ORIGINAL

IN THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM BAMBERG COUNTY
Court of Common Pleas
Doyet A. Early, III, Circuit Court Judge

Case No.: 2006-CP-05-00034

Connie Carson as Personal Representative
of the Estate of Beryl Harvey, ... Appellant,

-v-

CSX Transportation, Inc., ... Respondent.

Case No.: 2006-CP-05-00107

Connie Carson as Personal Representative
of the Estate of Beryl Harvey, ... Appellant,

-v-

CSX Transportation, Inc., ... Respondent.

BRIEF OF APPELLANT

J. Christopher Wilson
WILSON, LUGINBILL
& KIRKLAND, L.L.C.
Post Office Box 1150
Bamberg, SC 29003
Phone: (803) 245-7799

-And-

John E. Parker
R. Alexander Murdaugh
William F. Barnes, III
Matthew V. Creech
PETERS, MURDAUGH,
PARKER, ELTZROTH
& DETRICK, P.A.
101 Mulberry Street, East
Post Office Box 457
Hampton, SC 29924
Phone: (803) 943-2111

ATTORNEYS FOR APPELLANT

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

STATEMENT OF ISSUES ON APPEAL

I. DID THE TRIAL COURT ERR BY EXCLUDING THE SCDOT DIAGNOSTIC TEAM'S APRIL 26, 2004 RECOMMENDATION TO INSTALL GATES AND FLASHING LIGHTS AT THE HONEYFORD ROAD CROSSING WHEN THE DECISION WAS MADE PRIOR TO THE MAY 30, 2004 ACCIDENT?

II. DID THE TRIAL COURT ABUSE ITS DISCRETION IN REJECTING CRITCIAL EVIDENCE OFFERED AT TRIAL AND FAILING TO CHAGE S.C. CODE ANN. § 56-5-2715 IN ITS ENTIRETY?

III. DID THE TRIAL COURT ERR BY IMPUTING NEGLIGENCE TO INNOCENT BENEFICIARIES UNDER THE SURVIVAL ACTION AND IMPROPERLY INSTRUCTING THE JURY CONCERNING THE AWARD OF SURVIVAL ACTION DAMAGES?

STATEMENT OF THE CASE

This case arises out of a May 30, 2004 car-train collision that occurred on Honeyford Road in Bamberg County, South Carolina. The decedent, Beryl Harvey ("Beryl" or "Decedent") was a passenger in a van driven by his mother, Frances Harvey. As a result of the accident, Beryl was ejected from the van and sustained fatal injuries.

Beryl Harvey's sister, Connie Carson ("Appellant"), was appointed as the personal representative of the Estate of Beryl Harvey. (R. p. 910, lines 8-14). Appellant filed wrongful death action in the Bamberg County Court of Common Pleas on February 21, 2006. The Complaint alleges negligence causes of action against CSX Transportation, Inc. ("CSX") and the South Carolina Department of Transportation ("SCDOT"). Appellant alleged that CSX was negligent in maintaining an unreasonably dangerous railroad-grade crossing by failing to eliminate trees and other vegetation that obstructed Ms. Harvey's view of the approaching train. Against SCDOT, Appellant alleged it was negligent for failing to erect proper traffic control devices and failing to maintain a safe railroad-grade crossing for the traveling public. On May 25, 2006, Appellant filed a survival action against CSX and SCDOT. In her Summons and Complaint, she alleged the joint negligence of CSX and SCDOT resulted in Beryl Harvey suffering conscious pain and suffering prior to his death. In both actions, each defendant generally denied the allegations and asserted affirmative defenses.[1]

CSX and SCDOT moved to establish complex case designation and in an Order dated June 17, 2009, these cases were assigned to the Honorable Doyet A. Early, III. All

[1] Appellant subsequently filed an Amended Summons & Complaint in both the wrongful death and survival action.

parties agreed the survival action and wrongful death action would be consolidated for trial. Prior to the trial of these cases, Appellant reached a settlement with SCDOT.

These cases were tried in Bamberg County from November 9, 2009 through November 17, 2009. In comparing the party's negligence, the jury found CSX forty-percent negligent and Ms. Harvey, the sole beneficiary under the wrongful death action, sixty-percent negligent. (R. pp. 5-6). The jury awarded $0.00 damages on the Appellant's survival action claim. (R. pp. 5-6). At the conclusion of the trial, the court granted ten (10) days to file post-trial motions. Appellant moved on several grounds for judgment notwithstanding the verdict, or alternatively, for a new trial or new trial *nisi additur*. (R. pp. 157-160). The court heard arguments on the Appellant's post-trial motions on December 17, 2009, and by written order dated February 4, 2010 denied her motions. (R. pp. 3-4). Appellant timely filed her Notice of Appeal on February 12, 2010. (R. pp. 7-14).

FACTS

The events giving rise to this case occurred on Sunday afternoon, May 30, 2004 at a railroad-grade crossing on Honeyford Road in Bamberg County, South Carolina. (R. p. 675, line 22 – p. 676, line 4). Beryl Harvey was confined to a motorized wheelchair in the rear of a van driven by his mother, Frances Harvey. (R. p. 674, lines 1-19). As Frances approached the CSX crossing on Honeyford Road, all windows were up and the air conditioner was on. (R. p. 685, lines 2-9). She stopped, looked left, turned and looked right, and slowly proceeded across the tracks after not seeing or hearing a train. (R. p. 675, line 24 – p. 676, line 4). A northbound CSX struck the Harvey van toward the rear of the driver's side, throwing Beryl from the vehicle. (R. p. 290, lines 12-16). Beryl

Harvey died at the scene from blunt trauma to his head and chest. (R. p. 271, lines 5-24; p. 290, line 12 – p. 291, line 7; p. 306, line 22 – p. 307, line 7; R. p. 1572).

Beryl was the son of Frances and Charles Harvey. A swimming accident at age sixteen left Beryl a quadriplegic with no use of his legs and only limited movement of his arms. (R. p. 661, line 21 – p. 662, line 8; p. 810, lines 14-24; p. 662, lines 16-22). He was unable to care for himself, and was dependent on Frances for daily living necessities. (R. p. 663, line 19 – p. 665, line 11; p. 691, line 5 – p. 692, line 7).

Fishing was one of Beryl's favorite activities. (R. p. 668, lines 13-18). Even though he practically had no use of his hands, the Harvey family engineered a strap around his hand so he could hold a fishing pole and fish from his wheel chair. (R. p. 668, line 19 – p. 669, line 24; p. 695, line 22 – p. 696, line 14). One of Frances and Beryl's favorite fishing holes was a creek, south of Denmark, off Honeyford Road. (R. p. 675, lines 3-18). The creek was easily accessible for Beryl's motorized wheelchair. (R. p. 675, lines 6-10). On May 30, 2004, Beryl asked Frances to take him fishing. (R p. 672, lines 9-12). They left home in Frances' 1987 Chevrolet van. (R. p. 673, lines 1-2). The van was equipped with a mechanical lift so Beryl could back his wheelchair into the van. (R. p. 673, lines 3-16). Once properly in the van, locks would secure the wheelchair so it could not move. (R. p. 673, lines 17-25). Beryl faced the rear passenger door and would have to look left in order to see out the windshield where the vehicle was traveling. (R. p. 674, lines 5-17).

At the time of his death, Beryl Harvey was unmarried and had no children. His heirs at law were his mother Frances Harvey and his father Charles Harvey. Frances and Charles Harvey were divorced. (R. p. 658, lines 14-17). Three of Beryl Harvey's siblings

survived him as well. (R. p. 658, lines 20-25). Prior to the trial of this case, Charles Harvey passed away. (R. p. 909, lines 18-22). Therefore at the trial of this case, the closest classes of possible heirs of Beryl Harvey were his mother and three siblings.

