

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

2006-CP-05-00034

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

v.

CSX Transportation, Inc.,

Respondent.

2006-CP-05-00107

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

v.

CSX Transportation, Inc.,

Respondent.

FINAL BRIEF OF RESPONDENT,  
CSX TRANSPORTATION, INC.

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SC Court of Appeals

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## STATEMENT OF ISSUES ON APPEAL

I. Whether the trial court acted properly in excluding a South Carolina Department of Transportation (“SCDOT”) diagnostic team’s April 26, 2004 recommendation to install gates/lights at the subject crossing pursuant to 23 U.S.C. § 409 where such recommendation was generated “for the purpose of identifying[,] evaluating, or planning the safety enhancement of . . . [the Honeyford] railway-highway crossing[,] pursuant to sections 130, 144, and 148 of this title [23 USCS §§ 130, 144, and 148]” and “for the purpose of developing [a] highway safety construction improvement project which may be implemented utilizing Federal-aid highway funds. . . .” 23 U.S.C. § 409.

II. Whether the trial court properly excluded the April 26, 2004 recommendation pursuant to Rules 403 and 407, SCRE, because it was unduly prejudicial, misleading, and confusing to the jury and where introducing such evidence would have been tantamount to informing the jury of subsequent remedial measures.

III. Whether the trial court properly excluded evidence of post-accident cutting of vegetation and the installation of gates/lights at the crossing pursuant to Rules 403 and 407, SCRE, where Respondent did not “open the door” to such evidence by contesting ownership, control, feasibility, or any other comparable issue.

IV. Whether the trial court properly refused to charge the jury that the presence of stop signs at the crossing reflected a SCDOT finding that the crossing was “particularly dangerous” under S.C. Code Ann. § 56-5-2715, when such a charge would have been confusing, misleading, and erroneous given that it was the jury’s sole province to determine whether the crossing was reasonably safe.

V. Whether the trial court properly refused to allow Appellant’s counsel to refer to a portion of Exhibit 134 during closing argument which was never admitted as evidence during the trial and which the trial court concluded was subject to exclusion under Rules 401, 403, and 407, SCRE.

VI. Whether the trial court’s instructions on Appellant’s survival claims were erroneous and whether Appellant waived all objections to the trial court’s jury instructions and to the jury’s subsequent “zero damages” verdict on Appellant’s survival claims where Plaintiff allowed the jury to be discharged without objection in hopes of securing a new trial before a different jury.

### **STATEMENT OF THE CASE**

Appellant filed suit against Respondent CSX Transportation, Inc. (“CSXT”) as a result of a collision at a railroad grade crossing in Denmark, South Carolina. At approximately 7:05 p.m. on May 30, 2004, Frances Harvey (“Frances”) drove her van directly into the path of an oncoming CSXT freight train at a railroad grade crossing on Honeyford Road in Denmark. During the collision that followed, Beryl Harvey (“Beryl”), Frances’s adult son, was killed. Appellant, the personal representative of

Beryl's estate, brought the captioned wrongful death and survival actions, which were consolidated and tried from November 9, 2009 until November 17, 2009.

At trial, Appellant contended that CSXT negligently and recklessly allowed vegetation to obstruct Frances's view of the oncoming train. (See, e.g., R. p. 1187, lines 2-21) Appellant also contended that the train crew negligently failed to maintain a proper lookout and to blow the train's horn in accord with S.C. Code Ann. § 58-15-910. (R. p. 1186, lines 16-21) As a result, Appellant contended that Frances could neither see nor hear the train. (R. p. 675, line 22 – p. 676, line 4 and p. 684, lines 5-6)

At the time of the accident, the Honeyford crossing was equipped with stop signs, a stop line, crossbucks, and a large "X" painted on the roadway. (R. p. 502, lines 4-18 and p. 504, line 22 – p. 505, line 19) According to Frances, upon reaching the crossing, she stopped on the stop line, "looked down the railroad track on my left, and then [ ] turned and [ ] looked down the right and turned back around." (R. p. 675, line 22 – p. 676, line 4) This is the "last thing" that Frances remembers—she does not recall approaching the crossing or going over the tracks. (R. p. 683, line 24 – p. 684, line 9)

Engineer trainee Michael Stephens ("Stephens") operated the locomotive involved in the accident. Jack Cowan ("Cowan"), the senior engineer, and Jimmy Bonner ("Bonner"), a veteran conductor, also were onboard the locomotive. As the train approached, Stephens and Cowan, keeping a proper lookout, noticed a tan van moving toward the crossing. (R. p. 944, lines 7-9; p. 1064, lines 5-14 and p. 1083, lines 2-9) According to Stephens, the van stopped momentarily at the stop sign, then rolled up onto the crossing and stopped. (R. p. 1064, lines 5-14; p. 1083, lines 2-9 and p. 1084, lines 4-20) When Bonner first saw the van, it was stopped squarely on the tracks in front of the

locomotive. (R. p. 1049, lines 21-25) Yet, as noted above, Frances contends she never saw or heard the train. (R. p. 684, lines 3-6)

Within a few days of the accident, Don Crews (“Crews”), an investigator who has worked for Plaintiff’s law firm for more than 25 years (R. p. 644, lines 14-17), took photographs of the scene and recorded a number of measurements (R. p. 628, line 13 – p. 637, line 5) which belie Appellant’s claim that vegetation obstructed Frances’s view of the approaching train. First, Crews measured the distance from the front bumper of Frances’s van to the driver’s seat, which he recorded at 72 inches. (R. p. 646, line 20 – p. 647, line 1) He then took a number of photographs of the scene from 70 inches behind the stop line. (R. p. 652, line 19 – p. 654, line 20) Crews intended for these photographs to correspond to Frances’s position had she stopped with the front of her bumper at the stop line. (R. p. 654, lines 21-24) These photographs demonstrate that a driver located in this position had an unobstructed view of at least 1,014 feet down the tracks at the time of the accident. (R. p. 651, line 20 – p. 652, line 1)

The parties stipulated at trial that Crews’s photographs fairly and accurately portrayed how the scene looked at the time of the accident. (R. p. 248, lines 18-24) In addition, virtually every witness who testified at trial about the condition of the crossing affirmed the accuracy of the photographs. (R. p. 262, lines 15-22; p. 263, lines 18-21; p. 276, lines 14-18; p. 277, line 24 – p. 278, line 4; p. 302, lines 18-25; p. 319, lines 6-14; p. 410, lines 18-22; p. 922, lines 2-11; p. 1026, line 20 – p. 1027, line 5; p. 1031, lines 11-19; and p. 1036, lines 11-15) Perhaps more importantly, two veteran South Carolina Highway Patrolmen, Sergeant Richard S. Whatley (“Whatley”) and Corporal Joseph J. Cruz (“Cruz”) investigated the accident. Following his investigation, Sergeant Whatley reported no sight obstructions. (R. p. 992, line 23 – p. 994, line 25) Similarly, Corporal

Cruz, who received training in accident reconstruction and as a military sniper, estimated that a driver had over 1,320 feet of sight distance from four paces behind the stop line.

