

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

RECEIVED

FEB 11 2013

S.C. SUPREME COURT

APPEAL FROM HAMPTON COUNTY
COURT OF COMMON PLEAS

CARMEN TEVIS MULLEN, Circuit Court Judge

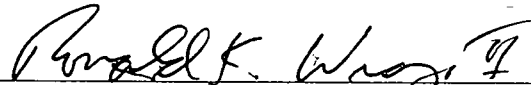
APPELLATE CASE NO.: 2013-000133

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

vs

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

RESPONDENT CSX TRANSPORTATION, INC.'S
RETURN IN OPPOSITION TO PETITION FOR
WRIT OF CERTIORARI



Ronald K. Wray, II (S.C. Bar #65046)
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.

TABLE OF CONTENTS

	<u>PAGE</u>
Table of Authorities.	i
Questions Presented	1
Statement of the Case	1
Statement of Facts	2
Argument	5
I. The Court of Appeals Applied Well-Established Rules and Precedent to Conclude that Stephens Failed to Preserve His Argument for Appeal.	5
II. The Court of Appeals Correctly Affirmed the Trial Court’s Jury Charges.	14
Conclusion	24

TABLE OF AUTHORITIES

	<u>PAGE</u>
 <u>Cases</u>	
<i>Cole v. Raut</i> , 378 S.C. 398, 663 S.E.2d 30 (2008)	15
<i>Dixon v. Weir Fuel Co.</i> , 251 S.C. 74, 160 S.E.2d 194 (1968)	22
<i>Giles v. Landford & Gibson, Inc.</i> , 285 S.C. 285, 328 S.E.2d 916 (Ct. App. 1985)	14
<i>Gleaton v. Southern Ry. Co.</i> , 208 S.C. 507, 38 S.E.2d 710 (1946)	16
<i>Gulledge v. McLaughlin</i> , 328 S.C. 504, 492 S.E.2d 816 (Ct. App. 1997)	22
<i>Henderson v. St. Francis Community Hosp.</i> , 295 S.E. 441, 369 S.E.2d 652 (Ct. App. 1988)	5, 8, 9
<i>Henning v. Union Pac. R.R. Co.</i> , 530 F.3d 1206 (10th Cir. 2008)	20
<i>Hinds v. Elms</i> , 358 S.C. 581, 595 S.E.2d 855 (Ct. App. 2004)	12
<i>Keaton ex rel. Foster v. Greenville Hosp. System</i> , 334 S.C. 488, 514 S.E.2d 570 (1999)	21
<i>Lee v. Bunch</i> , 373 S.C. 654, 647 S.E.2d 197 (2007)	22
<i>Lowery v. Seaboard Coastline R. Co.</i> , 270 S.C. 113, 241 S.E.2d 158 (1978)	16
<i>McMillan v. Oconee Memorial Hosp., Inc.</i> , 367 S.C. 559, 626 S.E.2d 884 (2006)	12
<i>Proctor v. Dept. of Health and Environmental Control</i> , 368 S.C. 279, 628 S.E.2d 496 (Ct. App. 2006)	15
<i>RFT Management Co. v. Tinsley & Adams</i> , 399 S.C. 322, 732 S.E.2d 166 (2002)	5
<i>Smith v. Ridgeway Chemicals, Inc.</i> , 306 S.E. 303, 395 S.E.2d 742 (Ct. App. 1990)	9

<u>Statutes and Regulations</u>	<u>PAGE</u>
<i>S.C. Code Ann. § 58-15-910</i>	12
<i>S.C. Code Ann. § 56-5-2930</i>	21, 22
<i>S.C. Code Ann. § 56-5-2950</i>	23
<i>S.C. Code Ann. § 56-5-2950(b)</i>	22
<i>S.C. Code Ann. § 56-5-2950(G)(1)</i>	23
<i>S.C. Code Ann. § 56-5-2330</i>	18, 19, 20
<i>S.C. Code Ann. § 56-5-2740</i>	18, 19, 20
<i>S.C. Code Ann. § 56-5-2715</i>	19, 20
<i>S.C. Code Ann. § 56-5-1010</i>	17
<i>S.C. Code Ann. § 56-5-1020</i>	17
<i>S.C. Code Ann. § 58-17-1390</i>	17
<i>S.C. Code Ann. § 58-16-1625</i>	17
<i>S.C. Code Ann. § 15-78-60(5)</i>	17

QUESTIONS PRESENTED

- I. Did the Court of Appeals Properly Apply the Longstanding Rule that Requires a Party to Present His Directed Verdict Motion at the Close of All the Evidence to Preserve the Issue for Appeal?
- II. Did the Court of Appeals Correctly Address the Relevant Jury Charges and Properly Conclude that the Trial Court Acted within its Discretion in Instructing the Jury?

