

**THE STATE OF SOUTH CAROLINA
In the Court of Appeals**

**APPEAL FROM HAMPTON COUNTY
Court of Common Pleas**

Carmen T. Mullen, Circuit Court Judge

Appellate Case No. 2009-126526

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

v.

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

APPENDIX – Vol. VIII

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

-And-

John E. Parker
J. Paul Detrick
Grahame E. Holmes
Matthew V. Creech
Peters, Murdaugh, Parker,
Eltzroth & Detrick, P. A.
P. O. Box 457
Hampton, SC 29924
(803) 943-2111

ATTORNEYS FOR PETITIONER

Thomas Vanderbloemen
Ronald K. Wray, II
Gallivan White & Boyd, PA
P.O. Box 10589
Greenville, SC 29603

J. Arthur Davison
James W. Purcell
Fulcher Haggler, LLP
P.O. Box 1477
Augusta, GA 30903

ATTORNEYS FOR CSXT

Andrew Lindemann
Peden B. McLeod
Davidson & Lindemann, P.A
P.O. Box 8568
Columbia, SC 39303-8568

ATTORNEYS FOR SCDOT

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Willie Homer Stephens, Guardian ad Litem
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v.

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

Final Brief of Appellants

John E. Parker
J. Paul Detrick
Grahame B. Holmes
Matthew V. Creech
PETERS, MURDAUGH, PARKER,
ELTZROTH & DETRICK, P.A.
Post Office Box 457
Hampton, South Carolina 29924
Phone: 803-943-2111
Fax: 803-914-2014

-- & --

Carl H. Jacobson
URICCHIO, HOWE, KRELL,
JACOBSON, TOPOREK,
THEOS & KEITH, P.A.
Post Office Box 399
Charleston, South Carolina 29401

ATTORNEYS FOR APPELLANT

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STATEMENT OF ISSUES ON APPEAL

- I. THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTIONS FOR DIRECTED VERDICT AND FOR JUDGMENT NOTWITHSTANDING THE VERDICT AS TO THE NEGLIGENCE OF CSXT ON APPELLANT'S TWO THEORIES: (1) CSXT'S ADMITTED FAILURE TO SOUND THE HORN IN ACCORDANCE WITH S.C. CODE ANN. § 58-15-910; AND, (2) CSXT'S ADMITTED FAILURE TO CLEAR THE SUBJECT CROSSING IN ACCORDANCE WITH ITS OWN RULES AND REGULATIONS?**
- II. WHETHER APPELLANT IS ENTITLED TO A NEW TRIAL DUE TO ERRORS CONCERNING THE ADMISSION AND REJECTION OF EVIDENCE AT TRIAL?**
- III. WHETHER APPELLANT IS ENTITLED TO A NEW TRIAL DUE TO THE COURT'S FAILURE TO CHARGE REQUESTED JURY CHARGES, AS WELL AS IMPROPER CHARGES GIVEN TO THE JURY, ALL OF WHICH CREATED PREJUDICE TO APPELLANT?**

STATEMENT OF THE CASE

Appellant Willie Homer Stephens, Guardian ad Litem for Lillian C. (hereinafter, "Stephens") filed his Summons and Complaint in the Court of Common Pleas of Hampton County on April 27, 2004. The Complaint alleges negligence causes of action against CSX Transportation, Inc. (hereinafter, "CSXT") and the South Carolina Department of Transportation (hereinafter, "SCDOT") arising out of an automobile/train collision on February 3, 2004, which resulted in brain injuries to Lillian C., a minor, as set forth in various particulars. The complaint alleges *inter alia*, that the accident was caused by CSXT's failure to properly warn the Colvin vehicle at the crossing by properly sounding its horn and/or that the accident was caused by CSXT's failure to maintain its right-of-way so as to create proper sight distances at the crossing. (R. p. 14). Against SCDOT, Appellant alleges, *inter alia*, that the SCDOT failed to warn motorists of the dangerous crossing. (Id.). Each Defendant generally denied the allegations of the Complaint and asserted affirmative defenses.

The case was tried in Hampton County from July 28, 2008 through August 14, 2008. The jury found for the Defendants. Appellant was granted ten (10) days to file post trial motions and thereafter timely moved for judgment notwithstanding the verdict pursuant to Rule 50(b), SCRCF, or alternatively, a new trial pursuant to Rules 59, SCRCF. The court heard arguments on the Appellant's post trial motions on September 11, 2008, and denied these motions by written Order dated and filed March 30, 2009. (R. pp. 1-9). Appellant timely filed his Notice of Appeal on May 12, 2009.

STATEMENT OF THE FACTS

Appellant Willie Homer Stephens is the grandfather and duly appointed Guardian ad Litem for Lillian C., a minor who was twelve years old at the time of this collision. On February 3, 2004, Lillian was a passenger in her mother, Tonia Colvin's, Ford Explorer. (R. p. 456). Lillian was riding with her mother to pick up her mother's boyfriend, Carlos Terry, from work. (R. p. 410). Mr. Terry worked at Dixie Poly Drum in Yemassee, South Carolina. (R. pp. 405-406).

Tonia Colvin picked Mr. Terry up around 4:30 p.m. at Dixie Poly Drum. (R. p. 410). When Mr. Terry got in the vehicle, he sat in the front passenger seat and Lillian sat in the right rear passenger seat. (R. p. 456). She left the Dixie Poly Drum parking lot and headed down Hill Road toward S.C. Highway 68. (R. pp. 410-411). Just before Hill Road intersects with S.C. Highway 68, there is a CSXT railroad grade crossing. (R. pp. 411-412). The railroad crossing is controlled by a stop sign and does not have gates or lights. (R. p. 411). The stop sign is 36 feet from the near rail of the railroad track. (R. p. 681). There is a stop line 117 inches, 9.75 feet, prior to the near rail of the railroad track. (Id). The railroad track crosses Hill Road at an 88 degree angle. (R. p. 102).

Mrs. Colvin stopped at the stop sign for the railroad crossing. She looked to her right and to her left. Her view was obstructed to her right due to vegetation on CSXT's right-of-way. (R. pp. 412; 415-417). Mrs. Colvin pulled forward, stopped again, and again looked to her right and her left. (R. pp. 412-413). She could see for a distance of three to four hundred feet to her right due to the vegetation in CSXT's right-of-way, (R. p. 416). After stopping the second time and not hearing or seeing a train, Mrs. Colvin pulled forward and began to cross the track. (R. pp. 412-413; 415-416; 419-420).

When Mrs. Colvin pulled forward onto the track she heard the train horn, hit the gas, and was hit by a CSXT train just before she cleared the track. (R. pp. 412-413). The train was traveling at 42 miles per hour. (R. p. 943, 11.9-20). When the vehicle was hit it was spun around and came to rest on the opposite side of the track from the stop sign where she had stopped. (R. p. 414). Carlos Terry was ejected from the vehicle. (R. p. 413). Lillian was slumped over in the back seat with a trickle of blood coming from her nose. (R. pp. 414; 442).

Emergency personnel responded and Lillian was air lifted from the scene to the Medical University of South Carolina. (R. p. 421-422). Lillian was combative at MUSC and flailed about. Her medical providers induced a coma. Lillian remained in a coma for approximately thirty days. (R. p. 430). During the coma, Lillian remained on a ventilator. (R. p. 431). A hole was drilled through her skull to relieve the pressure building around her brain. (Id).

When she woke from the coma, Lillian was not able to speak or walk. (R. pp. 432-434). She stayed at MUSC for approximately one month after she woke from the coma. (R. p. 433). Over the course of that month, she received speech therapy and eventually regained a great deal, but not all, of her speech. (R. pp. 433-436). She had to relearn how to feed herself. (R. pp. 434-435).

Lillian left MUSC in a wheelchair and was transferred by ambulance to Scottish Rite Children's Hospital in Atlanta, Georgia. (R. pp. 434-437). She received physical therapy, occupational therapy, and speech therapy for about a week in Atlanta before Tonia Colvin requested Lillian be allowed to return home and complete her therapy at the Colleton Regional Hospital. (R. p. 437). For the next several months, Lillian received

home health care and therapy at Colleton Regional Hospital. (R. p. 443). Lillian's medical bills total \$271,669.06. (R. p. 457).

When she returned home, Lillian had violent outbursts. (R. p. 438). She had episodes where she hallucinated. (R. p. 439). She constantly made inappropriate comments. She spoke without thinking and used curse words. (R. pp. 439-441). She also had problems with bed wetting. (R. pp. 441-442). She suffered short term memory loss, impaired judgment, and an inability to concentrate. (R. pp. 446-449). She also suffers from a drop foot. (R. p. 444).

Lillian was twelve at the time of the collision. She was in sixth grade. (R. p. 444). Before her injury, she was in advanced classes and performed well in class. (R. p. 542-543). She cooperated with her teachers, behaved well in class, and paid attention to her teachers. (R. p. 542). She was able to concentrate in class. (Id). Lillian was an Honor Roll student. (R. p. 556).

Following the collision, Lillian missed the remainder of her sixth grade year. (R. p. 445). When she started back to school in the Fall of 2005, she was placed in basic classes. (R. p. 544; 582-583). Lillian struggled academically after the wreck. (R. p. 545; 557). She required special accommodations and was often confused in class. (R. p. 545-546; p. 584).

In 2005, the Colleton County School District Department of Special Services evaluated Lillian to determine whether she was eligible to receive special education services. (R. p. 553-567). Lillian was assessed to determine whether she had a disability that affected her educational performance. (R. p. 553). Over a period of seven months, Lillian underwent a psycho-educational evaluation. (R. p. 555). Lillian's pre-injury

records were reviewed, her teachers were interviewed, she was observed in class, and she underwent several standardized tests, including an IQ test. (R. pp. 553-567). Lillian's overall IQ was in the first percentile. (R. p. 561).

The Colleton County School District Department of Special Services determined Lillian was eligible for special education services for the disability of traumatic brain injury. (R. p. 566). An Individualized Education Plan ("I.E.P.") was developed for Lillian. (R. p. 567). Under the I.E.P., Lillian was provided with a resource teacher and a resource period everyday to help her with her weak areas, such as math and writing, and to have thirty minutes a week to work individually with a physical therapist. (R. p. 571).

Lillian's teachers also made special accommodations for her. She was allowed extra time on assignments and was allowed to take her work and tests home. (R. p. 584-585; 597-598). Despite her I.E.P. and special accommodations, Lillian continued to struggle academically. (R. p. 584-585; 595).

In 2000, CSXT implemented a program to eliminate sight obstructions at railroad grade crossings. (R. p. 153; 1622; 1623). Under the program, CSXT was to clear cut all vegetation on its right of way at all passive railroad grade crossings for a distance of 350 feet from the roadway. (R. p. 153; 171-172; 1622; 1623). South Carolina was the top priority in the timing of the railroad grade crossing clearing program. (R. p. 156). The clearing program was to begin in South Carolina in May of 2001. (R. p. 162; p. 1624). The start date later changed to June of 2001. (R. p. 163; p. 1625). The clearing was to be completed within 158 days of the start date. (R. p. 164, p. 1625). The start date was subsequently pushed back again. (R. p. 166; p. 1629). However, all passive railroad grade crossings in Hampton and Allendale Counties were to be cleared by October 9,

2001. (R. p. 167; p. 1631). The clearing program was partially completed in South Carolina in 2001 but not to CSXT's original specifications due to problems with CSXT's contractor. (R. p. 164; p. 1632). The Hill Road crossing was not cleared. (R. p. 184).

In 2003, CSXT hired a different contractor, DeAngelo Brothers, in an effort to finish the crossing clearing program. (R. p. 177-178; p. 1640-1641). CSXT also changed the specifications for the clearing program. (R. p. 178-180; pp. 1640-1642). The new specifications required that CSXT's entire right-of-way be cleared for a distance of 100 feet from the edge of the roadway. (R. pp. 178-180; p. 1642). The clearing of the right-of way was then to be tapered in a straight line so that at a distance of 650 feet from the roadway, all vegetation would be cleared for a distance of twenty eight feet from the centerline of the track. (R. pp. 178-180; pp. 1642-1643).

The Hill Road crossing was partially cleared on September 10, 2003. (R. p. 184). However, the trees in the northwest quadrant of the crossing, the direction the train was coming from, were not cleared on September 10, 2003 due to a dispute with a landowner over ownership of the trees. (R. p. 185-186; p. 1647). Trees in this quadrant were located as close as 16 feet to the near rail which would require a motorist to get closer than 15 feet of the near rail before he or she would have an adequate view of a train approaching from the west. (R. pp. 1619-1621; 60; pp. 200-244; p. 682). The dispute was with Tommy Jackson. (R. p. 184-186; p. 1647). Mr. Jackson has for years lived on property within approximately 100 yards of the crossing at issue. (R. p. 50, ll. 18-24). In September of 2003, he was alerted to the fact that the railroad was cutting vegetation and timber in its right-of-way near the rail. (R. p. 51, l. 16 - 53, l.5). Jackson objected, believing that he owned the timber, which included a number of large oak trees and

"scrub" maples. (Id.) After notifying the road master for CSXT, he learned shortly after his objection that CSXT would not remove the disputed trees. (R. p. 53, l. 16 – 54, l. 17). Again, in early 2004, before this accident, Mr. Jackson confirmed through the CSXT road master that CSXT "weren't going to do anything about cutting that crossing." (R. p. 54, l. 18 – 55, l. 25). However, within days of Mr. Jackson's protestation, CSXT had determined that CSXT owned the disputed trees. (Vol. 3, p. 185-187; 1647). Within three (3) weeks after this collision and without consulting Mr. Jackson, CSXT removed the trees that Jackson claimed to have owned.

On February 3, 2004, the date of the subject collision, the northwest quadrant had not been cleared as required under CSXT's crossing program. Also, as CSXT admitted at trial, the engineer did not sound the horn of the train for the 1,500 feet prior to the crossing as required under South Carolina law.

ARGUMENTS

I. THE COURT ERRED IN FAILING TO GRANT APPELLANT'S MOTIONS FOR DIRECTED VERDICT AND FOR JUDGMENT NOTWITHSTANDING THE VERDICT AS TO DEFENDANT CSXT'S NEGLIGENCE FOR FAILURE TO SOUND ITS WHISTLE AT THE SUBJECT CROSSING IN ACCORDANCE WITH SOUTH CAROLINA LAW AND FOR FAILURE TO CLEAR THE SUBJECT CROSSING IN ACCORDANCE WITH ITS OWN RULES AND REGULATIONS.

The evidence presented at trial, including the admissions of the Respondent CSXT, are susceptible of but one conclusion: that CSXT was negligent in its failure to sound its whistle in accordance with South Carolina law and its admitted failure to clear and maintain the subject crossing in accordance with its own rules and regulations.

A motion for judgment notwithstanding the verdict (JNOV) is a renewal of a directed verdict motion. Wright v. Craft, 372 S.C. 1, 640 S.E.2d 486 (Ct. App. 2006). In

ruling on a directed verdict motion or JNOV motions, the trial court must view the evidence and all inferences reasonably drawn therefrom in the light most favorable to the nonmoving party. Jinks v. Richland County, 355 S.C. 341, 585 S.E.2d 281 (2003). However, when the evidence yields but one reasonable inference, a directed verdict in favor of the moving party is proper. R & G Const., Inc. v. Lowcountry Regional Transp. Authority, 540 S.E.2d 113 (Ct. App. 2000). Henderson v. St. Frances Community Hospital, 303 S.E. 177, 399 S.E.2d 767, 768 (1990). Similarly, if there is doubt as to the inferences to be drawn, then the motion for JNOV must be denied. Id. An appellate court will reverse a trial court's ruling on a directed verdict motion only when there is no evidence to support the ruling or when the ruling is controlled by an error of law. Estate of Carr ex rel. Bolton v. Circle S Enterprises, Inc., 664 S.E.2d 83 (Ct. App. 2008). In reviewing the trial court's ruling on a motion for directed verdict, the Court of Appeals must determine whether a verdict for a party opposing the motion would be reasonably possible under the facts as liberally construed in his favor. Goodwin v. Kennedy, 347 S.C. 30, 552 S.E.2d 319 (Ct. App. 2001); Long v. Norris & Associates, Ltd., 342 S.C. 561, 538 S.E.2d 5 (Ct. App. 2000).

At the conclusion of the Defendants' case, the Plaintiff moved for a directed verdict as to the negligence of CSXT on each theory of liability. The motion for directed verdict sought only the finding that CSXT's duty had been breached under each theory. The Appellant concedes that factual issues existed under each theory as to whether the collision and injuries sustained were proximately caused by CSXT's breach of their duty under each theory. Nevertheless, as a matter of law, the breach of duty was established and no facts or inferences existed to the contrary. For the reasons that follow, the trial

court erred in failing to direct a verdict against CSXT as to negligence and the trial court's order denying Appellants' Motion for JNOV should be reversed.

A. CSXT's Admitted Failure to Sound its Whistle in Accordance with S.C. Code Ann. § 58-15-910 Constituted Negligence as a Matter of Law.

S.C. Code Ann. § 58-15-910 dictates that a train crossing any highway must begin to sound its whistle or horn beginning at 1500 feet from the crossing and continue this warning until it has crossed that roadway. This section reads as follows:

A bell of at least thirty pounds' weight and a steam or air whistle shall be placed on each locomotive engine... and such bell shall be rung or such whistle sounded by the engineer, fireman or motorman at the distance of at least five hundred yards from the place where the railroad crosses any public highway, street or traveled place and be kept ringing or whistling until the engine... has crossed such highway, street or traveled place.

S.C. Code Ann. § 58-15-910

In opening, CSXT admitted its failure to sound the whistle in conformity with the above statute:

Now there's been a big deal made. You heard Mr. Parker talk about what he called the short whistle. And he's right. Under the law, 1500 feet before approach the crossing, the whistle is supposed to start blowing at that point in time. There is this black box on the train... the black box tells you information about what happened, and Ned Wooden believed that when he got to 1500 feet, he was blowing at what's called the whistle post, the big post in the ground when they start blowing. He believed he did. It turned out he didn't. He was a few seconds late in blowing the horn, members of the jury, and there won't be any dispute about that. (R. p. 46, l. 21 – p. 47, l. 8).

I'm not suggesting that it's not important, it's very important – he missed it by a few seconds. (R. p. 47, ll. 17-18).

By CSXT's own admission and the evidence adduced at trial, the evidence is only susceptible of the conclusion that CSXT was negligent in the discharge of its duty to

properly sound its whistle. (R. pp. 718-742; pp. 1648-1760). CSXT's counsel admitted in opening that the whistle was not properly sounded. Ned Wooden, the train's engineer, testified that he while he "believed" he had whistled appropriately, the on board recorder indicated that he had only blown for 1100 feet. Mr. Wooden received verbal counseling for failing to properly blow the whistle. Further, he did not dispute the recorder's data. (R. p. 809, l. 2 – p. 819 l. 4). On cross examination Wooden again acknowledged the accuracy of the event recorder and that he had not sounded for the required 1500 feet. (R. p. 815 – p. 816, l. 3). James Barton, a road foreman of engines for CSXT, testified as to post-accident review of the event recorder and concluded that the whistle sounded for only 1100 feet. (R. p. 683, l. 14 – p. 685, l. 3; p. 686, l. 21 – p. 687, l. 19). Therefore, based upon the evidence presented and the admissions of counsel for CSXT, the only conclusion to be drawn from the whole of the evidence prior to the directed verdict motion is that CSXT failed to comply with its statutory duty to sound its whistle for 1500 feet prior to the crossing. This failure constitutes a breach of its duty, or simple negligence. It follows that Stephens' motion for directed verdict at the close of the Respondent's case should have been granted on the grounds requested.

Furthermore, at the close of the Appellant's rebuttal, CSXT stipulated that the event recorder was accurate. It is well settled precedent that "[w]hen counsel enter into an agreed stipulation of fact as a basis for decision by the court, both sides will be bound by such agreed stipulation, and the court will not go beyond such stipulation to determine the facts upon which the case is to be decided." Belue v. Fetner, 251 S.C. 600, 164 S.E.2d 753 (1968).

In its Order Denying Appellant's post-trial motions, the court made numerous conclusions of law to deny the motions. First, the court states that "in order to direct a verdict for the Plaintiff, I would have had to find there was no jury issue on any element of the Plaintiff's negligence claim. This would have required me to find duty, breach and proximate cause as a matter of law." (R. p. 3). This logic is error because the trial court confuses the issue of negligence with that of liability. See, Hinds v. Elms, 358 S.C. 581, 595 S.E.2d 855 (Ct. App. 2004). "In a personal injury action, a determination of negligence, standing alone, does not entitle a plaintiff to a favorable verdict as a matter of law." Hinds, 358 S.C. at 586, 595 S.E.2d at 858. "Liability encompasses all elements of a negligence claim, including damages proximately caused by the negligence." Id. By its admission of failure to sound the whistle according to statute, CSXT simply admitted negligence, and the Appellant was entitled to a directed verdict on that issue. The issue of proximate cause as to the whistle's contribution to the accident remained an issue to be determined by the jury. A directed verdict would have simply established the existence of a duty and the breach of that duty to sound the whistle in accordance with the law. It follows that the jury's finding that CSXT was not negligent with regard to the whistle is an inconsistent and impermissible verdict.

The trial court held that because Appellant failed to move for a directed verdict after the close of all evidence, or after CSXT stipulated to the accuracy of the event recorder, the issue of the short whistle was waived and could not be considered by the court in a JNOV motion. This waiver argument is incorrect. First, based on the admissions noted above and the evidence prior to the Appellant's motion for directed verdict, the stipulation of the accuracy of the event recorder was not required for the court

to direct a verdict. Second, even if the stipulation was required, Appellant was not required to renew his directed verdict motion at the close of his own rebuttal case in order to have the issue considered through a motion for JNOV. Rule 50(b), SCRC, states as follows:

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

Id. Respondent argued, and the court adopted, the argument that the phrase "at the close of all evidence," required a renewal of the directed verdict motion after the Appellant's rebuttal testimony. It is illogical to conclude that after a party presents its own evidence in rebuttal, that party would then be required to renew his directed verdict motion based upon the presentation of his own evidence. Appellant concedes that if Defendants had offered reply testimony, a renewal may have been warranted. Under these circumstances, however, renewal was not required in order to have the trial court consider the motion for JNOV.

Furthermore, the fact that CSXT's stipulation was published after the Appellant's rebuttal testimony does not require the Appellant to renew his directed verdict motion. After the stipulation as to the accuracy of the event recorder showing the horn was blown at 1100 feet, the failure to comply with the whistle statute became the law of the case. Thus, the Appellant's failure to renew his directed verdict motion at the conclusion of his rebuttal testimony did not constitute waiver of a JNOV motion pursuant to Rule 50(b), SCRC, and a directed verdict was proper.

With regard to the whistle issue therefore, the only form of verdict should have been the question of whether CSXT's negligence in failing to sound the whistle was a proximate, contributing cause of the damages sustained by Lillian C. Instead, the jury found that CSXT was not negligent as to the whistle issue. This inconsistent finding by the jury and the trial court's failure to find CSXT negligent as a matter of law, are erroneous and inconsistent with the evidence, the admissions, and stipulation of CSXT. A directed verdict on CSXT's negligence in failing to sound its whistle was therefore appropriate. Appellant's motions for directed verdict and for JNOV should have been granted and reversal is warranted.

B. The Trial Court Erred in Failing to Direct a Verdict Against CSXT When the Evidence was Only Susceptible of the Conclusion that CSXT was Negligent in Admittedly Failing to Clear the Subject Crossing in Accordance with its Own Rules and Regulations.

Similar to the issues addressed above concerning the failure to sound the whistle in conformity with state law, CSXT admitted that it had failed to clear the vegetation and tree growth within its right-of-way at the subject crossing in conformity with its own rules and regulations.

Pursuant to CSXT's rules, regulations, and standards, CSXT's entire right-of-way should be cleared for a distance of 100 feet from the edge of the roadway. (R. p. 178-180; 1643). The clearing of the right-of way was then to be tapered in a straight line so that at a distance of 650 feet from the roadway, all vegetation would be cleared for a distance of twenty eight feet from the centerline of the track. (R. pp. 178-182; 1643; 1644). In this case, it is clear and uncontested that CSXT failed to comply with its own standards. Prior to this collision at the crossing, the evidence undisputedly showed that at certain distances back from the stop line at issue, motorists' sight lines were obstructed

by vegetation and trees. (R. pp. 412-413; 415-417; pp. 58-67; pp. 688-690; p. 1025, ll. 5-19). CSXT's subcontractor charged with clearing the right-of-way attempted to cut certain trees and vegetation within the right-of-way in September of 2003, but this effort was met with resistance by Mr. Tommy Jackson, who believed that his family owned a portion of the right-of-way. CSXT, within a few days of Mr. Jackson's claim of ownership to a portion of the right-of-way, had confirmed its ownership to the right of way. (R. p. 1647). For months, CSXT represented to Mr. Jackson that the railroad would do nothing to clear the trees. (R. pp. 50-55). However, within approximately three (3) weeks of the collision at the crossing, CSXT promptly removed the once "disputed" trees and vegetation without consultation with Mr. Jackson.

Mr. Jackson testified as to numerous photographs of the crossing which at different distances from the rail depicted the various sight obstructions caused by vegetation and trees. (R. pp. 59-65). Similarly, in describing his visit to the subject crossing the day after the accident, CSXT employee James Barton admitted that at the stop sign at the crossing, there was foliage on the right-hand side when looking towards the tracks. Barton further acknowledged that at the stop sign and pulling forward, there were trees that block a motorist's view of the tracks. (R. p. 686, l. 1 - p. 690, l. 11). Appellants' expert Kenneth Heathington, Ph.D., offered in depth testimony as to the sight obstructions which existed within the right-of-way maintained by the defendant and over the course of hours of testimony, catalogued in great detail the failures and omissions of CSXT to conform to their own standards. (R. pp. 97-118; pp. 132-194; p. 200, l. 15 - p. 244, l. 22). All evidence at trial, as well as the admissions of CSXT, lead to the single conclusion that CSXT was negligent in maintaining its right-of-way at this crossing.

Despite the fact that the evidence is susceptible of only one conclusion, the trial court failed to grant a directed verdict on the simple negligence of CSXT. This was error. As addressed in Section IA above, the trial court's ruling is based upon the trial court's confusion of the concept of negligence with that of liability. See, Hinds v. Elms, supra. The court erred in failing to direct a verdict on the simple negligence of CSXT in failing to cut this crossing under its own standards. The Appellant was entitled to a directed verdict on the issue so that the only question for the jury was whether CSXT's negligence in failing to cut its right-of-way was a proximate cause of the injuries sustained by Lillian C. Failure to direct a verdict on this issue constitutes reversible error, as does the failure to grant the motion for JNOV.¹

II. THE APPELLANT IS ENTITLED TO A NEW TRIAL DUE TO NUMEROUS ERRORS CONCERNING THE ADMISSION AND REJECTION OF EVIDENCE AT TRIAL.

Appellant asserts that the trial court erred in numerous respects concerning the admission and rejection of evidence. Due to these errors of law, which prejudiced the Appellant, Appellant's motion for a new trial pursuant to Rule 59, SCRCF, should have been granted and reversal is warranted.

A. The Trial Court Erred in Excluding Evidence that the Subject Crossing was Cut Shortly after this Collision when the Evidence Was Offered to Impeach Defendant CSXT's Position that Its Failure to Cut the Subject Crossing was Caused by Landowner Issues and Disputes.

CSXT's sole defense as to why the subject crossing had not been cleared in accordance with its own crossing-clearing program was that "landowner disputes" impeded its ability to cut trees at this clearing. From opening statements, CSXT argued

¹ Appellant adopts and incorporates by reference the previous arguments of Section IA concerning "waiver" under Rule 50, SCRCF, as applicable to the directed verdict and JNOV motions on the crossing-clearing issue as well.

their inability to remove certain trees at this crossing was due to the protestations of Mr. Tommy Jackson, a landowner abutting the tracks. (R. p. 44, l. 11 – p. 45, l. 1). This failure to clear the vegetation and trees occurred approximately four (4) months before this accident. (Id.) As noted in CSXT's opening: "Members of the jury, they should have been [cut], because Mr. Jackson did not own the land that he was claiming those trees were on. So those trees weren't cut." (R. p. 44, l. 23 – p. 45, l. 1).

To impeach CSXT's position as to its failure to cut and clear this crossing prior to the collision, Appellant sought to introduce evidence that within weeks of the collision at issue, CSXT had cut the very trees which it argued it was unable to remove due to "landowner disputes." The denial of the admission of this evidence was based upon the court's conclusion that the removal of these trees after the accident was a subsequent remedial measure under Rule 407, SCRE. 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.

(Emphasis added). *Id.* Based upon the plain language of Rule 407, SCRE, Appellant's purpose for admitting this evidence was entirely proper. The evidence was directly relevant for impeachment purposes, in that it shows CSXT had the ability and authority to remove the subject trees. A jury should have been allowed to consider this information to determine whether the failure to cut this right-of-way prior to the accident was borne of inability due to landowner disputes as contended by CSXT, or whether it was borne of

CSXT's neglect and failure to follow its own policies and procedures, as contended by Appellant.

Although the admission or exclusion of evidence is addressed to the sound discretion of the trial judge, the exclusion of this evidence was error. Moreover, due to the fact that this impeachment evidence struck at the very core of CSXT's defense to its failure to maintain their right-of-way, by excluding the evidence, the Appellant was unable to confront and impeach the defense. This inability prejudiced the Appellant and a new trial is warranted.

B. The Court Erred In Excluding the Testimony of Anna Sue Rivers and Betty Ruth Crews when their Testimony was Admissible to Impeach CSXT's Position that the Subject Crossing was Not Cut in Accordance with Standards Due to Landowner Issues and Disputes.

As addressed in Section II(A), above, CSXT's only defense as to its failure to properly cut and clear the subject crossing was the contention that it was unable to do so due to a "landowner dispute." Like the court's failure to allow Appellant to introduce evidence concerning the clearing of the subject crossing after the collision, the court rejected the testimony of Anna Sue Rivers and Betty Ruth Crews on the basis of Rule 407, SCRE. Again, the testimony of these witnesses was directly relevant and admissible to impeach the credibility of CSXT's asserted defense as to the non-removal of vegetation at the subject crossing.

Both of these witnesses' testimony shows that approximately five (5) months after this accident, in following its policies to clear its right-of-way, CSXT reached the crossing in Hampton near Mrs. Crews' home. (R. p. 377, l. 13 – p. 382, l. 22; p. 383, l. 16 – p. 384, l. 3). For decades Crews had maintained an ornamental garden within the right of way near her home. (Id.) These witnesses protested the removal of the garden

within the right-of-way to CSXT's subcontractor charged with clearing the right of way. In response to this protest, or landowner dispute, CSXT demanded that if the flowers and vegetation were not removed immediately, then the railroad would clear it. CSXT demanded immediate compliance. (Id.) Thus, the purpose of this testimony was to impeach CSXT's defense that with respect to the subject crossing, they could not promptly and efficiently remove the trees due to the dispute with Mr. Jackson. This testimony would have shown that in fact, CSXT had the ability and authority to demand of Mr. Jackson exactly what was demanded of Rivers and Crews: immediate compliance or the railroad would clear the vegetation.

Under the plain language of Rule 407, this evidence was admissible to impeach CSXT's sole defense to its failure to clear the vegetation at the crossing. The court agreed that the testimony was relevant to the issue, yet concluded that simply because this incident occurred after the collision at issue, it was inadmissible. (R. p. 382, ll. 11-17). This was error, and the discretionary decision to reject this evidence severely prejudiced the Appellant's ability to impeach the credibility of CSXT's defense.

III. APPELLANT IS ENTITLED TO A NEW TRIAL DUE TO THE COURT'S FAILURE TO GIVE REQUESTED JURY CHARGES AS WELL AS IN GIVING IMPROPER CHARGES TO THE JURY, ALL OF WHICH CREATED PREJUDICE TO THE APPELLANT.

