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

REPLY BRIEF FOR APPELLANTS

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I. THE APPEAL IS TIMELY

Ms. Talbert's timeliness complaint, consuming virtually a third of her argument, fails for several independent reasons.

A.

Ms. Talbert raised this identical argument, invoking the same authorities, in a Motion to Dismiss. After full briefing, and

Appellant's oral argument in support of her Petition for Appeal, this Court initially granted the Motion. But then, after renewed briefing, this Court reconsidered that Order, vacated the Order dismissing the Appeal, and granted Appellants' Petition for Appeal, solely on the questions presented in the Petition.

Of course jurisdictional issues may be raised at any time (Talbert Br. 3-4, n.2). But this jurisdictional issue has already been raised (twice), considered, and decided. This Court did not leave the jurisdictional issue "open" (Talbert Br. 3); it specifically accepted jurisdiction in the face of Ms. Talbert's arguments that it could not do so. Appellee's Brief does not merely introduce issues going beyond those this Court accepted for review, and thus not discussed in Appellant's Brief; it also revisits rulings that have become the law of the case. Appellee's effort is procedurally flawed. See, e.g., Miller-Jenkins v. Miller-Jenkins, 276 Va. 19, 26, 661 S.E.2d 822, 826, cert. denied, 129 S.Ct. 726 (2008).

B.

Appellee's timeliness argument fares no better on its merits.

The final Order of the trial Court -- the last judicial Order or act finally resolving all questions below -- was entered May 28 (all dates

are in 2008). As all parties agree, the May 28 Order was entered at a time when the trial Court still possessed jurisdiction to act. Compare, e.g., Wagner v. Shird, 257 Va. 584, 587, 514 S.E.2d 613, 615 (1999).

The May 28 Order itself was appealable. See, e.g. Motley v. Tarmac America, Inc., 258 Va. 98, 99, 516 S.E.2d 7, 7 (1999) (considering "whether the circuit court erred in denying the plaintiff's post-trial motion for a new trial"); Stubbs v. Cowden, 179 Va. 190, 198, 18 S.E.2d 275, 279 (1942) ("[t]he granting of a new trial invites further investigation, while a refusal operates as a final adjudication of the rights of the parties"); Rule 1:1 of this Court (referring to appealable "orders" as well as "final judgments"). Dr. Hutchins filed her Notice of Appeal on June 19, well within 30 days of May 28. The Appeal is timely.

C.

Ms. Talbert's arguments confound the pertinent Rules, and the purposes underlying them, and would if accepted create a confusing and unfair regime inconsistent with sound appellate practice.

The trial Court's first post-verdict Order was entered on April 25. But simultaneously with the entry of that Order, the Court

entered a separate Order suspending its first Order. By the latter Order's express terms, it "toll[ed]" the running of time under Rule 1:1 (A. 2333). See also Super Fresh Markets of Va., Inc. v. Ruffin, 263 Va. 555, 564, 561 S.E.2d 734, 739 (2002) (stressing that a suspended judgment does not become "a final judgment thereafter without a subsequent order confirming it as originally entered or as modified"). The purpose of the suspending Order was to accord the trial Court 14 additional days -- resulting in a maximum of 35 days after April 25 -- within which to consider any post-trial Motion, should one be timely filed.

If Dr. Hutchins had not filed a timely post-trial Motion, or if a timely Motion was filed but not ruled upon while the trial Court retained jurisdiction, the first post-verdict Order would have become the trial Court's final Order -- its last act finally resolving all issues in dispute. Dr. Hutchins would have been required to file her Notice of Appeal on or before June 8 -- 44 days after April 25 (the 44 days consists of the usual 30 days plus the additional 14 days during which the initial Order had been suspended) (June 8, 2008, was a Sunday, thus moving the last day to Monday, June 9; but we will refer to June 8 for simplicity).

But Dr. Hutchins did file a timely post-trial Motion and the trial Court ruled while it still had jurisdiction, and so the calculation in the foregoing paragraph, and Ms. Talbert's argument reciting it, is irrelevant. No party could know what the final disposition of the trial Court would be until the trial Court ruled, within the 35-day limit of its jurisdiction, on Dr. Hutchins' post-trial Motion. Appellee's regime would charge Dr. Hutchins with time running before the trial Court ruled on that Motion, a result that makes no sense: Had Dr. Hutchins filed a Notice of Appeal before the trial Court had ruled, a time when Ms. Talbert's argument says that such a Notice should be cognizable, that Notice would have been a nullity. See, e.g., Leggett v. Caudill, 247 Va. 130, 132-133, 439 S.E.2d 350, 351 (1994).

Appellee's analysis reduces a litigant's time to decide upon an appeal from the usual 30 days to, in this case, 11 days (the interval between May 28 (the ruling on the post-trial Motion) and June 8 (44 days after April 25). Here the post-trial Order was a simple denial; but in other cases the ruling may result in an opinion worthy of study, perhaps even with some issues resolved in each party's favor. In many cases, studying whether and what to appeal involves

coordination and communication among several people; in all cases such study should command considered reflection and analysis. No decision of this Court, nor Rule, nor sound policy compels so hastening the time for litigants to make reasoned decisions on whether to appeal, and on what grounds. Appellee's argument disserves the interests of meaningful appellate review.

