild v. S.C. Dep't of Transp.*, 398 S.C. 90, 727 S.E.2d 407 (2012) (recognizing that the violation of an applicable statute constitutes negligence per se).

In turn, the jury may have concluded that Colvin's negligence superseded any admitted or proven negligence of CSX or SCDOT. *See Gause v. Smithers*, 403 S.C. 140, 150, 742 S.E.2d 644, 649 (2013) ("To exculpate a negligent defendant, the intervening cause must be one which breaks the sequence or causal connection between the defendant's negligence and the injury alleged." (citation omitted)); *Matthews v. Porter*, 239 S.C. 620, 628, 124 S.E. 321, 325 (1962) ("In order to relieve the defendant of responsibility for the event, the intervening cause must be a superseding cause. It is a superseding cause if it so entirely supersedes the operation of the defendant's negligence that it alone, without his negligence contributing thereto in the slightest degree, produces the injury." (citation omitted)). Consequently, we find that Petitioner was prejudiced by the judge's error.

b. Intervening or Superseding Cause

Next, Petitioner asserts the trial judge erred in charging the law of intervening or superseding cause because any allegation of negligence against Colvin was "foreseeable as a matter of law, and therefore, could not serve as an intervening, superseding cause." Petitioner claims it was foreseeable that a motorist might not stop at the stop line at the Hill Road crossing as that stop line was improperly placed at a location that was too close to the railroad track.

We find Petitioner's argument to be without merit as evidence was presented that any negligence on the part of Colvin was not limited to the issue of the stop line. Rather, there was evidence that even though Colvin stopped at the line, she failed to yield, failed to exercise due care, and admitted to consuming alcohol and prescription medication prior to driving her vehicle. Any of these actions on the part of Colvin, none of which was reasonably foreseeable, could have served as the

intervening cause of the accident. *See Bishop v. Dep't of Mental Health*, 331 S.C. 79, 89, 502 S.E.2d 78, 83 (1998) ("The test by which the negligent conduct of the original wrongdoer is to be insulated as a matter of law by the independent negligent conduct of another is whether the intervening act and the injury resulting therefrom are of such character that the author of the primary negligence should have reasonably foreseen and anticipated them in the light of attendant circumstances."); *Small v. Pioneer Mach., Inc.*, 329 S.C. 448, 467, 494 S.E.2d 835, 844 (Ct. App. 1997) ("For an intervening force to be a superseding cause that relieves an actor from liability, the intervening cause must be a cause that could not have been reasonably foreseen or anticipated."). Accordingly, we find the charge was proper and supported by the evidence presented at trial.

c. "It is Always Train Time at a Railroad Crossing"

Petitioner argues the trial judge erred in charging the jury that "it is always train time at a railroad crossing"[15] because the charge misstates the respective duties of a motorist and the railroad company at crossings. Petitioner maintains that the charge, coupled with the judge's refusal to charge his proposed instruction No. 9,[16] improperly placed a higher duty of care upon motorists at railroad crossings.

Although the text of this segment of the judge's charge may be found in a series of cases decided in 1936 and 1940,[17] a careful review of these decisions

---

[15] This portion of the charge states:

> I further charge you it is the law of this state it has been well said 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.

[16] Petitioner's proposed instruction No. 9 provides:

> A driver of a motor vehicle is under no absolute duty to stop, look, and listen before going on the track at a railroad crossing, unless the exercise of ordinary care and prudence under all surrounding facts and circumstances requires the adoption of such a course.

[17] *See, e.g., Bingham v. Powell*, 195 S.C. 238, 245, 11 S.E.2d 275, 278 (1940) ("We are not unmindful of the principles long established by this Court that it is

reveals that the quoted language constitutes dicta and conflicts with case law that correctly assigns a mutual duty to a motorist and a railroad company at railroad crossings. *See Chisolm v. Seaboard Air Line Ry.*, 121 S.C. 394, 401, 114 S.E. 500, 503 (1922) ("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."). Due to the erroneous charge, the jury may have improperly assigned a higher duty of care to Colvin or shifted the duty of care entirely to Colvin. Accordingly, we find that Petitioner was prejudiced by this error.

d. Impaired Driving

Finally, Petitioner asserts the trial judge erred in charging the jury section 56-5-2930,[18] the criminal statute involving the charge of driving under the influence ("DUI"), but refusing to charge section 56-5-2950(b)(1)[19] to show that Colvin was presumptively not impaired by alcohol as her blood alcohol content was .018%. Additionally, Petitioner claims the prejudice from the refusal to

---

'always train time at a railroad crossing' and that one approaching must make use of his senses, to the best of his ability under the circumstances, to ascertain the presence or approach of a train and do so in time and place, so far as is reasonably within his control, to be effective[.]"); *Breeden v. Rockingham R.R. Co.*, 193 S.C. 220, 224, 8 S.E.2d 366, 368 (1940) ("It 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 v. Atlantic Coast Line R. Co.*, 179 S.C. 493, [501], 184 S.E. 96, 100 [1936], 'it is always train time at a railroad crossing.' ").

[18] S.C. Code Ann. § 56-5-2930 (2006) (outlining offense of operating a vehicle while under the influence of alcohol or drugs or a combination of both). We note that this statute has since been amended. Therefore, we cite to the version of the statute in effect at the time of the accident.