Appellant is entitled to a new trial based upon a number of Plaintiff's Requests to Charge which were refused, as well as improper charges which were given to the jury. "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). In Burns v. South Carolina Commission for Blind, the Court of Appeals held:

If the requested charge states a sound principle of law that is applicable to the case, and not otherwise covered by the charge, refusal to charge it is error and requires a new trial. Moreover, when general instructions to the jury are insufficient to enable the jury to understand fully the law of the case and issues involved, a refusal to give a requested charge is reversible error.

Id. at 323 S.C. 77, 80, 448 S.E.2d 589, 591 (Ct. App. 1994).

To warrant reversal, the party seeking the requested jury charge must demonstrate error and prejudice. Cole v. Raut, *supra*. "An alleged error is harmless if the appellate court determines beyond a reasonable doubt that the alleged error did not contribute to the verdict." Wells, 341 S.C. at 237, 533 S.E.2d at 343.

In light of the failure to charge applicable law and the inappropriate charges which were given, the Appellant's case was prejudiced. Reviewed individually, collectively, and in its entirety, the jury charge was erroneous and prejudicial to the Appellant because the charge confused and misled the jury. Therefore, a new trial is required.

- A. The Court Erred in Charging S.C. Code Ann. § 56-5-2930, because there is No Evidence that Tonia Colvin was Impaired; this Error was Compounded by the Court's Refusal to Charge S.C. Code Ann. 56-5-2950 Concerning the Presumptions of Impairment as well as S.C.

**Code Ann. § 15-78-60(20) Concerning the SCDOT's Immunity from
Liability for the Criminal Activities of Third Persons.**

During trial, Tonia Colvin admitted that in a period of five to five and one half hours prior to the accident, she had consumed one or two wine coolers. (R. pp. 422-433). Ms. Colvin also testified that on the day of the accident she had take her prescriptions for Darvocet and tizanidine, which she had taken for years due to her disk herniations. (R. pp. 426-429). Colvin testified that she took these prescriptions on a daily basis and during the course of her prescription use had never suffered any side effects from the medication. (Id.). During the course of emergency treatment following the accident, Ms. Colvin's blood alcohol content was measured to be .018, or 18 milligrams percent. (R. pp. 519-532). A drug screen performed during her emergency treatment found her presumptively positive for opiates. (Id.). The only evidence adduced at trial concerning this finding was that it stemmed from her prescription medication. (R. p. 665). Other than the admissions of Ms. Colvin that she consumed one or two wine coolers that day, absolutely no evidence was presented at trial, whether direct, circumstantial, or in the form of inferences, that she was in any way impaired at the time of this collision. Through various stages of the trial, Appellant lodged objections at the charging of this statute. (R. p. 1408, l. 12 – p. 1411, l. 17.) Nevertheless, the trial court charged the jury on the driving under the influence criminal statute as follows:

Ladies and gentlemen, under South Carolina law, again, Subsection 56-5-2930, it is unlawful... for a person to drive a motor vehicle in any one of the following situations: if that person is under the influence of alcohol to the extent that the person's faculties to drive are materially and appreciably impaired; if that person is under the influence of any other drug or combination of other drugs or substances, including prescription medication or narcotics, which cause impairment to the extent that the person's faculties to drive are materially and appreciably impaired; or if that

person is under the combined influence of alcohol and any other drugs, or drugs or substances, including prescription medication or narcotics, which cause impairment to the extent that the person's faculties to drive are materially and appreciably impaired.

Ladies and gentlemen, I charge you that driving under the influence, under Subsection 56-5-2930, which I just read to you, has been interpreted to mean that a person shall not operate a motor vehicle while under the influence of certain substances which materially and appreciably impair the mental and physical faculties of the operator; or, stated another way, the impairment due to drinking of alcohol must be to such a degree that it adversely affects the ability of the driver to operate the vehicle safely on the highways of the state.

I charge you, ladies and gentlemen, that it is not against the law of South Carolina to drink and/or use drugs and drive. A person is guilty of driving under the influence only if their abilities are impaired by alcohol and/or drugs to such an extent that their driving is materially affected and they are thereby unable to safely operate an automobile.

(R. p. 1452).

To compound the error in charging 56-5-2930 when there was no evidence of impairment, the trial court refused to charge S.C. Code Ann. § 56-5-2950(b). This statute states that when the driver of a vehicle registers below .05 blood alcohol concentration, "it is conclusively presumed that the person was not under the influence of alcohol."

Respondents objected to this statute being charged because it is criminal in nature and because there was testimony concerning prescription drugs, which could have combined with the negligible amount of alcohol to cause impairment. Appellant points out that S.C. Code Ann. § 56-5-2930 is a criminal statute, but was charged nevertheless. Furthermore, the evidence at trial showed that Tonya Colvin had taken her prescription medication at 6:30 that morning and may have taken another Darvocet approximately 5 hours before the collision. The jury could have therefore considered that the prescription

medication did not cause any impairment, but that alcohol could have. Although CSXT contended that the charge of § 56-5-2950 was inappropriate because it did not consider the mixture of alcohol and prescription medication, the jury was still entitled to learn the law concerning alcohol concentration.

Appellant was prejudiced by the jury being charged on the criminal statute concerning impaired driving and then the jury being precluded from learning that by Colvin's blood alcohol level, she was presumptively not impaired by alcohol under S.C. Code Ann. § 2950. (R. p. 1337, 1.5 – p. 1350, 1.7). The failure to charge the jury on correct, applicable law concerning the presumption of impairment deprived the jury of the ability to understand one of the central issues in this case, the driving and decisions of Ms. Colvin at the subject crossing. "When general instructions to the jury are insufficient to enable the jury to understand fully the law of the case and issues involved, a refusal to give a requested charge is reversible error." Fernanders, 323 S.C. at 80, 448 S.B.2d at 591 (Ct. App. 1994).

Furthermore, the Court charged the jury that the SCDOT was immune from liability pursuant to S.C. Code Ann. § 15-78-60(20) for the criminal actions of third persons. This charge was in error. By charging the criminal driving under impairment statute when there was no evidence of impairment and Colvin was never charged with any crime, the failure to allow Colvin to rebut impairment by presentation of Section 56-5-2950 confused the jury and prejudiced the Appellant. Much to the prejudice of the Appellant, the charge given and refusal of § 56-5-2950 impermissibly led the jury to infer that the SCDOT could not be liable for its omissions because "criminal activities" had been committed by Ms. Colvin.

The defense of this case centered upon the actions of Ms. Colvin as the driver of the vehicle carrying her daughter. To allow the jury to consider the criminal statutes concerning impairment, when there was absolutely no evidence to support violation of the statute, prejudiced the Appellant. This prejudice was amplified by the court's refusal to charge the jury concerning the presumption that Colvin was not impaired, and this prejudicial error requires and warrants the granting of a new trial.

B. The Trial Court Erred in Charging the Jury on the Law of Intervening or Superseding Negligence.

The court erred in charging the law of intervening, or superseding negligence under the facts of this case. Following instruction on concurring causes, the Court charged as follows:

An intervening cause is an independent cause which intervenes between the original wrongful act or omission and the injury, turns aside the natural sequence of events, and produces a result which would not otherwise have followed and which would not have been reasonably anticipated. It is an act of an independent agency which destroys the causal connection between the negligent act of a defendant and the wrongful injury; the independent act being the immediate cause, in which case damages are not recoverable because the original wrongful act is not the proximate cause.

An intervening act of a third person, ladies and gentlemen, breaks the chain of causation and obviates the liability for the original breach of duty if it is a superseding cause and one which the original wrongdoer was not bound to anticipate as the natural or ordinary result of their acts. If subsequent to an original wrongful act or negligent act a new cause has intervened, of itself sufficient to stand as the cause of the injury, the former must be considered as too remote. However, if the character of the intervening act claimed to break the connection between the original wrongful act and the subsequent injury with [sic] such that its probable or natural consequences could reasonably have been anticipated by the original wrongdoer, the causal connection is not broken and the original wrongdoer is responsible for all the consequences resulting from the intervening act.

(R. p. 1436, l. 12 – p. 1437, l.13).

Appellant objected to this charge on the grounds that any allegations of negligence against Ms. Colvin as the driver of the vehicle in the collision were foreseeable as a matter of law, and therefore could not serve as an intervening, superseding cause. (R. p. 1303, l. 3 – p. 1307, l. 4). Based on the facts presented at trial, it is absolutely foreseeable that a motorist might not stop at the stop line at the Hill Rd. crossing, as the stop line was closer than 15 feet of the near rail. It is not lawful to stop closer than 15 feet to the nearest rail. S.C. Code Ann. § 56-5-2715. Therefore, as a matter of law, these foreseeable risks cannot serve as an intervening or superseding negligent act which would sever the Respondents' wrongdoing from the resulting injuries.

The court erred by charging the jury on the theory of intervening and superseding negligence, and reversal is required.

C. The Court Erred in Failing to Charge Plaintiff's Requests to Charge Numbers 2 and 3, both Correct Statements of the Law Concerning CSXT's Duties at Crossings with Obstructed Views.

Appellant requested that the trial court charge as follows with respect to vegetation within its right-of-way at crossings:

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

(R. p. 1066, l. 5 – p. 1070, l.21). This requested charge is based on the case of Lowery v. Seaboard Coastline R. Co., 241 S.E.2d 158 (1978). The court refused to charge the

requested language because "it's not, clearly, from the case" and would only charge Number 2 "if you can give me a direct quote from the case and something that's applicable." The requested charge was clearly an accurate and correct statement of the law. Lowery dealt with a crossing accident where the jury found that the motorist's view of the crossing was obstructed by high weeds, requiring the motorist to approach the crossing so closely that once the train was visible, the collision could not be avoided. Thus, the liability in that case was founded, in part, on the railroad's failure to clear vegetation in its right-of-way, which was a contributing proximate cause to the accident. Despite the fact that the requested charge is not an exact, specific quote from the Lowery decision, the charge reflects the holding of that case. The notion that railroads are liable to injured parties if they fail to clear sight obstructing vegetation from its right-of-way and that failure is a proximate cause of injuries is entrenched in our jurisprudence. See also, Webb v. CSX, 364 S.C. 639, 615 S.E.2d 440 (2005). Plaintiff's second request to charge was a correct and current statement of the law. The failure to charge this request prejudiced Appellant.

Appellant's third request to charge also dealt with CSXT's duty to maintain its right-of-way clear of sight obstructions. (R. p. 1070, l. 22 – p. 1073, l. 13). Appellant requested that the jury be charged that "[w]hen vegetation at a railroad crossing is such that it obstructs a motorist's view of an oncoming train, the railroad has a duty to exercise added care in the operation of timing as the train approaches and crosses the crossing." Appellant's basis for the charge was Gleaton v. Southern, 38 S.E.2d 710, 714 (1946), a case which dealt with a sight obstruction caused by box cars and other equipment near the crossing that caused sight obstruction at the track. Because the case dealt with sight

obstructions other than vegetation and the requested charge was not a direct quote from Gleaton, the court refused the charge.² (R. p. 1073, ll. 10-13). Nevertheless, the requested charge is an accurate statement of the law and applicable under the facts of the case at bar. The issues of sight obstruction at the crossing and the engineer's conduct on approach of the crossing, specifically his failure to adequately sound the whistle, were the central issues in the case. Appellant was entitled to the charge requested, as it directly relates to the duty of care owed by the train in approaching the subject crossing.

The error in not charging Appellant's requests to charge numbers 2 and 3 was compounded by the court charging the jury that "it is the law of this state that when the vision of the motorist is obscured by unfavorable conditions, whether by reasons of weather, atmospheric conditions or other obstructions to vision such motorist must exercise due care consistent with the increased danger occasioned by the conditions that obstruct their vision." (R. p. 1461, ll. 13-18). The jury because of the charge was told if there is a view obstruction it is only the motorist's duty to exercise reasonable care. The railroad and the motorist have mutual duties to exercise due care. The railroad has a duty to provide an adequate, reasonable and safe sight distance and the motorist has a duty to exercise reasonable care under the circumstances. The Appellant was prejudiced by the failure to charge on the railroad's duty to provide a safe, reasonable and adequate sight distance free of obstructions and because the jury was instructed that sight obstructions only related to the motorist's conduct. It was error to refuse to charge this correct, applicable statement of the law. The failure to charge was prejudicial to the Appellant's case and the ability to show that the failure to properly warn by whistle was a

² "Mr. Parker, it's just not, clearly from the case. If you can give me a direct quote from the case and something that's applicable... I'll charge it." (R.II, p. 249, ll. 10-13).

contributing proximate cause of the collision. The trial court's failure to charge these correct statements of the law was in error, and it cannot be said beyond a reasonable doubt, that the failure to charge as requested was harmless error. Reversal is therefore warranted.

D. The Court Erred in Charging S.C. Code Ann. § 56-5-2330 and § 56-5-2740, which Apply to Intersecting Highways, but Not Railroad Grade Crossings, and which Conflict with S.C. Code Ann. § 56-5-2715 and the MUTCD.

The duties of a motorist to stop at highway grade crossings such as the one at issue are found in S.C. Code Ann. § 56-5-2715, which 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 thereat. 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.

(Emphasis added). *Id.* Furthermore, the Manual on Uniform Traffic Control Devices (MUTCD), which the SCDOT is bound to follow, dictates that stop signs must be posted no closer than 15 feet from the rail, which conforms to the duties of motorists in the above statute. There is no question that this statute applies to the crossing at issue. Despite the clear application of this statute to the crossing at issue, the trial court charged the jury on two unrelated, irrelevant statutes which do not apply to railway crossings: S.C. Code Ann. §§ 56-5-2330 and 56-5-2740.

The trial court charged the jury as follows:

Ladies and gentlemen, I charge you it is the law of this state, according to South Carolina Code Section 56-5-2330, that every driver of a vehicle approaching a stop sign shall stop at a clearly marked stop line. After having stopped, the driver shall yield the right-of-way to any approaching traffic that is so close as to

constitute an immediate hazard during the time when such driver is moving across or within the intersection.

(R. p. 1452). Section 56-5-2330 and the charge thereon, are inapplicable to the facts of this case, as the statute does not apply to stop signs at railroad crossings. The fact that the statute references the driver's duty to yield the right-of-way to oncoming traffic highlights its inapplicability.

S.C. Code Ann. § 56-5-2740 applies to highway intersections with crosswalks.

Section 56-5-2740 states:

Every driver of a vehicle approaching a stop sign shall stop before entering the crosswalk on the near side of the intersection or, in the event there is no crosswalk, shall stop at a clearly marked stop line but, if none, then at the point nearest the intersecting highway where the driver has a view of approaching traffic on the intersecting highway before entering the intersection except when directed to proceed by a police officer or traffic-control signal.

Id. Based on the plain language of the statute, it applies to highway intersections with crosswalks. It does not apply to the railway/highway crossing at issue and is an inappropriate charge.

Pursuant to § 56-5-2715, Tonia Colvin'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 charging two inapplicable statutes describing her duties to stop in other contexts, the jury could certainly have been confused as to Colvin's duties at this crossing. In fact, Colvin was not allowed by § 56-5-2715 to stop at the stop line in place at the crossing, as the stop line at this crossing is placed approximately 9.75 feet from the near rail of the roadway, in violation of the applicable MUTCD standard. (R. p. 681). To comply with the inapplicable statutes charged, therefore, would require that Colvin violate the one clearly

applicable statute, § 56-5-2715. It follows that the charge of the irrelevant statutes could have led the jury to place upon Colvin duties which did not exist. The prejudice to Appellant is clear in that it could have led the jury to believe that if Colvin failed to meet the requirements of one of the inapplicable statutes, she had acted negligently and was the sole cause of the collision. By charging the inapplicable statutes of §§ 56-5-2330 and 56-5-2740, the court erred, causing potential confusion of the jury, and ultimately causing prejudice to the Appellant's case, in that the jury could conclude that Colvin's violation of an inapplicable statute constituted the sole negligence of a third party. Due to the error, a new trial is warranted.

E. The Court Erred in Charging the Jury on Numerous Issues Concerning the Erection of Signage at Crossings, as These Charges were Irrelevant to Any Issue in the Case and Caused Confusion to the Jury.

The trial court charged the jury on a number of inapplicable statutes concerning the erection of signage at crossings, none of which had any bearing on issues in the trial. These inapplicable charges were on S.C. Code Ann. § 56-5-1010; § 56-5-1020; § 58-17-1390; and, § 58-15-1625.

S.C. Code Ann. §56-5-1010 requires that all railroad companies "shall place and maintain at every crossing of a highway and railroad at grade standard cross-buck signs" in accordance with the MUTCD. In the case at bar, there was no issue as to whether CSXT had erected a cross buck sign at the crossing. The required signage was present. By charging a requirement of law that had been met by CSXT, but which had no application to the facts of the case, the jury could have been led to believe that by compliance with the signage requirement, CSXT had fulfilled their duty to motorists at the crossing. The fulfillment of this signage obligation had no bearing on the questions

raised at trial of whether CSXT's admitted failures concerning vegetation clearance and appropriate whistle notification were a proximate cause of the collision at issue.

Similarly, the charging of S.C. Code Ann. §56-5-1020 was inapplicable and potentially led to jury confusion. (R. p. 1451, l. 17 – p. 1452, l. 3). Section 56-5-1020 prohibits the unauthorized placement of signs, signals, or other devices at crossings. This statute again, was irrelevant as to any issue in the trial of the case. Charging this statute created and potentially added to jury confusion concerning the obligations of the Respondents at the crossing and indicated compliance in an area which was uncontested.

Next, the court charged the jury on §58-17-1390, which requires railroad corporations to place and maintain signs reading "Railroad Crossing" at crossings. (R. p. 1452, l.25 – p. 1453, l.13). Again, there was no question that the subject crossing had signage in compliance with this section and this charge was not relevant as to any issue of liability in the case.

Finally, the court charged the jury on S.C. Code Ann. § 58-15-1625, the crux of which states: "...the Department of Transportation may order legally closed and abolished as a public way, within the limits of a railroad right-of-way, a grade crossing then in existence at the time the department assumes jurisdiction of the matter, upon a finding that the enhancement of public safety resulting from such closing outweighs any inconvenience caused by increased circuitry of highway routes." (R. p. 1059, ll. 17-25). This statute is simply inapplicable to any issue raised in the case and the charge was improper, again creating potential jury confusion and prejudice to the Appellant.

Taken individually and in conjunction with one another, there can be no question that the jury would have had to have been confused by the charging of these inapplicable

statutes. The Appellant was prejudiced by these charges because they created a list of requirements that had been met by CSXT, but none of which had any bearing on the theories of negligence asserted in the trial. The list of signage statutes complied with by CSXT potentially confused the jury because the inapplicable charges rendered a false picture of compliance at the crossing, rather than addressing the theories under which Appellants proved CSXT to be negligent. CSXT's compliance with these signage statutes has absolutely nothing to do with the issues of whether CSXT properly cleared vegetation in its right-of-way or whether CSXT complied with statutory law concerning the sounding of its whistle. Because of the inapplicability of the charges addressed herein and the prejudice and confusion occasioned by the charges, a new trial should be granted.

F. The Court Erred in Charging S.C. Code Ann. § 15-78-60(5) Because there Was No Evidence that the SCDOT Exercised any Discretion in the Placing of the Stop Sign and Stop Line at Issue.

South Carolina Code Ann. § 15-78-60(5) (Supp.2003) provides that governmental entities are not liable for losses resulting from "the exercise of discretion or judgment by the governmental entity or employee for the performance or failure to perform any act or service which is in the discretion or judgment of the governmental entity or employee."

The burden of establishing an exception to the waiver of immunity is on the governmental entity asserting the defense. Nlyer v. South Carolina Dept. of Hwy. & Pub. Transp., 302 S.C. 461, 395 S.E.2d 728 (Ct.App.1990). To establish discretionary immunity, the governmental entity must prove its employees, faced with alternatives, actually weighed competing considerations and made a conscious choice. Pike v. Dept. of Transp., 343 S.C. 224, 540 S.E.2d 87 (2000). The governmental entity must show that

in weighing the competing considerations and alternatives, it utilized accepted professional standards appropriate to resolve the issue before them. Id. Mere room for discretion on the part of the entity is not sufficient to invoke the discretionary immunity provision. Summer v. Carpenter, 328 S.C. 36, 492 S.E.2d 55 (1997).

In this case, there no evidence which would support the claim that the SCDOT was entitled to a charge on discretionary immunity. Numerous SCDOT witnesses testified as to the placement of signs at this crossing, but no witness indicated that they or the department had weighed any competing considerations as to the placement of the signs. (R. p. 996 - 1018; pp. 1051-1057). No witness for the SCDOT testified as to any conscious choice made in the placement of the stop signs or the stop line, but rather basically acknowledged that the stop sign and stop line were placed where they were simply because that is where it had been placed in the past. (Id.). It was therefore inappropriate to charge the discretionary immunity statute, as it confused the jury and certainly prejudiced the Appellant. Based upon this error, reversal is warranted.

G. The Court Erred in Charging CSXT's Request to Charge No. 45, which Stated "It is Always Train Time at the Crossing," Because this Misstates the Respective Duties of Motorists and the Railroad at Crossings.

The trial court improperly charged the jury as follows:

Ladies and gentlemen, I further charge you it is the law of this state it has been well said that it is always train time at a railroad crossing. The law regards a railroad crossing as a place of danger. The very presence of such a crossing is notice to the person approaching or attempting to cross it of the danger of colliding with a passing engine or train.

(R. p. 1460). The language of the charge is taken from the 1936 case of Robison v. Atlantic Coast Line R. Co., 184 S.E. 96, 100 (1936). First, the charged language is taken

from pure *dicta* and is not, in fact, the holding of the case. As charged, this language implies a higher duty upon motorists at crossings than required. Certainly at any crossing a motorist has the duty to drive as a reasonably prudent person would. However, as written, this charge appears to elevate the duties of the motorist above that of a railroad, which is inappropriate. The error in charging the jury that it is "always train time" at a railroad crossing was compounded by the trial court's failure to charge Appellant's Request to Charge No. 9, which would have instructed the jury correctly that "a driver of a motor vehicle is under no absolute duty to stop, look, and listen before going on the track unless the exercise of ordinary care and prudence under all the surrounding facts and circumstances require the adoption of such course." (R. pp. 1078-1079). The trial court's instruction as given placed a higher duty on the motorist than on the railroad when under the law duties are mutual. This was an incorrect charge on the law and prejudiced the Appellant. Therefore, reversal is warranted.

CONCLUSION

Based upon the foregoing, the trial court erred in refusing to direct a verdict against the Respondent CSXT as to negligence and the court's order denying Appellant Willie Homer Stephens' motions for judgment notwithstanding the judgment and/or for new trial should have been granted. For the reasons stated herein, reversal is warranted.

Respectfully submitted,

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



John E. Parker
J. Paul Detrick
Grahame E. Holmes

Matthew V. Creech
101 Mulberry Street, East
P. O. Box 457
Hampton, SC 29924
Phone: 803-943-2111
Fax: 803-914-2014

-- & --

Carl H. Jacobson
URICCHIO, HOWE, KRELL, JACOBSON,
TOPOREK, THEOS & KEITH, P.A.
Post Office Box 399
Charleston, South Carolina 29401

July 10, 2011
Ridgeland, South Carolina

ATTORNEYS FOR APPELLANT

**THE STATE OF SOUTH CAROLINA
In The Court of Appeals**

**APPEAL FROM HAMPTON COUNTY
Court of Common Pleas**

Carmen Tevis Mullen, Circuit Court Judge

Case No.: 2004CP-25-00267

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

v.

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

Final Reply Brief of Appellant

**John E. Parker
J. Paul Detrick
Grahame B. Holmes
Matthew V. Creech
PETERS, MURDAUGH, PARKER,
BLTZROTH & DETRICK, P.A.
Post Office Box 457
Hampton, South Carolina 29924
Phone: 803-943-2111
Fax: 803-914-2014**

-- & --

**Carl H. Jacobson
URICCHIO, HOWE, KRELL,
JACOBSON, TOPOREK,
THEOS & KEITH, P.A.
Post Office Box 399
Charleston, South Carolina 29401**

ATTORNEYS FOR APPELLANT

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STATEMENT OF THE CASE

Appellant adopts and incorporates by reference the Statement of Case and Facts presented in his Initial Brief of April 5, 2010. The factual history discussed below is limited to reply to issues raised in the Respondents CSXT's and SCDOT's Statements of the Case.¹

In its Statement of the Case, and throughout its brief, CSXT notes that the Appellant at trial and on appeal concedes "that there were disputed issues for the jury to decide." (Initial Brief of CSXT, p.2). Appellant reiterates that this concession is limited to the proximate cause and damages issues. Based on the evidence at trial, the stipulations of CSXT, and its counsel's admissions, Appellant was entitled to a finding of negligence as a matter of law against CSXT. First, CSXT admitted at trial the engineer did not sound the horn of the train for the 1,500 feet prior to the crossing as required under South Carolina law. Second, CSXT failed to clear and maintain the subject crossing in accordance with its own rules and regulations.

ARGUMENTS

- I. **REGARDLESS OF ANY WAIVER OR NON-PRESERVATION ARGUMENTS BY CSXT, WHICH ARE WITHOUT MERIT, BASED UPON THE EVIDENCE BEFORE THE TRIAL COURT, AND EVEN WITHOUT THE STIPULATION OF CSXT, APPELLANT WAS ENTITLED TO A DIRECTED VERDICT AS TO CSXT'S BREACH OF ITS DUTIES.**

At the conclusion of the Defendants' case, the Plaintiff moved for a directed verdict as to the negligence of CSXT concerning the failure to sound its whistle in accordance with South Carolina law and its failure to clear and maintain the crossing.

¹ Similarly, under the Argument section of this Reply Brief, Appellant adopts and incorporates by reference those arguments raised in his Initial Brief of April 5, 2010. For the sake of brevity, Appellant submits the arguments herein as a limited reply to those issues raised in the Respondents' Initial Briefs. Furthermore, the Appellant addresses both Respondents' briefs in this single Reply Brief.

This directed verdict motion sought only the findings that as a matter of law, CSXT's duties had been breached. These breaches were admitted and no facts or inferences existed to the contrary. At the close of the Respondents' case, the evidence and the admissions of Respondent CSXT were susceptible of a single conclusion: that CSXT breached its duty to sound its whistle in accordance with South Carolina law and it admittedly failed to clear and maintain the subject crossing in accordance with its own rules and regulations.

After the Appellant's directed verdict motion, and before the close of all evidence, the Appellant offered the stipulation of CSXT as to the accuracy of the event recorder on the locomotive. The accuracy of the event recorder only bolstered the admission of CSXT's counsel and the evidence that CSXT had not complied with S.C. Code Ann. §58-15-910.

First, Appellant did not waive or fail to preserve any of these issues. Second, even assuming *arguendo* that CSXT's arguments have merit, at the time of the initial motion for directed verdict, the evidence against and admissions of CSXT required that the trial court enter a verdict as to CSXT's breach of duty.

During opening statements, CSXT admitted it failed to sound the locomotive's whistle in conformity with S.C. Code Ann. §58-15-910:

Under the law, 1500 feet before approach the crossing, the whistle is supposed to start blowing at that point in time... He [Ned Wooden] was a few seconds late in blowing the horn, members of the jury, and there won't be any dispute about that. (R. p. 46, l. 21 – p. 47, l.8).

I'm not suggesting that it's not important, it's very important – he missed it by a few seconds. (R. p. 47, ll. 17-18).

There can be no other conclusion, based on this admission to the jury in opening statements, that CSXT was negligent in the discharge of its duty to properly sound its whistle. (R. pp. 1648-1759; 1760). Besides this admission, James Barton, a road foreman of engines for CSXT, testified as to analysis of the event recorder and concluded that the whistle sounded for only 1100 feet. (R. p. 683, 1.14 – p. 685, 1.3; p. 686, 1.21 – p. 687, 1.19). The train's engineer, Ned Wooden, testified that the on board recorder indicated that he had only blown for 1100 feet and that he did not dispute the recorder's data. (R. p. 809, 1.2 – p. 810 1; p. 815 - p. 816, 1.3).

Similar to the issues concerning the failure to sound the whistle in conformity with state law, CSXT admitted that it had failed to clear the vegetation and tree growth within its right-of-way at the subject crossing in conformity with its own rules and regulations.²

Therefore, the only conclusions to be drawn from the whole of the evidence prior to the directed verdict motion are that (1) CSXT failed to comply with its statutory duty to sound its whistle for 1500 feet prior to the crossing; and, (2) CSXT failed to clear the subject crossing in accordance with its own rules and regulations. These failures constitute breaches of its duties, or simple negligence. Stephens' motion for directed verdict at the close of the Respondents' case therefore should have been granted on the grounds requested, even *without* the stipulation of CSXT which occurred during the Appellant's rebuttal. Appellant's motions on these issues were denied.

CSXT argues that the Appellant's failure to move for directed verdict at the close of his own rebuttal case results in waiver and is fatal to this appeal from the standpoint of issue preservation. However, CSXT cites no cases which require or justify this

² For detailed analysis and citation to the record, see Appellant's Initial Brief, Section I(B).

conclusion, as it appears this specific issue has not been addressed by our Courts. Furthermore, CSXT's argument strains logic and seeks an absurd and unintended result under Rule 50(b) and the case law addressing this Rule.

Simply stated, the Appellant was not required to renew his directed verdict motion at the close of his own rebuttal case in order to have the issue considered through a motion for JNOV. Rule 50(b), SCRPC, states as follows:

Whenever a motion for a directed verdict made at the *close of all the evidence* is denied or for any reason is not granted, the court is deemed to have submitted the action to the jury subject to a later determination of the legal questions raised by the motion.

Id. (emphasis added). Respondent argues that the phrase "at the close of all evidence," required a renewal of the directed verdict motion after the Appellant's rebuttal testimony, thought the Respondents had produced no more evidence or testimony at that time.

One of the main cases cited by CSXT on the issue, Henderson v. St. Francis Community Hosp., 295 S.C. 441, 369 S.E.2d 652 (Ct. App. 1988) (reversed on other grounds) shows precisely how the phrase "the close of all evidence" has been interpreted under Rule 50(b). In Henderson, a premises liability case, the Plaintiff appealed, *inter alia*, the trial court's denial of her JNOV motion against the designer of the parking lot at issue, Snoddy & McCullough. This Court held that the issue was not preserved for review:

We need not consider this issue, however, because Henderson failed, as required by Rule 50(b) of the South Carolina Rules of Civil Procedure, to make a directed verdict motion at the close of all the evidence. (Citation omitted). Henderson made her motion for directed verdict after St. Francis and Sirrine closed but before Snoddy & McCulloch presented its evidence. Henderson, however, did not renew her motion after the close of all the evidence.

Clearly, Henderson's motion was premature and improper. (Citations omitted).

We therefore hold that, when a plaintiff, after moving for a directed verdict at the end of the case presented by one defendant, fails to renew his motion at the close of all the evidence, he waives his right to move for judgment notwithstanding the verdict. (Citation omitted). "The rule that a judgment notwithstanding the verdict may not be granted unless the moving party moved for a directed verdict at the close of all the evidence is a strict one." (Citation omitted).

In holding that a premature motion for directed verdict cannot support a motion for judgment notwithstanding the verdict, we note the trial court in no way prevented Henderson from also renewing her directed verdict motion, the trial court never suggested to Henderson that the renewal of the motion would not be necessary to preserve her rights, and the evidence offered by Snoddy & McCulloch following Henderson's unrenewed motion for directed verdict was neither brief nor inconsequential. (Citation omitted).

Id., 295 S.C. 441, 446-447, 369 S.E.2d 652, 655-656.

