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.

REPLY BRIEF OF APPELLANT

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1. Dr. Boyd's incomplete analysis was inadmissible.

When Adam Traish died, a medical examiner was unable to pinpoint the precise cause of his death. A. 465 ("cardiac arrhythmia of unknown etiology"). At trial, it fell to the parties' experts to establish that cause. Adam's mother called two experts – otolaryngologist Dr. Patricia Yoon and forensic pathologist Dr. Jonathan Arden – who explained that the cause of death traced to Adam's breathing. A. 173-75 (Yoon); Tr. 293-97 (Day 4) (Arden).

In response, Dr. Lee turned to Dr. Simeon Boyd, a geneticist. Dr. Boyd offered a differential diagnosis, excluding one cause at a time until only one remained. A. 392, 397. But he was unable to rule out a respiratory explanation, because it was out of his field. A. 393. Dr. Lee now claims for the first time that another doctor – the medical examiner, who did not testify at trial – excluded a respiratory cause, and that Dr. Boyd used that conclusion to check off that possibility. Brief of appellee at 10-13.

This contention is untrue in two ways. First, Dr. Boyd never testified that he relied on the medical examiner to rule out respiratory failure as the "unknown etiology." All of the transcript citations to this effect in Dr. Lee's brief state only that Dr. Boyd reviewed several documents, including the autopsy. But he never testified, positively or negatively, about a respiratory cause, other than to say, "I cannot speculate whether that's a possibility because it's out of the area of my expertise." A. 393.

If Dr. Lee had indeed relied on the medical examiner for this exclusion, he would have said so in that answer. This is instead his lawyers' attempt to squeeze more out of the record than it actually contains.

Dr. Lee's second misstatement is at p. 13: "Dr. Posthumus [the medical examiner] was qualified to rule out a pulmonary cause of death, and did." While the examiner may or may not have been qualified to rule out a pulmonary cause, the assertion that she "did" is simply false: she left the ultimate cause undetermined ("of unknown etiology").

Dr. Yoon explained at A. 174-75 how respiratory failure brought on Adam's cardiac arrhythmia and his death. The medical examiner was unable to find a cause, perhaps declining to offer an opinion in a specialized field. In short, no medical evidence provided the conclusion on which Dr. Boyd's testimony depends.

Dr. Lee was the proponent of Dr. Boyd's theory of death, so it fell to Dr. Lee to provide an adequate foundation for that opinion. The absence of such a foundation does not, as Dr. Lee claims at p. 9, go to the weight of the evidence. It means that the opinion is inadmissible. *Hyundai Motor Co. v. Duncan*, 289 Va. 147, 155 (2015); *Holiday Motor Corp. v. Walters*, 292 Va. ____, ____, 790 S.E.2d 447, 458 (2016).

2. Nonexperts cannot offer medical diagnoses.

When he recommended surgery, Dr. Lee did not know that Adam's parents were cousins or that two of their children had died from a genetic disease. A. 78. He does not deny that neither fact was connected to Adam's death. Brief

of appellee at 17-18. Despite this, he testified had he hypothetically known these facts, he would have prescribed a new course of treatment: referral to a pediatric geneticist. A. 82. This medical opinion was not included in Dr. Lee's expert disclosure, so it was inadmissible. *Mikhaylov v. Sales*, 291 Va. 349, 359-61 (2016).

Dr. Lee now argues that he was not required to disclose this testimony because it was factual or his lay opinion. He claims that it was factual because he was only describing the thought process that led him to recommend outpatient surgery, and asserts that a doctor's hypothetical testimony about unknown facts is "routinely" considered factual.

A. Dr. Lee did not regard genetics as a significant factor. In this Court, Dr. Lee tries to expand his trial testimony to say that he implicitly considers a patient's genetic makeup in deciding what treatment to prescribe. This contradicts his own testimony, listing the three criteria he considers to determine whether to perform outpatient surgery on a child: (1) the child's age, (2) whether the child

has a mental disability, and (3) whether the child bleeds in the recovery room. A. 114-15. Nothing in the record indicates that he considers genetic defects to be material.

Quite the contrary. The record confirms that Dr. Lee does *not* consider genetic history. His three-page intake form requests "important" family and social history, to aid him in making the "best" treatment decision for a patient. A. 71. This form seeks no information about a patient's parents' relationship or whether his siblings predeceased him. A. 78. Nor did Dr. Lee ask for this information during his oral consultation with Adam's mother. *Id.* Nothing indicates that Dr. Lee finds that information "important" to his decision-making process.

B. Nonexperts may not offer hypothetical medical opinions. The Rules of Court require parties to disclose to each other the expert testimony they expect to adduce at trial. While this requirement prevents the pre-1967 practice of trial by ambush, before the advent of discovery, it is even more significant in medical-malpractice cases.

