In the

Supreme Court of Virginia

At Richmond

Record No. 160495

MARIAM TORAISH, Administrator of the Estate of Adam Traish,

Appellant,

– v. –

JAMES JAY LEE, M.D. and
ENT & ALLERGY SPECIALISTS OF VIRGINIA, P.C.,

Appellees.

BRIEF OF APPELLEES

MICHAEL E. OLSZEWSKI, VSB #43078
BENJAMIN M. WENGERD, VSB #82794
RICHARD L. NAGLE, VSB #34265
JAMES N. KNAACK, VSB #65644
HANCOCK, DANIEL, JOHNSON &
NAGLE, P.C.
3975 Fair Ridge Drive, Suite 475 South
Fairfax, Virginia 22033
T: (703) 591-3440
F: (703) 591-7646
molszewski@hdjn.com
bwengerd@hdjn.com
rnagle@hdjn.com
jknaack@hdjn.com

Counsel for Appellees

COUNSEL PRESS • VA – (800) 275-0668

SCV: Submitted on 11-15-2016 15:50:40 EST for filing on 11-15-2016

TABLE OF CONTENTS

Preliminary Statement 1

Nature of the Case and Material Proceedings Below 1

Statement of the Facts 3

Argument 5

I. Dr. Boyd was properly qualified to testify as an expert witness and his expert opinions were properly admitted into evidence 5

A. Dr. Boyd was properly qualified 6

B. Dr. Boyd's testimony was premised on an adequate foundation and did not stray from his area of expertise 8

II. Dr. Lee's testimony was relevant, factual, and appropriately admissible 14

A. Dr. Lee did not provide testimony based on an incomplete or inaccurate hypothetical 17

B. Dr. Lee did not testify as an expert witness or offer expert opinion, so his testimony did not need to be designated 19

C. Any opinion testimony Dr. Lee offered as a lay witness did not need to be designated prior to trial 27

Conclusion 30

Certificate of Service

TABLE OF AUTHORITIES

Cases

Albain v. Flower Hospital,
533 N.E.2d 1038 (Ohio Ct. App. 1990) 24

Bailey v. Erdman,
No. 150394, 2015 Va. Unpub. LEXIS 14 (Va. Dec. 30, 2015)....27, 28

Bennett v. Sage Payment Solutions, Inc.,
282 Va. 49 (2011).....3

Bowers v. Huddleston,
241 Va. 83 (1991).....19

Boyce v. Commonwealth,
279 Va. 644 (2010).....14

Bussey v. E.S.C. Rests. Inc.,
270 Va. 531 (2005).....10, 20

Chandler v. Graffeo,
268 Va. 673 (2004).....19

CNH America L.L.C. v. Smith,
281 Va. 60 (2011).....8

Dagner v. Anderson,
274 Va. 678 (2007).....6, 8, 9

Dickerson v. Fatehi,
253 Va. 324 (1997).....26

Gill v. Foster,
157 Ill. 2d 304 (1993).....24

Holmes v. Doe,
257 Va. 573 (1999).....19

Keesee v. Donigan,
259 Va. 157 (2000).....9

Martin v. Ledingham,
774 N.W.2d 328 (Mich. Ct. App. 2009) 24

May v. Caruso,
264 Va. 358 (2002) 10

McMunn v. Tatum,
237 Va. 558 (1989) 10

O'Dell v. Commonwealth,
234 Va. 672 (1988) 9

Online Res. Corp. v. Lawlor,
285 Va. 40 (2013) 6

Raines v. Lutz,
231 Va. 11 (1986) 26

Rogers v. Marrow,
243 Va. 162 (1992) 26

Seef v. Ingals Memorial Hospital,
724 N.E.2d 115 (Ill. App. Ct. 1999) 23, 24

Smith v. Irving,
268 Va. 496 (2004) 19, 21, 22

Snelson v. Kamm,
204 Ill. 2d 1 (2003) 26

State Farm Mut. Auto Ins. Co. v. Kendrick,
254 Va. 206 (1997) 20

Suttle v. Lake Forest Hospital,
733 N.E.2d 726 (Ill. App. Ct. 2000) 24

Syed v. ZH Technologies, Inc.,
280 Va. 58, 64 (2010) 3

Tashman v. Gibbs,
263 Va. 65 (2002) 25, 26

Town & Country Properties, Inc. v. Riggins,
249 Va. 387 (1995) 6, 9

Ykimoff v. W.A. Foote Memorial Hospital,
776 N.W.2d 114 (Mich. Ct. App. 2009) 24

Rules and Statutes

Va. Code § 8.01-399(B) 20

Va. Code § 8.01-401.1 ..... 9, 10, 19

Va. Sup. Ct. R. 2:701 ..... 27, 28

Va. Sup. Ct. R. 2:703(a) 9, 10, 19

Va. Sup. Ct. R. 4:1(b)(4)(A)(i) 15, 20, 27, 29

PRELIMINARY STATEMENT

Following a seven day trial of this wrongful death case, a jury returned a verdict in favor of James Jay Lee, M.D. and his practice. Mariam Toraish, the Administrator of the Estate of Adam Traish (Adam), challenges several rulings made by the trial court during the course of the trial regarding the qualification and factual foundation for defendants' expert's testimony and the permissible scope of defendant Dr. Lee's testimony. The trial court's rulings on each of these issues were sound, and the trial court's judgment should be affirmed.

