

THE STATE OF SOUTH CAROLINA
In The Supreme Court

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

Opinion No. 5515
(S.C. Ct. App. filed September 14, 2017)

RECEIVED

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S.C. SUPREME COURT

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

v.

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

APPENDIX

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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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.

Appellate Case No. 2015-001828

Appeal From Spartanburg County
J. Mark Hayes, II, Circuit Court Judge

Opinion No. 5515
Heard February 15, 2017 – Filed September 14, 2017

REVERSED

Jordan Christopher Calloway, of McGowan Hood &
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LOCKEMY, C.J.: In this medical malpractice action, Lisa McKaughan, individually and as personal representative of the estate of her father, William Farr, alleges the circuit court erred by directing a verdict in favor of Critical Care Specialists and Dr. Sau-Yin Wan (collectively Respondents). McKaughan also

alleges the circuit court improperly excluded the testimony of her expert as unreliable. We reverse.

FACTS

On January 11, 2010, Dr. Sau-Yin Wan, a pulmonologist, examined William Farr, a lifelong smoker with complaints of trouble breathing. During Dr. Wan's examination, she ordered a chest x-ray. Dr. Wan interpreted the x-ray herself and determined Mr. Farr suffered from hyperinflation, meaning there was too much air in Mr. Farr's lungs. Dr. Wan specifically looked for nodules in the lungs, which would signal cancer, but did not find any. Dr. Wan diagnosed Farr with dyspnea, COPD, nondependent tobacco use disorder, and hypoxemia. None of these diagnoses indicated the presence of cancer. Dr. Wan recommended Farr stop smoking and instructed him to return to the clinic in six months in order to determine if he stopped smoking. Mr. Farr did not return for his follow-up appointment.

Following his initial consultation with Dr. Wan, Farr had continuing trouble breathing. McKaughan scheduled an appointment for her father to see Dr. Ronald Littlefield on October 6, 2010. On October 7, 2010, Dr. Littlefield ordered an x-ray of Farr's chest. The x-ray showed a large mass in Farr's right lung. Dr. Littlefield referred Farr to the Lung and Chest Medical Associates for further evaluation.

Eventually, doctors diagnosed Farr with a nine-centimeter primary lung cancer in his right lung. Doctors removed Farr's cancer in December 2010, and he began chemotherapy and radiation after the surgery.

Farr subsequently developed a tumor in his left lung in August 2011. Doctors biopsied the tumor and found it was cancerous in April 2012. Doctors diagnosed him with stage four lung cancer, with a three to six month prognosis. Farr died on June 19, 2012. His death certificate lists metastatic lung cancer as the cause of death.

McKaughan filed a lawsuit on May 30, 2013 against Respondents alleging medical malpractice in their care of her father. She alleged Respondents caused her father's death by failing to diagnose his lung cancer during the January 2010 appointment. The case proceeded to trial on July 27-29, 2015. After McKaughan presented her case, Respondents requested the trial court direct a verdict in their favor. Respondents alleged McKaughan failed to present sufficient evidence of a breach

of a standard of care or that any breach caused Farr's death. The trial court denied Respondents' motion on the standard of care issue, but granted their motion because it did not believe McKaughan presented sufficient evidence of causation. The trial court found McKaughan failed to present evidence of how the cancer metastasized from the right lung to the left lung, meaning the jury would have to speculate as to the method of metastasis. This appeal followed.

STANDARD OF REVIEW

"When reviewing a trial court's ruling on a directed verdict motion, this court will reverse if no evidence supports the trial court's decision or the ruling is controlled by an error of law." *Burnett v. Family Kingdom, Inc.*, 387 S.C. 183, 188, 691 S.E.2d 170, 173 (Ct. App. 2010). "When reviewing the trial court's decision on a motion for directed verdict, this court must employ the same standard as the trial court by viewing the evidence and all reasonable inferences in the light most favorable to the nonmoving party." *Id.* "The trial court must deny a directed verdict motion where the evidence yields more than one inference or its inference is in doubt." *Id.*

LAW/ANALYSIS

A medical malpractice plaintiff must prove, by a preponderance of the evidence:

- (1) The presence of a doctor-patient relationship between the parties;
- (2) Recognized and generally accepted standards, practices and procedures which are exercised by competent physicians in the same branch of medicine under similar circumstances;
- (3) The medical or health professional's negligence, deviating from generally accepted standards, practices, and procedures;
- (4) Such negligence being the proximate cause of the plaintiff's injury; and
- (5) An injury to the plaintiff.

