IN THE

Supreme Court of Virginia

RECORD NO. 081632

DEBRA HUTCHINS, M.D., et al.,

Appellants,

v.

RITA TALBERT,

Appellee.

BRIEF OF APPELLEE

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PRELIMINARY STATEMENT

This appeal involves a patient who, in the course of a head and neck surgery called a parathyroidectomy, was set on fire when the Defendants, Debra Hutchins, M.D. and Alexandria Surgery, LTD ("Hutchins"), placed an electrocautery device in close proximity to an oxygen-enriched environment, igniting pooled oxygen. (JA 2296.) Defendants' brief tries to minimize the severity of the fire and the injuries to Rita Talbert, suggesting that the blaze was quickly smothered and that Mrs. Talbert had "several" surgeries to correct her condition. (Appellants' br. at 3, 12, 13.) In reality, Inova Hospital's own nurse testified that the fire on Mrs. Talbert's face and neck lasted approximately fifteen seconds. (JA 930, 952.) The injuries were, and are, horrific. (JA 2304-21, 883-84, 904.) Mrs. Talbert is permanently disfigured and will likely never regain full mouth continence, which means that she will likely drool for the remainder of her life. (JA 1413.) She also suffered significant psychological damage, including depression. (JA 894, 897, 904.)

Mrs. Talbert spent several weeks in the Washington Hospital Center Burn Unit's ICU following the fire. (JA 886.) As of trial, she had endured nine reconstructive surgeries. (JA 900.) The jury's verdict of $4,000,000 was reduced under Va. Code § 8.01-581.15. (JA 2331.)

The trial court did not abuse its discretion in any of the evidentiary rulings that are now under challenge. The trial was conducted fairly and even-handedly, and the rulings below should stand.

STATEMENT OF THE CASE

The procedural history of this case is marred by a series of waiver issues. These problems include an untimely notice of appeal, the failure to file a critical transcript, and arguments raised on appeal that were not preserved below or for which there is no assignment of error.

Jurisdictional Issue

A "final order" was entered awarding Mrs. Talbert $885,000, plus interest, on April 25, 2008. (JA 2331-32.) That same date, another order was entered suspending the final order "for fourteen days" to allow the trial court thirty-five days (instead of the standard twenty-one days under Rule 1:1) to rule on anticipated post-trial motions. (JA 2333.) On May 28, within thirty-five days of judgment, the trial court heard the post-trial motions and completely rejected them, leaving the April 25, 2008 final order in full effect. (JA 2632.) The May 28 ruling did not modify, vacate or suspend the existing final order in any way; it merely stated that Hutchins' motion "is hereby denied." (*Id.*).

Under Rule 5:5, an order merely denying post-judgment motions to reconsider does not trigger additional time for filing a notice of appeal under

Rule 5:9. Defendants' notice of appeal was, therefore, due no later than June 9, 2008 – this is the date that falls thirty days after the expiration of the fourteen day suspension of the April 25, 2008 order. Defendants did not file their notice of appeal until June 19, 2008.

APRIL 25, 2008	MAY 9, 2008	MAY 28, 2008	MAY 30, 2008	JUNE 9, 2008	JUNE 19, 2008
FINAL ORDER ISSUED (JA 2331-32), SUSPENSION ORDER SUSPENDS FINAL ORDER "FOR FOURTEEN (14) DAYS FROM THIS DATE." (JA 2333)	EXPIRATION OF 14 DAY SUSPENSION ORDER	ORDER DENYING POST-TRIAL MOTIONS (DID NOT ALTER TERMS OF FINAL ORDER) (JA 2632)	END OF 35 DAY PERIOD FOR RECON-SIDERATION SET BY SUSPENSION ORDER AND RULE 1:1	DEADLINE TO FILE TIMELY NOTICE OF APPEAL	APPELLANTS' NOTICE OF APPEAL

Mrs. Talbert filed a Motion to Dismiss based on Defendants' failure to comply with the mandatory provisions of Rule 5:9, which this Court granted. Defendants filed a Petition for Rehearing.[1] This Court granted the Petition for Rehearing and granted the Petition, but left open the jurisdictional issues raised by the Motion to Dismiss.[2]

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[1] The Court did not request any response by Talbert.

[2] The Court vacated the prior dismissal, but did not deny the Motion to Dismiss which remains in place. In any event, a jurisdictional defect can
cont'd. to next page...

Defendants' Objections To Dr. Cohen's Testimony.

Defendants' brief devotes much discussion to whether Dr. Cohen testified beyond the scope of his designation. Defendants' assignments of error, however, relate only to whether Dr. Cohen was *qualified* to testify. (Assignment #1.) Indeed, at the time Dr. Cohen testified that Dr. Hutchins violated the applicable standard of care, Defendants neither objected nor suggested that his testimony exceeded the scope of the designation. (JA 1360-64.)

When Dr. Cohen finished his testimony, the trial court asked if there was any reason not to excuse Dr. Cohen, to which Defendants responded "no." (JA 1419.) It was not until the next day that Defendants moved to strike Dr. Cohen's testimony on the basis that he testified beyond the scope of his designation. (JA 1450.) No contemporaneous objection was lodged.

Dr. Cohen was eminently qualified to testify on head and neck surgeries in an oxygen-enriched environment. (JA 1336-37.) He is Virginia-licensed (JA 1328), performs head and neck surgery, uses anesthesia, and is presumed to know the applicable standard of care under

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be raised at any time in the course of the proceedings. *Wackwitz v. Roy*, 244 Va. 60, 63, 418 S.E.2d 861, 863 (1992); *Morrison v. Bestler*, 239 Va. 166, 170, 387 S.E.2d 753, 756 (1990).

Va. Code § 8.01-581.20. He did testify within the parameters of his designation (*see* JA 84-94), but the issue is waived regardless.

Defendants' Motion To Strike Dr. Williams' Testimony.

Defendants objected to Dr. Williams' testimony at trial solely on the basis that he did not have a sufficient knowledge of Virginia's standard of care. (JA 1573-79.)[3] Both Defendants' brief and their assignment of error are tied to the false factual contention that Dr. Williams knew about Virginia's standard of care *solely* through a single phone call to Dr. Cohen. To the contrary, over his thirty-year career, Dr. Williams attended many national seminars on head and neck surgery where Virginia surgeons were present, and he discussed patient care and the standard of care in Virginia. (JA 1517-18.) Dr. Williams' knowledge of the standard came from various sources, including his review of Dr. Hutchins' deposition. (JA 1519.) The trial court, in fact, took specific notice of Dr. Williams' reliance on Dr. Hutchins' deposition (JA 1573), given that Dr. Hutchins herself (and her expert Dr. Doherty) confirmed that the standard of care in Virginia for head and neck surgery in an oxygen-enriched field is the same as everywhere else in the country. (JA 2325-27, 2329, 710-11.) Dr. Williams is an

[3] Appellants' brief now challenges his "active practice" qualifications as well.

accomplished surgeon who has written and lectured extensively on the issue involved in *this* case – a surgeon's duty to prevent fire in the operating room. (JA 1502-15.)

Finally, Defendants argue that Dr. Williams' testimony violated the "Rule on Witnesses." While plaintiff strongly disagrees, again, no such objection was raised while Dr. Williams was on the stand (and could have defended against the attack). Defendants first raised the Rule on Witnesses complaint in a motion to strike the evidence at the conclusion of the case, a motion which by its very nature challenges the sufficiency, not the admissibility, of evidence. (JA 2153-55.) No objection to admissibility was timely preserved. The trial court, which thoroughly understood the nature of the standard of care issue, did not find any impropriety.

Precluding Dr. Petrovitch, an Anesthesiologist, from Providing Cumulative Evidence that Two Other Defense Experts Were Designated to Discuss.

Defendants had two surgical experts, Drs. Chen and Doherty, available to provide opinions regarding communication between surgeons and anesthesiologists during electrocautery surgery. The expert designations for both Chen and Doherty included the very topic that Defendants now complain Petrovitch was precluded from addressing. (Compare JA 151-55, 157-61, with JA 163-64.) Moreover, these surgical

experts, Chen and Doherty, *did* address this topic in their testimony. (JA 724-26, 1246-47.)