NATURE OF THE CASE AND MATERIAL PROCEEDINGS BELOW

On May 2, 2014, Mrs. Toraish sued Dr. Lee and his practice, ENT & Allergy Specialists of Virginia, P.C., in the Fairfax County Circuit Court.[1] Mrs. Toraish alleged medical negligence. The litigation proceeded to trial.[2]

At trial, Mrs. Toraish's central theory was that Dr. Lee breached the standard of care by scheduling Adam's tonsil and adenoidectomy surgery

---

[1] Hereinafter, Dr. Lee and his practice will be referred to collectively as Dr. Lee.

[2] On July 20, 2014, the trial court entered an order permitting Mrs. Toraish to file a First Amended Complaint adding Barry S. Valentine, M.D. and American Anesthesiology of Virginia, P.C. as defendants. *See generally* A. at 1-12. On the first day of trial, November 30, 2015, Mrs. Toraish nonsuited Dr. Valentine and his corporation. The trial proceeded against only Dr. Lee and his practice.

as outpatient surgery, rather than inpatient surgery. She claimed this decision by Dr. Lee caused Adam's death.

Mrs. Toraish called Dr. Lee as her first witness. A. at 14. Her examination challenged Dr. Lee's decision to set Adam's surgery as an outpatient procedure. On cross-examination, Dr. Lee explained his rationale. A. at 111-131. Over Mrs. Toraish's objection, Dr. Lee testified that he would not have moved forward with the surgery had he known that Adam was the product of a consanguineous marriage and that two of his siblings had died from genetic disorders. A. at 82. Mrs. Toraish challenges that testimony here.

During his case-in-chief, Dr. Lee elicited testimony from Simeon Boyd, M.D., a pediatric geneticist. Dr. Boyd testified on direct examination that the medical cause of "Adam's Traish's death was cardiac arrest due to Brugada Syndrome as confirmed by pathologic mutation in the SCN5A gene." A. at 345-346. He also testified as to the medical foundation for his opinion. A. at 355-356, 372-373.

During his testimony, Dr. Boyd acknowledged that his opinions regarding Adam's death were predicated, in part, on the expertise of other medical professionals—"[a]ll likely causes of death, I have either excluded myself or have relied on the expertise of people who are qualified to

exclude them." A. at 392. The autopsy report drafted by Jocelyn Posthumus, M.D. served as part of the factual foundation for Dr. Boyd's testimony regarding Adam's cause of death. A. at 316.[3]

The jury returned a verdict in favor of Dr. Lee. After the trial court entered judgment in favor of Dr. Lee, Mrs. Toraish appealed. Because the jury returned a verdict in favor of Dr. Lee that was approved by the trial court, Dr. Lee stands in the most favored position known to the law. *Bennett v. Sage Payment Solutions, Inc.*, 282 Va. 49, 54 (2011). "The trial court's judgment is presumed to be correct, and [the judgment] will not [be] set…aside unless it is plainly wrong or without evidence to support it." *Id.* (quoting *Syed v. ZH Technologies, Inc.* 280 Va. 58, 64 (2010)). All "evidence and all reasonable inferences fairly deducible from it [are viewed] in the light most favorable to the prevailing party at trial." *Id.*

STATEMENT OF THE FACTS

Adam was five-years-old when he presented to Dr. Lee, a board certified otolaryngologist, on October 16, 2013 for treatment. A. at 14-15. After performing a history and physical examination and reviewing a sleep study Adam had previously undergone, Dr. Lee concluded Adam had

[3] Dr. Posthumus's autopsy report was entered into evidence as an exhibit. A. at 467-470.

obstructive sleep apnea and recommended a tonsillectomy and adenoidectomy. A. at 90, 102-105.[4]

Dr. Lee tentatively scheduled Adam's surgery as an outpatient procedure because Adam did not demonstrate any risk factors that would necessitate inpatient, overnight monitoring. A. at 56, 110-111, 120-124. When Dr. Lee scheduled the procedure he did not know that Adam was the product of a consanguineous marriage or that two of Adam's siblings had predeceased him as a result of a genetic disorder. A. at 77-80.

Dr. Lee performed Adam's surgery at INOVA Loudoun Hospital on October 30, 2013. The surgery was uncomplicated. Dr. Lee did not encounter any unexpected events or bleeding during the procedure. A. at 129-131.

After surgery, Adam was transferred to the first stage of the post-anesthesia care unit (PACU) where he was monitored by nurses and anesthesiologists. A. at 132-134. Adam remained in the first stage of the PACU until he fully awakened from anesthesia. He was then transferred to the second stage of the PACU. A. at 135-136. Adam was discharged from the hospital at approximately 10:58 a.m. A. at 143.

---

[4] Dr. Lee had previously evaluated Adam on May 31, 2012. A. 60-61. At that visit, he concluded that Adam was not a candidate for a tonsillectomy and adenoidectomy because Adam had not experienced a sufficient number of strep infections during various pertinent timeframes. A. at 83.

At approximately 4:45 p.m. the same day, Dr. Lee learned that Adam had gone into cardiac arrest at home and that he was in the emergency department. A. at 144. Dr. Lee immediately proceeded to the emergency department to monitor him. Unfortunately, Adam died. A. at 465.

Following Adam's death, Jocelyn Posthumus, M.D. performed an autopsy. A. at 467-470. She concluded Adam's cause of death was "cardiac arrhythmia of unknown etiology." A. at 467, 469. Dr. Posthumus further noted that: "although nothing of significance was identified microscopically in the heart, an underlying cardiac channelopathy or cardiac conduction system disorder cannot be ruled out especially given that the child was the product of a consanguineous marriage." A. at 469.

