IN THE SUPREME COURT OF VIRGINIA

Record No. 081632

DEBRA HUTCHINS, M.D., and ALEXANDRIA SURGERY, LTD.,

Appellants,

v.

RITA TALBERT,

Appellee.

Appeal from the Circuit Court for the City of Alexandria

BRIEF FOR APPELLANTS

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BRIEF FOR APPELLANTS

ASSIGNMENTS OF ERROR

I. The trial court erred in qualifying Talbert's standard of care expert witnesses Barry Cohen M.D. and Russell Williams M.D. where neither expert had performed the procedure at issue and where Williams, who was not eligible for licensure in Virginia, was found to know the standard of care in Virginia based on a single

telephone conversation with Cohen, during trial, which violated the Rule on Witnesses.

II. The trial court erred in excluding Hutchins' anesthesiology expert and severely limiting the testimony of the anesthesiology witnesses, who were present during surgery and who would rebut Talbert's allegation that the Virginia standard of care required Hutchins to request the anesthesia care team to stop or reduce the use of supplemental oxygen prior to using electrocautery.

III. The trial court erred in allowing Talbert to correct her failure to highlight the passages in her Designation of Authoritative texts just one business day before trial began in violation of Va. Stat. Ann. § 8.01-401.1.

QUESTIONS PRESENTED

I. Whether the trial court erred in qualifying Cohen and Williams as expert witnesses as to the standard of care where neither physician had ever performed the procedure at issue, and where Williams was found to be familiar with the standard of care in Virginia based solely upon one telephone call, during trial, with fellow expert Cohen. (This relates to Assignment of Error 1).

II. Whether the trial court erred in precluding Hutchins from presenting an anesthesiology expert and fact witnesses to rebut Talbert's allegation that Hutchins was required by the Virginia standard of care to request that the anesthesia team alter the flow of oxygen before the use of the electrocautery. (This relates to Assignment of Error 2).

III. Whether the trial court erred by disregarding the requirements of § 8.01-401.1 of the Code of Virginia and allowing Talbert to amend her Designation of Authoritative Texts by demarcating selected text one business day before trial, thus limiting Hutchins' ability to rebut her demarcated text. (This relates to Assignment of Error 3).

STATEMENT OF THE CASE

A. Nature Of The Case

This is an action for damages for alleged medical malpractice. Appellee, Plaintiff below, is Rita S. Talbert. Appellants, two of the Defendants below, are Debra A. Hutchins, M.D., a surgeon, and her employer, Alexandria Surgery, Ltd.

Ms. Talbert sustained facial and neck injuries in a flash fire, lasting no more than a few seconds, while she underwent surgery at

Inova Alexandria Hospital. Ms. Talbert alleged that an electrical surgical instrument ignited the fire, that oxygen she was receiving fueled it, and that Dr. Hutchins, among others, failed to exercise due care to prevent this incident. Dr. Hutchins answered that, notwithstanding the exercise of due care, accidental fires such as this may occur in operating rooms. Resolution of the issue depended upon competing expert testimony of the parties.

B. Proceedings Below

1. Trial And Judgment

Upon completion of pretrial proceedings, the case proceeded to trial by jury (Kemler, J., presiding). The jury returned a verdict in favor of Ms. Talbert in the amount of $4 Million. Thereafter, taking into account both Ms. Talbert's earlier settlement with three other Defendants (Inova Alexandria Hospital; Anesthesia Associates, Ltd.; and one of its employees, anesthesiologist Robert D. Zurowski, M.D.), and the application of the statutory limit on available damages, the Court reduced the award to $885,000, plus post-judgment interest, and entered Judgment accordingly (Appendix ("A.") 2331-2333, 2632).

2. Pertinent Pretrial Rulings

a. Failure To Identify Medical Literature

Before trial, Ms. Talbert produced approximately 1,200 pages of medical literature that Ms. Talbert's expert witnesses intended to rely upon at trial. Because pertinent passages were not highlighted or otherwise identified, as required by Section 8.01-401.1 of the Virginia Code, Dr. Hutchins moved to preclude the use of this literature.

At a hearing on March 26, 2008, three business days before trial, the Court (Kemler, J.), agreed that the literature had not properly been highlighted, and that it was "unreasonable ... to give him 1,200 pages and expect them to sift through it and figure out where." (At trial, Ms. Talbert's Counsel did not disagree with the fairness of this ruling (A. 1607)). Over Dr. Hutchins' objection, however, the Court permitted Ms. Talbert's Counsel, "by the close of business tomorrow [March 27, 2008]," to highlight the passages -- "[g]ive him the exact page references and lines or whatever that your expert is relying on." (The proceedings of the March 26 hearing are transcribed and will be made available to the Court if,

contrary to our expectation, there is any dispute about what occurred at the hearing).

After the close of business on March 27 -- or one business day before trial -- Dr. Hutchins' Counsel received Ms. Talbert's identification of the passages.

b. Rulings On Experts

1. Ms. Talbert's Designations. Before trial, Dr. Hutchins challenged the adequacy of Ms. Talbert's disclosures of expert testimony. See John Crane, Inc. v. Jones, 274 Va. 581, 591-592, 650 S.E.2d 851, 856 (2007), cert. denied, ___ U.S. ___, 128 S. Ct. 1257 (2008) (expert testimony not properly disclosed should have been excluded). The Court agreed, but allowed Ms. Talbert to file two supplemental "expert designations," including most pertinently a 93-page designation in January 2008, two months before trial (A. 44, 56).

