

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM SPARTANBURG COUNTY
J. Mark Hayes, II, Circuit Court Judge

Appellate Case No. 2015-001828
Case No. 2013-CP-42-2404

Lisa McKaughan, Individually and as the
Personal Representative of the Estate of William Farr, Appellant,

v.

Upstate Lung and Critical Care Specialists, P.C.; and
Sau-Yin Wan, M.D., Respondents.

RESPONDENTS' PETITION FOR REHEARING

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SEP 29 2017

SC Court of Appeals

The Respondents Sau-Yin Wan, M.D. and Upstate Lung and Critical Care Specialists, P.C. petition the South Carolina Court of Appeals for a rehearing of the Court's recent decision in *McKaughan v. Upstate Lung and Critical Care Specialists, P.C.*, Op. No. 5515 (S.C. Ct. App. filed September 14, 2017).

The grounds for the Respondents' petition for rehearing are addressed in detail in the supporting memorandum filed herewith and incorporated herein.

The Respondents' petition for rehearing is based on the Court's decision in *McKaughan v. Upstate Lung and Critical Care Specialists, P.C.*, Op. No. 5515 (S.C. Ct. App. filed September 14, 2017); the supporting memorandum filed herewith; the briefs and Record on Appeal; Rule 221(a), SCACR; Rule 224, SCACR; and other rules of court.

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September 29, 2017

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**MEMORANDUM IN SUPPORT OF
RESPONDENTS' PETITION FOR REHEARING**

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SC Court of Appeals

The Respondents Sau-Yin Wan, M.D. and Upstate Lung and Critical Care Specialists, P.C. have petitioned this Court for a rehearing of its recent published decision in *McKaughan v. Upstate Lung and Critical Care Specialists, P.C.*, Op. No. 5515 (S.C. Ct. App. filed September 14, 2017). The Respondents respectfully submit that the following points were overlooked or misapprehended by the Court:

In reversing the directed verdict entered by the trial court, this Court analyzed the basis for the trial judge's ruling solely as a sufficiency of the evidence issue rather than what was the absolute essence of that ruling -- whether the causation evidence presented by the Appellant was reliable under the test established in *State v. Council*, 335 S.C. 1, 515 S.E.2d 508 (1999). In order to justify a reversal of the directed verdict, this Court inexplicably failed to even address the reliability of the causation evidence presented. Moreover, in so ruling, the Court applied an incorrect standard of review, having entirely disregarded the abuse of discretion standard which is applicable to a trial judge's determination of the *reliability* of expert evidence in fulfilling his gatekeeping role under Rule 702, SCRE, and the test established in *Council*. The standard of review, in fact, requires that great deference be given to the trial judge's evidentiary rulings. *See, State v. Torres*, 390 S.C. 618, 703 S.E.2d 226, 230 (2010) ("[t]he appellate court reviews a trial judge's ruling on admissibility of evidence pursuant to an abuse of discretion standard and gives great deference to the trial court").

The Court's errors in addressing this complex medical malpractice case are multi-faceted. The Court failed to recognize that the Appellant presented Dr. Willard Milby, a pathologist, as her causation expert. Instead, the Court focused on the testimony of Dr. Barry Singer without any mention at all of Dr. Milby's opinions. Yet, Dr. Singer distinctly testified that he is not a pathologist and is not qualified to

offer opinions in the field of pathology. (R. 223). He readily deferred to the opinions of the pathologist -- Dr. Milby -- as to what types of lung cancer the decedent William Farr had. (R. 223-224). Disregarding that admitted deference by Dr. Singer, the Court reversed the directed verdict and failed to address the actual causation testimony offered by Dr. Milby which had been determined to be unreliable by Judge Mark Hayes at trial.

Without conducting any analysis under Rule 702 and *Council*, the Court summarily rejected the results of the trial judge's gatekeeping role. The Court did this by treating the issue as one of *sufficiency* of the evidence rather than *reliability* of the evidence. The Court made no assessment of reliability of the causation testimony on which it based the reversal of the directed verdict motion. More importantly, the Court failed to actually discuss or explicitly reverse the trial judge's reliability rulings under *Council*. Instead, by footnote at the close of the opinion, the Court states only that it "declines to address McKaughan's arguments regarding expert testimony that was excluded as reliable." Slip Op. at 7. Those reliability rulings -- which are subject to an abuse of discretion standard rather than a "mere scintilla" standard -- are the crux of the directed verdict and should not have been disregarded or overlooked in adjudicating this appeal. Even if the Court finds that conclusory opinions of Dr. Singer satisfy the "mere scintilla" standard, such evidence must first meet the

reliability requirement under Rule 702 and *Council* in order even be deemed admissible.¹

As an additional error, the Court overlooked and failed to apply the critical element in a medical malpractice case that mandates that "the expert testimony as to proximate cause must provide a *significant causal link* between the alleged negligence and the injuries suffered, rather than a tenuous and hypothetical connection." *Martasin v. Hilton Head Health System, L.P.*, 364 S.C. 430, 613 S.E.2d 795, 800 (Ct. App. 2005). (Emphasis added). The Appellant's causation evidence, even with consideration of the unsupported opinions of Dr. Singer, does not meet this standard. As Judge Hayes correctly determined, without evidence as to how the cancer spread from the right lung to the left lung, the Appellant could not and did not show a "significant causal link." Judge Hayes correctly explained that the Appellant has "got that burden of proof of establishing what – some way how that cancer got from one lung to the other. ... I'm not convinced that it's enough for a doctor to come in and look at the end result and say okay, this cancer's the same as the other cancer, ... it metastasized and not say well how it did." (R. 607). Judge Hayes was concerned with "allow[ing] the jury to speculate as to how it got from one lung to the other." (R. 607). Later, in his ruling on the

¹ The Respondents rely on and incorporate herein by reference the detailed discussion regarding the unreliability of the Appellant's causation evidence as set forth in their brief to this Court.

directed verdict motion, Judge Hayes explained that "the Plaintiff has to explain to the jury medically how that transfer happened." (R. 617).