ARGUMENT

I. Dr. Boyd was properly qualified to testify as an expert witness and his expert opinions were properly admitted into evidence

Mrs. Toraish argues that the trial court abused its discretion by allowing Dr. Boyd to offer an opinion on the cause of Adam's death. The trial court appropriately qualified Dr. Boyd and his testimony was not speculative.

Mrs. Toraish consistently misconstrues Dr. Boyd's role at trial. Dr. Boyd was offered and qualified to testify that Adam died because of the manifestations of Brugada syndrome, a genetic disorder. Dr. Boyd's

testimony was not rendered inadmissible because he did not personally exclude all other potential causes of Adam's death. To the contrary, Dr. Boyd properly relied upon the medical examiner, Dr. Posthumus, to exclude potential causes of death and to conclude Adam expired due to a "cardiac arrhythmia of unknown etiology." A. at 467-470. Dr. Boyd, using his expertise as a geneticist, provided the etiology.

A. Dr. Boyd was properly qualified

Whether a witness is qualified to offer expert testimony is an issue largely within the discretion of the trial court. *Online Res. Corp. v. Lawlor*, 285 Va. 40, 59 (2013); *Town & Country Properties, Inc. v. Riggins*, 249 Va. 387, 398 (1995).

> Generally, to qualify as an expert a witness needs only to have a degree of knowledge of a subject matter beyond that of persons of common intelligence and ordinary experience so that the witness' opinion will have value in assisting the trier of fact in understanding the evidence or determining a fact in issue.

Dagner v. Anderson, 274 Va. 678, 687 (2007).

Dr. Boyd certainly cleared that threshold. The trial court qualified Dr. Boyd to testify that Adam suffered from Brugada syndrome and that "manifestations of that syndrome were the cause of death in this case." A. at 343. The trial court was well within its discretion to make that ruling

because it is clear that Dr. Boyd holds the requisite knowledge, skill, and experience to offer that opinion.

Dr. Boyd is a physician and pediatric geneticist. A. at 294. He completed residencies in pediatrics and medical genetics. A. at 294-295. He has maintained an active clinical practice in medical genetics in the United States since 1995, A. at 298, and currently practices at the University of California, Davis, where he was the founding chief of the section of genetics. A. at 297. He has been board-certified in medical genetics since 1999. A. at 299. He is well-published and has lectured on medical genetics at many universities in the United States and internationally.[5] A. at 299-300.

As part of Dr. Boyd's clinical practice as a pediatric geneticist, he is regularly asked by other physicians to consult and provide an opinion regarding the cause of death of a patient. A. at 307-309. He has provided such an opinion approximately 20 or 30 times in the past four to five years. A. at 307-308.

In his career, Dr. Boyd has ordered thousands of genetic tests for his patients and has reviewed and interpreted the genetic testing results. A. at 305-306. Dr. Boyd's clinical practice regularly involves consultation with

[5] The trial court admitted Dr. Boyd's *curriculum vitae* as Defense Exhibit 23. A. at 486-505.

healthcare providers from various specialties. A. at 307-308. A significant component of his pediatric genetics practice includes the study of genetic disorders and the cardiovascular system. A. at 303-304. Dr. Boyd is experienced in diagnosing Brugada syndrome. A. at 310-311. He has identified patients with it in his practice. *Id.*

Dr. Boyd's experience as a pediatric geneticist generally, and his knowledge and experience identifying patients with Brugada syndrome specifically, is sufficient to qualify him to testify regarding whether Adam suffered from Brugada syndrome and whether the manifestations of that syndrome caused his death. *Dagner v. Anderson*, 274 Va. at 687. Indeed, his qualifications exactly match the opinions for which he was offered. *CNH America L.L.C. v. Smith*, 281 Va. 60, 68 (2011). The trial court appropriately qualified him.

B. Dr. Boyd's testimony was premised on an adequate foundation and did not stray from his area of expertise

Mrs. Toraish attacks Dr. Boyd's opinion because Dr. Boyd did not personally rule out all causes of death. The medical examiner, Dr. Posthumus, did. Dr. Boyd is permitted to rely on Dr. Posthumus's opinion that Adam died from "cardiac arrhythmias of unknown etiology." A. at 467, 469. The fact that Dr. Boyd relied on Dr. Posthumus's determination regarding the cause of Adam's death does not render Dr. Boyd's opinion

inadmissible. Rather, Mrs. Toraish's argument merely goes to the weight of Dr. Boyd's opinion.[6]

Expert testimony is admissible if it is based on an adequate foundation. *Keesee v. Donigan*, 259 Va. 157, 161 (2000). Dr. Boyd's testimony was. After an expert witness has been properly qualified, an "attack on [the expert's] testimony as lacking 'adequate foundation' […] merely demeans the weight to be accorded the testimony, *and does not affect its admissibility*." *Riggins*, 249 Va. at 398 (emphasis added). Challenges regarding the "experience and competence" of an expert, the reliability of the expert's testing methods, and the manner in which the expert conducted testing are "factual issues involving the weight of the evidence rather than its admissibility." *O'Dell v. Commonwealth*, 234 Va. 672, 696-97 (1988).