2. Scope Of Dr. Cohen's Testimony. One of Ms. Talbert's designated experts was Barry Cohen, M.D., a plastic surgeon who had treated Ms. Talbert. In her first two "expert designations," Ms. Talbert had limited Dr. Cohen's disclosed anticipated testimony to causation and damages, with emphasis on the depth of Dr.

Hutchins' incision and the reasonableness of the care provided to Ms. Talbert after she had sustained her injuries (A. 37, 49). In her January 2008 designation, however, Ms. Talbert repeated this disclosure but also added that Dr. Cohen might opine that Dr. Hutchins had breached the standard of care by using the surgical electrical device too close in proximity to "sources of ignition" (A. 84-94). Then, at the March 26 hearing, after her designations had been filed, and three business days before trial, Ms. Talbert notified the Court that one of her other treating physicians had become unavailable for trial, and so she requested that Dr. Cohen be permitted to testify on the reasonableness of that doctor's treatment based upon Dr. Cohen's review of the records. Dr. Hutchins' Counsel agreed, and the Court permitted the testimony, based upon Ms. Talbert's Counsel's statements that Dr. Cohen would "testify as to the care and treatment...[;] he has been listed [as an expert] but with regards to the care and treatment there, yes, it is basically about whether the care and treatment is reasonable and necessary and related, and what was done for her at Washington Hospital Center."

3. Dr. Hutchins' Anesthesiology Expert . In her pretrial disclosures, Dr. Hutchins listed, as an expert, an anesthesiologist, Charise T. Petrovitch, M.D. (A. 163-166, 248-254). Ms. Talbert moved to preclude testimony from this witness (A. 317, 688), and the Court deferred decision until trial (see A. 1430).

3. Pertinent Trial Rulings

a. Rule On Witnesses

On the first day of trial, immediately after jury selection, the Court "impose[d]" the Rule on Witnesses (A. 798-799; see also A. 786). In doing so, the Court emphasized Counsel's "need to be responsible" for assuring compliance (A. 799).

b. Permitting Ms. Talbert's Experts' Opinions On Standard Of Care

Ms. Talbert elicited standard-of-care testimony from Dr. Cohen, the treating plastic surgeon (A. 1327, 1337), and Russell Williams, M.D., a general surgeon licensed in California and retained for the litigation (A. 1487-1488, 1494, 1495, 1578).

Dr. Hutchins challenged Dr. Cohen's testimony on the ground that it went beyond Ms. Talbert's pretrial disclosures, and challenged the eligibility of both witnesses under Section 8.01-581.20 of the Virginia Code to testify on standard of care (A. 1360-

1362, 1449-1461 (Dr. Cohen); A. 1467, 1572-1574 (Dr. Williams)). In addition, the testimony of Dr. Williams revealed that, at the suggestion and with the aid of Ms. Talbert's Trial Counsel, Dr. Williams and Dr. Cohen had conferred about standard of care during the trial, notwithstanding the Court's earlier imposition of the Rule on Witnesses (A. 1530-1433).

The Court overruled Dr. Hutchins' objections (A. 1363-1364, 1575-1577) and denied her Motion to strike the testimony of Drs. Cohen and Williams (A. 2153-2170).

c. Precluding Dr. Hutchins' Anesthesiology Experts' Opinions On Standard Of Care

Both Dr. Cohen and Dr. Williams testified that, in Virginia, the standard of care required Dr. Hutchins to request the anesthesiologist attending Ms. Talbert to stop or reduce the flow of supplemental oxygen to the patient while Dr. Hutchins used the electrical device during surgery. To meet this charge, in addition to surgical experts, Dr. Hutchins proffered the testimony of Dr. Petrovitch, an anesthesiologist, and also sought to elicit pertinent testimony from the anesthesia specialists who attended Ms. Talbert during the surgery, Robert Zurowski, M.D., and John Henry, a Certified Registered Nurse Anesthetist ("CRNA"). The Court

precluded that testimony (A. 1462-1465, 1946-1947 (Dr. Petrovitch); A. 2018-2019 (Dr. Zurowski); A. 2066-2067, 2103-2104 (Nurse Henry); see also A. 2158).

4. Post-Trial Proceedings

Dr. Hutchins filed a timely motion to set aside the verdict and enter judgment for the Defendants, or in the alternative, award a new trial. The Court denied the Motion (A. 2632).

C. The Petition For Appeal

Ms. Talbert challenged the timeliness of Dr. Hutchins' Notice of Appeal. After initially dismissing the Petition for Appeal, this Court granted Dr. Hutchins' Petition for Rehearing, vacated the dismissal, and granted the Petition for Appeal.

STATEMENT OF FACTS

A. Diagnosis And Treatment

In April 2005, Ms. Talbert, a 58-year-old woman, was diagnosed with a tumor on one of her parathyroid glands (A. 716, 875, 1227-1228). (People normally have four parathyroid glands, two each on either side of the neck. The glands control the amount of calcium within a person's blood and bones (A. 716-717, 1228)). Ms. Talbert's diseased gland was adversely affecting Ms. Talbert's

calcium levels, and there was no dispute below as to the necessity or consent for the surgical removal of the gland (A. 718, 720-721, 1829). Ms. Talbert's primary care physician referred her to Dr. Hutchins, a surgeon specializing in diseases of the parathyroid glands (A. 878-879, 1785-1786, 1789-1790). Dr. Hutchins made the diagnosis, and scheduled Ms. Talbert for the surgery (see A. 1227).