In Henderson, the Plaintiff moved for a directed verdict after the cases of two defendants, but not after the case of the third. Having failed to move "at the close of all evidence" as against the third defendant, the Court concluded the JNOV motion against the third Defendant had been waived. The Henderson Court did not find waiver as against the two other defendants, who the Henderson did make timely directed motions against. If the logic of CSXT's strict construction of the phrase "close of all evidence," were applicable, the Henderson Court would have found that JNOV was waived as to ALL defendants, as it is clear that Henderson did not move for a directed verdict at the close of all evidence. Most importantly, the Henderson Court unequivocally holds that the "close of evidence" refers to the close of the Defendant's evidence: "We therefore

hold that, when a plaintiff, *after moving for a directed verdict at the end of the case presented by one defendant, fails to renew his motion at the close of all the evidence*, he waives his right to move for judgment notwithstanding the verdict." *Id.* (emphasis added.)

Here, by contrast, it is conceded that the Appellant timely moved for directed verdict at the close of the Respondents' cases. The only additional or supplemental evidence presented at trial was rebuttal evidence of the Appellant. By moving for JNOV at the *close of all evidence presented by all defendants*, the Appellant has preserved its motion pursuant to Rule 50(b), in accordance with Henderson, supra.

If, as suggested by CSXT, a motion for judgment notwithstanding the verdict only relates back to the issues joined at the time of the actual motion, Appellant was entitled to a directed verdict on simple negligence. The admissions noted above and the evidence prior to the Appellant's motion for directed verdict, require the same. Therefore, the stipulation at issue was simply not necessary for a directed verdict to have been rendered, as required, no the whistle and crossing clearing theories of negligence.

Nevertheless, CSXT ultimately formally stipulated that the event recorder on the locomotive was accurate. CSXT thus stipulated that it did not sound the whistle in accordance with the law. "Parties are bound by their trial stipulations." Southern Realty and Const. Co., Inc. v. Bryan, 290 S.C. 302, 312, 350 S.E.2d 194, 199-200 (Ct. App. 1986), citing Goodson v. Carolina Container Corp., Inc., 283 S.C. 575, 324 S.E.2d 67 (1984). "When counsel enter into an agreed stipulation of fact as a basis for decision by the court, both sides will be bound by such agreed stipulation, and the court will not go beyond such stipulation to determine the facts upon which the case is to be decided."

Blue v. Fetner, 251 S.C. 600, 164 S.E.2d 753 (1968). Regardless of the timing of the motion for directed verdict, or any purported preservation issues raised, CSXT is bound by its stipulation. CSXT could not below, and cannot now, contest any issue concerning the stipulated fact that it breached its statutory duty under S.C. Code Ann. §58-15-910.

Appellant acknowledges, pursuant to Hinds v. Blms, 358 S.C. 581, 595 S.E.2d 855 (Ct. App. 2004), that "[i]n a personal injury action, a determination of negligence, standing alone, does not entitle a plaintiff to a favorable verdict as a matter of law." Id., 358 S.C. at 586, 595 S.E.2d at 858. The Appellant was, however, entitled to a determination that as a matter of law, CSXT was negligent in the discharge of their duties. Had this determination been properly made, the questions before the jury would have then been whether, or to what extent, CSXT's admitted negligence proximately caused the Plaintiff's damages. This core issue in the case, proximate cause, was not even reached by the jury because as seen by the verdict form, the jury simply found that CSXT was not negligent. This finding is inconsistent with what the Court should have found as a matter of law, based upon the admissions and stipulations of CSXT. The Appellant was therefore prejudiced, and reversal is warranted, because the core issue in the case was never considered by the jury.

As CSXT spends great length discussing in its brief, Appellant concedes that the issue of proximate cause was for factual determination by the jury. However, based upon the trial court's failure to direct a verdict as to CSXT's simple negligence, the issue of proximate cause was not reached. The only issue that the jury rendered judgment on (negligence) is inconsistent with what the Appellant was entitled to as a matter of law. While CSXT argues that the Appellant waived this argument due to failure to object to

the jury form, the Appellant did in fact request separate findings as to negligence and proximate cause. (R. p. 1367, ll. 14-23). CSXT's arguments as to waiver in the context of the jury form center upon the "general" verdict form in asking the jury to differentiate between theories of liability (failure to sound whistle versus crossing clearing and maintenance) as opposed to separate findings of negligence and proximate cause. Appellant has not waived any argument on this issue.

With regard to liability, the decision of the jury should have been whether CSXT's negligence in failing to sound the whistle and/or failing to maintain this crossing was a proximate, contributing cause of the damages sustained by Lillian C. Instead, the jury found that CSXT was not negligent in either respect. This inconsistent finding by the jury and the trial court's failure to find CSXT negligent as a matter of law, are erroneous and inconsistent with the evidence, the admissions, and stipulations of CSXT. The Appellant has preserved these issues and a directed verdict on CSXT's negligence was therefore appropriate. Appellant's motions for directed verdict and for JNOV should have been granted and reversal is warranted.

II. THE APPELLANT HAS NOT WAIVED OR FAILED TO PRESERVE ARGUMENTS CONCERNING THE ADMISSION AND REJECTION OF EVIDENCE AT TRIAL.

CSXT's contends that the grounds presented in Appellant's brief concerning the post-accident cutting of the subject crossing have not been preserved and/or were not argued below. This argument is unavailing.

From opening statements, CSXT argued their inability to remove certain trees at this crossing was due to the protestations of Mr. Tommy Jackson, a landowner abutting the tracks. (R. p. 44, l. 11 – p. 45, l. 1). In opening CSXT stated: "Members of the jury,

they should have been [cut], because Mr. Jackson did not own the land that he was claiming those trees were on. So those trees weren't cut." (R. pp. 106-107). Later, in response to Plaintiff's directed verdict motion, Counsel for CSXT states:

Second, Mr. Harmon said in opening statement that in accordance with our crossing-clearing program, when they got to this quadrant it should have been cleared but for the landowner dispute, not that it should have been cleared because otherwise there wasn't appropriate sight distance. And we made very clear that we contented [sic] that there was appropriate sight distance, notwithstanding the fact that the program had not been followed because of the landowner dispute.

(R. p. 1062, ll. 5-14).

Now, in its brief, CSXT argues that the Plaintiff's only proffered reasoning for the admission of the evidence at the trial level was to "impeach" the argument that this "crossing was safe." However, review of the transcript reveals Appellant's arguing that "the fact that they came back and cut it impeaches their position they've opened in opening statement." (R. p. 49, ll. 24-25). As conceded above by counsel for CSXT, their position in opening statement dealt solely with "landowner issues," as opposed to the safety of the crossing. Thus, the arguments contained in the Appellant's brief concerning the alleged erroneous rejection of the evidence are appropriate for review.

For the substantive reasons presented in Appellant's Initial Brief, Appellant is entitled to the relief requested therein concerning the admission and rejection of the contested evidence.

**III. THE TRIAL COURT'S JURY CHARGE, CONTAINING
NUMEROUS IMPROPER CHARGES AND MULTIPLE OMITTED
CHARGES, WARRANTS REVERSAL.**

Respondents argue that those charges rejected and those accepted by the trial court were appropriate. Respondents further contend that even if errors exist, reversal is not warranted because the Appellant can show no prejudice. When reviewing these erroneous charges cumulatively though, the jury charge as a whole confused the jury on multiple issues and prejudiced the Appellant. 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. Cole v. Raut, 378 S.C. 398, 404, 663 S.E.2d 30, 33 (2008). To warrant reversal, the party seeking the requested jury charge must demonstrate error and prejudice. Id. supra. "An alleged error is harmless if the appellate court determines beyond a reasonable doubt that the alleged error did not contribute to the verdict." Wells, 341 S.C. at 237, 533 S.E.2d at 343. In light of these errors, individually or collectively considered, this Court cannot determine "beyond a reasonable doubt" that these multiple errors did not contribute to the verdict. Therefore, reversal is warranted.

In response to the Respondents' briefs, Appellant incorporates by reference his previous substantive arguments on these issues. Below, Appellant simply addresses a number of procedural issues raised by the Respondents in their underlying Initial Briefs.

A. Appellant Preserved all Arguments Concerning S.C. Code Ann. § 56-5-2930; S.C. Code Ann. § 56-5-2950; and, S.C. Code Ann. § 15-78-60(20).

In their Initial Briefs, both CSXT and SCDOT claim that the Appellant did not object to the charging of S.C. Code Ann. Section 56-5-2930, the state statute concerning the "presumptions of impairment" while operating a motor vehicle. Appellant did object, however, and the discussion of this statute and the others above in the heading is found in the record. (R. p. 1408; p. 1411, l.19).

The issues being properly before this Court, as argued in the Appellant's Initial Brief on the substance of these issues, the erroneous allowance and/or disallowance of the above charges prejudiced the Appellant and confused the jury, especially when read in conjunction.

B. Respondent SCDOT's Arguments Concerning Waiver and/or Non-Preservation of Certain Arguments Are Without Merit.

First, Respondent SCDOT claims that Appellant's arguments concerning the "conflict" between S.C. Code Ann. Sections 56-5-2330, 56-5-2740, and the one clearly applicable statute, § 56-5-2715, are not properly preserved. This argument fails. The Appellant's objections concerning the inapplicability of this statute are sufficiently clear that he has in no way waived the arguments asserted on the issue. (R. pp. 1134-1136). Previous objections to this statute are noted by the trial Court. (R. p. 1134, ll. 15-16). In arguing that all three statutes should be read "in conjunction," the parties acknowledge the purported conflict between the statutes. (R. p. 1135, l. 11). Appellant clearly argued the contested, charged statutes were inapplicable and irrelevant to this crossing, which Appellant argued was governed by §56-5-2715. While the cited discussion with the Court may not contain the word "conflict," the issue of the conflicting statutes was raised by the Appellant and contemplated and addressed by all parties as they argued this charge. Appellant's arguments are proper.

Second, Respondent SCDOT argues that Appellant's complaints concerning the charging of two issues under the South Carolina Torts Claims Act (SCTCA) are improperly before the Court, waived and precluded. These charged instructions deal with various immunities under the SCTCA, the "discretionary immunity" exception of S.C. Code Ann. § 15-78-60(5) and the sovereign immunity defense of S.C. Ann. Section 15-

78-60(20). The SCDOT essentially claims that the Appellant's objection to the charges on these defenses is an end run to strike the defenses, when no directed verdict was made to either of these affirmative defenses. While it does not appear that a directed motion was made by the Appellant to strike these defenses, it does not follow that the trial court cannot properly refuse to charge a wholly inapplicable defense. During the charge conference, and his brief below, Appellant has clearly stated the reasons that these charges are inapplicable and irrelevant to the case. In the context of this lengthy jury charge, with multiple defendants, the inclusion of these inapplicable statutes simply added to the jury's confusion by the charge. The charges were erroneous, prejudicial, and reversal is warranted.

CONCLUSION

Based upon the foregoing and the Initial Brief of the Appellant, dated April 5, 2010, reversal of the trial court is warranted.

Respectfully submitted,

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



John B. Parker
J. Paul Detrick
Grahame B. Holmes
Matthew V. Creech
101 Mulberry Street, East
P. O. Box 457
Hampton, SC 29924
Phone: 803-943-2111
Fax: 803-914-2014

-- & --

Carl H. Jacobson

URICCHIO, HOWE, KRELL, JACOBSON,
TOPOREK, THEOS & KEITH, P.A.
Post Office Box 399
Charleston, South Carolina 29401

July 11, 2011
Ridgeland, South Carolina

ATTORNEYS FOR APPELLANT

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM HAMPTON COUNTY
COURT OF COMMON PLEAS

GARMEN TEVIS MULLEN, Circuit Court Judge

CASE NO.: 2004-CP-25-00267

William Homer Stephens, Guardian ad Litem
for Lillian G. minor Appellant,

vs

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

FINAL BRIEF OF RESPONDENT
CSX TRANSPORTATION, INC.

Ronald K. Wray, II (S.C. Bar #65246)
Thomas Vanderbloemen (S.C. Bar #75784)
GALLIVAN, WHITE & BOYD, P.A.
55 Beattie Place, Suite 1200
Greenville, SC 29603
(864) 271-9580

James W. Purcell
Fulcher Hagler, LLP
P.O. Box 1477
Augusta, GA 30903-1477
(706) 724-0171

Jonathan P. Harmon
McGuire Woods, LLP
One James Center
901 East Cary Street
Richmond, VA 23219-4030
(804) 775-1000
Attorneys for Respondent
CSX Transportation, Inc.

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STATEMENT OF ISSUES ON APPEAL

I. Did the trial court properly deny Appellant's motion for judgment notwithstanding the verdict where Appellant concedes that there were factual issues in dispute, where he failed to move for directed verdict at the close of all evidence and relies on arguments not presented at trial, and where there is substantial evidence to support the jury's defense verdict?

II. Did the trial court properly deny Appellant's motion for new trial based on the exclusion of evidence of subsequent remedial measures relating to post-accident clearing of the crossing at issue as well as an unrelated crossing, where the admission of such evidence would have been contrary to the Supreme Court's ruling in *Webb v. CSX* and the evidence was irrelevant to the condition of the crossing on the date of the accident?

III. Did the trial court properly deny Appellant's new trial motion based on the jury charge where Appellant has not challenged that the charges were correct statements of South Carolina law, the charges were based on the evidence presented at trial, and Appellant has demonstrated no prejudice from the court's charge?

STATEMENT OF THE CASE

In this railroad crossing case, a jury in Hampton County returned a defense verdict in favor of CSX Transportation, Inc. ("CSX") and the South Carolina Department of Transportation ("DOT"). Acting as Guardian ad Litem for his granddaughter Lillian, Willie Homer Stephens ("Stephens") filed a complaint alleging CSX and DOT were liable for injuries that Lillian sustained in an accident at the crossing, which is located in Yemassee, South Carolina. (R. pp. 15-18). CSX and DOT denied these allegations, and asserted several affirmative defenses.

A three-week trial was held in Hampton County between July 28, 2008 and August 14, 2008. (R. p. 43). At the close of all the evidence, Stephens did not make a directed verdict motion. Despite this failure, and after the jury returned with a defense verdict, Stephens moved for judgment notwithstanding the verdict pursuant to Rule 50(b) of the South Carolina Rules of Civil Procedure. (R. pp. 38-42). At the hearing on the motion, Stephens raised arguments he had not previously presented to the trial court. (R. pp. 1483-1550). Although Stephens claimed he was entitled to a judgment in his favor, he conceded that there were disputed issues for a jury to decide, a concession he made at trial and repeats on appeal. (R. pp. 1061, 1488, 1503); *see also* Br. of Appellant, at 9-10. Stephens also moved for a new trial, challenging the refusal to admit certain evidence and arguing that the court's jury charge contained error.

The trial court denied Stephens' post-trial motions and this appeal followed.

STATEMENT OF FACTS

On the afternoon of February 3, 2004, Lillian was riding in a car with her mother, Tonia Colvin ("Colvin"), in Yemassee, South Carolina. Prior to getting in the car, Colvin admitted she had taken multiple medications, including Darvocet and tizanidine, had consumed alcohol, and had "potentially some other things" in her system. (R. p. 473) (admissions by Colvin). Labels on these medications warned against taking them with alcohol, and Colvin acknowledged it was a "very bad idea to take alcohol and tizanidine at or around the same time," just as it was a "very bad idea" to take "alcohol and Darvocet at or around the same time." (R. p. 460-67).

Colvin picked up her boyfriend, Carlos Terry, at the Dixie Poly Drum plant and came to a railroad crossing at Hill Road maintained by CSX. (R. p. 410-12). Larry Biser was leaving the Dixie Poly Drum plant at the same time as Colvin and was traveling directly behind her in his truck. (R. p. 713). Biser testified that, as soon as he got in his truck, he heard the horn sounding the approach of a CSX train, and that he saw and heard it as he traveled along the road leading up to the crossing. (R. p. 714). When he arrived at the crossing, knowing he would need to wait for the train to cross, he "put [his] truck in park and shut it off." *Id.*

Other witnesses in close proximity to the crossing also testified they were well aware of the approaching train. Lon Hoover testified that he heard the train coming from a quarter mile away, and Patricia Griffith stated that the horn was so loud that she complained to her children about the noise. (R. pp. 263, 353-54). Undisputed evidence showed the horn sounded at least seventeen to eighteen seconds before it reached the

crossing and could be heard from as far as two and a half miles away. (R. pp. 278-80, 294).

As the train was nearing the crossing and the crew was blowing the horn, Colvin arrived at the crossing and stopped at a stop sign. (R. p. 714). She then pulled up and stopped at a white stop line marked on the pavement and, according to Biser, "just sat there." *Id.* The train's engineer, Ned Wooden, saw Colvin "ease up to the stop bar and stop," which logically means she was able to see the train as well. (R. p. 806). The conductor, Calvin Cummings, also saw the Colvin vehicle stopped at the stop line. (R. p. 1564). Witnesses testified about the ability to see down the tracks from the location where Colvin stopped. (R. pp. 73-74). From the stop line, the view was unobstructed down the tracks for approximately 2,000 feet. (R. pp. 81-82). Terry, Colvin's passenger that day, admitted that from the stop line he could see the I-95 bridge, which was at least 2,000 feet down the track. (R. p. 633). This sight distance was, as the trial judge ruled, "undisputed." (R. p. 2).

Despite having clear sight distances down the track that permitted her to see the approaching train, and despite the sounding of the train's horn heard by several witnesses, Colvin suddenly drove in front of the train and her vehicle was hit. As Biser explained, "next thing I know her brake lights went out and across the tracks she went in front of the train." (R. p. 714). Even Colvin admitted that from where she stopped she believed she could see a safe distance down the tracks such that she could safely cross ahead of an oncoming train. (R. pp. 481-83).

Miraculously, Colvin and Terry sustained only minor injuries. (R. pp. 414, 534, 618). They were treated by emergency responders, one of whom told Colvin she smelled

of alcohol. (R. p. 484). Hospital lab reports from Colvin's treatment were also positive for opiates. (R. p. 538). Lillian, however, was more seriously injured, requiring hospitalization. (R. pp. 429-38). Fortunately, she appears to have recovered well and her testimony at trial suggests she is a teenager who does normal teenage things, like sending text messages, attending school, and having a lot of friends, including a boyfriend. (R. pp. 701-04).

The jury heard considerable testimony that at the time of the accident the Hill Road crossing was a safe crossing with more than adequate sight distances. As mentioned above, numerous witnesses testified about the ability to see unobstructed for 2,000 feet down the track from the stop line, and the DOT previously had inspected the crossing and determined that it passed inspection under state law. ~~(Supplemental Record~~ ("S.R.") p. 35; R. pp. 711-18, 1047). Biser, who was behind Colvin at the crossing, testified that he passed over the crossing "five or six times ... a day," had never heard of an accident there, and had never thought the crossing was unsafe. (R. pp. 711-718). Another witness stated that he was unaware of any accidents at the crossing in 40 years and he had never had a problem with trees blocking his view down the tracks. (R. pp. 72-73).

Ample evidence also was presented that the train's horn sounded prior to the train's approach to the crossing and alerted those in close proximity to the crossing of the train's approach. (R. pp. 263, 353-54). The train engineer testified he sounded the horn at the whistle post, approximately 1,500 feet from the crossing, although the train's event recorder indicated the horn may not have been sounded at this distance. (R. p. 809). Nevertheless, Hoover, Griffith, and Biser all confirmed that they heard the train well

before it reached the crossing. Stephens' expert, David Lipscomb, testified it made no difference when or where the train horn was sounded, as notwithstanding the multiple witnesses who testified they did, in fact, hear the horn as the train approached the crossing, Lipscomb opined that Colvin would not have heard the train horn regardless of where it was sounded. (R. pp. 324-26).

As a result, the jury had more than adequate evidence to conclude that the crossing at Hill Road was safe, that CSX and DOT had fulfilled all of their respective obligations, that Colvin should have been as aware of the approaching train as everyone else around her was, that the alleged failure to sound the horn at 1,500 feet had nothing to do with the accident, and that Colvin's poor judgment and unsafe decision were the sole cause of this accident.

ARGUMENT

I. The Trial Court Properly Denied Appellant's Motion for Judgment Notwithstanding the Verdict since Appellant concedes that there were factual issues in dispute, he failed to move for directed verdict at the close of all evidence and relies on arguments not presented at trial, and there is substantial evidence to support the jury's defense verdict

Stephens "concedes that factual issues existed under each theory as to whether the collision and injuries sustained were proximately caused" by CSX. Appellant's Initial Br., at 9. Despite his concession, Stephens argues that the trial court somehow committed reversible error by not granting him a judgment notwithstanding the verdict. As explained below, however, a court is forbidden from entering judgment in favor of a plaintiff that concedes there are factual issues in dispute on essential elements of a claim.

Stephens' arguments also fail for the more fundamental reason that he never presented them to the trial court in a directed verdict motion at the close of all the

evidence or in any objection to the verdict form. Finally, even if Stephens had not waived these arguments, he cannot meet the exceptionally rigorous standard of showing that “no evidence” exists to support the jury’s defense verdict, especially where there was considerable evidence that witnesses at the scene saw the train and heard its horn well in advance of the accident, that the driver, Tonia Colvin, had a clear and unobstructed view of the tracks and oncoming train, that DOT had inspected the crossing and found it safe, and that Colvin’s own judgment was either impaired or reckless.

A. Standard of Review

This Court must uphold a trial court’s denial of judgment notwithstanding the verdict unless there is “no evidence” to support the ruling or the ruling is controlled by an error of law. *See Hinkle v. National Cas. Ins. Co.*, 354 S.C. 92, 579 S.E.2d 616 (2003).

This Court applies the same standard as the trial court, viewing the evidence and inferences that reasonably can be drawn from it in the light most favorable to the non-moving party. *See Gadson ex rel. Gadson v. ECO Services of South Carolina, Inc.*, 374 S.C. 171, 175-76, 648 S.E.2d 585, 588 (2007). The verdict will be upheld if there is “any evidence” to sustain the factual findings implicit in the jury’s verdict. *See Shupe v. Settle*, 315 S.C. 510, 445 S.E.2d 651 (Ct. App. 1994).

B. A Plaintiff Cannot Obtain Judgment Notwithstanding the Verdict Where He Concedes that Factual Disputes Exist on an Essential Element of his Claim

Stephens claims that the trial court committed reversible error by not granting him judgment notwithstanding the verdict. However, as discussed below, a trial court cannot grant this relief to a plaintiff who concedes that factual issues remain in dispute on essential elements of his claim.

Stephens' arguments misunderstand the timing and nature of relief sought by motions for directed verdict and for judgment notwithstanding the verdict. A directed verdict motion must be brought before the case is submitted to the jury. See Rule 50, SCRCF. The directed verdict motion "goes to the entire case and may be granted only when the evidence raises no issue for the jury as to liability." *Ecclesiastes Production Ministries v. Outparcel Associates, LLC*, 374 S.C. 483, 490, 649 S.E.2d 494, 497 (Ct. App. 2007). In rare situations, such as where liability is conceded, a trial court might be permitted to "direct a verdict" on limited issues and send the remainder of the disputed questions to the jury for resolution. See, e.g., *Hinds v. Elms*, 358 S.C. 581, 583, 595 S.E.2d 855, 856 (Ct. App. 2004) (affirming defense verdict of no liability, even though "negligence" was conceded at trial, because remaining issues were contested). Even in those rare cases, however, because disputed issues remain, "a plaintiff's verdict is not mandated." *Id.*

In contrast, a motion for judgment notwithstanding the verdict is brought after the jury returns with a verdict against the moving party. In that situation, the losing party at trial seeks to "have the verdict and any judgment entered thereon *set aside* and to have *judgment entered* in accordance with his motion for a directed verdict." Rule 50(b), SCRCF (emphasis added). The party moving for judgment notwithstanding the verdict is therefore arguing that there is "no evidence" to support the jury's verdict and that an opposite verdict must be entered. See *McMillan v. Oconee Memorial Hosp., Inc.*, 367 S.C. 559, 564, 626 S.E.2d 884, 886 (2006). After all, a trial judge's decision to deny judgment notwithstanding the verdict can only be reversed "when there is *no evidence* to support the ruling below." *Id.* (emphasis added).

The important distinction Stephens overlooks is that, even assuming a directed verdict could have been granted for him on discrete issues like the alleged breach of duty (and it could not have been proper, for reasons discussed below), because Stephens conceded that there were factual issues in dispute on essential elements of the claim, the trial court could not grant Stephens a *judgment* in his favor after the jury returned with a defense verdict. For these reasons, Stephens' reliance on *Hinds v. Elms*, 358 S.C. 581, 595 S.E.2d 855 (Ct. App. 2004), is misplaced. In fact, that case demonstrates how the premise of Stephens' argument is "flawed," and that a plaintiff is not entitled to a judgment in his favor, even where directed verdict has been granted on a discrete issue, if there are disputed issues on the remaining elements. *See Hinds*, 358 S.C. at 585. As ~~*Hinds* illustrates, this Court does not possess the power to replace a jury's defense verdict~~ where, as here, the plaintiff concedes that "factual issues existed under each theory" of liability. Plaintiff's Initial Br., at 9.

While CSX disagrees that Stephens conclusively proved anything at trial that would have entitled him to a directed verdict on any issue, much less a breach of any of CSX's duties, Stephens is not entitled to a *judgment* in his favor where he concedes that there were still factual disputes for the jury to decide. For this reason alone, this Court should affirm the trial court's denial of Stephens' JNOV motion. *See Hinds*, 358 S.C. at 583.

C. Stephens Did Not Preserve His Arguments

1. Stephens Did Not Make A Directed Verdict Motion at the Close of All the Evidence

Stephens' argument that he is entitled to judgment notwithstanding the verdict is further flawed because it is waived. Specifically, Stephens did not make a directed verdict motion at the close of all the evidence, as required by the rules.

In order to preserve the right to seek judgment notwithstanding the verdict, the rule requires a party to move first for directed verdict "at the close of all the evidence." Rule 50(b), SCRPC. Because the rules are treated as statutes, they must be given their plain meaning. See *Farnsworth v. Davis Heating & Air Conditioning, Inc.*, 367 S.C. 634, 638, 627 S.E.2d 724, 726 (2006) ("In interpreting the meaning of the South Carolina

Rules of Civil Procedure, the Court applies the same rules of construction used to interpret statutes."); *Hodges v. Rainey*, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000) ("Where the statute's language is plain and unambiguous, and conveys a clear and definite meaning, the rules of statutory interpretation are not needed and the court has no right to impose another meaning.").

This Court has observed that "[t]he rule that a judgment notwithstanding the verdict may not be granted unless the moving party moved for a directed verdict at the close of all the evidence is a strict one." *Henderson v. St. Francis Community Hosp.*, 295 S.E. 441, 369 S.E.2d 652, 655-56 (Ct. App. 1988), *overruled on other grounds*, 303 S.C. 177, 399 S.E.2d 767 (1990); see also *Smith v. Ridgeway Chemicals, Inc.*, 302 S.C. 303, 395 S.E.2d 742, 743-44 (Ct. App. 1990) ("[I]nasmuch as no motion was made for a directed verdict at the conclusion of the trial, no motion for relief as a matter of law is available after the jury verdict.").

There is no dispute that Stephens failed to make a motion for directed verdict "at the close of all the evidence," as required by the rule. Although Stephens did make a directed verdict motion at the close of one of the defendant's cases, (R. p. 1059), he made no directed verdict motion "at the close of all the evidence" prior to the case going to the jury. (R. pp. 1202-03) (motion for directed verdict at close of evidence made by CSX and DOT, but not by Stephens). Without a motion at the close of all the evidence, the trial court could not even consider Stephens' motion under Rule 50(b) for judgment notwithstanding the verdict, just as this Court cannot consider on appeal the failure to grant that motion.

Without citing any authority, Stephens claims he did not need to renew his motion ~~at the close of all evidence because he had previously made a directed verdict motion at~~ the close of DOT's case. See Br. of Appellant, at 13. The rule, however, is unequivocal, and only permits post-verdict motions under Rule 50(b) where there was a pre-verdict motion "at the close of *all* the evidence." See Rule 50(b), SCRPC (emphasis added). Nor is the rule a mere technicality, but is intended to ensure the trial judge has all evidence before her prior to sending the case to the jury. See *Henderson*, 369 S.E.2d at 655-56 (finding that plaintiff who moved at the close of two defendants' evidence but did not renew at close of all evidence had waived issue).

After the trial, Stephens argued to the trial judge about a stipulation entered by the parties that the event recorder on the locomotive was accurate, and he argued this established a violation of the whistle statute, S.C. Code Ann. § 58-15-910. (R. p. 1487). However, the parties entered this stipulation *after* Stephens made his only motion for directed verdict and before the close of all the evidence, demonstrating his failure to

comply with the rule. (R. p. 1059) (Stephens' only motion for directed verdict, made before the close of the evidence and not referring to event recorder stipulation); (R. p. 3).

Therefore, Stephens' motion for judgment notwithstanding the verdict improperly relied on matters that were not even in the record at the time of his motion for directed verdict. *See Taylor v. Bridgebuilders, Inc.*, 275 S.C. 236, 238, 269 S.E.2d 337, 339 (1980) (observing that a motion for judgment notwithstanding the verdict relates back to the point in the trial when a motion for a directed verdict was made and is limited to the previously presented grounds). As this Court has explained, a motion for judgment notwithstanding the verdict "is available to one suffering an adverse ruling of the jury only when the same issues were submitted to the judge at the directed verdict stage."

Smith v. Ridgeway Chems., Inc., 302 S.C. 303, 305, 395 S.E.2d 742, 743 (Ct. App. 1990)

(emphasis added); *see also Marsh v. South Carolina Dep't. of Highways & Public Transp.*, 298 S.C. 420, 423, 380 S.E.2d 867, 869 (Ct. App. 1989) (motion for judgment notwithstanding the verdict must be limited to grounds stated in motion for directed verdict); *Glover v. North Carolina Mut. Life Ins. Co.*, 295 S.C. 251, 256-57, 368 S.E.2d 68, 72 (Ct. App. 1988) (finding denial of JNOV proper because "the ground upon which the motion for judgment n.o.v. was made was not the same ground stated in the motion for directed verdict"). The trial court was well aware of this defect, explaining it "could not have erred in denying Plaintiff's motion on a basis never stated at trial and not even available to Plaintiff until the conclusion of Plaintiff's rebuttal case." (R. pp. 3-4). Because he did not bring a motion for directed verdict "at the close of all the evidence," Rule 50(b), SCRCp, and because he relies on arguments that were never presented to the trial court at the directed verdict stage, Stephens cannot now claim that the trial judge

committed reversible error in the denial of his improper motion for judgment notwithstanding the verdict. *See Glover*, 295 S.C. at 256-57, 368 S.E.2d at 72.

2. Stephens Did Not Object to the Verdict Form

The trial judge also correctly observed that Stephens did not preserve these issues for review because he did not object to the verdict form. (R. pp. 4, 10). Prior to submitting the case to the jury, the trial judge held a lengthy conference about the verdict form. (R. pp. 1351-81). CSX specifically requested that the jury be asked special interrogatories on each of Stephens' theories of negligence. (R. pp. 1373-81). CSX explained that the case law in some instances requires special interrogatories to preserve an appeal where multiple issues and theories are presented to the jury. *See id.*; *see also Anderson v. S.C. Dep't of Highways & Pub. Transp.*, 322 S.C. 417, 419-20, 472 S.E.2d 253, 254-55 (1996) (discussing application of the "two issue" rule).

