

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM HAMPTON COUNTY
Carmen Tevis Mullen, Circuit Court Judge

Op. No. 27587
(S.C. S.Ct. filed November 4, 2015)

RECEIVED
DEC 10 2015
S.C. Supreme Court

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

v.

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

**REPLY TO PETITIONER'S RETURN TO
PETITIONS FOR REHEARING**

The Respondent South Carolina Department of Transportation (SCDOT) has petitioned this Court for a rehearing of its recent decision in *Stephens v. CSX Transportation, Inc.*, Op. No. 27587 (S.C. S.Ct. filed November 4, 2015). The Petitioner has now filed a return to which a brief reply is warranted.

In that return, the Petitioner relies upon a standard for assessing prejudice from an erroneous jury charge that has previously been rejected by this Court. The Petitioner recognizes that the majority concluded that "erroneous jury charges *may* have contributed to the jury's findings on the liability issues," and on that basis, the Petitioner maintains that the majority was "*obligated* to reverse for a new trial." *See*, Petitioner's Return, p. 2. (Emphasis added). In making that statement, the Petitioner errs in relying on a principle of law from the case of *Wells v. Halyard*, 341 S.C. 234, 533 S.E.2d 341 (Ct. App. 2000), where the Court of Appeals wrote: "An alleged error is harmless if the appellate court determines beyond a reasonable doubt that the alleged error did not contribute to the verdict." 533 S.E.2d at 343. Relying on that citation, the Petitioner claims that a "reasonable doubt" standard applies when an appellate court evaluates whether an erroneous charge was prejudicial.

However, this very issue was addressed by this Court in *Fairchild v. South Carolina Department of Transportation*, 398 S.C. 90, 327 S.E.2d 407 (2012). In that unanimous opinion, this Court recognized as follows:

Palmer takes issue with one case the court cited, *Wells v. Halyard*, 341 S.C. 234, 533 S.E.2d 341 (Ct. App. 2000), which states: "An alleged error is harmless if the appellate court determines beyond a reasonable doubt that the alleged error did not contribute to the verdict." Palmer contends the "beyond a reasonable doubt" reference is a criminal standard that is not applicable in this civil case. We agree, but find the citation to *Wells*

did not affect the propriety of the conclusion reached by the Court of Appeals in *Fairchild*.

327 S.E.2d at 414, n.5.¹

Thus, the applicable standard for assessing the prejudicial impact, if any, of an erroneous charge is not a "reasonable doubt" standard. Likewise, the standard should not be a "may have tainted" standard as employed by the majority in this case. The standard should not be one that relies on mere speculation or possibilities. Instead, as this Court has consistently required in the past, prejudice needs to be demonstrated in order for a verdict to be overturned. This Court's precedent, in fact, has required that prejudice be shown to be a "reasonable probability" which is a substantially different standard than the "reasonable doubt" standard argued by the Petitioner or the "may have tainted" standard employed by the majority in this case. *See e.g., Fields v. J. Haynes Waters Builders, Inc.*, 376 S.C. 545, 658 S.E.2d 80, 86 (2008) ("[p]rejudice is a reasonable probability that the jury's verdict was influenced by the challenged evidence or the lack thereof"); *Conner v. City of Forest Acres*, 363 S.C. 460, 611 S.E.2d 905 (2005) (same); *Austin v. Stokes-Craven Holding Corp.*, 387 S.C. 22, 691 S.E.2d 135 (2010)

¹ On rehearing, the Court is urged to take this opportunity to clarify that the "reasonable doubt" standard in *Wells* has been overturned. Since *Fairchild* was decided in April 2012, judges continue to rely on that citation from *Wells*. One example is Judge Short's dissent in this case, where he cited *Wells* as a basis for concluding that "these errors were not harmless beyond a reasonable doubt." *Stephens v. CSX Transportation, Inc.*, 400 S.C. 503, 735 S.E.2d 505, 518 (Ct. App. 2012) (Short, J., dissenting). In Judge Short's defense, the *Fairchild* opinion was only recently issued when his dissent was published.

(same).²

The Respondent SCDOT submits that a rehearing is warranted in this case to address the appropriate standard for assessing prejudice from an erroneous jury charge. The Court is urged to reject the "reasonable doubt" standard -- as the Court did in *Fairchild* -- as well as the "may be tainted" standard employed in this case. The Court is urged to apply longstanding precedent and require that the prejudice be shown as a "reasonable probability." The "may have tainted" standard employed in this case is clearly a much lesser standard than "reasonable probability." As this majority's discussion reflects, the "may have tainted" standard is satisfied by a *possibility* of prejudice, while the existing "reasonable probability" standard requires just that -- a *probability* of prejudice.

If the "reasonable probability" standard is employed in this case, the Court should conclude that the Petitioner has not shown a reasonable probability of prejudice -- *particularly in light of the special interrogatory finding that SCDOT was not negligent*. Accordingly, the jury's verdict in favor of SCDOT should be upheld.

² There is no reason that the standard for showing prejudice for an erroneous evidentiary ruling is or should be any different than the standard for showing prejudice for an erroneous jury instruction.

Respectfully submitted,

DAVIDSON & LINDEMANN, P.A.

BY:  _____

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

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

*Counsel for Respondent South Carolina
Department of Transportation*

Columbia, South Carolina

December 10, 2015

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM HAMPTON COUNTY
Carmen Tevis Mullen, Circuit Court Judge

Op. No. 27587
(S.C. S.Ct. filed November 4, 2015)

RECEIVED

DEC 10 2015

S.C. Supreme Court

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

v.

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

CERTIFICATE OF SERVICE

The undersigned employee of Davidson & Lindemann, P.A., attorneys for the Respondent South Carolina Department of Transportation, does hereby certify that service of the **Reply to Petitioner's Return to Petitions for Rehearing** was made upon all counsel of record by placing copies in the United States Mail, first class postage prepaid, at the below listed addresses clearly indicated on said envelopes this the 10th day of December 2015:

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

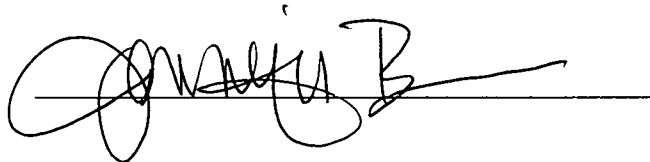
Carl H. Jacobson, Esquire
Uricchio, Howe, Krell, Jacobson,
Toporek, Theos & Keith, P.A.
Post Office Box 399
Charleston, South Carolina 29401

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

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

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

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

A handwritten signature in black ink, appearing to read 'Jonathan P. Harmon', is written over a horizontal line. The signature is stylized and cursive.