Code § 8.01-401.1 and Virginia Supreme Court Rule 2:703(a) permit expert witnesses to render opinions based on "facts, circumstances, or data made known to or perceived by such witness…" "Facts,

---

[6] Mrs. Toraish's reliance on *Dagner* is misplaced. In *Danger*, Dr. Shank was the only expert witness for the defendant to opine on the cause of death, relying on no other expert to cover topics outside of his specialty. *Dagner v. Anderson*, 274 Va. 678, 686-88 (2007). Because Dr. Shank admitted he was not qualified to form opinions beyond his specialty, it was error to allow his testimony at trial. *Id.* Here, Dr. Boyd stayed within his specialty in forming his opinion, while relying on other experts to opine in their specialty.

circumstances, or data [may be] relied upon by [an expert] witness in forming an opinion or drawing inferences, if of a type normally relied upon by others in the particular field of expertise in forming opinions and drawing inferences…" Code § 8.01-401.1; Va. Sup. Ct. R. 2:703(a); *see, e.g.*, *Bussey v. E.S.C. Rests. Inc.*, 270 Va. 531 (2005). So, an expert may, in forming his opinions, rely upon the opinions of others. *See May v. Caruso*, 264 Va. 358, 361-62 (2002); *McMunn v. Tatum*, 237 Va. 558, 566 (1989).

Here, some of the facts and opinions Dr. Boyd relied upon as the foundation for his opinions were found in Dr. Posthumus's autopsy report. A. at 465-470. Dr. Posthumus did not testify at trial and she did not serve as a retained expert witness for either party.

In her capacity as pathologist for the Department of Health and Office of the Chief Medical Examiner, Jocelyn Posthumus, M.D. performed a complete autopsy the day after Adam's death. A. at 465-470. She documented detailed factual findings, both gross and microscopic findings. A. at 465-470. Dr. Posthumus evaluated Adam's toxicology report. A. at 469, 471-472. After performing the detailed evaluation of Adam's body and evaluating the available pertinent information, Dr. Posthumus concluded Adam's cause of death was "cardiac arrhythmia of unknown etiology." A. at 467, 469. Dr. Posthumus further observed "although nothing of significance

was identified microscopically in the heart, an underlying cardiac channelopathy or cardiac conduction system disorder cannot be ruled out given that the child was the product of a consanguineous marriage." A. at 469. Dr. Posthumus excluded pulmonary causes by affirmatively concluding Adam died from a "cardiac arrhythmia of unknown etiology." A. at 465-470.

Based on Dr. Posthumus's affirmative conclusion that Adam died of a cardiac arrhythmia of unknown etiology, Dr. Boyd was retained to ascertain what the etiology was—if possible. Dr. Boyd relied on Dr. Posthumus's autopsy report and conclusion excluding potential causes of Adam's death other than cardiac arrhythmia. A. at 345-347, 392. Dr. Boyd independently reviewed Adam's medical records and other information presented to him, such as photographs of Adam. A. at 346-348, 358-361.

After examining the medical records and other documents, Dr. Boyd suspected Adam may have died from a genetic abnormality. A. at 361-362. Based on Dr. Posthumus's conclusion that Adam died of a cardiac arrhythmia and his own evaluation of Adam's potential susceptibility to a genetic disorder, Dr. Boyd used his expertise in genetics to identify potential causes of Adam's death, including Brugada Syndrome. A. at 361-363.

To do so, Dr. Boyd ordered testing of Adam's DNA with specific focus on those potential genetic variants that he suspected caused Adam's cardiac arrhythmias. A. at 363. Dr. Boyd then provided an explanation of how DNA testing is completed and how geneticists rely on the results of DNA testing. A. at 363-369. He discussed that the results of Adam's DNA testing were positive for two variants that may have caused Adam's death. A. at 371-372. Dr. Boyd noted that whole exome testing established that Adam's DNA had two heterozygous mutations related to cardiac disease, including the gene mutation (SCN5A) associated with Brugada syndrome. A. at 372-373. He further noted that Adam's Brugada syndrome was more likely to be severe because he was the product of a consanguineous marriage. A. at 355-356.

Based on this evidentiary foundation, Dr. Boyd opined to a reasonable degree of medical probability that the cause Adam's death was of genetic origin—Brugada syndrome, a genetic condition caused by a pathologic mutation in the SCN5A gene. A. at 345-346, 373-374. This opinion was founded upon the application of his education, knowledge, and expertise as a pediatric geneticist to his review of the medical facts of this case, including records from the surgery at issue, from Adam's sleep study, and from the autopsy and genetic testing, and photographs of Adam. A. at

346-347. Dr. Boyd then explained to the jury the mechanics by which Brugada syndrome likely caused Adam's cardiac arrhythmia and death. A. at 374-384.

Mrs. Toraish argues that Dr. Boyd admitted he was not qualified to rule out "respiratory compromise and respiratory [cause of] death," so he was incompetent to testify as an expert witness. But this misses the point. Dr. Posthumus was qualified to rule out a pulmonary cause of death, and did. Dr. Boyd did not start his expert analysis in a vacuum—with only the bare fact that a young patient died on the day of surgery and to determine why. Rather, Dr. Posthumus did that. After she ruled out other causes of death, such as pulmonary, Dr. Posthumus concluded the cause of death was a cardiac arrhythmia of unknown etiology. Dr. Boyd then determined the genetic etiology of cardiac arrhythmias.

Dr. Boyd's testimony did not stray from his area of expertise, as Mrs. Toraish contends. To the contrary, Dr. Boyd limited his testimony to what he was qualified on as an expert—that Adam suffered from Brugada syndrome and that Brugada syndrome caused Adam's death. A. at 343. Dr. Boyd's opinion that the etiology of Adam's cardiac arrhythmia was genetic in nature, specifically the pathologic mutation in the SCN5A gene associated with Brugada syndrome, was predicated upon a sufficient

foundation and within Dr. Boyd's qualification by the trial court. Dr. Boyd's opinion was properly admitted.