(R. p. 912, line 19 – p. 918, line 17)

Although CSXT conceded that the train crew did not begin blowing the horn at 1,500 feet as required by the letter of S.C. Code Ann. § 58-15-910, the crew did begin blowing the horn more than 1,400 feet from the crossing, and witnesses heard the engineer “sitting on the horn” as the train approached the crossing. (R. p. 283, line 9 – p. 285, line 4; p. 880, line 8 – p. 881, line 1) All three crew members testified that Stephens began blowing the horn at the whistle post as required by CSXT operating rules and blew in the manner required by those rules. (R. p. 944, lines 2-6; p. 1047, lines 14-25; and p. 1064, lines 5-19)

Of particular note, Bennie Spell (“Spell”), an independent eyewitness to the accident, was approaching the Honeyford Road crossing at the same time as Frances, but from the opposite direction. (R. p. 280, line 25 – p. 283, line 10) While advancing toward the crossing, Spell heard the train horn blow two times. When he heard the train’s horn, he stopped some distance short of the crossing and then heard the engineer go wide open on the horn. (R. p. 283, line 12 – p. 284, line 4) The horn was very loud. (R. p. 293, lines 1-2) The horn blew continuously and uninterrupted for almost six seconds prior to impact; yet, Frances Harvey claims she never heard it. (R. p. 684. lines 3-4)

At the conclusion of the trial, the jury rendered a special verdict, finding Frances and CSXT to be 60% and 40% at fault for the accident, respectively. (Verdict Form) This fault allocation gave rise to a defense verdict on Appellant’s wrongful death claims and a “zero damages” verdict on the survival claims. (*Id.*) Despite an invitation from the trial court, Appellant allowed the jury to be discharged without objection following the

publication of the verdict. (R. p. 1321, line 17 – p. 1323, line 2) Appellant then filed motions for judgment notwithstanding the verdict (“JNOV”), new trial, and new trial *nisi additur*. The trial court denied each of those motions, and Appellant filed the instant appeal on February 12, 2010.

## ARGUMENT

### **A. The Trial Court Properly Excluded the SCDOT Diagnostic Team’s April 26, 2004 Recommendation to Install Gates/Lights at the Crossing.**

#### **1. The April 2004 Diagnostic Review**

In late April 2004, roughly one month before the decedent’s accident on May 30, 2004, the SCDOT sent a diagnostic review team, headed by Rail Safety and Research Engineer Darrell Munn, to evaluate the Honeyford Road crossing. (R. p. 1331, line 22 – p. 1332, line 15) On April 26, 2004,<sup>1</sup> following a site inspection, the diagnostic team recommended that gates/lights be installed at the crossing using federal funds pursuant to 23 U.S.C. § 130. (R. p. 1333, lines 1-7) In reaching this determination, the SCDOT diagnostic team utilized an internal SCDOT “priority list” which ranks every crossing in the State; each year, the SCDOT requests federal funds pursuant to § 130 (the “130 Program”) to upgrade the top crossings on the list. (R. p. 1333, line 11 – p. 1334, line 19; p. 1348, line 18 – p. 1350, line 3; see also R. p. 867, lines 1-11; cf. 23 U.S.C. § 130(d) & (g))

In ranking the State’s crossings, the SCDOT uses an equation—an “accident prediction formula”—which takes into account various data collected by the SCDOT, including: the accident history at each crossing, the volume of rail and vehicular traffic at

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<sup>1</sup>Appellant mistakenly dates the recommendation April 24, 2004 throughout her brief. In actuality, the diagnostic team’s recommendation was dated April 26th. (R. p. 1333)

each crossing, and train speed at each crossing. (R. p. 1333, line 20 – p. 1334, line 2; p. 1337, line 4 – p. 1338, line 11; p. 1341, line 6 – p. 1342, line 12; and p. 1348, line 14 – p. 1350, line 13) The SCDOT compiles all of this data, including the priority list, for the sole purpose of participation in the federal “rail highway safety program.” (R. p. 1342, lines 5-12) As Mr. Munn explained during his deposition, the diagnostic team’s decision to recommend the use of § 130 funds to upgrade the Honeyford crossing was driven largely by the priority ranking, which reflected SCDOT data regarding the characteristics and history of every crossing in the State. (R. p. 1341, lines 9-12 (“Well, first of all, we have the ranking that I mentioned and that determines a lot of what we do [in deciding whether to recommend upgrades], where a crossing, you know, ranks relative to the other crossings in the state.”))

At trial, Appellant sought to admit evidence of “the recommendation or the decision to install gates and lights.” (R. p. 866, line 24 – p. 877, line 3) The trial court excluded this evidence pursuant to 23 U.S.C. § 409 and Rules 403 and 407, SCRE. For the reasons explained below, the trial court’s rulings reflect both the proper application of § 409 and a valid exercise of the court’s discretion under Rules 403 and 407.

## **2. 23 U.S.C. § 409 Rendered the April 2004 Review Inadmissible.**

In its entirety, § 409 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 148 of this title [23 U.S.C. §§ 130, 144, and 148]<sup>2</sup>

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<sup>2</sup>In 2005, Congress updated § 409 by striking a prior reference to 23 U.S.C. § 152 and replacing it with a reference to 23 U.S.C. § 148. This minor change in the statutory text is irrelevant to this appeal, which concerns § 409’s application to materials generated for 23 U.S.C. § 130 purposes. Regardless, the statute also broadly covers any report generated “for the purpose of developing any highway safety construction improvement project which may be implemented utilizing Federal-aid highway funds.” 23 U.S.C. § 409.

or for the purpose of developing any highway safety construction improvement project which may be 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. Here, Appellant concedes that § 409 rendered inadmissible the data upon which Mr. Munn and his diagnostic team relied in forming their April 2004 recommendation, but nevertheless contends that Mr. Munn's testimony regarding the team's actual recommendation is admissible because: (1) § 409 applies only to documents (Appellants Br. at 13); and (2) § 409 applies only to raw "data" or pure facts and not to conclusions drawn from such data (*id.* at 13).

Appellant is wrong on both counts. First, the statute's reference to "reports" generated for the purpose of "identifying, evaluating, or planning" safety enhancements plainly encompasses more than raw data or purely factual information.<sup>3</sup> Evaluations and plans by their very nature extend beyond bare facts to include the conclusions and opinions of the author: As a result, "[t]he exclusion of discovery and evidence mandated by section 409 encompasses more than just simple factual information. It also includes

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<sup>3</sup>In this regard, Appellant mistakenly relies upon *Pierce County v. Guillen*, 537 U.S. 129 (2003), for the proposition that § 409 "protects only data collected specifically for 23 U.S.C. § 152 purposes." (Appellant's Br. at 12.) The *Guillen* Court did not address the matter at issue in the case *sub judice*—the application of § 409 to evaluations and opinions drawn from data collected for 23 U.S.C. § 130 purposes. Faced only with addressing the scope of § 409's (pre-2005) reference to § 152 materials, the *Guillen* Court concluded that "§ 409 protects not just the information an agency generates, *i.e.*, compiles, for § 152 purposes, but also any information that an agency collects from other sources for § 152 purposes." 537 U.S. at 145. The Court then went on to hold that "§ 409 is a proper exercise of Congress' authority under the Constitution." *Id.* at 146.

Of interest here, § 152 codifies the federal Hazard Elimination Program, which "provides state and local governments with funding to improve the most dangerous sections of their *roads*." *Id.* at 133 (emphasis added). In contrast, § 130 provides specific funds for the improvement of "Railway-Highway Crossings." *Id.* While acknowledging in passing § 409's application to § 130 materials, the Court made no attempt to address that issue. *See id.* Nor did the Court address whether § 409 permits a witness to offer opinion testimony which is based on protected § 409 data/reports. *See id. generally.* Both before and since *Guillen*, courts have routinely refused to allow witnesses to render "opinion[s] in court based on materials compiled for the purpose of complying with the federal program of enhancing safety at crossings." *Vigil v. Burlington N. & Santa Fe Ry.*, 521 F. Supp. 2d 1185, 1209 (D.N.M. 2007).

documents held by the DOT[] that may reflect mental impressions, conclusions, and opinions of DOT[] representatives regarding the survey results.” Reichert v. Dep’t of Transp. & Dev., 694 So. 2d 193, 200 (La. 1997) (holding that recommendation for installation of flashing beacon was inadmissible pursuant to § 409) (citing Martinolich v. S. Pacific Transp. Co., 532 So. 2d 435 (La. App. 1st Cir. 1988; see also BNSF Ry. Co. v. Town of Vinton, 980 So. 2d 152, 162 (La. App. 3d Cir. 2008) (excluding “maps and handwritten notes regarding the results of a diagnostic review of the Eddy Street crossing”); Miller v. Grand Trunk Western R.R., Inc., 727 N.E.2d 488, 493 (Ind. App. 2000) (concluding that opinions derived from § 409 materials/data are inadmissible); Fry v. Southern Pac. Transp. Co., 715 So. 2d 632, 637-38 (La. App. 2d Cir. 1998) (concluding that § 409 applied not only to DOT inspection report but also to “recommendations and impressions rendered in that inspection”); Shots v. CSX Transp., Inc., 887 F. Supp. 204, 205-06 (S.D. Ind. 1995) (excluding a “letter from the Indiana Department of Highways engineer . . . relaying a request from the City of Vincennes for installation of signals at the subject crossing”); Sawyer v. Illinois C. G. R. Co., 606 So. 2d 1069, 1073 (Miss. 1992) (excluding evidence of letter recommending that flashing lights be installed); cf. Robertson v. Union Pacific R. Co., 954 F.2d 1433, 1435 (8th Cir. 1992) (excluding newspaper article containing conclusions based on protected § 409 data).