Bennie Spell was also traveling on Honeyford Road at the time of the collision. (R. p. 280, line 25 – p. 281, line 2). He was traveling towards Highway 321 in the opposite direction as Ms. Harvey. (R. p. 281, line 17 – p. 282, line 1; p. 283, lines 9-10). The northbound CSX train approached the crossing from Mr. Spell's right. (R. p. 1372). Since it was a warm day, Mr. Spell was riding with his driver's side window down. (R. p. 282, lines 9-20). As Mr. Spell approached the crossing, he heard the horn blow twice. (R. p. 284, line 16 – p. 285, line 1). He did not hear it blow again for another five to six seconds until the engineer sat down on the horn. (R. p. 285, lines 3-6; p. 287, lines 5-8). After the five to six second delay with no horn, Mr. Spell estimated the engineer only blew the horn for a "second or two" prior to the train striking the Harvey vehicle. (R. p. 287, lines 20-25). Mr. Spell did not see the Harvey vehicle go onto the tracks, but realized after seeing the flash and the train slowing down, that something had been hit. (R. p. 288, lines 8-19). After calling 911, Mr. Spell approached the van. (R. p. 289, lines 12-19). Mr. Spell saw Beryl lying in a briar patch, and heard him yelling "Mama." (R. p. 290, lines 12-16; p. 291, lines 4-7). Other witnesses testified they heard Beryl moaning prior to his passing away at the scene. (R. p. 271, lines 5-24; p. 290, line 12 – p. 291, line 7; p. 306, line 22 – p. 307, line 7).

CSX owns the railroad tracks at Honeyford Road on a line that runs from Savannah, Georgia to Cayce, South Carolina. (R. p. 897, lines 14-19; p. 943, lines 4-6). The tracks parallel US Highway 321, south of Denmark, and intersect Honeyford Road at

a skewed angle.[2] (R. p. 502, lines 10-13; p. 506, line 1; R. p. 1409-1413; 1579). The CSX crossing is approximately 250 feet from Highway 321. (R. p. 630, lines 8-12;R. p. 1409-1413; R. p. 1373). An average of seven trains and 320 vehicles traverse the Honeyford Road crossing daily. (R. p. 518, line 10 – p. 519, line 3). The maximum train (track) speed along the CSX line at Honeyford Road is 79 mph for Amtrak trains, and 60 mph for freight trains. (R. p. 518, lines 5-9; p. 518, line 25 – p. 519, line 3).

The CSX train crew on May 30, 2004 was Michael Stephens, Jimmy Bonner, and Jack Cowan. (R. p. 943, lines 9-16). Mr. Stephens, an engineer trainee, was operating the train at the time of the collision on the right side of the locomotive. (R. p. 940, lines 11-14). He was being supervised by senior engineer,[3] Jack Cowan. (R. p. 927, line 24 – p. 928, line 19; p. 943, lines 12-16). The trip from Savannah to Cayce was Mr. Stephens last required trip to complete his certification to be an engineer. (R. p. 928, line 23 – p. 929, line 2; p. 943, lines 14-16). Jimmy Bonner, the conductor[4], was sitting on the left side of the locomotive. (R. p. 940, lines 13-16).

S.C. Code Ann. § 58-15-910 mandates that a train crossing any roadway must begin to sound its whistle or horn 1500 feet from the crossing and continue this warning until it has crossed the roadway. (R. p. 739, lines 4-8). According to CSX Operating Rule 14(L), the train horn must be sounded at the whistle post and be blown in two long blasts, followed by a short blast, followed by another long blast. (R. p. 738, line 20 – p. 739, line 3; R. p. 1546). The last long should continue until the locomotive occupies the

---

[2] Honeyford Road does not intersect the CSX tracks at a 90-degree angle. Instead, one side is 50-degrees while the other side is 130-degrees. (R. p. 506, lines 6-13).

[3] A train engineer is responsible for operating the locomotive safely and in accordance with the CSX operating rules. (R. p. 925, line 23 – p. 926, line. 1).

[4] The conductor is responsible for the make-up of the train, and for assuring that the cars are dropped off or picked up at a given location. (R. p. 925, lines 10-13).

crossing, or the sequence repeated until the crossing is occupied. (R. p. 738, line 23 – p. 739, line 3; R. p. 1546). A long is traditionally five-to-seven seconds and the short is usually two-to-three seconds. (R. p. 739, lines 20-23). A one-to-two second gap of no horn usually follows each sounding of the horn. (R. p. 739, lines 20-23).

The train crew first sounded the horn 1347 feet from the south edge of the Honeyford Road crossing.[5] (R. p. 749, lines 9-10; R. p. 1515-1524; R. p. 1545). After initially sounding the horn for 1.9 seconds, an 8.1 second gap of no horn followed as the train continued towards Honeyford Road. (R. p. 759, lines 11-12; R. pp. 1515-1524; R. p. 1545). The second horn lasted for 1.7 seconds followed by another 2.4 seconds of no horn. (R. p. 759, lines 12-13; R. pp. 1515-1524; R. p. 1545). The third horn lasted 3.2 seconds with no horn for 0.1 seconds. (R. p. 759, lines 13-14; R. pp. 1515-1524, R. p. 1545). The fourth blowing of the horn lasted for 1.6 seconds followed by no horn for 0.6 seconds prior to impact. (R. p. 759, lines 15-16; R. pp. 1515-1524, R. p. 1545). The manner in which the horn was blown violated S.C. Code Ann. § 58-15-910 and CSX Operating Rules. At the time of the collision the train was traveling 46 miles-per-hour. (R. p. 744, lines 23-24; R. pp. 1515-1524; R. p. 1545). The train crew first saw the Harvey vehicle slowly approach the crossing half-way through the horn blowing cycle. (R. p. 944, lines 9-13). Mr. Cowan testified that as collision was imminent the train was put into emergency[6] simultaneously upon striking the vehicle. (R. p. 983, line 15 – p. 984, line 4). The event recorder, however, shows the crew did not put the train into emergency until 499 feet after striking the van. (R. p. 760, lines 4-5; R. p. 1545).

[5] The locomotive is equipped with a data event recorder that records various parameters, including train speed, length of horn blows, and throttle position, among others. (R. p. 724, lines 8-16; R. pp. 1515-1524).
[6] The locomotive is equipped with an emergency mode that will stop the train as quickly as possible.

In 2000, CSX adopted a pilot program to eliminate vegetation and other sight obstructions at its passive[7] railroad-grade crossings. (R. p. 562, lines 14-20; R. p. 1433). Under the program, CSX was to clear cut all vegetation along the full width of its right-of-way for a distance of 300 feet from the roadway. (R. p. 563, lines 2-10; R. p. 1433). All passive crossings throughout the CSX system were to be completed within three years. (R. p. 1433). South Carolina, and other Southern states, received the highest priority due to increased numbers of grade crossing incidents and were to be targeted during the first year. (R. p. 562, line 21 – p. 563, line 1; R. p. 1433).

In 2002, CSX expanded the areas to be cleared in its crossing clearing program. (R. pp. 1449-1450). CSX contracted with another company, DeAngelo Brothers, in an effort to clear the vegetation at its passive crossings. (R. p. 468, lines 13-20; R. pp. 1468-1482). The May 1, 2002 contract with DeAngelo Brothers specified that all vegetation was to cut so not to exceed 4" in height. (R. p. 559, lines 20-25; R. pp. 1468-1482). Once cleared, the vegetation could not exceed three feet in height. (R. p. 560, lines 1-9; R. pp. 1468-1482). CSX also changed the specifications for the clearing program. (R. pp. 1468-1482). The new specifications required that CSX's entire right-of-way parallel to the track be cleared for a distance of 900 feet from the edge of the roadway. (R. p. 559, lines 13-20; R. pp. 1449-1450; R. pp. 1468-1482). May 16, 2002 was the proposed start date and all passive crossings in South Carolina were to be cut in accordance with the contract's specifications during the first year of the program. (R. pp. 1449-1450).