Defendants sought to furnish Petrovitch as a third expert on the issue. Va. Code § 8.01-581.20(c), however, limits a party to two experts on a given topic. Moreover, Defendants had successfully objected earlier in the trial that Mrs. Talbert should not be permitted to put on non-surgeon accounts of operating room communication between the anesthesia team and surgeon. Talbert's witness, Nurse Debra Owen, was prepared to testify that she frequently saw surgeons in the operating room request a lowering of supplemental oxygen, but Defendants argued that whether Owen "observed a surgeon ask anesthesia to do something in the operating room is not relevant to the issues in this case." (JA 1297.) The trial court sustained the objection. (JA 1326.) The trial court was merely consistent in preventing Petrovitch from testifying to this issue.[4]

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[4] The testimony of defense fact witnesses Zurowski and Henry was similarly tied to the exclusion of Owen's testimony. Defendants specifically told the trial court that they were not calling Dr. Zurowski as an expert. (JA 2003-04.) Similarly, Defendants specifically told the trial court that Nurse Henry was a fact witness. (JA 2015.) Yet, on appeal, Defendants argue Zurowski and Henry should have been permitted to offer expert "standard of care" testimony. (Appellants' br. at 33.) The trial court properly limited Zurowski's testimony to non-expert opinion matters, and precluded him from testifying to what he did as an anesthesiologist in other surgery cases as irrelevant to the standard of care governing Dr. Hutchins' conduct in this
cont'd. to next page...

Designation of Authoritative Texts

Mrs. Talbert designated her authoritative texts when there were five defendants in the case. Shortly before trial, Hutchins moved to preclude use of the pages because they were not highlighted. (R. 2791.) Defendants failed to file the transcript relating to the March 26, 2008 hearing where this issue was addressed. Nor is there an order in the record reflecting the court's ruling on March 26, 2008.

The anesthesiologist and hospital defendants had settled prior to the March 26 hearing, and the highlighted documents re-filed by Talbert were significantly shorter than the original filing. In the end, not a single authoritative text was used by Mrs. Talbert at trial. The assignment of error on this point does not identify any further relief purportedly sought by Hutchins or denied by the trial court. Again, the absence of the transcript governing this issue is fatal.

QUESTIONS PRESENTED

I. Whether the Appeal Must be Dismissed Based on Defendants' Failure to File a Timely Notice of Appeal?

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case. (JA 2018-22.) At trial, the court properly ruled that Henry could be asked about what he did, and why, with respect to Mrs. Talbert's case. (JA 2063-67).

II. Whether it Was an Abuse of Discretion to Permit Drs. Cohen and Williams to Testify as Experts Where they Were Highly Qualified to do so?

III. Whether the Trial Court Abused its Discretion in Precluding Defendants' Third Designated Expert, an Anesthesiologist, from Testifying to the Same Issues on which Defendants had Two Other Experts Provide Testimony, and in Limiting Defendants' Fact Witnesses from Offering Expert Opinions?

IV. Where No Authoritative Sources were Admitted at Trial, Whether Defendants' Complaint About the Trial Court's Handling of Mrs. Talbert's Designation of Authoritative Sources is Meritless as well as Waived Since Defendants Never Obtained an Order on Their Motion in Limine and Failed to File the Relevant Transcript?

V. Where the Jury's Verdict was Supported Even by Defendants' Evidence, if any Error is Found, Whether it Should be Deemed Harmless?

STATEMENT OF FACTS[5]

Mrs. Talbert required surgery to remove a diseased parathyroid gland. The procedure undertaken by Dr. Hutchins involves an incision in the neck to remove the diseased gland. The patient's breathing was aided during the procedure by oxygen provided through a mask (JA 925), however, intubation is an alternative method of providing oxygen. (JA 931, 1579-80, 1649-50.) Hutchins used an electrocautery device in the

[5] Under well-settled principles, the evidence is viewed in best light to Mrs. Talbert, the prevailing party. *Holmes v. Doe*, 257 Va. 573, 515 S.E.2d 117 (1999); *Murray v. Hadid,* 238 Va. 722, 385 S.E.2d 898 (1989). Appellants' brief fails to adhere to this standard on numerous occasions.

procedure. (JA 2295, 726-27.) The tip of the device is *extremely* hot. (JA 1804.) When a heat source is placed in close proximity to a high concentration of oxygen, the risk of fire exists. (JA 1513.) In fact, at the outset of Mrs. Talbert's surgery, prior to the fire, the device had sparked when Hutchins first turned it on. (JA 1903-04.)

In this case, Dr. Hutchins' own post-surgery notes suggest a pooling of oxygen ignited by the heat of the electrocautery device caused the fire. (JA 1865.) Dr. Hutchins utilized the electrocautery device (JA 1851), and Dr. Hutchins' confirmed she was responsible for draping the patient and preventing pooling of oxygen under the drapes. (JA 1730, 1845, 1885.)

Standard of Care Issues

Defendants' Own Experts Testified Both that Virginia's Standard of Care is the Same as the National Standard and that Head and Neck Procedures in an Oxygen-Enriched Environment are Related to Parathyroidectomies.

Dr. Hutchins was designated at her deposition as an expert witness on the standard of care. (JA 2499.) She testified that: (i) the same technique is used for cervical node biopsies (a head and neck surgery) with the same incision and the same instruments as the procedure she performed on Mrs. Talbert, (ii) the "fact that it was a parathyroidectomy" is not "at all relevant *per se*", (iii) there is a national standard of care for such procedures and (iv) there is not a standard of care unique to Virginia. (JA

1485-86, 2326-30.)[6] In Hutchins' own words, "I don't expect Virginia to be any different than Denver, Colorado." (JA 2329.) Defendants' expert witness, Dr. Gerard Doherty, likewise confirmed that Virginia's standard of care is no different than anywhere else in the country. (JA 710-11.)

Dr. Cohen's Qualifications.

Dr. Barry Cohen is a plastic surgeon licensed in Virginia, Maryland, and the District of Columbia. (JA 1328.) He is credentialed to perform parathyroid biopsies, as well as the procedure performed on Mrs. Talbert, and is thus presumed to know the applicable standard of care. (JA 1353.) Defendants conceded that Dr. Cohen was "in somewhat of a related field..." (JA 1360.)

Dr. Cohen's clinical practice for the year prior to Mrs. Talbert's surgery included head and neck surgeries with various kinds of anesthesia (including the same type administered to Mrs. Talbert), and surgeries utilizing electrocautery devices. (JA 1335-36, 1352-53.) During that time,

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[6] Mrs. Talbert sought to play for the jury the video clips of Dr. Hutchins' standard of care testimony. The trial court cut back on what Mrs. Talbert was permitted to play. (JA 1468-82.) To preserve the record, the trial court allowed Mrs. Talbert to mark and place in the record, as Plaintiff's Exhibit 55, the entirety of the excerpts she sought to play. (JA 1477.) The trial court, like Plaintiff's experts, had the benefit of all of Dr. Hutchins' standard of care testimony in determining whether Mrs. Talbert's experts practiced in a related field. (JA 2322-30.)

Dr. Cohen also performed cervical node biopsies, including a minimally invasive cervical node biopsy. *Id.* Moreover, in opening a fully accredited surgery center in 2004 that services Northern Virginia, Maryland and the District of Columbia, Dr. Cohen had researched the governing standards of care. (JA 1353-54.)

Dr. Cohen confirmed that the standard of care was the same "for any surgeon doing general head and neck surgery under IV sedation in 2005" irrespective of whether the procedure was a biopsy of the parathyroid, thyroid, or lymph node. Defendants' attempts to draw distinctions between the procedures would, in Dr. Cohen's professional opinion, be "splitting hairs unduly." (JA 1351-52.)

Dr. Williams' Qualifications.

Dr. Williams is an experienced surgeon who, in the year prior to Mrs. Talbert's surgery, had performed approximately 400 surgeries, including numerous head and neck surgeries, the most typical of which were cervical lymph node removals and carotid artery surgeries. (JA 1522-25.)[7]

As a physician licensed out of state, he read Dr. Hutchins' deposition as one of several sources of information on the applicable standard of care.

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[7] The carotid artery is located in proximity to the parathyroid deep in the neck. (JA 1526.)