Jamison v. Hilton, 413 S.C. 133, 140-41, 775 S.E.2d 58, 62 (Ct. App. 2015) (quoting *Brouwer v. Sisters of Charity Providence Hosps.*, 409 S.C. 514, 521, 763 S.E.2d 200, 203 (2014)).

"When one relies solely upon the opinion of medical experts to establish a causal connection between the alleged negligence and the injury, the experts must, with reasonable certainty, state that in their professional opinion, the injuries complained of most probably resulted from the defendant's negligence." *Id.* at 141, 775 S.E.2d at 62 (quoting *Hoard ex rel. Hoard v. Roper Hosp.*, 387 S.C. 539, 546, 694 S.E.2d 1, 5 (2010)). "The reason for this rule is the highly technical nature of malpractice litigation." *Ellis v. Oliver*, 323 S.C. 121, 125, 473 S.E.2d 793, 795 (1996). "When expert testimony is the only evidence of proximate cause relied upon, the testimony must provide a significant causal link between the alleged negligence and the plaintiff's injuries, rather than a tenuous and hypothetical connection." *Hilton*, 413 S.C. at 141, 775 S.E.2d at 62 (quoting *Hoard*, 387 S.C. at 546-47, 694 S.E.2d at 5). "Only on the rarest occasion should the trial court determine the issue of proximate cause as a matter of law." *Burnett*, 387 S.C. at 191, 691 S.E.2d at 175.

Dr. Barry Singer, an expert in medical oncology and hematology, examined Farr's medical records and testified those records indicate the right lung tumor was a stage 2B lung cancer with no metastases. Singer testified the right lung cancer was a bronchoalveolar type adenocarcinoma. According to Singer, adenocarcinoma means a tumor that develops in the glands. Specifically, Singer stated the cancer was adenocarcinoma with papillary features.

Singer's review of the pathology report compiled after Farr's 2010 surgery indicated the right lung cancer was 9x8.5x5 centimeters. Singer described the tumor as "quite large." Singer testified the tumor was likely two to three centimeters in size in January 2010.

Singer testified the larger a tumor is, the more likely it is to have spread. According to Singer, "as cancer grows, cells break off all the time. The body's immune system is able to generally prevent them taking hold and growing [what] we call a metastasis, but the more surface area, the more area cells [have] to break off." Singer asserted the prognosis for a larger tumor is no different from a small tumor "until the actual metastasis occurred. When a recurrence occurs, then the patient, in lung cancer, generally is going to die." Singer testified his

recommended treatment for Farr's cancer would not have included chemotherapy and radiation had it been discovered in January 2010 instead of October 2010. Singer testified it was his opinion that, more likely than not, had Farr's cancer been diagnosed in January 2010, Farr would have survived the cancer.

Singer stated he believed Farr's cancer metastasized from the right lung to the left lung. Singer noted the tumor cells that were removed from Farr's right lung were within one millimeter of the resection, meaning "there's a great risk that cells may have been left after the surgery." Singer opined these close margins were the reason for Farr's chemotherapy and radiation following surgery, to ensure any cells that were left were destroyed.

Singer explained the tumor on Farr's left lung was also an adenocarcinoma, but with primarily lepidic and acinar patterns. According to Singer, "as an adenocarcinoma, knowing they can have a multitude of variance in terms of appearance, that it's, to me, it would, 95 percent of the time be the same cancer" as the right lung. Singer stated the tumors contain the same cells, but different types of cells were predominate. Singer testified he would expect to see a metastasis in primary lung cancer within one-and-a-half to two years.

Singer did not find the difference between the papillary primary cancer in the right lung and the lepidic and acinar patterns in the left lung extraordinary. Singer testified that cancers are not uniform and "metastases in primaries don't often have the exact same histology." Singer further opined, "[The primary] may be predominance of one type and then metastasis [sic] because that's the most aggressive form of the tumor versus the primary." Singer testified, to a reasonable degree of medical certainty, Farr's cancer spread from his right lung to his left lung.