On February 24, 2003, CSX changed the specifications of its crossing clearing program in an effort afford the traveling public greater sight distance at its passive

[7] Passive crossings are controlled by crossbucks. A stop sign may also be present if installed pursuant to S.C. Code Ann. § 56-5-2715.

crossings. (R. p. 560, lines 10-16; p. 566, line 19 – p. 567, line 4; R. p. 1451). Under the revised specifications, the Honeyford Road crossing – and all other crossings with a track speed exceeding 60 mph – was to be cleared the entire width of CSX's right-of-way for a distance of 100' from the roadway, tapered to a point 28' from the track's centerline 950' feet from the roadway. (R. p. 560, lines 10-16; R. p. 1451). Because all of South Carolina's passive crossings were not cut by the deadline, on January 9, 2004, CSX granted DeAngelo Brothers until March 15, 2004 to complete its contractual obligation to cut the passive crossings in South Carolina to the program's specifications. (R. p. 568, lines 4-24; R. p. 1483). If the crossings in South Carolina were not completed by March 15, 2004, the clearing of crossings in the Northeast was to be suspended until the South Carolina crossings were completed. (R. p. 1483). At the time of the May 30, 2004 accident, the vegetation at Honeyford Road had not been cut in accordance with the crossing clearing program's specifications. (R. p. 564, lines 18-25). Eighty feet from the roadway brush was four feet high twenty-eight feet from the track. (R. p. 633, lines 12-22; R. pp. 1409-1413). At 392 feet down the track, forty-to-fifty feet tall trees were twenty-eight feet from the track. (R. p. 634, lines 23-25; R. pp. 1409-1413). Had the vegetation at Honeyford Road been cut to the crossing clearing program's specifications, this collision would not have occurred. (R. p. 568, line 25 – p. 569, line 4).

On April 26, 2004, a month before the May 30, 2004 collision, the SCDOT Diagnostic Team made a site visit to inspect the CSX crossing at Honeyford Road. (Munn Depo. R. p. 1333, lines 1-7). SCDOT Rail Safety and Research Engineer, Darrell Munn, led the Diagnostic Team, which was comprised of other SCDOT officials and railroad representatives. (Munn Depo. R. p. 1328, lines 8-9; p. 1328, lines 17-21; p. 1332,

lines 13-15). The Diagnostic Team inspects railroad-grade crossings throughout South Carolina and determines which crossings need active traffic control devices (e.g., gates and flashing lights), instead of passive traffic control devices (e.g., crossbucks). (Munn Depo. R. p. 1328, lines 10-14). Once a decision is made that a particular crossing needs gates and flashing lights, the Diagnostic Team submits a request to the federal government, which approves funding for the warning device upgrade. (Munn Depo. R. p. 1334, lines 3-13). In deciding if gates and flashing lights are warranted, the Diagnostic Team relies on criteria set forth by federal regulation and the Railroad Highway Grade Crossing Handbook. (Munn Depo. p. 1328, line 22 – p. 1329, line 24). Such criteria includes, maximum train speed, available sight distance, average number of daily trains, crossing layout, average daily traffic count traversing the crossing, and accident record. (Munn Depo. R. p. 1337, line 4 – p. 1338, line 16). Based on the objective criteria and conditions observed during its site visit, the Diagnostic Team recommended on April 26, 2004 that gates and flashing lights be installed at the Honeyford Road Crossing. (Munn Depo. R. p. 1333, lines 1-7). Over two years after the proposed start date of the expanded crossing clearing program, CSX finally cut the vegetation at Honeyford Road on July 19, 2004. (R. p. 1491).

ARGUMENTS

"The grant or denial of new trial motions rests within the discretion of the trial judge and his decision will not be disturbed on appeal unless his findings are wholly unsupported by the evidence or the conclusions reached are controlled by error of law." Stevens v. Allen, 336 S.C. 439, 446, 520 S.E.2d 625, 628-29 (Ct. App. 1999).

I. THE TRIAL COURT COMMITTED REVERSIBLE ERROR BY EXCLUDING THE SCDOT DIAGNOSTIC TEAM'S APRIL 26, 2004 RECOMMENDATION TO INSTALL GATES AND FLASHING LIGHTS AT THE HONEYFORD ROAD CROSSING WHEN THE DECISION WAS MADE PRIOR TO THE MAY 30, 2004 ACCIDENT.

The trial court erred and a new trial is warranted based on the trial court's exclusion of the SCDOT Diagnostic Team's April 26, 2004 recommendation to install gates and flashing lights at the Honeyford Road crossing. Appellant sought to call SCDOT Rail Safety and Research Engineer, Darrell Munn, as a witness to testify concerning his observations and recommendation to install gates and flashing lights after the Diagnostic Team's April 26, 2004 site visit to the Honeyford Road crossing. CSX objected to Mr. Munn's testimony on the grounds that the April 26, 2004 recommendation was inadmissible pursuant to 23 U.S.C. § 409. (R. p. 867, lines 22-24). In sustaining CSX's objection, the trial court ruled:

> . . . I have made every effort in this case to try the case based on how the crossing appeared at the time of the collision and I will respectfully not allow the evidence concerning the subsequent installation of lights, crossbucks.
>
> I think - - I'm making my analysis under federal preemption law and, not only that, under Rule 407 subsequent remedial measures and not only that, more importantly, a 403 analysis it being more prejudicial than probative. When I consider all of that collectively I am of the opinion that I should not allow it in.

(R. p. 876, lines 9-25).

Section 409 of Title 23, U.S.C. provides:

> Notwithstanding any other provision of law, reports, surveys, schedules, lists, or data compiled or collected for the purpose of identifying evaluating, or planning the safety enhancement of potential accident sites, hazardous roadway conditions, or railway-highway crossings, pursuant to sections 130, 144, and 152[8] of this title or for the purpose of developing any highway safety construction improvement project which may be

[8] 23 U.S.C. §§ 144, 152 are inapplicable in this case.

> implemented utilizing Federal-aid highway funds shall not be subject to discovery or admitted into evidence in a Federal or State court proceeding or considered for other purposes in any action for damages arising from any occurrence at a location mentioned or addressed in such reports, surveys, schedules, lists, or data.

23 U.S.C. § 409.

In Pierce County, Wash. v. Guillen, 537 U.S. 129 (2003), the United States Supreme Court held that 23 U.S.C. § 409 only protects data collected specifically for 23 U.S.C. § 152 purposes. Id. at 144. Section 409 does not protect documents collected for purposes unrelated to § 152. 23 U.S.C. § 152 is the Hazard Elimination Program of the Federal Highway Safety Act and applies to highways. On the other hand, 23 U.S.C. § 130 is the Federal Railway-Highway Crossing Program under which funds are provided for warning device upgrades at railroad-grade crossings. Congress enacted 23 U.S.C. § 409 in 1987 because states feared that diligent efforts to identify hazardous locations would increase their risk of liability before improvements could be made. Id. at 134.

A. Darrell Munn's Testimony Regarding the Diagnostic Team Recommendation Is Not "Reports, Surveys, Schedules, Lists, or Data" Compiled or Collected To Obtain § 130 Funding.