(JA 1519.) As related above, Dr. Hutchins testified that the standard of care that applied in Virginia was the same as anywhere else in the country. (JA 2329.) She equated the procedure she performed on Mrs. Talbert to cervical node biopsies (which Williams performed frequently (*see* JA 1522-25)), noting the same incision, and same instruments are used, and "nothing different was done." (JA 2326, 1486.)

Hutchins also said that the standard of care was based on recommendations from the American College of Surgeons. (JA 2327.) Dr. Williams made presentations on fire prevention in the operating room at annual meetings of this organization. (JA 1511-12.) At its request, Dr. Williams published a peer review article on fire prevention in the operating room, which was disseminated to its fellows across the country. (JA 1502-05.) He agreed with all of the other experts that the applicable Virginia standard of care for such procedures was the same as everywhere else in the country. (JA 1527-28.)

Deviation from Standard of Care.

Drs. Cohen and Williams, as well as Defendants' expert, Dr. Doherty, testified as to the dangers of the "fire triangle" consisting of oxygen, fuel and a heat source. (JA 1365-66, 1638-39, 745.) Drs. Cohen and Williams further stated that Dr. Hutchins had a duty to minimize the risk of a fire by

keeping sources of ignition, such as an electrocautery device, away from a fuel source and high levels of oxygen. (JA 1365-69, 1513, 1642-50.)

Thus, the standard of care required that a heat source should not be near an oxygen-enriched environment. (JA 1564-65.) Accordingly, in a head and neck surgery, the surgeon should not use a heat source such as an electrocautery "when you have open oxygen." *Id.* Even Defendants' expert, Dr. Doherty, agreed that the standard of care requires that the fuel, ignition, and oxygen must be separated. (JA 758-59.) The oxygen should be switched off, delivered in some other way (*e.g.,* intubation), or the surgeon should stop the bleeding another way without using an electrocautery. (JA 1564-65, 1649-50.)

The standard of care also requires the surgeon to talk to the anesthesia team to make the procedure safe. (JA 1642-46, 724.) While the anesthesia team generally decides whether and how to give supplemental oxygen, the surgeon should object if supplemental oxygen will be continuously delivered through the mask during a head and neck surgery, because the use of oxygen must be adapted to prevent fires if the electrocautery is to be used. (JA 1689-90.) If turning the oxygen levels down or off is not possible or practical, the patient should be intubated so that she receives oxygen through a tube, directly into her lungs, precluding

the risk of fire. (JA 1579-80, 1649-50.) In Dr. Williams' opinion, Dr. Hutchins failed to adequately communicate with the anesthesia team, failed to keep an ignition source away from an oxygen enriched environment, failed to educate herself on these dangers, and, as a result, Mrs. Talbert was set on fire. (JA 1642-49, 1651-53.)

ARGUMENTS AND AUTHORITIES

I. The Appeal Must be Dismissed Based on Defendants' Failure to File a Timely Notice of Appeal.

A. The Final Order was Issued on April 25, 2008.

On April 25, 2008, the trial court entered a "Final Order" concluding this medical malpractice action. (JA 2331-2332.) The Final Order awards Mrs. Talbert a judgment in the amount of $885,000, plus interest. The Order is denominated "Final Order" and it concludes: "AND THIS CAUSE IS ENDED." (*Id.*)

That same date, however, a separate "Suspending Order" (JA 2333) was entered by the Court, extending the time to consider post-trial motions by the specific and finite period of fourteen days. The document stated:

> It is ORDERED that the ***final Order*** be suspended for fourteen (14) days from this date. This tolls the running of the twenty-one (21) day provision in Rule 1:1, thus allowing a total of thirty-five (35) days for entry of an Amended Final Order. (JA 2333.) (Emphasis added.)

Ultimately, the trial court considered and simply denied the post-trial motion on May 28, 2008, within the 35-day period the Court granted itself to rule. (JA 2632.) The May 28 order neither altered nor modified the April 25, 2008 Final Order in any respect and no "Amended Final Order" was issued. (JA 2632.) The May 28 Order does not purport to be "final"; instead, it tersely reflects that Hutchins' Motion to Set Aside the Verdict "is hereby denied." (JA 2632.)

This appeal, accordingly, is like any other case in which post-trial motions are denied and the Final Order – which triggers the requirements of Rule 5:9 of the Supreme Court of Virginia – remains in effect. A fresh 30 days does not run from an Order simply denying the motion to reconsider. (Rule 5:5.) The one anomaly here is that the Final Order of April 25 was suspended for fourteen days. This fourteen day time period set forth in the suspending Order of April 25 was "self-executing" and it expired by its own terms on May 9, 2008. *Wagner v. Shird*, 257 Va. 584, 587, 514 S.E.2d 613, 614-15 (1999) (at expiration of finite suspension period, time limits run unless new suspension order entered.)

Once the suspension ended on May 9, 2008 (and was not renewed), an effective notice of appeal was required within thirty days under Rule 5:9. Thus, a timely notice had to be filed by June 9, 2008. (*See* Chart *supra* at

3.) The appellants filed their notice of appeal on June 19, 2008. The June 19 notice plainly came too late. Accordingly, this appeal should be dismissed under the mandatory provisions of Rule 5:9.

B. The Running of Time Under Rules 1:1 and 5:9 of the Rules of the Supreme Court of Virginia is Only Interrupted by an Order "Modifying, Vacating or Suspending" a Final Order, and the May 28th Order Merely Denying Defendants' Post-Trial Motions Did Not Extend the Time for Filing a Notice of Appeal.

This jurisdictional question involves the relationship between Rules 1:1, 5:5, and 5:9 of the Rules of the Supreme Court of Virginia. Rule 1:1 states that "all final judgments shall remain under the control of the trial court and subject to be modified, vacated, or suspended for twenty-one days after the date of entry, and no longer." This Rule is critically important when, as here, a motion to set aside the verdict or for a new trial is filed post-judgment. In the absence of suspension, if the court fails to rule within twenty-one days after judgment, jurisdiction is lost. Rule 1:1; *Wagner*, 257 Va. at 587, 514 S.E.2d at 614-15; *School Bd. of City of Lynchburg v. Caudill Rowlett Scott, Inc.*, 237 Va. 550, 556, 379 S.E.2d 319, 323 (1989).

Under Rule 5:5, the running of time under Rule 1:1 may be interrupted *only* by the timely entry of an order modifying, vacating, or suspending the final judgment previously entered. *Berean Law Group, P.C. v. Cox*, 259 Va. 622, 626, 528 S.E.2d 108, 111 (2000); *accord*

Wagner, 257 Va. at 587, 514 S.E.2d at 614-15. An order simply *denying* a post-judgment motion to reconsider does not "modify, vacate or suspend" the "final order" at issue.[8]

Similarly, under Rule 5:5, "The time period for filing the notice of appeal ***is not extended*** by the filing of a motion for a new trial, a petition for a rehearing, or a like pleading ***unless*** the final judgment is modified, vacated or suspended ..." (emphasis added). *Caudill Rowlett Scott, Inc.*, 237 Va. at 556, 379 S.E.2d at 323 (running of time under Rule 5:9 only interrupted by order "modifying, vacating or suspending" final order). Rule 5:5(a) also confirms that the provisions of Rule 5:9 (which govern the time for filing the notice of appeal) are mandatory.[9]

Thus, in the normal course, the trial court has twenty-one days under Rule 1:1 to modify or reconsider its final order. If its order disposing of the post-trial motion simply denies the motion to reconsider, the time for filing

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[8] Rule 5:5; *see also Super Fresh Food Markets v. Ruffin*, 263 Va. 555, 560-61, 561 S.E.2d 734, 737 (2002); *In re Commonwealth, Department of Corrections*, 222 Va. 454, 464, 281 S.E.2d 857, 863 (1981) (taking a motion to set aside under advisement "did not 'modify, vacate, or suspend' the judgment.")

[9] Rule 5:9 states: "No appeal shall be allowed unless, within 30 days after the entry of judgment or other appealable order or decree, counsel for the appellant files with the clerk of the trial court a notice of appeal ..."

the Notice of Appeal under Rule 5:9 is ***not*** extended. If the denial occurs on the 21st day after judgment, the appellant has only nine additional days to file a timely Notice of Appeal under Rule 5:9.