[19] *Id.* § 56-5-2950(b)(1) (providing that in a criminal prosecution for violation of section 56-5-2930 an alcohol concentration of .05 or less is conclusively presumed that the person was not under the influence of alcohol). We note that section 56-5-2950(b)(1) is now codified as section 56-5-2950(G)(1). S.C. Code Ann. § 56-5-2950(G) (Supp. 2014).

charge section 56-5-2950(b)(1) was exacerbated by the judge's decision to charge section 15-78-60(20),[20] which led the jury to infer that SCDOT could not be liable for its omissions because of criminal activities committed by Colvin.

Like the dissent in the Court of Appeals' opinion, we are most troubled by this issue. Given the evidence, it was necessary to provide the jury with some type of instruction regarding impaired driving as the emergency responder testified the accident scene smelled of alcohol, Colvin admitted that she consumed alcohol and took prescription medication the morning of the accident, and Colvin's blood test after the accident revealed the presence of opiates. However, because Petitioner presented evidence that Colvin's blood alcohol content was .018%, we find Petitioner was entitled to have the jury instructed on the statutory presumption provided in section 56-5-2950(b)(1). In the absence of this instruction, it is arguable the jury found Colvin was impaired while driving and that this criminal act negated any negligence on the part of CSX and SCDOT. Accordingly, we find Petitioner was prejudiced by the judge's refusal to charge his proposed instruction.

III. Conclusion

Based on the foregoing, we affirm the rulings of the Court of Appeals regarding the denial of Petitioner's JNOV motion and the jury charge issues that it addressed. However, we find the Court of Appeals erred in restricting its analysis only to those jury charge issues related to the breach of CSX's and SCDOT's duty of reasonable care. Because portions of the judge's charge were erroneous and prejudiced Petitioner, we reverse and remand for a new trial.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

TOAL, C.J., and HEARN, J., concur. KITTREDGE, J., dissenting in a separate opinion in which PLEICONES, J., concurs.

---

[20] *Id.* § 15-78-60(20) (2005) ("The governmental entity is not liable for a loss resulting from an act or omission of a person other than an employee including but not limited to the criminal actions of third persons.").

JUSTICE KITTREDGE: I respectfully dissent. I would affirm the court of appeals in result. I begin by commending Justice Beatty on his well-written and thorough opinion. I further take no issue with the finding of error concerning the challenged jury instructions related to Tonia Colvin. However, given the verdict form and the jury's determinations that CSX Transportation and the South Carolina Department of Transportation were not negligent in the first instance, I would find the erroneous jury instructions did not prejudice Petitioner.

The Court finds no reversible error in the jury's findings of no negligence against CSX and SCDOT, while finding a new trial is warranted due to jury instructions related to Colvin. The Court even speculates that "the jury may have concluded that Colvin's negligence superseded any admitted or proven negligence of CSX or SCDOT." The jury's findings of no negligence against CSX and SCDOT preclude such speculation. Absent a reversible error in a jury's findings, I believe the law requires a court to give effect to the jury's determinations.

On a final note, this appeal presents the frequent tension between the practical realities of jury deliberations and established legal principles. The established principle at issue here is seen in the jury's threshold findings of no negligence against CSX and SCDOT. As a practical matter, is it possible that the jury ignored the trial court's instructions and allowed its possible view of Colvin's alleged responsibility for the accident to influence the verdict of no negligence against CSX and SCDOT? The answer is, of course, yes. Yet there are compelling policy reasons to resist such speculation and for honoring the agreed-upon verdict form. 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.

PLEICONES, J., concurs.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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

v.

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

Appellate Case No. 2009-126526

Appeal From Hampton County
Carmen T. Mullen, Circuit Court Judge

Opinion No. 5008
Heard May 7, 2012 – Filed July 25, 2012

AFFIRMED

John E. Parker, J. Paul Detrick, Grahame E. Holmes, and Matthew V. Creech, Peters, Murdaugh, Parker, Eltzroth & Detrick, P.A., of Hampton, Carl H. Jacobson, Uricchio, Howe, Krell, Jacobson, Toporek, Theos & Keith P.A., of Charleston, for Appellant.

J. Arthur Davison and James W. Purcell, Fulcher Hagler, LLP, of Augusta, Georgia, Ronald K. Wray, II and Thomas Vanderbloemen, Gallivan, White & Boyd, P.A., of Greenville, for Respondent CSX Transportation, Inc.

Andrew F. Lindemann, Davidson & Lindemann, P.A., of Columbia, Peden B. McLeod, McLeod Fraser & Cone, LLC, of Walterboro, for Respondent South Carolina Department of Transportation.

FEW, C.J.: This is an appeal from a defense verdict in a personal injury action involving a collision between a train and an automobile at a railroad crossing. Willie Stephens argues the trial court erred in excluding evidence of measures taken by CSX Transportation, Inc., after the collision, in denying his motions for partial directed verdict and JNOV, and in charging the jury. We affirm.

