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.

PETITION FOR WRIT OF CERTIORARI

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CERTIFICATE OF COUNSEL

Counsel for the Petitioner certifies that the Petition for Rehearing and Rehearing *En Banc* was made and finally ruled on by the Court of Appeals on December 11, 2012.

QUESTIONS PRESENTED

1. WHETHER THE COURT OF APPEALS ERRED IN AFFIRMING THE DENIAL OF STEPHENS' DIRECTED VERDICT AND J.N.O.V. MOTIONS BASED UPON MISINTERPRETATION OF PROCEDURAL RULES, EXISTING PRECEDENT, AND MISINTERPRETATION OF THE RECORD AT HAND?

2. WHETHER THE COURT OF APPEALS ERRED IN AFFIRMING THE TRIAL COURT'S FLAWED, ERRONEOUS, AND CLEARLY PREJUDICIAL JURY CHARGE AND APPLIED THE INCORRECT STANDARD OF REVIEW?

STATEMENT OF THE CASE

Petitioner/Appellant Willie Homer Stephens, Guardian ad Litem for Lillian C. (hereinafter, "Stephens"), filed his Summons and Complaint in Hampton County on April 27, 2004. The Complaint alleges negligence causes of action against CSX Transportation, Inc. (hereinafter, "CSX") and the South Carolina Department of Transportation (hereinafter, "DOT") arising out of an automobile/train collision that occurred on February 3, 2004 and which resulted in serious brain injuries to Lillian C., a minor. The Complaint alleges *inter alia,* that the accident was caused by CSX's failure to properly warn the Colvin vehicle at the crossing by properly sounding its horn and/or that the accident was caused by CSX's failure to maintain its right-of-way so as to create proper sight distances at the crossing. (R. p. 14). Against the DOT, Stephens alleges, *inter alia,* that the DOT 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 Respondents. Stephens was granted ten (10) days to file post-trial motions and thereafter timely moved for judgment notwithstanding the verdict pursuant to Rule 50(b), SCRCP, or alternatively, a new trial pursuant to Rules 59, SCRCP. The court heard arguments on Stephen'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). Stephens timely filed his Notice of Appeal on May 12, 2009. On July 25, 2012, the Court of Appeals issued its Opinion Number 5008, which affirmed the trial court's denial of Stephens' directed verdict and JNOV motions, the trial court's evidentiary rulings, and the trial court's charge to the jury. Stephens timely filed a Petition for Rehearing and

Suggestion for Rehearing En Banc on August 9, 2012. The Petition was denied by Order of the Court of Appeals on December 11, 2012.

STATEMENT OF THE FACTS

Willie Homer Stephens's granddaughter Lillian C. was twelve years old at the time of this collision. On February 3, 2004, Lillian was a passenger in her mother Tonia'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). Lillian sat in the right rear passenger seat. (R. p. 456). Tonia drove 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 CSX 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, or 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). Tonia 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 CSX's right-of-way. (R. pp. 412; 415-417). She 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 CSX'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 CSX 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). Lillian was slumped over in the back seat with a trickle of blood coming from her nose. (R. pp. 414; 442). Lillian suffered severe and permanent brain injuries from the collision.

Prior to this collision, in 2000, CSX implemented a program to eliminate sight obstructions at railroad grade crossings. (R. p. 153; 1622; 1623). Under the program, CSX 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). Then it was delayed 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 pushed back yet 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 CSX's original specifications due to problems with CSX's contractor. (R. p. 164; p. 1632). Through all of this, the Hill Road crossing was not cleared. (R. p. 184).