II. Dr. Lee's testimony was relevant, factual, and appropriately admissible

Mrs. Toraish contends the trial court abused its discretion in allowing Dr. Lee to comment on what he would have done had he known Adam was the product of a consanguineous marriage and that two of his siblings died from genetic disorders. The introduction of those two facts into evidence is not challenged in this appeal. Rather, what is at issue is whether the trial court abused its discretion in allowing Dr. Lee to testify "to what he would have done in a hypothetical situation" (i.e. had he known these two facts), and whether such testimony was "an undisclosed expert opinion."[7]

A trial court's evidentiary ruling is reviewed for an abuse of discretion. *Boyce v. Commonwealth*, 279 Va. 644, 649 (2010). Here, the trial court's ruling was sound. There was no abuse of discretion in allowing the defendant to explain the impact of the undisclosed facts on his decision-making process. And, Dr. Lee did not testify as an expert witness. He was the defendant, a fact witness. He was not required to designate his

[7] The assignment of error also mentions the hypothetical is based on "irrelevant information". But whether the basis of the hypothetical is relevant is not properly on appeal. If it is, it was abandoned. It was not argued in either Mrs. Toraish's Petition for Appeal or her Opening Brief.

anticipated testimony pursuant to Rule 4:1(b)(4)(A)(i) as he was neither an expert witness nor did he testify to any expert opinions.

Dr. Lee's defense was premised on the fact that he reasonably decided to perform outpatient, not inpatient, surgery. In explaining his rationale, he discussed the reasons he consciously considered when deciding whether he would perform Adam's surgery on an outpatient basis—reasons that have not been disputed in this appeal. A. at 114-115, 120-124. Dr. Lee testified he would perform Adam's surgery outpatient if Adam was at least three years old, had sufficient mental ability, and did not excessively bleed post-operatively. *Id*. These were not hypothetical issues for Dr. Lee. If he encounters children less than three years old, or with insufficient mental ability, he does not recommend outpatient surgery. If a patient experiences excessive post-operative bleeding, he converts the procedure from outpatient to inpatient. A. at 123.

Dr. Lee took Adam's history to see what background might influence his decisions about the planned surgery. A. at 72-73. He learned Adam was at least three years old with sufficient mental ability to undergo surgery. A. at 79, 121-122. Adam did not bleed excessively post-op. A. at 122-123. Dr. Lee told the jury that these facts were the basis of his thought process in recommending outpatient surgery.

In addition to these conscious considerations, Dr. Lee relies on a number of implicit considerations, based on his medical knowledge and training, personal experiences, and observations. One such implicit consideration Dr. Lee makes before recommending outpatient surgery is that his patient is not at increased risk of having genetic defects. Dr. Lee explained that had he known Adam was a product of a consanguineous marriage or that his siblings had previously died of genetic disorders, he would not have performed surgery on him.[8] A. at 79-82.

> Q: Dr. Lee, if you had been apprised either verbally or in writing by Ms. Toraish of either the consanguineous nature of the relationship or the fact that two of Adam's siblings had died of genetic problems, would you have recommended that Adam undergo a T&A procedure on an outpatient basis under your care?
>
> A: I would not—knowing that there could be a genetic defect, there would be no way that I could recommend any surgery at that time.

---

[8] In the opening brief, Mrs. Toraish asserts that Dr. Lee blamed her for her son's death for not informing him of these two facts. Dr. Lee made no such assertion. Rather, these facts were admitted into evidence for Dr. Lee to explain his decision-making process based on the facts he knew and those he did not know. The jury was asked to evaluate if Dr. Lee reasonably decided to perform surgery on Adam—these facts were a critical component of that decision-making process. Dr. Lee did not know these two facts. A. at 77-78. Indeed, Mrs. Toraish never claimed Dr. Lee should have known these two facts. A. at 171-172. Dr. Lee took a proper history but never learned these two facts. But, the fact remains, Dr. Lee did not know of the consanguineous marriage or Adam's predeceased siblings and would not have performed surgery on Adam had he known. A. at 82. The risk of genetic defects would be too great.

Q: What would you have done?

A: Well, he would need to see a pediatric geneticist, and I would have sent this child to Children's Hospital in DC.

A. at 82. As he properly told the jury, Dr. Lee does not recommend surgery for children who are at risk for genetic defects. *Id.* Because Dr. Lee's decision-making process was the paramount issue in the case, Dr. Lee's implicit thought process was likewise of paramount importance. However, whether this evidence was relevant is not at issue in this appeal. Rather, what is at issue in this appeal is whether this testimony was based on an incomplete hypothetical or should have been disclosed in an expert designation.[9]

A. Dr. Lee did not provide testimony based on an incomplete or inaccurate hypothetical

Mrs. Toraish's argument that Dr. Lee testified based on an incomplete hypothetical improperly focuses on the *results* of the genetic testing which showed Adam had Brugada Syndrome, not Pearson's Syndrome, like his siblings, or that the Brugada Syndrome was autosomal

[9] Had Dr. Lee been accused of negligently obtaining an incomplete medical history when deciding whether to perform surgery in this case, in order for Mrs. Toraish to prove causation, she would have needed to prove Dr. Lee would not have performed outpatient surgery had he learned of the genetic risk. In that setting, she would need Dr. Lee's testimony of what he would have done had he known those two facts.

But, if Mrs. Toraish's position in this appeal is adopted, she would have had to name defendant Dr. Lee as *her* expert witness. Of course, that makes no sense. Such testimony simply is not expert in nature, it is factual.

(inherited from one parent) rather than a result of his parents' consanguineous marriage.