I. Facts

CSX maintains a railroad track in Hampton County. As the track passes through the town of Yemassee, it runs parallel to state Highway 68 and crosses Hill Road, a two-lane road that terminates at Highway 68 just a few feet from the crossing. The Hill Road crossing is a passive grade crossing, meaning it has no active traffic-control devices, such as lights or gates. Vehicle traffic is controlled by a stop sign, a stop line, and a cross-buck.[1]

In 2000, CSX started a program to improve sight distances for vehicles approaching its passive grade crossings in South Carolina by removing vegetation at the crossings. Several months before this accident, CSX's clear-cutting crew reached the Hill Road crossing. When the crew attempted to cut down a line of trees on land adjacent to the crossing, they encountered Thomas Jackson. Jackson claimed he owned the land and CSX had no right to cut down the trees. The crew did not cut down the trees. CSX's policy was that in the event of a dispute with a landowner, the crew would not remove vegetation until the dispute was resolved. CSX eventually showed Jackson that it owned a right of way over the land on which the trees were located, and its crew removed them. However, the trees were still in place on the day of the accident.

On February 3, 2004, as Tonia Colvin drove down Hill Road towards Highway 68, a CSX train approached the crossing from her right. Tonia's boyfriend sat in the

---

[1] A cross-buck is a white, "X-shaped sign with the words 'Railroad Crossing' in black lettering." It "is considered the same as a 'Yield' sign." *Webb v. CSX Transp., Inc.*, 364 S.C. 639, 644 n.1, 615 S.E.2d 440, 443 n.1 (2005).

front passenger's seat, and her twelve-year old daughter Lillian sat in the back seat. When Tonia reached the crossing, she stopped at the stop sign. She pulled forward to the stop line and stopped again. Her line of sight in the direction of the train ran across the property Jackson claimed he owned. Tonia testified that she did not hear or see the train before she drove onto the track. As she did so, she heard the train's horn. She tried to get out of the way by accelerating, but the train struck her vehicle.

South Carolina law requires that a train's horn be sounded continuously from a distance of at least 1,500 feet from the road until the engine has crossed it. The train's engineer testified he "believed" he blew the horn on time, but the train's event recorder showed he did not blow the horn until the engine was 1,161 feet from the crossing. CSX took varying positions on whether it complied with the requirement, but eventually stipulated that the data from the event recorder was accurate.

Tonia, her boyfriend, and Lillian were all injured in the accident. Lillian's injuries were devastating. She sustained severe brain injuries, requiring that doctors place her in a medically induced coma and drill a hole in her skull to alleviate pressure on her brain. When Lillian awoke from the coma approximately one month later, she could not speak, walk, or feed herself. Her injuries required months of physical, occupational, and speech therapy, but even at the time of the trial over four years later, she continued to suffer severe intellectual, behavioral, and physical impairments.

II. Procedural History

Acting on behalf of Lillian, Stephens sued CSX and the state Department of Transportation for negligence. Stephens' primary claims of negligence as to CSX were that it failed to sound its train's horn far enough in advance of the crossing and that it failed to remove trees and other vegetation that obstructed Tonia's view of the track. As to DOT, Stephens claimed it failed to properly inspect the crossing and installed the stop sign and stop line at improper locations.

At trial, after both defendants had presented their evidence, Stephens moved for a partial directed verdict against CSX. Stephens asked the trial court to hold CSX breached its duty of reasonable care and to have the jury decide proximate cause and damages. The trial court denied the motion. Stephens then presented evidence

in reply, including the stipulation with CSX that the data from the train's event recorder was accurate. He rested without renewing his motion for directed verdict.

The verdict form contained special interrogatories, which first asked whether CSX or DOT breached its duty of reasonable care. The jury answered both questions "No" and did not answer any of the other questions on the form. Stephens filed a motion for JNOV, renewing his request for judgment as a matter of law on CSX's breach of duty. He also asked for a new trial on grounds that the trial court erroneously excluded evidence and erred in charging the jury. The trial court denied the motions.

III. Evidentiary Rulings

Stephens sought to admit evidence of two actions taken by CSX after the accident: (1) CSX removed the trees at the Hill Road crossing that Thomas Jackson claimed CSX had no right to remove, and (2) CSX removed vegetation planted at a different location on the railroad right of way, despite opposition by members of a local garden club. In separate rulings, the trial court sustained CSX's objections to testimony regarding these actions on the basis that the actions were subsequent remedial measures and thus inadmissible under Rule 407, SCRE. We affirm both rulings.

A. Removal of Trees at the Hill Road Crossing

One of Stephens' theories of liability as to CSX was that the trees CSX failed to remove interfered with the proper sight distance, so that a driver on Hill Road could not see an approaching train. Stephens argued that if the trees had not been there, or more particularly if CSX had cut the trees before the accident, there would have been sufficient sight distance and the crossing would have been reasonably safe. He claimed that CSX's failure to cut the trees was a breach of its duty to maintain a reasonably safe crossing. CSX argued in response that the crossing was reasonably safe even with the trees. On this point, Stephens presented testimony from Jackson about CSX's efforts to cut the trees before the accident. Without objection, Jackson testified he "rais[ed] hell" and CSX agreed not to cut them. Stephens also attempted to elicit testimony from Jackson that CSX cut the trees shortly after the accident. The trial court excluded the testimony of the subsequent measure under Rule 407.