The protections afforded pursuant to § 409 apply to: "(1) reports, surveys, schedules, lists, or data; (2) compiled or collected; (3) for the purpose of identifying, evaluating, or planning the safety enhancement of . . . railway-highway crossings; (4) pursuant to 23 U.S.C. § 130." Palacios v. La. and Delta R.R., Inc., 740 So.2d 95, 99 (La. 1999). "[If] any of these four factors are absent, the protections afforded by Section 409 are inapplicable regardless of whether it is the defendant or plaintiff who wishes to use the documents." Burlington N. Santa Fe Ry. Co. v. Town of Vinton, 980 So.2d 152, 157 (La. Ct. App. 3d Cir. 2008). In analyzing the applicability of § 409, "the trial court must

first decide whether the *document* is within the proper scope of 23 U.S.C. § 409." Ducote v. Union Pac. R.R. Co., 4 So.3d 240, 245 (La. Ct. App. 3d Cir. 2009) (emphasis added). If the trial court determines that the document is not governed by 23 U.S.C. § 409, "the *document* itself is not privileged and is not subject to a protective order." Id. (emphasis added). The plain language of § 409 limits its application to certain *documents* that are compiled or collected for purposes set forth in §§ 130, 144, or 152 of the Federal Highway Act. Mr. Munn's testimony regarding the Diagnostic Team recommendation to install gates and flashing lights at the Honeyford Road did not constitute a report, survey, schedule, list, or data. Data is "facts from which to draw a conclusion." Black's Law Dictionary, 472 (4th ed. Rev. 1968). Given that the Diagnostic Team recommendation was not data compiled or collected, the trial court committed reversible error in excluding Mr. Munn's testimony.

B. CSX Did Not Satisfy Its Burden To Establish The Elements Necessary Under 23 U.S.C. § 409.

The Supreme Court established in Guillen that § 409 establishes an evidentiary privilege, and therefore, § 409 "must be construed narrowly because privileges impede the search for the truth." Guillen, 537 U.S. at 144-45. The "burden rests with the party asserting it to establish that the elements of Section 409 are met." Powers v. CSX Transp. Inc., 177 F. Supp. 2d 1276, 1282 (S.D. Ala. 2001). For § 409 to have any application to this case, and preclude the admissibility of the Diagnostic Team recommendation, CSX needed to produce evidence that documents were compiled or collected for the purpose of planning safety enhancements of the crossing pursuant to 23 U.S.C. § 130. CSX offered absolutely no evidence or testimony at trial which established the elements necessary to

invoke § 409, and cannot rely on argument from counsel to establish the necessary elements.

The facts here are similar to those in Bowman v. Norfolk S. Ry. Co., 66 F.3d 315, 1995 WL 550079 (4th Cir. 1995). In Bowman, the Plaintiff contended the trial court erred by admitting the testimony from Kenneth Nichols, a South Carolina Highway Department official, who had inspected the railroad crossing sixty days before Bowman's accident. Id. at 6. Nichols recorded his findings in a report that both parties acknowledged was inadmissible pursuant to 23 U.S.C. § 409. Id. The Fourth Circuit Court of Appeals found no error in South Carolina District Court Judge Joseph Anderson's decision to allow Nichols' testimony concerning his site inspection. Judge Anderson allowed Mr. Nichols to refresh his recollection from the report, even though the document itself was inadmissible pursuant to 23 U.S.C. § 409. Id. Because CSX failed to establish the evidence came within the confines of § 409, the trial court erred in failing to admit the Diagnostic Team recommendation for gates and flashing lights.

C. The Diagnostic Team's April 26, 2004 Recommendation to Install Gates and Flashing Lights at the Honeyford Road Crossing is Not a Subsequent Remedial Measure Since it Was Made A Month Prior to the May 30, 2004 Accident.

Rule 407, SCRE, does not preclude admission of the April 26, 2004 recommendation to install gates and flashing lights at the Honeyford Road crossing. Rule 407, SCRE, provides:

> When, *after an event*, measures are taken which, if taken previously, would have made the event less likely to occur, evidence of the subsequent measures is not admissible to prove negligence or culpable conduct in connection with the event. This rule does not require the exclusion of evidence of subsequent measures when offered for another purpose, such as proving ownership, control, or feasibility of precautionary measures, if controverted, or impeachment.

Id. (emphasis added). Subsequent remedial measures are not admissible to prove negligence or other culpable conduct, but may be admissible for another purpose. Taylor v. Nix, 307 S.C. 551, 558, 416 S.E.2d 619, 623 (1992). In addition to the exceptions set forth in Rule 407, SCRE, subsequent remedial measures may also "be admissible to show the defective condition existed at the time alleged." Id. (citing Eargle v. Sumter Lighting Co., 110 S.C. 560, 96 S.E. 909 (1918)).

Here, the Diagnostic Team recommended the installation of gates and flashing lights on April 26, 2004, over a month prior to the May 30, 2004 accident. While possibly precluding the admissibility of the subsequent installation of the gates and lights, Rule 407 does not retroactively govern the recommendation made prior to the May 30, 2004 accident. Moreover, the installation of the gates and flashing lights was not a subsequent remedial measure taken in response to the May 30, 2004 accident. Instead, the process was started on April 26, 2004 with the Diagnostic Team recommendation.

The subsequent installation of the gates and flashing lights was also admissible under the impeachment exception to Rule 407. CSX's defense throughout trial was that there was adequate sight distance for Ms. Harvey to see the approaching train on May 30, 2004, despite the overgrown vegetation not being cut in accordance with CSX's internal standard. The recommendation and subsequent installation of the gates and lights was admissible to impeach CSX's position, because sight distance was one factor the Diagnostic Team relied on in making its recommendation. (Munn Depo. R. p. 1337, line 4 – p. 1338, line 16). The trial court's exclusion of the Diagnostic Team's recommendation and subsequent installation was error which prejudiced Appellant. A new trial is warranted.

D. The Trial Court Abused Its Discretion in Excluding Darrell Munn's Testimony Regarding The Diagnostic Team's Recommendation Pursuant to Rule 403, SCRE, When CSX Did Not Object On Rule 403, SCRE, Grounds.

The trial court also excluded the Diagnostic Team recommendation pursuant to Rule 403, SCRE, as it was "more prejudicial than probative." (R. p. 876, lines 23-24). When specifically asked by the trial court what evidence rule precluded the Diagnostic Team recommendation, CSX did not contend it violated Rule 403, SCRE. Instead, CSX argued it was precluded by 23 U.S.C. § 409. (R. p. 867, lines 20-24). Rule 403, SCRE, provides that ". . . evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice. . . ." Id. "Unfair prejudice means an undue tendency to suggest decision on an improper basis." State v. Wiles, 383 S.C. 151, 158, 679 S.E.2d 172, 176 (2009). To be ruled inadmissible under Rule 403, SCRE, the probative value must be *substantially outweighed* by unfair prejudice. It is not enough that the evidence be "more prejudicial than probative" because most evidence offered into evidence against an opposing party is prejudicial to some degree, otherwise it would not be offered. CSX did not articulate any unfair prejudice pursuant to Rule 403 in seeking to preclude the admissibility of the Diagnostic Team recommendation.

While the admission or exclusion of evidence is within the trial judge's discretion, the decision should be reversed if the trial court abused that discretion. Conner v. City of Forest Acres, 363 S.C. 460, 467, 611 S.E.2d 905, 908 (2005) . "An abuse of discretion occurs when the ruling is based on an error of law or a factual conclusion without evidentiary support." Id. In this case, CSX did not object to the Diagnostic Team recommendation on 403 grounds, but instead, contended it was precluded by 23 U.S.C. § 409. (R. p. 867, lines 20-24). The trial court did not weigh the probative value against

any unfair prejudice, but instead found that the recommendation was merely "more prejudicial than probative." In excluding the Diagnostic Team's recommendation, the trial court abused its discretion.