In 2003, CSX hired a different contractor, DeAngelo Brothers, in an effort to finish the crossing clearing program. (R. p. 177-178; p. 1640-1641). CSX also changed the specifications for the clearing program. (R. p. 178-180; pp. 1640-1642). The new specifications required that CSX's entire right-of-way be cleared for a distance of 350 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). On February 3, 2004, the date of the subject collision, the northwest quadrant had not been cleared as required under CSX' s crossing program. Also, as CSX 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

Pursuant to Rule 242, SCACR, the Petitioner respectfully moves for a Writ of Certiorari and for this Court to review and reverse the Court of Appeals' Opinion No. 5008 of July 25, 2012, which affirmed the trial court's rulings on numerous issues. Review should be granted because of the special and important issues raised by the Opinion' rulings below. The Opinion below should be reviewed because in interpreting Rule 50 and issue preservation at the directed verdict stage, the Opinion creates a novel question of law. Furthermore, the Opinion directly conflicts with decisions of this Court. Also, the Opinion unconstitutionally creates a change to the rules of civil procedure. Finally, as to the issue of the propriety of the jury charge, the partial dissent to the Opinion is correct and the fatally flawed jury instruction must be reversed.

This Court's consideration is necessary to secure and/or maintain uniformity of the appellate courts' opinions concerning the issues of directed verdict issue preservation and procedure as well as uniformity of appellate review of jury charges. The Court below 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 Stephens failed to preserve the trial court's denial of his directed verdict motion, the Opinion directly conflicts with this Court's previous opinion 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), SCRCP, is inconsistent with the plain language of Rule 50(a), SCRCP, and unsupported by South Carolina precedent. The effect of the ruling is that a new, never before established procedural rule for issue preservation has been established by the *Stephens* Opinion. Based on established standards, Stephens's directed verdict motions as to both the horn and vegetation theories against CSXT should be considered by this Court.[1]

Next, the Court should grant certiorari to consider 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. Review is also required because in addressing the allegations of error regarding the jury charge, the Court of Appeals chose to not address issues and

[1] For the sake of brevity, in this Petition Stephens addresses those issues specifically raised by the Opinion. Nevertheless, with regard to all issues raised in the appeal, Stephens specifically adopts and incorporates by reference all arguments on all issues raised previously on appeal.

arguments which should be addressed in considering the charge as a whole. By claiming that certain jury charges need not be addressed, the Opinion simply avoided addressing the merits of a fatally flawed and confusing jury charge by which Stephens was actually prejudiced and which requires reversal. For the reasons that follow, Petitioner Stephens therefore respectfully requests that this Court grant his Petition for Writ of Certiorari.

I. THE COURT OF APPEALS ERRED IN AFFIRMING THE DENIAL OF STEPHENS' DIRECTED VERDICT AND J.N.O.V. MOTIONS BASED UPON MISINTERPRETATION OF PROCEDURAL RULES, EXISTING PRECEDENT, AND MISINTERPRETATION OF THE RECORD AT HAND.

On both theories of negligence asserted against CSX, the trial court erred in failing to direct a verdict as to CSX's duties and the breach thereof. As to Stephens' horn sounding and vegetation sight obstruction theories, the Court of Appeals erroneously ruled that the Stephens failed to preserve the issue for appeal by failing to renew his directed verdict motion "at the close of all evidence."

A. To Require Stephens To Renew His Directed Verdict Motion After Presenting Reply Evidence Misapprehends Rule 50, SCRCP, and South Carolina Precedent Addressing the Purpose of a Directed Verdict Motion; Furthermore, the Court of Appeals Created New Procedural Law for Which No Authority Existed at the Time of this Trial.

Stephens 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. CSX nor DOT have cited any authority to support the position adopted by the Court of Appeals. There is no authority cited in the Court of Appeals' opinion which requires a plaintiff to renew a directed verdict motion after he has presented reply or rebuttal testimony after the defendants have rested. In fact, *Wright v. Craft*, 372 S.C. 1, 640 S.E.2d 486 (Ct. App. 2006), which the Court of Appeals relied

upon as authority to find waiver, actually highlights the different procedural posture of this case and the Court of Appeals' 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 of Appeals held that the phrase "at the close of all evidence," requires a renewal of the directed verdict motion after Stephens' rebuttal testimony, though the Respondents 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" is appealing in its simplicity, the Court of Appeals' 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), SCRCP. Furthermore, not one South Carolina case procedurally frames 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), SCRCP.