Surgery on parathyroid glands falls within the specialty known as endocrine surgery (since the parathyroid is an endocrine gland) (A. 701, 1184; see A. 1495, 1500). There are two alternative surgical approaches for removing a parathyroid gland. One option is to place the patient under general anesthesia, place a breathing tube down the patient's trachea ("intubate" the patient), perform a large incision in the neck exposing all four glands, and then excise the diseased gland (A. 1230-1231, 1267-1268, 1791). This technique carries the risks of general anesthesia and complications, including damage to the other parathyroid glands and to the laryngeal nerve controlling speech (A. 1791-1792, 1831).

The other option, and the one Dr. Hutchins selected with Ms. Talbert's approval, is a specialized, "minimally invasive" technique. Using a local anesthetic and intravenous sedation, and guided by

radio waves, the surgeon locates and removes only the diseased gland (A. 1234-1237). The patient's breathing is aided by supplemental oxygen provided through nasal tubes or (as in Ms. Talbert's case) a mask (A. 2029-2031). This technique avoids the risks of general anesthesia and the larger incision, and generally allows the patient to be discharged within an hour or two after the surgery (A. 1236, 1258, 1793-1794). This option is generally called, and was referred to at trial, as a "MIRP" -- "minimally invasive radioguided parathyroidectomy" (A. 1234). There was no allegation below that the selection of this option was negligent or otherwise improper.

B. The Incident Giving Rise To This Suit

An "electrocautery" device is an electric surgical tool used to cut tissue and to stop bleeding from blood vessels (e.g., A. 726-727, 1247, 1697, 1799). In a "MIRP," an electrocautery device is used throughout the procedure (A. 1248-1249).

During Ms. Talbert's surgery, Dr. Hutchins activated the electrocautery device and instantly a flame appeared on Ms. Talbert's neck (A. 731, 1851). Very quickly, using her own hands, Dr. Hutchins extinguished the flame (e.g., A. 1851-1852; see also A.

731, 1668-1670). Because only a few minutes were needed to complete the surgery, an anesthesiologist placed an intubation tube into Ms. Talbert's trachea to aid her breathing, and the surgical team successfully completed the "MIRP" (A. 1852-1854).

Dr. Hutchins called for a plastic surgeon to evaluate Ms. Hutchins' burns (A. 1855-1856). She was transferred to the Washington Hospital Center, where she came under the care of Marion Jordan, M.D., a plastic surgeon (see A. 2300-2301). Upon her discharge from the Hospital Center, Ms. Talbert became a patient of Dr. Cohen, who performed several surgeries on her face arising from her burns (see, A. 2304-2321). (The nature and extent of Ms. Talbert's injuries are not an issue in this Appeal).

C. The Malpractice Claim

The trial Judge correctly observed that Ms. Talbert's claim presented "a battle of the experts" (A. 1763).

Ms. Talbert's witnesses, Drs. Cohen and Williams, testified that, to meet the standard of care in Virginia, Dr. Hutchins needed to ask the attending anesthesiologist to stop or reduce the delivery of supplemental oxygen to Ms. Talbert each time Dr. Hutchins intended to activate the electrocautery device. Her failure to do so,

they alleged, resulted in an accumulation of oxygen serving as fuel for a fire ignited upon a spark from that device.

By contrast, Dr. Hutchins answered that neither Dr. Cohen nor Dr. Williams had experience or knowledge with the "MIRP" surgery, and as a result their account did not correctly mirror the pertinent standard of care. "MIRP" surgeries are unlike other surgeries, even in the neck region, and other procedures using the electrocautery device, because of the interplay of supplemental oxygen, frequent electrocauterization, and radio-guided resection. Dr. Hutchins presented the testimony of Herbert Chen, M.D, and Gerard M. Doherty, M.D., endocrine surgeons who had performed over 900 and 1,000 of these "MIRP" surgeries, respectively, during their careers (A. 739, 1185; see also A. 151-163, 170-254). In pertinent part, they related that, in "MIRP" surgeries, the electrocautery device must be used too often to allow the cessation or reduction of supplemental oxygen to the patient (e.g., A. 1248-1249).

Surgical fires such as the one that occurred during Ms. Talbert's "MIRP" are statistically rare, but they do occur even in the absence of negligence (see A. 732-733). Dr. Hutchins' care met the

standard, and Ms. Talbert suffered injuries notwithstanding the exercise of due care (A. 730-731, 760-761, 1227, 1286).

ARGUMENT

I. DR. COHEN AND DR. WILLIAMS WERE INELIGIBLE TO RENDER STANDARD-OF-CARE TESTIMONY

A. Eligibility Is Fixed By Law

In a medical malpractice case in the Commonwealth, there are unambiguous requirements that must be met before a witness may render an opinion on standard of care. E.g., Hinkley v. Koehler, 269 Va. 82, 87, 606 S.E.2d 803, 806 (2005). Neither Dr. Cohen nor Dr. Williams met those requirements, and so the Court below erred, as a matter of law, in permitting them to criticize Dr. Hutchins' care.

Section 8.01-581.20 of the Virginia Code pertinently provides:

> "[T]he standard of care by which the acts or omissions [of the defendant] are to be judged shall be that degree of skill and diligence practiced by a reasonably prudent practitioner in the field of practice or specialty in this Commonwealth and the testimony of an expert witness, otherwise qualified, as to such standard of care, shall be admitted ….
>
> "A witness shall be qualified to testify as an expert on the standard of care if he demonstrates expert knowledge of the standards of the defendant's specialty and of what conduct conforms or fails to conform to

> those standards and if he has had active clinical practice in either the defendant's specialty or a related field of medicine within one year of the date of the alleged act or omission forming the basis of the action." (Emphasis added).