II. THE JURY SHOULD NOT HAVE HEARD STANDARD-OF- CARE TESTIMONY FROM DRS. COHEN AND WILLIAMS

We will not repeat arguments made in our principal Brief, but add the following to place the issues in proper focus.

1. Dr. Hutchins' trial Counsel provided the Court below with ample opportunity, before the Defense presented its case, to preclude the jury's consideration of the testimony we challenge (see principal Br. 8-9). Had the Court agreed with Dr. Hutchins' trial Counsel, there would have been no need to present the evidence Appellee now suggests is sufficient to render the error harmless. No one can say, with any assurance, that the jury did not base its conclusion upon the criticisms of Drs. Cohen and Williams. If it was error to admit this testimony, it was not harmless.

2. The only specific referent Dr. Williams ever provided as the basis for his knowledge of Virginia's standard of care was his conversation with Dr. Cohen. It is not enough for Dr. Williams, who the Commonwealth's Department of Health Professions attested "[did] not appear to meet" the Commonwealth's requirements for practicing medicine in this State (A. 2334), to announce by ipse dixit that he knows Virginia's standard, to present his own out-of-State experience, or to voice generalities, without any direct reference to the procedure at issue in this case. See, e.g., Lawson v. Elkins, 252 Va. 352, 355, 477 S.E.2d 510, 511,12 (1996) (holding that a neurosurgeon who had neither performed nor observed a chemonucleolysis procedure was not qualified to testify regarding an orthopedic surgeon's alleged deviation from the standard of care in performing a chemonucleolysis procedure). The Cohen-Williams conversation came, based upon the testimony of Dr. Williams himself (A. 1530), during trial -- indeed, Appellee never directly refutes that testimony, because she has no basis for doing so. And while, upon a request and the trial Court's agreement, an expert may, in advance of violating the Order, be ruled exempt from the Rule on Witnesses, there was no such request here. Instead, for all

that appears, there was a deliberate flouting of that Order, to the obvious unfair prejudice of Dr. Hutchins.

3. In this Court, painting with as broad a brush as possible, Appellee suggests that any physician who had ever performed head or neck surgery would be qualified to criticize Dr. Hutchins' surgery. But the surgery at issue was removing parathyroid glands, requiring intermittent electro-cauterization, all the while a patient received supplemental oxygen through a mask. No one criticized the need for this procedure, or how it was to be performed. The frequency of electro-cauterization, and how the patient could cope with oxygen deprivation while it was applied, were questions dependent upon the procedure at issue, not susceptible to generalizations gleaned from plastic surgery or other operations. Fair criticism of Dr. Hutchins could come only from someone who had walked in her shoes, that is, one who had had actually performed the procedure within the statutorily mandated time frame. Neither Dr. Cohen nor Dr. Williams satisfied that criterion.

4. Appellee's argument that Dr. Hutchins' Trial Counsel failed to preserve the pertinent objections is without merit. The contention that "[n]o contemporaneous objection was lodged" (Br. 4)

is specious. The trial Court had adequate opportunity to avoid prejudicial error.

a. Dr. Cohen. Ms. Talbert does not, and cannot, deny that, three days before trial, her trial Counsel had represented to the Court that Dr. Cohen would testify as an expert, but on whether Ms. Talbert's post-injury care had been "reasonable and necessary and related" (see actual quotation from the hearing, at page 7 of our principal Brief), or that Dr. Cohen himself expressed surprise at trial that he was being viewed as anything more than Ms. Talbert's "treating doctor" (see A. 1356). Before Appellee's Counsel elicited Dr. Cohen's opinions, Dr. Hutchins' trial Counsel objected based upon the scope of the designation (A. 1342-1343). Dr. Hutchins' Counsel argued that "what he [Ms. Talbert's Counsel] is trying to do now is to broaden [Dr. Cohen's expertise] out and I don't see how he could qualify" (A. 1362). Dr. Hutchins' Trial Counsel also argued, "I think he's totally unqualified to speak to the standard of care" (A. 1361), and Appellee's trial Counsel argued that Dr. Cohen was qualified (A. 1362-1363). The words and context of this Record demonstrate that the objection went to Dr. Cohen's qualifications. Nonetheless, the trial Court overruled the objection and held that, in

its view, the objection "really" went to weight of the evidence (A. 1363).

b. Dr. Williams. According to the Record, the trial Court was aware that Dr. Hutchins' trial Counsel contended that Dr. Williams did not meet either the knowledge or active clinical practice requirements; see, e.g., A. 1572, where the Court stated its view that "it doesn't require that he do the exact surgery." Counsel argued, "I do not think this gentleman is qualified at all to express an opinion as to the standard of care" (A. 1572-1573). Although Counsel addressed the knowledge requirement, the trial Court had already essentially overruled the clinical practice portion of the objection (A. 1573).