The recommendation was relevant on the issue of sight distance and the ultra-hazardous nature of the crossing. The Diagnostic Team's April 26, 2004 site visit also confirmed Dr. Heathington's testimony that additional safety measures were needed at the Honeyford Road crossing. This error warrants a new trial.

II. THE APPELLANT IS ENTITLED TO A NEW TRIAL DUE TO NUMEROUS ERRORS CONCERNING THE REJECTION OF CRITCIAL EVIDENCE AT TRIAL AND FAILURE TO CHAGE S.C. CODE ANN. § 56-5-2715 IN ITS ENTIRETY.

Appellant contends that the trial court erred in numerous respects concerning the rejection of critical evidence during the trial. These errors of law prejudiced Appellant and her motion for new trial pursuant to Rule 59, SCRCP, should have been granted. Reversal is warranted.

A. The Trial Court Erred in Prohibiting Appellant from Arguing CSX's Exhibit 134 During Her Closing Argument When CSX Moved the Exhibit Into Evidence Without Objection.

The trial court committed reversible error by prohibiting Appellant from discussing Defendant's Exhibit 134[9] in her closing argument, when CSX introduced the exhibit and it was admitted into evidence without objection. Throughout the trial, the court excluded any evidence of post-accident cutting of the CSX right-of-way offered by Appellant on the basis that it constituted a subsequent remedial measure, thus inadmissible under Rule 407, SCRE. Defendant's Exhibit 134 was five pages of Gary Huett's handwritten notes from his scene inspection which was done prior to Mr. Huett

[9] CSX cross-examined Ken Heathington and Gary Huett using Exhibit 134. (R. p. 581, line 20 – p. 583, line 25; p. 840, lines 7-23).

creating an animation of the collision. (R. p. 1611). Mr. Huett's animation was admitted into evidence. (R. p. 1417). The day before closing arguments, the parties went through which exhibits would be admitted into evidence and which exhibits the other party objected to. The following exchange took place regarding Defendant's Exhibit 134 which CSX offered into evidence:

Mr. Wilby: . . . 134, I believe, is admitted without any objection, Your Honor?

The Court: Is that correct?

Mr. Parker: Correct, Your Honor.

(R. p. 1154, line 23 – p. 1155, line 1).

The court later asked for a list of exhibits admitted into evidence in the event objections took place during closing arguments about what was properly admitted, which counsel for CSX agreed to provide. (R. p. 1158, lines 5-16). During its closing argument, CSX took exception to and strongly criticized the "deceptive animation" Gary Huett created. (R. p. 1265, line 25 – p. 1266, line 3). CSX argued Mr. Huett was a member of team of experts brought in to justify how the accident happened, and to fix the problem that there was sufficient sight distance on May 30, 2004. (R. p. 1257, line 25 – p. 1258, line 4; p. 1265, lines 3-6). CSX also insinuated that Mr. Huett's notes contained information which he did not tell the jury on direct examination. (R. p. 1259, lines 2-14).

To rebut this attack, Appellant sought to use Exhibit 134 to explain that post-accident cutting of the CSX right-of-way necessitated Mr. Huett's reliance on poor quality photos taken shortly after the accident and photogrammetry[10] in order to create the animation. In order to recreate the accident scene for the animation, Mr. Huett

[10] Photogrammetry is the process used to determine the geometric properties of an object from two-dimensional photographs based on the height and elevation of other known points. (R. p. 514, line 9 – p. 515, line 21).

needed measurements of the trees and other vegetation along the track to accurately depict Frances' line of sight as it appeared on May 30, 2004. CSX, however, cut the trees and vegetation along its right-of-way shortly after the accident and prior to Mr. Huett's site visit. Mr. Huett would have been able to use more reference points in his animation but for CSX cutting the trees and other vegetation shortly after the accident. Once Appellant sought to use Exhibit 134 in her rebuttal argument, CSX immediately objected to any use of the document which it offered as evidence. (R. p. 1276, line 22 – p. 1277, line 16). After a sidebar, the trial court sustained CSX's objection and prohibited Appellant from commenting on or reading from Exhibit 134. (R. p. 1306, lines 10-14).

Appellant's counsel sought to object to the trial court sustaining CSX's objection at the conclusion of the rebuttal argument, but was instructed by the trial court to wait until the conclusion of the jury charge. (R. p. 1280, lines 3-10). At the conclusion of the jury charge, the court allowed Appellant to put her objection on the record regarding not being allowed to argue from Exhibit 134. (R. p. 1305, line18 – p. 1306, line 5). In noting Appellant's objection the court ruled:

> Thank you. We've ruled consistently through the trial that any subsequent - - whether it's remedial or whatever it is - - any subsequent cutting of the trees I was keeping out. I found it to be not relevant. I found it to violate 407 and 403, and when it was brought to our attention at the side bar during argument that document or exhibit in its entirety would have violated my prior rulings and that's the reason I precluded argument on it at that time. You're protected, Mr. Parker.

(R. p. 1306, lines 6-15).

Under South Carolina law, the trial court serves as the gatekeeper and decides as a matter of law whether evidence submitted by a party is admissible pursuant to the Rules of Evidence. Watson v. Ford Motor Co., 389 S.C. 434, 445, 699 S.E.2d 169, 174 (2010).

Once the evidence is properly admitted, "then it is exclusively within the jury's province to decide how much weight the evidence deserves." Id. at 445, 699 S.E.2d at 174-75. It is well established that in arguing the case to the jury, counsel is given considerable latitude in drawing and arguing inferences from evidence properly admitted during trial. Lesley v. Am. Sec. Ins. Co., 261 S.C. 178, 185, 199 S.E.2d 82, 85 (1973). Closing arguments must be confined to evidence in the record and reasonable inferences from the evidence. Johnson v. Life Ins. Co. of Ga., 227 S.C. 351, 369, 88 S.E.2d 260, 269 (1955). In this case, CSX offered Exhibit 134 and it was properly admitted without objection from Appellant. In sustaining CSX's objection to Appellant's use of Exhibit 134 in closing argument, the trial court improperly prohibited Appellant from arguing based on evidence in the record.

The trial court cannot sustain CSX's objection and prohibit argument from a document properly admitted on relevancy grounds or Rule 403 and 407, SCRE. In sustaining CSX's objection, the trial court noted Exhibit 134 in its entirety is not relevant, and violates Rule 403, and Rule 407. (R. p. 1306, lines 6-15). Relevancy, Rule 403, and Rule 407, are initial objections the party opposing the evidence must make prior to the evidence being admitted. The trial court must note these objections and decide as a matter of law whether the offered evidence is admissible under the Rules of Evidence. Watson, 389 S.C. at 445, 699 S.E.2d at 174-75. It is well established that "[t]he failure to make an objection at the time evidence is offered constitutes a waiver of the right to object." Cogdill v. Watson, 289 S.C. 531, 538, 347 S.E.2d 126, 129 (Ct. App. 1986) (citing McCreight v. MacDougall, 248 S.C. 222, 149 S.E.2d 621 (1966). In this case, CSX moved Exhibit 134 into evidence, and the trial court admitted the evidence, without

objection from Appellant. During Appellant's closing argument, CSX then objected to Exhibit 134, contending portions were irrelevant and violated Rules 403 and Rule 407. CSX cannot move into evidence, without limitation, an exhibit that contains favorable portions while later objecting to any prejudicial portions. Once CSX moved Exhibit 134 into evidence it became equally available to both parties and it cannot later object to portions that may violate Rules 403 or 407 as they were waived.