STATEMENT OF THE CASE

This is a railroad crossing case arising from an accident that occurred in Hampton County on February 3, 2004. Petitioner Willie Homer Stephens (“Stephens”) filed this action alleging that his granddaughter, Lillian, suffered injuries in the accident and that her injuries were due to the alleged negligence of Respondents CSX Transportation, Inc. (“CSX”) and South Carolina Department of Transportation (“DOT”). CSX and DOT denied these allegations. Following a three-week trial in Hampton County, the jury returned a verdict in favor of CSX and DOT. The Trial Court denied Stephens’ post-trial motions. The Court of Appeals affirmed, agreeing that because Stephens had not moved for a directed verdict at the close of all the evidence at trial, he had not preserved his challenge to the jury verdict. It also rejected Stephens’ arguments concerning evidentiary rulings and jury charges.

This matter is now before this Court on Stephens’ Petition for a Writ of Certiorari. Stephens presents two issues for review. First, even though he admits that he did not move for directed verdict at the close of all the evidence, Stephens claims the Court of Appeals incorrectly decided that he failed to preserve his appeal of the Trial Court’s ruling on his Motion for Judgment Notwithstanding the Verdict (“JNOV”). Second, he argues that it incorrectly affirmed the Trial Court’s jury charges.

For the reasons discussed below, Stephens is incorrect and has failed to show any “special and important reasons” for this Court to grant a Writ of Certiorari. *See* Rule 242, SCACR. The Court of Appeals applied the plain language of Rule 50(b), SCRCP in ruling that a party must move for directed verdict at the close of all the evidence to preserve the issue for later appeal. As the cases cited *infra* reflect, as recently as 2012 this Court reiterated this same rule. There are no “special” or “important” reasons to grant a writ of certiorari to again affirm this rule.

Additionally, Stephens conceded in the Trial Court, in the Court of Appeals, and before this Court, that “factual issues existed under each theory” of liability he asserted, including proximate cause. Stephens’ Brief, at 9. There is no reason for this Court to grant certiorari, as this concession renders it improper for any court to grant Stephens judgment as a matter of law, and neither the Trial Court nor the Court of Appeals could have erred in failing to grant him this relief.

Finally, the Court of Appeals followed black letter law in holding that a Trial Court cannot be reversed where its instructions correctly stated the law and did not prejudice the Appellant. Stephens does not challenge the legal accuracy of any of the charges given by the Trial Court, but argues only their relevance to the issues presented. However, the jury having found no negligence by CSX or DOT, Stephens can demonstrate no prejudice from any of the charges given. This Court should deny the Petition for Writ of Certiorari.

STATEMENT OF THE FACTS

On the afternoon of February 3, 2004, Lillian was riding in a car with her mother, Tonia Colvin (“Colvin”), in Yemassee, South Carolina. 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 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 heard 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 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 that from the stop line where Colvin stopped, 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). The 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). Colvin admitted she had taken multiple medications that day, 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 with alcohol, and Colvin acknowledged it was a "very bad idea to take alcohol and tizanidine at or around the same time," and it was a "very bad idea" to take "alcohol and Darvocet at or around the same time." (R. p. 460-67).

Lillian was more seriously injured, requiring hospitalization. (R. pp. 429-38). Fortunately, she appears to have recovered well and her testimony suggested she was a

teenager doing normal teenage things, like sending text messages, attending school, and having a lot of friends, including a boyfriend. (R. pp. 701-04).

ARGUMENT

I. The Court of Appeals Applied Well-Established Rules and Precedent to Conclude that Stephens Failed to Preserve His Argument for Appeal.