Rule 407 provides that "evidence of . . . subsequent [remedial] measures is not admissible to prove negligence or culpable conduct in connection with the event." The central inquiry under Rule 407, therefore, is the purpose for which the evidence is offered. If the proponent of the evidence offers it for the purpose of proving negligence or culpable conduct, Rule 407 excludes it. However, the rule also provides that it "does not require the exclusion of evidence of subsequent measures when offered for another purpose." *See also Webb*, 364 S.C. at 653, 615 S.E.2d at 448 ("Rule 407 bars the introduction of any change, repair, or precaution that under the plaintiff's theory would have made the accident less likely to happen, unless the evidence is offered for another purpose."). Permissible purposes include, as the rule provides, "proving ownership, control, or feasibility of precautionary measures, if controverted, or impeachment."

At trial, Stephens argued his purpose for introducing evidence of the tree removal was to "impeach" CSX's position that the Hill Road crossing was reasonably safe even with the trees in place. He argued the evidence was admissible because "[i]f [the crossing] was safe, it didn't need cutting. The fact that [CSX] came back later and cut it impeaches their position . . . ." It is the trial court's responsibility to determine whether the proponent is offering the evidence for the prohibited purpose of proving negligence or culpable conduct, or is offering it for some other purpose. *Webb* requires the trial court to consider Stephens' argument as to his purpose for offering the evidence in light of his theory of the case, which was that CSX's duty of reasonable care required it to cut the trees, and therefore the crossing was not reasonably safe because CSX was negligent. 364 S.C. at 653, 615 S.E.2d at 448 ("Rule 407 bars the introduction of any change, repair, or precaution that *under the plaintiff's theory* would have made the accident less likely to happen . . . ." (emphasis added)). The trial court correctly saw past the "impeachment" label Stephens put on the evidence and determined that his purpose for admitting the evidence was to prove that the crossing was not safe because CSX was negligent in failing to cut the trees. By offering the evidence to "impeach" CSX's position that the crossing was safe, Stephens was actually attempting to prove that CSX's negligence in failing to cut the trees was the reason the crossing was not safe. The admission of the evidence for that purpose is precisely what Rule 407 forbids. The trial judge properly excluded the evidence under Rule 407.

On appeal, Stephens presents a different argument. He now claims his purpose for offering the evidence was to show that Jackson's opposition to cutting the trees was not the reason CSX failed to cut them. He argues that CSX's decision to cut the trees after the accident shows that CSX had the right to cut them before the

accident, which means Jackson's opposition could not be the reason CSX failed to act sooner. Stephens thus argues that the purpose of offering the evidence was not the prohibited purpose of proving CSX was negligent, but the permitted purpose of impeaching the testimony of a CSX witness who testified that it was Jackson's opposition to the trees being cut that prevented CSX from cutting them beforehand. His argument also goes to the "feasibility of [the] precautionary measure[]" of cutting the trees. If Stephens had presented this argument to the trial court, the court might have exercised its discretion to admit the evidence.[2] A trial court's broad discretion to decide evidence questions would have allowed it to determine whether the evidence violated Rule 407 or was legitimately offered for a purpose permitted under the rule. However, a party "may not argue one ground on the admissibility of evidence at trial and an alternate ground on appeal." *Pike v S C Dep't of Transp* , 332 S.C. 605, 615, 506 S.E.2d 516, 521 (Ct. App. 1998). Because Stephens did not present this argument to the trial court, the court was not given the opportunity to exercise its discretion as to that argument, and the argument is not preserved for appeal.

B. Removal of a Garden in Hampton

Stephens also attempted to introduce evidence regarding the removal of vegetation at a different crossing. Several months after the accident, CSX removed a public garden in Hampton that was planted in CSX's right of way near the other crossing. Stephens offered the testimony of two members of a local garden club who opposed the removal of the garden on the grounds that it did not obstruct sight. Stephens offered the testimony for the purpose of contradicting CSX's position that its dispute with Jackson caused the delay in removing the trees at the Hill Road

---

[2] Stephens insists he did present this argument, citing his lawyer's statement at trial: "The fact that [CSX] came back and cut it impeaches their position . . . ." In context, however, it is clear that the position to which this statement referred was the safety of the crossing with the trees in place:

> in [CSX's] opening statement - - by the opening statement saying this crossing was safe, it didn't need cutting, is what he said in the opening statement, it was only - - it was safe, but we wanted to make it safer. If it was safe, it didn't need cutting. The fact that they came back later and cut it impeaches their position . . . .

crossing. The trial court excluded the testimony under Rule 407. We find Rule 407 does not exclude this testimony because removing a sight obstruction at a different crossing was not a "measure[] . . . which, if taken previously, would have made the event less likely to occur." Rule 407, SCRE. Thus, by its own terms, the rule does not apply to this evidence. *See Webb*, 364 S.C. at 653, 615 S.E.2d at 448 ("Rule 407 bars the introduction of any change, repair, or precaution that . . . would have made the accident less likely to happen . . . .").

However, we affirm the exclusion of the testimony. First, we question whether it is relevant. *See* Rule 402, SCRE ("Evidence which is not relevant is not admissible."). The garden club members opposed the removal of the garden on an entirely different basis than the ownership-based objection Jackson asserted. Second, for this reason and because it relates to a collateral matter, even if it is relevant the evidence had almost no probative value. *See* Rule 403, SCRE (stating "evidence may be excluded if its probative value is substantially outweighed by the danger of . . . confusion of the issues, or misleading the jury, or by considerations of undue delay, [or] waste of time"). In any event, the exclusion of the evidence caused Stephens no prejudice. *See Fields v Reg'l Med'l Ctr. Orangeburg*, 363 S.C. 19, 26, 609 S.E.2d 506, 509 (2005) (holding appellant must show prejudice from admission of evidence to warrant reversal).