Judge Hayes recognized that, consistent with the expert testimony presented including the testimony of Dr. Milby, there are three mechanisms by which cancer typically metastasizes: (1) through the lymphatic system, (2) through the bloodstream (i.e., "hemotogenous spread"), or (3) by direct extension. (R. 512, 559). Importantly, the Appellant was unable to point to any of these three mechanisms to explain the alleged spread of the cancer from the decedent's right lung to his left lung. Even Dr. Singer, on whose testimony the Court solely relies to reverse the directed verdict, could not opine that one of those three mechanisms supported the Appellant's theory of liability. Dr. Singer's testimony, when closely examined, offers only possibilities -- but no concrete explanation for causation that satisfies the "most probably" standard. *See generally, Harris v. Rose's Stores, Inc.*, 315 S.C. 344, 433 S.E.2d 905, 907 (Ct. App. 1993). ("[c]ausation based upon a possibility rather than a probability is not sufficient for a plaintiff to recover"). In fact, as the basis for its reversal of the directed verdict, the Court specifically relies on Dr. Singer's testimony that "these close margins indicated 'there's a great risk that cells may have been left after the surgery.'" Slip Op. at 7. That testimony using the term "may" does not meet the requirement that causation be proven to a probability. Moreover, it shows that Dr. Singer was only speculating, at best, as to a

mechanism of spread. Likewise, the Court cites Dr. Singer's testimony that "30% of patients with negative margins and no lymph node involvement subsequently have a recurrence of cancer." Slip Op. at 7. That testimony also does not provide proof of causation meeting the "most probably" standard. Thus, contrary to this Court's conclusion, Dr. Singer's testimony does not, in fact, provide sufficient evidence of causation to survive the Respondents' directed verdict motion.

Moreover, the Appellant's counsel conceded in his directed verdict argument that Dr. Singer "can't offer an opinion on how it spread." (R. 607). But, this Court nonetheless found his testimony sufficient to prove a metastasis, which with all due respect is in error.

In reversing the directed verdict, the Court excuses the Appellant's lack of proof of causation by concluding that "the trial court imposed too high a burden on McKaughan to prove how the cancer spread from one lung to the other." Slip Op. at 5. The Court found that "it was an error of law to direct a verdict in favor of Respondents because Dr. Singer did not definitively indicate by what method the cancer metastasized." Slip Op. at 5. The Court went on to explain that "[i]f a plaintiff presents an expert who testifies, to a reasonable degree of medical certainty, *and with supporting scientific evidence*, that the plaintiff's cancer is a metastasis, the plaintiff has met its burden to overcome a directed verdict." Slip Op. at 6. (Emphasis added).

The Court's error in this ruling was two-fold. First, the Court erred in finding that proof of a mechanism of spread was "too high a burden." That proof was necessary to establish the requisite significant causal link, just as Judge Hayes correctly determined. Second, the Court makes no mention of the requirement that the "supporting scientific evidence" be reliable under Rule 702 and the *Council* test. In fact, the Court explicitly declined to address the reliability of the causation evidence -- which again is the crux of this case and the trial judge's ruling at the directed verdict stage. In effect, the Court stripped Judge Hayes of his gatekeeper role under *Council*, which clearly merits a rehearing of this appeal.

CONCLUSION

Based on the foregoing discussion, the Respondents respectfully request that the Court rehear its published decision and affirm the directed verdict entered by Circuit Court Judge J. Mark Hayes, II.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned employee of Davidson & Lindemann, P.A., counsel for the Respondents, does hereby certify that service of **Respondents' Petition for Rehearing** and **Memorandum in Support of Respondents' Petition for Rehearing** in the above-captioned matter was made upon all counsel of record by placing copies in the United States Mail, first class postage prepaid, at the below listed addresses clearly indicated on said envelopes this the 29th day of September 2017:

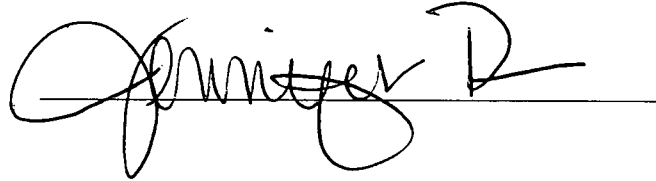
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A handwritten signature in black ink, appearing to read "David L. Williford, II", written over a horizontal line. The signature is highly stylized and cursive.

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The Honorable Jenny Abbott Kitchings
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RE: Lisa McKaughan, Individually and as the Personal Representative of the Estate of William Farr v. Upstate Lung and Critical Care Specialists, P.C.; and Sau-Yin Wan, M.D.
Appellate Case Number: 2015-001828
Civil Action Number: 2013-CP-42-2404
Our File Number: 359.9771

Dear Ms. Kitchings:

Please find enclosed for filing the originals and seven copies each of **Respondents' Petition for Rehearing** and **Memorandum in Support of Respondents' Petition for Rehearing** in the above referenced matter. Please file the originals and return a clocked-in copy of each document to me by way of my courier. I have also enclosed my firm's \$25.00 check for the filing fee.

By copy of this letter, I am serving copies on all counsel of record. Thank you for your assistance in this matter.

Sincerely,

DAVIDSON & LINDEMANN, P.A.



Andrew F. Lindemann

AFL/jmb
Enclosures

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SC Court of Appeals

The Honorable Jenny Abbott Kitchings
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Page Two

cc: (w/ Enclosures)

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