A. A Motion for Directed Verdict Must Be Made at the Close of All the Evidence to Preserve the Issue for Appeal.

In his petition, Stephens contends that the Court of Appeals “misapprehended the record before it and misapplied the law of South Carolina with regard to the preservation of issues on appeal.” (Petition, p. 5). It is Stephens, however, who is misconstruing and attempting to misapply our law on error preservation. Rule 50(b) could not be clearer in stating that “[w]henver 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 did not make a motion for directed verdict “at the close of all the evidence” as the rule requires, the Court of Appeals properly concluded that he had not preserved his right to seek JNOV. There is nothing new about this longstanding and well known rule, and the Court of Appeals’ application of it did not enact a “procedural change” as argued by Stephens.

Indeed, just last year, this 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*, 399 S.C. 322, 331, 732 S.E.2d 166, 170 (2012) (emphasis added) (quoting *Wright v. Craft*, 372 S.C. 1, 20, 640 S.E.2d 486, 496 (Ct. App. 2006)), reh’g denied (Sept. 19, 2012); 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). Further, as Chief Justice Toal explained in her treatise on South Carolina appellate practice, “[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, documents, and stipulations, before her when deciding whether to submit the case to the jury or rule as a matter of law. As the Court of Appeals correctly explained, the “reason for the rule” is “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.” 735 S.E.2d at 514.

Stephens argues that despite his admitted failure to renew his motion for directed verdict at the close of all the evidence, this Court should overlook the plain language of Rule 50(b) and reverse the Court of Appeals’ affirmance of the trial court’s denial of his JNOV motion. He argues that this is required because, according to him, he was entitled to a directed verdict on his claim that CSX did not properly sound the horn at the crossing based upon statements made by CSX’s counsel during opening statement and a stipulation entered into by the parties during his rebuttal case. These arguments are discussed more fully below, but CSX notes that it contested liability throughout the trial, and the jury’s verdict in its favor demonstrates that the jury agreed that the evidence did not warrant a finding of liability. More importantly, Stephens’ argument not only would

require this Court to ignore Rule 50(b) and prior precedent, but it would be extremely unfair to the trial court and Respondents. In addition to the opportunity to properly preserve this argument by making a directed verdict motion at the close of all the evidence as the rule requires, Stephens had numerous other opportunities to raise and attempt to preserve this issue below if he thought it had merit. For example, 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. 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. *See, e.g., Br. of Respondent CSX Transportation*, at 13-14 (explaining Stephens' opportunities).

In his 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 was properly rejected by the Court of Appeals. *See* 735 S.E.2d at 512 (rejecting argument and explaining that "[t]he 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"). Tellingly, the words

“evidence offered by an opponent” never appear in Rule 50(b). Instead, that Rule plainly refers to a motion made at the “close of all the evidence.” Rule 50(b), SCRCP. 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.” *Id.* There is nothing new about this rule. *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.”).

In support of his argument, Stephens also misstates the Court of Appeals’ 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 defendants.” Petition, at 7 (emphasis in original). This argument is misleading, however, because this was not even an issue concerning the other defendants because those other defendants had been *granted* JNOV.

The fallacy in the logic of Stephens' argument is also demonstrated by the following example. If Stephens argument 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 end of the trial. 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.”).¹

In short, the Court of Appeals ruled correctly in finding that Stephens had waived his right to seek JNOV by not moving for directed verdict at the close of all the evidence. There is no basis to grant certiorari for further review of this issue.

B. The Court of Appeals Did Not Make An Unconstitutional Rule Change.

Stephens also makes a curious argument that the Court of Appeals' opinion somehow constituted “an unconstitutional rule change of the existing Rule 50, SCRPC.” However, the Court of Appeals neither created nor suggested any new rule, but merely applied the plain language of the current rule and ruled against Stephens, finding he had not followed the rule. Stephens may disagree with this finding, but this does not mean the Court of Appeals somehow altered the South Carolina Rules of Civil Procedure. If anything, it is Stephens who is asking this Court to effect a rule change by omitting the

¹ For these reasons, Stephens is incorrect in asserting that the Court of Appeals' decision “directly conflicts with decisions of this Court.” Petition, at 4. The only case he discusses on this point is *Henderson*, but that was not a decision of this Court, and there is nothing conflicting about it. On the contrary, *Henderson* supports the Court of Appeals' decision here.