Thus, the controlling standard of care for Dr. Hutchins' "MIRP" endocrine surgery was the prevailing standard for such surgery in the Commonwealth of Virginia. And for Ms. Talbert to present Dr. Cohen and Dr. Williams as experts on that standard, she needed to show that each witness (a) had demonstrable expert knowledge in the pertinent specialty, and (b) had -- within one year of Dr. Hutchins's surgery -- engaged in an active clinical practice either within Dr. Hutchins' specialty or in a related field.

B. Drs. Cohen And Williams Failed These Eligibility Requirements

1. Drs. Cohen And Williams Failed The "Active Clinical Practice" Requirement

We discuss first the "active clinical practice" requirement because this Court has recently emphasized its importance for the fair adjudication of medical malpractice disputes. In Lloyd v. Kime, 275 Va. 98, 654 S.E.2d 563 (2008), the Court reaffirmed that this requirement is necessary "to prevent testimony by an individual who has not recently engaged in the actual performance of the

procedures at issue in a case." Id., 275 Va. at 110, 654 S.E.2d at 570, quoting Sami v. Varn, 260 Va. 280, 285, 535 S.E.2d 172, 175 (2000).

a. On their own uncontroverted testimony, neither Dr. Cohen nor Dr. Williams met the "active clinical practice" requirement. Dr. Cohen is a plastic surgeon, not an endocrine surgeon (A. 1327). He was "[n]ot specifically" familiar with the term "minimally invasive" as applied to the removal of parathyroid glands, has not operated to remove a parathyroid gland, has never performed a "MIRP," and has not even observed any endocrine surgery since he was a student over 20 years ago (A. 1346-1360). Dr. Williams, a general surgeon, testified that endocrine surgery is "a specialty within general surgery" (A. 1495), that he does not specialize in it, and that he has never performed a "minimally invasive parathyroidectomy" (A. 1519). "I don't do minimally invasive parathyroid surgery" and "I don't remove the parathyroid," he testified (A. 1570-1571, 1686).

b. In the Court below, Ms. Talbert argued that, because Dr. Cohen had used an electrocautery unit in head and neck surgery, and had performed biopsies on parathyroid glands, and because Dr.

Williams is a general surgeon who had removed lymph nodes and operated on carotid arteries in the neck, both were eligible to testify even though neither had removed parathyroid glands or otherwise performed "MIRP" procedures (see A. 1362-1363, 1522-1523). But the statute is not so forgiving; it requires the proponent of the testimony, here Ms. Talbert, to show, in material ways, the overlap between the "actual clinical practices" of Drs. Cohen and Williams and the treatment of diseased parathyroid glands through "minimally invasive" surgical removal. Plastic surgery and general "head and neck" surgery do not qualify in the circumstances here.

(i) The evidence below was that "MIRP" procedures especially require the exercise of medical judgment repeatedly to employ the electrocautery device, among other things, to control bleeding. Ms. Talbert's allegation was that it was negligent for an endocrine surgeon, in such circumstances, to rely upon the anesthesiologist to determine whether the patient could safely tolerate reduction or termination of supplemental oxygen. Having acknowledged that Ms. Talbert's experts did not have "active clinical practices" in Dr. Hutchins' specialty, neither Drs. Cohen and Williams, nor Ms. Talbert's trial Counsel, provided any evidence that

this use of the electrocautery device was matched in need or frequency in any of the non-“minimally invasive” procedures Drs. Cohen and Williams may have performed within a year of Ms. Talbert’s surgery.

(ii) Indeed, Dr. Williams testified that he does not even use the electrocautery device in his surgeries in which the patient, like Ms. Talbert, is under local anesthesia and receiving supplemental oxygen through a mask (A. 1525). If a patient needs supplemental oxygen, his practice always is to deliver oxygen through intubation, under general anesthesia, with the patient on a ventilator (A. 1545). His carotid artery surgery is always performed with the patient under general anesthesia, with oxygen received through an intubation tube (A. 1571). This is not the “MIRP” procedure that Dr. Hutchins performed.

(iii) In such circumstances, Drs. Cohen and Williams did not have the first-hand experience required to support their opinions that their espoused “standard” required the reduction or termination of oxygen each time Dr. Hutchins used the electrocautery device, that it was safe or even necessary to do so, that the anesthesiology team attending the patient would comply with a surgeon’s repeated

requests to cut off oxygen to the patient, or even that doing so would have decreased the risk of surgical fire.

c. This Court's most recent jurisprudence on this point informs the analysis.

(i) "[W]e determine whether a proffered expert witness satisfies the active clinical practice requirement by referring to the 'relevant medical procedure' at issue in a case." Hinckley v. Koehler, supra, 269 Va. at 89, 606 S.E.2d at 807. In Hinckley, the "relevant medical procedure" was management of pregnancy and labor, and so an obstetrician, with many years' experience delivering babies, was ineligible because he had not managed a pregnancy or delivered a baby within a year of the alleged negligence. In Lloyd v. Kime, supra, the "relevant medical procedures" were back surgery and post-surgical care; and so a neurologist who did not perform back surgery was ineligible, but because the defendant (an orthopedic surgeon) had failed to show any material distinction between a neurologist's post-surgery spinal care and that of an orthopedic surgeon, the neurologist was eligible to opine on post-surgery care. And in Wright v. Kaye, 267 Va. 510, 521-522, 593 S.E.2d 307, 313 (2004), the "relevant medical procedure" was

"laparoscopic surgery in the female pelvic area near the bladder using a surgical stapler," and so proffered experts having timely experience in such surgery were eligible.