On cross-examination, Singer acknowledged the surgeons checked the margins around the tumor for signs of cancer cells and did not find any. The surgeons also looked at the lung itself for further signs of cancer, but did not discover any. Singer acknowledged that lymph nodes taken during the surgery tested negative for cancer cells, and there did not appear to be any vascular involvement. Singer also recognized Farr continued to smoke following his surgery. Finally, Singer acknowledged that if Farr did not die of the right lung cancer, and the right lung cancer did not spread to the left, but the left cancer was in fact a new cancer, Respondents would not be responsible for his death.

On redirect, Singer testified he has seen several thousand patients with lung cancer during his career. Singer stated a patient can have a metastasis with negative margins and no lymph node involvement. According to Singer, surgical resection does not remove every cancer cell from a patient, and "even in patients with pathologic Stage, Stage 1 lung cancer, where every node is negative and every margin is negative, 30 percent die because they have metastatic disease that turns up within a year or two." Singer testified, in his opinion, it is more likely than not that Farr was part of the 30 percent who die without lymph node involvement.

At the close of McKaughan's case, Respondents moved for a directed verdict, arguing she had not introduced any evidence of how the cancer metastasized from the right lung to the left. Respondents argued McKaughan's failure to prove a method of metastasis constituted a failure to prove causation.

McKaughan argued she does not have to prove the mechanism of spread, only that the tumor did in fact spread. McKaughan noted, "A lot of times, in a cancer spread, Your Honor, there is no evidence" of how the cancer spread.

The trial court detailed its belief that McKaughan had the responsibility to prove how the cancer got from one lung to the other. The trial court stated, "I'm just 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 met—it metastasized and not say well, how did it—that happen." McKaughan again asserted, "How something happens is not our burden." Respondents again asserted McKaughan must prove the method by which the cancer metastasized in order to prove causation.

The trial court found McKaughan had not presented sufficient evidence to prove how the cancer metastasized from one lung to the other. The trial court then granted Respondents' motion for directed verdict, reasoning that allowing the jury to deliver a verdict in this case would require them to "engage in improper speculation in [determining] how this cancer got from one side to the other."

We find the trial court imposed too high a burden on McKaughan to prove how the cancer spread from one lung to the other. In this highly technical field, where there may not be clear markers indicating by what method a cancer spreads, 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. *See Hilton*, 413 S.C. at 141, 775 S.E.2d at 62 ("When expert testimony is the only evidence of proximate cause relied upon, the testimony must provide a significant causal link

between the alleged negligence and the plaintiff's injuries, rather than a tenuous and hypothetical connection." (quoting *Hoard*, 387 S.C. at 546-47, 694 S.E.2d at 5)). If 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.

Under this standard, we believe Singer presented sufficient evidence for the jury to determine that Farr's cancer metastasized from his right lung to his left lung. *Burnett*, 387 S.C. at 188, 691 S.E.2d at 173 ("The trial court must deny a directed verdict motion where the evidence yields more than one inference or its inference is in doubt."). Singer's testimony indicates his professional opinion that the cancer in Farr's right lung metastasized to his left lung, even though the margins surrounding the tumor and the lymph nodes were negative for cancer cells. Singer noted cancer cells were found within one millimeter of the edge of the lung resection following the 2010 surgery. According to Singer, these close margins indicated "there's a great risk that cells may have been left after the surgery." Further, Singer testified surgical resections do not remove all cancer cells, and 30% of patients with negative margins and no lymph node involvement subsequently have a recurrence of cancer. Based on his experience, Singer testified he was 95% sure the adenocarcinoma in Farr's left lung was the same adenocarcinoma from Farr's right lung, based in part on when the second tumor appeared. We believe Singer's testimony alone provided a basis by which the jury could have found the cancer metastasized from the right lung to the left lung. This evidence was sufficient to overcome Respondent's motion for a directed verdict.¹

CONCLUSION

Accordingly, the decision of the trial court is

REVERSED.