IV. Denial of Motions for Partial Directed Verdict and JNOV Against CSX

Stephens argues the trial court erred in denying his motion for partial directed verdict. We find this issue is not preserved.

When a party moves unsuccessfully for directed verdict at any point during a trial, "he must renew that motion at the close of all evidence." *Wright v Craft*, 372 S.C. 1, 19, 640 S.E.2d 486, 496 (Ct. App. 2006). "Otherwise, this court is precluded from reviewing the denial of the motion on appeal." 372 S.C. at 20, 640 S.E.2d at 496. Stephens made his motion for partial directed verdict when both defendants rested, and the trial court denied the motion. Stephens then introduced evidence in reply. However, he did not renew his directed verdict motion after he presented that evidence. Therefore, the denial of his directed verdict motion is not preserved for our review.

After the trial, Stephens filed a motion for JNOV and a new trial, raising the same points he argued in his directed verdict motion. However, because he had not

renewed his directed verdict motion after presenting evidence in reply, he could not obtain JNOV. "When a party fails to renew a motion for a directed verdict at the close of all evidence, he waives his right to move for JNOV." *Wright*, 372 S.C. at 20, 640 S.E.2d at 496. Therefore, Stephens did not properly present his JNOV motion to the trial court, which leaves this issue unpreserved on appeal. *See* 372 S.C. at 20, 640 S.E.2d at 496-97 ("Because Craft did not renew his motion for a directed verdict at the close of all evidence, there is no JNOV motion to review."); *see also Hendrix v. E Distribution, Inc.*, 316 S.C. 34, 37, 446 S.E.2d 440, 442 (Ct. App. 1994) ("The rule that a judgment notwithstanding the verdict may not be granted unless the moving party moved for a directed verdict at the close of all the evidence is a strict one."), *vacated in part on other grounds*, 320 S.C. 218, 464 S.E.2d 112 (1995) (per curiam).

Stephens makes several arguments that the rule requiring the renewal of an unsuccessful directed verdict motion does not apply in the procedural circumstances presented in this case. He first argues the rule applies only to a directed verdict motion made by a defendant, as it would be "illogical" to require a plaintiff to renew his directed verdict motion after he presents reply evidence. We disagree. The facts and procedural circumstances of this case illustrate that the rule always applies when the question of law addressed in the motion is whether the facts yield only one reasonable inference. *See* Rule 50(a), SCRCP ("When upon a trial the case presents only questions of law the judge may direct a verdict."); *Hanahan v. Simpson*, 326 S.C. 140, 149, 485 S.E.2d 903, 908 (1997) (stating "when only one reasonable inference can be deduced from the evidence, the question becomes one of law").

Stephens' argument that he was entitled to partial directed verdict is based primarily on section 58-15-910 of the South Carolina Code (1976), which requires that a train engine's horn be sounded "at the distance of at least five hundred yards from the place where the railroad crosses any public highway, street or traveled place and be kept . . . whistling until the engine . . . has crossed such highway, street or traveled place."[3] When Stephens made the motion, he relied on evidence that the horn was sounded for a distance of less than 1,500 feet, including the data from the train's event recorder indicating that the horn began sounding 1,161 feet

---

[3] Alternatively, a "bell of at least thirty pounds' weight" may be rung for the same distance. *Id.* Nothing in the record indicates CSX met this alternative requirement.

from the crossing. The event recorder is an electronic device that records data from various systems in the train. Stephens argued its record of when the horn was sounded should be considered conclusive and thus he was entitled to a directed verdict that CSX breached its duty of reasonable care. However, in CSX's case-in-chief, the train's engineer testified as follows:

> Q: Did you believe that you blew the horn at the whistle post?
>
> A: I believe I started at the whistle post.

The whistle post was 1,544 feet from the crossing. This testimony by the engineer appears to create a conflict in the evidence, and if so, the trial court could not have properly granted Stephens' motion at that time.

Stephens argues, however, that viewing even this testimony by the engineer in context, there is only one reasonable inference to be drawn from the evidence—that CSX failed to sound the whistle on time and thus violated section 58-15-910. We agree that, taking this statement by the engineer in the context of his entire testimony, the inference that he blew the horn on time is a weak one. In the next question to the engineer, CSX's counsel asked, "the event recorder says you were short, right?" The engineer answered, "right." Counsel also asked whether the engineer was "disputing what the event recorder said," and the engineer replied, "No, I'm not." On cross examination, Stephens' counsel asked the engineer if "we can agree that you failed to blow the horn of the locomotive for 1500 feet before the crossing as required by the company rule and South Carolina law?" The engineer replied, "According to the event recorder."

There is other testimony from the engineer, however, that supports the inference he blew the horn on time. Stephens' counsel read into the record notes a CSX official took from a statement the engineer gave him—"The engineer thought he started at whistle post." Stephens' next question to the engineer was "your best memory that day was that you started that blowing the horn at the whistle post?" The engineer stated, "Right." Stephens' counsel cross-examined the engineer using his deposition, in which the engineer testified "[I] believe[I] started blowing the horn at the whistle post." Explaining his deposition testimony, the engineer testified at trial, "I started at the whistle post, I thought, and I was in the process of blowing two longs, a short, and a long."