However, Stephens proposed – and the trial court adopted – a generalized verdict form asking the jury simply whether "Defendant CSX ... was negligent," without specifying any actual theory of negligence. (R. pp. 1374-75, 1394). Although Stephens now argues that some of these theories never should have been submitted to the jury, he never made this argument when discussing the verdict form. (R. pp. 1351-80). As the trial court correctly observed, if this was Stephens' position, "it was incumbent on Plaintiff to raise this issue and object to the verdict form" prior to submission of the case to the jury. (R. p. 4) ("Plaintiff's failure to voice any objection to the verdict form, which they in fact helped draft, is an additional waiver on this point.").¹

¹ Stephens' request for a general verdict form creates for him the same appeal problem CSX attempted to avoid by requesting special interrogatories to the jury. It also requires this Court to reject Stephens' appeal. *See Anderson*, 322 S.C. at 419-20 ("Under the 'two

Under these circumstances, Stephens cannot argue on appeal about what “the only form of the verdict should have been,” or that there was an “inconsistent and impermissible verdict.” Br. of Appellant, at 12-14. *See Longshore v. Saber Security Servs., Inc.*, 365 S.C. 554, 619 S.E.2d 5 (Ct. App. 2005) (finding trial judge had “no authority or duty” to order a new trial when not requested by the parties on the grounds of an allegedly inconsistent verdict, and that “it is the duty of the court to sustain verdicts when a logical reason for reconciling them can be found”). Nor is there anything inconsistent about the jury’s verdict, even had Stephens preserved these issues. As set forth below, *see infra* § I.D.2, there was more than sufficient evidence for the jury to properly conclude that Stephens failed to meet his burden of proof. Because it is the duty of this Court to sustain verdicts when a logical reason for reconciling them can be found, the jury’s verdict should be affirmed. *See Daves v. Cleary*, 355 S.C. 216, 231, 584 S.E.2d 423, 430 (Ct. App. 2003) (explaining that a jury’s verdict should be affirmed if it is possible to do so and carry into effect the jury’s clear intention).

D. Sufficient Evidence Existed to Support the Jury’s Defense Verdict

1. This Court Must Affirm If There Is “Any Evidence” to Support the Jury’s Decision

Even if Stephens can overcome the numerous procedural defects in his arguments on appeal and the fact that he waived the relief sought, he cannot meet the exceptionally high burden required to reverse a trial judge’s denial of judgment notwithstanding the verdict. This Court must uphold the verdict “if there is *any evidence* to sustain the factual

issue’ rule, when the jury returns a general verdict involving two or more issues and its verdict is supported as to at least one issue, the verdict will not be reversed on appeal.”) (citation omitted). Here, because the jury could have found either that Stephens failed to prove proximate cause (which he concedes was a jury issue), or that CSX breached its duty, there is no basis to set aside the verdict.

findings implicit in the jury's verdict." *Burns v. Universal Health Services, Inc.*, 361 S.C. 221, 231-233, 603 S.E.2d 605, 611 (Ct. App. 2004) (emphasis added); *see also McMillan*, 367 S.C. at 564, 626 S.E.2d at 886 (only situation where court of appeals can reverse a trial judge's decision to deny judgment notwithstanding the verdict is where "there is *no evidence* to support the ruling below") (emphasis added). Furthermore, as mentioned above, where the jury returns a general verdict involving "two or more issues and its verdict is supported as to at least one issue, the verdict will not be reversed on appeal." *Anderson*, 322 S.C. at 419-20 (citation omitted). In ruling on a motion for judgment notwithstanding the verdict, "the trial judge is concerned with the *existence* of evidence [to support the verdict], not its weight," and the trial judge "cannot disturb the ~~factual findings of a jury unless a review of the record discloses no evidence which~~ reasonably supports them." *Burns*, 361 S.C. at 231-233, 603 S.E.2d at 611 (emphasis added).

On a motion for judgment notwithstanding the verdict, the trial judge is required to "view the evidence and the inferences that reasonably can be drawn therefrom in the light most favorable to the nonmoving party," and "must deny the motion when the evidence yields more than one inference or its inferences are in doubt." *Id.* Furthermore, because Stephens bore the burden of proof at trial, his burden here is even more stringent, requiring a showing that the evidence is "so one-sided as to be of overwhelming effect." *See, e.g., U.S. E.E.O.C. v. Massey Yardley Chrysler Plymouth, Inc.*, 117 F.3d 1244, 1250 (11th Cir. 1997) (holding in parallel federal context that directing a verdict in favor of party with the burden of proof is an "extreme step" that can only be done "when the

evidence favoring the claimant is so one-sided as to be of overwhelming effect”); *Grey v. First Nat. Bank in Dallas*, 393 F.2d 371, 380 (5th Cir. 1968) (same).

2. There Is More Than Sufficient Evidence To Support The Jury's Verdict

This Court should affirm the decision below because Stephens cannot meet the stringent burden of showing that there is “no evidence” to support the jury’s defense verdict. As the trial judge properly instructed, to impose liability on CSX for negligence, Stephens had to prove by a preponderance of the evidence *each* of the elements of negligence, including proving that CSX breached a duty of care by a negligent act or omission and that “the damages complained of were proximately caused by the defendant’s breach of duty.” (R. pp. 1433-34); *see also Doe v. Marlon*, 373 S.C. 390, 400, 645 S.E.2d 245, 250 (2007) (“In order to prove negligence, a plaintiff must show: (1) defendant owes a duty of care to the plaintiff; (2) defendant breached the duty by a negligent act or omission; (3) defendant’s breach was the actual and proximate cause of the plaintiff’s injury; and (4) plaintiff suffered an injury or damages.”). Stephens cannot show there was “no evidence” to support the jury’s decision that he failed to meet this burden on each element, *Burns*, 361 S.C. at 231-233, 603 S.E.2d at 611, nor can he show the evidence was “so one-sided as to be of overwhelming effect” that a verdict against CSX was mandated, *Massey*, 117 F.3d at 1250. Indeed, as noted above, Stephens concedes that there was a factual issue at least on the issue of proximate cause, and the jury had ample evidence to decide that issue against Stephens.

Numerous witnesses – including one located *directly behind the Colvin vehicle at the crossing* – testified that they heard and saw the train well in advance of the accident. Larry Biser testified that he was directly behind the Colvin vehicle at the crossing and

that he heard the train crew sound the horn long before he arrived there. (R. p. 714) ("As we was [sic.] approaching Highway 68, you could see – you could hear the train blowing its horn"). Biser was so aware of the train, and that he would have to wait for it to pass, that he "put [his] truck in park and shut it off." *Id.* The jury heard Biser explain that he had been traveling right behind Colvin from the same parking lot and along the same road, and heard the horn almost "immediately" after he got in his vehicle and continued to hear it while he was traveling behind her up to the crossing. *Id.*

Another witness, Lon Hoover, testified that he heard the train and its approach from a quarter mile away. (R. p. 263). Likewise, Patricia Griffith testified that the horn was so loud as it approached the crossing that she complained to her children about the noise. (R. pp. 353-54). ~~Even Stephens' own expert testified that the CSX engineer had~~
sounded the horn *seventeen to eighteen* seconds before the collision occurred, and that the horn could be heard two and a half miles away. (R. pp. 278-80, 294).

The jury also heard and saw evidence, including from Stephens' own witnesses, that from where Colvin stopped, the view was unobstructed down the tracks to the I-95 overpass located approximately 2,000 feet from the crossing, and that from the stop line a motorist could easily see an approaching train free from any obstruction. (R. pp. 81-82) (testimony of Thomas Jackson, who lived near the crossing for years, that from the stop line a train could be seen coming from a half mile down the tracks.); (R. p. 251) (testimony by Stephens' expert Dr. Kenneth Heathington that, "[w]hen you're stopped at the stop line, you can [see to the I-95 overpass]."); (R. pp. 354-55) (testimony of Patricia Griffin, a nearby resident who had often used the crossing, that from the stop line there is no problem with sight obstructions). Yemassee Police Chief Jack Nagy, who

investigated the accident, testified that when "your wheel is on the [stop] line...you could see clear all the way back to the overpass." (R. p. 370). Even a passenger *who was in the car with Colvin on the day of the accident*, admitted that from the stop line the sight lines were clear. (R. p. 633) (testimony of Carlos Terry, the front seat passenger in Colvin's vehicle, that he could see to the I-95 bridge). In fact, the trial judge ruled that "it was undisputed that from the stop line a motorist had vision down the tracks to the I-95 overpass located approximately 2000 feet from the crossing." (R. p. 2).

Other testimony confirmed the crossing was safe and that CSX did not breach any duty of care with respect to maintenance of the crossing. Police Chief Hagy testified that in his 12 years of service there had been no previous accidents at the Hill Road crossing ~~and he was not aware of any complaints about sight obstructions at the crossing.~~ (R. p.

371). Larry Biser, who was behind Colvin at the crossing, testified that he passed over the crossing "five or six times ... a day," had never heard of an accident there, and had never thought the crossing was unsafe. (R. pp. 711-18). Likewise, Thomas Jackson stated that he was unaware of any accidents at the crossing in 40 years and he had never had a problem with trees blocking his view down the tracks. (R. p. 72-73). In fact, the record showed that the DOT had previously inspected the crossing and that the crossing passed inspection under state law. (S.R. p. 35). Randy Lomax, the DOT inspector, specifically testified that there were no obstructions at the crossing. (R. pp. 960-64; *see also* R. p. 1047 (testimony of DOT official Dick Jenkins confirming that it was a safe crossing and in compliance with state law)).

The jury also heard considerable evidence showing that nothing CSX did was the proximate cause of this unfortunate accident. On the contrary, the jury properly

concluded that responsibility for this accident lay solely with unsafe decisions made by Tonia Colvin. For example, Larry Biser testified that both he and Colvin stopped their vehicles at the crossing as the train was approaching, but that "next thing I know her brake lights went out and across the tracks she went in front of the train." (R. p. 714). As explained above, there was substantial evidence that those around the crossing heard and saw the train coming, and that Colvin could have seen approximately 2,000 feet down the track from where the evidence proved she had stopped.

Other evidence, including Colvin's own admissions, permitted the jury to infer that her judgment was compromised. Colvin admitted on the stand that when she got in the car on the day of the accident, she had Darvocet, tizanidine, alcohol, and "potentially some other things" in her system. (R. p. 473) (admissions by Colvin). Colvin told an BMT at the scene of the accident that she had been drinking and acknowledged that the BMT told her that she smelled of alcohol. (R. p. 484). Moreover, Colvin admitted that she ignored the warning labels on her prescription medications that warned against taking them with alcohol, and acknowledged that it was a "very bad idea to take alcohol and tizanidine at or around the same time," just as it was a "very bad idea" to take "alcohol and Darvocet at or around the same time." (R. pp. 460-67). The jury could properly infer from this evidence that Colvin was well aware of or should have been well aware of the oncoming train and rather than prudently waiting for it to pass made a reckless decision to try and "beat" the train. *Henderson*, 399 S.E.2d at 768 ("A motion for judgment *non obstante veredicto* should not be granted if the evidence is susceptible to more than one reasonable inference.")

Stephens argues that the trial judge and jury were required to ignore this mountain of evidence and instead render a *judgment* in his favor because CSX allegedly failed to sound its horn precisely at 1,500 feet and because it allegedly did not finish clearing the crossing in accordance with its internal company policies. Br. of Appellant, at 11, 14-15. These arguments are meritless and ignore the substantial evidence above that nothing CSX did caused this accident.

Stephens' claim that CSX "violated" its internal policies concerning the clearing of vegetation, an allegation CSX disputed and the evidence established did not occur, does not prove a breach of the standard of care, much less one that caused this accident or that compels judgment in his favor. As an initial matter, the jury heard considerable ~~evidence that CSX did not violate its crossing clearing program, but followed it by~~ peaceably resolving a dispute with a landowner who was "raising hell" about CSX's cutting of trees he thought were his. (R. p. 83). Even if *Stephens* believes there was a violation, it was for the jury to decide whether one occurred, whether it amounted to a breach of any standard of care and, most importantly, whether it had anything to do with this accident. *See, e.g., Eastern Brick & Tile Co. v. United States*, 281 F. Supp. 216, 222 (D.S.C. 1968) (discussing how self-imposed rules can sometimes be relevant, but were not relevant in that case; railroad's failure to follow its own rule for having a flagman at the crossing had nothing to do with the accident because the plaintiff, who tried to "beat" the train, saw the train coming); *see also Caldwell v. K-Mart Corp.*, 306 S.C. 27, 32, 410 S.E.2d 21, 24 (Ct. App. 1991) (explaining that significance of complying with internal guidelines is question for jury). CSX's defense, which the evidence supported and the jury obviously accepted, was that the Hill Road crossing was safe and that CSX's

crossing clearing program was designed to make safe crossings even safer. *See generally* R. p. 1568 (testimony of Kelly Goedde by video deposition p. 66, ll. 2-6). Stephens' argument that CSX allegedly did not comply with the new clearing program at the Hill Road crossing was irrelevant in this case, because the jury heard considerable evidence that Colvin stopped at the stop line where her vision was completely unobstructed. Further, evidence at trial showed the crossing had been inspected and was safe as CSX contended. (S.R. p. 35; R. pp. 711-18). Under these circumstances, Stephens cannot be entitled to *judgment* in his favor.²

Stephens' claim that CSX allegedly failed to sound the horn precisely at 1,500 feet fares no better, as *Stephens' own expert* testified that it would not have mattered at what specific distance the horn was sounded. (R. pp. 331-32). The trial judge could not possibly have been required to grant *judgment* to Stephens on a theory of negligence his own expert rejected. Like Stephens' expert, the trial judge and the jury could properly

² Stephens does not dispute that this evidence existed, but instead makes a generalized claim only that "at certain distances back from the stop line at issue, motorists' sight lines were obstructed by vegetation and trees." Br. of Appellant, at 15 (emphasis added); *see also id.* (referring to photographs "at different distances from the rail"). However, Stephens' argument simply begs the question – at which one of these distances was Colvin located prior to trying to beat the train? The jury obviously concluded that she was stopped at a point where she was able to observe the train and avoid the accident. Stephens' claim that there may have been obstructions at the stop sign suffers from the same flaws. *See* Br. of Appellant, at 15. The jury heard evidence that Colvin stopped not just at the stop sign, but also at the stop line. (R. p. 714) (Larry Biser testified that Colvin "stopped at the stop sign...[then] she pulled up to the white line and she just sat there."). Even from the stop sign, the evidence showed that Colvin should have seen and heard the train. *See, e.g., id.* (testimony of Biser that he saw and heard train even as he was approaching). At a minimum, taking all evidence in the light most favorable to CSX, these issues were for the jury to decide.

dismiss any alleged infraction of the statute as having nothing to do with the accident.³ See, e.g., *Eastern Brick*, 281 F. Supp. at 220 ("The failure of the defendant to give the statutory signals for the full distance of 850 feet prior to reaching the crossing was not a cause of the accident. The driver of the truck saw the engine in ample time to have stopped, had he not chosen to attempt to 'beat' the engine across."). If anything, the jury heard numerous witnesses testify they were "alerted" to the sound and saw and heard the train coming, including the witness sitting in the vehicle *directly behind Colvin* at the crossing. (R. pp. 714, 263, 353-54).

In short, even if Stephens had preserved these arguments for appeal, which he did not, he is still unable to meet the very high burden of showing there is "no evidence" at all to support the jury's decision, or that the evidence was so "one-sided" that he was entitled to a verdict in his favor. See *Burns*, 361 S.C. at 231-233 ("[T]he trial judge is concerned with the *existence* of evidence [to support the verdict], not its weight," and the trial judge "cannot disturb the factual findings of a jury unless a review of the record

³ Indeed, while Stephens touts CSX's counsel's opening statement that the horn was not sounded at 1,500 feet and a stipulation by the parties that the train's event recorder was accurate as proving a violation of the statute, neither contention has merit. The South Carolina whistle statute in effect at the time of this accident required that "[a] bell of at least thirty pounds' weight and a steam or air whistle" be placed on each locomotive and "such bell shall be rung or such whistle sounded . . . at the distance of at least five hundred yards" from the crossing. See S.C. Code § 58-15-910 (emphasis added). Even assuming the parties' stipulation established the whistle was not properly sounded, Stephens does not contend and has pointed to no evidence showing that he proved that the bell was not rung for the statutory distance. Stephens had the burden of proving both the failure to sound the whistle and to ring the bell in order to establish violation of the statute. See *McAbee v. Southern Ry.*, 166 S.C. 166, 164 S.E. 444, 444-445 (1932) ("The statute does not require both the ringing of the bell and the blowing of the whistle. The ringing of the bell, or sounding of the whistle, so far as the statute is concerned, is a sufficient signal of the moving or approach of the train."). In any event, this is immaterial given Stephens' concession that proximate cause was an issue for the jury, thus precluding him from receiving j.n.o.v. as discussed above.

discloses *no evidence* which reasonably supports them.”) (emphasis added); *see also Massey*, 117 F.3d at 1250. The judgment below should be affirmed.

II. The Trial Court Did Not Err in Denying Stephens’ Motion for New Trial based upon exclusion of evidence of subsequent remedial measures relating to post-accident clearing of the crossing at issue as well as an unrelated crossing, since the admission of such evidence would have been contrary to the Supreme Court’s ruling in Webb v. CSX and the evidence was irrelevant to the condition of the crossing on the date of the accident.

Stephens claims that the trial court should have allowed him to introduce evidence that after the accident CSX cut vegetation at the crossing and at a different crossing in another part of Hampton County. Although Stephens now advances a new argument he never presented during trial regarding the admission of evidence concerning the post-accident cutting at Hill Road, the trial court properly excluded the evidence proffered by Stephens as subsequent remedial measures prohibited by Rule 407 of the South Carolina Rules of Evidence, and Stephens has not shown any prejudice from the exclusion that requires a new trial.

A. Standard of Review

A trial court has wide discretion in deciding whether to admit evidence, and this Court will not reverse unless the trial court abused that discretion and the admission of evidence was prejudicial. *See Jamison v. Ford Motor Co.*, 373 S.C. 248, 268, 644 S.E.2d 755, 765 (Ct. App. 2007); *see also Fields v. J. Haynes Waters Builders, Inc.*, 376 S.C. 545, 557, 658 S.E.2d 80, 86 (2008). As explained below, Stephens fails to show that the trial court committed any error, much less a prejudicial one requiring a new trial.

B. The Trial Court Properly Excluded CSX's Subsequent Clearing Of Vegetation At The Hill Road Crossing

Prior to the accident at this crossing, CSX had been conducting a system-wide crossing clearing program at public grade crossings including those in South Carolina. CSX explained to the jury that this program was intended to make safe crossings even safer. *See generally* (R. pp. 1566-69) (testimony of Kelly Goedde by video deposition p. 66, ll. 2-6). At the time of the accident, CSX had cleared three of the four quadrants at the Hill Road crossing. It had not cleared the fourth quadrant because an adjoining landowner, Tommy Jackson, confronted CSX's subcontractor claiming certain of the trees at issue were on his land. (R. p. 83). After the accident at issue in this case, CSX cut the remaining trees in that quadrant. (R. p. 49).

Stephens attempted to introduce evidence of this post-accident cutting, but the trial court properly excluded it under Rule 407 of the South Carolina Rules of Evidence. (R. p. 48). Rule 407 explains:

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.

Rule 407, SCRE. In *Webb v. CSX Transp., Inc.*, 364 S.C. 639, 615 S.E.2d 440 (2005), our Supreme Court faced the same issue involving an accident at a CSX crossing and a similar improper effort to introduce post-accident cutting of vegetation. The Court clarified that Rule 407 must be broadly interpreted to "bar[] the introduction of any change, repair, or precaution that under the plaintiff's theory would have made the

accident less likely to happen, unless the evidence is offered for another purpose.” *Webb*, 364 S.C. at 653-54, 615 S.E.2d at 448.

At trial, Stephens argued this evidence purportedly “impeached” CSX’s defense that the crossing was already safe on the day of the accident. (R. p. 49) (arguing that evidence would impeach CSX claim that “it was safe, but we wanted to make it safer”). This argument is squarely forbidden by Rule 407 and would create an “exception” swallowing the rule. *See Flaminio v. Honda Motor Co.*, 733 F.2d 463, 468 (7th Cir.1984) (applying similar federal rule and explaining that, “[a]lthough 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.”); *see also Stecyk v. Bell Helicopter Textron, Inc.*, 295 F.3d 408, 416 (3d Cir. 2002) (“While the text of Rule 407 permits admission of subsequent remedial measures for impeachment, we have cautioned against permitting the exception to “swallow” the rule.”). Courts are mindful that Rule 407’s exceptions are narrowly drawn and must not be used to frustrate the purpose of the rule. *See Wilkinson v. Carnival Cruise Lines, Inc.*, 920 F.2d 1560, 1568 (11th Cir. 1991) (“Care must be taken to insure that Rule 407’s impeachment exception is not used merely “as subterfuge to prove negligence or culpability of the defendant.”).

Under *Webb*, Rule 407 prohibits “introduction of *any* change, repair, or precaution that *under the plaintiff’s theory* would have made the accident less likely to happen, unless the evidence is offered for another purpose.” *Webb*, 364 S.C. at 653-54, 615 S.E.2d at 448 (emphasis added). Because Stephens’ theory at trial was that the crossing was not safe, he could not rely on evidence of subsequent remedial measures to “impeach”

or rebut the defense that it was safe. To hold otherwise would permit introduction of subsequent remedial measures anytime the defense contends that an accident site was safe at the time of the accident, gutting the very purpose of Rule 407. *See Werner v. Upjohn Co., Inc.*, 628 F.2d 848, 855 (4th Cir. 1980) ("Rule 407 is designed to protect the important policy of encouraging defendants to repair and improve their products and premises without the fear that such actions will be used later against them in a lawsuit. Several exceptions to the rule have developed, but it is clear that they must be narrowly construed if the central policy behind the rule is to be effectuated."); *Probus v. K-Mart, Inc.*, 794 F.2d 1207, 1210 (7th Cir. 1986) ("The purpose of Rule 407 is to promote safety by removing the disincentive to take post-accident safety measures that would exist if the accident victim could introduce evidence of these measures on the issue of the defendant's liability.").

Presumably because it failed below, Stephens abandons this argument on appeal and makes a different argument he never presented to the trial judge when trying to introduce this evidence. Stephens now claims that the evidence was admissible "for impeachment purposes ... [to] show[] CSXT had the ability and authority to remove the subject trees." Br. of Appellant, at 17-18; *cf.* R. p. 49 (showing Stephens' different argument at trial that evidence would supposedly "impeach" CSX's claim that the crossing was safe).

As a threshold matter, this Court cannot consider new evidentiary arguments not presented at trial. *See Wilder Corp. v. Wilke*, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998) ("It is axiomatic that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial judge to be preserved for appellate

review.”); *see also Lucas v. Rawl Family Ltd. P'ship*, 359 S.C. 505, 511, 598 S.E.2d 712, 714 (2004). Even if this Court could consider this new argument, however, it lacks merit and does not provide a basis for a new trial.

Stephens' new argument is that the evidence of post-accident clearing was admissible “for impeachment purposes” to show that CSX had the “ability and authority to remove the subject trees.” Br. of Appellant, at 17-18. However, CSX never claimed it lacked the ability or authority to remove the trees, so there was nothing for Stephens to “impeach.” Rather, the only reason offered for why the remaining trees were not removed was that Tommy Jackson, according to his own testimony, was “raising hell” about CSX's cutting of trees he thought were his. (R. p. 83). CSX never disputed that ~~the trees at issue were located in its right of way, nor did CSX dispute that removal of the~~ trees was physically, technologically, or economically possible. *See* Rule 407, SCRE (stating that a party can only use exception to show feasibility “if controverted”); *see also Albrecht v. Baltimore & Ohio R.R. Co.*, 808 F.2d 329, 331 (4th Cir. 1987) (applying parallel federal rule to explain that “[i]t is not for the plaintiff to put feasibility in issue, for feasibility is not an issue unless and until controverted by the defendant”).

Indeed, CSX's contractors would have cut the crossing prior to the accident had they not encountered objections from Mr. Jackson. The trial judge properly observed that none of these issues were in dispute, as CSX knew it had the right-of-way over that land and the ability and authority to cut the trees. (R. p. 390; R. pp. 1517-18 (Court: “I don't think at any time did they say that they were not able to clear the crossing at that point. ... I never heard them try to rebut or say it wasn't possible [or] we didn't have a right to do

it. I never heard that in any way as a defense.”)). The mere fact that CSX cut the trees after the accident in no way “impeached” this undisputed evidence.

More importantly, Stephens cannot show any prejudice from the exclusion of this evidence that requires a new trial. *See Fields*, 376 S.C. at 557, 658 S.E.2d at 86 (requiring an appellant to show proof by a reasonable probability that the jury’s verdict was influenced by the challenged evidence or the lack thereof). The jury had ample evidence of the conditions as they existed at the time of the accident. The jury saw photographs of the scene before the cutting and heard undisputed evidence from witnesses who were present at the collision – including Colvin’s passenger – that she had more than adequate sight distances along the track that were unobstructed by trees or vegetation. *See, e.g.* R. p. 633 (testimony of Carlos Terry, the front seat passenger in Colvin’s vehicle, that from the stop line he

could see to the I-95 bridge); S.R. pp. 1-34 (photographs); S.R. Table of Contents, p. 2 (citing Defendant’s Exhibits D-4A, 4B, 4C (videos)); *see also* R. pp. 81-82 (testimony of Thomas Jackson); R. p. 251 (testimony of Stephens’ expert); R. p. 370 (testimony of Police Chief Jack Nagy).

In *Webb*, “[t]here were numerous witnesses, photos, and two videos demonstrating the condition of the crossing on the day of the accident,” making evidence of the post-accident cutting unnecessary “for the jury to understand the conditions at the time of the accident.” 364 S.C. at 653-54, 615 S.E.2d at 448 (ruling that evidence of post-accident cutting was inadmissible under Rule 407). Likewise, evidence that CSX removed trees from the Hill Road crossing after the accident would have done nothing to advance Stephens’ case or assist the jury. As a result, the trial court committed no reversible error in excluding this evidence.

C. The Trial Court Properly Excluded CSX's Post-Accident Clearing Of Vegetation At Another Crossing

For similar reasons, the trial judge properly excluded evidence concerning the post-accident clearing of ornamental vegetation maintained by a garden club in Varnville. According to the proffered evidence, *five months after* the accident, CSX's subcontractor was clearing vegetation at a *different crossing* down the line in Varnville when it encountered, in CSX's right-of-way, an ornamental garden maintained by the local garden club. (R. pp. 377-84). CSX purportedly instructed that the vegetation be removed within 24 hours. *Id.*

Stephens claims that this post-accident evidence was proper to "impeach" CSX's defense that it could not "promptly and efficiently remove the trees" near Mr. Jackson's home at the Hill Road crossing. Br. of Appellant, at 19. Again, the trial court properly explained why this was an inadmissible subsequent remedial measure:

It sounds like [CSX] is responding to what happened Hindsight being twenty-twenty: Mr. Parker, that's not appropriate. That is a remedial measure. They knew something had happened. They, I'm assuming, were responding to it. It sounds to me like they realized there may be a sight obstruction problem so we had better make sure we take care of it. ... Obviously, the purpose of the rule is to encourage businesses and persons in the future to take appropriate action if there is any type of problem that they are put on notice of. And certainly if we were to use any of that evidence and their reaction -- what we wouldn't want is an incentive for them not to react promptly and to do what believes is in the best interest and safety of all persons.

(R. pp. 379-81, 390). Although Stephens claimed there was "no evidence" that the incident with the garden club was "in any way related to this accident at Hill Road," (R. p. 381), the Supreme Court in *Webb* has foreclosed any such argument. In *Webb*, the

court rejected the same "narrow view" that Stephens argued at trial, that Rule 407 should only cover "measures taken in direct response to the accident." *Webb*, 364 S.C. at 653, 615 S.E.2d at 448. Rather, the court clarified that this incorrect and "narrow interpretation ignores the literal language of the rule," and that "Rule 407 bars the introduction of *any* change, repair, or precaution that under the plaintiff's theory would have made the accident less likely to happen, unless the evidence is offered for another purpose." *Id.* (emphasis added). Tellingly, Stephens' appellate brief makes no mention of *Webb*.⁴

Furthermore, and as explained above, there was nothing for this evidence to "impeach," as CSX never claimed it lacked the ability or authority to remove the trees.

~~*See supra* § II.B. To the extent Stephens argues this subsequent measure shows that CSX~~
could have cut more promptly and avoided the accident at Hill Road, this is precisely the kind of evidence Rule 407 prohibits. As a result, Stephens' suggestion that the trial court erred in excluding the testimony "simply" because this incident occurred "after the collision," Br. of Appellant, at 19, is misplaced. *See Webb*, 364 S.C. at 653, 615 S.E.2d at 448. The fact that this evidence concerns matters occurring "after" the accident is the very reason it is excludable under Rule 407, which by definition only concerns *subsequent* measures.

⁴ Furthermore, even assuming Stephens is correct that the garden club incident was not "in any way related to this accident at Hill Road," (R. p. 381), he simply confirms that the incident has no relevance to this case. The fact that the garden club incident occurred five months after the accident and at a different crossing demonstrates the remoteness and irrelevance of this evidence. *See* Rule 401, SCRE (defining "relevant evidence" as evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence).

The trial court's ruling falls well within Rule 407, the Supreme Court's interpretation of it in *Webb*, and the wide discretion afforded trial courts on matters of evidence, and Stephens has shown no prejudice from the exclusion of this evidence requiring a new trial.

III. The trial court properly denied Appellant's new trial motion based on the jury charge since Appellant has not challenged that the charges were correct statements of South Carolina law, the charges were based on the evidence presented at trial, and Appellant has demonstrated no prejudice from the court's charge.

Stephens also raises a number of challenges to the jury charges, many of which he never made to the trial court below. Even assuming his challenges are not waived, the charge as a whole was a correct statement of the law, and Stephens has shown no prejudice entitling him to a new trial.

A. Standard of Review

Trial courts are vested with discretion to fashion appropriate instructions for the jury, and this Court will not reverse unless the trial court abuses that discretion. *See Clark v. Cantrell*, 339 S.C. 369, 389, 529 S.E.2d 528, 539 (2000). This Court considers the charge "as a whole in light of the evidence and issues presented at trial." *In re Estate of Pallister*, 363 S.C. 437, 451-452; 611 S.E.2d 250, 258 (2005). If the charge as a whole contains the correct definitions and adequately covers the law, there is no error. *See id.* Moreover, to warrant reversal, the refusal to give a requested charge must have been erroneous and prejudicial. *See Koutsogiannis v. BB & T*, 365 S.C. 145, 149, 616 S.E.2d 425, 428 (2005). In determining prejudice, the charge should be considered in its entirety. *See id.*

B. The Impairment Charges Were Approved By Stephens and Supported by the Evidence

Stephens claims that the trial judge erred in charging the jury about the unlawfulness of driving while impaired by the use of alcohol and drugs. The complete charge, which contained language from S.C. Code Ann. § 56-5-2930, accurately stated the law:

[I]t is unlawful ... for a person to drive a motor vehicle ... if that person is under the combined influence of alcohol and any other drugs, or drugs or substances, including prescription medication or narcotics, which cause impairment to the extent that the person's faculties to drive are materially and appreciably impaired. ... I charge you, ladies and gentlemen, that it is not against the law of South Carolina to drink and/or use drugs and drive. A person is guilty of driving under the influence only if their abilities are impaired by alcohol and/or drugs to such an extent that their driving is materially affected and they are thereby unable to safely operate an automobile.

(R. pp. 1456-58).

In his appellate brief, Stephens states that he "lodged objections at the charging of this statute" at "various stages of the trial." Br. of Appellant, at 21. This statement is incorrect and finds no support in the record. On the contrary, Stephens agreed to the charging of the statute with the additional language, which he requested and the trial court included, "that it is not against the law of South Carolina to drink and/or use drugs and drive," only to drive "if their abilities are impaired by alcohol and/or drugs to such an extent that their driving is materially affected and they are thereby unable to safely operate an automobile." (R. p. 1232) (Plaintiff's counsel: "I agree - I agree with that."). There can be no error in giving a charge Stephens proposed and even approved. See *Keaton ex rel. Foster v. Greenville Hosp. System*, 334 S.C. 488, 495, 514 S.E.2d 570,

573-74 (1999) (ruling that to preserve an objection to a jury charge, a party must make the objection on the record and have it specifically ruled on by the trial judge).