¹ Because we reverse the trial court's order granting Respondents' motion for a directed verdict, we decline to address McKaughan's arguments regarding expert testimony that was excluded as unreliable. *See Futch v. McAllister Towing of Georgetown, Inc.*, 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (ruling an appellate court need not review remaining issues when its determination of a prior issue is dispositive of the appeal).

HUFF and THOMAS, J.J., concur.

The South Carolina Court of Appeals

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


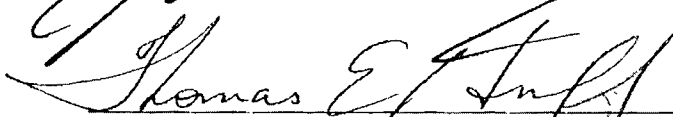
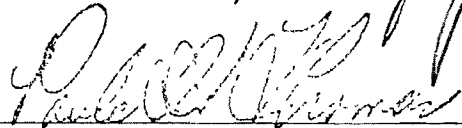
v.

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

Appellate Case No. 2015-001828

ORDER

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

 C.J.
 J.
 J.

Columbia, South Carolina

FILED

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October 19, 2017

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The Honorable J. Mark Hayes, II

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

RECEIVED

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

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.

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

RECEIVED
SEP 29 2017
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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September 29, 2017

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APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas

J. Mark Hayes, II, Circuit Court Judge

Appellate Case No. 2015-001828

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

v

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

RETURN TO PETITION FOR REHEARING

Pursuant to Rule 240(e), SCACR, Appellant Lisa McKaughan respectfully submits her Return to Petition for Rehearing.

INTRODUCTION

Appellant's medical negligence suit brought on behalf of her father William Farr was cut short when the circuit court erroneously entered a directed verdict against her on proximate causation despite expert oncological testimony definitively linking the misdiagnosis of a tumor in Mr Farr's right lung to the metastatic left lung cancer that caused Mr. Farr's death. This Court reversed in a unanimous opinion McKaughan v. Upstate Lung & Critical Care Specialists, P.C., Op No. 5515 (S.C. Ct App. filed Sept 14, 2017) (Shearhouse Adv Sh No 35 at 39) The

opinion is well supported in its conclusion that, when an expert oncologist (Dr. Barry Singer) offers unchallenged testimony stating with a 95% probability that a doctor's misdiagnosis caused the decedent's terminal cancer (R. p. 211), no additional evidence is required to clear the minimal hurdle of a directed verdict motion Respondents' Petition for Rehearing does not challenge this conclusion but instead reframes this matter and argues the Court erred in refusing to address Appellant's second causation expert (Dr. Willard Milby) and Respondents' challenge to Dr. Milby's reliability.

Respondents fail to address, however, why the Court is required to consider the second issue when its ruling on the first was dispositive On this point, Respondents' petition runs head-first into venerable Supreme Court precedent relieving appellate courts from the burden of reaching issues that are unnecessary to an appeal's resolution. Moreover, Respondents assert for the first time a reliability challenge to Dr. Singer's testimony This belated challenge is not only unfounded but was waived when Respondents did not raise it at trial and then decided to omit it from their brief When they finally address the Court's ruling on Dr. Singer, Respondents misstate the issue as an admissibility question subject to abuse of discretion review and falsely portray Dr. Singer's testimony as stating possibilities rather than probabilities. In sum, this Court did not overlook or misapprehend anything in its opinion, and the Petition for Rehearing should be denied.

ARGUMENT

The Petition makes three bold, inaccurate charges regarding the Court's ruling— (1) the Court "inexplicably" ignored the "essence" of the circuit court's directed verdict by ruling on Dr. Singer's testimony and declining to address Dr. Milby's; (2) the opinion "stripped" the circuit court of its gatekeeping role in evaluating the reliability of expert testimony; and (3) Dr. Singer

offered only “speculat[ion]” to support his causation testimony. The Court should reject each of these arguments for the reasons stated below