It did not matter what the *results* of genetic testing would have revealed. The *risk* of any genetic disorder was simply too great for Dr. Lee to perform surgery. A. at 82. Dr. Lee knew what he would never do based on the two undisclosed facts—he would not have recommended surgery for Adam. A. at 82. Allowing a physician-defendant to testify to what they would never do is not an abuse of the trial court's discretion.

The undisputed *fact* of Adam's parents' consanguinity and the *fact* of Adam's siblings dying from a genetic defect were determinative for Dr. Lee, *not* the result of genetic testing. Dr. Lee did not need to know that the siblings died from a different genetic defect (Pearson's syndrome) than the one Adam had (Brugada Syndrome). He did not need to know that Brugada Syndrome was an autosomal disease, inherited from only one parent, not both, unlike Pearson's syndrome. If Dr. Lee knew that Adam was the product of a consanguineous marriage *or* that his siblings died of genetic defects, there was "no way" he would ever recommend surgery for Adam. A. at 82. This is not an incomplete hypothetical, and the trial court did not abuse its discretion in allowing the testimony.

B. Dr. Lee did not testify as an expert witness or offer expert opinion, so his testimony did not need to be designated

Dr. Lee has expertise, but that did not make him an expert witness. Dr. Lee was a fact witness and the defendant. He was accused of negligently recommending outpatient surgery. He was permitted to defend himself by explaining his thought process in arriving at his recommendation for outpatient surgery. That does not make him an expert witness.

Factual testimony from a defendant in a medical malpractice action "includ[es] what actions he took and his reasons for taking those actions." *Smith v. Irving*, 268 Va. 496, 502 (2004). Expert witnesses in medical malpractice cases are not fact witnesses, normally. *Id.* Staying with the norm, expert witnesses are hired to review records and render their opinions on the standard of care, causation and damages. *See generally Chandler v. Graffeo*, 268 Va. 673, 679-80 (2004) (addressing retained expert witnesses). Sometimes, expert witnesses are only asked to explain unique and complicated medical and scientific concepts or procedures to the jury. *See* Va. Sup. Ct. R. 2:702(a); *see also Holmes v. Doe*, 257 Va. 573, 577-78 (1999). But, normally, an expert witness has no personal knowledge in the case. *See* Va. Sup. Ct. R. 2:703(a); Code § 8.01-401.1; *see also Bowers v. Huddleston*, 241 Va. 83, 86-87 (1991) (noting expert

opinions are often properly based on factual hearsay, i.e., knowledge not personal to the expert witness).

Also rarely, non-party fact witnesses, such as treating physicians might become expert witnesses. *See, e.g.*, *Bussey v. E.S.C. Rests., Inc.*, 270 Va. 531, 535-38 (2005). In addition to their factual testimony, they render opinions as to the reasonableness of the defendant's actions or whether the defendant's actions caused the patient harm. *See, e.g.*, *id.* Such a witness would be a hybrid witness and his newly-formed expert opinions (on standard of care or causation and damages) would need to be disclosed in discovery for them to be admissible at trial. Rule 4:1(b)(4)(A)(i). But, the medical opinions, personal knowledge, and experience treating physicians develop during their care and treatment of a patient need not be disclosed in an expert designation, because those are the facts of the case, not expert opinions developed for the case. *See* Code § 8.01-399(B).

Rarely an expert witness might have personal knowledge. *See, e.g.*, *State Farm Mut. Auto Ins. Co. v. Kendrick*, 254 Va. 206, 208-09 (1997). For example, a defendant may choose to be his own standard of care expert and testify that his decision was consistent with the standard of care. He might choose to be his own causation expert and testify that his actions did not cause harm to the patient. These would make the defendant an expert

witness. Dr. Lee never commented on the reasonableness of his own decisions or whether his decisions caused harm to Adam. He was not an expert witness.

Dr. Lee was a fact witness who expressed his decision-making process in taking Adam to outpatient surgery. Dr. Lee, either consciously or implicitly, considers a patient's age, mental ability, post-operative bleeding, and possible genetic defects. A. at 82, 114-115. Some of these criteria come from his training and his 15 years of clinical experience. A. at 115. Dr. Lee bases his recommendations for surgery on these issues. Explaining his decision making does not make him an expert witness. He educated the jury about why he, the defendant, recommended Adam's surgery.

Treating physicians routinely testify to what they would do with undisclosed/unknown information. This is not a unique type of factual testimony. For example, in *Smith v. Irving*, 268 Va. 498 (2004), a surgeon performed a gastric bypass surgery that was subsequently complicated by a perforation, leading to the patient's death. *Smith*, 268 Va. at 498. The surgeon "was not designated as an expert witness by either party, but testified in his own defense about his treatment and care of the decedent." *Id.* at 498-99. The surgeon testified he did not find a perforation during

surgery, so he did not place a drain. *Id.* at 499. But, had the surgeon known of a perforation, he would have placed a drain. *Id.* at 499-500. This Court concluded the surgeon's testimony, which included an explanation of what the surgeon would have done had he known different facts (i.e., that a perforation was actually present), was not expert witness testimony. *Id.* at 501-02. *Smith* determined that when a treating physician testifies to what he would have done had he known different facts, the physician has not become an expert witnesses. *Id.* at 502.

For Dr. Lee to become an expert witness in this case, he would have needed to testify on topics such as whether he met the standard of care, whether Brugada Syndrome (learned after the fact) caused Adam's death, whether inpatient surgery would have afforded Adam a better chance of survival. *Id.* at 502. Dr. Lee did none of that. In the same fashion as the surgeon in *Smith*, Dr. Lee testified what he would have done had he known different facts (i.e., that Adam's parents were consanguineous or that Adam's siblings predeceased him as a result of a genetic defect). Just like the surgeon in *Smith*, this testimony did not convert Dr. Lee into an expert witness. Dr. Lee's testimony was factual and he remained a fact witness.