(ii) "We also have explained that the phrase ""actual performance'" of the procedures at issue must be read in the context of the actions by which the defendant is alleged to have deviated from the standard of care,'" [and] [t]he question whether a proffered expert witness met the active clinical practice requirement must be analyzed in the same manner." Hinckley v. Koehler, supra, 269 Va. at 89, 606 S.E.2d at 807 (citation omitted).

(iii). Applying this teaching, the "relevant medical procedure" at issue here was the "MIRP" procedure, with its defining characteristics: (A) a "minimally invasive" radio-guided procedure (not open surgery), (B) in the specialty of endocrine surgery (not general surgery), (C) on the parathyroid gland (with its own characteristics), (D) with the patient under local anesthesia (not general anesthesia) and (E) breathing supplemental oxygen (not intubated and on a ventilator), with (F) frequent use of the electrocautery device within the judgment of the endocrine surgeon. Dr. Hutchins was alleged to have deviated from the standard of care

by failing to recognize that the characteristics of this procedure made it necessary for her to ask that the supplemental oxygen be reduced or terminated each time she used the electrocautery device; her answer was that, in this procedure, it was not safe nor practical, and thus not the standard, to do so.

d. Dr. Cohen and Dr. Williams have never done Dr. Hutchins' procedure. Thus they did not have the requisite experience either in the "relevant medical procedure" or "the actions by which" Dr. Hutchins was "alleged to have deviated from the standard of care." In short, they lacked the experience allowing them to second-guess the medical judgment of those attending Ms. Talbert during her "MIRP." In this Court's words, because Dr. Cohen and Dr. Williams "ha[d] not recently engaged in the actual performance of the procedures at issue in [the] case," they were ineligible to opine on whether Dr. Hutchins had met Virginia's standard of care when performing those procedures. Lloyd v. Kime, supra, 275 Va. at 110-112, 654 S.E.2d at 570-571; accord, e.g., Hinkley v. Koehler, supra, 269 Va. 82, 86-90, 606 S.E. 2d 803, 805-807 (2005); see also, e.g., Fairfax Hospital System, Inc. v. Curtis, 249 Va. 531, 537, 457 S.E.2d 66, 70 (1995).

2. Drs. Cohen And Williams Failed To Demonstrate Expert Knowledge Of Virginia's Standard Of Care In The Pertinent Specialty

Even if either Dr. Cohen or Dr. Williams theoretically had satisfied the "active clinical practice" requirement, neither demonstrated knowledge of the standard of care prevailing in the Commonwealth for the "MIRP" procedure. Without that knowledge, they could not criticize Dr. Hutchins. See, e.g., Lawson v. Elkins, 252 Va. 352, 354-355, 477 S.E.2d 510, 511-512 (1996) (neurosurgeon who had neither performed nor observed a "chemonucleosysis" procedure was not qualified to testify regarding an orthopedic surgeon's alleged deviation for the standard of care in performing that procedure).

Dr. Williams was licensed in California and ineligible for licensure in Virginia (see A. 1553-1555, 1562; see also A. 2334, a letter from the Commonwealth's Department of Health Professions attesting that Dr. Williams' credentials "do not appear to meet the requirements to hold a license to practice medicine and surgery in the Commonwealth of Virginia"). As a result, Ms. Talbert's trial Counsel tried to establish Dr. Williams' knowledge of Virginia's standard of care, in Dr. Hutchins' specialty, through Dr. Williams'

conversation -- occurring during trial -- with his fellow "expert," Dr. Cohen. That effort failed, and should in any event not be condoned.

First, Dr. Cohen, as discussed above, was a plastic surgeon, not an endocrine surgeon, and he had no demonstrable first-hand experience with the "MIRP" procedure at issue in this case.

Second, it may be fair to satisfy the "knowledge" requirement of Section 8.01-581.20 through an out-of-State physician's conversations with Virginia-licensed physicians. See, e.g., Christian v. Surgical Specialists of Richmond, Ltd., 268 Va. 60, 66, 596 S.E.2d 522, 525 (2004) (out-of-State physician gained knowledge through conversations with Virginia physicians at seminars held in Virginia on the medical procedure at issue). But it is a perversion of that rule, which contemplates exchanges at continuing medical education conferences and other professional consultations, to allow the statue to be satisfied through "bootstrapping," self-serving, and mutually reinforcing conversations, at the direction of partisan counsel.

Third, the conversation here occurred in violation of the Rule on Witnesses, a Court Order designed to prevent this very kind of collusion, whether benign or not.

Fourth, in her pretrial disclosures, Ms. Talbert identified Dr. Cohen as a treating physician whose supposed knowledge of the standard of care related to the proximity of electrocautery devices to oxygen, while Dr. Williams testified that Dr. Hutchins was required to request the anesthesiologist to reduce or shut off Ms. Talbert's oxygen supply -- something quite different from what had been disclosed about Dr. Cohen. Moreover, at the March 26 hearing, three business days before trial, Ms. Talbert's Counsel advised the Court and Dr. Hutchins' Counsel that Dr. Cohen would testify on the nature and extent of her injuries, without mentioning standard of care. (Indeed, at trial Dr. Cohen himself expressed surprise that he was being called as an "expert" and not solely as a treating physician (see A. 1356)). In these circumstances, permitting Dr. Cohen to serve as the fount for Dr. Williams' knowledge of Virginia's standard of care flouted the requirements of pretrial disclosure, and encourages trial by surprise instead of considered preparation of the merits.