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" has been interpreted historically 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. The 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 of four 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 evidence of the Court of Appeal's failed analysis and construction of the phrase "close of all the evidence," the 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 undisputed that Stephens timely moved for directed verdict at the close all evidence presented by his opponents CSX and DOT. The only additional or supplemental evidence presented at trial was rebuttal evidence of the Stephens. By

moving for a directed verdict at the close of all evidence presented by all defendants, the Stephens has preserved its motion pursuant to Rule 50(b), in accordance with *Henderson*.

The issues of *Henderson* and Rule 50 interpretation are not addressed in the Court of Appeals' Opinion. Nevertheless, in reaching the conclusion that Stephens was required to renew his directed verdict motion at the close of his own rebuttal/reply evidence, the Court of Appeals cites to *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 whatsoever for the Court of Appeals' finding of non-preservation by Stephens. The Court of Appeals instead should have addressed the arguments concerning denial of directed verdict and JNOV on the merits.

The Court of Appeals should have applied *Henderson* here, as its holding is most factually and procedurally similar to this case. *Henderson*, the only precedent cited by Respondents before the Court of Appeals to support their arguments, compels that this Court reverse the opinion's finding of waiver. There is an absolute dearth of authority which would require Stephens 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 this Court does not reverse the

ruling of waiver, based on the concepts of equity and fairness, Stephens requests a finding that the ruling on this procedural change apply prospectively only.

B. The Opinion's Holding that Stephens 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, SCRCP

As addressed above, prior to the Opinion below, there was no rule-based or common law precedent requiring a plaintiff to renew his directed verdict motion under the procedural posture of the case. The Court of Appeals' 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. This Court should grant certiorari to review whether the alteration of procedural rules is constitutional, given that the constitutionally mandated process was not followed.

C. The Court of Appeals Erred by Ignoring the Effect of the Admissions and Formal Stipulation of CSX with Regard to its Breach of Duty to Sound its Horn in Compliance with S.C. Code Ann. §58-15-910.

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[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.

The Court of Appeals' Opinion ignores the effect and importance of the stipulation which was entered into by the parties concerning CSX's breach of duty to sound its horn. The Court also failed to recognize the fact that the stipulation mirrors the statements of CSX'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, CSX admitted its failure to sound the whistle in conformity with S.C. Code Ann. § 58-15-910. From its opening statement, CSX 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 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 CSX's own admission and the evidence adduced at trial, the evidence is only susceptible of the conclusion that CSX 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, CSX admitted violation of the horn statute at S.C. Code Ann. § 58-15-910.

The Court of Appeals' finding of non-preservation of directed verdict as to the horn issue flies in the face of the record itself. In reaching the decision that the issues were not preserved, the Court of Appeals concluded that Stephens was not entitled to a directed verdict when: (1) In opening statements CSX twice admitted it failed to properly sound the horn in violation of the applicable statute; (R. pp. 46-47); (2) In opening statements CSX told the jury that while the engineer "believed" he had sounded the horn on time, CSX did not take the position that it was sounded properly; (Id.); (3) In opening CSX 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 CSX 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 CSX stipulated as to the accuracy of the event recorder, which showed the horn was blown late.

Despite CSX's stipulation and the clear admissions of CSX, the Court of Appeals sought to mine from the record a mere fly's speck of evidence sufficient to support the trial court's denial as to the horn issue. To do so, the Court of Appeals notes what it acknowledges 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 CSX, that the horn was <u>not</u> sounded in accordance with the law.

Based upon the record, there is absolutely no doubt that CSX, in asserting its vigorous and successful defense of this case before the jury, <u>NEVER</u> argued or contended

that it met its duties with regard to S.C. Code Ann. § 58-15-910. From opening to closing, CSX admitted the breach. The defenses 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, 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 Opinion's analysis of waiver and issue preservation were correct, 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 trial court to charge the jury that CSX 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 appellate courts consistently have 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 trial court was required to direct a verdict for Stephens on the issue of duty and breach only with regard to S.C. Code Ann. §58-15-910.

Parties may stipulate to facts and the trial court is bound by those facts stipulated to. Here, CSX stipulated that it failed to comply with the horn law. Throughout the entire trial, from opening statements forward, CSX 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. Despite the stipulation, the Court of Appeals erroneously affirmed the denial of directed verdict and JNOV.