The case of Greenville County v. Stover, 198 S.C. 240, 17 S.E.2d 535 (1941), is controlling here. Stover involved an action brought by Greenville County against County Attorney Dakyns Stover for the recovery of $3,000. Id at 536. At trial, Greenville County introduced the entire record from two prior proceedings before the Honorable T.S. Sease where he ordered Greenville County Supervisor, Board of County Commissioners, and County Treasurer to pay Stover $3,000. Id. The trial court's order was later declared invalid. Id. Stover moved for a directed verdict and contended the record introduced by Greenville County proved his cause of action that he did not owe $3,000, which warranted a directed verdict. Id. at 537. The Court noted that Greenville County "[i]n introducing this record, which was done without objection on the part of appellant [Stover], the respondent did not undertake to limit the purpose of its introduction . . . ." Id. 536-37. In reversing and holding the trial court should have granted Stover a directed verdict, the Court ruled:

> Of course, the appellant [Stover] could not, had it been objected to, have introduced the entire record in the proceeding before Judge Sease, but as hereinbefore stated the record of the entire proceeding was introduced in evidence by respondent without qualification or restriction, and must therefore be treated as admitted generally, and was available to either party to the action.

Id at 537.

CSX may have been able to preclude admission of Exhibit 134 with a timely objection if offered by Appellant. Here, however, as in Stover, CSX introduced Exhibit 134 into evidence without limitation. Once admitted generally, it became equally available to both parties. See Bennett v. Floyd, 237 S.C. 64, 72, 115 S.E.2d 659, 663 (1960) ("Under these circumstances, it must be treated as admitted generally, as applicable to any issue it tended to prove, and the contents thereof available to either party to this action."). The trial court's limitation of Appellant's closing argument regarding Exhibit 134 prejudiced Appellant, and warrants a new trial.

B. The Trial Court Erred By Excluding Evidence of Post-Accident Cutting of the CSX Right-of-Way to Impeach The Testimony of CSX Engineer, Jack Cowan, That the Vegetation Had Always Been Cut.

CSX Engineer, Jack Cowan testified he traversed the Honeyford Road crossing by rail off and on during his 40-year career but during the last 18-years he traveled the crossing more regularly. (R. p. 943, line 19). On cross-examination, Mr. Cowan testified that CSX has always cut the vegetation at its crossings. (R. p. 954, line 16 – p. 955, line 16). In rebuttal, Appellant sought to impeach Mr. Cowan's testimony that the crossing had always been cut with a picture taken on November 13, 2009 by Don Crews of the Honeyford Road crossing.[11] (R. p. 1088, line 22 – p. 1089, line 2; p. 1105, line 14 – p. 1106, line 15; R. p. 1380). Exhibit 32-A showed vegetation cleared in accordance with CSX's crossing clearing program and the additional sight distance in the southeast quadrant of the Honeyford Road crossing. This would have allowed the jury to compare a photo with the vegetation cut in accordance with CSX's crossing clearing program to the vegetation at Honeyford Road on May 30, 2004.

[11] Exhibit 32-A did not show the gates and lights installed at the Honeyford Road crossing after May 30, 2004.

In prohibiting Appellant from introducing Exhibit 32-A the trial court sustained CSX's objection and excluded Exhibit 32-A as a subsequent remedial measure under Rule 407, SCRE:

> I find that 32-A, number one, as we've said I've tried to try this case - - I've attempted to try this case based on what happened the day in question. It could be deemed and I think it probably is stretching of the 407 subsequent remedial measure. It is also cumulative under 403, and it's also more prejudicial than probative under 403. I sustain your objection.

(R. p. 1089, lines 19-25). While Rule 407, SCRE, prohibits evidence of subsequent remedial measures when used to prove negligence or other culpable conduct, it does not serve as a blanket prohibition to exclude all subsequent conduct. As the Court noted in Webb, Rule 407 "permits admission of subsequent remedial measures only when necessary to demonstrate such things as ownership, control, impeachment, or feasibility of precautionary measures, if contested." Webb v. CSX Transp., Inc., 364 S.C. 639, 653, 615 S.E.2d 440, 448 (2005).

Based on the plain language of Rule 407, SCRE, and the ruling in Webb, Appellant's purpose for admitting this evidence was not only entirely proper but also admissible as an exception to Rule 407, SCRE. The exhibit was relevant to impeach Mr. Cowan's testimony that the right-of-way had always been cut, and the jury should have been allowed to consider Exhibit 32-A to compare the trees and vegetation cut in accordance with CSX's crossing clearing program to the overgrown vegetation as it appeared on May 30, 2004.

The trial court also sustained CSX's objection to Exhibit 32-A on Rule 403, SCRE, as it was cumulative and more prejudicial than probative. Exhibit 32-A cannot be deemed cumulative and therefore excluded under Rule 403. While witnesses testified

regarding the available sight distance around May 30, 2004, the trial court prohibited any testimony or evidence regarding the additional sight distance available after the vegetation was cut in accordance with the crossing clearing program's specifications. Also, while the trial court has discretion to weigh evidence pursuant to Rule 403, such decision may be reversed if the decision resulted in prejudice. Here, the trial court noted early on and throughout the trial that the case would be tried based on the scene as it appeared around May 30, 2004. In essence, no subsequent cutting of the vegetation or installation of the gates and lights would be admitted into evidence. Exhibit 32-A was admissible as an exception to Rule 407, SCRE, to impeach Mr. Cowan's testimony that the right-of-way had always been cut. The trial court's blanket prohibition against subsequent conduct, despite its admissibility under Rule 407, greatly prejudiced Appellant. This blanket prohibition, including the exclusion of Exhibit 32-A, warrants a new trial.

C. The Trial Court Erred in Failing to Charge S.C. Code Ann. § 56-5-2715 In Its Entirety When the Honeyford Road Crossing Had Been Designated A Particularly Dangerous Crossing.

The duties of a motorist to stop at railroad-grade crossings are found in S.C. Code Ann. § 56-5-2715. Section 2715 furthermore dictates which grade crossings are designated as requiring stop signs. Section 2715 states as follows:

> The Department of Transportation, and local authorities with the approval of the Department of Transportation, *may designate particularly dangerous highway grade crossings of railroads and erect stop signs threat.* When such signs are erected, the driver of any vehicle shall stop within fifty feet, but not less than fifteen feet, from the nearest rail of the railroad and shall proceed only upon exercising due care.

Id. (emphasis added). There is no dispute that this statute applies to the Honeyford Road crossing. Despite the clear application of § 56-5-2715, the trial court failed and refused to charge the statute in its entirety, specifically excluding the language which identified the Honeyford Road crossing designated as a "particularly dangerous highway grade crossing."

With regard to S.C. Code Ann. § 56-5-2715, trial court charged as follows:

> I further charge you in our state that we have a statute 56-5-2715 that says if stop signs are erected a crossing when such signs are erected the driver of any vehicle shall stop within 50 feet, but not less than 15 feet from the nearest rail of the railroad and shall proceed only upon exercising due care.

(R. p. 1292, lines 17-22). Counsel for the Appellant made appropriate objections during the charge conference and after the jury was charged by the court. (R. p. 1176, lines 14-15; p. 1305, lines 6-15).

"A trial court must charge the current and correct law." Wells v. Halyard, 341 S.C. 234, 237, 533 S.E.2d 341, 343 (Ct. App. 2000). 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. In reviewing a jury charge for alleged error, an appellate court must consider the charge as a whole in light of the evidence and issues presented at trial. Id. "Ordinarily, a trial [court] has a duty to give a requested instruction that correctly states the law applicable to the issues and evidence." Fernanders v. Marks Constr. of S.C., Inc., 330 S.C. 470, 473, 499 S.E.2d 509, 510 (Ct. App. 1998).