First, Respondents contend the Court was required to rule on Dr. Milby’s testimony because it was the essence of the appeal. Respondents push this argument a step further by asserting the Court used the wrong standard of review, specifically arguing an abuse of discretion standard applied. Mem. in Supp. of Pet. for Rehearing at 2. However, these arguments ignore the appeal’s procedural posture Respondents moved for and were granted a directed verdict No South Carolina authority supports the notion that a directed verdict is subject to an enhanced standard of review or that this Court owes deference to a circuit court’s ruling on a directed verdict. The opinion correctly states that a court may not enter a directed verdict if the evidence “yields more than one inference” on a disputed issue when considered in the light most favorable to the non-moving party. McKaughan, Shearhouse Adv. Sh No. 35 at 41 (citing Burnett v Family Kingdom, Inc., 387 S.C. 183, 188, 691 S.E.2d 170, 173 (Ct. App. 2010)). Even Respondents’ brief acknowledges the “scintilla of evidence” standard applies to directed verdict motions. Resp’ts. Br. at 19 n 1 (quoting Jones v. Sun Publ’g Co., Inc., 278 S.C. 12, 292 S.E. 23 (1982))

Respondents go further to suggest the Court had to address Dr. Milby’s testimony because he was the only causation expert Appellant offered. Mem in Supp. of Pet. for Rehearing at 2. (“The Court failed to recognize that the Appellant presented Dr Willard Milby, a pathologist, as her causation expert”) However, Dr Milby was not *the* causation expert for Appellant, he was only *a* causation expert Both doctors were offered to provide causation testimony. (R pp 214; 218; 539-40) The suggestion that Dr Singer was not offered to address causation contradicts the record and Respondents’ arguments to the circuit court. In their motions

in limine, Respondents argued Dr. Singer was “strictly offering causation testimony” and cited an excerpt from Dr. Singer’s deposition to support this conclusion. (R. p. 1497). Moreover, Appellant has consistently maintained that Dr. Singer’s testimony was sufficient on its own to create a jury question on causation. Appellant’s Br. at 12 (arguing circuit court “gave no consideration to substantial evidence of metastasis offered by Dr. Singer”), at 24 (concluding Dr. Singer’s medical records review “demonstrated that the second tumor was a metastasis”). Therefore, the Court ruled properly in holding that “Singer’s testimony *alone* provided a basis” for finding proximate cause to support Appellant’s claims McKaughan, Shearhouse Adv. Sh. No. 35 at 45 (emphasis added).

Second, the Court’s ruling in no way “stripped” the circuit court of its gatekeeping role for expert testimony. See Mem. in Supp. of Pet. for Rehearing at 7. The reliability of Dr. Singer’s testimony was never challenged. In fact, Respondents made the conscious decision not to challenge Dr. Singer on reliability. Respondents’ motions in limine presented a nine-page argument on the reliability of Dr. Milby’s testimony.¹ However, Respondents never even hinted that Dr. Singer’s testimony was based on unreliable scientific methods. The same was true at trial. Dr. Singer was qualified as an oncology expert without objection (R. p. 198, lines 9-12) and there was no reliability challenge to Dr. Singer’s reliability either immediately after his testimony or in Respondents’ directed verdict motion (R. p. 596-600). See State v. Schumpert, 312 S.C. 502, 435 S.E.2d 859 (1993) (explaining the failure to object when an expert witness is qualified constitutes a waiver of the issue on appeal); see also State v. Somerset, 276 S.C. 220, 277 S.E.2d 593 (1981).

¹ Appellant maintains that Dr. Milby’s standard microscopic examination of Mr. Farr’s tumor cells using standard pathology techniques meets Rule 702, SCRE’s threshold reliability requirement. Appellant’s Br. at 14-24; Reply Br. at 1-5

Respondents' brief also failed to raise a reliability challenge to Dr. Singer's testimony. Respondents argued only Dr. Singer "never offered an opinion" on causation and, to the extent he did, Dr. Singer's testimony was "conclusory" so as not to meet the "most probably" rule of causation for medical negligence claims. Resp'ts. Br. at 18. Despite now claiming this Court's ruling "strips" away the circuit court's gatekeeping role, Respondents' brief asked the Court to consider Dr. Singer's testimony for sufficiency only—not admissibility and reliability. While Respondents were free to raise additional sustaining grounds in their brief, they may not do so for the first time after the appellate court has ruled. I'On, LLC v. Town of Mt. Pleasant, 338 S.C. 406, 420, 526 S.E.2d 716, 723 (2000) (holding that "a respondent may abandon an additional sustaining ground . . . by failing to raise it in the appellate brief") (citations omitted). Moreover, Dr. Singer provided reliable testimony based on his oncological education/training, forty years as a practicing oncologist during which he has examined numerous lung cancer patients, and his thorough review of Mr. Farr's medical records (R. p. 197, lines 4-5; 199, lines 15-21).