Here, the result is no different except that the final order of April 25, 2008 (JA 2331) was suspended for fourteen days (JA 2333) – a finite period that expired by its own terms. With this fourteen day extension, the court had thirty-five days to rule on the post-trial motions (fourteen days added to Rule 1:1's twenty-one days) and the Defendant had forty-four days from the Final Order to file a Notice of Appeal pursuant to Rule 5:9.[10]

The trial court ruled within the thirty-five day time frame after April 25, 2008 (JA 2331) – denying the motion for reconsideration on May 28, 2008. (JA 2632.)[11] The May 28, 2008 order denying Hutchins' Motion for Reconsideration did not purport to be a new or amended final order (JA 2632); nor did it purport to modify, vacate or suspend the April 25, 2008 Final Order. Only the April 25, 2008 Order is denominated as the "Final Order" in this case (JA 2331), and a Notice of Appeal was required within thirty days of the expiration of the suspension order. Under Rule 5:5, the

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[10] The thirty days from Rule 5:9, plus the fourteen days that the final order was suspended comprise the forty-four days.

[11] This was "day 33" after the Final Order.

trial court's May 28 Order (JA 2632) merely denying the motion for reconsideration did ***not*** trigger a new thirty-day period for filing a notice of appeal, and Defendants' June 19 Notice of Appeal came too late. *See* Chart, *supra* at 3.

C. The Initial Suspending Order Expired by its Own Terms and Was Not Tied to Resolution of the Post-Trial Motions.

This case is similar to *Wagner* in that the suspending order was of finite duration and was never tied to resolution of the post-trial motions; nor was the final order suspended anew after the court's denial of the post-trial motion. In *Wagner*, this Court confirmed that a "suspension" for a finite period is just what it claims to be, "expressly limited" to the specified period (in *Wagner*, thirty days; here, fourteen days). This Court explained:

> In the present case, the circuit court suspended the January 6th final order within the twenty-one day period allowed in Rule 1:1 by entering the order of stay on January 27, 1998. ***Contrary to Shird's position, the duration of the stay was not tied to the court's resolution of the motion*** for remittitur. Instead, ***it was expressly limited*** to "a period of thirty days." Since the court did into enter an additional order within that thirty-day period to continue the stay, the January 6th order became final well before [an ineffective order purporting to modify the prior order was entered in April.]

257 Va. at 584, 587, 514 S.E.2d at 615 (brackets and emphasis supplied.)

Ultimately, this appeal involves a Final Order dated April 25, 2008, which was suspended for *only* fourteen days. When the suspension expired, on May 9, the thirty-day time limit under Rule 5:9 began running for Defendants to file their Notice of Appeal from the Final Order of April 25. If an order extending the suspension or otherwise "modifying, vacating or suspending" the Final Order had been timely entered on May 28, the thirty-day limit could have been extended. No such order was entered.[12]

The Appellants' Notice of Appeal was filed long after the expiration of the *mandatory* thirty-day period fixed by Rule 5:9. Defendants' Petition came late, too. This appeal should be dismissed.

D. Hutchins' Petition for Rehearing Misconstrues the Circuit Court's Rulings and Would Radically Alter Existing Virginia Law.

Hutchins' Petition for Rehearing mischaracterizes both the trial court's rulings and Mrs. Talbert's position. While the appellation of an Order is not

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[12] While there is language in *Super Fresh* that a general suspension order requires entry of a subsequent order to confirm its finality, this case, like *Wagner,* involves a suspension order that had a fixed duration that expired by its own terms. *Wagner*, 257 Va. at 587, 514 S.E.2d at 615; *see also Berean Law Group*, 259 Va. at 627, 528 S.E.2d at 111-12 (discussing orders requiring further action to forestall finality.) Thus, here, there was no surviving suspension order after expiration of the fourteen day suspension period. The "final order" was only suspended "for fourteen (14) days from this date." (JA 2333.) *Super Fresh* involved an order which, while ineffective, purported to "retain jurisdiction" indefinitely.

determinative, the April 28 Order states that it is "final" (JA 2331) and the suspending order states that the "final Order" is suspended for the finite period of "fourteen (14) days from this date." (JA 2333.) The May 28 order does not call itself a final order – it merely rejects Hutchins' motion. (JA 2632) (stating the Post-Judgment Motion "is hereby denied.")[13]

Hutchins argues that Talbert contends that the Court lacked authority to expand its time to consider the post-trial motion to thirty-five days. (Reh'g. at 9.) That is inaccurate – the trial court properly "suspended" the April 25 final order and ruled within the timing window provided by the suspension. It is Hutchins who failed to respond to the denial of the motion the way all litigants are required to respond when the Final Order is left unchanged and in-place when post-trial motions are simply denied. Hutchins' thirty day limit for filing a notice of appeal was not re-started when the May 28 order flatly denied her post-trial motion without amending or suspending the final Order. Rule 5:5; *Caudill Rowlett Scott, Inc.*, 237 Va. at

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[13] Hutchins claims that the trial court's mere *consideration* of post-judgment motions automatically moots a final order because it leaves "something left to do." (Reh'g at 8.) This is contrary to the numerous cases where pending motions for reconsideration expired and this Court ruled the original "final order" was final when the "21 day" period expired. *Wagner*, 257 Va. at 587, 514 S.E.2d at 614-15; *Caudill*, 237 Va. at 556, 379 S.E.2d at 323; *Davis v. Mullins*, 251 Va. 141, 150, 466 S.E.2d 90, 94 (1996).

556, 379 S.E.2d at 323 (running of time under Rule 5:9 only interrupted by order "modifying, vacating or suspending" final order).

While Hutchins argues that this rule will stand Virginia law on its head, it is her position that would dramatically alter current practice. Hutchins' position is that a denial of a motion to reconsider automatically constitutes a new final order even if it does not "modify, suspend or vacate" the original final order. (Reh'g. at 7-8, 13.) This is directly contrary to the dictates of Rule 5:5 and would mean that every post-judgment order denying a motion for reconsideration would become the true final order. Under Hutchins' analysis, appellate time frames tied to the "final order" would be easily manipulated, unreliable and ever-changing. This is simply not the law. *See, Wagner*, 297 Va. at 587, 514 S.E.2d at 614; *Davis v. Mullins*, 251 Va. at 150, 466 S.E.2d at 94; *Super Fresh*, 263 Va. at 563, 561 S.E.2d at 739 (mandatory appellate provisions "assure the certainty and stability that the finality of judgment brings"); *Safrin v. Travaini Pumps USA, Inc.*, 269 Va. 412, 418, 611 S.E.2d 352 (2005) (same).

Under well-settled precedent, Hutchins' Notice of Appeal was untimely filed and this appeal should be dismissed.

II. The Trial Court Did Not Abuse its Discretion in Permitting Drs. Cohen and Williams to Testify as Experts.

A. Trial Courts Have Broad Discretion in the Admission of Expert Testimony.

The trial court has wide discretion to determine whether a witness is qualified as an expert. *Jackson v. Qureshi*, 277 Va. 114, 671 S.E.2d 163 (2009); *Lloyd v. Kime, III*, 275 Va. 98, 654 S.E.2d 563 (2008). Under Va. Code 8.01-581.20, an expert may qualify in one of several ways. If, like Dr. Cohen, the witness is licensed in Virginia, "he is presumed to know the standard of care of the specialty or field of medicine in which he is qualified and certified." *Wright v. Kaye*, 267 Va. 510, 518, 593 S.E.2d 307, 311 (2004). If, like Dr. Williams, the witness is not licensed in Virginia and does not meet the educational and examination requirements to become licensed, then the witness can still be qualified if he demonstrates "sufficient knowledge, skill, or experience to make him competent to testify as an expert on the subject matter at issue." *Christian v. Surg. Spec. of Richmond, Ltd.*, 268 Va. 60, 65, 596 S.E.2d 522, 524 (2004).

A testifying expert must satisfy both the "knowledge" and "active clinical practice" requirement under Va. Code § 8.01-581.20. *Wright*, 267 Va. at 518, 593 S.E.2d at 311. Va. Code § 8.01-581.20 provides that a testifying expert must have "expert knowledge of the standards of the defendant's specialty and 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." A trial court's ruling as to the admission of expert testimony will only be reversed for an abuse of discretion. *Wright*, 267 Va. at 517, 593 S.E.2d at 310.