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 to the rules of civil procedure.

Moreover, this case has nothing to do with “unconstitutional rule changes.” Stephens is attempting to raise an issue on appeal that he never properly presented to the trial court. The rules on issue preservation, which are clear and were correctly applied by the Court of Appeals in this case, have always foreclosed new arguments on appeal, as they are unfair to both the trial judge and the opposing parties.

C. The Parties’ Stipulation and Opening Statements Cannot Cure Stephens’ Failure to Preserve His Argument

Stephens also incorrectly contends that the Court of Appeals “ignore[d] the effect and importance of the stipulation” reached by the parties concerning the train’s event recorder. Petition, at 13. The Court of Appeals specifically referred to the stipulation, but explained that it could not change the fact that Stephens failed to preserve the issue for appeal.

By not renewing his motion, Stephens never gave the 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.

735 S.E.2d at 514. The trial court made this point clear 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).²

Stephens' efforts to highlight isolated comments in CSX's opening statement about the alleged failure to sound the horn – which are not evidence and could not be considered by the jury as such in any event – fare no better. As the Court of Appeals explained, regardless of any alleged admissions, Stephens did not preserve his argument because he did not move for directed verdict at the close of all the evidence. *See id.* In fact, the Court of Appeals correctly observed that Stephens did not even make this argument when he made his only motion for directed verdict, prior to the close of all the evidence. *See id.* The only reference Stephens made to CSX's opening statement in his motion for directed verdict – which, again, occurred prior to the close of the evidence – was to statements about CSX's clearing of vegetation at the crossing. R-5-1061. In other words, Stephens never argued to the trial court about CSX's opening statements concerning the horn until *after* trial and *after* the jury's decision.³

The Court of Appeals' 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

² Indeed, the Court of Appeals could hardly have given more consideration to the stipulation than it did, because Stephens elected not to include it in the Record on Appeal. *See id.* at 513 n.4.

³ Moreover, from start to finish in this case CSX denied that it was liable for the claims asserted, and, as discussed in the following section, there was overwhelming evidence presented to the jury to support its verdict in favor of CSX. *See infra* § I.D. Furthermore, Stephens' arguments about the horn are somewhat of a red herring, as his own expert contended that Colvin would not have heard the train horn regardless of when or where it was sounded. (R. pp. 324-26).

JNOV. The Court of Appeals has already fully heard and considered Stephens' arguments, and there is no reason to hear them again in this Court.

D. A Plaintiff Cannot Obtain Judgment Notwithstanding the Verdict Where He Concedes that Factual Disputes Exist on an Essential Element of his Claim and Sufficient Evidence Supports the Jury's Verdict.

Even if Stephens had preserved these issues for appeal, they would fail for a more fundamental reason. Stephens could not have been entitled to *judgment* notwithstanding the verdict, or JNOV, because he has conceded all along that “factual issues existed under each theory” of liability, including proximate cause. Stephens' Br., at 9; *see also* R-1, 3. A party moving for JNOV 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), SCRPC (emphasis added). The moving party 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).

The trial court could not have committed reversible error in denying Stephens' post-trial motion. Stephens' motion sought JNOV on the basis that CSX allegedly failed to sound the horn in accordance with § 58-15-910 and failed to clear the crossing in accordance with its rules and regulations. R-1-38. Yet, as the trial court noted in its order denying the motion, Stephens “did not contest that the issue of proximate cause on both the short whistle and vegetation claims were for the jury.” R-1-3. Under these circumstances, Stephens could not have been entitled to *judgment* in his favor, and the denial of his JNOV motion was not error. *See Hinds v. Elms*, 358 S.C. at 585.

Furthermore, even without the concessions on proximate cause, Stephens could not have been entitled to JNOV because the evidence at trial was more than sufficient to submit the case to a jury. Numerous witnesses – including one located *directly behind the Colvin vehicle at the crossing* – testified they heard and saw the train well in advance of the accident. (R. p. 714) (Larry Biser, testifying that “[a]s we was [sic.] approaching Highway 68, you could see – you could hear the train blowing its horn,” and that he was so aware of the train and that he would have to wait for it to pass, he “put [his] truck in park and shut it off”); (R. p. 263) (Lon Hoover, who testified that he heard the train and its approach from a quarter mile away); (R. pp. 353-54) (Patricia Griffith, who testified that the horn was so loud as it approached the crossing that she complained to her children about the noise); (R. pp. 278-80, 294) (Stephens’ expert, who 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).