For example, in 'failure to inform' cases, defendant physicians routinely testify what they would have done with undisclosed information.

These cases often arise when a nurse is accused of failing to inform the attending physician of a material change in a hospital patient's condition. For example, in *Seef v. Ingals Memorial Hospital*, 724 N.E.2d 115 (Ill. App. Ct. 1999), a defendant-doctor testified that "he would not have done anything differently" had he seen the fetal monitor strips that the nurses saw. *Id.* at 118. The admissibility of that testimony was not even questioned. Causation testimony was necessary for the plaintiff to prove what the attending physician would have done with proper warnings from the nurses. Because the plaintiff could not prove the physician would have done something different to save the baby, the trial court dismissed the hospital (employer of the nurses). On appeal, the decision was affirmed "because Dr. Sutkus [defendant physician] had testified that, even if the nurses had notified him earlier, he would not have acted sooner." *Id.* at 119.

The *Seef* Court considered arguments similar to those raised in this appeal by Mrs. Toraish—that the defendant's testimony was self-serving and hypothetical. But, even the dissenting Justice in *Seef* recognized the admissibility of the defendant's testimony and that such testimony did not

turn him into an expert witness.[10] *Seef*, 724 N.E.2d at 130; *see also Ykimoff v. W.A. Foote Memorial Hospital*, 776 N.W.2d 114, 121-27 (Mich. Ct. App. 2009) (surveying case law regarding proximate causation testimony from healthcare providers regarding different "failure to inform" cases and concluding "[t]his survey of caselaw serves to illustrate that a determination regarding the presence or absence of proximate cause is highly *fact dependent* and that the determinations, by their very nature, do not lend themselves to an overly broad formulation.") (emphasis added) (examining *Martin v. Ledingham*, 774 N.W.2d 328 (Mich. Ct. App. 2009); *Suttle v. Lake Forest Hospital*, 733 N.E.2d 726 (Ill. App. Ct. 2000); *Seef v. Ingals Memorial Hospital*, 724 N.E.2d 115 (Ill. App. Ct. 1999); *Gill v. Foster*, 157 Ill. 2d 304 (1993); *Albain v. Flower Hospital*, 533 N.E.2d 1038 (Ohio Ct. App. 1990)).

In fact, where proximate cause is contingent on what someone would have done with undisclosed information, as a matter of law a plaintiff cannot prevail if there is no evidence of what she would have done with the

[10] The dissenting Justice explained: "Dr. Sutkus [defendant physician] speculated about what he would have done had the nurse acted in accordance with the standard of care, whereas Dr. Lilling [hired expert] offered not speculation, but an expert medical opinion as to how an obstetrician meeting the standard of care should have proceeded if properly notified. The weight to be given to Dr. Sutkus' and Dr. Lilling's conflicting testimony was a matter for the jury to determine." *Seef*, 724 N.E.2d at 130.

undisclosed information. For example, in *Tashman v. Gibbs*, 263 Va. 65 (2002), this Court reversed a plaintiff's verdict because the plaintiff failed to testify about what she would have done with undisclosed information. *Id.* at 76.

Tashman was a lack of informed consent, medical malpractice case. The patient, Ms. Gibbs, alleged that her doctor, Dr. Tashman, failed to tell her that there were two approaches to performing her sacrospinous ligament suspension surgery—an abdominal approach and a transvaginal approach. *Id.* at 75-76. In order to prove her claim for lack of informed consent, Ms. Gibbs was required to testify that she would not have consented to the surgery had she been told of the abdominal approach alternative. *Id.* at 76. She did not, so she failed to prove her case. *Id.* at 77.

When a plaintiff testifies to what she would have done with the undisclosed information in a lack of informed consent case, she does not become an expert witness. Rather, she remains a fact witness testifying to her subjective belief of her likely decision-making process. In *Tashman*, Ms. Gibbs testified that had Dr. Tashman told her of his inexperience with the sacrospinous procedure, she would not have consented to the surgery. *Id.* at 76. That testimony did not convert Ms. Gibbs into an expert witness.

In general, fact witnesses who control the decision-making process important to a case are permitted to provide their subjective belief of what their decision would have been had they known the undisclosed information. Such testimony does not convert those witnesses from fact witnesses into expert witnesses. It taxes credulity to believe patients become expert witnesses simply because they testify to what their decision would have been with undisclosed information. Yet, in every lack of informed consent case, the patient-plaintiff must testify to what they would have done with undisclosed information. *Tashman*, 263 Va. at 73.

Just as a patient-plaintiff may testify as a fact witness to what they would have done had they known of key undisclosed information, so too can a physician-defendant. The patient remains a fact witness, as does the physician. But this is not to say that either party is precluded from hiring an expert witness, someone unrelated to the case, to opine on what a reasonably prudent physician would normally do with the undisclosed information. That happens all the time too. *See Snelson v. Kamm*, 204 Ill. 2d 1, 46 (2003); *see generally Tashman v. Gibbs*, 263 Va. at 74 (citing *Dickerson v. Fatehi*, 253 Va. 324, 327 (1997); *Rogers v. Marrow*, 243 Va. 162, 167 (1992); *Raines v. Lutz*, 231 Va. 11, 113 (1986)). But, such testimony by an expert witness would need to be designated under Rule

4:1(b)(4)(A)(i), while such testimony by fact witnesses—the patient or physician—need not. Theirs is factual testimony; they are the people who would have made the actual decision.