The petition goes on to suggest the Court's ruling not only stripped gatekeeping duties from the circuit court but also "summarily rejected the results of the trial judge's gatekeeping role" in this case. Mem. in Supp. of Pet. for Rehearing at 3. This suggestion misrepresents the opinion's text. The Court offered no comment on the results of the circuit court's reliability analysis. McKaughan, Shearhouse Adv. Sh. No. 35 at 45 n. 1 (citing Futch v. McAllister Towing of Georgetown, Inc., 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999)). In other words, the Court did not reject the results of that analysis, it simply held that analysis need not be examined because the circuit court's error in weighing Dr. Singer's causation testimony was enough to decide the appeal. In asking for a rehearing on this basis, Respondents attack Futch directly on a principle for which it has been cited dozens of times for nearly twenty years. The judicial

restraint embodied in Futch is well-established by our appellate courts which consistently hold that “a court usually should refrain from deciding unnecessary questions” I’On, 338 S.C. at 419-20, 526 S.E.2d at 723.

Finally, Respondents argue the Court erred in evaluating Dr. Singer’s testimony because he was “only speculating” in his causation opinions. Mem. in Supp. of Pet. for Rehearing at 5-6. Respondents contend Dr. Singer testified only that cancer cells from Mr. Farr’s first tumor “may” have broken off and relocated elsewhere in his body. Pet. at 5. Respondents also fault Dr. Singer’s testimony for a statistic he referenced which indicates 30% of lung cancer patients whose initial tumor was removed with clear margins and negative lymph nodes will die from metastatic lung cancer. Mem. in Supp. of Pet. for Rehearing at 6. However, Respondents’ examples do not provide an accurate representation of Dr. Singer’s testimony. Speaking in the abstract, Dr. Singer testified that a lung cancer patient’s tumor cells “may” break off. When referencing Mr. Farr specifically, Dr. Singer spoke definitively. It was “[a]bsolutely not” true that surgically resecting Mr. Farr’s first tumor removed every cancer cell from his body. (R. p. 276, lines 8-10). Dr. Singer cited Mr. Farr’s post-resection chemotherapy and radiation treatments as evidence his treating physicians were concerned about a recurrence. (R. p. 208-09).

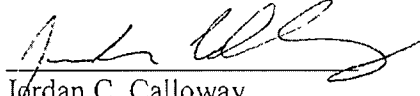
Respondents’ reliance on the 30% statistic is also misleading. Dr. Singer was referencing an aggregate statistic for lung cancer patients. The very next question raised to him asked specifically about Mr. Farr. Dr. Singer testified that, “more likely than not,” Mr. Farr died from metastatic lung cancer caused by cells breaking off the primary tumor even though the primary tumor had been removed with negative margins and lymph nodes (R. p. 276, lines 15-17). This testimony was sufficient on its own to meet the “most probably” rule of causation.” See e.g., Scroggins v. McClellion, 321 S.C. 264, 268, 468 S.E.2d 12, 15 (Ct. App. 1996) (finding rule

does not require use of the phrase “most probably” so long as expert’s testimony shows the advocated cause is “most likely among the possible causes”). Moreover, Dr. Singer’s entire testimony demonstrates his conclusions were definitive. He testified that there was a 95% likelihood that Mr. Farr’s cancer had metastasized, that the right and left lung tumors were “the same cancer,” and that Respondents’ breaches of the standard of care caused Mr. Farr’s death. (R p 211, lines 13-21; 217, line 25 - 218, line 6, 218, lines 10-17)

CONCLUSION

For the reasons stated above, Respondents’ Petition for rehearing should be denied

Respectfully submitted,



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