There was also considerable 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). Given all of this evidence, the trial court could not have taken the case from the jury and granted *judgment* to Stephens.

II. The Court of Appeals Correctly Affirmed the Trial Court’s Jury Charges

A. Appellate Courts are not Required to Rule on Irrelevant Issues.

Stephens also asks this Court to review the Court of Appeals’ decision on the jury charges, arguing initially that the Court of Appeals erred because it “refused” to “address the charge as a whole to determine whether [he] is entitled to reversal.” Petition, at 17. However, this argument does not fairly explain that the Court of Appeals did review as a whole the charges that were relevant to the jury’s verdict and the issues on appeal.

At the Court of Appeals, Stephens raised numerous issues concerning the trial court’s jury charges. Some of the charges related to the duties of CSX and DOT, while others concerned the duties of motorists. Because the jury specifically found no breach of any duty by CSX or DOT, it did not have to consider any additional charges on duties of third parties. The Court of Appeals properly declined to rule on arguments concerning these additional charges because they could not have prejudiced Stephens and were, therefore, not relevant to the issues on appeal.

There is nothing wrong with this approach, as appellate courts cannot reverse on the basis of jury charges that did not prejudice the appellant. *See Giles v. Lanford & Gibson, Inc.*, 285 S.C. 285, 291, 328 S.E.2d 916, 919-20 (Ct. App. 1985) (“Since the jury

found constructive fraud, not negligence, the charge regarding negligence obviously had no influence on their verdict. Therefore, Lanford & Gibson were not prejudiced by the judge's instruction on this issue."); *see also 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"). As to those charges that were relevant to the issues on appeal, the Court of Appeals properly considered them as a whole and, as discussed below, properly affirmed the trial court's charge.

B. The Trial Court Properly Instructed the Jury on CSX's Duties

Stephens challenges two jury charges he proposed concerning CSX's duties, but does not set forth the actual language of the charges in his petition. From the context of his argument, however, he appears to be referring to those in § V.A. of the Court of Appeals' opinion, which refer to a railroad's duty to maintain its right of way free from obstructions. *See* 735 S.E.2d at 514-515.

As the Court of Appeals properly concluded, the trial court's charge as a whole instructed the jury on the substance of both proposed charges, and it properly conveyed the mutual duties owed by the railroad and motorists. *Id.* Our courts have long held that 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 verbiage.") (citation omitted). Here, the trial court adequately and correctly charged the jury on CSX's duties, including general instructions on negligence, as well as more specific charges on a railroads duty at crossings. Stephens complains that the charge needed to include

wording about the “added care” railroads allegedly have where there are obstructions, but the Court of Appeals correctly ruled that this concept was already implicit in the charge and was a factual issue the parties were free to argue at closing.

The trial court was also understandably reluctant to accept the exact language of Stephens’ charges because they were not contained in or supported by the cases he provided to the court, *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). The language supposedly drawn from *Lowery* was nothing more than a recitation of the *plaintiff’s allegations*, and there was no holding in *Gleaton* about vegetation at a crossing creating an added duty of care in the operation of a locomotive. (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”).⁴

In any event, Stephens could not have been prejudiced by the trial court’s instructions, because the trial court specifically charged the jury on the railroad’s duty at crossings, including that it “may be affected by obstructions which prevent the track from being seen as a train approaches.” (R. pp. 1449, 1462). The same is true of Stephens’ claim that the charges somehow put higher duties on the motorist, because the trial court explicitly charged that “there is a *mutual* duty on traveler and railroad to exercise due

⁴ Stephens’ claim on appeal that CSX had an alleged duty of “added care” in the “operation” of the train due to vegetation at the crossing is also without merit, because Stephens’ only argument concerning a breach of the duty of care in the “operation” of the train related to the statutory duty for sounding of the bell and whistle at the prescribed distance. Yet, this statutory duty is not modified or “added” due to any alleged obstructions at the crossing. In any event, the jury was charged on the statutory duty, so there can be no prejudice.