Even as to the engineer's testimony that he was not disputing what the event recorder said, there is reason to believe he did not intend to admit violating the statute. The engineer testified he did not know how to interpret the recorder's data, and he never stated whether he agreed or disagreed with what the data indicated. The engineer's statement "[a]ccording to the event recorder" could be interpreted either as a concession he did not blow the horn on time or simply as an acknowledgement of what the event recorder said, not a concession of its accuracy. When Stephens' counsel asked the engineer "you have testified previously you don't contest the event recorder," he replied "I did not." The answer can be interpreted as stating he *does* "contest" the accuracy of the recorder, or as denying he ever said that. While it is possible to draw from the engineer's testimony the inferences Stephens argues should be drawn, the testimony also supports an inference that the engineer was simply conceding the existence of the data, which he did not understand, but not agreeing to its accuracy.

The point of this discussion is not whether the trial court should have granted the motion for directed verdict, but whether the issue is preserved. During his presentation of evidence on reply, Stephens introduced a stipulation with CSX that the data from the train's event recorder was accurate.[4] If conflicting inferences could be drawn from the engineer's testimony at the point when the motion was made, the stipulation arguably removed the conflict. Stephens makes this very argument in his reply brief:

> After the Appellant's directed verdict motion, and before the close of all evidence, the Appellant offered the stipulation of CSX as to the accuracy of the event recorder on the locomotive. The accuracy of the event recorder . . . bolstered . . . the evidence that CSX had not complied with [section] 58-15-910.

The argument proves our point on preservation. In response to Stephens' motion for partial directed verdict, CSX argued the engineer "believe[s] he did begin sounding at the whistle post . . . . That is an issue of fact." The trial court saw a conflict in the evidence and stated, "I am going to deny the directed verdict motions to CSX. . . . I think it is a jury issue." The stipulation was entered in evidence after this ruling. By not renewing his motion, Stephens never gave the

---

[4] The exact language of the stipulation is not known, as Stephens did not include it in the record on appeal.

trial court an opportunity to consider whether the stipulation eliminated the conflict the court saw in the evidence as to this issue. Even if we thought the trial court was mistaken as to the ruling it did make, we have no idea how the court would have ruled in light of the stipulation. This illustrates the reason for the rule—a party must renew his directed verdict motion at the close of all evidence so that the court may decide whether evidence presented after it denied the earlier motion changed the evidentiary landscape in such a way that directed verdict has now become appropriate.

For these reasons, we reject Stephens' argument that the rule requiring the renewal of an unsuccessful motion for directed verdict does not apply to the facts and procedural circumstances of this case. *See State v. Bailey*, 368 S.C. 39, 43 n.4, 626 S.E.2d 898, 900 n.4 (Ct. App. 2006) (stating in a criminal case "[i]f a defendant presents evidence after the denial of his directed verdict motion at the close of the State's case, he must make another directed verdict motion at the close of all evidence in order to appeal the sufficiency of the evidence").

Stephens' second argument is that even without the stipulation, he was entitled to a directed verdict at the time he made his motion because CSX's counsel admitted in his opening statement that the engineer did not begin sounding the horn at the whistle post. Even if Stephens is correct about the significance of what CSX's counsel said, Stephens' failure to renew his motion still leaves the issue unpreserved. Moreover, Stephens did not make this argument to the trial court. When Stephens made his motion for partial directed verdict, he never contended that counsel's remarks in opening statement constituted a binding admission that CSX breached its duty. *See Armstrong v Collins*, 366 S.C. 204, 224-25, 621 S.E.2d 368, 378 (Ct. App. 2005) (finding because appellant did not present to the trial court the argument he raised in his appellate brief, the trial court was never given an opportunity to rule upon that argument, and thus the argument was not preserved for appeal).

The trial court's denial of Stephens' motions for directed verdict and JNOV are not preserved.[5]

---

[5] Stephens also appeals the trial court's refusal to grant him partial directed verdict that CSX breached its duty of reasonable care by not removing the trees at the crossing. For the reasons discussed above regarding preservation, and because the record is full of conflicting evidence on this issue, we affirm the trial court's decision.

V. Jury Charge Rulings

Stephens challenges a number of rulings the trial court made in regards to the jury charge. Our review of the trial court's jury charge is controlled in the first instance by the fact that the trial court prepared special interrogatories for the jury to answer in returning its verdict, and that the jury resolved the case by finding that neither CSX nor DOT breached its duty of reasonable care. Because the jury's verdict on that basis made it unnecessary for the jury to reach the other issues in the case, it is not necessary that we address any ruling on the jury charge unless it relates to breach of CSX's and DOT's duty of reasonable care. *See Cole v Raut*, 378 S.C. 398, 405, 663 S.E.2d 30, 33 (2008) (stating an erroneous jury instruction "is not grounds for reversal unless the appellant can show prejudice from the erroneous instruction"); *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."). Therefore, we address only those issues on appeal challenging portions of the charge given, or the refusal to give requested charges, that relate to CSX and DOT's alleged breach of their duty of reasonable care. Specifically, we find it unnecessary to address the issues raised by the dissent regarding the presumption against impairment and "Train Time" charges, as those alleged errors could hardly have affected the jury's deliberations over whether CSX or DOT breached its duty of reasonable care, and could not possibly have prejudiced Stephens.