The defendant in such cases is usually a doctor, skilled in the medical profession. When a doctor is allowed to blindside a lay opponent at trial by offering undisclosed medical opinions by the simple ruse of calling them "lay opinions," the scales are tipped in a way that modern practice condemns, since a layman is unable to immediately assess the new opinion and decide how best to address it. Dr. Lee asks this Court to take a giant step backward.

None of the cases that Dr. Lee cites support his contention that a nonexpert physician's hypothetical testimony is "routinely" permitted as factual. Except for *Bailey v. Erdman*, Record No. 150394 (Dec. 30, 2015), the admissibility of hypothetical testimony is not at issue in any of those decisions. Dr. Lee recognizes this; *see*, *e.g.*, his discussion at p. 23 of *Seef v. Ingals Mem'l Hosp.*, 724 N.E.2d 115 (Ill. App. 1999) ("The admissibility of that testimony was not even questioned."). Nor was hypothetical testimony in issue in *Smith v. Irving*, 268 Va. 496 (2004), where the defendant doctor explained only what he had

done and why, *id*. at 502, and never stated what he would have done under hypothetical, different circumstances.

In spite of the record, Dr. Lee asserts that his testimony was not hypothetical because he was testifying to something he "would never have done." Brief of appellee at 27. But this reengineers his testimony at trial, at A. 82:

> 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.
>
> 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 D.C.

Contrary to his lawyers' new assertions in this Court, Dr. Lee did not say that he "would never" perform surgery on a child with Adam's genetic background.

After allowing this hypothetical opinion into evidence over the mother's objection, the trial court then prevented her from examining Dr. Lee on it. Tr. 235-40 (Day 2). The court ruled that he could not be examined on information that only came to his attention after suit was filed. *Id*. at

239-40. A consistent ruling would also have barred his original hypothetical opinion on the same basis.

A simple rule governs here: As this Court noted in *Bailey*, if a physician does "not testify as an expert, it [is] not permissible for [him] to answer hypothetical questions." Record No. 150394, slip op. at 2.

C. <u>This was not a proper lay opinion</u>. If his testimony was not factual, Dr. Lee continues, then it was a lay opinion. He asserts that because his hypothetical testimony "aided the jury in understanding his perception," it was admissible. But lay opinions are only permitted if they are based on a witness's "personal experience or observations" and will help the jury understand the "witness' perceptions." Rule 2:701.

Dr. Lee admittedly did not know Adam's parents' relation or that his siblings predeceased him when he recommended outpatient surgery, A. 78, so his testimony was not based on his personal experience or observations. He was not describing his perception in any sense of that word. He was testifying to a medical recommendation to

address a hypothetical situation. This cannot be a layman's opinion.

D. Dr. Lee's hypothetical opinion turned on irrelevant factors. Dr. Lee admits that he based his hypothetical testimony on facts unrelated to Adam's death, but he contends at p. 18 that it "did not matter." He claims that the relation of Adam's parents and the deaths of his siblings created a "risk" that Adam had a genetic disorder. *Id*. He now asserts for the first time that the results of genetic testing would be irrelevant because the risk on these facts alone "was simply too great" to justify surgery. *Id*.

This claim is not supported by Dr. Lee's testimony or his actions. Over the whole course of treatment, he never asked about Adam's genetic background. If the possibility of a genetic disorder truly made surgery this risky, Dr. Lee would have explored it before treatment, and would have requested this information from all patients on his intake form. But he did neither. Instead, he blames the mother for not knowing to volunteer the information. A. 146-47.

Dr. Lee's hypothetical bore no relation to reality; neither consanguinity nor the siblings' deaths contributed to Adam's cause of death, so this information was irrelevant to the case. *Compare* brief of appellee at 14, n.7. Because his testimony had no probative value, it is inadmissible. *Vasquez v. Mabini*, 269 Va. 155, 159 (2005).

This testimony also did not address the nature of the mother's claim. She did not sue Dr. Lee for recommending surgery; her claim turned on his discrete decision not to order overnight monitoring. Whether the surgery was wise or not was immaterial to the claim actually litigated.

* * *

Ultimately, a medical decision, like medical testimony, is the unique province of medical experts. Dr. Lee decided what would be relevant to his young patients' treatments, and that decision was reflected in his intake form and in his oral consultations. But now, facing liability, he claims that he had no responsibility to determine medical relevance, in order to shift blame for Adam's death onto the boy's mother.

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CERTIFICATE

I hereby certify that on this 29th day of November, 2016, pursuant to Rule 5:26, ten paper copies of the Reply Brief of Appellant have hand-filed with the Clerk of the Supreme Court of Virginia and an electronic copy of the Brief was filed, via VACES. On this same day, an electronic copy of the Reply Brief of Appellant was served, via email, upon:

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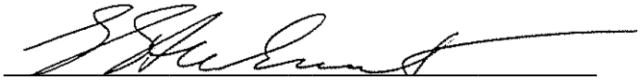

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