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). The trial court adequately instructed the jury about the railroad’s duties, and there are no “special and important reasons” this Court should grant a writ of certiorari just to confirm this fact. Rule 242(a), SCACR.⁵

C. The Charges Concerning Signage Rules and SCDOT’s Authority to Close Crossings Were Relevant and Properly Charged.

Stephens briefly argues that certiorari is appropriate to review the Court of Appeals’ decision affirming the trial court’s charging of statutes related to the placement of signs at railroad crossings, §§ 56-5-1010, 58-17-1390, and 56-5-1020, and to the authority of SCDOT to close railroad crossings, § 58-16-1625. 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.⁶

Instead, Stephens claims that the statutes were not relevant to the dispute. However, as the Court of Appeals appropriately explained, these statutes all related to Stephens’ claims. *See* 735 S.E.2d at 516. The first two statutes, which concern a railroad

⁵ Stephens also claims that CSX admitted that the vegetation in “Quadrant A” of the crossing should have been cut, but this is not a complete or fair statement of CSX’s position. Petition, at 19. The crossing was scheduled for the clearing program, but the quadrant in question was not cleared due to a landowner dispute. Nevertheless, there was still more than adequate sight distance and the crossing was safe. CSX’s position throughout the trial was that the crossing clearing program was merely an extra step in making a safe crossing even safer. *See generally* R. p. 1568 (testimony of Kelly Goedde by video deposition p. 66, ll. 2-6).

⁶ Stephens also seeks review of the Court of Appeals’ decision concerning various charges related to DOT, including its discretionary immunity pursuant to S.C. Code Ann. §15-78-60(5). These issues do not concern CSX and could not serve as a basis for a new trial against it. Therefore, CSX will not address these arguments except to note that the trial court did not err in its charge on these issues, nor did the Court of Appeals commit any error in affirming them.

company's duties to install certain signs at crossings, were relevant because Stephens alleged that CSX was negligent "in maintaining an unreasonably hazardous and unsafe crossing" and "in failing to maintain adequate warning devices at the crossing." *Id.* The third statute, which prohibits unauthorized signs, signals, or other devices at crossings, was also relevant because Stephens' own expert testified that active traffic-control devices – which, under the statute, required DOT approval – would have made the crossing safer. *Id.* The final statute, which gives DOT the authority to close crossings, was relevant because it was necessary to inform the jury that CSX lacked authority to close the crossing without DOT's permission. *Id.* In light of the testimony presented by Stephens at trial, 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.

D. The Trial Judge Properly Instructed the Jury on a Motorist's Obligations

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 a motorists' duty to stop at stop signs, and on the impairment of motorists due to drugs and alcohol. As explained by the Court of Appeals, Stephens' arguments are irrelevant at this stage in light of the jury's determination, because the jury never reached the issues about the duties of third-party motorists. *See* 735 S.E.2d at 514. Even if Stephens' challenges were relevant on appeal, the trial court properly instructed the jury and the Court of Appeals properly affirmed.⁷

⁷ Stephens makes the incorrect argument that the jury, by finding no breach of the duty of care by CSX or SCDOT, must have necessarily found third party Tonia Colvin to be the "sole negligent actor which produced the accident." Petition, at 22. However, the

1. The Charges Concerning Stop Signs Were Correct.

Stephens does not dispute the legal accuracy of the charges, which are taken directly from the statutes, but claims that they 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 before the trial court 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). S.C. Code § 56-5-2740 contains a similar and straightforward rule 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). There is nothing improper about instructing a jury about a motorist’s duties to stop at stop lines and watch for oncoming traffic.

jury verdict demonstrates that the jury determined Stephens failed to meet his burden of proving negligence by CSX or SCDOT, and an appellate court has no reason to consider what else may have proximately caused or “produced the accident.”

Stephens argues 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. Petition, at 22.