This understanding comports with the purpose of the statute. Congress promulgated § 409 “to facilitate candor in administrative evaluations of highway safety hazards . . . and to prohibit federally required record-keeping from being used as a tool in private litigation.” Robertson v. Union Pacific R.R. Co., 954 F.2d 1433, 1435 (8th Cir. 1992); see also Duncan v. Union Pacific R.R., 790 P.2d 595, 597 (Utah Ct. App. 1990)

(“To facilitate candor in administrative evaluations of highway safety hazards, 23 U.S.C. § 409 prevents a court from receiving records of such evaluations into evidence.”). No such candor can exist if participants in crossing safety evaluations must look over their shoulders for fear that their assessments and recommendations are destined to become litigation fodder. Rather, as the Eighth Circuit has noted, “[u]nder § 409, the evidence presented at trial should be the same as if no upgrades had been planned.” St. Louis Southwestern Ry. v. Malone Freight Lines, Inc., 39 F.3d 864, 867 (8th Cir. 1994).

Appellant’s attempt to limit § 409’s application to documents and data, while allowing testimony derived from the contents of those documents and data, would eviscerate the purpose of the statute. See Stephens v. Town of Jonesboro, 642 So. 2d 274, 280 (La. App. 2d Cir. 1994) (“To exclude the actual compilations while allowing testimony regarding those compilations and their results would in effect allow the compilations into evidence contrary to the intent of 23 U.S.C.A. 409. Consequently, we see no difference between the survey or plat and testimony revealing the mental impressions or opinions relating to it.”). Put plainly, “§ 409 encompasses not only grade crossing safety enhancement documents, but also any testimony about those documents.” Rodenbeck v. Norfolk & Western Ry. Co., 982 F. Supp. 620, 623 (N.D. Ind. 1997).

Indeed, “[i]t is well settled that a plaintiff may not circumvent Section 409 by asking a witness to testify to matters the witness learned from documents protected by Section 409.” Powers v. CSX Transp., Inc., 177 F. Supp. 2d 1276, 1279-80 (S.D. Ala. 2001).

Allowing Mr. Munn or any other member of the diagnostic team to testify as to contents of their April 2004 recommendation, which was based on data collected for the purpose of identifying, evaluating, and planning crossing safety enhancements with federal funds under § 130, “would have circumvented the purposes of the statute.”

Harrison v. Burlington N. R. Co., 965 F.2d 155, 160 (7th Cir. 1992) (holding that § 409 precluded admission of investigative report and recommendations regarding crossing, as well as testimony from the report’s authors regarding the report’s contents and conclusions).

In this regard, Plaintiff’s reliance upon Bowman v. Norfolk S. Ry., 66 F.3d 315, 1995 U.S. App. LEXIS 26107, at \*19 (4th Cir. Sept. 15, 1995) (table), is misplaced. In Bowman, Kenneth Nichols, a South Carolina Highway Department official, was allowed to testify regarding his “recollection about matters otherwise available to any lay witness who had observed the scene.” Id. In other words, Nichols was called to testify as an ordinary, percipient witness. He was not called upon to offer opinions regarding whether crossing safety upgrades were warranted or to render opinions based on § 409 data.

In contrast, in the instant case Appellant attempted to elicit opinion testimony from Mr. Munn regarding the diagnostic review team’s evaluation of the crossing and the team’s expert recommendation—derived largely from § 409 data—that gates/lights should be installed. Contrary to the reference in Appellant’s Brief to Mr. Munn’s “observations” (Appellant’s Br. at 11), Appellant was *not* seeking to admit Mr. Munn’s firsthand observations of a lay witness.<sup>4</sup> (R. p. 877, lines 6-12) (“We’re seeking to put in only that on April 24, a month prior to this collision, that SCDOT did an evaluation recommended [sic] that gates and lights be installed at that crossing. That is the sum total of what we’re seeking to put in.”).) Accordingly, Bowman is inapposite and the testimony sought from Mr. Munn fell squarely within the purview of § 409.

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<sup>4</sup>Nor would such testimony necessarily have helped Appellant’s case. Mr. Munn testified that sight distance at the crossing was *not* restricted from a motorist’s vantage point at the stop sign. (R. p. 1338)

### 3. Rules 403 and 407, SCRE, Justify Exclusion As Well.

Not only did the trial court properly exclude the diagnostic team's April 2004 recommendation under § 409, it properly utilized its discretion to exclude the recommendation pursuant to Rules 403 and 407, SCRE. "The admission or exclusion of evidence is a matter within the sound discretion of the trial court and absent clear abuse, will not be disturbed on appeal." Gamble v. Int'l Paper Realty Corp., 323 S.C. 367, 373, 474 S.E.2d 438, 441 (1996). Thus, in order for an evidentiary ruling to warrant a new trial, the appellant "must show both the error of the ruling and resulting prejudice." Recco Tape & Label Co. v. Barfield, 312 S.C. 214, 216, 439 S.E.2d 838, 840 (1994). Here, Appellant can show neither.

To begin, as the trial judge aptly observed, informing the jury of the diagnostic team's recommendation would have been tantamount to informing them that gates/lights were installed after the accident. (R. p. 876, lines 9-25) Acting within his discretion, the trial judge concluded that evidence regarding these subsequent remedial measures would distract the jury from the key issue—"how the crossing appeared at the time of the collision." (R. p. 876, lines 15-17) The trial court also concluded that this evidence would prejudice CSXT by misleading the jury into believing that the SCDOT had concluded the crossing was unreasonably dangerous at the time of the accident. (R. p. 876, lines 20-25)

In this regard, even though Rule 407 refers explicitly only to measures taken "after [the] event," the policy rationales underpinning Rule 407 apply with equal force to measures which are planned, but not implemented, until after the accident.<sup>5</sup> See, e.g.,

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<sup>5</sup>Courts have long sought to adhere to Rule 407's underlying spirit rather than strictly to its letter. To illustrate, *every* court to consider the issue has held that Rule 407 bars evidence of post-accident

Ibieta v. Star Casino, 720 So. 2d 143, 147 (La. App. 4th Cir. 1998) (“We find no authority for the proposition that the mere fact that a preliminary planned change was under consideration at the time of an accident makes La.C.E. art. 407’s proscription inapplicable.”). Rule 407 is based on two distinct policy goals: (1) to encourage (or at least not discourage) voluntary repairs and safety enhancements, see, e.g., Fed. R. Evid. 407 advisory committee’s note (1972), and (2) to exclude poor and misleading proof of negligence which unfairly injects hindsight bias into the trial,<sup>6</sup> see, e.g., In re Air Crash Disaster, 86 F.3d 498, 529 (6th Cir. 1996) (“Independent of its effect on safety upgrades by alleged tortfeasors, the rule bars a class of evidence that is very poor proof of negligence or defectiveness.”).