Here, the trial court erred by failing to give the Appellant's requested instruction that correctly stated the law applicable to the issues and evidence presented at trial. The requested charge was current, accurate, and applicable to the Honeyford Road Crossing. Furthermore, by installing a stop sign SCDOT designated the Honeyford Road crossing as particularly dangerous. In light of the evidence and issues at trial –whether CSX's vegetation maintenance at the crossing was adequate and whether Frances Harvey drove with due care at this particular crossing – the designation of the Honeyford Road crossing as "particularly dangerous" was directly relevant to the issues and should have been charged.

Pursuant to § 56-5-2715, Frances Harvey's duties as she approached the crossing were to stop her vehicle "within fifty feet, but not less than fifteen feet, from the nearest rail of the railroad" and to "proceed only upon exercising due care." By failing to charge the entire statute, the Court unnecessarily shielded from the jury the fact prior to this accident SCDOT designated this crossing as particularly dangerous.[12] This designation is significant because such designation directly impacted the duties of CSX in the maintenance of the vegetation at Honeyford Road. By charging only the duties of the driver, the actual duties of CSX in maintaining the crossing in a reasonably safe condition are diminished, while the duties of the driver are inflated. Due to the error, the Appellant was prejudiced and a new trial is warranted.

D. The Trial Court Erred in Excluding Plaintiff's Exhibit 105, Which Showed The Crossing Was Cut on July 19, 2004, To Impeach CSX's Position That The Sight Distance on May 30, 2004 Was Adequate.

[12] Taken together with Issue I, *supra*, SCDOT designated this crossing as particularly dangerous, and also later recommended the installation of gates and flashing lights. The trial court excluded both from the jury.

The trial court erred in excluding Plaintiff's Exhibit 105, which showed that CSX cut the vegetation along its right-of-way at the Honeyford Road crossing on July 19, 2004. Appellant sought to offer Exhibit 105 to impeach CSX's position regarding available sight distance and that the vegetation did not need to be cut. (R. p. 626, line 15 – p. 627, line 3). The trial court sustained CSX's objection and excluded Exhibit 105 pursuant to Rule 407 as a subsequent remedial measure. (R. p. 627, lines 4-10).

As discussed above, Rule 407 excludes evidence of subsequent remedial measures when offered to proved negligence or culpable conduct. Taylor v. Nix, 307 S.C. 551, 558, 416 S.E.2d 619, 623 (1992). However, impeachment is an exception to the general rule excluding subsequent remedial measures. Rule 407, SCRE. Throughout the trial, CSX contended the available sight distance on May 30, 2004 was adequate. Exhibit 105 impeached this position because the vegetation would not have been cut unless additional sight distance was needed.

III. APPELLANT IS ENTITLED TO A NEW TRIAL ABSOLUTE, OR ALTERNATIVELY NEW TRIAL *NISI ADDITUR*, DUE TO NUMEROUS ERRORS CONCERNING THE IMPUTATION OF NEGLIGENCE TOWARDS THE SURVIVAL ACTION, ALLOWANCE OF AN INCONSISTENT VERDICT, AND IMPROPER INSTRUCTIONS TO THE JURY CONCERNING THE AWARD OF SURVIVAL ACTION DAMAGES.

The Appellant is entitled to a new trial absolute or new trial *nisi additur* because the trial court allowed the negligence of Frances Harvey to be imputed to the recovery of survival action damages by the next class of beneficiaries, siblings who were faultless. The trial court also erred by improperly instructing the jury in response to a jury question as to proper standard for the award of damages under the survival cause of action. Finally, the trial court erred in entering an inconsistent verdict for zero damages

conscious pain and suffering when the record was only susceptible of the inference or conclusion that in fact some amount of damages should be awarded.

A. The Trial Court Erred in Allowing the Jury to Impute Frances Harvey's Negligence to the Survival Action When One-Half of the Survival Action Had Passed by Intestacy to the Innocent Siblings of Beryl Harvey.

Actual damages in a survival action are awarded for the benefit of the decedent's estate. Welch v. Epstein, 342 S.C. 279, 536 S.E.2d 408 (Ct. App. 2000). "Appropriate damages in survival actions include those for medical, surgical, and hospital bills, conscious pain, suffering, and mental distress of the deceased." Scott v. Porter, 340 S.C. 158, 170, 530 S.E.2d 389, 395 (Ct. App. 2000). Unlike actual damages in a wrongful death action, actual damages in a survival action are awarded for the benefit of the decedent's estate rather than for the family. Id.

In this matter, the wrongful death beneficiaries for the death of Beryl Harvey were his surviving parents, Frances Harvey and Charles Harvey. Because Charles Harvey died prior to the trial of this matter, his rights and damages as a wrongful death beneficiary abated upon his death. Rushton v. Smith, 233 S.C. 292, 296, 104 S.E.2d 376, 378 (1958). As to the damages and rights of Frances Harvey as a wrongful death beneficiary, she could only recover for such damages if her own negligence was fifty percent (50%) or less than that of CSX under the comparative negligence framework. The jury found her negligence to be 60% and Frances Harvey was therefore precluded from the recovery of her own wrongful death damages. Due to the abatement of Charles Harvey's damages and rights as a wrongful death beneficiary, his wrongful death damages were extinguished.

However, this analysis does not apply to the survival action because under S.C. Code Ann. §§ 62-2-101, *et seq.* Charles Harvey's portion passes to his heirs. Thus, Frances Harvey's share of the survival action was 50% and her own negligence precluded her receipt of damages through her share. However, Charles Harvey's 50% share of the Estate of Beryl Harvey statutorily passed through to the next class of beneficiaries under the laws of intestate distribution. It is unconvtroverted that no action on their part could be effected by any theory of comparative negligence.

Throughout the trial of this matter Appellant argued that as to this remaining 50% of the survival action, no amount of Frances Harvey's negligence could be imputed and Appellant proposed procedural protections which were denied. (R. pp. 1107-1120.) During the trial the court decided to bifurcate the actual damages and punitive damages portions of the case. Appellant advocated for the survival action to be addressed separately in order to shield the 50% survival share of the siblings from any imputation of negligence. (Id.) The verdict form was in fact altered due to the Appellant's objections (R. pp. 1297-1303). However, ultimately in its charge to the jury, the court failed to charge that the jury could not impute the negligence of Frances Harvey to part of the survival action, as the court acknowledged it would address the issue from a post-trial standpoint if necessary. (R. p. 1297-1303).

As addressed further in section B, below, this error resulted in prejudice to the Appellant and an inconsistent verdict of "zero damages" for the survival action. A new trial absolute or new trial *nisi additur* is required.

B. A New Trial Absolute, or Alternatively *Nisi Additur*, is Required Because the Jury's Award of Zero Dollars ($0) for the Survival Action is a Facially Inconsistent Verdict and the Trial Court Failed to

Remedy the Inconsistency Instructing the Jury That it Was Required to Award Some Amount of Damages on the Survival Action.

The evidence at the trial of this case proved conclusively that Beryl Harvey suffered conscious pain and suffering prior to his death. (R. p. 271, lines 5-24; p. 290, line 12 – p. 291, line 7; p. 306, line 22 – p. 307, line 7). The sole conclusion to be drawn from the evidence was that if CSX was found to be a contributing proximate cause of the collision, the jury was required to award some amount of damages for Beryl's conscious pain and suffering. In fact, the jury found that CSX was negligent (40%) and found for the Plaintiff on the survival action. However, the jury awarded $0.00 damages. (R. p. 6).