This Court permits physicians with personal knowledge and experience to testify to that which they would have never done. *Bailey v. Erdman*, No. 150394, 2015 Va. Unpub. LEXIS 14 at *6 (Va. Dec. 30, 2015) ("It was also permissible for Dr. Klevan [a treating physician] to testify as to what he has never done…"). That is what Dr. Lee did in this case—he testified that he would never perform surgery on a patient with consanguineous parents or who had siblings predecease him as a result of genetic defect. A. at 82. *Bailey* does not stand for the proposition that such testimony is "hypothetical" such that a fact witness who was not designated as an expert cannot offer such testimony.

C. Any opinion testimony Dr. Lee offered as a lay witness did not need to be designated prior to trial

To the extent this Court considers Dr. Lee's testimony to be an opinion, it was Dr. Lee's lay opinion. As such, it did not have to be designated pursuant to Rule 4:1(b)(4)(A)(i) to be admissible. Rule 2:701 permits the admission of lay opinion testimony but does not require pretrial disclosure in discovery. The "[o]pinion testimony by a lay witness is admissible if it is reasonably based upon the personal experience or

observations of the witness and will aid the trier of fact in understanding the witness' perceptions." Rule 2:701. *Bailey* teaches that not every opinion from a medical doctor is an expert opinion. *See Bailey v. Erdman*, No. 150394, 2015 Va. Unpub. LEXIS 14 at *4-5 (Va. Dec. 30, 2015).To the contrary, *Bailey* recognizes that a physician may offer lay witness opinion testimony. *Id.* at *5-6.

As previously discussed, Dr. Lee was a fact witness. Because Mrs. Toraish elected not to testify, he was the only fact witness to testify about the events at issue. As a fact witness, Rule 2:701 allowed Dr. Lee to offer lay opinion testimony so long as it was "reasonably based on [his] personal experience or observations" and would "aid the [jury] in understanding [his] perceptions." The testimony at issue met both requirements.

Mrs. Toraish's central theory at trial was that Dr. Lee breached the standard of care by scheduling Adam's surgery as an outpatient surgery. A. at 122-124. Dr. Lee explained to the jury why he made that decision by including the factors he considered in determining whether Adam was a candidate for outpatient surgery. This aided the jury in understanding his perception. A. at 114-115, 120-124.

In referring to the undisclosed information of the consanguineous marriage and predeceased siblings, Dr. Lee explained: "if I had either piece

of information, I would not be able to recommend surgery on that day." A. at 98. In the event this Court considers Dr. Lee's testimony to be an opinion, the testimony was his lay opinion, just like his testimony as to why he chose to take Adam to outpatient surgery. It was Dr. Lee's lay opinion that, based on Adam's age, mental capacity and propensity not to bleed excessively, outpatient surgery was appropriate. A. at 120-124. All of Dr. Lee's testimony was based on his personal experience as an otolaryngologist.

Dr. Lee was not required to designate his anticipated testimony under Rule 4:1(b)(4)(A)(i). That rule applies to expert witnesses and expert opinions, not lay witnesses and lay opinions. It was well within the sound discretion of the trial court to permit Dr. Lee to testify how the facts that were properly admitted into evidence (the consanguineous marriage and predeceased siblings) would have affected his decision making about whether to take Adam to surgery. The trial court properly admitted this testimony.

CONCLUSION

Because the trial court's rulings underlying each of Mrs. Toraish's assignments of error were correct, Mrs. Toraish's appeal should be denied. The jury's verdict, and the trial court's judgment, in favor of Dr. Lee should be affirmed.

Respectfully Submitted,

/s/ Michael E. Olszewski

Michael E. Olszewski, VSB #43078
Benjamin M. Wengerd, VSB #82794
Richard L. Nagle, VSB #34265
James N. Knaack, VSB # 65644
HANCOCK, DANIEL, JOHNSON & NAGLE, P.C.
3975 Fair Ridge Drive, Suite 475 South
Fairfax, Virginia 22033
T: (703) 591-3440
F: (703) 591-7646
molszewski@hdjn.com
bwengerd@hdjn.com
rnagle@hdjn.com
jknaack@hdjn.com

Counsel for Appellees

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on November 15, 2016, the Brief of Appellees was filed electronically via the VACES system with the Supreme Court of Virginia and that ten copies of the same were hand delivered to the clerk's office. This same date, a copy of the Brief of Appellees was sent via email to all counsel of record, at the email addresses below:

L. Steven Emmert, VSB #22334
Sykes, Bourdon, Ahern & Levy, P.C.
281 Independence Boulevard, 5th Floor
Virginia Beach, VA 23462
T: (757) 499-8971
F: (757) 456-5445
emmert@virginia-appeals.com

Robert T. Hall, VSB #4826
Gobind S. Sethi, VSB #72266
Samantha K. Sledd, VSB #82656
Hall & Sethi, P.L.C.
12120 Sunset Hills Road, Suite 150
Reston, VA 20190
T: (703) 925-9500
F: 703) 925-9166
rthall@hallandsethi.com
gsethi@hallandsethi.com
sksledd@hallandsethi.com

Juli M. Porto, VSB #80820
Carluzzo Rochkind & Smith, P.C.
9300 W. Courthouse Road, Suite 203
Manassas, VA 20110
T: (703) 361-0776
F: (703) 361-9531
jporto@crslegal.net

Counsel for the appellees does not waive oral argument.

/s/ Michael E. Olszewski