In The

Supreme Court of Virginia

RECORD NO. 160495

MARIAM TORAISH, Administrator of the Estate of Adam Traish, Deceased,

Appellant,

v.

JAMES JAY LEE, M.D.,

Appellee.

BRIEF OF APPELLANT

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STATEMENT OF THE CASE

This is an appeal of a final judgment of the Fairfax Circuit Court in a wrongful-death action. Appellant Mariam Toraish, as administrator of the estate of her son Adam, sued appellee James Jay Lee, M.D., alleging medical malpractice associated with a tonsillectomy/adenoidectomy.

At trial, the mother adduced expert testimony that Dr. Lee violated the standard of care for an otolaryngologist-head and neck surgeon by allowing Adam to go home after surgery instead of keeping him in the hospital overnight for monitoring, when he knew that the boy had severe obstructive sleep apnea. That testimony included a statement that if her son had been kept in the hospital, "he likely would have survived." A. 166-68.

Dr. Lee responded with an expert of his own, a geneticist who, by process of elimination, deduced that Adam must have died from a genetic condition known as Brugada syndrome. A. 346, 392. When asked if he had eliminated the mother's theory of the death – a respiratory

failure unrelated to genetics – he replied that he was unqualified to judge that. A. 392-93.

Dr. Lee also testified, though not as an expert witness. Over the mother's objection, he stated that if he had hypothetically known two items of family history, he would have recommended a different course of treatment. A. 82. On cross-examination, he admitted that he had never asked the parents for that family information. A. 145-47.

A jury returned a defense verdict, and the trial court entered judgment on that verdict. This Court awarded the administrator an appeal on September 12, 2016.

ASSIGNMENTS OF ERROR

2. The trial court erroneously permitted the defendant's genetics expert to testify, and to offer an opinion on the cause of death. [Preserved: A. 219-23, 281, 286-89, 329-30, 332-36, 339-40, 343-44.]

3. The trial court erroneously permitted the defendant to testify to what he would have done in a hypothetical situation, based on irrelevant information. In addition, this testimony constituted an undisclosed expert opinion. [Preserved: A. 80-82, 85-88.]

FACTS

Mariam Toraish's five-year-old son, Adam, died a few hours after undergoing surgery on October 30, 2013. Dr. Lee performed the surgical procedure.

Adam had a history of obstructive sleep apnea. His parents arranged for a sleep study of their child (A. 421); that study showed that Adam's condition was severe. A. 34-37, 422-24. With this information, Dr. Lee urged removal of Adam's tonsils and adenoids. A. 52-56.

On the last day of his life, Adam's parents brought him to a hospital for outpatient surgery to take out his tonsils and adenoids. As Dr. Lee had planned, he was discharged from the hospital shortly after surgery. Dr. Lee's discharge instructions told the parents to administer prescribed pain medicine to their son every four hours. A. 428. The family left the hospital just before 11:00 a.m. A. 57.

At approximately 3:30 p.m., Adam's mother gave him the prescribed medicine – a mixture of hydrocodone and

acetaminophen – and laid him on a couch to rest. Half an hour later, she found her son unresponsive, not breathing. A. 190-91. Emergency treatment was unavailing; the boy was dead.

ARGUMENT

1. The trial court erroneously allowed Dr. Lee's geneticist to testify, and to stray from his field of expertise. (Assignment 2)

Standard of Review

The admission of expert testimony is reviewed for abuse of discretion. *Dagner v. Anderson*, 274 Va. 678, 685 (2007). But whether an opinion has an adequate foundation is a legal question, reviewed de novo, because a court "has no discretion to admit clearly inadmissible evidence." *Harman v. Honeywell Int'l, Inc*., 288 Va. 84, 92 (2014).

Discussion

Adam Traish[1] died, according to a medical examiner, from "cardiac arrhythmia of unknown etiology." A. 465. Dr. Lee called Dr. Simeon Boyd as an expert in genetics. There was no objection to this qualification, but the mother challenged his credentials to offer an opinion on the cause of death. After considering the mother's bench brief and oral argument (A. 281-89, 337-43), the court allowed Dr. Boyd to testify on the cause of death. A. 343. This ruling was error.