It is clear under South Carolina law that a "verdict finding the defendant liable but awarding zero damages [is] inconsistent or incomplete." Stevens v. Allen, 342 S.C. 47, 50, 536 S.E.2d 663, 664 (2000). South Carolina law does not allow such an inconsistent verdict to be construed as an indication that the jury found that the plaintiff failed to prove damages. Id. If, in fact, a jury believes the plaintiff has failed to prove any damages, "then its verdict should [be] for the defendants." Id. Moreover, under South Carolina law where there is no evidence of conscious pain and suffering in a survival action, the defendant is entitled to a directed verdict. Id. (citing Camp v. Petroleum Carrier Corp., 204 S.C. 133, 28 S.E.2d 683 (1944)). Accordingly, if the jury found that Beryl Harvey suffered no conscious pain and suffering prior to his death, then, rather than finding CSX liable on the survival cause of action and awarding "zero damages," the jury should have returned a verdict for the defense. See Stevens, 342 S.C. 47, 50, 536 S.E.2d 663, 664 (2000).

The jury found Frances Harvey sixty percent (60%) negligent and CSXT forty percent (40%) negligent for the collision. After allocating the percentages of negligence

to both CSX and the Plaintiff, the jury submitted a question to the court and asked if it had to award damages on the survival action claim if it concluded that CSX's negligence caused the collision. The trial court published the question:

> The question was: If we answer yes to number six, do we have to have to award any amount of number eight? Number eight being, of course, conscious pain – survival action.

(R. p. 1318, lines 8-11). The trial court answered the jury as follows:

> The answer is yes, if you find Beryl Harvey suffered conscious pain and suffering; no, if you find that Beryl Harvey did not suffer any conscious pain and suffering.

(R. p. 1318, lines11-14). Counsel for the Appellant made a contemporaneous objection to the Court's response to the jury, noting that the bills for the funeral, monument, and EMS bills would be survival damages. (R. p. 1318, lines 15-18). The court noted the objection and instructed that "if they come back with a zero amount, I will consider post-trial amendment if that be the case." (R. p. 1318, lines 21-23).

In its argument on Appellant's post-trial motion, CSX cite the case of Stevens, supra, for the proposition that the Appellant was required to object again to the jury's verdict and move to resubmit the case to the jury on the issue of damages. To conclude such requires a misreading of and misapplication of Stevens to the facts at hand. In Stevens, the jury returned a verdict which found both the plaintiff and the defendant to be 50% negligent, but award the plaintiff "zero damages." Id. at 48, 536 S.E.2d at 663. Stevens requested that the trial court resubmit the case to the jury on the issue of damages as a result of the inconsistent verdict and the trial court denied the request. Id. The Supreme Court held that the trial judge should have resubmitted the issue of damages. Id.

Here, on its own initiative the jury asked the trial court whether it was required to award damages for the survival action claim in light of its finding of CSX's negligence. Appellant's counsel timely objected to the court's erroneous response to the jury question, as noted above. The trial court noted the objection and ensured the parties that the court would address the issue appropriately at the post trial stage. Appellant's timely objection is a "request" as contemplated by the Stevens decision. Such request was timely and under Stevens, the Court was required to resubmit the damages to the jury or to award new trial *nisi additur*.

In light of the evidence at trial, the court erred in addressing the viability of Beryl Harvey's claim for conscious pain and suffering, the trial court should have granted either a new trial *nisi additur* or a new trial absolute to correct the inconsistency of the verdict.

CONCLUSION

Based upon the foregoing, the trial court erred denying Appellant's motion for new trial, or in the alternative, new trial *nisi additur*. The trial court excluded critical evidence throughout trial regarding the Diagnostic Team recommendation, Defendant's Exhibit 134, and Plaintiff's Exhibit 32-A which would have impeached Jack Cowan's testimony. The trial court also erred in failing to properly instruct the jury regarding the damages warranted on the survival action based on the undisputed testimony at trial. For the reasons set forth above, reversal is warranted.

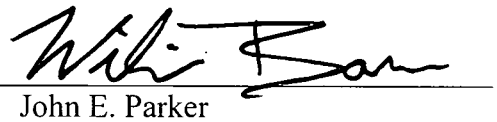
Respectfully submitted,

J. Christopher Wilson
WILSON, LUGINBILL & KIRKLAND, L.L.C.
Post Office Box 1150
Bamberg, SC 29003
Phone: (803) 245-7799

-And-

PETERS, MURDAUGH, PARKER, ELTZROTH
& DETRICK, P.A.

May 27, 2011
Hampton, SC

BY: 

John E. Parker
R. Alexander Murdaugh
William F. Barnes, III
Matthew V. Creech
101 Mulberry Street, East
Post Office Box 457
Hampton, SC 29924
Phone: (803) 943-2111
ATTORNEYS FOR APPELLANT

IN THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM BAMBERG COUNTY
Court of Common Pleas
Doyet A. Early, III, Circuit Court Judge

Case No.: 2006-CP-05-00034

Connie Carson as Personal Representative
of the Estate of Beryl Harvey, ... Appellant,

-v-

CSX Transportation, Inc., ... Respondent.

Case No.: 2006-CP-05-00107

Connie Carson as Personal Representative
of the Estate of Beryl Harvey, ... Appellant,

-v-

CSX Transportation, Inc., ... Respondent.

CERTIFICATE OF COUNSEL

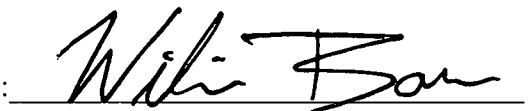
The undersigned certified that this final Brief of Appellant complies with Rule 211(b) of the SCACR.

J. Christopher Wilson
WILSON, LUGINBILL & KIRKLAND, L.L.C.
Post Office Box 1150
Bamberg, SC 29003
Phone: (803) 245-7799

-And-

PETERS, MURDAUGH, PARKER, ELTZROTH
& DETRICK, P.A.

May 27, 2011
Hampton, SC

BY: 

John E. Parker
R. Alexander Murdaugh
William F. Barnes, III
Matthew V. Creech
101 Mulberry Street, East
Post Office Box 457
Hampton, SC 29924
Phone: (803) 943-2111
ATTORNEYS FOR APPELLANT

IN THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM BAMBERG COUNTY
Court of Common Pleas
Doyet A. Early, III, Circuit Court Judge

Case No.: 2006-CP-05-00034

Connie Carson as Personal Representative
of the Estate of Beryl Harvey, ... Appellant,

-v-

CSX Transportation, Inc., ... Respondent.

Case No.: 2006-CP-05-00107

Connie Carson as Personal Representative
of the Estate of Beryl Harvey, ... Appellant,

-v-

CSX Transportation, Inc., ... Respondent.

PROOF OF SERVICE

This is to certify that I, *Donna L. Mann*, legal assistant with the Law Firm of Peters, Murdaugh, Parker, Eltzroth & Detrick, P.A., Attorneys for the Appellant, have this date mailed via the U.S. Postal Service with first class postage prepaid, a true and correct copy of the within **BRIEF OF APPELLANT** to:

Mark C. Wilby, Esquire
Elizabeth A. McLeod, Esquire
Fulcher Hagler, LLP
Post Office Box 1477
Augusta, GA 30903-1477

-And-

John C. Millberg, Esquire
Millberg, Gordon & Stewart, P.L.L.C.
1101 Haynes Street
Suite 104
Raleigh, NC 27604

ATTORNEYS FOR RESPONDENT
CSX TRANSPORTATION, INC.

May 31, 2011
Hampton, SC

Donna L. Mann