II. CERTIORARI SHOULD BE GRANTED TO REVIEW THE COURT OF APPEALS' ERRONEOUS AFFIRMATION OF THE FLAWED, ERRONEOUS, AND CLEARLY PREJUDICIAL JURY CHARGE, BECAUSE THE MAJORITY OPINION BELOW FAILS TO APPLY THE CORRECT STANDARD OF REVIEW.

In reviewing a jury charge for alleged error, this Court has made clear that 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) (emphasis added). 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. *Wells v. Halyard,*

341 S.C. 234, 237, 533 S.E.2d 341, 343 (Ct. App. 2000) (emphasis added). The Court of Appeals failed – and in fact refused – to address the jury charge as a whole to determine whether Stephens is entitled to reversal. Based on any of the alleged errors individually, and certainly when considering the charge as a whole, as indicated by the dissent, the Court of Appeals could not have determined beyond a reasonable doubt that the error(s) did not contribute to the verdict.

The Court of Appeals' 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. CSX and DOT contended that the proximate cause of the accident was the "unsafe choices" by the driver of the car in which young Lillian was a passenger.

Other than the Dissent, the Opinion refused 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 Court of Appeals chose to address only the charges "that relate to CSX and DOT's alleged breach of their duty of reasonable care" and found 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 Court of Appeals declined to address all allegations of error in the charge because of the jury's verdict finding that neither CSX not 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 an appellate 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

The Court of Appeals erred in affirming the trial court's rejection of Stephen's two proposed charges, both accurate statements of the law. While the Opinion found that substantially equivalent charges were given, the finding 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."

CSX admitted throughout the trial that vegetation at this crossing in Quadrant A should have been cut. The effect of refusing Stephen's requested 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 Court of Appeals 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 failure to charge the railroad's corresponding duty of added care at a crossing with conditions which obstruct vision.

ii. Charging on Discretionary Act Immunity as to DOT

Even where the Court of Appeals found that charges given by the trial court were erroneous and without evidentiary support as to DOT's discretionary immunity charge, the Opinion justified 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 Stephen's theory as evidence was presented that the placement conflicted with the requirements of the MUTCD, which

supplies professional standards. Nevertheless, Stephens 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 carne into court and testified about why the sign was placed there.

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

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

The Opinion does address Stephen'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.

The Opinion is incorrect in its findings. These statutes were not in issue or in dispute in this case. Stephens 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 Stephens 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 CSX or DOT's Duty of Reasonable Care, The Opinion Fails to Address a Number of Alleged Errors Directly Related to Reasonable Care.

On appeal Stephens argued 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 a highway grade crossing such as the one at issue is 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.

Furthermore, § 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 charged, actually would require that Colvin violate the one clearly applicable 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 Stephens 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 Stephen's case.

ii. **The Dissent Correctly Concluded 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 Court of Appeals refused 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.

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 taken 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, Stephens 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." The evidence at trial showed that Tonia 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 CSX argued 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.

Stephens 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 impartment 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.E.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 Stephens. Much to the prejudice of Stephens, the charge given and refusal of § 56-5-2950 impermissibly led the jury to infer that the DOT could not be liable for its omissions because "criminal activities" had been committed by Ms. Colvin.

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."

CONCLUSION

For the reasons addressed herein, Stephens' Petition for a Writ of Certiorari should be granted. The Court of Appeals' Opinion affirming the trial court's decision is unsupported by existing law or borne out by the Record on Appeal. Stephens therefore requests that the Court inquire further as to these matters and grant the relief originally requested through his Appeal.

Respectfully submitted,

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-And-

PETERS, MURDAUGH, PARKER,
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January 10, 2013
Ridgeland, S.C.

BY: _____

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ATTORNEYS FOR PETITIONER

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.