Dr. Boyd told the jury that Adam died from a genetic defect, not Dr. Lee's decision to release him from the hospital. A. 346. To reach that conclusion, he considered a range of possibilities and ruled out one after another until there was one left. A. 392. This process is called a *differential diagnosis*; Dr. Boyd used this term at trial. A. 363.

[1] The spelling of the decedent's surname is different from that of his mother.

Dr. Boyd acknowledged on voir dire that he was not a forensic pathologist, a toxicologist, or a cardiologist, and did not have an active clinical practice in those fields. A. 332-34. He diagnosed Adam with a cardiac condition known as Brugada syndrome, but agreed that Adam never developed symptoms of it during his life. A. 385. While he described to the jury several facts about Adam that suggested a genetic condition, A. 346-61, he admitted that none of those pertained to Brugada. A. 321-24.

Dr. Boyd admitted that he does not treat Brugada syndrome, and has no experience with anyone who possessed the genetic variant he attributed to Adam's Brugada syndrome. A. 336, 389. In the absence of a history of Brugada or of any positive evidence that death was due to that syndrome, his diagnosis had to be, as noted above, a differential one, requiring that he exclude other possibilities, leaving only one remaining. A. 392, 397.

Cross-examination confirmed what the mother had previously argued to the court after voir dire, that Dr. Boyd was not qualified to render a diagnosis of Adam's death:

> Q. And the other cause of death attributed in this case was that cause of death described in the otolaryngology literature of a child with severe sleep apnea . . . who had tonsils and adenoid surgery, had severe sleep apnea, were sent home and died at home, that's the other possibility in this case; right, doctor?
>
> . . .
>
> A. I'm not qualified to judge that. If you're referring to a particular case that's published, I'm not aware of that. But I cannot speculate whether that's a possibility because it's out of the area of my expertise.

A. 392-93; internal colloquy deleted. Dr. Boyd agreed that he lacked the expertise to evaluate whether Adam suffered "respiratory compromise and respiratory death …." A. 397. This was the mother's theory of the case.

In *Dagner*, this Court ruled in a similar circumstance that a physician could not cross the boundary between his field of expertise and another. There, an emergency-medicine physician offered opinions about a patient who

came to an emergency room suffering from hypoglycemia complicated by alcohol use.

As here, the plaintiff there agreed to the doctor's qualification within his field, but objected to his testifying as to the cause of the patient's death. 274 Va. at 684. The *Dagner* trial court allowed the causation opinions, but this Court reversed, noting that the doctor's expertise in emergency medicine did not qualify him to testify as to the cause of death. *Id*. at 687.

Here, Dr. Boyd purported to exclude other causes in order to reach a diagnosis, but admitted that excluding the one that was the mother's theory of the case was "out of the area of my expertise." This admission echoes the one by the emergency physician in *Dagner*, that he was unqualified to testify about multifactorial causes of brain injury. *Id*.

More fundamentally, Dr. Boyd should not have been allowed to testify at all. His differential diagnosis required him to exclude all other causes of death; not merely the ones that happened to fall within his area of expertise.

Where an expert's testimony "fails to consider all the variables that bear upon the inferences to be deduced from the facts observed," the evidence is inadmissible. *Hyundai Motor Co. v. Duncan*, 289 Va. 147, 155 (2015).

2. The trial court permitted improper testimony by Dr. Lee. (Assignment 3)

Standard of Review

Evidentiary rulings are reviewed for abuse of discretion. *Boyce v. Commonwealth*, 279 Va. 644, 649 (2010).

Discussion

During the trial, the jury learned that Adam's parents were cousins, as is not uncommon in their culture. The defense also informed the jury that two other children of this union had died from a different genetic condition, one that Adam did not have.

Dr. Lee had not known these facts before surgery, because he didn't request them. He had the mother fill out a patient-intake form that did not ask for information about

consanguinity or predeceased siblings. A. 145-46, referencing A. 444. When confronted with this form, he claimed that the mother, who is not a doctor, should have known to provide the information anyway – effectively making her the judge of medical relevance. A. 146-47. He used this theme in his closing argument, in an effort to shift blame for the death onto the mother. A. 413-14.