Stephens' claim of error is also dubious considering that, from the outset of the trial, he intentionally volunteered to the jury that Tonia Colvin had been drinking and had taken prescription narcotics on the day of the collision. (R. p. 43). Stephens contends that there was "no evidence of impairment," but this contention is belied by the record and, in any event, was for the jury to decide. As noted above, *see supra* § I.D.2, Colvin admitted on the stand that, when she got in the car on the day of the accident, she had Darvocet, tizanidine, alcohol, and "potentially some other things" in her system. (R. p. 473) (admissions by Colvin). She also admitted to telling an EMT that she had been drinking and she admitted that the EMT said she smelled of alcohol. (R. p. 484); *see also* R. pp. 460-67 (Colvin's admissions concerning ignoring warning labels advising of dangers of mixing alcohol and her medications). As also noted above, hospital lab reports were positive for opiates, which could have come from the medications or the "other things" she admitted she took. (R. p. 538).

The jury could properly infer that this combination of alcohol and medications impaired Colvin given that she inexplicably pulled in front of an oncoming train on a clear day where witnesses all around her heard and saw the train coming. *See supra* § I.D.2; *cf. Lee v. Bunch*, 373 S.C. 654, 659, 647 S.E.2d 197, 200 (2007) ("The circumstances surrounding Bunch's version of the accident, i.e. that Lee inexplicably ran into Bunch's automobile, would be more probable if Lee was impaired."); *Gulledge v. McLaughlin*, 328 S.C. 504, 511-512, 492 S.E.2d 816, 820 (Ct. App. 1997) (explaining that blood alcohol content, "even without further explanation, at least allowed the jury to

conclude that Gulledge had alcohol in his bloodstream, and this, when combined with the beer cans, the cooler, and the circumstances of the accident, were sufficient for the jury to conclude that Gulledge was impaired from alcohol consumption"). As our Supreme Court has explained in a similar context:

It is well settled that one may be under the influence as contemplated by the traffic laws without being drunk or passed out, or even intoxicated. One violates the traffic statute if he partakes of alcohol to the extent that he cannot drive a motor vehicle with reasonable care, or if he cannot drive as a prudent driver would operate a vehicle. So the question is not: was Roberts drunk or intoxicated? The question is: was his condition such that he could drive with due regard for others (and we might add, for himself)? If not, he breached his statutory as well as his common law duty.

Dixon v. Weir Fuel Co., 251 S.C. 74, 160 S.E.2d 194, 197 (1968) (emphasis added).

Faced with this record, Stephens cannot argue that there was no evidence from which the jury could find impairment or that it was improper to charge the jury on this issue.

Stephens also incorrectly claims the trial judge should have charged the presumption in S.C. Code Ann. § 56-5-2950(b), which states that in a "criminal prosecution" for violation of S.C. Code Ann. § 56-5-2930, "if the alcohol concentration was at that time five one-hundredths of one percent or less, it is conclusively presumed that the person was not under the influence of alcohol." S.C. Code Ann. § 56-5-2950(b).⁵ By its own terms, however, the presumption in section 56-5-2950 applies only in *criminal prosecutions* where the State must prove beyond a reasonable doubt that the person was "under the influence." This limitation reflects the legislature's policy

⁵ Effective February 10, 2009, S.C. Code Ann. § 56-5-2950(b) was re-codified as § 56-5-2950(G)(1). So as to remain consistent with the citations in the record, CSX cites to this provision as S.C. Code Ann. § 56-5-2950(b).

judgment that, where only alcohol is involved and the level is below the specified amount, the State will be unable to meet this high burden of proof. These circumstances and the statute's presumption are not implicated in a civil proceeding where the burden of proof is the preponderance of the evidence.

The "presumption" is further inapplicable because Tonia Colvin admitted she had consumed not just alcohol, but narcotics that came with a warning not to be mixed with alcohol. The statute expressly states that it "must not be construed as limiting the introduction of *any other evidence* bearing upon the question of whether or not the person was under the influence of alcohol, drugs, or a combination of them." S.C. Code Ann. § 56-5-2950(b) (now S.C. Code Ann. § 56-5-2950(G)(1)) (emphasis added). As a result, the presumption in S.C. Code Ann. § 56-5-2950(b), which concerned solely the issue of "not being under the influence of alcohol" and only in criminal prosecutions, would not have applied in this civil case and would have confused the jury.

Nor can Stephens show any prejudice given that the trial judge did charge, at Stephens' request, "that it is not against the law of South Carolina to drink and/or use drugs and drive," only to drive "if their abilities are impaired by alcohol and/or drugs to such an extent that their driving is materially affected and they are thereby unable to safely operate an automobile." (R. pp. 1457-58). Considering the charges as a whole, the trial court committed no error.

C. The Court Did Not Err in Charging the Law of Intervening and Superseding Negligence

Stephens claims the trial court should not have charged the jury on intervening and superseding negligence. Stephens did not object to the legal accuracy of the charge, but claimed only that it did not apply to this case. According to Stephens, it was

supposedly foreseeable that Tonia Colvin would not stop at the stop line, and thus intervening or superseding negligence did not apply. Br. of Appellant at 25.

Even accepting this position, which the trial court found hard to accept ("I think you expect people to stop at a stop line", (R. p. 1304)), there was considerable evidence that Tonia Colvin had consumed alcohol, had taken drugs that should not be mixed with alcohol, smelled of alcohol, and showed poor judgment by driving directly in front of an oncoming train on a clear day where witnesses all around her heard and saw the train coming. *See supra* § I.D.2. Therefore, the trial judge's decision to give the charge was not just based on the stop line issue. (R. p. 1304) ("I don't think it is foreseeable that she would be drinking and using, you know, narcotics, and on the road. I don't think that's foreseeable, or at least shouldn't be."). Furthermore, there was substantial evidence

presented at trial that Colvin did, in fact, stop at the stop line where she would have been able to see for 2,000 feet down the track. *See supra* § I.D.2. To the extent Stephens disagrees about where Colvin stopped, this dispute was proper for the jury to resolve, and it resolved the question against him. The trial court did not err in charging the jury on intervening and superseding negligence, and Stephens can show no prejudice by the trial court's charge on this well-accepted South Carolina law. Accordingly, the verdict should be affirmed.

D. The Trial Court Was Not Required to Charge the Exact Wording of Two of Stephens' Charges

Stephens objects to the trial court's refusal to charge the specific wording of his Requests to Charge Nos. 2 and 3, which he characterizes as correct statements of the law on the duty of the railroad to maintain its right of way and warn of the approach of trains. The trial judge was not required to give the specific wording of either charge. *See*

Proctor v. Dept. of Health and Environmental Control, 368 S.C. 279, 310, 628 S.E.2d 496, 513 (Ct. App. 2006) (“The substance of the law is what must be instructed to the jury, not any particular verbiage.”) (citation omitted).

As to Request to Charge No. 2, Stephens claims it is “based” on the case of *Lowery v. Seaboard Coastline R. Co.*, 270 S.C. 113, 241 S.E.2d 158 (1978), and “reflects” the holding of the case with regard to the duty of the railroad to maintain its right of way. Br. of Appellant, at 26. However, the requested language was nothing more than a recitation of *the plaintiff’s allegations in that case*⁶ and, contrary to Stephens’ assertion, formed no part of the court’s ruling. Furthermore, Stephens was not prejudiced by the trial court’s refusal of this specific language because the charge given accurately addressed the railroad’s duties and was a correct statement of the law. (R. p. 1462) (charging that the railroad “has a duty to maintain a reasonably safe grade crossing”).

Stephens also objects to the trial court’s failure to charge the exact language in his Request to Charge No 3. Stephens again claims this language was based on a case – *Gleaton v. Southern Ry. Co.*, 208 S.C. 507, 38 S.E.2d 710 (1946) – but that language does not appear anywhere in the decision. In fact, the case did not even involve “vegetation,” as Stephens’ proposed charge read. Even though the trial court correctly observed “it’s just not, clearly, from the case,” it offered to give a charge “[i]f you can give me a direct quote from the case and something that’s applicable,” but Stephens could not comply. (R. p. 1073). More importantly, the case does not even stand for the

⁶ “It was alleged that the collision and resulting damages were caused by the negligence and recklessness of appellant...in allowing weeds to grow on its right of way adjacent to the crossing to such height as to obstruct the vision of motorists using the roadway.” *Lowery*, 270 S.C. at 114, 241 S.E.2d at 158.

proposition for which Stephens offered it. Stephens claims he wanted a charge based on *Gleaton* to address the railroad's duties, but, as that court observed, "the only [issue] involved in [*Gleaton*] embrace[d] the contention that the collision was due to decedent's sole or contributory negligence, gross negligence or willfulness." 208 S.C. at 517; 38 S.E.2d at 714.

Further, the failure to charge Stephens' exact proposed wording (which did not appear in the decision) is inconsequential because the trial court's instructions included a specific charge on the railroad's duty at crossings, including that the railroad's duty "may be affected by obstructions which prevent the track from being seen as a train approaches." (R. pp. 1449, 1462). It is not error for the trial judge to refuse a specific request to charge when the substance of the request is included in the general instructions. *See Burroughs v. Worsham*, 352 S.C. 382, 392, 574 S.E.2d 215, 220 (Ct. App. 2002).

Stephens claims that the effect of not giving these charges was to put all duties on the motorist, *see* Br. of Appellant, p. 27, but this position is meritless given the explicit language in the jury charges that "there is a *mutual* duty on traveler and railroad to exercise due care" and that "[b]oth the traveler and the company are charged with the same degree of care: the one to avoid being injured; and the other to avoid inflicting injury." (R. pp. 1462-63) (emphasis added). Stephens also argues that failing to give these charges was "prejudicial" to his claim concerning the alleged failure to sound the horn, Br. of Appellant, p. 28, but this claim is flawed for similar reasons. The trial court specifically instructed the jury on the statute concerning the horn and bell, (R. p. 1449), and, more importantly, Stephens' own expert stated that Colvin would not have been

"alerted" to the sound of the horn regardless of when sounded, (R. p. 331-32). Considering "the charge as a whole in light of the evidence and issues presented at trial," the trial court did not commit any reversible error. *Welch v. Epstein*, 342 S.C. 279, 311, 536 S.E.2d 408, 425 (Ct. App. 2000) (citation omitted).

E. The Trial Judge Properly Instructed the Jury on the Law Concerning a Motorist's Obligations at a Stop Sign

Stephens argues that the trial judge should not have instructed the jury on S.C. Code Ann. §§ 56-5-2330 and 56-5-2740, which concern stopping at stop signs. As with other charges, Stephens does not dispute the legal accuracy of the charges, which are taken directly from the statutes. Instead, Stephens claims that these statutes did not apply and "conflicted" with S.C. Code § 56-5-2715, which the trial court also charged. These statutes, however, were directly relevant to the evidence and there is nothing "conflicting" about them. More importantly, given the substantial evidence that Colvin did stop at both the stop sign and the stop line there could not have been any prejudice.

The trial judge's charge based on S.C. Code § 56-5-2330 stated the general and unassailable rule that "every driver of a vehicle approaching a stop sign shall stop at a clearly marked stop line," and that, after having stopped, "the driver shall yield the right-of-way to any traffic that is so close as to constitute an immediate hazard during the time when such driv[er] is moving across or within the intersection." (R. p. 1452). There is nothing improper about instructing a jury that motorists must stop at stop lines and watch for oncoming traffic, nor would a jury find such a common-sense charge confusing in the least.

The trial judge then instructed the jury on a similar and straightforward rule from S.C. Code § 56-5-2740 that "[e]very driver of a vehicle approaching a stop sign shall stop

before entering the crosswalk on the near side of the intersection or ... in the event there is no crosswalk, shall stop at a clearly marked stop line, but, if none, then at the point nearest the intersecting highway where the driver has a view of approaching traffic on the intersecting highway before entering the intersection except when directed to proceed by a police officer or traffic-control signal." (R. p. 1452). Again, this charge merely instructs jurors about the general rules concerning stop signs, and where a motorist must stop when a stop line is in place.

Stephens argues, however, that these charges somehow conflicted with the charge based on S.C. Code § 56-5-2715, which states that the DOT or local authorities with the approval of the DOT "may designate particularly dangerous highway grade crossings of railroads and erect stop signs thereat. 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." (R. pp. 1448-49). Stephens argues that Colvin was "not allowed by § 56-5-2715 to stop at the stop line" at this crossing because it was less than 15 feet from the rail. Br. of Appellant, at 30. There is, however, no conflict, nor was there anything improper about Colvin stopping at the stop line that DOT had deliberately placed.

DOT marked this crossing with both a stop sign and, closer to the track, a stop line. A witness from the DOT testified that it is not uncommon to have a stop sign followed by a stop line farther ahead to indicate a proper location to stop, and that DOT's manuals permit placing them separately. (R. pp. 1021-23). The jury heard evidence that, when marking this crossing with a stop sign, DOT had to consider the presence of underground cables, a ditch, and a pipe and a desire not to block Mr. Jackson's

neighboring driveway. (R. pp. 1017-18). The stop line, which obviously did not require any digging or these considerations, was placed closer to the track. According to the DOT witness, any motorist stopping at this line “would have been fine looking down the track,” and it was reasonable to assume a motorist would stop there or, at a minimum, verify that there was not an oncoming train before crossing. (R. pp. 1025, 1046). The jury also heard testimony that the crossing had passed DOT inspections and was safe. (S.R. p. 35; R. pp. 711-18, 1047).

This evidence demonstrates how the various statutes the trial court charged can and should be read together. Sections 56-5-2330 and 56-5-2740 discuss the obligations to stop at stop lines if they are in place, while section 56-5-2715 discusses where to stop at a crossing that has a stop sign but no stop line directing the motorist where to stop.

Section 2715 makes no mention about the presence of a stop line. If a stop line is present, then the motorist would obviously be in compliance with the law by stopping there. *See* S.C. Code Ann. §§ 56-5-2330 and 56-5-2740 (discussing stopping at stop lines). These statutes are therefore not conflicting, but complimentary. *See Henning v. Union Pac. R.R. Co.*, 530 F.3d 1206, 1221-22 (10th Cir. 2008) (finding “no instructional errors” in trial court’s charging of both the Oklahoma stop line statute and statute providing for a stop no closer than 15 and no further than 50 feet from a railroad crossing, as both were applicable). As the trial judge observed, “I think you expect people to stop at a stop line,” (R. p. 1304), and if DOT places a stop line at a railroad crossing, a motorist would not violate the law by stopping at it.

More importantly, there is nothing prejudicial about charging these statutes because the jury heard evidence that Colvin *did* stop at both the stop sign and the stop

line in this case. *See, e.g.*, R. p. 714 (testimony of Larry Biser that Colvin stopped first at the stop sign, then pulled up to the stop line and “just sat there”); R. p. 806 (testimony of Ned Wooden who saw Colvin “ease up to the stop bar and stop”). CSX’s defense was not that Colvin failed to stop at the line, but that, *despite stopping at the stop line*, she unreasonably pulled out in front of a train when others around her heard and saw it coming. The jury obviously found in CSX’s favor on the issue. As a result, there was no error, and certainly no prejudicial error, in charging the jury on these corresponding and interrelated statutes.

R. The Trial Court Properly Charged the Jury on Statutes Concerning Traffic Control Devices

Stephens contends that the trial court should not have charged the provisions from S.C. Code Ann. §§ 56-5-1010, 56-5-1020, 58-17-1390, and 58-15-1625 concerning the placement of traffic control devices at railroad crossings and DOT’s authority to close grade crossings. As a threshold matter, Stephens does not contend that the charges are legally inaccurate, nor could he, as the charges are drawn directly from South Carolina statutes. Instead, Stephens argues that these statutes had “absolutely nothing to do” with the issues in the case. Br. of Appellant, at 32. This argument, however, is incorrect and contradicted by the issues and evidence Stephens presented at trial.

Stephens argued at length, and his expert witness testified for days, about the obligations of a railroad company to make crossings safe and give adequate warnings. For example, his expert specifically testified that in his opinion the Hill Road crossing was unsafe and that the only way to remedy the danger presented by the crossing was to adopt one of three options: (1) flag the crossing; (2) install gates and lights; or (3) close the crossing. (R. pp. 216-17). Confusingly, and despite his expert’s explicit testimony on this

issue, Stephens later argued to the trial court that he was not contending CSX had an obligation to put up gates and lights, but just an overall duty to warn. (R. pp. 1395-98) (Stephens' counsel in bench conference outside of presence of jury: "There's no statute requiring them to put up gates and lights."). However, Stephens had already presented evidence improperly suggesting that CSX did have obligations concerning gates and lights or even closing the crossing. The jury also heard evidence from Stephens' expert and others concerning the safety of the crossing and the location of stop signs, cross bucks, and stop lines. In light of this testimony, the trial judge needed to instruct the jury on what CSX's obligations actually were concerning traffic control devices at the crossing. In fact, failing to do so would have prejudiced CSX. The trial judge committed no reversible error in charging the jury on accurate law that applied to the issues and facts presented to the jury.

G. The Trial Judge Properly Instructed the Jury on DOT's Discretionary Immunity

Stephens claims the trial court erred in charging S.C. Code Ann. §15-78-60(5), which concerns the discretionary immunity of DOT. This issue does not concern CSX and could not serve as a basis for a new trial against it. Therefore, CSX will not address this argument except to note that the trial court did not err in its charge on this issue, and the charge given does not provide a basis for a new trial.

H. The Trial Judge Properly Instructed the Jury on Applicable Language from the Case Law

Lastly, Stephens claims error in the trial court's charge that "it is always train time at the crossing" because this language "implies a higher duty upon motorists at crossings than required." Appellant's Br., p. 34. However, the language of the charge comes straight from well settled South Carolina law. See *Peagler v. Atlantic Coast Line R.R. Co.*, 234 S.C. 140,

107 S.E.2d 15, 22 (1959) ("We are not unmindful of the principles long established by this court that *it is 'always train time at a railroad crossing'* and that one approaching must make use of his senses, to the best of his ability under the circumstances, to ascertain the presence or approach of a train and do so in time and place, so far as is reasonably within his control, to be effective"); *Robison v. Atlantic Coast Line R. R.*, 179 S.C. 493, 184 S.E. 96, 100 (1936) ("It has been well said that *it is always train time at a railroad crossing.*"); *Hawkins v. Southern Ry. Co.*, 45 F.R.D. 459, 462 (D.S.C. 1968) ("[T]his court is mindful of the rule that *'it is always train time at a railroad crossing'* and that a vehicle driver, or pedestrian, going on or near railroad tracks must observe due care, or as otherwise stated reasonable care, when attempting to cross."). Our Supreme Court has even endorsed the practice of using language in jury charges taken directly from appellate

decisions that illustrate the principles of law at issue. See *Sumter Trust Co. v. Holman*, 134 S.C. 412, 132 S.E. 811, 814 (1926) ("It was not improper for the court to use cases, decided by this court, for the purpose of illustrating to the jury principles of law applicable to the case on trial; and a trial judge is permitted even to read from such cases the law as announced by this court, when it is applicable to the case being tried."); *Richardson v. Northwestern R.R. Co.*, 131 S.C. 57, 126 S.E. 397, 399 (1924) ("It is well to give the statement in the language of the appellate court, written after supposedly mature deliberation, rather than an offhand paraphrase announced in the rush of a trial.").

Stephens' claim that the trial judge erred by not charging his Request No. 9 is meritless. The substance of this charge, that a motorist "is under no *absolute* duty to stop, look and listen" at a railroad crossing, as well as the mutual duties of the motorist and railroad, were adequately covered by the charges. (R. pp. 1460-61) (charging jury that

"[t]he duty of a traveler arising under the foregoing rule [to stop, look, and listen] is not an absolute one, but maybe qualified by attendant circumstances"; (R. pp. 1462-63) (charging jury that "there is a *mutual* duty on traveler and railroad to exercise due care" and that "[b]oth the traveler and the company are charged with the same degree of care: the one to avoid being injured; and the other to avoid inflicting injury") (emphasis added). Because "[a] jury charge is correct ... when the charge ... read as a whole ... contains the correct definition and adequately covers the law," the trial court did not commit any reversible error. *In re Care and Treatment of Canupp*, 380 S.C. 611, 616, 671 S.E.2d 614, 616 (Ct. App. 2008). As such, the judgment below should be affirmed.

CONCLUSION

For the foregoing reasons, this Court should affirm the jury's verdict and the judgment in favor of CSX and DOT.



Ronald K. Wray, II (S.C. Bar #65246)
Thomas Vanderbloemen (S.C. Bar #75784)
GALLIVAN, WHITE & BOYD, P.A.
55 Beattie Place; Suite 1200
Greenville, SC 29603
(864) 271-9580

James W. Purcell
Fulcher Hagler, LLP
P. O. Box 1477
Augusta, GA 30903-1477
(706) 724-0171

Jonathan P. Harmon
McGuire Woods, LLP
One James Center
901 East Cary Street
Richmond, VA 23219-4030
(804)775-1000

Attorneys for Respondent
CSX Transportation, Inc.

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM HAMPTON COUNTY
Carmen Tevis Mullen, Circuit Court Judge

Case No. 2004-CP-25-0267

Willie Homer Stephens, Guardian ad Litem for
William C. Aminor, ... Appellant,

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

BRIEF OF RESPONDENT
SOUTH CAROLINA DEPARTMENT OF TRANSPORTATION

Andrew P. Lindemann
DAVIDSON & LINDEMANN, P.A.
1611 Devonshire Drive
Post Office Box 8568
Columbia, South Carolina 29202
(803) 806-8222

Peden B. McLeod
MCLEOD, FRASER & CONE
111 East Washington Street
Post Office Drawer 230
Walterboro, South Carolina 29488
(843) 549-2516

Counsel for Respondent SCDOT

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STATEMENT OF THE CASE

This is a railroad crossing case. The Appellant Willie Homer Stephens, as the Guardian ad Litem for his granddaughter Lillian, brought suit against the Respondents CSX Transportation, Inc. ("CSX") and the South Carolina Department of Transportation ("SCDOT"). The Appellant alleges that both CSX and SCDOT were negligent in causing an accident on February 3, 2004, at the Hill Road crossing located in Yemassee, South Carolina.

A trial was held in Hampton County beginning on July 28, 2008, before Circuit Court Judge Carmen Tevis Mullen and a jury. On August 14, 2008, after three weeks of trial, the jury returned a defense verdict in favor of both CSX and SCDOT. The jury answered special interrogatories and specifically found that neither CSX nor SCDOT were negligent. (R. 10).

The Appellant thereafter moved for a judgment notwithstanding the verdict against CSX only as well as a new trial absolute against both Respondents. A hearing was held on September 11, 2008. Judge Mullen subsequently issued an order filed March 30, 2009, denying all post-trial motions. (R. 1-7).

The Appellant thereupon filed a timely appeal to this Court.

STATEMENT OF FACTS

The Respondent SCDOT hereby adopts by reference and incorporates herein the "Statement of Facts" included in the brief filed by the Respondent CSX.

ARGUMENTS

- I. The trial court properly denied the Appellant's motion for new trial finding that the jury charge accurately states the law of South Carolina and was proper in light of the evidence introduced at trial.**

In seeking a new trial, the Appellant raises several issues with respect to the jury charge.¹ The Appellant argues that the Judge Mullen erred in refusing to give certain requested instructions. He also complains that certain portions of the jury charge are in error. The Appellant also incorporates challenges to the propriety of ~~SCDOT's affirmative defenses in his challenge to the charge. Each of these issues~~ will be addressed in turn below.

Initially, it is instructive to consider the standard of review for jury instructions. It is well settled that "[w]hen 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." *Daves v. Cleary*, 355 S.C. 216, 584 S.E.2d 423, 427 (Ct. App. 2003). "If the charge is reasonably free from error, isolated portions that might be misleading do not constitute reversible error." *Id.* "The

¹ The issues on appeal raised in Sections I and II of the Appellant's Brief are directed solely at the Respondent CSX. As a result, SCDOT is not addressing those issues. The same is also true with respect to the issues addressed in Sections III.C and III.G of the Appellant's Brief. To the extent a response on these issues is required from SCDOT, the arguments made by CSX are adopted and incorporated herein in accordance with Rule 208(b)(6), SCACR.

substance of the law is what must be charged, not any particular verbiage." *Id.* "A jury charge is correct if it contains the correct definition and adequately charges the law." *Id.* Similarly stated, "[a] jury charge which is substantially correct and covers the law does not require reversal." *Stewart v. Richland Memorial Hospital*, 350 S.C. 589, 567 S.E.2d 510, 513 (Ct. App. 2002). "A confusing charge alone is insufficient to warrant reversal." *Keaton v. Greenville Hospital System*, 334 S.C. 488, 514 S.E.2d 570, 575 (1999).

"It is not error to refuse a request to charge when the substance of the request is included in the general instructions." *Brown v. Stewart*, 348 S.C. 33, 557 S.E.2d 676 (Ct. App. 2001). "Refusal to give a properly requested charge is not error if the general instructions are sufficiently broad to enable the jury to understand the law and the issues involved." *McCourt v. Abernathy*, 318 S.C. 301, 457 S.E.2d 603, 606 (1995).

"To warrant reversal for refusal to give a requested instruction, the refusal must have not only been erroneous, but prejudicial as well." *Daves v. Cleary*, 355 S.C. 216, 584 S.E.2d 423, 427 (Ct. App. 2003). "An erroneous jury instruction, however, is not grounds for reversal unless the appellant can show prejudice from the erroneous instruction." *Cole v. Raut*, 378 S.C. 398, 663 S.E.2d 30, 33 (2008). "An alleged error is harmless if the appellate court determines beyond a reasonable doubt that the alleged error did not contribute to the verdict." *Fairchild v. South*

Carolina Dept. of Transportation, 385 S.C. 344, 683 S.E.2d 818, 822 (Ct. App. 2009). See also, *Keaton v. Greenville Hospital System*, 334 S.C. 488, 514 S.E.2d 570 (1999).

A. The trial court did not err in charging Section 56-5-2930 or in refusing to charge Section 56-5-2950(b).

The Appellant contends that Judge Mullen erred in charging Section 56-5-2930 because there was no evidence that Tonia Colvin was impaired. The Appellant also argues that Judge Mullen erred in refusing to charge the presumptions of impairment set forth in Section 56-5-2950(b).

Section 56-5-2930 provides that it is unlawful for a person to operate a motor vehicle under the influence of alcohol or drugs "to the extent that the person's faculties to drive a motor vehicle are materially and appreciably impaired." S.C. Code Ann. § 56-5-2930. "A driver is 'under the influence' when ingestion of drugs or alcohol results in the impairment of the driver's faculties, impairs the driver's ability to operate the vehicle with reasonable care, or impairs the driver's ability to drive as a prudent driver would operate the vehicle." *Kennedy v. Griffin*, 358 S.C. 122, 595 S.E.2d 248, 251 (Ct. App. 2004).

The Appellant claims to have objected to the charge of Section 56-5-2930. That is not the case. The Appellant did not oppose charging Section 56-5-2930 but

requested only that the Court provide an additional explanation that it is not unlawful for a person to drink and drive or take medication and drive where the motorist is not impaired by the alcohol or medication. (R. 1230-1232). Judge Mullen agreed and charged the requested language in conjunction with her charge of Section 56-5-2930. (R. 1457-1458). The Appellant therefore is precluded from challenging on appeal the charge of Section 56-5-2930. *See, Vaughn v. City of Anderson*, 300 S.C. 55, 386 S.E.2d 297 (Ct. App. 1989) (failure to object to jury charge waives any alleged error in the charge).

Additionally, there is sufficient evidence in the record to support the charge of Section 56-5-2930. The Appellant fully concedes that there is evidence of alcohol and drug use by Tonia Colvin prior to the accident. Colvin testified that she consumed one or two wine coolers while doing housework shortly before the accident. (R. 422-423). She also admitted to having taken the pain medication Darvocet and a muscle relaxer Tizanidine prior to the accident. (R. 427). Colvin further admitted to having taken codeine cough syrup although she later questioned whether it may have been children's cough syrup. (R. 470-472). Colvin agreed that each of these medications was combined with alcohol and was in her system at the time of the accident. (R. 473). She further admitted that the medications came with warnings not to take with alcohol. (R. 461-464). Colvin had also gotten a new prescription for hydrocodone which she admitted was a narcotic pain

medication "more powerful than Darvocet." (R. 467-468). Colvin testified that she had not taken hydrocodone prior to the accident, but in her earlier deposition she admitted that she did not remember. Upon being impeached with her deposition testimony, Colvin agreed that she was not "a hundred percent sure" whether she had taken hydrocodone. (R. 468-470).

At the accident scene, the attending EMT noted a "strong odor of alcohol." (R. 1573). Following the accident at the hospital, the attending physician ordered a blood-alcohol test and drug screen. Allison Schaffer, a registered nurse at Hampton County Hospital, testified that typically physicians do not order such tests and agreed that such tests are not conducted unless there appears to be a need. (R. 537). The blood-alcohol test which was conducted more than three hours after the accident revealed a 0.018 blood-alcohol level. (R. 531). The drug screen was positive for opiates. (R. 538).

Despite the overwhelming evidence of alcohol and drug use prior to the accident, the Appellant contends that there is no evidence of impairment. While Tonia Colvin denied impairment, there exists circumstantial evidence of impairment that would make the issue a jury question. The use of alcohol and prescription medication is undisputed, and specifically the mixing of alcohol and drugs. The jury was also presented with eyewitness testimony that Colvin stopped for the train, was able to see and hear the approaching train, and then tried to cross

the tracks to beat the train. (R. 714). As Judge Mullen observed, "I think based on circumstantial evidence this jury could conclude that she saw the train, she decided to go and she thought she could either get past it or beat it in some way and that she pulled out." (R. 1219). Hence, there is circumstantial evidence that would lead a jury to believe that Colvin was operating the motor vehicle in an impaired state.

Judge Mullen's decision to charge the jury that it is unlawful to operate a motor vehicle in an impaired state is supported by this Court's decision in *Gulledge v. McLaughlin*, 328 S.C. 504, 492 S.E.2d 816 (Ct. App. 1997). In *Gulledge*, the plaintiff objected to the admission of evidence of the decedent's blood alcohol content. The plaintiff argued "that no evidence indicated Gulledge either was acting in an intoxicated manner or smelled of alcoholic beverages. In fact, [plaintiff] points out that the ambulance personnel who transported Gulledge specifically testified they did not observe anything that would indicate Gulledge had been drinking." 492 S.E.2d at 819. Nonetheless, this Court found no error in the admission of the blood alcohol content. This Court concluded that a jury could have found the decedent was drinking by the proximity of empty "fresh" beer cans and a cooler. Significantly, this Court also found that "the circumstances of this accident also provide some corroborating evidence that Gulledge was driving while under the influence of intoxicants." *Id.* This Court thus determined that the

blood-alcohol content "when combined with the beer cans, the cooler, and the circumstances of the accident, were sufficient for the jury to conclude that Gullledge was impaired from alcohol consumption." 492 S.E.2d at 820.

The evidence in the present case is as compelling as in *Gullledge*. Here, there is no dispute that Tonia Colvin had ingested alcohol *and* prescription medication prior to the accident. Moreover, as in *Gullledge*, the circumstances of the accident provide circumstantial evidence that Colvin was impaired. Therefore, if the admission of the decedent's blood-alcohol content was proper in *Gullledge*, certainly it was appropriate to charge the jury in the case at bar that it is unlawful for a motorist to drive while impaired. Contrary to the Appellant's contention, there was sufficient evidence to charge Section 56-5-2930 to the jury.

The Appellant further argues that Judge Mullen erred in failing to charge Section 56-5-2950 and specifically subsection (b) which provided as follows:

In the criminal prosecution for a violation of Section 56-5-2930, 56-5-2933, or 56-5-2945 relating to driving a vehicle under the influence of alcohol, drugs, or a combination of alcohol and drugs, the alcohol concentration at the time of the test, as shown by chemical analysis of the person's breath or other body fluids, gives rise to the following:

- (1) If the alcohol concentration was at that time five one-hundredths of one percent or less, it is conclusively presumed that the person was not under the influence of alcohol.