B. Drs. Cohen And Williams Were Qualified Because, Under *Jackson v. Quereshi, Griffett v. Ryan*, and *Wright v. Kaye*, And As Confirmed By The Record, They Had Abundant Experience In Related Head And Neck Surgeries Similar To Parathyroidectomies.

Defendants downplay Drs. Cohen's and Williams' significant medical experience as head and neck surgeons who performed procedures similar to the parathyroid surgery at issue. Instead, Defendants assign error to their admission as experts essentially because they have never performed the ***identical*** "minimally invasive radioguided parathyroidectomy" ("MIRP") procedure performed on Mrs. Talbert. This contention is contrary to established Virginia law and to the extensive evidence from numerous witnesses including Dr. Hutchins herself, that the other head and neck procedures routinely performed by plaintiff's experts are closely related to Mrs. Talbert's surgery. (JA 2326, 1353, 1486, 1519-23.)[14]

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[14] It should be noted that Defendants made no "active practice" objection as to Dr. Williams at trial. After their lengthy *voir dire*, Defendants objected to Dr. Williams solely on the basis that he did not have sufficient knowledge of Virginia's standard of care. (JA 1573-75.)

1. There is No Requirement that Drs. Cohen and Williams Must Perform the MIRP Procedure in Order to be Expert Witnesses Here.

The analysis of Defendants' first assignment of error turns on the proper "definition" of the relevant medical procedure for purposes of satisfying the knowledge and active clinical practice requirements. A plaintiff has the burden of showing that her expert's specialty or field is the same as the defendant's, *or is in a related field of medicine*. *Lloyd*, 275 Va. 98, 654 S.E.2d at 569-570. This determination is made "in context of the actions by which the defendant is alleged to have deviated from the standard of care." *Id.*, (quoting *Wright*, 267 Va. at 523, 593 S.E.2d at 314).

Here, as detailed above, this key "context" is the manner in which Dr. Hutchins dealt with the "fire triangle," and the precautions she failed to take in placing a heat source in close proximity to fuel in an oxygen-enriched environment. (*Supra* at 13-14.) As Dr. Hutchins, Dr. Cohen and Dr. Williams all stated, the general concepts applicable to such head and neck surgery are ***not*** unique to a parathyroidectomy. (JA 2326, 1353, 1528.) Moreover, Virginia case law makes it abundantly clear that an expert need not perform the precise procedure that the plaintiff received, or that he be the same exact type of physician as the defendant to provide expert opinions.

This Court's most recent pronouncement on the topic is *Jackson v. Qureshi,* 277 Va. 114, 117, 671 S.E.2d 163, 164 (2009), where a pediatrician board-certified in pediatric infectious diseases qualified to state the standard of care related to pediatric emergency medicine. This Court reiterated that where the expert's "area of qualification and certification . . . had certain overlapping medical practices and a similar standard of care," then the expert is deemed to have knowledge of the standard of care at issue and should be allowed to testify. 277 Va. at 121, 671 S.E.2d at 167 (citing *Lloyd,* 275 Va. at 109, 654 S.E.2d at 569-70).

This "overlap" in medical practices and the standard of care can be shown with evidence that "the standard of care, as it relates to the alleged negligent act or treatment, is the same for the proffered expert's specialty as it is for the defendant doctor's specialty." *Id.* In *Jackson,* the standard of care centered on the emergency room diagnosis of an infant with pertussis or "whooping cough." 277 Va. at 117, 671 S.E.2d at 165. The proffered expert's specialty in *Jackson* was not pediatric emergency room medicine; in fact, his hospital did not even have a separate emergency room for children. *Id.* However, despite this distinction, "the only relevant medical procedure at issue" was the defendant doctor's "decision to not admit [the infant] to inpatient hospital care when the infant presented to the

emergency room showing signs of respiratory distress and/or pertussis." 277 Va. at 123, 671 S.E.2d at 168. This Court concluded that "the standard of care, as it pertains to the medical procedure at issue, is the same for a physician with specialties in pediatrics and pediatric infectious diseases as it is for a physician with a specialty in pediatric emergency medicine." 277 Va. at 124, 671 S.E.2d at 168.

Similarly, in *Griffett v. Ryan*, 247 Va. 465, 443 S.E.2d 149 (1994), an internist was deemed qualified to give standard of care testimony relating to a gastroenterologist because, *inter alia*, there was a significant "overlap" in diagnostic skills of internists and gastroenterologists. 247 Va. at 472, 443 S.E.2d at 153. The Court noted that the duty at issue, namely the duty to review medical records in that case, should not vary between internists and gastroenterologists. 247 Va. at 472, 443 S.E.2d at 154. Thus, this Court upheld the trial court's admission of the internist as an expert.

In *Wright v. Kaye*, which involved an injury to the patient's gall bladder during a urachal cyst surgery, this Court found an abuse of discretion where the trial court excluded a laproscopic surgeon as an expert on the basis that he had not performed a urachal cyst surgery. This Court observed that the record did not establish a unique standard of care in urachal cyst surgery "as it relates to the injury of the bladder… which

differs from the standard of care for other surgery adjoining the bladder." 267 Va. at 521, 593 S.E.2d at 312. Significantly, in its review of the record the Court took note of, *inter alia*, the deposition of the defendant doctor. 267 Va. at 521, 593 S.E.2d at 313. The Court found that the issue in the case was "the standard of care for *laparoscopic surgery* in the vicinity of the bladder involving the use of a surgical stapler." *Id.* (emphasis in original.)[15]

Applying these governing principles of law to the case at bar, the trial court did not abuse its discretion by permitting Drs. Williams and Cohen to testify. They routinely performed procedures that even Dr. Hutchins conceded are related to the procedure performed on Mrs. Talbert – and the relevant deviation in care was failing to take proper steps to prevent a heat source from contact with the oxygen-enriched surroundings. As will be

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[15] Defendants misconstrue *Lawson v. Elkins*, 252 Va. 352, 355, 477 S.E.2d 510, 511-512 (1996), to mean an expert must have performed the *exact* same procedure to offer standard of care testimony. (Appellants' Br. at 23.) However, in *Lawson*, this Court held that the proffered expert neurosurgeon had "very limited knowledge" of the orthopedic surgery procedure at issue and that it was this limited knowledge that did not qualify him to testify. Here, Dr. Hutchins herself stated that the same techniques are used throughout head and neck surgeries (JA 2330), surgeries well known by Dr. Williams and Dr. Cohen.

shown below, the record amply supports the trial court's use of its discretion.[16]

2. Evidence Overwhelmingly Supports the Trial Court's Conclusion that Head and Neck Surgery in an Oxygen Enriched Environment is Related to Mrs. Talbert's Surgery.

The trial court had abundant evidence establishing the "relatedness" between Drs. Cohen and Williams' active clinical practices and Mrs. Talbert's surgery. Dr. Hutchins' own deposition confirms that the head and

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[16] Dr. Hutchins' brief repeatedly takes the position that only a doctor who exclusively performs the "MIRP" procedure itself can qualify as an expert in this case. That is a misreading of both the evidence of record and the governing statute. First, the "active clinical practice" component of Va. Code § 8.01-581.20 is satisfied by treatment in "the defendant's specialty or a related field." *Queresi*, 297 Va. at 122, 671 S.E.2d at 167. Second, Defendants' efforts to narrowly delineate her field are somewhat ironic since she stated that she was the only physician in Virginia performing the "minimally invasive parathyroidectomy" and, as of trial, she had relocated to Dubai. (JA 1789, 1807.) Not even her own expert designations so narrowly delineated the field. (*See* JA 708-09, 1206; neither Chen nor Doherty were offered as "MIRP" experts.) Hutchins' brief at 21 tries to further narrow the procedure by suggesting that a MIRP *requires* an oxygen mask (rather than intubation) and local anesthesia versus general. Again, Defendants' own evidence does not support this "hair-splitting." Hutchins conceded that local or general anesthesia could be appropriate, and a mask or intubation could be proper. (JA 1793, 1898-1901.) In fact, Hutchins conceded that she had second thoughts concerning which sedation method was proper for Mrs. Talbert, (JA 1821, 1902) and, indeed, Plaintiff was intubated after the fire was put out enabling Dr. Hutchins to finish the procedure. (JA 1852-53.) For his part, Defendants' expert, Dr. Chen acknowledged that approximately half of his MIRPs are done under local anesthesia. (JA 1262-67, 1251.)

neck surgeries (*e.g.,* lymph node biopsies) performed by Drs. Cohen and Williams are plainly "related to" the parathyroidectomies that Hutchins performs. Dr. Hutchins candidly acknowledged that the procedure she undertook was comparable to, for example, a lymph node biopsy or cervical node biopsy. (JA 1486, 2326, 2330.) She stated this several times: "The same technique is used for lymph nodes, okay, cervical node biopsies. That wouldn't be specific for parathyroidectomies, in my opinion. I don't think the fact that it was a parathyroidectomy is at all relevant *per se*." (JA 2330, *see* 1486.) In comparing the procedure she performed on Mrs. Talbert to a lymph node biopsy, Dr. Hutchins stated: "I mean it's the same sort of incision, the same instruments, aside from Neoprobe... Nothing different was done." (JA 1486, 2326.)