During direct examination of Dr. Lee, his lawyer asked him this hypothetical question:

> Q. Had you been aware of either the consanguineous marriage or the fact that two siblings had died of genetic problems, would you have recommended a T&A procedure on an outpatient basis for Adam Toraish?

A. 80. This question called upon the defendant – who was not offered or qualified as an expert witness – to generate a new, hypothetical diagnosis, evaluation, and course of treatment. It called for a medical opinion, one that was not included in Dr. Lee's expert disclosures.

The mother immediately objected to this question on these grounds. *Id*. She also reminded the court that Adam

did not share his siblings' genetic trait, so the hypothetical had an inaccurate foundation. A. 81-87.

The court overruled this objection and allowed Dr. Lee to testify that "there would be no way I could recommend any surgery at that time," and that he would have sent Adam to a different hospital. A. 82. This implied that the mother, not Dr. Lee, was to blame for Adam's death.

Rule 4:1(b)(4)(A)(i) was promulgated to "allow the litigants to discover the expert witnesses' opinions in preparation for trial." *Woodbury v. Courtney*, 239 Va. 651, 654 (1990). Part III of the pretrial scheduling order requires disclosure of expert opinions well before trial.

Where a party fails to disclose an opinion in compliance with this requirement, the opinion should be excluded. *Mikhaylov v. Sales*, 291 Va. 349, 359-61 (2016). The mother should not have been required to contend with an undisclosed opinion, particularly one that implicated her instead of her son's physician. And having been called as a lay witness, Dr. Lee was not permitted to answer

hypothetical questions at all. *Bailey v. Erdman*, Record No. 150394 (December 30, 2015) at 3 ("Because Dr. Klevan did not testify as an expert, it was not permissible for him to render an opinion on a hypothetical question …"), citing Rule 2:703(a) and Code §8.01-401.1.

Nor should the mother have been forced to defend against a hypothetical scenario that bore no relation to reality. Adam's siblings died of a condition called Pierson's syndrome, which Adam did not have (A. 482-83); his condition was wholly separate from theirs. A. 80-88, 216-17, 437. And Dr. Lee's geneticist reluctantly admitted that the parents' consanguinity did not contribute to the genetic condition that he believed led to the death. A. 321-24. Thus, even under Dr. Lee's theory, neither factor was medically relevant.

Expert opinion is inadmissible if it lacks a proper foundation. *CNH America v. Smith*, 281 Va. 60, 67 (2011). This Court has consistently disapproved of "expert testimony

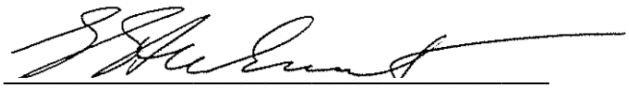
that lacks evidentiary support." *Vasquez v. Mabini*, 269 Va. 155, 159 (2005).

In the middle of this trial, the court allowed Dr. Lee to inject an undisclosed, self-exculpatory, hypothetical evaluation, diagnosis, and course of treatment – one that had no basis in science, in evidence, or in fact.

CONCLUSION

This court should reverse the judgment and remand the case for a new trial.

MARIAM TORAISH,
Administrator of the Estate
of Adam Traish, Deceased

By: 
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CERTIFICATE

I hereby certify that on this 21st day of October, 2016, pursuant to Rules 5:26 and 5:32(a)(3)(i), ten paper copies of the Brief of Appellant and three paper copies of the Appendix have hand-filed with the Clerk of the Supreme Court of Virginia and electronic copies of the Brief and Appendix were filed, via VACES. On this same day, an electronic copy of the Brief of Appellant was served, via email, and electronic copies on CD of the Brief and Appendix were served, via UPS Ground Transportation, upon:

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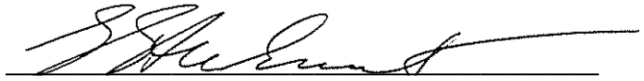

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