* * * * *

The provisions of this section must not be construed as limiting the introduction of any other evidence bearing upon the question of whether or not the person was under the influence of alcohol, drugs, or a combination of them.

S.C. Code Ann. § 56-5-2950(b). (Emphasis added).² The Appellant contends that, because Tonia Colvin's blood-alcohol content was less than five one-hundredths of one percent, he was entitled to a charge that she is presumed not to be under the influence of alcohol.

Judge Mullen did not abuse her discretion in refusing to charge Section 56-5-2950(b). She explains her reasoning as follows in her order denying post-trial motions:

Plaintiff contends I should have charged Section 56-5-2950. This statute was discussed at length at trial. By its very wording, the statute applies only in criminal prosecutions. Thus, to use it in a civil proceeding, where the burden of proof is the preponderance of the evidence and not beyond a reasonable doubt, would have been inappropriate. Further, the statute refers to presumptions regarding blood alcohol level, whereas evidence in this case showed Ms. Colvin had combined the use of both alcohol and prescription drugs. Additionally, Plaintiff can show no prejudice given that I did charge, at Plaintiff's request, that it is not unlawful in this State to drink and drive, it is only unlawful to drive while impaired or under the influence. Thus, I correctly refused the requested charge.

² Effective February 10, 2009, Section 56-5-2950(b) has been re-codified as Section 56-5-2950(G).

(R. 7). There is no case law or other authority stating that the presumptions set forth in Section 56-5-2950(b) are applicable in a civil case and under a preponderance of the evidence standard.³ As Judge Mullen concluded, the express language of Section 56-5-2950(b) makes those presumptions applicable only "in the *criminal prosecution* for a violation of Section 56-5-2930." S.C. Code Ann. § 56-5-2950(b). (Emphasis added). Furthermore, the charge would have been confusing to a jury given that the evidence did not concern only alcohol consumption. Instead, it is undisputed that Colvin ingested a combination of alcohol and prescriptions drugs. The presumptions set forth in Section 56-5-

2950(b) pertain to alcohol use only. Thus, the presumptions have no applicability or relevance given that Colvin's impairment was not based on the use of alcohol alone. Thus, if the Court charged the jury on Section 56-5-2950(b), that could have likely resulted in jury confusion. Judge Mullen avoided that confusion by correctly refusing to charge Section 56-5-2950(b), while at the same time making certain that the jury understood that it is not unlawful to drink alcohol and then drive, only that it is unlawful to drive while impaired.

Moreover, even if this Court were to conclude that Judge Mullen erred in

³ In *Gulledge v. McLaughlin*, 328 S.C. 504, 492 S.E.2d 816 (Ct. App. 1997), this Court noted that the presumptions in Section 56-5-2950(b) were not charged. By footnote, the Court explained that the plaintiff did not seek such an instruction and that the defendant conceded "the statute implied the inferences were not applicable in a civil case." 492 S.E.2d at 819, n.2. This Court did not suggest that this reasoning was in error.

charging Section 56-5-2930 or refusing to charge Section 56-5-2950(b), the Appellant must still show prejudice. This aspect of the charge was directed solely at the issues of Tonia Colvin's fault and proximate cause. The charge does not implicate the threshold question of whether SCDOT or CSX were negligent. By response to special interrogatories, the jury concluded that both SCDOT and CSX were not negligent. (R. 10). The jury never reached the issue of proximate cause. Consequently, given the jury's deliberative process as ascertained from the verdict form, the Appellant has not shown any prejudice from this portion of the jury instructions.

Furthermore, the Appellant cannot show prejudice because he was able to present evidence as to the meaning and effect of Tonia Colvin's blood-alcohol content. The Appellant elicited testimony from Allison Schaffer that the 0.018 result was a "negative" result. (R. 531). Schaffer also offered the opinion that the blood-alcohol content was not above the "legal limit." (R. 538). Thus, the record included evidence by which the jury understood the implications of the 0.018 blood-alcohol content.

In sum, the Appellant has not shown that Judge Mullen committed reversible error in charging Section 56-5-2930 or refusing to charge Section 56-5-2950(b). The Appellant has not shown that Judge Mullen's reasoning constitutes an abuse of discretion nor has the Appellant demonstrated any prejudice given that the jury

concluded that neither SCDOT nor CSX were negligent.

B. The trial court did not err in charging the sovereign immunity defense under Section 15-78-60(20) of the Tort Claims Act.

As a corollary to the Appellant's challenge to the Section 56-5-2930 portion of the charge, the Appellant also argues that Judge Mullen erred in charging a sovereign immunity defense under Section 15-78-60(20) of the Tort Claims Act. The Appellant argues that there is no evidence of any criminal conduct to which Section 15-78-60(20) applies.

This issue is, however, not preserved for appellate review. The Appellant is attempting to use a challenge to the jury instructions as a means to challenge the sufficiency of the evidence in support of certain affirmative defenses asserted by SCDOT including sovereign immunity defenses under the South Carolina Tort Claims Act. The record reflects that the Appellant never moved for a directed verdict on any of SCDOT's affirmative defenses during the trial. The Appellant never moved for a directed verdict on the basis that there was no evidence to support the sovereign immunity defense now being challenged. In the absence of a directed verdict motion, the Appellant cannot now take the position that there was no evidence to support this defense and, as a result, the trial court erred in charging the defense.

In *Barber v. Citizens & Southern National Bank*, 268 S.C. 16, 231 S.E.2d 295 (1977), the Supreme Court ruled that the failure of a party to move for a directed verdict at trial precludes any challenge on appeal to the sufficiency of the evidence. 231 S.E.2d at 297. See also, *Evans v. Wabash Life Ins. Co.*, 247 S.C. 464, 148 S.E.2d 153 (1966); *Epting v. Brumble*, 264 S.C. 114, 212 S.E.2d 711 (1975); *Lites v. Taylor*, 284 S.C. 316, 326 S.E.2d 173 (Ct. App. 1985). In short, a directed verdict motion is required to preserve any issue regarding the sufficiency of the evidence.

By arguing on appeal that Judge Mullen erred in charging a Section 15-78-60(20) sovereign immunity defense because there was no evidence to support that defense, the Appellant is clearly challenging on appeal the sufficiency of the evidence. He is doing so without having made a motion for directed verdict at trial, and hence, that issue is not preserved.

In short, the record reflects that SCDOT affirmatively pled a Section 15-78-60(20) sovereign immunity defense and the Appellant never moved for directed verdict on the basis that no evidence supported such a defense. In the context of challenging a jury charge on that defense, the Appellant now disputes the existence of any evidence to support such a defense. That is not an appropriate or timely method for challenging the sufficiency of evidence in support of an affirmative defense.

At any rate, SCDOT submits that the record includes evidence that could lead the jury to believe that Tonia Colvin committed the criminal act of driving under the influence in violation of Section 56-5-2930. Consequently, there exists sufficient evidence to justify an instruction on Section 15-78-60(20) immunity.

Moreover, the Appellant has failed to show any prejudice resulted from this charge. The jury never reached any of SCDOT's affirmative defenses including immunity defenses. In responding to special interrogatories, the jury did not find that SCDOT is immune from liability. Instead, the jury concluded that SCDOT was not negligent. (R. 10). An immunity defense by definition presupposes a conditional admission of negligence or fault. *See, Rayfield v. South Carolina Dept. of Corrections*, 297 S.C. 95, 374 S.E.2d 910, 916 (1988) ("One who pleads immunity, conditionally admits the plaintiff's case, but asserts his immunity as a bar to liability"). Because the jury failed to find that SCDOT was negligent, it is clear that the jury did not even reach the immunity defenses including the Section 15-78-60(20) defense. Thus, the Appellant has failed to demonstrate any prejudice resulting from the charge of a Section 15-78-60(20) sovereign immunity defense.

C. The trial court did not err in charging the law on intervening or superseding negligence.

The Appellant argues that Judge Mullen's charge on intervening or

superseding negligence was in error because Tonia Colvin's negligence was foreseeable as a matter of law. Specifically, the Appellant maintains that it was foreseeable that a motorist would fail to stop at the stop line given that the stop line was closer than fifteen feet of the nearest rail.

The Appellant's challenge to the intervening negligence charge fails for two principal reasons. First, the Appellant has not shown any prejudice or harm from this charge. As discussed above, the jury found that SCDOT and CSX were not negligent. (R. 10). The jury never reached the issue of proximate cause. Consequently, the jury likewise would not have reached the defense of intervening negligence. The defense of intervening or superseding negligence requires an initial finding that the defendant is negligent. *See, Mellen v. Lane*, 377 S.C. 261, 659 S.E.2d 236 (Ct. App. 2008). Here, there was no such finding by the jury. As a result, the jury could not have concluded that negligence of Tonia Colvin was an intervening act that broke the causal chain.

Second, the record does include evidence of an intervening negligent act by Tonia Colvin, the foreseeability of which would be a jury question. Larry Biser, an eyewitness to the accident who was behind the Colvin vehicle at the crossing, testified that Colvin stopped at the stop line. Biser described the accident as follows:

As we was approaching Highway 68, you could see --
you could hear the train blowing its horn and you could

see the train coming through the trees briefly. And she stopped at the stop sign; I stopped behind her; she pulled up to the white line and she just sat there; and I put my truck in park and shut it off. And the next thing I know her brake lights went out and across the tracks she went in front of the train.

(R. 714). Biser further testified as follows:

Q. ... And where is it that you saw Ms. Colvin stop that day, sir?

A. It appeared that her bumper should have been right at that white line, her front bumper.

Q. And that is where you saw her before she attempted – when she ran out in front of the train?

A. Yes, sir.

(R. 719). While the Appellant argues that it is foreseeable that a motorist would not stop at the stop line at the Hill Road crossing, there is evidence that Colvin did stop, was able to hear and see the train, and then pulled across the tracks into the train's path. The scenario described by Larry Biser is not foreseeable as a matter of law. Biser's account of the accident describes what would be deemed an intervening negligent act, and as a result, it was appropriate for Judge Mullen to charge the jury on intervening or superseding negligence.

For each of these reasons, the Appellant's challenge to the charge on intervening or superseding negligence lacks merit and does not warrant a new trial.

D. The trial court did not err in charging the jury on Sections 56-5-2330 and 56-5-2740.

The Appellant next argues that Judge Mullen erred in charging the jury on Sections 56-5-2330 and 56-5-2740. The Appellant contends in part that these statutes were inapplicable to the facts of this case because the statutes do not apply to stop signs at railroad crossings.

Section 56-5-2330 sets forth the general duties of a motorist upon approaching a stop sign. Judge Mullen did not charge the entire statute verbatim. Instead, she simply explained that a motorist upon approaching a stop sign has a duty to stop at a clearly marked stop line. Similarly, Section 56-5-2740 explains where a motorist approaching a stop sign is required to stop. There was no error in charging these statutes.

The Appellant further argues that Sections 56-5-2330 and 56-5-2740, which require a motorist to stop at a clearly marked stop line, are inconsistent with Section 56-5-2715, which addresses stop signs posted at railroad crossings. Section 56-5-2715 provides in part: "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." S.C. Code Ann. § 56-5-2715. The Appellant has not shown any inconsistency between the statutes in question. Instead, the statutes are to be read together. The clear

intent of these statutes is that a motorist is required to stop where there is a clearly marked stop line. However, if there is no stop line but only a stop sign, the motorist is required to stop at the stop sign.

Furthermore, the Appellant has not shown that this challenge to the jury charge is even properly preserved for appellate review. Rule 51, SCRPC, provides that "[n]o party may assign as error the giving or the failure to give an instruction unless he objects thereto before the jury retires to consider its verdict, *stating distinctly the matter to which he objects and the grounds for his objection.*" Rule 51, SCRPC. (Emphasis added). Therefore, in order to preserve an objection to a jury charge, a party must "support[] those objections with distinctly-stated grounds of objections." *Bellamy v. Payne*, 304 S.C. 179, 403 S.E.2d 326, 328 (Ct. App. 1991). This is required "so that the Court is apprised of the alleged defect and the justification for the requested charge" which in turn gives the trial court the opportunity to correct or revise the charge accordingly. *Id.* "In the absence of distinctly-stated grounds of objection, appellate review of ... objections is not available." *Id.* Therefore, in order to properly preserve an objection to a jury charge, a party must articulate the objection to the trial judge. The same objection as raised at trial may be asserted on appeal. However, a party is precluded from raising a new objection or a different objection for the first time on appeal or by way of post-trial motion.

Yet, that is precisely what the Appellant has done. At trial, the Appellant objected to the charge on Sections 56-5-2330 and 56-5-2740 only on the basis that the statutes had "no applicability" because "it applies to an intersection where the roads intersect" and "has no relevancy to a railroad crossing." (R. 1134). The Appellant never argued at trial, as he argues in this Court, that Sections 56-5-2330 and 56-5-2740 actually conflict with Section 56-5-2715. That argument was never made at trial but was raised for the first time in post-trial motions, which is too late. The Appellant should be precluded from raising new objections to charges for the first time on appeal or in a motion for new trial. Consequently, SCDOT submits that part of the Appellants' current challenge to the charge on Sections 56-5-2330 and 56-5-2740 is not even preserved for review.

E. The trial court did not err in charging several statutes addressing the placement of signage at railroad crossings and SCDOT's authority to close railroad crossings.

The Appellant contends that Judge Mullen should not have charged the jury on several statutes addressing the placement of signage at railroad crossings and SCDOT's authority to close railroad crossings. Importantly, the Appellant does not maintain that these charges did not accurately recite the statutory law. Instead, he complains that the statutes had no bearing on any issues at trial.

As a threshold matter, the Appellant has not shown that he stated any

objections to these charges at trial. The record clearly shows that the Appellant raised no objection to Section 56-5-1020. (R. 1286-1288). The same is true with respect to Section 56-15-1625. That charge was specifically addressed, and the Appellant raised no objections. (R. 1298-1301).

The preservation problems notwithstanding, the Appellant has not demonstrated that it was inappropriate for the trial court to instruct the jury as to the duties and obligations regarding railroad crossing signage. The Appellant's own expert raised issues regarding signage and also raised the possibility of closing the Hill Road crossing. The statutes which were charged provided the jury the legal context in which to assess such expert testimony. The Appellant's claims of jury confusion are without foundation and are frankly unavailing. In sum, the Appellant has not shown that accurate charges on statutes governing railroad crossings were in error and merit a new trial.

F. The trial court did not err in charging the discretionary immunity defense under Section 15-78-60(5) of the Tort Claims Act.

The Appellant argues that Judge Mullen erred in charging discretionary immunity under Section 15-78-60(5) of the Tort Claims Act. The Appellant insists that there was no evidence to support the defense of discretionary immunity.

Just as he has done with the Section 15-78-60(20) sovereign immunity

defense, the Appellant is improperly attempting to use a challenge to the jury instructions as a means to challenge the sufficiency of the evidence supporting an affirmative defense. The record again clearly shows that the Appellant never moved for a directed verdict on any affirmative defense including the discretionary immunity defense. Thus, he did not seek a proper ruling at trial on the sufficiency of the evidence supporting that defense. He is thus precluded from raising that issue on appeal. *See, Barber v. Citizens & Southern National Bank*, 268 S.C. 16, 231 S.E.2d 295 (1977) (as discussed in Section I.B above).

In addition, the Appellant has not shown that he made an objection during the charge conference to the trial court's charge of Section 15-78-60(5) immunity. Thus, in absence of an objection, this issue has been waived.

The preservation issues notwithstanding, the record does include evidence that the SCDOT exercised discretion in the placement of the stop sign and stop line and that the exercise of that discretion was controlled by industry standards, specifically the Manual of Uniform Traffic Control Devices (MUTCD). The SCDOT witnesses including Richard F. Jenkins, Jr, Joel Smith, and Richard Reynolds explained in their testimony the factors that were considered in the placement of the stop sign and stop line. In particular, the positioning of the stop sign was affected by the presence of an access road, driveway, culvert, and fiber optic line. The witnesses explained how those physical obstructions impacted the

positioning of the stop sign. (R. 1016-1018, 1052). The witnesses also offered the opinions that the placement of the stop sign and stop line were proper and in substantial compliance with the guidelines provided in the MUTCD. (R. 997-998, 1016-1018, 1040-1044, 1052). In short, this testimony was sufficient to support a jury charge on discretionary immunity.

At any rate, the Appellant has made no showing of any prejudice from the discretionary immunity charge. The Appellant has argued only in a conclusory manner that the charge "confused the jury" and "certainly prejudiced the Appellant." *See*, Appellant's Brief, p. 33. Indeed, no showing of jury confusion or prejudice was made. Moreover, as was discussed above with the charge on Section 15-78-60(20) sovereign immunity, the Appellant cannot show that the jury even reached the discretionary immunity defense. The jury concluded on the verdict form that SCDOT was not negligent. The jury did not find that SCDOT was entitled to any immunity. Consequently, the Appellant has failed to demonstrate any prejudice resulting from the discretionary immunity charge.⁴

⁴ In accordance with Rule 208(b)(6), SCACR, the Respondent SCDOT adopts and incorporates herein the arguments made by the Respondent CSX to the extent not inconsistent herewith with respect to each of the Appellant's challenges to the jury charge.

CONCLUSION

Based on the foregoing discussion and analysis, the Respondent South Carolina Department of Transportation respectfully requests that this Court affirm the order of Judge Carmen Tevis Mullen denying post-trial motions and upholding the jury's verdict and the judgment in favor of the Respondents.

Respectfully submitted,

DAVIDSON & LINDEMANN, P.A.

BY: 

ANDREW F. LINDEMANN
1611 Devonshire Drive
Post Office Box 8568
Columbia, South Carolina 29202
(803) 806-8222

PEDEN B. McLEOD
McLeod, Fraser & Cone
111 East Washington Street
Post Office Drawer 230
Walterboro, South Carolina 29488
(843) 549-2516

*Counsel for Respondent South Carolina
Department of Transportation*

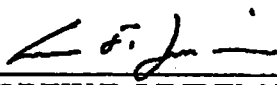
Columbia, South Carolina

July 11, 2011

CERTIFICATE OF COMPLIANCE

The undersigned counsel for the Respondent South Carolina Department of Transportation certifies that the Brief of Respondent complies with the Supreme Court's Order of August 13, 2007, regarding personal identifiers and sensitive information.

DAVIDSON & LINDEMANN, P.A.

BY: 

ANDREW F. LINDEMANN
1611 Devonshire Drive
Post Office Box 8568
Columbia, South Carolina 29202
(803) 806-8222

PEDEN B. McLEOD
McLeod, Fraser & Cone
111 East Washington Street
Post Office Drawer 230
Walterboro, South Carolina 29488
(843) 549-2516

*Counsel for Respondent South Carolina
Department of Transportation*

Columbia, South Carolina

July 11, 2011

CERTIFICATE OF COUNSEL

The undersigned counsel for the Respondent South Carolina Department of Transportation certifies that the Final Brief of Respondent South Carolina Department of Transportation complies with Rule 211(b), SCACR.

DAVIDSON & LINDEMANN, P.A.

BY: 

ANDREW F. LINDEMANN
1611 Devonshire Drive
Post Office Box 8568
Columbia, South Carolina 29202
(803) 806-8222

PEDEN B. McLEOD
McLeod, Fraser & Cone
111 East Washington Street
Post Office Drawer 230
Walterboro, South Carolina 29488
(843) 549-2516

*Counsel for Respondent South Carolina
Department of Transportation*

Columbia, South Carolina

July 11, 2011

CERTIFICATE OF SERVICE

The undersigned employee of Davidson & Lindemann, P.A., attorneys for the Respondent South Carolina Department of Transportation, does hereby certify that service of the **Final Brief of Respondent South Carolina Department of Transportation** in the above-captioned matter was made upon all counsel of record by placing copies in the United States Mail, first class postage prepaid, at the below listed addresses clearly indicated on said envelopes this the 11th day of July 2011:

John E. Parker, Esquire
J. Paul Detrick, Esquire
Grahame E. Holmes, Esquire
Matthew V. Creech, Esquire
Peters Murdaugh Parker Eltzroth & Detrick, P.A.
Post Office Box 457
Hampton, South Carolina 29924-0457

Carl H. Jacobson, Esquire
Uricchio, Howe, Krell, Jacobson, Toporek, Theos & Keith, P.A.
Post Office Box 399
Charleston, South Carolina 29401

Peden B. McLeod, Esquire
McLeod, Fraser & Cone
Post Office Drawer 230
Walterboro, South Carolina 29488-0003

Ronald K. Wray, II, Esquire
Thomas B. Vanderbloemen, Esquire
John R. Bell, Jr., Esquire
Gallivan White & Boyd, P.A.
Post Office Box 10589
Greenville, South Carolina 29603

J. Arthur Davison, Esquire
James Purcell, Esquire
Fulcher Hagler, LLP
Post Office Box 1477
Augusta, Georgia 30903



**THE STATE OF SOUTH CAROLINA
In The Court of Appeals**

**APPEAL FROM HAMPTON COUNTY
Court of Common Pleas**

Carmen T. Mullen, Circuit Court Judge

Appellate Case No. 2009-126526

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

v.

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

**APPELLANT'S PETITION FOR REHEARING AND SUGGESTION FOR
REHEARING *EN BANC***

Pursuant to Rule 221(a) of the South Carolina Rules of Appellate Procedure, the Appellant, Willie Homer Stephens, Guardian ad Litem for Lillian C., a minor, moves the Court for Rehearing and/or to alter its Opinion No. 5008 filed July 25, 2012, which affirmed the trial court's denial of Stephens' directed verdict motions, affirmed the trial court's evidentiary rulings, and affirmed the trial court's jury charges. Appellant also petitions and suggests the desirability of rehearing by the Court *en banc* because the proceeding involves questions of exceptional importance.

Reconsideration is appropriate because the Court has misapprehended the record before it and misapplied the law of South Carolina with regard to the preservation of

issues on appeal. In ruling that the Appellant failed to preserve the trial court's denial of his directed verdict motion, the Opinion directly conflicts with this Court's previous case of Henderson v. St. Francis Community Hosp., 295 S.C. 441, 369 S.E.2d 652 (Ct. App. 1988). Furthermore, with regard to this finding, the Opinion's literal interpretation of the phrase "close of all the evidence" within Rule 50(b), SCRPC, is inconsistent with the plain language of Rule 50(a), SCRPC, and unsupported by South Carolina precedent. The effect of the ruling is that a new, never before established procedural rule for issue preservation has issued through the Stephens Opinion. Based on these standards Appellant's directed verdict motions as to both the horn and vegetation theories against CSX should be reconsidered.¹

Next, the Court should rehear and reconsider the Opinion because the Opinion fails to give effect to the factual stipulation of the parties and the effect of that stipulation on the parties. On this issue too, the Opinion does not address or misapprehends the record, which requires a finding that the trial court erred by failing to find as a matter of law that Respondent CSX breached the statutory duty found at S.C. Code Ann. § 58-15-910.

With regard to the evidentiary rulings within the Opinion, the Court has misapprehended the record as whole in finding the issues are not preserved. In so finding, the Court's Opinion conflicts with established precedent concerning the specificity with which a litigant must argue in order to preserve issues on appeal. It is clear a "party need not use the exact name of a legal doctrine in order to preserve it, but it

¹ For the sake of brevity, Appellant in this Petition addresses those issues specifically raised by the Opinion. Nevertheless, with regard to this specific issue on appeal, as well as all others, Appellant specifically adopts and incorporates by reference all arguments on all issues raised previously on appeal.

must be clear that the argument has been presented on that ground.” State v. Russell, 345 S.C. 128, 546 S.E.2d 202 (Ct. App. 2001).

Rehearing is also required because in addressing the allegations of error regarding the jury charge, the Opinion also chooses to not address issues and arguments which should be addressed in considering the charge as a whole. By claiming that certain jury charges need not be addressed, as specifically addressed herein, the Opinion simply avoids addressing on the merits a fatally flawed and confusing jury charge by which the Appellant was actually prejudiced and which requires reversal.

Because of these issues above, consideration by the full Court is necessary to secure and/or maintain uniformity of the Appellate Court’s opinions and to address the newly carved procedural requirement which heretofore, has never existed in the procedural or common law requirements of South Carolina.

I. BECAUSE THE OPINION AFFIRMS THE DENIAL OF A DIRECTED VERDICT BASED UPON MISINTERPRETATION OF PROCEDURAL RULES, EXISTING PRECEDENT, AND MISINTERPRETATION OF THE RECORD AT HAND, REHEARING AND RECONSIDERATION IS NECESSARY.

On appeal Stephens contends that the trial court erred in failing to direct a verdict as to duty and breach only, on both theories of negligence asserted against Respondent CSX. As to both the horn sounding and vegetation sight obstruction theories, the Court ruled that the Petitioner failed to preserve the issue for appeal by failing to renew his directed verdict motion “at the close of all evidence,” a phrase which the Court interprets to include the presentation of Petitioner’s own reply testimony. Under the analysis below, the Court should rehear or alter its Opinion to conclude that the trial court should have directed a verdict on both issues and that the issues were preserved for appeal. .

A. The Requirement that the Plaintiff Renew His Directed Verdict Motion After the Plaintiff Himself Presented Reply Evidence, Misapprehends Rule 50, SCRCP, and South Carolina Precedent Addressing the Purpose of a Directed Verdict Motion; Furthermore, the Opinion Creates New Procedural Law for Which No Authority Existed at the Time of this Trial.

Simply stated, the Appellant was not required to renew his directed verdict motion at the close of his own rebuttal case in order to have the issue considered through a motion for judgment notwithstanding the verdict. Whether through post-trial motions or on appeal, Respondents have cited no authority for the position which the Court has now adopted. There is no authority cited in the Opinion which requires the Plaintiff to renew a directed verdict motion after he has presented reply or rebuttal testimony after the defendants have rested. In fact, the Opinion's citation to Wright v. Craft, 372 S.C. 1, 640 S.E.2d 486 (Ct. App. 2006), as authority to find waiver actually highlights the different procedural posture of this case and the Court's misapprehension of the requirements of directed verdict motions.

First, reference to the relevant plain language of Rule 50(a), SCRCP, instructs as to when, and under what circumstances, a directed verdict motion may be made: "A party who moves for a directed verdict at the close of the *evidence offered by an opponent* may offer evidence without having reserved the right to do so..." Rule 50(a), SCRCP. (emphasis added). Thus, the plain language of the rule verifies the practice in this state, that after an opponent has presented its evidence, the other party makes its directed verdict motion.

Rule 50(b), SCRCP, states as follows:

Whenever a motion for a directed verdict made at the *close of all the evidence* is denied or for any reason is not granted, the court is deemed to have submitted the action to

the jury subject to a later determination of the legal questions raised by the motion.

Id. (emphasis added). The Court has adopted the approach that the phrase "at the close of all evidence," required a renewal of the directed verdict motion after the Appellant's rebuttal testimony, though the Respondents had produced no more evidence or testimony at that time. While such a literal construction of the plain meaning of the phrase "at the close of all the evidence" may be appealing in its simplicity, this construction does not harmonize with the plain language of Rule 50(a), which requires that motions be made at the close "of the evidence offered by an opponent." Rule 50(a), SCRCF. Furthermore, it appears that there is not a single South Carolina case which procedurally could frame Rule 50(b)'s phrase "at the close of all evidence" to be interpreted as anything other than the equivalent of the close of "the evidence offered by an opponent" as stated in Rule 50(a), SCRCF.

Again, reference to the lone citation to authority offered by CSX on this point is instructive, Henderson v. St. Francis Community Hosp., 295 S.C. 441, 369 S.E.2d 652 (Ct. App. 1988) (reversed on other grounds). Henderson shows precisely how the phrase "the close of all evidence" historically has been interpreted under Rule 50(b). In Henderson, a premises liability case, the Plaintiff appealed, *inter alia*, the trial court's denial of her JNOV motion against the designer of the parking lot at issue, Snoddy & McCullough. This Court held that the issue was not preserved for review. The Court arrived at the conclusion because the Plaintiff's motion for directed verdict was premature because when made, only two (2) of four (4) defendants had rested. After the remaining two Defendants rested, Plaintiff failed to renew the directed verdict motion. The Plaintiff, therefore, failed to make a directed verdict motion at the close of "all of the

evidence," which in that case clearly meant at the close of the evidence of all opponents, or all defendants. The Court explained:

We need not consider this issue, however, because Henderson failed, as required by Rule 50(b) of the South Carolina Rules of Civil Procedure, to make a directed verdict motion at the close of all the evidence. (Citation omitted).

Henderson made her motion for directed verdict after St. Francis and Sirrine closed but before Snoddy & McCulloch presented its evidence. Henderson, however, did not renew her motion after the close of all the evidence.

Clearly, Henderson's motion was premature and improper. (Citations omitted).

We therefore hold that, when a plaintiff, after moving for a directed verdict at the end of the case presented by one defendant, fails to renew his motion at the close of all the evidence, he waives his right to move for judgment notwithstanding the verdict. (Citation omitted). "The rule that a judgment notwithstanding the verdict may not be granted unless the moving party moved for a directed verdict at the close of all the evidence is a strict one." (Citation omitted).

In holding that a premature motion for directed verdict cannot support a motion for judgment notwithstanding the verdict, we note the trial court in no way prevented Henderson from also renewing her directed verdict motion, the trial court never suggested to Henderson that the renewal of the motion would not be necessary to preserve her rights, and the evidence offered by Snoddy & McCulloch following Henderson's unrenewed motion for directed verdict was neither brief nor inconsequential. (Citation omitted).

Id., 295 S.C. 441, 446-447, 369 S.E.2d 652, 655-656.

As further proof of this Opinion's failed analysis and construction of the phrase "close of all the evidence," it must be addressed that this Court, in Henderson, *did not find waiver as against the two other defendants, who Henderson did make timely directed*

motions against. If the Stephens' Opinion's strict, literal construction of the phrase "close of all evidence," were correct – as opposed to the construction of the phrase which harmonizes with Rule 50(a)'s close of evidence "offered by an opponent" – the Henderson Court would have found that JNOV was waived as to ALL defendants, because it is clear that Henderson failed to move for a directed verdict at the "close of all evidence." Tellingly, the Henderson Court unequivocally held that the "close of evidence" refers to the close of the Defendant's evidence: "We therefore hold that, when a plaintiff, *after moving for a directed verdict at the end of the case presented by one defendant, fails to renew his motion at the close of all the evidence*, he waives his right to move for judgment notwithstanding the verdict." Id. (emphasis added.)

Here, by contrast, it is conceded that the Petitioner timely moved for directed verdict at the close all evidence presented by his opponents CSXT and SCDOT. The only additional or supplemental evidence presented at trial was rebuttal evidence of the Petitioner. By moving for JNOV at the *close of all evidence presented by all defendants*, the Appellant has preserved its motion pursuant to Rule 50(b), in accordance with Henderson.

While the issues of Henderson and Rule 50 interpretation are not addressed in the Opinion, in reaching the conclusion that the Petitioner was required to renew his directed verdict motion at the close of his own rebuttal/reply evidence, the Opinion cites Craft v. Wright, *supra*, and Hendrix v. E. Distribution, Inc., 316 S.C. 34, 446 S.E.2d 440 (Ct. App. 1994). Both of these cases specifically address the long-held requirement that a defendant, in order to challenge the sufficiency of evidence through a JNOV motion, must renew his directed verdict at the close of all evidence. Certainly, neither of these

cases addresses any requirement that a plaintiff who submits reply testimony after the defendants rest should be required to renew the directed verdict motion made previously at the close of the defendant's evidence. There is simply no precedent for this position.