Both rationales support the trial court’s decision to apply Rule 407’s exclusionary rule in the instant case. First, Rule 407’s policy of encouraging people to take steps to improve safety is “equally as supportive of exclusion of evidence of safety measures taken before someone is injured . . . , even if those measures are taken in response to

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employee discipline, even though such action cannot logically be “taken previously,” Rule 407, SCRE. See Fed. R. Evid. 407 advisory committee’s note (1972) (noting that Rule 407 encompasses the post-incident “discharge of employees”); Hull v. Chevron U.S.A., Inc., 812 F.2d 584, 587 (10th Cir. 1987); Maddox v. City of Los Angeles, 792 F.2d 1408, 1417 (9th Cir. 1986); Jumper v. Yellow Corp., 176 F.R.D. 282, 284-85 (N.D. Ill. 1997); Wanke v. Lynn’s Transp. Co., 836 F. Supp. 587, 595 (N.D. Ind. 1993); see also Tyson v. Old Dominion Freight Line, Inc., 270 Ga. App. 897, 899, 608 S.E.2d 266, 269 (2004); Strack & Van Til, Inc. v. Carter, 803 N.E.2d 666, 671 (Ind. Ct. App. 2004); Bulger v. Chicago Transit Auth., 345 Ill.App.3d 103, 112, 801 N.E.2d 1127, 1135 (Ill. App. 1 Dist. 2003); Martel v. Massachusetts Bay Transp. Auth., 403 Mass. 1, 5, 525 N.E.2d 662, 664 (1988); Parrish v. Atl. Coast Line R. Co., 20 S.E.2d 299, 304 (N.C. 1942); White v. Missouri Motors Distrib. Co., 47 S.W.2d 245, 247-48 (Mo. App. 1932).

<sup>6</sup>As the South Carolina Supreme Court observed long ago:

the taking of such precautions against the future is not to be construed as an admission of responsibility for the past, has no legitimate tendency to prove that the defendant had been negligent before the accident happened, and is calculated to distract the minds of the jury from the real issue, and to create a prejudice against the defendant.

Worthy v. Jonesville Oil Mill, 77 S.C. 69, 74 (1907).

[prior] experience.”<sup>7</sup> See Kelly v. Crown Equipment Co., 970 F.2d 1273, 1276-77 (3d Cir. 1992) (quoting Petree v. Victor Fluid Power, Inc., 831 F.2d 1191 (3d Cir. 1987)). Furthermore, in products liability cases, courts have readily recognized that “evidence of pre-accident design modifications not made effective until after the manufacture of the allegedly defective product may reasonably be found unfairly prejudicial to the defendant and misleading to the jury for resolving the question whether the product was unreasonably dangerous at the time of manufacture and sale,” as “[i]ntroduction of such evidence is likely to encourage Monday-morning quarterbacking among the jurors.” Bush v. Michelin Tire Corp., 963 F. Supp. 1436, 1449 (W.D. Ky. 1996) (internal citations and quotation marks omitted). The same is true here. Accordingly, the trial court acted within its discretion in concluding that Rule 407 barred admission of both the April 2004 diagnostic team recommendation and the subsequent installation of gates/lights after the accident.

Of note, the trial court’s resolution of these issues mirrors the approach taken by the federal district court in AMTRAK v. Transwood, Inc., Civ. A. No. 99-0487, 2001 U.S. Dist. LEXIS 12653, at \*2 (E.D. La. Aug. 15, 2001). Just as in the instant case, in Transwood the plaintiff sought to admit evidence that: (1) prior to the accident, plans were made to install gates at the crossing using federal funds, and (2) after the accident, gates were actually installed. Id. The district court excluded the plans for the crossing upgrade pursuant to 23 U.S.C. § 409 and then excluded the actual crossing upgrade

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<sup>7</sup>In this regard, it is not necessary for the remedial measure to have been taken in “direct response to the accident” to warrant exclusion—in other words, the knowledge and motives underlying the remedial measure are irrelevant. Webb v. CSX Transp., Inc., 364 S.C. 639, 653, 615 S.E.2d 440, 448 (2005); see also Johnson v. State, 224 Ariz. 554, 555 (2010) (“We hold that Rule 407 applies even if the party took such measures without knowledge of, or for reasons unrelated to, the prior event.”); Martin v. Norfolk S. Ry. Co., 271 S.W.3d 76, 88 (Tenn. 2008) (same); Bush v. Michelin Tire Corp., 963 F. Supp. 1436, 1449 (W.D. Ky. 1996) (noting that Fed. R. Evid. 407 “does not go to Defendant’s intent in adopting the later measures”).

pursuant to Fed. R. Evid. 407. In so doing, the Transwood court reasoned that, even if Rule 407 did not technically bar the evidence, it was nevertheless inadmissible under Rule 403 because it threatened to confuse or mislead the jury. Id. at \*7.

Numerous other courts similarly have held that, even if remedial activity does not technically fall within the purview of Rule 407, the trial court may nevertheless exclude reference to the measure if it determines that the evidence lacks probative value or threatens to confuse or mislead the jury. See Fed. R. Evid. 407 advisory committee's note (1997) ("Evidence of subsequent measures that is not barred by Rule 407 may still be subject to exclusion on Rule 403 grounds when the dangers of prejudice or confusion substantially outweigh the probative value of the evidence."); see also Raymond v. Raymond Corp., 938 F.2d 1518, 1525 (1st Cir. 1991) (upholding exclusion of product design modifications which were "on the drawing board" at the time of the accident); GM Corp. v. Moseley, 213 Ga. App. 875, 881 (1994) (holding that evidence of design change planned before accident could not be admitted in products liability case).

Here, Appellant does not even argue that the probative value of the diagnostic team's recommendation was not substantially outweighed by its unduly prejudicial effect, much less explain how the trial court's exclusion of this evidence affected the outcome of the trial given the jury's allocation of fault to Frances (60%) and CSXT (40%). Rather, Appellant offers only the flimsy argument that the trial court abused its discretion in relying upon Rule 403, SCRE, when CSXT "did not object . . . on 403 grounds." (Appellant's Br. at 16.)

This argument is inaccurate—CSXT raised Rule 403-based arguments in a pretrial motion *in limine*, and the trial court was fully aware of those arguments at the time it ruled on the issue. (R. pp. 94-95; p. 123) More fundamentally, although a trial

court has no obligation to exclude evidence *sua sponte*, a court always has discretion to exclude evidence it deems irrelevant, cumulative, confusing, misleading, or unduly prejudicial. Cf. United States v. Wallace, 972 F.2d 344, 1992 U.S. App. LEXIS 17865 (4th Cir. July 30, 1992) (table (affirming district court's decision to exclude evidence *sua sponte* pursuant to Fed. R. Evid. 403). Moreover, if the evidence was inadmissible under Rule 403, Appellant can show no prejudice from its exclusion. In sum, the trial court did not err, and Appellant has shown no prejudice.