II. THE COHEN-WILLIAMS CONVERSATION VIOLATED THE RULE ON WITNESSES

Trial began on March 31, 2008, and the Court imposed the Rule on Witnesses that day. Dr. Williams testified three days later, on April 3, 2008, the fourth day of trial.

According to Dr. Williams himself, a "day or two" before he testified -- and thus after the Court had imposed the Rule -- Dr. Williams called Dr. Cohen at the request of Ms. Talbert's trial Counsel (A. 1530-1533). Ms. Talbert's trial Counsel provided Dr. Williams with Dr. Cohen's name and telephone number (A. 1532-1533). (It is likely the telephone call occurred after Dr. Cohen had testified, because Dr. Cohen testified that he did not know who Dr. Williams was, and had not even read his deposition (A. 1356-1357)). Dr. Williams testified the day after Dr. Cohen had testified (see A. 1327, 1487)).

Dr. Williams specifically called Dr. Cohen to "ask[] him what the standard would be" (A. 1532). Dr. Williams could not recall discussing the subject of oxygen and electrocautery with any other Virginia surgeon (A. 1533, 1551). In developing his opinions for this case, he did not contact anyone in Virginia who did the procedure that Dr. Hutchins had performed (A. 1570), and indeed could not

even identify the names of any additional surgeons in Virginia with whom he had ever discussed head and neck surgery (A. 1533). His knowledge of Ms. Talbert's alleged Virginia "standard" thus rested on this solitary in-trial telephone conversation with Dr. Cohen, another witness.

By statute and this Court's jurisprudence, the Commonwealth recognizes the Rule on Witnesses as "'(next to cross-examination) one of the greatest engines that the skill of man has ever invented for the detection of liars in a court of justice.'" Motley v. Tarmac America, Inc., 258 Va. 98, 101-102, 516 S.E.2d 7, 8-9 (1999). "The purpose of the" Statute embodying the Rule on Witnesses, Virginia Code, § 8.01-375, "is to discourage and expose fabrication and collusion by witnesses and to minimize the likelihood that witnesses will alter their testimony so that such testimony is consistent with testimony provided by other witnesses." Motley v. Tarmac America, Inc., supra, 258 Va. at 101-102, 516 S.E.2d at 8-9; accord, e.g., Huddleston v. Commonwealth, 191 Va. 400, 405, 61 S.E.2d 276, 279 (1950) (the "purpose of excluding the witnesses from the courtroom is, of course, to deprive a later witness of the opportunity of shaping his testimony to correspond to that of an earlier one");

Geders v. United States, 425 U.S. 80, 87 (1976) (the Rule on Witnesses "exercises a restraint on witnesses 'tailoring' their testimony to that of earlier witnesses" and "aids in detecting testimony that is less than candid").

It would be difficult to conceive of a grosser violation of the Rule on Witnesses. The proscribed communication was commissioned and facilitated by Ms. Talbert's Counsel, without any request for an exemption from the Court's Order or the Statute. The discussion related to the central issue in dispute, occurred before Dr. Williams testified, and was designed to assure that Dr. Williams would espouse the same "standard," and thus the same testimony, as an earlier witness, Dr. Cohen. See, e.g., Bennett v. Commonwealth, 236 Va. 448, 465-466, 374 S.E.2d 303, 314-315 (1988), cert. denied, 490 U.S. 1028 (1989) (outlining the factors, each met here, for resolving whether a witness who has violated the Rule should be precluded from testifying). See also, e.g., Motley v. Tarmac America, Inc., supra, 258 Va. at 101-102, 516 S.E.2d at 8-9 (new trial ordered for violation of the Rule); Martin v. Commonwealth, 217 Va. 847, 848 234 S.E.2d 62, 62-63 (1977) (per curiam) (failure to exclude material witness held reversible error);

Johnson v. Commonwealth, 217 Va. 682, 682-683, 232 S.E.2d 741, 741-742 (1977) (same); United States v. Cropp, 127 F.3d 354, 363 (4th Cir. 1997), cert. denied, 522 U.S. 1098 (1998) (striking witness' testimony appropriate when "a party or a party's counsel caused the violation"); compare Wolfe v. Commonwealth, 265 Va. 193, 214, 576 S.E.2d 471, 483, cert. denied, 540 U.S. 1019 (2003) (no showing of prejudice or intentional impropriety); Satcher v. Commonwealth, 244 Va. 220, 244-245, 421 S.E.2d 821, 836 (1992), cert. denied, 507 U.S. 993 (1993) (no showing of prejudice).

The prejudice to Dr. Hutchins was severe, and obvious. The trial Court based its qualification of Dr. Williams on this conversation between the two physicians (A. 1575-1576). Without the violation of the Rule, Dr. Williams could not have qualified as an "expert," even if the Court were to disagree with Dr. Hutchins' other reasons for his disqualification. Not only did the Court below fail to consider any sanction for the violation, but it also failed to impose the sanction most compelling in the circumstances -- striking the testimony of Dr. Williams. The Court's ruling was an abuse of discretion.

III. PRECLUDING THE ANESTHESIOLOGISTS' TESTIMONY ON THE PROPRIETY OF REDUCING OR TERMINATING OXYGEN FLOW WAS PREJUDICIAL ERROR

A. The Testimony Went To The Core Of Ms. Talbert's Allegation

1. The Allegation

At trial, the jury learned that the surgical team performing the "MIRP" included an anesthesiologist and an assisting nurse anesthetist. Those team members were responsible for monitoring Ms. Talbert's vital signs during surgery and regulating the flow of supplemental oxygen to her (see, e.g., A. 1642). Ms. Talbert charged that Dr. Hutchins was negligent because she supposedly failed to communicate with the anesthesiologist and the nurse anesthetist, and did not request that they decrease or terminate the flow of supplemental oxygen to Ms. Talbert every time the electrocautery device was used (e.g., A. 1367-1370, 1641-1647).