Henderson should be applied here, as its holding is most factually and procedurally similar to this case. Henderson, the only precedent cited by the Respondents before this Court to support their argument, compels that this Court rehear and reverse its finding of waiver. There is an absolute dearth of authority which would require the Plaintiff to renew his motion for directed verdict if reply testimony is offered after the close of all defendants' evidence. Without such direction, either by way of a procedural rule or case law applying the rules, if the Court does not rehear or alter its Opinion, based on the concepts of equity and fairness, Appellant requests a finding that the ruling on this procedural change apply prospectively only.

B. The Opinion's Holding that Plaintiff was Required to Renew His Motion for Directed Verdict After His Own Presentation of Reply Evidence is an Unconstitutional Rule Change of the Existing Rule 50, SCRCF

As addressed above, prior to this Opinion, there was no rule-based or common law precedent requiring a plaintiff to renew his directed verdict motion under the specific procedural posture of the case. The Court's newly announced procedural requirement contravenes the constitutionally mandated process requiring submission of rules affecting practice and procedure to the Legislature. Section 4a of article V provides:

All rules and amendments to rules governing practice and procedure in all courts of this State promulgated by the Supreme Court must be submitted by the Supreme Court to the Judiciary Committee of each House of the General Assembly during a regular session, but not later than the first day of February during each session. Such rules or amendments shall become effective ninety calendar days

after submission unless disapproved by concurrent resolution of the General Assembly, with the concurrence of three-fifths of the members of each House present and voting.

S.C. Const. art. V, § 4a. See also, Stokes v. Denmark Emergency Medical Services, 315 S.C. 263, 266, 433 S.E.2d 850, 852 (1993) (“This section [4a] of the Constitution merely sets forth the procedure for the Court to follow when it promulgates rules and amendments.”).

Adoption of this new rule was also not submitted to the Rules Advisory Committee for its review and input. Rule 609, SCACR. Rule 609 authorizes the committee to make recommendations “regarding the adoption or amendment of rules governing the practice and procedure before the trial courts of this State.” Rule 609(b), SCACR. However, the Committee must provide a written “explanation or analysis” for all recommendations. Id. Any Committee recommendation must be submitted to the General Assembly pursuant to article V, Section 4a of the South Carolina Constitution, and while Rule 609 does not prevent “the Supreme Court from promulgating a rule or amendment without submitting the matter to the committee,” Rule 609(d), SCACR, any rule or amendment governing the practice and procedure must nonetheless be submitted to the Legislature pursuant to S.C. Const. art. V, § 4a to be constitutional.

The purpose behind both Rule 609, SCACR, and S.C. Const. art. V, § 4a is to provide notice of newly proposed rules or amendments to the public, bench, and bar. Submitting proposed rules and amendments, pursuant to section 4a, also ensures proper restraint of judicial rulemaking authority. See generally, Thomas DeWitt Rogers, III,

"Practice and Procedure – The Procedural Rule-Making Power of the South Carolina Supreme Court," 30 S.C. L. REV. 625 (1979).²

At the time of the trial in this case, no rule existed requiring a plaintiff to renew his directed verdict motion after he has presented reply evidence. Nor was there case law requiring the renewal. To the contrary, under Henderson the language of Rule 50(b) interpreting "the close of all evidence" clearly meant at the close of an opponent's case. The Court should grant rehearing to allow argument and briefing on whether the alteration of procedural rules is constitutional given that the constitutionally mandated process was not followed.

C. The Opinion Ignores the Effect of the Admissions and Formal Stipulation of CSXT with Regard to its Breach of Duty to Sound its Horn in Compliance with S.C. Code Ann. §58-15-910.

The Court's opinion ignores the effect and importance of the stipulation which was entered into by the parties concerning. The Court also fails to recognize the fact that the stipulation mirrors the statements of CSXT's counsel in opening, and indeed the entire tenor of the defense of the case on the issue of the sounding of the horn.

From opening statements, CSXT admitted its failure to sound the whistle in conformity with S.C. Code Ann. § 58-15-910. From its opening statement, CSXT acknowledged that despite Ned Wooden's "belief" that he had blown the horn in a timely fashion, as a party CSXT acknowledged that it failed to sound the horn in compliance with the requirements of South Carolina law:

Now there's been a big deal made. You heard Mr.
Parker talk about what he called the short whistle.
And he's right. Under the law, 1500 feet before

² Mr. Rogers' article in the South Carolina Law Review was based on a 1979 statute requiring rules or amendments proposed by the Supreme Court be submitted to the Legislature. Section 4a of article V, S.C. Const., adopted in 1985, mirrors, in large part, the 1979 statute.

approach the crossing, the whistle is supposed to start blowing at that point in time. *There is this black box on the train... the black box tells you information about what happened, and Ned Wooden believed that when he got to 1500 feet, he was blowing at what's called the whistle post, the big post in the ground when they start blowing. He believed he did. It turned out he didn't. He was a few seconds late in blowing the horn, members of the jury, and there won't be any dispute about that.* (R. p. 46, l. 21-p. 47, l. 8).

I'm not suggesting that it's not important, it's very important – *he missed it by a few seconds.* (R. p. 47, ll. 17-18).

(emphasis added). By CSXT's own admission and the evidence adduced at trial, the evidence is only susceptible of the conclusion that CSXT was negligent in the discharge of its duty to properly sound the horn. Over and over again, as a strategic ploy and faced with the evidence on this issue, CSXT admitted violation of the horn statute at S.C. Code Ann. § 58-15-910.

The Opinion's finding of non-preservation as to the directed verdict as to the horn issue flies in the face of the record before the Court. In reaching the decision that the issues were not preserved, the Court has concluded that the Plaintiff was not entitled to a directed verdict when:

- 1.) In opening statements CSXT twice admitted it failed to properly sound the horn in violation of the applicable statute; (R. pp. 46-47)
- 2.) In opening statements CSXT told the jury that while the engineer "believed" he had sounded the horn on time, CSXT did not take the position that it was sounded properly; (Id.)

- 3.) In opening CSXT admitted that the "black box" event recorder showed Wooten was late sounding the horn and based on the recorder, Wooden was "a few seconds late in blowing the horn." (Id.)
- 4.) In opening CSXT told the jury that as to the sounding of the horn being late, "there won't be any dispute over that." (R. p. 47)
- 5.) At the close of the case CSXT stipulated as to the accuracy of the event recorder, which showed the horn was blown late.

Yet, in an effort to mine from the record a fly's speck of evidence sufficient to support the trial court's denial as to the horn issue, we are left with what the Opinion notes to be only "weak" inference concerning the engineer's "belief" that he sounded the horn appropriately. This belief, whatever its worth in the determination of whether sufficient evidence existed to warrant the denial of a directed verdict, cannot supplant the only position taken by CSXT, that the horn was not sounded in accordance with the law.

From a trial standpoint and based upon review of the record, there is absolutely no doubt that CSXT, in asserting its vigorous and successful defense of this case before the jury, NEVER argued or contended it met its duties with regard to S.C. Code Ann. § 58-15-910. From opening to closing, CSXT admitted as much. The defenses on this issue in the case were proximate cause and the comparative fault of the driver of the vehicle, Tonia Colvin. However, due to the trial court's error in failing to direct a verdict on the breach of this duty, these very issues, arguments, and defenses tried before the jury on the horn issue never even reached the jury's consideration.

Finally, and most simply, the finding of failure to preserve the motion for directed verdict is an unfair result when on that issue it was stipulated that the event recorder was

accurate and the horn did not timely sound in compliance with the law. Even if the trial court's decision to deny a directed verdict on this issue were correct based on the Opinion's analysis, upon the entry of the stipulation at issue, ultimately CSX was bound by this fact and stipulation. A stipulation of fact binds the parties to the substance of the stipulation. This stipulation bound and required the Court to charge the jury that CSXT was negligent in the discharge of its statutory duty. "When counsel enter into an agreed stipulation of fact as a basis for decision by the court, both sides will be bound by such agreed stipulation, and the court will not go beyond such stipulation to determine the facts upon which the case is to be decided." Belue v. Fetner, 251 S.C. 600, 606, 164 S.E.2d 753, 755 (1968); see also, Winchell v. Winchell, 291 S.C. 321, 353 S.E.2d 309 (Ct.App.1987). A trial court is bound by the parties' stipulation of facts. Furthermore, as this Court as consistently held, a "stipulation is an agreement, admission, or concession made in judicial proceedings that is binding upon those who make them. Rutland v. South Carolina Dept. of Transportation, 390 S.C. 78, 700 S.E.2d 451 (Ct. App. 2010); Bodkin v. Bodkin, 388 S.C. 203, 694 S.E.2d 230 (Ct. App. 2010); McCrea v. City of Georgetown, 384 S.C. 328, 332, 681 S.E.2d 918, 921 (Ct. App.2009); Kirkland v. Allcraft Steel Co., Inc., 329 S.C. 389, 392, 496 S.E.2d 624, 626 (1998) (citation omitted); Corley v. Rowe, 280 S.C. 338, 312 S.E.2d 720 (Ct.App.1984).

Applying the stipulation regarding the accuracy of the black box recorder to the case at hand, the calculation is as simple as:

IF S.C. Code Ann §58-15-910 requires a horn to be sounded at 1,500 feet,

AND CSXT stipulates the black box was accurate and showed the horn sounded at 1,161 feet,

THEN, CSXT violated the statute.

As a matter of law, the Court was required to direct a verdict for the Plaintiff on the issue of duty and breach only with regard to S.C. Code Ann. §58-15-910.

Consider the following hypothetical of admittedly an unlikely factual scenario: In opening statements in a personal injury case, counsel for the plaintiff tells the jury that while his client believes she lost wages and income as a proximate result of her injuries, and suffered intangible elements of actual damages associated with her injuries, the Plaintiff will not seek compensation for any element of damages beyond her medical bills from her injuries, which total \$25,000.00. Plaintiff's counsel further tells the jury that while he anticipates that the Plaintiff might testify as to losing wages, the plaintiff does not dispute that element of damages and will not seek compensation for them. During trial, on direct examination, the Plaintiff states that she believes that as a result of the injuries she lost a year from work and she lost wages totaling \$100,000.00. The Defendant moves at the close of evidence for a directed verdict as to loss of income damages. Based on the Plaintiff's testimony, the court denies the motion. Next, the Defendant presents its case and rests. At the close of the defendant's evidence, Defendant renews the motion for a directed verdict. However, the Plaintiff then publishes a stipulation that there are no lost wage/income damages at issue or being sought. Following the publication of the stipulation, Defendant fails to renew the motion for directed verdict. In closing, the Plaintiff asks for the medical bills to be paid, totaling \$25,000.00, actual damages. After deliberations, the jury returns a verdict for the Plaintiff in the amount of \$125,000.00, actual damages. During the arguments of post-trial motions, the Plaintiff claims that the verdict should stand because the Defendant failed to renew its motions at the "close of all evidence." In such a posture, would the

Plaintiff be allowed to receive the benefit of a verdict which clearly and unequivocally runs counter to her arguments, positions, the evidence, and even the parties' stipulation at trial?

Parties may stipulate to facts and the trial court is bound by those facts stipulated to. Here, CSXT stipulated that it failed to comply with the horn law. Throughout the entire trial, from opening statements forward, CSXT admitted the failure and even told the jury that it would not dispute that the failure to sound the horn in accordance with the law. Rehearing on these issues is required.

II. THE OPINION ERRONEOUSLY HOLDS THAT PETITIONER FAILED TO PRESERVE EVIDENTIARY ISSUES AND THE COURT SHOULD ALTER ITS OPINION ON EACH ISSUE PRESENTED.

Two evidentiary issues were raised before the Court on appeal concerning the trial court's exclusion of evidence. The Court's finding of non-preservation and waiver as to the Hill Road Crossing issue is not supported by the record. With regard to the "Hampton garden" issue, the Court failed to find the relevance of the testimony.

A. Removal of Trees at the Hill Road Crossing

At trial the Appellant attempted to elicit testimony from Thomas Jackson that, shortly after the wreck at issue, CSXT cut the trees and vegetation at the crossing which Petitioner claimed created a dangerous and unsafe crossing due to sight obstruction. CSXT did not cut these trees prior to the accident because a purported land owner, Thomas Jackson, objected to the cut. (R. p. 51, 1.16 - p. 53, 1.5; p. 54, 1.18 – p. 55, 1.25; p. 1647). The trial court excluded the testimony of the subsequent action as violative of Rule 407, SCRE.

During the trial, and on appeal, Appellant consistently argued that the admission of this evidence was to impeach CSX's position as to why the trees had not been cut, as will be addressed below. Nevertheless, this Court decided the evidentiary issue by concluding that Appellant argued a new ground on appeal and therefore the Hill Road Crossing ownership issue is not preserved: "Because Stephens did not present this argument to the trial court, the court was not given the opportunity to exercise its discretion as to that argument, and the argument is not preserved for appeal." The Opinion casts Appellant's arguments in the following light:

At trial, Stephens argued his purpose for introducing evidence of tree removal was to "impeach" CSX's position that the Hill Road crossing was reasonably safe even with the trees in place. He argued the evidence was admissible because "[i]f [the crossing] was safe, it didn't need cutting. The fact that [CSX] came back later impeaches their position..."

Importantly, what is ignored by the use of ellipses within this quotation is the portion of Appellant's argument which *did raise* and preserve the arguments presented to this Court.

Prior to the testimony of Mr. Thomas Jackson the parties discussed the Court's ruling concerning the cutting issues and Rule 407. The trial judge instructed Jackson that he was not to testify "in any way, shape, or form that CSX, or anyone, subsequently came out and cut this quadrant... because it's almost as if it's somehow an admission." (R. p. 48, 11.5-18). After the Court ruled that the cutting was inadmissible as a subsequent remedial measure under Rule 407, Appellant continued discussion with the Court about his intentions to introduce testimony of the landowner's dealings with CSX after the wreck, when it was established that Jackson did not own the land he had protested over, and the land was immediately cut.

After acknowledging the Court's ruling excluding the subsequent cutting of the trees, counsel for CSX continued:

We're clear on that, Judge. The only thing I'm unclear on is the fact that Mr. Detrick wants to bring out that there were officials who came out later in connection with the subsequent remedial measures, had discussions with Mr. Jackson to show him the plats, to show him the surveys, in preparation for cutting...

(R. p. 48, ll. 19-25). It is in the context of this same discussion of land ownership issues that the following colloquy appears in the record:

PURCELL:	Your Honor, it's the shortly after this wreck. It's by the railroad that they-- you know, then it's how did they
THE COURT:	Why can't you just say, Mr. Detrick, isn't it correct and isn't it true that the railroad owned this right-of-way. Is there any question, any doubt in your mind, that the railroad owned this right-of-way. No. I mean, that's the only way not to bait it. Okay?
MR. DETRICK:	All right.
THE COURT:	That's what we're going to have to do. You're going to get dangerously close. If you get into remedial measures, you and I both know
MR. PARKER:	Your Honor, I
THE COURT: --	it's possible that it can be overturned based on that.
MR. PARKER:	Even though He might not with this witness, but clearly in the opening statement -- by the opening statement saying this crossing was safe, it didn't need cutting, is what he said in the opening statement, it has only -- it was safe, but we wanted to make it safer. If it was safe, it didn't need cutting. The fact that they came back and cut it impeaches their position they've opened in opening statement.

(R. p. 49, l. 1-25).

Because Appellant contends that he has not raised new arguments on appeal based in part on the last sentence cited above, reference to portions of CSX's opening statement

is helpful. In the context of the above cited discussion of ownership, plats, land disputes, etc., CSX's opening statement provides the basis of the rationale, or excuse, offered by CSX for the uncleared vegetation: the ownership issues raised by Mr. Jackson when CSX attempted to cut the crossing. Furthermore, in opening CSX admitted that the trees at issue should have been cut. The relevant portions of CSX's counsel's opening which address the issue are reproduced below:

And this is not -- this is not drawn to scale. I'm just trying to give you-all an idea of what happened. There are trees on this side of the tracks; there were some trees here; there were some trees here. And Mr. Parker showed you where Ms. Colvin first stopped. And I'm going to talk about that in a moment. And then there were some trees over here.

The contractor's instructions were, when you go out to the crossings to do these clearings, if a landowner disputes it, don't get into a fight, report it up-chain and then continue going down and clearing. So the contractors came out about four months before this accident and they cleared the trees on that side, they cleared the trees on that side, they cleared trees over here. When they came to clear the trees right over on this side, there was a homeowner who lived there. And, again, this is not to scale. His name was Tommy Jackson. And Mr. Jackson came out and raised all kinds of cane, saying that these trees were on his property and that CSX shouldn't be cutting them. Per their instructions, the contractor did not get into a dispute with Mr. Jackson but continued on down the road, and those trees weren't cut then. Members of the jury, they should have been, because Mr. Jackson did not own the land that he was claiming those trees were on. So those trees weren't cut.

(R. p. 44, l.1 -- p.45, l.1). CSX's only justification for not cutting the trees according to their own requirements prior to this accident is based upon Mr. Jackson's protests. Later in opening statements CSX again conceded that the trees should have been cut, but clearly denied that the trees were a proximate cause of the wreck:

So the trees, although they should have been cut when those contractors came out, they did not have anything to do with the accident. The trees go into the box of things that did not cause the accident, because, members of the jury, we believe it will be undisputed in this case that when you stop at or near that stop line, you can see down the tracks a long, long ways. And stopped at the stop line on February 3rd, 2004, Ms. Colvin should have seen the train; and if you saw the train, you should have waited for the train to pass; and trying to cross that day was an unsafe choice.

(R. p. 45, ll. 13-24). Later, in response to Appellant's directed verdict motion, Counsel for CSX stated:

Second, Mr. Harmon said in opening statement that in accordance with our crossing-clearing program, when they got to this quadrant it should have been cleared but for the landowner dispute, not that it should have been cleared because otherwise there wasn't appropriate sight distance.

And we made very clear that we contented [sic] that there was appropriate sight distance, notwithstanding the fact that the program had not been followed because of the landowner dispute.

(R. p. 1062, ll. 5-14).

These are the issues referred to by Appellant's counsel's statement that the testimony was offered to impeach the "position they've [CSX] opened in opening statements."

The Opinion finds that Stephens' only proffered reasoning for the admission of the evidence at the trial level was to "impeach" the argument that this "crossing was safe." Appellant concedes that counsel's statement referring the trial court back to CSX's "position in opening" is open to interpretation without the full context of the discussion above. However, the exact argument raised on appeal was also raised to the trial court through post-trial motions. (R. p. 39, ¶¶ 7-8). Respondents did not argue then that this

was a "new argument" and the trial court certainly did not find such. Thus, the arguments contained in the Appellant's brief concerning the alleged erroneous rejection of the evidence are appropriate for review.

B. Though the Court Correctly Found the Exclusion of the Hampton Garden Evidence was Erroneously Excluded under Rule 407, SCRE, the Court Failed to Find the Evidence Admissible.

Approximately five (5) months after the wreck at issue, in following its policies to clear its right-of-way, CSX reached a crossing in Hampton near Mrs. Crews' home. (R. p. 377, l. 13 - p. 382, l. 22; p. 383, l. 16- p. 384, l. 3). CSX removed a public garden at that crossing that was located within CSX's right of way near a different crossing. For decades Mrs. Crews had maintained an ornamental garden within the right of way near her home. (Id.) These excluded witnesses protested the removal of the garden within the right of way to CSX's subcontractor charged with clearing the right of way. In response to this protest, or landowner dispute, CSX demanded that if the flowers and vegetation were not removed immediately, then the railroad would clear it. CSX demanded immediate compliance. (Id.)

Without question, the record verifies that Appellant's purpose for offering this testimony was to impeach CSX's defense that with respect to the subject crossing, they could not promptly and efficiently remove the trees due to the dispute with Mr. Jackson. (R. pp. 377-382). This excluded testimony would have shown that contrary to CSX's defense of landowner issues stopping the cutting of the crossing at issue, CSX should have demanded of Mr. Jackson exactly what was demanded of Rivers and Crews: immediate compliance or the railroad would clear the vegetation. Likewise, there is no question whatsoever, upon reading of the record regarding the issue, that the only

objection to the evidence ever made by CSX was under Rule 407. Not a single objection to the evidence under Rule 402, 401, or 403 was ever uttered by the Respondent. Any objection to relevance of the testimony, or of the probative value being outweighed by prejudice, is therefore waived. Despite the lack of objection on these points, the Opinion nevertheless finds that the evidence was irrelevant and that even if probative, such value was substantially outweighed by the danger of Rule 403 issues. The sole objection raised and ruled upon by the trial court was that the evidence violated Rule 407 as a subsequent remedial measure, simply because it was an action taken by Defendant after the wreck. (R. pp. 377-382). The trial court itself noted the relevance of the testimony, but excluded it because of when the cutting occurred, post-accident. (R. p. 382, ll. 11-17). This was error and the Opinion's findings under Rules 401, 402, and 403 misapprehend the record before the Court. Because CSX failed to object to the evidence on the grounds found by this Court, alteration of the Opinion is required. More importantly though, the Opinion on this issue ignores the clear relevance of the testimony, as CSX stated it was not able to timely remove the vegetation due to a landowner dispute but demanded immediate compliance with other disputes.

III. REHEARING IS REQUIRED BECAUSE THE JURY INSTRUCTIONS WERE SO FLAWED, ERRONEOUS, AND CLEARLY PREJUDICIAL, THAT REVERSAL IS REQUIRED.

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. (emphasis added). Cole v. Raut, 378 S.C. 398, 404, 663 S.E.2d 30, 33 (2008). An alleged error is harmless *only if the appellate court determines beyond a reasonable doubt that the alleged error did not contribute to the verdict*. (emphasis added). Wells v. Halyard, 341

S.C. 234, 237, 533 S.E.2d 341, 343 (Ct. App. 2000). The Opinion fails – and in fact refuses – to address the jury charge as a whole in determining whether the Appellant is entitled to reversal. Based on any of the alleged errors individually, and certainly when considering the charge as a whole, the Court cannot determine beyond a reasonable doubt that the error(s) did not contribute to the verdict under the applicable appellate standard.

The failure to address all of the alleged errors and to consider them in conjunction, as required, ignores the actual defenses the case was tried upon. From opening statements to the previously discussed stipulation, CSX admitted that it did not sound its horn in compliance with South Carolina law. From opening statements forward CSX admitted that the trees in “Quadrant A” of this crossing – the very vegetation which Appellant claims caused the dangerous sight obstruction – should have been cut in accordance with its own rules but that the trees were not cut due to the landowner issue with Mr. Jackson, who didn’t actually own the land. Instead, CSX defended this case on the grounds that neither of these breaches was a proximate cause of the accident. Rather, Respondents contended, the proximate cause of the accident was the “unsafe choices” by the driver of the car in which young Lillian was a passenger.

However, other than the dissent, the Opinion refuses to address those clearly erroneous charges that relate to this very defense, the defense of the sole negligence of a third party, the driver of the vehicle. The defense of this case was succinctly set forth by CSX in opening, laying the groundwork for what would become the mantra of the “unsafe choice” of the driver:

[M]embers of the jury, we believe it will be undisputed in this case that when you stop at or near that stop line, you can see down the tracks a long, long ways. And stopped at the stop line on February 3rd, 2004, Ms. Colvin should

have seen the train; and if you saw the train, you should have waited for the train to pass and trying to cross that day was an unsafe choice.

(R. p. 45, ll. 18-24).

The Opinion chooses to address only the charges “that relate to CSX and DOT’s alleged breach of their duty of reasonable care” and finds consideration of the other charges to be unnecessary because those “alleged errors could hardly have affected the jury’s deliberations over whether CSX or DOT breached its duty of reasonable care.” The Opinion declines to address all allegations of error in the charge because of the jury’s verdict finding that neither CSX nor DOT breached any duty. Where CSX so clearly admitted from opening and stipulated that it had breached its duty to sound the horn timely, the fact that the jury never reached the actual issues in the case (proximate cause defenses, negligence of Colvin) is strong proof of the utter confusion created by the jury charge. By not considering the whole of the jury charge as this Court must, the charges that were not addressed actually show the confusing, erroneous, and prejudicial nature of the jury charge.

A. Alleged Errors in Jury Charge Which Were Addressed by The Opinion

i. Charges Related to CSXT’s Duties at Crossing

For the reasons stated in all of its previous briefings, the Opinion’s findings affirming the trial court’s rejection of Appellant’s two proposed charges, both accurate statements of the law, should be reconsidered. While the Opinion finds that substantial equivalent charges were given, this ignores the law’s requirement of “added care in the operation of its train” where there are view obstructions at crossings. This is a duty imposed in operating the train which is separate from the existing duties to maintain the

crossing from vegetation which causes sight obstruction. In this case, it was admitted that the horn was not sounded at the minimal, statutorily required distance of Section 58-15-910, much less sounded commiserate to a duty of "added care."

As previously addressed, CSX admitted throughout the trial that vegetation at this crossing in Quadrant A should have been cut. The effect of refusing these charges was to confuse the jury as to the mutual duties which applied to the driver of the car at this crossing and the defendants in operating the crossing in a safe manner. To compound the issue, over objection, the trial court charged and this Court affirmed that the motorist must "exercise due care consistent with the increased danger occasioned by the conditions that obstruct their vision." Therefore, the Opinion affirms a charge which established a driver's heightened duty, but refuses to find error in the refusal to charge the railroad's corresponding duty of added care at a crossing with conditions which obstruct vision. For these reasons and all previously addressed before the Court as to the reasons the trial court erred, rehearing is required.

ii. Charging on Discretionary Act Immunity as to DOT

Even where the Court found that charges were given in error and without evidentiary support as to DOT's discretionary immunity charge, the Opinion justifies this as non-error by claiming that Stephens did not present certain arguments, or changed his arguments on appeal to include DOT's failure to follow professional standards in the placement of the signs. The Opinion notes that "at the charge conference, therefore, the [trial] court approached the issue believing immunity was for the jury to decide." Stephens concedes that the phrase "professional standards" is not specifically used in discussing the objection. However, with regard to the placement of the stop line at issue,

this concept was engrained in the Appellant's theory as evidence was presented that the placement conflicted with the requirements of the MUTCD, which supplies professional standards. Nevertheless, Appellant sufficiently objected to the charge:

They didn't bring anybody in to testify about what they did out there. None of these people knew what they did or why they did it. They didn't call any witness to say that they exercised discretion in placing these signs...But these people had no knowledge. Mr. Smith testified that all he did was replace a sign that was already there, and no witness at all came into court and testified about why the sign was placed there.

(R. pp. 1118-1120). The trial court was therefore certainly aware of the Appellant's valid objection to the charge. The court simply erred in giving the charge, for which there is absolutely no evidentiary support. This objection was not waived. The charging of discretionary immunity defenses, for which the Opinion acknowledges there was an insufficient factual basis, clearly could have confused the jury. Rehearing and reversal is required.

iii. Charges Related to Signage and DOT's Authority to Close Railroad Crossings

The Opinion does address Appellant's allegations of error in the trial court's charging of three statutes pertaining to signage at crossings: S.C. Code Ann. §§ 56-5-1010 (2006), 58-17-1390 (1976) and 56-5-1020. Finally, the Opinion affirms the charge on S.C. Code Ann. § 58-15-1625, which authorizes DOT to close crossings when DOT finds the increased public safety of closing the crossing outweighs the inconvenience caused to motorists who would be rerouted.

For the reasons previously articulated on brief by Appellant, the Opinion is incorrect in its findings. These statutes were not in issue or in dispute in this case. The

Appellant was prejudiced by these charges because they created a list of requirements that had been met by CSX, but none of which had any relevance on the theories of negligence asserted in the trial. The list of signage statutes complied with by CSX potentially confused the jury because the inapplicable charges rendered a false picture of compliance at the crossing, rather than addressing the theories under which Appellants proved CSX and DOT to be negligent.

B. Allegations of Error Which Were Not Addressed in the Opinion

- i. **Even Under the Opinion's Narrow Addressing of Charges That it Views as Applicable to CSXT or DOT's Duty of Reasonable Care, The Opinion Fails to Address a Number of Alleged Errors Directly Related Thereto.**

On appeal, Appellant alleged that the trial court erred in charging S.C. Code Ann. § 56-5-2330 and § 56-5-2740, statutes which apply to intersecting highways, but not railroad grade crossings, and which conflict with S.C. Code Ann. § 56-5-2715 and the MUTCD. A motorist's duty to stop at highway grade crossings such as the one at issue are found in S.C. Code Ann. § 56-5-2715, which states:

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 thereat. 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.*

(emphasis added). *Id.* Furthermore, the MUTCD, which the DOT is bound to follow, dictates that stop signs must be posted no closer than 15 feet from the rail, which conforms to the duties of motorists in the above statute. There is no question that this statute applies to the crossing at issue. Despite the clear application of this statute to the

crossing at issue, the trial court charged the jury on two unrelated, irrelevant statutes which do not apply to railway crossings: S.C. Code Ann. §§ 56-5-2330 and 56-5-2740.

As previously addressed on brief, §56-5-2330 and the charge thereon are inapplicable to the facts of this case, as the statute does not apply to stop signs at railroad crossings. This statute should not have been charged. S.C. Code Ann. § 56-5-2740 applies to highway intersections with crosswalks, which is again clearly inapplicable.

By charging two inapplicable statutes describing the driver's duties to stop in other contexts, the jury certainly could have been confused as to Colvin's duties at this crossing. In fact, Colvin was not allowed by § 56-5-2715 to stop at the stop line in place at the crossing, as the stop line at this crossing is placed approximately 9.75 feet from the near rail of the roadway, in violation of the applicable MUTCD standard. (R. p. 681). To comply with the inapplicable statutes that the trial court chose to charge, actually would require that Colvin violate the one governing statute, § 56-5-2715. It follows that the charge of the irrelevant statutes could have confused the jury by placing upon Colvin duties which did not exist. The prejudice to Appellant is clear in that it could have led the jury to believe that if Colvin failed to meet the requirements of one of the inapplicable statutes, she had acted negligently and was the sole cause of the collision. In this case where the defense of the action centered on the claims of "unsafe actions" by Colvin, these charges confused the jury and caused prejudice to the Appellant's case.

ii. The Dissent Correctly Concludes that the Jury Charge's Errors Regarding Impairment Levels, Presumptions of Impairment, and the DOT's Immunity from Criminal Activities of a Third Person Requires Reversal

The jury's verdict stated that neither CSX nor DOT breached any duty. Consistent with the "unsafe choices" defense presented by the Respondents to the jury,

the jury therefore found the driver of the car, Colvin, to be the sole negligent actor which produced the accident. Despite this, the Opinion refuses to address the clearly erroneous charges related to Colvin's alleged impairment, her inability to rebut the erroneous charge, and DOT's purported immunity from "criminal" acts of third parties. Without rehashing all of the specific arguments previously made on these issues, which are incorporated by reference herein, Appellant contends that the dissent's analysis of the jury charges is correct and should be adopted. Viewing the jury charge as a whole, and addressing all of the allegations of error raised, the cumulative, confusing charges include, but are not limited to: an unbalanced scale of duties created by the erroneous "It is Always Train Time at the Crossing" charge; a factually unsupported discretionary immunity charge; erroneous blood alcohol charges with a refused charge on the required presumption of impairment statute; a host of inapplicable statutes; and, other confusing and erroneous charges addressed herein. It is inconceivable that the Opinion concludes "beyond a reasonable doubt" that the erroneous charges did not "contribute to the verdict."

When considered as a whole, as this Court must, this fatally flawed, confusing, and prejudicial jury charge warrants reversal and the Court should rehear this matter.

CONCLUSION

For the reasons addressed herein, rehearing of this matter is warranted. The Opinion's affirmation of the trial court's decision is unsupported by existing law or borne out by the record on Appeal. Appellant therefore requests that the Court inquire further as to these matters and grant the relief originally requested through his Appeal.

Respectfully submitted,

Carl H. Jacobson
URICCHIO, HOWE, KRELL, JACOBSON,
TOPOREK, THEOS, & KEIGH, P.A.
P. O. Box 399
Charleston, SC 29402-0399
(843) 723-7491

-And-

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

August 9, 2012
Ridgeland, S.C.