**B. The Trial Court Acted Properly in Precluding Appellant's Counsel from Referencing a Portion of CSXT Exhibit 134 During Closing Argument which was Never Admitted into Evidence.**

Similarly, Appellant claims that the Court should have allowed her counsel to use a portion of CSXT Exhibit 134 during closing argument which referred to post-accident brush-cutting at the crossing. This document originally consisted of five pages of handwritten notes by Gary Huett, a retained expert who created an animation (R. p. 1417), which animation Appellant used at trial. CSXT's trial counsel used only one page of Huett's notes during his cross-examination and only admitted into evidence the one page actually used. (R. p. 840, lines 10-23)

Although Appellant correctly notes that the parties stipulated to the admissibility of a portion of Mr. Huett's notes (Appellant's Br. at 18), CSXT never offered into evidence the portion of Mr. Huett's notes which referred to CSXT's post-accident cutting of vegetation on its right-of-way. Furthermore, any attempt to present this evidence to the jury would have violated the trial court's uniform directive throughout the trial that evidence of these subsequent remedial measures was excluded pursuant to Rules 401,

403, and 407, SCRE.<sup>8</sup> (See, e.g., R. p. 1306, lines 6-15) Accordingly, when Appellant’s counsel attempted to refer during closing argument to the unadmitted portion of Mr. Huett’s notes, the trial court properly sustained CSXT’s prompt objection. (See R. p. 1276, line 22 – p. 1277, line 2 and p. 1305, line 18 – p. 1306, line 15)

Regardless, the Court acted well within its discretion when it concluded that any reference to CSXT’s subsequent remedial measures was barred under Rules 403 and 407. In this regard, Appellant argues that she should have been allowed to refer to the subsequent remedial measures: (1) to explain why Mr. Huett relied upon photos taken by Appellant’s counsel’s own investigator rather than “measurements of the trees and other vegetation along the track” in generating Appellant’s animation (Appellant’s Br. at 18), and (2) to rebut an “insinuat[ion] that Mr. Huett’s notes contained information which [Mr. Huett] did not tell the jury on direct examination” (*Id.* (citing R. p. 1259)).

Taking the latter argument first, defense counsel merely indicated (accurately) during closing argument that Mr. Huett had admitted on cross-examination—when confronted with his own notes—that his photogrammetric sight-distance analysis was consistent with a photograph taken by Appellant’s counsel’s own investigator showing a sight distance of 1,014 feet. (R. p. 1259, lines 2-8) Exposing the jury to the explosively prejudicial evidence of subsequent remedial measures would have added nothing to the jury’s consideration of Mr. Huett’s admission on cross-examination of this undisputed fact. More generally, nothing in CSXT’s closing argument on this point misled the jury or somehow opened the door to evidence of subsequent remedial measures.

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<sup>8</sup>In fact, during Plaintiff’s counsel’s direct examination of Mr. Huett, the trial court instructed Mr. Huett not to refer to the post-accident cutting despite Plaintiff’s counsel’s objection that the court’s directive would leave the jury to “wonder[] why we didn’t go measure the bushes.” (R. p. 825, lines 17-20)

In this regard, the Court should reject Appellant’s apparent argument that evidence of post-accident cutting was necessary for the jury to understand Mr. Huett’s sight-distance analysis or the conditions at the crossing at the time of the accident. The parties presented lengthy testimonial evidence from several witnesses, numerous photographs, and actual sight-distance measurements which fully enabled the jury to evaluate the accuracy of Mr. Huett’s animation and visibility at the crossing. (See, e.g., R. pp. 1365-1370; pp. 1372-1375; pp. 1377-1378; pp. 1379-1396; and pp. 1590-1602) Accordingly, admission of evidence of subsequent remedial measures was not warranted in this case. See Webb, 364 S.C. at 653 (“The evidence of the clear cutting of Jordan Street was inadmissible at this trial under Rule 407. There were numerous witnesses, photos, and even video (R. p. 1408) to demonstrate the condition of the crossing on the day of the accident. The evidence of the clear cutting was not necessary for the jury to understand the conditions at the time of the accident.

In short, Appellant argues that the mere fact that CSXT disputed the accuracy of Mr. Huett’s animation somehow “opened the door” for Appellant to impeach CSXT with evidence of subsequent remedial measures. In other words, because CSXT disputed Appellant’s claim that sight-distance was inadequate, Appellant was entitled to “impeach” CSXT’s denial of negligence with evidence that CSXT cleared vegetation at the crossing after the accident. This argument constitutes nothing more than a thinly-veiled attempt to use subsequent remedial activity as an admission of negligence—the very inference Rule 407 forbids.

The impeachment exception does not apply when “the sole value of the impeachment rests on the impermissible inference that the subsequent measures are admissible evidence of prior negligence.” Herzog v. Lexington Township, 167 Ill.2d

288, 301, 657 N.E.2d 926, 933 (1995). The trial court correctly rejected Appellant's contention that, because CSXT contested her negligence claims, she was automatically entitled to "impeach" with evidence of subsequent remedial measures.

Under Appellant's logic, Rule 407's impeachment exception would swallow the rule:

Just as evidence of subsequent remedial measures is not considered sufficiently probative to be admissible to prove prior negligence, that evidence is not admissible for impeachment where the sole value of the impeachment rests on that same impermissible inference of prior negligence.

Allowing such evidence in these circumstances would swallow the general rule prohibiting the introduction of subsequent remedial measures and frustrate the policy considerations that support it. In every case, a defendant will dispute that his prior conduct was negligent. Once a defendant disputes his or her negligence at trial, a plaintiff could always seek to introduce evidence of subsequent remedial measures under the guise of impeachment. Thus, the general rule of excluding evidence of subsequent remedial measures would be swallowed by the impeachment exception. Furthermore, contrary to the policies supporting the general rule, parties to lawsuits would be discouraged from making improvements for fear that such actions would be used against them at trial.

Id. at 301-02, 657 N.E.2d at 933; see also Flaminio v. Honda Motor Co., 733 F.2d 463, 468 (7th Cir. 1984) ("Although any evidence of subsequent remedial measures might be thought to contradict and so in a sense impeach a defendant's testimony that he was using due care at the time of the accident, if this counted as 'impeachment' the exception would swallow the rule."); accord McCorkle v. GDOT, 257 Ga. App. 397, 400 (2002). In sum, the trial court properly excluded all evidence of subsequent remedial measures, including the unadmitted portion of Mr. Huett's notes which referenced CSXT's vegetation-clearing activities after the accident.

**C. CSXT Did Not “Open the Door” to Use of Evidence of Subsequent Remedial Measures for Impeachment.**

Similarly, the Court should reject Appellant’s argument that trial testimony from Cowan, the locomotive engineer, to the effect that CSXT “always cut [crossings] back” (R. p. 954, lines 6-22) opened the door to evidence of the post-accident cutting. (See Appellant’s Br. at 22.) More generally, as explained *supra*, CSXT’s position at trial that sight-distance at the crossing was “adequate” did not entitle Appellant to “impeach” CSXT’s denial of negligence with evidence of post-accident cutting. (See *id.* at 26-27.)

Initially, it should be noted that, as a locomotive engineer, Mr. Cowan was not tasked with formulating, implementing, or ensuring compliance with CSXT’s vegetation-control policies. Thus, Mr. Cowan was not being asked whether CSXT had complied with industry standards, company policies, or other rules governing vegetation control; nor did Mr. Cowan testify that sight-distance at the Honeyford crossing could not have been increased prior to the accident.

Rather, Appellant’s counsel merely asked whether Mr. Cowan had ever had trouble seeing at crossings because of vision-obstructing vegetation; Mr. Cowan denied having difficulty seeing. (R. p. 954, lines 9-17) Consistent with all the other evidence presented at trial, Mr. Cowan then testified that CSXT had always had a vegetation-clearing program, while admitting that the program was “changed” at some point. (R. p. 954, line 22 – p. 955, line 21)

As Appellant’s counsel admitted during his closing argument, the Honeyford Road crossing was cut in 2001. (See, e.g., R. p. 1192, lines 4-9) However, in 2003, CSXT adopted new specifications requiring crossings with a track speed of greater than 60 MPH (including the Honeyford Road crossing) “to be cleared the entire width of

CSXT'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." (Appellant's Br. at 9 (citing R. p. 560 and p. 1451).) CSXT contracted with an outside vendor, DeAngelo Brothers, Inc. ("DBI"), to cut its crossings in South Carolina in accord with these new internal guidelines. (R. p. 568, lines 13-17) Unfortunately, DBI struggled to fulfill its contract, and at the time of Frances's accident, DBI had not yet cut the crossing in accord with CSXT's new specifications. (R. p. 564, lines 18-22) Appellant's central argument at trial was that sight-distance at the crossing was inadequate as a result.