PROOF OF SERVICE

This is to certify that I, ***Matthew V. Creech***, with the Law Firm of PETERS, MURDAUGH, PARKER, ELTZROTH & DETRICK, PA, Attorneys for the Appellant/Petitioner, have this date mailed via the U.S. Postal Service with first class postage prepaid, a true and correct copy of the within ***Petition for Writ of Certiorari*** to the following

The Honorable Daniel E. Shearouse
Clerk of Court
South Carolina Supreme Court
Post Office Box 11330
Columbia, SC 29211
(Including Appendix)

The Honorable Jenny Abbott Kitchings
Clerk of Court
South Carolina Court of Appeals
P.O. Box 11629
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Matthew V. Creech

January 10, 2012
Ridgeland, South Carolina

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January 16, 2013

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JAN 16 2013
SC Court of Appeals

RECEIVED
JAN 17 2013
S.C. Supreme Court

VIA U.S. MAIL & FACSIMILE

Clerk of Court,
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Clerk of Court,
South Carolina Court of Appeals
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Columbia, SC 29211
F: 803.734.1839

Re: Willie Homer Stephens, as GAL for Lillian C. v. CSXT and SCDOT;
Appellate Case No.: 126526

Dear Ms. Allen and Ms. Johnson:

I am writing to follow up on Ms. Allen's call earlier today notifying me that the Petition for Certiorari and Appendix have not been received by the Supreme Court, but had been received by the Court of Appeals.

On January 10, 2013, we served a Petition for Writ of Certiorari, along with two copies of the Appendix to the Supreme Court. The Court of Appeals and all counsel of record were served with the Petition, but not the Appendix, as allowed by Rule 242(e). The Appendix itself is very voluminous, consisting of eight or nine volumes.

My paralegal, Tammy Lee, had the box with the materials for the Supreme Court weighed and mailed from our local post office in Ridgeland, sent first class mail to the Supreme Court's post office address. Please also allow this to confirm that my office has received no notification from the Post Office of any returns, problems with delivery, etc. I am enclosing with this letter a copy of the Petition along with our Proof of Service.

I will be happy to resend the Appendix materials if you would like. Just let me know how you would like me to proceed.

With kind regards, I am

Sincerely,

Matthew V. Creech

Encl.: Petition for Certiorari and Proof of Service
cc: J. Arthur Davison, Esq.
James W. Purcell, Esq.
Thomas Vanderbloemen, Esq
Ronald K. Wray, II, Esq.
Peden B. McLeod, Esq.
Andrew Lindemann, Esq.

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January 10, 2013

VIA U.S. MAIL & FACSIMILE
The Honorable Daniel E. Shearouse
Clerk of Court
SUPREME COURT OF SOUTH CAROLINA
P.O. Box 11330
Columbia, South Carolina 29211

Re: Willie Homer Stephens, as Guardian ad litem for Lillian C., a minor vs. CSX Transportation;
Case No.: 2009-126526

Dear Mr. Shearouse:

With reference to the above case, pursuant to Rule 242, SCACR, enclosed for filing please find the following documents:

1) One unbound, original and seven (7) bound copies of *Appellant's Petition for Certiorari;*
2) One original and two (2) copies of the *Certificate of Service;*
3) One unbound and one bound copy of the *Appendix;* and,
4) Firm check for $100.00 for the filing fee.

Please return a filed copy of the *Petition for Writ of Certiorari* and of the *Certificate of Service* in the envelope I have provided. By copy of this correspondence, copies of the enclosed Petition, Certificate of Service, and Appendix are being served on all counsel of record. By separate cover I am filing a copy of our Petition for Certiorari and Certificate of Service with the Court of Appeals.

Sincerely,

Matthew V. Creech

Encl.: as stated
cc: J. Arthur Davidson, Esquire
James W. Purcell, Esquire
Ronald K. Wray, II, Esquire
Thomas Vanderbloemen, Esquire
Andrew F. Lindemann, Esquire
Peden B. McLeod, Esquire
The Hon. Tonya Gee (Petition & Certificate of Service, w/out Appendix)

The Supreme Court of South Carolina

Peters, Murdaugh, Parker, Eltzorth & Detrick

01/22/2013

RECEIPT #66973

Fee Type:	Case Initiation Fee
Amount:	$100.00
Payment Type:	Check
Reference No:	3542
Check/Money Order Date:	01/08/2013
Comments:	Lillian Colvin v. CSX