Both Dr. Williams and Dr. Cohen performed these comparable procedures, including cervical node biopsies, on a regular basis. (JA 1522-25, 1335-36, 1352-53.) Thus, Dr. Hutchins *herself* demonstrated the overlap between minimally invasive parathyroidectomies and the procedures performed by Mrs. Talbert's experts. *See Qureshi, supra; Griffett, supra.* Moreover, both Drs. Williams and Cohen confirmed Hutchins' view that the relevant field, for purposes of this inquiry, was head and neck surgery in an oxygen-enriched environment. (JA 1528, 1351-53.)

According to Cohen, in this context, the appropriate standard of care is the same "for any surgeon doing general head and neck surgery under IV sedation in 2005." (JA 1351.) Dr. Cohen stated that whether the procedure was a parathyroidectomy, a face lift, or even rhinoplasty is "irrelevant from a medical perspective" (JA 1352-53) and drawing distinctions between such procedures as Defendants try to do would be "splitting hairs unduly." (JA 1351-52.)

Dr. Williams explained that the issue is not "parathyroid" or any other specific head and neck surgery, but rather any operation in the "head or neck in the presence of the high concentration of oxygen." (JA 1519-20.) The relevant inquiry is the

> standard of using a heat source in the presence of oxygen regardless of what the operation is. It's the closeness of the two. And the parathyroid operation is just one operation. If you need to take the parathyroids out, it's near the – it's in the head and neck. And if you use high oxygen and you use the heat source, then you're risking a fire.

(JA 1528.) In this context, Dr. Williams' "active clinical practice" evidence is overwhelming, given his performance of approximately 400 surgeries, including numerous head and neck surgeries, in the year prior to Talbert's surgery. The most typical of these neck surgeries were cervical lymph node removals and carotid artery surgeries. (JA 1522-25.)

Similarly, Dr. Cohen's clinical practice for the year prior to Mrs. Talbert's surgery included head and neck surgeries in oxygen-enriched environments, using various kinds of anesthesia (including the same type administered to Mrs. Talbert), and utilizing electrocautery devices. (JA 1336, 1352-53.) During that time, Dr. Cohen also performed cervical node biopsies, including a minimally invasive cervical node biopsy. *Id.* There was no shortage of evidence supporting the trial court's conclusion that the experts' practices were "related to" Talbert's surgery. Thus, the trial court had ample basis to permit Drs. Cohen and Williams to testify and certainly did not abuse its discretion.

C. Dr. Williams' Review of Dr. Hutchins' Deposition, Conversations with Virginia Physicians, and Extensive Career as a Surgeon, Teacher, and Writer on the Subject Gave Him a Sufficient Understanding of Virginia's Standard of Care.

Defendants' brief and assignment of error incorrectly contend that Dr. Williams' understanding of Virginia's standard of care came *solely* from Dr. Cohen. Dr. Williams' standard of care knowledge came predominantly from other sources. For example, the trial court observed that Dr. Williams had reviewed Dr. Hutchins' deposition (JA 1519) – a document which contained the following statements about the standard of care:

> A. I don't expect it to be any different anywhere in the country with an appropriately trained

> individual. I don't expect Virginia to be any different than Denver, Colorado. (JA 2329.)
>
> ***
>
> A. It's not specific for Virginia for me, I wasn't trained, *per se*, in Virginia, but I don't believe I'd do anything differently. Guidelines written by the American College of Surgeons or techniques learned in my residency weren't in the state of Virginia, but I don't believe the state of Virginia to be any different than national guidelines or expectations.
>
> Q. So it your testimony that the standard of care that existed in Virginia in April of 2005 was the same that existed everywhere else in the country for head and neck surgeries?
>
> A. I would expect it's essentially the same, and it's probably based upon the recommendations of the American College of Surgeons. (JA 2327.)[17]

Hutchins' emphasis on the American College of Surgeons ("ACS") (JA 1805-06, 1810-11) is particularly relevant given that Dr. Williams made presentations on fire prevention in the operating room – the very issue involved here – at annual meetings of this organization. (JA 1511-12.)

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[17] Dr. Hutchins gave her deposition testimony, when she was first disclosed as a standard of care expert by her counsel, (JA 2499), before Plaintiff was required to designate her experts. In reliance on Dr. Hutchins' testimony, Mrs. Talbert retained experts who agreed with her that Virginia's standard of care is no different than the rest of the country, and that the relevant procedure is not confined to minimally invasive parathyroidectomies. What was a non-controversial issue at the time Dr. Hutchins was deposed became controversial only at trial when Defendants perceived an opening to bar Dr. Williams from testifying.

Indeed, at its request, Dr. Williams published a peer review article on fire prevention in the operating room, which was disseminated to ACS fellows all across the country. (JA 1502-05.) Additionally, Dr. Williams performed, taught, and lectured on minimally invasive surgeries, head and neck surgeries (JA 1522), and also attended seminars with Virginia doctors. (JA 1517-18.) He was highly qualified and well informed on the applicable standard of care.

Defendants' efforts to manufacture a dispute over the standard of care were properly rejected by the trial court. In fact, Defendants ignored not only Dr. Hutchins' deposition testimony, but also the testimony of their expert, Dr. Gerard Doherty, who, like Dr. Hutchins, testified that Virginia's standard of care is the same as everywhere else in the country. (JA 710-11.) Dr. Williams was properly permitted to testify.

D. Defendants Failed to Timely Object to Dr. Cohen's Testimony on the Basis That He Went Beyond His Designation, and, in Any Event, Dr. Cohen Testified Within His Designation.

At the time Dr. Cohen testified that Dr. Hutchins violated the applicable standard of care, there was no objection that he exceeded the scope of his designation. (JA 1360-70.) Dr. Cohen had already been

excused when Defendants raised this "scope of designation" objection.[18] By failing to make the objection when Dr. Cohen was testifying, Defendants waited too long, and thus the objection is waived. *Shelton v. Comm.*, 274 Va. 121, 126, 645 S.E.2d 914, 916 (2007) (objection must provide opportunity to address the issue.)

Moreover, Defendants *failed to assign error* on this particular issue. (Assignment of Error 1.) Defendants' sole assignment of error with regard to Dr. Cohen is that he was not "qualified" to testify as a standard of care expert. The failure to assign error precludes appellate review on this issue. Rule 5:17(c) ("Only errors assigned in the petition for appeal will be noticed by this Court."); *Ace Temporaries, Inc. v. City Council of City of Alexandria*, 274 Va. 461, 465, 649 S.E.2d 688, 690 (2007); *Martin v. Howard*, 273 Va. 722, 727 n. 5, 643 S.E.2d 229, 232 n. 5 (2007) (issue waived when Rule 5:17(c) violated by failing to identify "specific errors in the rulings below.")

In any event, Dr. Cohen's designation plainly included a recitation of deviations from the applicable standard of care (JA 84-94) which faithfully tracked his testimony.

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[18] In fact, when Dr. Cohen finished his testimony, the trial court asked if there was any reason not to excuse Dr. Cohen, to which Defendants responded "no." (JA 1419.) Dr. Cohen was excused, and Mrs. Talbert's next witness was called.