At trial, CSXT conceded that the crossing had not been cut in accord with its 2003 program specifications. Thus, contrary to Appellant's view, evidence of subsequent remedial measures was not necessary to demonstrate that the crossing had not been cut in compliance with the 2003 specifications or to rebut CSXT's theory of the case. Cf. Landry v. Hilton Head Plantation Prop. Owners Ass'n, 317 S.C. 200, 205 (Ct. App. 1994) (holding that evidence that hole had been filled was not admissible "to prove a defect existed at the time of the alleged incident" where the defendants "admitted the existence of the hole" and "the record reflect[ed] ample evidence . . . regarding the existence, dimensions, and location of the hole").

Rather, CSXT's theory at trial was that its 2003 crossing-clearing program was intended "to make safe crossings even safer." (See, e.g., R. p. 229, line 24 – p. 230, line 10) Consequently, CSXT's principal argument at trial was that, although sight-distance at the crossing (an undisputed 1,014 feet from a motorist's vantage point while stopped at the stop sign) was not perfect and improvements had been planned, Frances nevertheless had ample opportunity to see the train. Mr. Cowan's testimony that (to his knowledge)

CSXT had provided adequate sight distance was consistent with this general theory of defense and did not open the door to evidence of subsequent remedial measures.

In arguing to the contrary, Appellant once again proposes an interpretation of Rule 407's "impeachment" exception which would swallow the rule. A defense witness does not open the door to evidence of subsequent remedial measures merely by testifying that the defendant provided adequate safety. Cf. Kelly, 970 F.2d at 1278 (holding that expert's statement "that the forklift involved in the accident was of an excellent and proper design" did not open the door to evidence of design modification because "[e]vidence that the forklift's design had been altered [did] not contradict that statement since alteration did not compel the conclusion that the first design was defective"). Rather, the impeachment exception only comes into play when the defendant offers misleading testimony or suggests that safety could not have been materially improved. See, e.g., McCorkle, 257 Ga. App. at 399 (explaining that impeachment exception applies when the defendant "mislead[s] the jury as to a material issue"); see also Wood v. Morbark Indus., 70 F.3d 1201, 1208 (11th Cir. 1995) (concluding that post-accident change to the design of a wood chipper was admissible for impeachment where defense witness testified that the wood chipper contained "the safest length chute you could possibly put on the machine"); cf. Harrison v. Sears, Roebuck & Co., 981 F.2d 25, 31 (1st Cir. 1992) ("A more direct impeachment use of subsequent remedial measure evidence would exist if Respondents' witness stated that he did not change the product after the alleged accident was brought to his employer's attention.").

Neither Mr. Cowan's testimony nor any other evidence CSXT presented at trial misled the jury as to conditions at the crossing or suggested that compliance with the 2003 specifications was unfeasible or impractical. Nor did Mr. Cowan or any other

CSXT witness boast that safety at the crossing could not have been significantly improved. Accordingly, neither CSXT's defense in general nor Mr. Cowan's testimony in particular "opened the door" for impeachment under Rule 407.

Regardless, as observed *supra*, even if an exception to Rule 407 otherwise applied, the trial court retained discretion to exclude the post-accident cutting pursuant to Rule 403. See, e.g., Russell v. Parkford Mgmt. Co., 235 Ga. App. 81, 82 (1998) ("A trial court in its discretion may exclude evidence of remedial measures, even though such evidence is otherwise admissible under an impeachment exception, if its probative value is substantially outweighed by the risk that its admission will unduly prejudice or mislead the jury or confuse the issues being tried."); see also Reiland v. Southland Equip. Serv., 330 S.C. 617, 633 (Ct. App. 1998) (noting that evidence which is admissible under Rule 407 may nevertheless be subject to exclusion under Rule 403). The trial court determined that evidence of the post-accident cutting was only marginally relevant, unnecessary and cumulative in light of the abundance of evidence regarding sight-distance at the crossing, and likely to prejudice CSXT by drawing the jury's attention away from the key issue in the case—whether Frances had a reasonable opportunity to detect and avoid the train. (R. p. 1088, line 22 – p. 1089, line 25) Other than a conclusory reference to "great[] prejudice[]" (Appellant's Br. at 24), Appellant offers no real reason to suppose that the trial court's rulings were erroneous, much less that she was prejudiced in any way.

**D. The Trial Court Properly Refused to Charge the Jury that the Presence of Stop Signs at the Crossing Reflected a Finding by SCDOT that the Crossing was “Particularly Dangerous” under S.C. Code Ann. § 56-5-2715**

Next, the Court should reject Appellant’s argument that the trial court should have charged the jury that SCDOT’s placement of stop signs at the crossing constituted a finding that the crossing was “particularly dangerous.” The trial court charged the jury regarding Frances’s duty to stop “within fifty feet, but not less than fifteen feet” from the crossing. S.C. Code Ann. § 56-5-2715. In explaining Frances’s duties under § 56-5-2715, the trial court omitted language in the statute empowering the SCDOT to “designate particularly dangerous crossings.” *Id.*

The trial judge reasonably concluded that reading the omitted language to the jury would have been unnecessary, confusing, misleading, and erroneous. Although § 56-5-2715 does empower the SCDOT to designate certain crossings as dangerous and to erect stop signs there, nothing in the statute purports to limit the installation of stop signs to crossings SCDOT deems “particularly dangerous.” Thus, standing alone, the bare presence of stop signs at the crossing was not tantamount to an administrative conclusion that the crossing was unusually or unreasonably dangerous. Consequently, it would have been inappropriate to instruct the jury that the presence of stop signs demonstrated that the crossing was “particularly dangerous.”

It was for the jury alone to decide whether the crossing provided adequate safety, and charging the jury on the omitted portion of § 56-5-2715 would not have been of substantive benefit to that determination. Referring to the crossing as “particularly dangerous” also would have confused the jury by needlessly complicating the issue of the railroad’s duty of care:

Instructions to juries have used terms such as “extrahazardous,” “peculiarly dangerous,” or “more dangerous than the ordinary crossing.” It is apparent that such instructions have only served to confuse juries. The focus of a jury's inquiry should be whether the railroad exercised due care under all of the circumstances of the case before it.

Perkins v. Nat'l R. R. Passenger Corp., 289 N.W.2d 462, 466 (Minn. 1979) (rejecting “extra-hazardous crossing” doctrine).

In sum, the omitted portion of § 56-5-2715, while potentially confusing and prejudicial, was irrelevant to the issues of negligence, comparative negligence, proximate cause, and compensatory damages which the jury was called upon to resolve.

Appellant's suggestion that the trial court unfairly focused on Frances's duties under § 56-5-2715 while deemphasizing the railroad's duties is specious. The trial court accurately and comprehensively charged the jury regarding CSXT's duty to provide a reasonably safe crossing. (See, e.g., R. p. 536, lines 5-23; p. 1289, line 19 – p. 1290, line 7) Accordingly, Plaintiff has shown no prejudice from the trial court's omission of her desired charge.