There is, however, no conflict, nor anything improper about Colvin stopping at the stop line that DOT had deliberately placed. 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. 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.⁸

⁸ As noted above, there was no prejudice in giving these charges on third-party duties because the jury never reached them. Moreover, the evidence showed that Tonia Colvin *did stop* at both the stop sign and the stop line in this case. *See, e.g.*, R. p. 714 (testimony

2. The Trial Judge Correctly Charged the Jury on Impairment.

The trial judge also acted well within her discretion to charge the jury that it 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.” (R. pp. 1456-58). As a threshold matter, Stephens cannot complain about this charge, which is based on language from S.C. Code Ann. § 56-5-2930, because *he agreed to it in the trial court*. Stephens incorrectly claims to have “lodged objections at the charging of this statute” at “various stages of the trial,” Petition, at 23. However, he actually agreed to the charging of the statute with the following additional language, which 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.”). An appellate court cannot reverse a trial court on a jury charge that the appellant approved. *See Keaton ex rel. Foster v. Greenville Hosp. System*, 334 S.C. 488, 495, 514 S.E.2d 570, 573-74 (1999) (requiring objection and specific ruling on jury charge to appeal).

Furthermore, there was more than sufficient evidence in the record to support this charge, including Tonia Colvin’s own admission that she had consumed both alcohol, prescription drugs, and “potentially some other things” that could have affected her

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”).

judgment. (R. p. 473). Colvin also admitted telling an EMT that she had been drinking, that the EMT said she smelled of alcohol, and that there were dangers in mixing alcohol and her medications. (R. p. 460-67, 484). Hospital lab reports were also positive for opiates, which could have come from the medications, or from the “other things” she admitted having taken. (R. p. 538). Indeed, Stephens made this an issue from the outset of the trial, volunteering to the jury that Tonia Colvin had been drinking and had taken prescription narcotics on the day of the accident. (R. p. 43).

On this record, the trial court was well within its discretion to give the charge and allow the jury to decide the issue. *See Dixon v. Weir Fuel Co.*, 251 S.C. 74, 160 S.E.2d 194, 197 (1968) (“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.”); *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”).

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

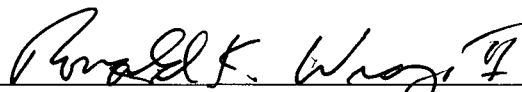
was at that time five one-hundredths of one percent or less, it is conclusively presumed that the person was not under the influence of alcohol.” S.C. Code Ann. § 56-5-2950(b).⁹ This charge, however, would have been confusing, because the “presumption” is inapplicable because Tonia Colvin admitted she 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” did not apply and would have confused the jury.

Stephens also cannot show any prejudice. As noted above, the trial judge did give Stephens’ requested charge, “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). Moreover, and as is the case for all the charges concerning Tonia Colvin, the jury never had to reach these issues because it found no breach of duty by CSX or SCDOT. Considering the relevant charges as a whole, the trial court committed no error.

⁹ 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).

CONCLUSION

For the foregoing reasons, this Court should deny Stephens' petition for certiorari.



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 SUPREME COURT

APPEAL FROM HAMPTON COUNTY
COURT OF COMMON PLEAS

CARMEN TEVIS MULLEN, Circuit Court Judge

APPELLATE CASE NO.: 2013-000133

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

vs

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

PROOF OF SERVICE

The undersigned, an attorney in this matter for the Respondent, CSX Transportation, Inc., certifies that I have this 8th day of February, 2013, served copies of Respondent, CSX Transportation, Inc.'s, Return to Petition for Writ of Certiorari upon counsel for the Appellant and counsel for Respondent, South Carolina Department of Transportation by causing them to be deposited in the United States Mail, first-class postage prepaid, addressed to:

Mr. John E. Parker
Mr. Matthew V. Creech
Peters, Murdaugh, Parker, Eltzroth & Detrick, P.A.
P.O. Box 457
Hampton, SC 29924

Mr. Peden B. McLeod
McLeod, Fraser & Cone
P. O. Drawer 230
Walterboro, SC 29488.

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

Mr. Andrew Lindemann
Davidson & Lindemann, P.A.
PO Box 8568
Columbia, SC 39303-8568



Ronald K. Wray, II (S.C. Bar #65246)
Thomas Vanderbloemen (S.C. Bar #75784)
GALLIVAN, WHITE & BOYD, P.A.
55 Beattie Place; Suite 1200
Post Office Box 10589
Greenville, SC 29603
(864) 271-9580

Attorneys for Respondent CSX Transportation