E. There Was No "Rule on Witnesses" Violation, and the Claimed Error Was Not Preserved in Any Event.

This issue, too, is a product of the demonstrably false suggestion that Dr. Williams only knew the applicable standard of care by talking to Dr. Cohen – and Defendants' assertion loses its luster in light of Hutchins' and Doherty's "national standard" testimony that confirms Williams testimony.

Nonetheless, during the trial, Dr. Williams was questioned about his conversations with Virginia surgeons in general and with Dr. Cohen in particular. (*See, e.g.*, JA 1527, 1530-32.) Yet, at no time during Dr. Williams' testimony did counsel for Defendants raise an objection about his discussions with Dr. Cohen. The first suggestion that the "Rule on Witnesses" had been violated came when Defendants moved to strike the evidence at the conclusion of the case. (JA 2153-55.) Such motions test the sufficiency of the evidence, not its admissibility, and having failed to assert a timely "Rule on Witnesses" objection, Defendants waived the right to claim error in that regard on appeal. *Bitar v. Rahman*, 272 Va. 130, 139, 630 S.E.2d 319, 324 (2006) ("[A]n objection to the admissibility of evidence must be made when the evidence is presented. The objection comes too late if the objecting party remains silent during its presentation and brings the matter to the court's attention by a motion to strike...")

The wisdom of this rule is well-illustrated by this case. While Defendants speculate regarding when the conversation occurred, a timely objection would have given plaintiff a chance to clear this up.[19] In reality, it is clear that Dr. Williams did not discuss the trial with Dr. Cohen. Dr. Williams stated that he had discussions with Dr. Cohen within days of his own testimony and that he did not know that Dr. Cohen was also testifying in the case. (JA 1531, 1532.) At the time Dr. Cohen was testifying, Dr. Williams was flying to Virginia (JA 1429), and he testified the next day. (JA 1487.) He did not testify, as Defendants suggest, that he had talked to Cohen the previous night. The "favorable inference" is that they talked several days earlier. By objecting only after Williams had flown back to California – in fact, *after* Mrs. Talbert had rested her case – Defendants prevented Plaintiff from setting the record straight and the trial court from conducting a more detailed inquiry.

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[19] Given the trial court's reliance on Dr. Williams' conversation with Dr. Cohen in holding that he demonstrated the requisite knowledge of Virginia's standard of care, it is very doubtful that the trial court would have found a violation of the Rule on Witnesses worthy of barring Dr. Williams from testifying. (JA 1575-76.) Of course, the trial court also knew Williams' position on the standard of care was actually the same as Hutchins'. *See Bennett v. Comm.*, 236 Va. 448, 374 S.E.2d 303 (1988), *cert. denied*, 490 U.S. 1028 (1989) (abuse of discretion standard applies.)

Simply put, there was no violation of the Rule on Witnesses. A doctor who is not licensed in Virginia is permitted to ascertain Virginia's standard of care by speaking to Virginia-licensed doctors. *Christian,* 268 Va. 60, 65 S.E.2d at 524; *Griffett*, 247 Va. at 474, 443 S.E.2d at 155. Dr. Williams did that by speaking to Dr. Cohen. Dr. Williams did *not* discuss testimony with Cohen; indeed, he did not even know that Dr. Cohen was testifying. (JA 1530-32.) Dr. Williams simply checked with Dr. Cohen to confirm what he already knew. Indeed, Dr. Williams was deposed months prior to the conversation (JA 1540) and if his testimony had changed in any respect as a result of the brief discussion with Dr. Cohen, counsel had ample opportunity to highlight such changes during cross-examination. The lack of any such inconsistencies is telling.

Notably, Va. Code § 8.01-401.1 permits an expert to consider evidence from other experts. None of the cases cited by the Defendants says otherwise. In fact, Defendants' expert Chen acknowledged reading Dr. Doherty's deposition in formulating his opinion. (JA 1225-26.) Conversing with another expert is no different. Under the facts and circumstances here, the trial court did not abuse its discretion in rejecting the untimely "Rule on Witnesses" objection. *Huddleston v. Comm.*, 191 Va.

400, 405, 61 S.E.2d 276, 279 (1950) (applying abuse of discretion standard).

III. The Trial Court Did Not Abuse its Discretion in Precluding Defendants' Third Designated Expert, an Anesthesiologist, from Testifying to the Same Issues on which Defendants had Two Other Experts Provide Testimony, and in Limiting Defendants' Fact Witnesses from Offering Expert Opinions.

A. The Court Did Not Abuse its Discretion in Limiting Petrovitch's Testimony.

After devoting a substantial portion of their petition to the proposition that only surgeons who perform the *exact* "MIRP" procedure attempted by Hutchins are qualified to testify, Defendants assign error to the trial court's exclusion of their *third* designated expert witness on the standard of care – an *anesthesiologist* (Dr. Petrovitch). The trial court plainly did not abuse its discretion by excluding this witness.

Defendants already had two surgical experts, Drs. Chen and Doherty, who provided the same opinions as Dr. Petrovitch regarding communication between surgeons and anesthesiologists. The expert designations of Hutchins' surgical experts are almost identical to that of Petrovitch on this subject. (*Compare*, JA 163-64 *with* 152-55, 158-61.) Virginia Code § 8.01-581.20(c) permits a litigant only two experts on a given subject, and the trial court did not abuse its discretion in denying a third expert.

Dr. Petrovitch was not in a "related field," and her testimony would have been duplicative. (*See* JA 726, 1237-39, 1247.) *Virginia Financial Assoc. v. ITT Hartford Group*, 266 Va. 177, 186, 585 S.E.2d 789, 794 (2003) (court has broad discretion to limit number of expert witnesses). Both of Defendants' surgical experts, Chen and Doherty, had already offered testimony dealing with communications with the anesthesia team. For example, Chen testified as follows:

> Q. Have you ever asked the anesthesiologist to turn off any oxygen that they are giving to supplement the patient because you were going to use cautery?"
>
> A. No.

(JA 1247, *see* JA 1322.) Doherty testified to the same effect. (JA 726.) Hutchins was free to pursue this avenue of testimony in detail, and Hutchins was free to argue this point and let the jury decide it. It was not error to deny cumulative expert standard of care testimony from an anesthesiologist in an unrelated field where Defendants already offered two surgical experts on this same topic.

More to the point, Defendant had already successfully blocked Mrs. Talbert's efforts to elicit similar testimony from a non-surgeon, nurse practitioner, Debra Owen. Mrs. Talbert called Owen to testify that in her 22 year career as an operating room nurse in Virginia, she had seen

numerous head and neck surgeries where the surgeon requested the anesthesiologist to lower or turn off the supplemental oxygen. Defendants strenuously objected (JA 1297):

> Q. During your years as a nurse in operating rooms in Virginia during head and neck surgeries, have you ever observed a surgeon request an anesthesiologist –
>
> MR. PLEDGER: Your [Honor], I'm going to object. I think we need to approach the bench.
>
> THE COURT: Okay. ...
>
> MR. PLEDGER: Whether she has observed a surgeon ask anesthesia to do something in the operating room is not relevant to the issues in this case. She cannot qualify under the standard of care for physician, for a surgeon in this particular case. And it's irrelevant, this testimony.

The trial court sustained Defendants' objection and prohibited Owen from testifying as to what she had seen in other operating rooms. (JA 1326.) Given Defendants' success in convincing the trial court that what may have happened in other Virginia operating rooms is irrelevant, Defendants can hardly complain that they were barred from putting in similar evidence through Dr. Petrovitch.

B. The Trial Court Did Not Abuse its Discretion by Limiting Dr. Zurowski and Nurse Henry to Testify as Fact Witnesses.

Defendants raise similar claims with respect to the testimony of Dr. Zurowski and Nurse Henry. Defendants specifically told the trial court that they were *not* calling Zurowski as an expert. (JA 2003-04.) Defendants told the trial court that Henry was a fact witness. (JA 2015.) Having made these representations, Defendants have no basis to complain that they were not permitted to call them as expert witnesses. Not only did Defendants fail to designate Zurowski and Henry as experts (JA 150-67), Defendants did not proffer their qualifications to give standard of care opinions regarding Dr. Hutchins' conduct. Yet Defendants now contend that they wanted to call them to discuss "the standard of care" vis-a-vis communication between surgeon and anesthesia regarding the discontinuation or decrease in the administration of supplemental oxygen during the use of cautery. (Appellants' Br. at 33.) The trial court appropriately saw through this argument: "I think that what the defense is trying to do is to get standard of care evidence in through Dr. Zurowski who has not been designated..." (JA 2018; *see also* JA 2011.)