**E. The Trial Court's Instructions on Appellant's Survival Claims were Not Erroneous, and Appellant Waived All Objections to the Jury's Subsequent “Zero Damages” Verdict by Allowing the Jury to be Discharged Despite an Invitation from the Court to Resubmit the Issue.**

**1. The Trial Court's Charges Were Not Erroneous.**

Next, while correctly conceding that Frances's negligence bars her from recovering in both the wrongful death action and the survival action,<sup>9</sup> Appellant argues

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<sup>9</sup>“It is well-established in South Carolina that a parent, or other beneficiary, suing under the wrongful death statute can be barred from recovery by his own contributory negligence.” Hall v. United States, 381 F. Supp. 224, 226 (D.S.C. 1974) (citing Wilson v. Clarendon County, 139 S.C. 333, 138 S.E. 33 (1927) & Cirosky v. Smathers, 128 S.C. 358, 122 S.E. 824 (1924)); see also Crowley v. Spivey, 285 S.C. 397, 413 n.1, 329 S.E.2d 774, 784 n.1 (Ct. App. 1985). This is because public policy dictates that wrongful death beneficiaries “cannot hold [a] defendant liable to them for the consequence of their own negligence. No one is allowed to take advantage of his own wrong.” 381 F. Supp. at 226 (quoting Sandel v. State, 115 S.C. 168, 175, 104 S.E. 567, 569 (1920)).

that the Court erred in allowing the jury to impute Frances's negligence to Beryl's innocent survival claimants. (Appellant's Br. at 27, 29.) Here, Appellant is simply mistaken. Although the trial court initially suggested that the jury's deliberations would "end" if it found that Frances was more than 50% responsible for the accident (R. p. 1299, lines 13-14), it later explicitly instructed the jury to determine damages for the survival action even if found that Frances was more than 50% at fault. (R. p. 1309, lines 7-16 and p. 1311, lines 10-22) Appellant's counsel expressed no objection to the trial court's latter charge. (R. p. 1312, lines 22-25) Thus, Appellant is entitled to no relief on this ground.

Regardless, even if the trial court had not given the latter charge, its initial charge was not erroneous because Frances was in fact the sole survival claimant, making her contributory negligence a complete defense to both the wrongful death and survival actions. Although the South Carolina courts have yet to address the issue in the context of survival actions, in wrongful death actions "it seems to be generally conceded that, where one or more of the several beneficiaries in the same class die, the right of action abates as to them and survives for the exclusive benefit of the remaining beneficiaries of

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The same public policy rationale bars a negligent survival claimant from recovery as well. "Survival actions are like wrongful death actions in that some types of misconduct by a beneficiary defeat recovery of damages for that beneficiary in a survival action because such conduct is deemed to relinquish the right to a distributive share." F. Patrick Hubbard & Robert L. Felix, The S.C. Law of Torts, 621 (2d Ed. 1997); see also Aetna Casualty & Surety Co. v. Curley, 585 A.2d 640, 645 (R.I. 1991) (concluding that survival claim is barred by the contributory negligence of sole beneficiary); Moore v. Kinney, 315 So. 2d 340, 342 (La. Ct. App. 1975) (barring parent's survival action based on the "public policy which forbids one to reap benefit from his own misconduct").

As the Rhode Island Supreme Court has aptly concluded:

to maintain an action pursuant to [the survival statutes], when any award would go to the tortfeasor responsible for the wrongful death of the decedent, cannot be tolerated. Such an action would permit the wrongdoer to benefit from her own wrong and would violate the public policy of this jurisdiction.

Curley, 585 A.2d at 645. Thus, Appellant has correctly admitted that Frances's negligence bars her from any recovery in this matter.

the same class.” Elkin v. S. Ry. Co., 153 S.E. 337, 339 (S.C. 1930). In other words, the action passes to a more remote class of beneficiaries only if no beneficiary in a more immediate class exists. Respondent respectfully contends that the same rule should apply in survival actions.

South Carolina’s survival statute provides that causes of action for “any and all injuries to the person” survive to the personal representative of the deceased person. S.C. Code Ann. § 15-5-90 (1976). Survival actions generally cover medical expenses, conscious pain and suffering, and funeral expenses. Smalls v. S.C. Dep’t of Educ., 339 S.C. 208, 216, 528 S.E.2d 682, 686 (Ct. App. 2000); see also S.C. Code Ann. § 15-5-100 (1976) (funeral expenses may be recovered in a wrongful death action or a survival action, but not both).

Damages in a survival action are awarded for the benefit of the decedent’s estate, rather than for the benefit of the decedent’s family as is the case with wrongful death damages. Scott v. Porter, 340 S.C. 158, 170, 530 S.E.2d 389, 395 (Ct. App. 2000). Consequently, South Carolina’s Probate Code, S.C. Code Ann. § 62-1-100, *et seq.* (1976), controls the distribution of survival damages because Beryl died intestate. According to the Probate Code, because Beryl died without a surviving spouse or issue, his parents are the sole beneficiaries of his estate. S.C. Code Ann. § 62-2-103(2) (1976). As in wrongful death actions, the heirs or beneficiaries of the decedent’s estate, rather than the personal representative, are the real parties in interest. See Cowan v. Pacific Gamble Robinson Co., 232 F. Supp. 403, 404 (D. Mont. 1964) (noting that beneficiary is real party in interest in a survival action). Thus, while Appellant was properly named as the plaintiff in the survival action, Frances is the real party in interest because she is Beryl’s sole surviving parent.

When one dies intestate and has no spouse or children, his estate passes to his parent or parents equally. S.C. Code Ann. § 62-1-103(2). In this case, at the time of Beryl's death, he was survived by his parents, making them the preferred beneficiaries. However, Beryl's father, Charles, died before this case went to trial and before any verdict or judgment was entered. As a result, when Charles died, his share abated to Beryl's mother, Frances.

Appellant argues that Charles's share did not abate to Frances at the time of his death, but instead passed to Charles's heirs, Beryl's siblings and half-siblings. Nonetheless, "[u]nless displaced by the particular provisions of this [South Carolina Probate] Code, the principles of law and equity supplement its provisions." S.C. Code Ann. § 62-1-103. Equitably, it makes no sense for Charles's share to pass down to remote beneficiaries when a member of the preferred class of beneficiaries, Beryl's mother Frances, still lives. Thus, Respondent respectfully contends that Frances, the sole wrongful death beneficiary, is the sole survival claimant as well.

As Appellant has conceded, the jury's finding that Frances was 60% at fault bars her from any recovery. As Frances was the sole beneficiary of both the wrongful death action and the survival action, her negligence forecloses both causes of action. Accordingly, Appellant's arguments regarding supposed errors in the trial court's instructions to the jury regarding the survival claim are of no moment.

**2. Appellant Waived Any Challenge to the Jury's Verdict by Allowing the Jury to be Discharged Without Objection.**

Finally, Appellant argues that she is entitled to new trial absolute or *nisi additur* because it was undisputed that Beryl suffered conscious pain and, therefore, the jury's finding that CSXT was 40% at fault entitles Appellant to some amount of damages on her

survival claims. Putting aside whether Frances was in fact the sole beneficiary in the survival action (discussed *supra*), CSXT recognizes that typically “a verdict finding the defendant liable but awarding zero damages [is] inconsistent or incomplete.”<sup>10</sup> Stevens v. Allen, 342 S.C. 47, 50, 536 S.E.2d 663, 664 (2000). Consequently, when the jury returned a zero damages verdict on the survival action, Appellant could have requested the Court to resubmit the verdict to the jury “with instructions to either find for the defense or award some amount of damages.” Id. However, despite the Court’s clear invitation, Appellant did not object to the jury’s verdict and instead consented to the Court’s discharge of the jury. (R. p. 1321, lines 17-19)

As a result, Appellant waived any objection to the jury’s verdict. See Dykema v. Carolina Emergency Physicians, P.C., 348 S.C. 549, 553, 560 S.E.2d 894, 896 (2002) (“The trial court held the jury’s failure to award actual damages against Companion mandated the grant of JNOV to Companion. We disagree. We find Companion's failure to object prior to discharge of the jury results in a waiver of the right to challenge the verdict.”). A party may not “allow the jury to be discharged in the face of an obviously defective verdict, which could easily be corrected upon resubmission to the jury, in the hopes of gaining a reversal on appeal.” Id. Likewise, “the law imposes no duty upon the trial judge to reject an inconsistent verdict in the absence of an objection by either party.” Longshore v. Saber Sec. Servs., Inc., 365 S.C. 554, 563, 619 S.E.2d 5, 10 (Ct. App. 2005); see also Smith v. Phillips, 318 S.C. 453, 455, 458 S.E.2d 427, 429 (1995) (“[T]here is no duty imposed on the trial judge to question a jury's verdict of liability, but

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<sup>10</sup>Of note, Appellant does not argue that the zero damages verdict on the survival claims, standing alone, requires reversal of the defense verdict in the wrongful death action. In this regard, the jury’s allocation of 60% of the fault to Frances unambiguously dictated a defense verdict in the wrongful death action, as it is undisputed that Frances is the sole beneficiary of the wrongful death claims. Consequently, even assuming *arguendo* that Appellant is entitled to reversal and remand in the survival action, the Court should nevertheless affirm the jury’s complete and unambiguous verdict in the wrongful death action.

no damages, unless requested to by a party.”). Accordingly, having allowed the jury to be discharged without objection, Appellant cannot now complain that the jury’s verdict was defective.