A. Rejection of Stephens' Proposed Charges on a Railroad Company's Duties

Stephens argues the trial court erred in rejecting two proposed instructions concerning a railroad company's liability for injuries occurring at crossings. In the first, Stephens requested the court charge the jury:

> A railroad corporation has a duty to maintain its right-of-ways and highway railroad grade crossings in a reasonabl[y] safe condition. If a railroad corporation negligently allows vegetation to grow on its right-of-way adjacent to the crossing to such an extent that it obscures or obstructs the vision of the driver of a motor vehicle using the roadway, it is liable to anyone who is injured in

> a collision, if the obstructing vegetation contributed as a proximate cause to the collision.

In his second proposed instruction, Stephens requested the court charge: "When vegetation at a railroad crossing is such that it obstructs a motorist's view of an oncoming on train, the railroad has a duty to exercise added care in the operation . . . of its train as the train approaches and crosses the crossing."

We find the instructions the trial court gave adequately addressed the substance of both of Stephens' proposed instructions. "It is not error to refuse a request to charge when the substance of the request is included in the general instructions." *See Brown v. Stewart*, 348 S.C. 33, 53, 557 S.E.2d 676, 686 (Ct. App. 2001). As to the first proposed instruction, the trial court's general instructions fully and accurately explained the concepts of negligence and proximate cause. The court also specifically instructed the jury that "a railroad corporation has a duty to maintain a reasonably safe grade crossing." As to the second proposed instruction, the court instructed the jury that a railroad company must use "reasonable and ordinary caution to prevent accidents at [a] crossing, and this degree of care may be affected by obstructions which prevent the track from being seen as a train approaches." While this instruction does not specifically refer to "added care," it explains that obstructions affect what a railroad must do to comply with its duty of care. We do not believe the jury would have understood the charge to mean the presence of sight obstructions would allow CSX to exercise less care at the crossing. In any event, the precise manner in which an obstruction affects the degree of care required by a railroad or a driver is a matter for the parties to argue in closing argument, not one for the trial court to address in its charge. *See* S.C. Const. art. V, § 21 ("Judges shall not charge juries in respect to matters of fact, but shall declare the law."). The trial court committed no error in refusing to give the requested instructions.

Stephens argues the trial court's alleged error in refusing these charges was compounded by the instruction it gave that a motorist whose vision is obscured "must exercise due care consistent with the increased danger occasioned by the conditions that obstruct their vision." He contends this instruction led the jury to believe the law places the duty of care entirely on the motorist, when the law actually places duties on both the railroad company and the motorist. Stephens is correct that there are mutual duties, and that the duties of each must be exercised in light of all surrounding circumstances. *See Chisolm v. Seaboard Air Line Ry.*, 121 S.C. 394, 401, 114 S.E. 500, 503 (1922) ("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."). The trial court conveyed that point to the jury, however, stating "there is a mutual duty on traveler and railroad to exercise due care." Additionally, the trial court instructed the jury that "both 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. The care of each must be commensurate with the risk and danger involved. The greater the risk, the greater the care." We find no error.

B. Charging on Signage Rules and DOT's Authority to Close Railroad Crossings

Stephens argues the trial court erred in charging the substance of three statutes pertaining to signs at railroad crossings: section 56-5-1010 (2006), which requires railroad companies to install and maintain cross-buck signs at crossings; section 58-17-1390 (1976), which requires railroad companies to install and maintain signs reading "Railroad Crossing" at crossings; and section 56-5-1020 (2006), which prohibits unauthorized signs, signals, or other devices at crossings. The court also instructed the jury on section 58-15-1625 (Supp. 2011), which authorizes DOT to close railroad crossings to public traffic when DOT finds the increased public safety of closing the crossing outweighs the inconvenience caused to motorists who will have to take another route.

Despite Respondents' argument to the contrary, Stephens' challenges to these instructions are preserved. However, the charges contain accurate statements of law, and there was evidence to support the trial court's decision to give each of them. *See Clark*, 339 S.C. at 390, 529 S.E.2d at 539 (stating a trial court must charge the current and correct law of South Carolina, and must charge principles of law that apply to the issues raised in the pleadings and developed by the evidence in support of those issues).

As to the first two charges, Stephens claimed in his complaint that, in addition to failing to remove vegetation and properly sound the train horn, CSX was negligent "in maintaining an unreasonably hazardous and unsafe crossing" and "in failing to maintain adequate warning devices at the crossing." CSX's duty to install and maintain the cross-buck and railroad crossing sign relate to those claims.

As to the third charge, Stephens' grade crossing safety expert gave an opinion that the Hill Road crossing could be made safer with the installation of active traffic-control devices, such as lights and gates. DOT's traffic management engineer, Richard Jenkins, testified railroad companies have installed gates and lights at crossings without DOT's authorization. The charge on section 56-5-1020 was applicable because it informed the jury that CSX could not legally install active traffic-control devices without DOT's authorization.

Finally, as to DOT's authority to close crossings, the charge properly relates to the liability of DOT. Further, Jenkins testified railroads have closed crossings without asking DOT for permission. From that testimony, the jury could have inferred CSX should have closed the crossing. Section 58-15-1625 places the power to close crossings in DOT's hands. Accordingly, the charge on that statute was applicable because it showed the jury CSX did not have the authority to close Hill Road at the crossing.