This theme, and the inexorable, interrelated responsibility of all team members, was emphasized in Ms. Talbert's evidence and argument. For example, her expert Dr. Williams testified that "the anesthesiologist" -- "the anesthetic specialist" (A. 1665) -- "is really responsible for seeing that the oxygen is being provided to the

patient at the right concentration" (A. 1642); see also A. 1689-1690). "[T]o a person, they [nurse anesthetists] all know that you reduce the oxygen, switch it off," Dr. Williams said (A. 1677). Dr. Cohen opined that it was the joint responsibility of "the surgeon, anesthesia provider and everybody in the room" to prevent the fire, and that every member of the surgical team, including the anesthesiologist, had been negligent in view of what happened during Ms. Talbert's surgery (A. 1367, 1369-1370, 1418-1419). And in closing argument, Ms. Talbert's Counsel argued:

> "Dr. Hutchins never spoke to the anesthesia care team people. She got there. She rushed. She came in. She never spoke to them. Mrs. Talbert deserves to have a surgeon speak to the anesthesia care team." (A. 2212-2213).

2. The Testimony

To meet this evidence, and to enable her to counter Ms. Talbert's argument that Dr. Hutchins had breached an alleged duty to try to reduce or terminate the flow of oxygen, Dr. Hutchins proffered the testimony of a retained expert in anesthesiology, Dr. Petrovitch, and pertinent testimony from the anesthesiologist and nurse anesthetist who were members of Ms. Talbert's surgical team, Dr. Zurowski and Nurse Henry.

a. Dr. Petrovitch, whose testimony had been preserved in a de bene esse (trial) deposition, related that, in her 28 years' experience, she had never been asked by the surgical team member to do what Ms. Talbert alleged was required of Dr. Hutchins:

> "I have never been the surgeon [performing a "MIRP"], but I have been in the position in the same room interacting with the surgeon, myself as the anesthesiologist. You can't separate the two and say that we are two independent [physicians] working in two different rooms because the fact is, it's two -- the interaction of two specialists, both the surgeon and the anesthesiologist.
>
> * * *
>
> "In my 28 years at the Washington Hospital Center, Providence, George Washington University, and now at the V.A. Hospital, I have never, ever had a surgeon ask that the oxygen be turned off or turned down prior to the use of electrocautery.
>
> * * *
>
> "I have never had the surgeon address the oxygen in terms of the flow rate or whether it's on or off or turning it down. No, I have not had a surgeon ask me to stop giving a patient supplemental oxygen in my entire career." (A. 532-533, 574-575).

b. Similarly, at trial Dr. Hutchins' Counsel proffered that, if permitted, Dr. Zurowski, the anesthesiologist member of Ms. Talbert's surgical team, would have testified that he was very familiar with the use of the electrocautery device; that it is not the standard of care to reduce or terminate the flow of supplemental oxygen during "MIRP" surgeries; and that he had never been asked by a surgeon to do so (A. 2010-2024). And Nurse Henry, Counsel proffered, was expected to testify to the same effect (see A. 2103-2104).

B. The Court's Ruling Was Prejudicial Error

The Court below precluded this testimony because it felt that it was not "related" to the obligations of the surgeon (e.g., A. 1462-1465, 1946-1947). This ruling ignored the evidence, which the Court acknowledged Ms. Talbert had introduced (A. 1437-1438; see also A. 1680), that the members of the surgical team, including the anesthesiologist and his assistant, operated as a unit when performing "MIRP's." Fairness commended that these witnesses be permitted to relate that the standard of care governing this surgery reflected the interrelated responsibilities of the team members, and that the standard required Dr. Hutchins to leave the management of

Ms. Talbert's oxygen to the judgment of the anesthesiology members of the team. An endocrine surgeon could testify as to the standard controlling the surgeon, but an anesthesiologist also could testify, from the perspective of the "anesthetic specialist," whether, had Dr. Hutchins performed in accordance with Ms. Talbert's "standard," she would have breached the standard governing the "MIRP" procedure and invaded the province of anesthesiology.

The testimony was relevant to the claims and defenses, either on its own or in response to Ms. Talbert's evidence that had "opened the door" to it. See, e.g., Satcher v. Commonwealth, supra, 244 Va. at 246, 421 S.E.2d at 837 (when defense counsel implied that experts would disagree with the plaintiff's expert, the defense opened the door for that expert to name on redirect examination other experts who agreed with his views); Vinson v. Commonwealth, 258 Va. 459, 470-471, 522 S.E.2d 170, 178 (1999), cert. denied, 530 U.S. 1218 (2000) (trial Court properly permitted expert to testify in rebuttal regarding defendant's future dangerousness after the defense's medical expert had testified regarding defendant's medical condition and offered excuses for his behavior); Norfolk and Western Ry. Co. v. Sonney, 236 Va. 482, 489, 374 S.E.2d 71, 75

(1988) (when another witness alleged that a foreman had tampered with evidence, the foreman should have been permitted to testify to rebut the charge despite his omission from the witness list).