The trial court properly limited Zurowski's testimony to non-expert matters, and precluded him from testifying as to what he did as an anesthesiologist in other surgery cases as irrelevant to the standard of care governing Dr. Hutchins' conduct in this case. (JA 2018-22.) Zurowski did

testify (JA 2025), but Defendants complain that he was unduly limited. It is very difficult, however, to decipher what testimony Defendants proffered that was excluded.[20]

Zurowski's – and Henry's – testimony, too, must be viewed in light of the exclusion of Debra Owen's testimony. (S*upra* at 42.) Defendants' assignment here seems to be that it was unfair to apply the same evidentiary ruling to both sides. Both sides were permitted to have their relevant surgical *experts* testify on communication from the surgeon to anesthesia. Defendants' experts certainly utilized this opportunity. (JA 1247, 724-26.) Non-surgeons were equally prevented from offering testimony deemed irrelevant -- at Defendants' urging. (JA 1297, 2011, 1326.) The trial court was consistent and even-handed.

As to Nurse Henry, the trial court ruled that he could be asked about what he did, and why, with respect to Mrs. Talbert's case. (JA 2063-67.) Defendants now suggest that Henry, too, was unfairly silenced.

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[20] Appellants Brief at 33 suggests that a proffer occurred at JA 2010-24, but this is mere argument of counsel. The same defect occurs with respect to Henry's testimony. Appellants' brief at 33 cites JA 2103-04 as a proffer – but the court specifically stopped counsel and told him that if he wished to make a proffer, it could be done over recess. (JA 2104.) It was not done. Defendants then sought to attach portions of the depositions of both Henry and Zurowski to their Petition as Exhibits 4 and 6. *See Rose v. Jaques*, 268 Va. 137, 154, 597 SE.2d 64, 74 (2004); *Williams v. Harrison*, 255 Va. 272, 277-78, 497 S.E.2d 467, 471 (1998).

(Appellants' Br. at 33.) Yet, as a fact witness – as he was designated – Henry was permitted to testify expansively. (JA 2056-2103.) Again, it is difficult to discern what proffered evidence was excluded. *See, Jaques, supra*; *see e.g., Prince Seating Corp. v. Rabideau*, 275 Va. 468, 470, 659 S.E.2d 305, 307 (2008). Certainly, Henry was not in a position, as a *fact* witness, to offer expert "standard of care" testimony as Hutchins contends in her brief. The court did not abuse its discretion in its evidentiary rulings.

IV. No Authoritative Sources were Admitted at Trial and Defendants' Complaint About the Trial Court's Handling of Mrs. Talbert's is Meritless as well as Waived Since Defendants Never Obtained a Ruling on Their Motion in Limine and Failed to File the Relevant Transcript.

Shortly before trial, Defendants filed a motion *in limine* to preclude Mrs. Talbert from using any of her designated authoritative texts because they had not been highlighted. (R. 2791.) Defendants failed to file the transcript of the hearing on that motion (although they improperly seek to paraphrase it several times in their brief). Under Rule 5:11, "When the appellant fails to ensure that the record contains transcripts ... necessary to permit resolution of appellate issues, any assignments of error affected by the omission shall not be considered." *Towler v. Comm.*, 216 Va. 533, 221 S.E.2d 119 (1976). Similarly, courts speak through written orders, and here none was entered. *Wagner*, 257 Va. at 588, 514 S.E.2d at 615;

Austin v. Consolidation Coal Co., 256 Va. 78, 81, 501 S.E.2d 161, 162 (1998).

Defendants also fail to recognize that Va. Code § 8.01-401.1 gives the trial court discretion to establish a time table for producing authoritative texts that will be read at trial. Va. Code § 8.01-401.1 states that "if the statements are to be introduced through an expert witness upon direct examination, copies of the statements shall be provided to opposing parties thirty days prior to trial *unless otherwise ordered by the court*." (emphasis added).[21]

In the end, this assignment is as irrevocably waived as it is meritless.

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[21] While Defendants argue that there was "unfair prejudice" in not providing the highlighted texts thirty days out from trial, their argument centers around the fact that it did not allow them enough time to prepare "answering testimony." However, no passage from the literature was actually read to the jury. Va. Code § 8.01-401.1 centers around texts that "are to be *introduced* through an expert witness upon direct examination," – namely those texts that are actually utilized at trial. Clearly, here, no prejudice occurred as no texts were introduced. The court sustained Defendants' objection the only time Talbert attempted to admit these authorities. (JA 1588, 1627.) Finally, Defendants complain about spending time reviewing the documents. Notably, however, Defendants designated numerous witnesses and documents that were not utilized at trial, and usurped Plaintiff's counsel's time on the eve of trial by setting a last-minute *de bene esse* deposition in Michigan the weekend before trial. (JA 697.)

V. The Jury's Verdict was Supported Even By Defendants' Evidence, and if any Error is Found, It is Harmless.

While the decision below should be affirmed in all respects (or the appeal dismissed), even if this Court should find error, the claimed errors would not have affected the outcome of this trial. Defendants failed to move to strike the evidence at the conclusion of Plaintiff's case-in-chief. (JA 1918.) Thus, there was no mechanism for the trial court to take the case away from the jury at that point. The evidence subsequently introduced by Dr. Hutchins and her own experts provided ample support for the jury's decision.[22]

Dr. Chen (Hutchins' expert) acknowledged that whoever drapes the patient is responsible for preventing the oxygen from leaking to the surgical field. (JA 1283.) Dr. Gerard Doherty (Hutchins' other expert) testified that the surgeon controls the draping, that the standard of care requires that the physician not put fuel, ignition, and an oxidizing agent together, and that, in Mrs. Talbert's case, those three elements came together. (JA 758-59.)

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[22] When Defendants moved to strike the Plaintiff's evidence at the end of the case, the standard governing such motions required that the trial court consider all of the evidence before the jury, not just the Plaintiff's evidence. *Williams v. Condit*, 265 Va. 49, 52, 574 S.E.2d 241, 242 (2003); *Hadeed v. Medic-24, Ltd.*, 237 Va. 277, 280-281, 377 S.E.2d 589, 590 (1989).

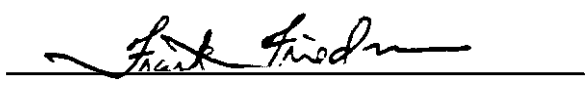
Dr. Hutchins admitted her responsibility for draping Mrs. Talbert. (JA 1730.) This is done, according to Defendants' expert, Dr. Doherty, to prevent oxygen from pooling under the drapes. (JA 757-58.) Yet, Dr. Hutchins' post-surgery notes on the incident reflect that "a flash burn developed in the operating room I assume to pooling of oxygen under the mask, which came under the drapes and was ignited by electrocautery." (JA 2296.) Dr. Hutchins further wrote that the oxygen leaked to the level of the electrocautery. (JA 2296.)

In short, the jury had ample evidence – from both Mrs. Talbert's and Dr. Hutchins' evidence – upon which to base its verdict. Its $4,000,000 damage award (JA 2331) was significantly reduced under the cap of Va. Code § 8.01-581.15. The verdict should stand. *See* Va. Code §§ 8.01-680 and 8.01-681.

CONCLUSION

For the foregoing reasons, the Circuit Court's rulings should be affirmed and/or the appeal should be dismissed for failure to comply with the mandatory provisions of Rule 5:9.

RITA TALBERT



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CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing was mailed, first-class and postage prepaid, this 14th day of May, 2009 to R. Harrison Pledger, Esq., Law Offices of Pledger & Associates, P.C., 4530 Walney Road, Suite 202, Chantilly, VA 20151, and to Alfred F. Belcuore, Esq., Montedonico, Belcuore & Tazzara, P.C., 1020 19th Street, N.W., St. 420, Washington, D.C. 2003; and that Rule 5:26(d) has been complied with. This same day, fifteen copies were hand filed and an electronic copy in PDF format delivered via email to the Clerk's Office of the Supreme Court of Virginia.