c. The Rule on Witnesses Violation. Having failed with an earlier objection to Dr. Williams' qualifications, Dr. Hutchins' trial Counsel moved to strike the testimony, based in part, upon the violation of the Rule on Witnesses. Dr. Hutchins' contention was (and is) based upon Dr. Williams' own acknowledgement that he had talked to Dr. Cohen during the trial. Striking the testimony was one appropriate remedial measure, and Dr. Hutchins' trial Counsel gave the Court that opportunity. See, e.g., Kondaurov v. Kerdasha,

271 Va. 646, 655, 629 S.E.2d 181, 186 (2006) ("[t]he motion to strike ... met one of the primary purposes of the contemporaneous objection rule: To afford the trial judge a fair opportunity to correct errors while the case was still before the trial court"); Vasquez v. Mabini, 269 Va. 155, 163, 606 S.E.2d 809, 813 (2005) (same).

5. The prejudice to Dr. Hutchins was obvious, and substantial. The trial Court relied heavily on the Cohen-Williams conversation in finding Dr. Williams knowledgeable of the Virginia standard of care. Appellee suggests that any error would be harmless because there was sufficient evidence to support the verdict. This is not the standard. The question is whether the outcome may have been different, not whether it could have been the same. 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").

III. APPELLEE'S REMAINING CONTENTIONS CANNOT SAVE THE JUDGMENT BELOW

A.

Appellee misses the mark with respect to the unfair preclusion of testimony from Dr. Hutchins' anesthesiology witnesses.

1. Our basic point, to which Appellee assays no answer, is that this testimony was invited by Ms. Talbert's own case, which focused upon Dr. Hutchins' alleged failure to direct the attending anesthesiology personnel to cease administering oxygen to Ms. Talbert. To defend this charge, Dr. Hutchins should have been permitted to present testimony demonstrating that the standard controlling the anesthesiology component of the surgical team would not have permitted cessation of oxygen.

2. Appellee grossly distorts Section 8.01-581.20 of the Virginia Code. That statute does not limit a litigant to two experts "on a given subject" (Talbert Br. 40). It limits a litigant to two standard-of-care witnesses "per medical discipline." Virginia Code, § 8.01-581.20C. Dr. Hutchins' proffered anesthesiology expert (Dr. Petrovitch) would not have exceeded this limit, because her discipline was anesthesiology, not surgery.

3. Nor is it any answer to say that, because the Court accepted Dr. Hutchins' objection to the relevance of a nurse's testimony, as to what the nurse may have seen in operating rooms, the Court was correct to preclude expert testimony from Dr. Hutchins' anesthesiology expert, a physician (see Talbert Br. 41-42).

The nurse's anecdotal observations were not of the same probative force as a physician's testimony identifying a standard of care that would rebut Appellee's assertion that a physician in this specialty (anesthesiology) would have ceased administering oxygen to Ms. Talbert in the circumstances confronting Dr. Hutchins' surgical team.

4. The Record is precise as to what the precluded testimony would have been. The entire de bene esse deposition of Dr. Petrovitch, the precluded anesthesiology expert, is before the Court (A. 488-687), and Dr. Hutchins' trial Counsel specifically identified what the other two witnesses (Dr. Zurowski and Nurse Henry) would testify if permitted (A. 2010-2024; A. 2103-2104). Appellee's "failure to make a proffer" argument is without merit. See, e.g., Holles v. Sunrise Terrace, Inc., 257 Va. 131, 135, 509 S.E.2d 494, 497 (1999) (Record must reflect what the precluded testimony would have been); see also Whittaker v. Commonwealth, 217 Va. 966, 969, 234 S.E.2d 79, 81-82 (1977).

B.

Appellee does not dispute the trial Judge's ruling, quoted -- not paraphrased -- in our Brief, that Appellee had failed timely to produce identified medical literature (see Talbert Br. 45). It is no

answer to suggest that the trial Judge possessed the power to alter the timetable; Appellee did not request a change, she simply ignored the statute and presented the Court, and Dr. Hutchins' Counsel, with a fait accompli. That is not fair trial practice.

CONCLUSION

For the foregoing reasons, and for the reasons stated in our principal Brief, 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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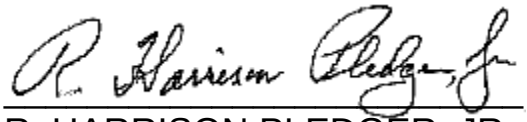
By: 

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May 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 May 28, 2009, I caused 15 copies of the Reply Brief for Appellants to be filed, by hand, in the Office of the Clerk of the Supreme Court of Virginia; and that an electronic copy was also filed, on a CD, with the Office of the Clerk.

I further certify that, on May 28, 2009, three copies of the Reply Brief for Appellants were mailed, through the U.S. Postal Service, postage prepaid, to each Counsel for Appellee:
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