Nor may Appellant obtain a court-imposed damages award via new trial *nisi additur* or *remittitur*. “South Carolina law requires the jury to be the sole judge of issues of fact, including the issue of damages.” Krepps ex rel. Krepps v. Ausen, 324 S.C. 597, 609, 479 S.E.2d 290, 296 (Ct. App. 1996). Thus,

[t]o permit the court to ‘correct’ or ‘construe’ a jury finding of no damages would, as a practical matter, displace the jury as the fact finder by allowing the court either to decide how the jury viewed the facts or to substitute its own view of the facts when the jury’s verdict is uncertain. Under our law, where the case is tried to a jury, the judge cannot perform the jury’s function for it. If the jury renders an ambiguous verdict, the court must resubmit the case to the jury, not act as a substitute for the jury.

Id. Accordingly, having waived her right to request that the case be resubmitted to the jury, Appellant cannot ask this Court or the trial court to substitute itself for the jury and award damages via new trial *nisi additur*.

Of course, it is true that, before the jury rendered a verdict, the trial court suggested that a potential zero damages verdict could be remedied via “post trial amendment.” (R. p. 1318, lines 4-23) This does not excuse, however, Appellant’s failure to request the trial court to resubmit the issue to the jury when she was given the opportunity to do so. “It is well established that where a verdict is objectionable as to form, the party who desires to complain should call that fact to the Court’s attention *when the verdict is published*. Otherwise, the right to do so is waived.” Limehouse v. S. Ry. Co., 216 S.C. 424, \_\_\_, 58 S.E.2d 685, 688 (1950) (emphasis added).

More generally, neither raising a potential issue beforehand nor complaining about an alleged error after the fact in a motion for JNOV will suffice to preserve the

issue for appellate review; rather, a party must raise a *contemporaneous* objection or risk waiving the issue. Cf. Holroyd v. Requa, 361 S.C. 43, 59-60 (Ct. App. 2004) (“Although Requa opposed the introduction of the evidence of medical bills and premiums paid before the testimony, after the testimony, and in a post-trial motion, he did not object when the evidence was actually introduced during the trial. . . . Failure to object to the introduction of evidence at the time the evidence is offered constitutes a waiver of the right to have the issue considered on appeal.”); see also Washington v. Whitaker, 317 S.C. 108, 114 (1994) (“Unlike the federal courts, this Court does not recognize a ‘plain error’ rule. Rather, it is well settled that a contemporaneous objection must be made to preserve an argument for appellate review.”). Appellant did not, and could not, have preserved the issue for appeal before it even happened. Thus, Appellant waived all objections to the jury’s zero damages verdict when she failed to request the trial court to resubmit the verdict to the jury and instead consented to the jury’s discharge.

To illustrate, in Limehouse (cited *supra*), the jury returned a verdict of zero actual damages, yet awarded \$1,500.00 in punitive damages. 216 S.C. at \_\_\_, 58 S.E.2d at 687. The South Carolina Supreme Court concluded that the railroad had waived its right to object to the verdict where defense counsel “did not expressly complain of the form of the verdict before the jury was discharged. The only action taken by them was to note a motion for judgment non obstante veredicto.” Id. at \_\_\_, 58 S.E.2d at 688. The Court went on explain that an objection to an inconsistent verdict must be made prior to the discharge of the jury—a motion for new trial made after the jury has been discharged will not suffice. See id. at \_\_\_, 58 S.E.2d at 689 (“The appellant, instead of making its objection to the form of the verdict as soon as it was read, waited until the jury separated and then urged the alleged irregularity as a ground for a new trial. This was too late.”).

More recently, the Supreme Court has reaffirmed this principle, holding that

Limehouse and like-minded cases

are consistent with our recent opinion in Stevens v. Allen, 342 S.C. 47, 536 S.E.2d 663 (2000), in which we held a verdict finding the defendant liable but awarding zero damages is inconsistent or incomplete and that, *when the issue is raised*, the matter should be resubmitted to the jury with instructions to either enter a verdict for the defendant or award some amount of damages.

Dykema, 348 S.C. at 554 (emphasis original). In Dykema, the jury returned an inconsistent verdict which awarded punitive damages but no actual damages; the Court concluded that the appellant had waived any objection to the verdict by failing to raise the issue until it filed a post-trial motion for JNOV “ten days after the verdict was returned.” Id. at 553, 560 S.E.2d at 896. Such was the case here, as well.


As noted *supra*, a party may not “allow the jury to be discharged in the face of an obviously defective verdict, which could easily be corrected upon resubmission to the jury, in the hopes of gaining a reversal on appeal.” Id. Yet, that is exactly what Appellant seeks to do here. Rather than apprising the trial judge of the proper remedy and requesting the trial court to resubmit the matter to the jury, Appellant waited until after the jury’s discharge, hoping for a second bite at the apple with a new and perhaps more favorable jury. The Court should not allow this result, which would contravene not only Dykema but nearly 100 years of settled South Carolina jurisprudence. See id. at 554, 560 S.E.2d at 896 (citing Washington v. Whitaker, 317 S.C. 108, 451 S.E.2d 894 (1995); Deese v. Williams, 237 S.C. 560, 118 S.E.2d 330 (1961); Limehouse, 216 S.C. 424, 58 S.E.2d 685 (1950); McAlister v. Thomas & Howard Co., 116 S.C. 319, 108 S.E. 94 (1921); & Bethea v. Western Union Telegraph, 97 S.C. 385, 81 S.E. 675 (1914)). In

sum, Appellant waived the right to object to the verdict and thus is not entitled to JNOV, new trial *nisi additur*, or new trial absolute.

**CONCLUSION**

For all the foregoing reasons, the trial court's evidentiary rulings and jury instructions were proper. Appellant waived any challenge to the verdict by allowing the jury to be discharged without objection. Accordingly, Appellant is entitled to no relief, and the trial court's judgment should be affirmed in all respects.

DATED this 31st day of May, 2011.



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IN THE STATE OF SOUTH CAROLINA  
IN THE COURT OF APPEALS

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APPEAL FROM BAMBERG COUNTY  
COURT OF COMMON PLEAS

DOYET A. EARLY, III, Circuit Court Judge

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**PROOF OF SERVICE**

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The undersigned, an attorney in this matter for the Respondent, CSX Transportation, Inc., certifies that I have this 31st day of May, 2011, served copies of **Respondent CSX Transportation, Inc.'s Final Brief and Certificate of Compliance with Rule 211(b), SCACR**, upon counsel for the Appellant by causing it to be deposited in the United States mail, first-class postage prepaid, addressed to:

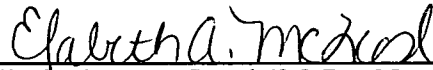
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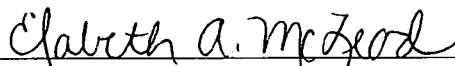
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**CERTIFICATE OF COUNSEL**

The undersigned certifies that this Final Brief complies with Rule 211(b),  
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DATED this 31st day of May, 2011.

  
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