We find the trial court did not err in giving these charges.

C. Charging on Discretionary Act Immunity

Stephens argues the trial court erred in charging the jury on subsection 15-78-60(5) of the South Carolina Code (2005), which immunizes governmental entities from liability for injuries caused by "the exercise of discretion or judgment by the governmental entity or employee or the performance or failure to perform any act or service which is in the discretion or judgment of the governmental entity or employee."[6]

---

[6] Discretionary act immunity is an affirmative defense, which the defendant bears the burden of proving. *Creech v. S.C. Wildlife & Marine Res. Dep't*, 328 S.C. 24, 28, 491 S.E.2d 571, 573 (1997). However, it is not clear whether discretionary act immunity comes into play only after a plaintiff establishes the elements of negligence, or instead relates to the question of whether a governmental entity breached its duty in the first place. *See Pike v. S.C. Dep't of Transp.*, 343 S.C. 224, 230, 540 S.E.2d 87, 90 (2000) (stating discretionary act immunity requires proof that the government entity used "accepted professional standards," "actually weighed competing considerations and made a conscious choice"). If the latter is true, then the court's instruction could have affected the jury's verdict that DOT did not breach its duty. Thus, we address this issue.

"To establish discretionary immunity, the governmental entity must prove that the governmental employees, faced with alternatives, actually weighed competing considerations and made a conscious choice." *Pike*, 343 S.C. at 230, 540 S.E.2d at 90. "[T]he governmental entity must show that in weighing the competing considerations and alternatives, it utilized accepted professional standards appropriate to resolve the issue before them." *Id.* (citation and quotation marks omitted). In this case, DOT asserted it was entitled to an instruction on discretionary immunity for its installation of the stop sign and the stop line at the crossing. Stephens contends DOT did not present evidence entitling it to the instruction.

We agree with Stephens that DOT did not present sufficient evidence to prove its discretionary act immunity claim. However, that does not necessarily mean the trial court erred in giving the instruction. The trial court was never asked to direct a verdict on DOT's immunity claim. At the charge conference, therefore, the court approached the issue believing immunity was for the jury to decide. The arguments on whether to instruct the jury on discretionary act immunity centered on whether there was evidence of DOT making an actual choice in where it located the stop sign or the stop line. With regard to the stop line, there was evidence that the DOT employee who installed it made a conscious choice between two potential locations.

On appeal, Stephens contends the immunity defense failed because DOT did not follow an accepted professional standard in its placement of the stop sign or the stop line. Stephens did not present this argument to the trial court. We will not reverse the trial court's jury charge based on a point Stephens never asked the court to consider. *See Elam v. S.C Dep't of Transp.*, 361 S.C. 9, 23, 602 S.E.2d 772, 779-80 (2004) ("[A]rguments are preserved for appellate review only when they are raised to and ruled on by the lower court."). Therefore, we affirm.

VI. Conclusion

For the foregoing reasons, the trial court's decisions are **AFFIRMED.**

HUFF, J., concurs.

SHORT, J., concurs in part and dissents in part.

SHORT, J.: I concur with the majority regarding the trial court's exclusion of subsequent remedial acts. I also concur with the majority's finding that Stephens failed to preserve the issues regarding the trial court's denial of her motions for directed verdict and JNOV. However, I respectfully disagree with the majority regarding the alleged erroneous jury charges, and I would reverse and remand for a new trial.

First, I agree with the majority that DOT failed to present sufficient evidence to entitle it to a jury charge on discretionary immunity. However, I disagree with the majority's conclusion that despite DOT's failure to prove entitlement to the charge, the trial court did not err by giving the charge. Furthermore, I find Stephens was prejudiced by the error because the charge could easily have confused the jury. Here, as noted by the majority, there was testimony by three DOT employees about the conditions near the crossing.

I also note the trial judge erred in charging section 56-5-2930, which makes it unlawful for a person to drive a motor vehicle under the influence, but refusing to charge section 56-5-2950(G)(1), which provides that a person with a blood alcohol level of .05% or less is conclusively presumed to not be under the influence. *See* S.C. Code Ann. §§ 56-5-2930; -2950(G)(1) (Supp. 2011). The trial court also charged that DOT was immune from liability for the criminal actions of third persons. S.C. Code Ann. § 15-78-60 (20) (2005). Colvin admitted she consumed one or two wine coolers in the five hours preceding the accident and took prescription medications. Her blood alcohol content was measured at .018% following the accident. I conclude the trial court erred by charging the criminal driving under impairment statute and the immunity statute without charging 56-5-2950(G)(1), which permitted Colvin to rebut her alleged impairment and prejudiced her.

I next find the trial judge erred in charging CSX's proposed request to charge Number 45, which stated, "It is Always Train Time at the Crossing." In my view, this could have implied to the jury that CSX and DOT had lesser duties of care than a motorist and constituted prejudicial error.

Finally, I find these errors were not harmless beyond a reasonable doubt. *See Wells v. Halyard*, 341 S.C. 234, 237, 533 S.E.2d 341, 343 (Ct. App. 2000) ("An alleged error is harmless if the appellate court determines *beyond a reasonable doubt* that the alleged error did not contribute to the verdict.") (emphasis added). Accordingly, I would reverse and remand.