BY: _____
John E. Parker
J. Paul Detrick
Grahame E. Holmes
Matthew V. Creech
101 Mulberry Street, East
P. O. Box 457
Hampton, SC 29924
(803) 943-2111

ATTORNEYS FOR APPELLANT

**THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS**

**APPEAL FROM HAMPTON COUNTY
COURT OF COMMON PLEAS**

CARMEN TEVIS MULLEN, Circuit Court Judge

CASE NO.: 2004-CP-25-00267

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

vs

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

**RESPONDENT CSX TRANSPORTATION, INC.'S
RETURN TO APPELLANT'S PETITION FOR REHEARING AND
SUGGESTION FOR REHEARING *EN BANC***

At the conclusion of this three-week trial in which the jury heard ample evidence that this grade crossing accident was not the fault of CSX Transportation, Inc. ("CSX") or SCDOT, the jury returned a verdict in favor of both Respondents. In a thorough and well-reasoned opinion, this Court affirmed the judgment entered by the trial court following the jury's verdict. Because this Court did not "overlook[] or misapprehend[]" any material facts or law, Appellant Willie Homer Stephens' petition for rehearing should be denied. *See* Rule 221(a), SCACR; *see also Kennedy v. S. Carolina Ret. Sys.*, 349 S.C. 531, 532, 564 S.E.2d 322 (2001) ("In order to prevail on a petition for rehearing, appellants must demonstrate the Court overlooked or misapprehended their argument.").

I. This Court Applied Well-Established Rules and Precedent Requiring a Motion for Directed Verdict to be Made at the Close of "All the Evidence" in Order to Preserve the Right to Seek JNOV.

In his petition, Stephens contends that this "proceeding involves questions of exceptional importance" and reconsideration is warranted because "the Court has misapprehended the record before it and misapplied the law of South Carolina with regard to the preservation of issues on appeal". (Petition, p. 1-2). It is Stephens, however, who is misconstruing and attempting to misapply our law on error preservation. Further, there is nothing "exceptional" or novel about this Court's application of the plain language of our Rules of Civil Procedure that warrants rehearing or reconsideration, nor is this Court's opinion remotely inconsistent with precedent interpreting and applying these well-established rules.

Rule 50(b) could not be clearer in stating that "[w]hen a motion for a directed verdict made at the close of all the evidence is denied or for any reason is not granted, the court is deemed to have submitted the action to the jury subject to a later determination of the legal questions raised by the motion." Rule 50(b), SCRPC (emphasis added). Because Stephens has never contended that he made a motion for directed verdict "at the close of all the evidence" as the rule requires, this Court properly concluded that he had not preserved his right to seek JNOV. There is nothing new about this longstanding and well known rule, and this Court's application of it did not enact a "procedural change" as argued by Stephens. Indeed, as recently as this week, our Supreme Court reiterated that "[w]hen a party fails to renew a motion for a directed verdict at the close of all evidence, he waives his right to move for JNOV." *RFT Management Co. v. Tinsley & Adams*, Op. No. 27157 at 6 (S.C.Sup.Ct. filed August 15,

2012) (emphasis added) (quoting *Wright v. Craft*, 372 S.C. 1, 20, 640 S.E.2d 486, 496 (Ct. App. 2006)). *See also Henderson v. St. Francis Community Hosp.*, 295 S.E. 441, 369 S.E.2d 652, 655-56 (Ct. App. 1988) ("The rule that a judgment notwithstanding the verdict may not be granted unless the moving party moved for a directed verdict at the close of all the evidence is a strict one."), *overruled on other grounds*, 303 S.C. 177, 399 S.E.2d 767 (1990); *see also Smith v. Ridgeway Chemicals, Inc.*, 302 S.C. 303, 395 S.E.2d 742, 743-44 (Ct. App. 1990) ("[I]nasmuch as no motion was made for a directed verdict at the conclusion of the trial, no motion for relief as a matter of law is available after the jury verdict."). Further, as Chief Justice Toal explained in her authoritative treatise on South Carolina appellate practice, "[f]or an appellate court to consider issues raised in a directed verdict motion made after the plaintiff's case, the motion must be renewed at the close of all the evidence....A motion for JNOV may not be granted unless the moving party moves for a directed verdict at the close of all the evidence." Toal, J.H., et al., *Appellate Practice in South Carolina* 74 (2d ed. 2002).

The rationale for the rule is apparent, as the trial judge must have all the evidence, including testimony, documentary evidence and stipulations, before her when deciding whether to submit the case to the jury or rule as a matter of law. An appellate court could hardly find that a trial court committed reversible error where the appellant never gave the trial judge that opportunity. Stephens incorrectly claims this rule and practice of the South Carolina courts is unfair, but what would truly be unfair would be to undo a jury's verdict after three weeks of trial based on an argument that was never presented to the trial judge in the first place. Tellingly, Stephens relies heavily on a stipulation that was only introduced into evidence *after* he made his directed verdict motion, and, therefore,

formed no basis for the directed verdict motion he made at trial. The trial court was well aware of this defect when later ruling on Stephens' JNOV motion, explaining it "could not have erred in denying Plaintiff's motion on a basis never stated at trial and not even available to Plaintiff until the conclusion of Plaintiff's rebuttal case." (R. pp. 3-4).¹

Furthermore, Stephens overlooks the numerous opportunities he had to raise and attempt to preserve this issue below. *See, e.g.*, Br. of Respondent CSX Transportation, at 13-14. Stephens could have raised this issue during the lengthy conference on the jury charges, asking the court to instruct the jury that it had to find in his favor as a matter of law on certain issues, but he did not. Stephens could have proposed or argued for a verdict form that specifically addressed his arguments and instructed the jury to find a breach of certain duties, but he did not. Instead, the verdict form, which Stephens himself prepared, left the general question of negligence for the jury to decide. *See id.* Even after the jury returned with its verdict, Stephens never asked for further instructions or requested that the jury be sent back for further deliberations. Now, Stephens asks this Court to reverse the trial judge on the basis of these very arguments that he never made or presented to her.

In his rehearing petition, Stephens refers to the language of Rule 50(a) in a curious argument claiming that a party seeking JNOV is only required to move for directed verdict at the close of the evidence "offered by an opponent." Petition, at 4. This argument confuses the differences between Rule 50(a) and Rule 50(b), as well as the relief Stephens requested from this Court. Tellingly, the words "evidence offered by an

¹ As this Court also noted, this Court cannot even review the substance of this stipulation because the Appellant elected not to include it in the Record on Appeal. *See* Opinion, at 10 n.4. Appellant's reference to CSX's arguments in opening statements to the jury are also irrelevant, because arguments are not evidence.

opponent” never appear in Rule 50(b), and instead that Rule plainly refers to a motion made at the “close of all the evidence” Further, while it is certainly true a party *may* move for directed verdict under Rule 50(a) at the close of his opponent’s case, and the trial court *may* grant it if proper, in order to *preserve* the issue for a later JNOV motion under Rule 50(b) and for a later appeal to this Court, he *must renew* his motion at the “close of all the evidence.” Rule 50(b), SCRCF. There is nothing new about this. See *Henderson*, 369 S.E.2d at 655-56 (“The rule that a judgment notwithstanding the verdict may not be granted unless the moving party moved for a directed verdict at the close of all the evidence is a strict one.”).²

In support of his argument, Stephens also misstates this Court’s decision in *Henderson*. *Henderson* did not in any way – expressly or implicitly – endorse a rule that all a party has to do to preserve his argument for appeal is move for directed verdict at the close of his opponent’s case, and not again at the close of all the evidence. *Henderson* instead holds that, “when a plaintiff, after moving for a directed verdict at the end of the case presented by one defendant, fails to renew his motion *at the close of all the evidence*, he waives his right to move for judgment notwithstanding the verdict.” 369 S.E.2d at 656 (emphasis added). In fact, Stephens misstates what actually occurred in *Henderson*. He claims that if the rule required a renewed motion literally at the close of all the evidence, then the “*Henderson* Court would have found that JNOV was waived as to ALL

² Moreover, and significantly, Stephens conceded that the issue of proximate cause was for the jury. See Br. of Appellant, at 9. Under those circumstances, he could not have been entitled to judgment in his favor. CSX’s response brief more completely explains this fundamental flaw in Stephens’ argument. See Br. of Respondent CSX Transportation, at 7-9 (explaining that a court may not grant JNOV to a party that concedes there are material disputes of fact for a jury to decide)

defendants." Petition, at 7 (emphasis in original). This argument is misleading, however, because this was not even an issue concerning the other defendants.

In *Henderson*, the plaintiff alleged injuries suffered when she fell on a sweetgum ball in a hospital parking lot. See 369 S.E.2d at 654. She sued three defendants – the hospital, the original designer of the parking lot, and the designer of an addition to the parking lot. The jury found against the hospital and the original designer, but in favor of the designer of the new addition, where the accident did not occur. See *id.* The hospital and original designer moved for JNOV, which the trial judge granted. The plaintiff moved for JNOV against the designer of the addition, which the trial judge denied. The plaintiff appealed the *grant* of JNOV to the first two defendants, and the *denial* of plaintiff's JNOV motion against the third defendant. See *id.* The court of appeals found that the plaintiff could not appeal the denial of her JNOV motion against the third defendant because she had not moved for directed verdict at the close of all the evidence. See *id.* at 655-56.

This procedural history illustrates the flaw in Stephens' argument about the *Henderson* court's treatment of "all defendants" in that case, because "all defendants" did not stand in the same procedural posture. The plaintiff in *Henderson* was not appealing the denial of JNOV as to "all defendants," but only the third defendant. Her waiver as to the other two defendants was not even an issue because those other defendants had been *granted* JNOV.³

³ In fact, this Court's decision in *Henderson* was reversed on the ground that JNOV should not have been granted to one of these other defendants, St. Francis Hospital. See 399 S.E.2d at 769. This reversal, however, does not affect the rule that a party must renew a motion for directed verdict at the close of all evidence to preserve the issue for appeal.

More simply, the fallacy in the logic of Stephens' argument is demonstrated by the following example. If Stephens' view that a party need only move for directed verdict at the close of his opponent's evidence were correct, then a defendant would only need to move for directed verdict at the close of the plaintiff's case and would not be required to renew his motion at the conclusion of his own evidence or at the end of the case as a whole. Obviously, this is not the rule, and our courts have regularly found waiver where parties have done just that. *See, e.g., Henderson*, 369 S.E.2d at 655-56; *Smith*, 395 S.E.2d at 743-44 ("[I]nasmuch as no motion was made for a directed verdict at the conclusion of the trial, no motion for relief as a matter of law is available after the jury verdict.").

Finally, Stephens makes the bizarre argument that this Court's opinion somehow effects "an unconstitutional rule change of the existing Rule 50, SCRCF", and contends this Court ignored the effect of the admissions by CSX at trial and the stipulation entered into by the parties. As to the first point, as already noted, this Court neither created nor suggested any new rule, but merely applied the plain language of the current rule. On the contrary, it is Stephens who is asking this Court to effect a rule change by omitting the language "at the close of all the evidence" from Rule 50(b), and substituting in its place his preferred language of "close of evidence offered by an opponent." This would obviously be an incorrect and unauthorized change in our long-standing rules of civil procedure, and would also be a departure from Supreme Court precedent that this Court is not permitted to make.

As to the second point, Stephens overlooks the fact that from start to finish in this trial CSX denied that it was liable for the claims asserted. Further, Stephens continues to

ignore the overwhelming evidence this jury had to support its verdict in favor of CSX. Instead, Stephens refers to arguments of counsel which are not evidence, and points to a stipulation that is not in the record and that was not introduced until after his trial motions were made. Contrary to Stephens' suggestion, there is nothing unfair or unjust in the result reached by this jury, nor in this Court's opinion upholding the result. Over the course of this three-week trial, the jury heard testimony of witnesses who were at the scene on the day of the accident and who saw and heard the train coming. It heard testimony of the driver and a passenger of the car that recklessly drove in front of the train. It also heard from a witness who was located directly behind the car, saw the car pull up and stop, and then saw the car pull out in front of the oncoming train. (R. p. 714). The jury saw considerable visual evidence showing that drivers had more than adequate sight distance at the crossing. The jury considered this evidence and ultimately, and properly, concluded that CSX was not at fault.

The Court's opinion is a straightforward application of longstanding rules that govern the trial and appeal of cases in our courts. Parties are required to renew their directed verdict motions at the close of all the evidence if they wish to later seek JNOV. This Court unanimously affirmed on this point, the argument has already been fully heard and considered, and there is no reason to hear it again.

II. This Court Properly Affirmed the Trial Court's Evidentiary Rulings

Stephens also submits that this Court incorrectly affirmed the trial court's exclusion of evidence related to the post-accident clearing of vegetation at the crossing and also at a garden club location along CSX's right of way. As to the post-accident clearing at the crossing, this Court properly concluded that the trial judge acted within her

discretion to exclude the evidence as a subsequent remedial measure barred by Rule 407. The trial judge rejected Stephens' argument that the post-accident cutting "impeached" CSX's position that the crossing was safe, an argument this Court found to be "precisely what Rule 407 forbids." *Opinion*, at 5.

Though this was Stephens' argument to the trial court, he attempted to make a different argument on appeal, claiming that the evidence was admissible "for impeachment purposes ... [to] show[] CSX had the ability and authority to remove the subject trees." *Br. of Appellant*, at 17-18; *cf.* *R.* p. 49 (showing Stephens' different argument at trial that evidence would supposedly "impeach" CSX's claim that the crossing was safe). However, this Court also correctly concluded that Stephens' new argument had never been presented to the trial judge, and, therefore, could not be a basis for finding that she abused her discretion. *See Opinion*, at 6.

To obtain rehearing, Stephens must show that the Court somehow "overlooked or misapprehended [his] argument." *Kennedy*, 349 S.C. at 532 (citing Rule 221(a), SCACR). On this evidentiary argument, however, Stephens merely reargues his position, claiming that the whole "context" of his argument in the trial court shows that he made the same argument on appeal. *See Petition*, at 19. However, even Stephens concedes that the context of his trial court argument was "open to interpretation." *Petition*, at 19. A trial court could hardly abuse its discretion in denying an argument whose context is "open to interpretation," and, therefore, subject to reasonable and different meanings. More importantly, this Court has already expressly addressed and rejected this claim, and therefore did not overlook or misapprehend it. *See Opinion*, at 6 n.2 ("Stephens insists he

did present this argument....In context, however, it is clear that the position to which this statement referred was the safety of the crossing....”).

Additionally, Stephens has not shown any prejudice from the exclusion of this evidence. The jury had ample evidence of the conditions as they existed at the time of the accident, saw photographs of the scene before the cutting, and heard undisputed evidence from witnesses who were present at the collision – including Colvin’s passenger – that the driver had more than adequate site distances along the track that were unobstructed by trees or vegetation. *See* Br. of CSX Transportation, at 28 (discussing argument and evidence); *see also Webb v. CSX Transp., Inc.*, 364 S.C. 639, 653-54, 615 S.E.2d 440, 448 (2005) (ruling that evidence of post-accident cutting was inadmissible under Rule 407, noting that “[t]here were numerous witnesses, photos, and two videos demonstrating the condition of the crossing on the day of the accident,” making evidence of the post-accident cutting unnecessary “for the jury to understand the conditions at the time of the accident.”).

As to Stephens’ request for rehearing concerning the exclusion of the garden club incident, his argument is also unpersuasive. Although this Court concluded that evidence of the incident was not a subsequent remedial measure, it still correctly concluded that the evidence could have been excluded as irrelevant. *See* Opinion, at 7.⁴ An appellate court can affirm for any reason appearing in the record, and it would be illogical for an appellate court to vacate a judgment and order a new trial on the basis of excluded evidence if that same evidence would be properly excluded again on re-trial. *See* Rule 220(c), SCACR (“The appellate court may affirm any ruling, order, decision or judgment

⁴ Stephens even stated at trial that there was “no evidence whatsoever that this incident had anything to do with this or in any way related to this incident at Hill Road” where the crossing accident occurred. (R. p. 381).

upon any ground(s) appearing in the Record on Appeal.”). Moreover, as this Court properly observed, Stephens could show no prejudice in such a situation. *See* Opinion, at 7 (citing *Fields v. Reg'l Med. Ctr. Orangeburg*, 363 S.C. 19, 26, 609 S.E.2d 506, 509 (2005) (“To warrant reversal based on the admission or exclusion of evidence, the appellant must prove both the error of the ruling and the resulting prejudice, i.e., that there is a reasonable probability the jury's verdict was influenced by the challenged evidence or the lack thereof.”).

III. This Court Correctly Affirmed the Trial Court's Jury Charges

Stephens also takes issue with this Court's decision on the jury charges. There is no reason to grant rehearing on this basis, for this Court merely followed black letter law holding that a trial court cannot be reversed on the basis of instructions that were irrelevant to the jury's decision and that could not have prejudiced the appellant. *See* Opinion, at 12; *see also Clark v. Cantrell*, 339 S.C. 369, 390, 529 S.E.2d 528, 539 (2000).

Stephens mistakenly continues to argue that the trial court should have accepted the exact language of two of his proposed charges. As this Court concluded, however, the trial court's charge as a whole properly instructed the jury on the substance of both proposed charges, and it properly conveyed the mutual duties owed by the railroad and motorists. *See* Opinion, at 13-14. A trial judge is not required to use the specific wording of a charge as long as the substance of the law is properly instructed. *See Proctor v. Dept. of Health and Environmental Control*, 368 S.C. 279, 310, 628 S.E.2d 496, 513 (Ct. App. 2006) (“The substance of the law is what must be instructed to the jury, not any particular verblage.”) (citation omitted).

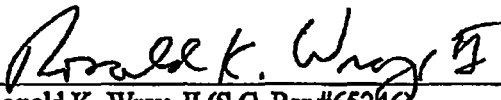
Stephens contended that the specific wording of his two proposed charges came from case law, namely *Lowery v. Seaboard Coastline R. Co.*, 270 S.C. 113, 241 S.E.2d 158 (1978), and *Gleaton v. Southern Ry. Co.*, 208 S.C. 507, 38 S.E.2d 710 (1946). However, the language supposedly drawn from *Lowery* was nothing more than a recitation of *the plaintiff's allegations*, and there was no such language in *Gleaton*. (R. p. 1073) (comment by trial court that the proposed language was "just not, clearly, from the case," and offering to give a charge "[i]f you can give me a direct quote from the case and something that's applicable"). Furthermore, *Gleaton* did not even stand for the proposition for which Stephens offered it. Stephens claims he wanted a charge based on *Gleaton* to address the railroad's duties, but, as that court observed, "the only [issue] involved in [*Gleaton*] embrace[d] the contention that the collision was due to decedent's sole or contributory negligence, gross negligence or willfulness." 208 S.C. at 517, 38 S.E.2d at 714.

In any event, Stephens could not have been prejudiced by the trial court's decision, because the trial court's instructions included a specific charge on the railroad's duty at crossings, including that the railroad's duty "may be affected by obstructions which prevent the track from being seen as a train approaches." (R. pp. 1449, 1462). The trial court also included charges that "there is a *mutual* duty on traveler and railroad to exercise due care" and that "[b]oth the traveler and the company are charged with the *same degree of care*: the one to avoid being injured; and the other to avoid inflicting injury." (R. pp. 1462-63) (emphasis added). It is not error for the trial judge to refuse a specific request to charge when the substance of the request is included in the general instructions. See *Burroughs v. Worsham*, 352 S.C. 382, 392, 574 S.E.2d 215, 220 (Ct.

App. 2002). Therefore, there is no merit to Stephens' argument that the instructions were confusing or failed to properly instruct the jury on the parties' respective obligations.

CONCLUSION

Stephens has not carried his burden of demonstrating that this Court "overlooked or misapprehended [his] argument." *Kennedy*, 349 S.C. at 532. On the contrary, by applying longstanding rules and case law of this State, the Court has honored the verdict of a jury who heard three weeks of trial testimony, and has shown deference and respect to a trial judge who acted well within her discretion on the arguments presented to her. For the foregoing reasons, this Court should deny Stephens' petition for rehearing.



Ronald K. Wray, II (S.C. Bar #65246)
Thomas Vanderbloemen (S.C. Bar #75784)
GALLIVAN, WHITE & BOYD, P.A.
55 Beattie Place; Suite 1200
Greenville, SC 29603
(864) 271-9580

James W. Purcell
Fulcher Hagler, LLP
P. O. Box 1477
Augusta, GA 30903-1477
(706) 724-0171

Jonathan P. Harmon
McGuire Woods, LLP
One James Center
901 East Cary Street
Richmond, VA 23219-4030
(804) 775-1000

Attorneys for Respondent
CSX Transportation, Inc.

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM HAMPTON COUNTY
Carmen Tevis Mullen, Circuit Court Judge

Case No. 2004-CP-25-0267

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

v.

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

RESPONDENT SCDOT'S RETURN TO
PETITION FOR REHEARING

On July 25, 2012, this Court issued a published decision affirming the order of Judge Carmen Tevis Mullen denying post-trial motions and upholding the jury's verdict and the judgment in favor of the Respondents. The Appellant Willie Homer Stephens, Guardian ad Litem for Lillian C., has now filed a petition for rehearing.

In response, the Respondent South Carolina Department of Transportation (SCDOT) submits that no rehearing is warranted. SCDOT submits the following discussion with respect to the arguments raised in the petition that are directed at SCDOT:

I.

The Appellant argues that Judge Mullen erred in charging discretionary immunity under Section 15-78-60(5) of the Tort Claims Act because there was no evidence to support the defense of discretionary immunity. This Court agreed that "DOT did not present sufficient evidence to prove its discretionary act immunity." However, this Court found no error by the trial court in giving an instruction on the defense because, in part, the Appellant never moved for a directed verdict on that defense. In addition, this Court found no error because the Appellant did not raise the absence of evidence of accepted professional standards as an argument before the trial court. On these bases, the Court was correct in finding no reversible error.

In *Barber v. Citizens & Southern National Bank*, 268 S.C. 16, 231 S.E.2d 295 (1977), the Supreme Court ruled that the failure of a party to move for a directed verdict at trial precludes any challenge on appeal to the sufficiency of the evidence. 231 S.E.2d at 297. See also, *Evans v. Wabash Life Ins. Co.*, 247 S.C. 464, 148 S.E.2d 153 (1966); *Epting v. Brumble*, 264 S.C. 114, 212 S.E.2d 711 (1975); *Lites v. Taylor*, 284 S.C. 316, 326 S.E.2d 173 (Ct. App. 1985). In short, a

directed verdict motion is required to preserve any issue regarding the sufficiency of the evidence.

By arguing on appeal that Judge Mullen erred in charging a Section 15-78-60(5) discretionary immunity defense because there was no evidence to support that defense, the Appellant is clearly challenging on appeal the sufficiency of the evidence. He is doing so without having made a motion for directed verdict at trial, and hence, that issue is not preserved.

Further, the Court is correct that the Appellant's counsel did not object to the discretionary immunity charge on the basis that there was no evidence that SCDOT failed to present evidence of accepted professional standards in the placement of the stop sign or stop line. The brief discussion of the charge during the charge conference confirms that that ground was never articulated to the trial court, and as a result, Judge Mullen had no opportunity to consider that specific objection. *See, State v. Hughes*, 336 S.C. 585, 521 S.E.2d 500 (1990) (objection to charge not preserved where different objection stated below); *State v. Sterling*, 396 S.C. 599, 723 S.E.2d 176, 186 (2012) (a party may not change his grounds of objection to the jury charge on appeal).¹

¹ Rule 51, SCRCP, provides that "[n]o party may assign as error the giving or the failure to give an instruction unless he objects thereto before the jury retires to consider its verdict, *stating distinctly the matter to which he objects and the grounds for his objection.*" Rule 51, SCRCP. (Emphasis added). Therefore, in order to preserve an objection to a jury charge, a party must "support[] those objections with distinctly-stated grounds of objections." *Bellamy v. Payne*, 304 S.C. 179, 403 S.E.2d 326, 328 (Ct. App. 1991). This is required "so that the Court is

II.

The Appellant contends that Judge Mullen should not have charged the jury on several statutes addressing the placement of signage at railroad crossings and SCDOT's authority to close railroad crossings. Importantly, the Appellant does not maintain that these charges did not accurately recite the statutory law. Instead, he complains that the statutes had no bearing on any issues at trial.

The Court correctly ruled that it was appropriate for the trial court to instruct the jury as to the duties and obligations regarding railroad crossing signage. The Appellant's own expert raised issues regarding signage and also raised the possibility of closing the Hill Road crossing. The statutes which were charged provided the jury the legal context in which to assess such expert testimony. The Appellant has not shown any prejudice from these instructions. The claim of jury confusion is unfounded.

III.

The Court is also correct in not addressing on appeal those jury charges that did not impact the jury's decision. The jury was required to answer special interrogatories whereby the jury determined that CSX and SCDOT were not

apprised of the alleged defect and the justification for the requested charge" which in turn gives the trial court the opportunity to correct or revise the charge accordingly. *Id.* "In the absence of distinctly-stated grounds of objection, appellate review of ... objections is not available." *Id.* Therefore, in order to properly preserve an objection to a jury charge, a party must articulate the objection to the trial judge. The same objection as raised at trial may be asserted on appeal. However, a party is precluded from raising a new objection or a different objection for the first time on appeal or by way of post-trial motion.

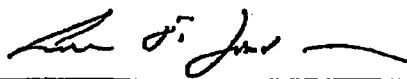
negligent. (R. 10). As a result, the Court is correct in concluding that it is unnecessary to address the propriety of jury charges that could not have affected the jury's deliberations over whether CSX or SCDOT breached any duty of care including the presumption against impairment charge and the charge on Sections 56-5-2330 and 56-5-2740.²

CONCLUSION

Based on the foregoing discussion, the Respondent South Carolina Department of Transportation respectfully requests that this Court deny the petition for rehearing.

Respectfully submitted,

DAVIDSON & LINDEMANN, P.A.

BY: 

ANDREW F. LINDEMANN
1611 Devonshire Drive
Post Office Box 8568
Columbia, South Carolina 29202
(803) 806-8222

² As additional bases, the Respondent SCDOT relies upon the arguments contained in its brief to support Judge Mullen's decision not to charge Section 56-5-2950(b) and her charge on Sections 56-5-2330 and 56-5-2740.

PEDEN B. McLEOD
McLeod, Fraser & Cone
111 East Washington Street
Post Office Drawer 230
Walterboro, South Carolina 29488
(843) 549-2516

*Counsel for Respondent South Carolina
Department of Transportation*

Columbia, South Carolina

September 6, 2012

CERTIFICATE OF SERVICE

The undersigned employee of Davidson & Lindemann, P.A., attorneys for the Respondent South Carolina Department of Transportation, does hereby certify that service of the Respondent SCDOT's Return to Petition for Rehearing was made upon all counsel of record by placing copies in the United States Mail, first class postage prepaid, at the below listed addresses clearly indicated on said envelopes this the 6th day of September 2012:

Matthew V. Creech, Esquire
Peters Murdaugh Parker Eltzroth & Detrick, P.A.
Post Office Box 457
Hampton, South Carolina 29924-0457

Carl H. Jacobson, Esquire
Uricchio, Howe, Krell, Jacobson, Toporek, Theos & Keith, P.A.
Post Office Box 399
Charleston, South Carolina 29401

Peden B. McLeod, Esquire
McLeod, Fraser & Cone
Post Office Drawer 230
Walterboro, South Carolina 29488-0003

Thomas E. Vanderbloemen, Esquire
Gallivan White & Boyd, P.A.
Post Office Box 10589
Greenville, South Carolina 29603

J. Arthur Davison, Esquire
James Purcell, Esquire
Fulcher Hagler, LLP
Post Office Box 1477
Augusta, Georgia 30903

Jonathan P. Harmon, Esquire
McGuire Woods, LLP
One James Center
901 East Cary Street
Richmond, Virginia 23219-4030



THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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

v.

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

Appellate Case No. 2009-126526

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

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

AFFIRMED

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

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

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

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

I. Facts

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

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

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

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

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

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

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

II. Procedural History

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

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

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

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

III. Evidentiary Rulings

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

A. Removal of Trees at the Hill Road Crossing

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

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

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

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

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

B. Removal of a Garden in Hampton

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Q: Did you believe that you blew the horn at the whistle post?

A: I believe I started at the whistle post.

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

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

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

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

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

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

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

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

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

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

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

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

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

V. Jury Charge Rulings

Stephens challenges a number of rulings the trial court made in regards to the jury charge. Our review of the trial court's jury charge is controlled in the first instance by the fact that the trial court prepared special interrogatories for the jury to answer in returning its verdict, and that the jury resolved the case by finding that neither CSX nor DOT breached its duty of reasonable care. Because the jury's verdict on that basis made it unnecessary for the jury to reach the other issues in the case, it is not necessary that we address any ruling on the jury charge unless it relates to breach of CSX's and DOT's duty of reasonable care. *See Cole v. Raut*, 378 S.C. 398, 405, 663 S.E.2d 30, 33 (2008) (stating an erroneous jury instruction "is not grounds for reversal unless the appellant can show prejudice from the erroneous instruction"); *Clark v. Cantrell*, 339 S.C. 369, 390, 529 S.E.2d 528, 539 (2000) ("[E]ven if the trial court erred in failing to give a requested instruction, the requesting party also must show that the error was prejudicial to warrant reversal on appeal."). Therefore, we address only those issues on appeal challenging portions of the charge given, or the refusal to give requested charges, that relate to CSX and DOT's alleged breach of their duty of reasonable care. Specifically, we find it unnecessary to address the issues raised by the dissent regarding the presumption against impairment and "Train Time" charges, as those alleged errors could hardly have affected the jury's deliberations over whether CSX or DOT breached its duty of reasonable care, and could not possibly have prejudiced Stephens.

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

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

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

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

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

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

Stephens argues the trial court's alleged error in refusing these charges was compounded by the instruction it gave that a motorist whose vision is obscured "must exercise due care consistent with the increased danger occasioned by the conditions that obstruct their vision." He contends this instruction led the jury to believe the law places the duty of care entirely on the motorist, when the law actually places duties on both the railroad company and the motorist. Stephens is correct that there are mutual duties, and that the duties of each must be exercised in light of all surrounding circumstances. *See Chisolm v. Seaboard Air Line Ry.*, 121 S.C. 394, 401, 114 S.E. 500, 503 (1922) ("A railroad company and a traveler on a

highway crossing are charged with a mutual duty of keeping a lookout for danger, and the degree of vigilance required of both is in proportion to the known risk; the greater the danger, the greater the care required of both." The trial court conveyed that point to the jury, however, stating "there is a mutual duty on traveler and railroad to exercise due care." Additionally, the trial court instructed the jury that "both the traveler and the company are charged with the same degree of care: the one to avoid being injured; and the other to avoid inflicting injury. The care of each must be commensurate with the risk and danger involved. The greater the risk, the greater the care." We find no error.

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

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

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

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

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

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

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

C. Charging on Discretionary Act Immunity

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

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

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

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

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

VI. Conclusion

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

HUFF, J., concurs.

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

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

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

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

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

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

The South Carolina Court of Appeals

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

v.

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

Appellate Case No. 2009-126526

ORDER DENYING PETITION FOR REHEARING

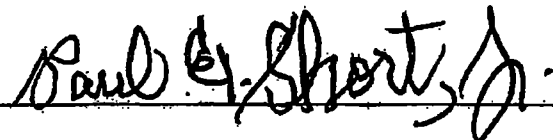
After careful consideration of the petition for rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing. Accordingly, the petition for rehearing is denied.



Thomas C. Hoff

C.J. J.

I vote to deny the petition for rehearing, but adhere to my dissent.



J.

Columbia, South Carolina

cc:

John E. Parker

N. Keith Emge, Jr.

Thomas Edward Vanderbloemen

Ronald K. Wray, II

Andrew F. Lindemann

Peden B. McLeod

Grahame Ellison Holmes

John Paul Detrick

J. Arthur Davison

FILED

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