THE STATE OF SOUTH CAROLINA
In The Supreme Court

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

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S.C. SUPREME COURT

Appellate Case No. 2017-002388
Opinion No. 5515
(S.C. Ct. App. filed September 14, 2017)

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.

REPLY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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TABLE OF CONTENTS

ARGUMENTS

I. The Court of Appeals erred in reversing the directed verdict on the issue of proximate cause.

In reversing the directed verdict entered by the trial court, the South Carolina Court of Appeals analyzed the basis for the trial judge's ruling solely as a sufficiency of the evidence issue rather than what was the essence of that ruling -- that the causation evidence presented by the Respondent Lisa McKaughan was not 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, the Court of Appeals inexplicably failed to even address the reliability of the causation evidence presented. Moreover, in so ruling, the Court of Appeals 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*.

In her response brief, the Respondent McKaughan makes several points that require a reply. For starters, she insists that the Court of Appeals' decision is not "groundbreaking" and indeed describes it as a "garden variety application of South Carolina 'most probably' rule of causation and 'scintilla of evidence' standard for directed verdicts." *See*, Respondent's Return, p. 5. The Court of Appeals

obviously did not view this as a "garden variety" decision in that the Court published its opinion and thus deemed it worthy of creating precedent to be cited in later cases. Moreover, it is quite telling that McKaughan does not mention the Rule 702 standard for expert testimony in describing the case as "garden variety." This, of course, is because the Court of Appeals failed to properly consider the impact of Rule 702 on Dr. Barry Singer's opinions. In essence, McKaughan has acknowledged the very reason the Court of Appeals' decision is significant and worthy of review on certiorari -- the Court of Appeals considered the *sufficiency* of the causation evidence without any consideration of the *reliability* of that evidence. Most certainly, a scintilla of unreliable expert testimony is not sufficient to withstand a directed verdict motion, and as the Petitioners have argued, the Court of Appeals has essentially stripped the trial judge of his gatekeeper role under *Council*.[1]

Contrary to McKaughan's arguments, Circuit Court Judge J. Mark Hayes, II did reject Dr. Singer's causation testimony as part of his directed verdict ruling and, at least implicitly if not directly, ruled that Dr. Singer's opinions were unreliable, as were the opinions of Dr. Willard Milby, who was the causation expert. McKaughan's counsel asked Judge Hayes to "forget Dr. Milby for a second" and

[1] McKaughan claims that the Petitioners are arguing an "enhanced" standard of review for a directed verdict. That is not the case. The Petitioners are simply arguing that the evidence to allow the plaintiff's case to proceed beyond the directed verdict stage must be reliable under Rule 702 and the trial court serves a gatekeeper role that cannot be brushed aside or disregarded.

then addressed Dr. Singer's opinions. (R. 607). Judge Hayes ultimately found all of the expert causation testimony to be unreliable under Rule 702 as part of his "gatekeeper" role. (R. 618-619).

At any rate, the record is clear that the Court of Appeals never addressed the reliability of Dr. Singer's opinions although there is some acknowledgement in its opinion that such an analysis is required. The Court of Appeals writes: "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." (App. 7). (Emphasis added). The highlighted language -- "with supporting scientific evidence" -- gives some indication by the Court of Appeals that the expert's opinion must be scientifically reliable or at least "supported." Under the *Council* test, that means the following reliability factors should be assessed: "(1) the publications and peer review of the technique; (2) prior application of the method to the type of evidence involved in the case; (3) the quality control procedures used to ensure reliability; and (4) the consistency of the method with recognized scientific laws and procedures." *Council*, 515 S.E.2d at 517.

Yet, none of those factors were ever considered by the Court of Appeals, and instead, the Court found Dr. Singer's opinions to be sufficient to withstand the directed verdict motion. Certainly, the Court of Appeals -- using its own language

-- never addressed, let alone ensured, that Dr. Singer's opinions had "supporting scientific evidence." The Court of Appeals focused on three points in Dr. Singer's testimony. First, the Court relied on Dr. Singer's testimony that "these close margins indicated 'there's a great risk that cells may have been left after the surgery.'" (App. 7). In addition to failing to meet the "most probably" standard with the use of the term "may," Dr. Singer never quantified the meaning of "great risk," including whether the risk was fifty percent or higher so as to make probable rather than just possible. He also offered no supporting scientific evidence, such as peer-reviewed literature, to support his premise. Next, the Court of Appeals cites to Dr. Singer's testimony that "30% of patients with negative margins and no lymph node involvement subsequently have a recurrence of cancer." (App. 7). Again, there was no supporting scientific evidence offered to suggest that this opinion is scientifically reliable. Finally, the Court of Appeals writes: "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." (App. 7). Interestingly, this very same 95% testimony was offered by Dr. Milby, who opined "[p]robably 95 to 99 percent of the time that's gonna be a metastasis and not [a] new tumor." (R. 499). He later reiterated that "the percentage chance that lung cancer is adenocarcinoma is a spread" is "about 95 percent." (R. 590). That 95 percent testimony was argued to Judge Hayes at

directed verdict and was found unreliable. (R. 603). Correctly so. There was no supporting scientific evidence, such as peer-reviewed literature, to support that opinion. Moreover, Dr. Singer does not even attempt to suggest that there is a consensus in the literature or the medical field to support that premise. In fact, in distinct language, Dr. Singer shows that this is purely a *personal* opinion as opposed to one of scientific consensus in that he explained that the percentage was "*to me*, it would, 95 percent of the time." (R. 211). (Emphasis added). That testimony and how it was phrased ("to me") further show that the opinion is not sufficiently supported in the medical field to be deemed scientifically reliable.

Finally, in a last ditch effort to claim that Dr. Singer's opinions are reliable and sufficient to withstand the Petitioners' directed verdict motion, McKaughan points to the Court of Appeals' decision in the case of *Haselden v. Davis*, 341 S.C. 486, 534 S.E.2d 295 (Ct. App. 2000), in which "similar causation testimony by the same expert" was "approved." *See*, Respondent's Return, p. 5. In that case, Dr. Singer offered opinions on the "probability of cure," i.e., the lost chance of survival, which is certainly distinguishable from opinions on the probability that cancer in one lung metastasized to another lung. Nonetheless, there is no evidence that the courts in *Haselden* -- either the trial court or the appellate courts -- even considered the reliability of Dr. Singer's opinions on probability. It is also worth mentioning that the case in *Haselden* was tried in 1997, which was two years

before the *State v. Council* decision was even issued. Finally, even if the Court of Appeals found Dr. Singer's opinions to be reliable in a past case does not mean that his opinions are always reliable and should be adjudged sufficient to withstand a motion for directed verdict or a JNOV motion in later, unrelated litigation.

In sum, the Court of Appeals 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. This alone shows a divergence with prior precedent thereby justifying the issuance of a writ of certiorari. Second, and as discussed in more detail herein, the Court of Appeals explicitly declined to address the reliability of the causation evidence -- which is the crux of this case and the trial judge's ruling at the directed verdict stage. In so doing, the Court of Appeals stripped the trial judge of his gatekeeper role under *Council*, which clearly merits the issuance of a writ of certiorari to review and reverse the Court of Appeals' decision.

CONCLUSION

Based on the foregoing discussion, the Petitioners respectfully renew their request that this Court grant their petition for a writ of certiorari.

Respectfully submitted,

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January 8, 2018

CERTIFICATE OF SERVICE

The undersigned employee of Davidson & Lindemann, P.A., counsel for the Defendant, does hereby certify that service of the **Reply in Support of Petition for Writ of Certiorari** 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 8th day of January 2018:

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