The Court's ruling allowed a one-sided presentation to the jury. It denied the factfinder the wherewithal to assess the credibility of Ms. Talbert's witnesses who had presented an alleged duty on the part of Dr. Hutchins, and indeed the entire surgical team, to reduce or terminate the flow of oxygen -- for as much as a minute at a time, if Dr. Williams' opinions were to be taken seriously -- each and every time the electrocautery device was used. The precluded evidence directly contradicted that assertion, from witnesses with the experience to testify with authority and conviction. Moreover, the anesthesiologist and nurse anesthetist who attended Ms. Talbert were also able to testify that, because of Ms. Talbert's preexisting medical conditions and lack of capacity to withstand a diminished oxygen supply, sound medical judgment would not have justified reducing or terminating her oxygen.

Depriving all this evidence to Dr. Hutchins was prejudicial error. See, e.g., Dandridge v. Marshall, 267 Va. 591, 597, 594 S.E.2d 578, 581-582 (2004) ("[w]ell established principles require

that error be presumed prejudicial unless the record clearly shows that the error could not have affected the result"); Barkley v. Wallace, 267 Va. 369, 374, 595 S.E.2d 271, 274 (2004) ("[i]n a civil case, the erroneous exclusion of evidence is reversible error when the record fails to show plainly that the excluded evidence could not have affected the verdict"); McNeir v. Greer-Hale Chinchilla Ranch, 194 Va. 623, 631, 74 S.E.2d 165, 170 (1953) (exclusion of testimony, at least part of which was relevant, was prejudicial error requiring a new trial).

IV. THE LATE DISCLOSURE OF MEDICAL LITERATURE DENIED DR. HUTCHINS A FAIR CHANCE TO USE OR REBUT IT AT TRIAL

When a litigant intends to display medical literature to a jury, as an exception to the hearsay rule, the law requires that specific conditions be met. The precise statements to be read from the literature must be identified to the adverse party at least 30 days prior to trial, unless the Court orders another time. See, e.g., Virginia Code § 8.01-401.1; Budd v. Punyanitya, 273 Va. 583, 591-595, 643 S.E.2d 180, 184-187 (2007); May v. Caruso, 264 Va. 358, 362, 568 S.E.2d 690, 692 (2002).

After Ms. Talbert had failed to highlight the passages within the 30-day time period, but instead had merely provided over 1,200 pages in unhighlighted bulk, Dr. Hutchins moved to preclude any use of the literature. The Court agreed that Ms. Talbert had failed to comply with the disclosure requirements, but permitted identification of the passages. That identification came one business day before trial, and indeed after the trial testimony of one of Dr. Hutchins' experts (Dr. Petrovitch) had already been preserved (see A. 488). The Court's ruling was an abuse of discretion.

At trial, no passage from the literature was actually read to the jury, and Ms. Talbert will assuredly argue that the late disclosure was "harmless." But, as argued below (A. 1625-1638), there was unfair prejudice to Dr. Hutchins.

First, a preeminent purpose for timely identification and disclosure is to enable the opposing litigant sufficient time to confer with his or her experts, to allow those experts time to conduct answering research, and to prepare their own answering testimony. See, e.g., Budd v. Punyanitya, supra, 273 Va. at 591-595, 643 S.E.2d at 184-187. Here the timing of the disclosure, after one of the defense experts had already testified, meant that this defense

expert obviously would have no occasion to comment on any of the literature.

Second, the timing of the disclosure -- the Thursday evening before the Monday morning start of trial -- denied Dr. Hutchins' trial Counsel effective opportunity to confer with his experts and to prepare an effective cross-examination using the material. The timing was exacerbated because, in the intervening Saturday, trial Counsel was scheduled to conduct the de bene esse deposition of one of Dr. Hutchins' experts, Dr. Doherty (see A. 697).

Third, although Ms. Talbert's experts did not specifically quote from the literature, they did review it and based their opinions, at least in part, upon what Ms. Talbert's Counsel had provided them (see, e.g., A. 1518, 1587-1598, 1604-1619, 1621, 1633, 1637-1638). It worked unfair prejudice to deny Dr. Hutchins' Counsel sufficient time to study the literature, to pinpoint inconsistency, and otherwise to use it for impeaching Ms. Talbert's witnesses or rebutting her case.

In all events, it will be unfair for Ms. Talbert in this Court to proclaim "no prejudice" when in fact her untimely disclosure deprived Dr. Hutchins of a fair opportunity to use the identified

passages to her advantage, all the while Ms. Talbert's experts had the benefit of them. The practice violates the spirit if not the letter of Section 8.01-401.1 of the Virginia Code. It should not be condoned.

CONCLUSION

For the foregoing reasons, the Judgment should be reversed, and the cause remanded with instructions (i) to strike the testimony of Drs. Cohen and Williams and enter judgment in favor of Appellants, or (ii) in the alternative, to award a new trial.

Respectfully submitted,

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April 2009

CERTIFICATE

Pursuant to Rules 5:26(d) and 5:27 of the Rules of the Supreme Court of Virginia, this is to certify that, on April 20, 2009, I caused 15 copies each of the Brief for Appellants and Appendix to be filed, by hand, in the Office of the Clerk of the Supreme Court of Virginia; and that an electronic copy of each was also filed, on a CD, with the Office of the Clerk.

I further certify that, on April 20, 2009, three copies each of the Brief for Appellants and Appendix were mailed, through the U.S. Postal Service, postage prepaid, to Counsel for Appellee:

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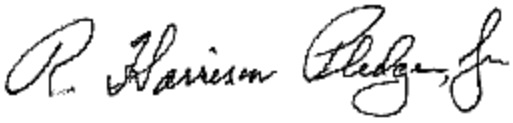

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