IN THE

Supreme Court of Virginia

RECORD NO. 091745

VIRGINIA S. JONES, Administratrix of the
ESTATE of PAUL ARBON JONES, JR., DECEASED,

Appellant,

v.

JOHNNY WILLIAMS, an infant, who sues by his Mother
and Next Friend, DOSSHANDRA WILLIAMS, and
DOSSHANDRA WILLIAMS, individually,

Appellees.

REPLY BRIEF OF APPELLANT

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ARGUMENT

I. Plaintiffs[1] do not defend the Trial Court's Dead Man's Statute ruling on its own terms.

Plaintiffs' brief covers a lot of ground, but is most remarkable for what it does *not* say. It largely ignores Defendant's arguments. And it does not even attempt to defend the Trial Court's rationale for its Dead Man's Statute ruling.

For example, Plaintiffs' brief does not contest Defendant's assertion that each of the three witnesses upon whom the Trial Court relied to find corroboration was biased. (Br. of Appellant at 17-21). The Trial Court based its finding of corroboration "as a matter of law" on "[t]he testimony received thus far from Nurse McGuirt and the other persons who were present at the time in the delivery room." (App. 697). But the only witnesses other than Nurse McGuirt "who were present at the time in the delivery room" were Johnny's parents, Dosshandra Williams and Johnny Custis. (Br. of Appellant at 9-10). All three of these allegedly corroborating witnesses had biases that could have led the jury to completely discredit their testimony. Under this Court's holding in *Taylor v. Mobil Corporation,* therefore, the corroboration question presented a jury issue. 248 Va. 101, 111, 444 S.E.2d 705, 710 (1994) ("[G]iven the nurse's possible bias . . . the jury was not required to accept the nurse's testimony.").

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[1] For the sake of clarity, Appellee will use the designations of the parties in the trial court.

Plaintiffs do not respond to any of these arguments. They do not dispute that Johnny's parents were biased in the matter. And though Plaintiffs now claim that Nurse McGuirt was not an "interested party" for Dead Man's Statute purposes (see *infra*), they never deny (1) that she, like the nurse in *Taylor*, had a potential bias in the matter, or (2) that her notes failed to corroborate her on key points (e.g., that she applied fundal pressure *at the direction of Dr. Jones*). Nor do Plaintiffs dispute the legal proposition established in *Taylor* that corroboration is a jury issue where the allegedly corroborating witnesses have biases that could lead the jury to reject their testimony. Indeed, Plaintiffs do not even cite *Taylor*, choosing to ignore Defendant's legal arguments altogether.

The same holds true for Defendant's arguments that corroboration must come from a source that is "independent" from the witness who is to be corroborated. Plaintiffs do not—because they cannot—dispute the validity of this well-established proposition. Nor do they deny that Johnny's parents had a pecuniary interest in the outcome of the lawsuit and so could not themselves corroborate Nurse McGuirt's testimony.

These undisputed facts and unchallenged legal principles establish that the Trial Court's Dead Man's Statute analysis was seriously in error. The Trial Court held that Nurse McGuirt's testimony had been corroborated "as a matter of law." But the only evidence the Trial Court cited to support this conclusion

was the testimony and documentation from McGuirt, Dosshandra, and Custis. Under settled principles, McGuirt could not corroborate her own testimony. Neither could Johnny's parents supply the necessary corroboration, as they too had a pecuniary interest in the matter. Moreover, even if these individuals *could* provide competent corroboration, their biases meant that the issue was one for the jury, not the Trial Court, to resolve. By ignoring these issues, Plaintiffs tacitly acknowledge that the Trial Court's analysis was indefensible on its own terms.

II. Plaintiffs' argument that Nurse McGuirt was not an interested party is both factually without merit and procedurally barred.

Rather than defend the Trial Court's decision on the grounds that the Trial Court itself asserted, Plaintiffs offer other justifications for the ruling. In their first argument, for example, Plaintiffs claim that the Trial Court's (erroneous) corroboration finding can be affirmed because Nurse McGuirt was not an "interested party" and, thus, her testimony did not need to be corroborated. This argument is both factually flawed and procedurally barred.

In point of fact, Nurse McGuirt *was* an interested party because—as a potentially liable participant in the delivery—she had a strong pecuniary interest in the outcome of this suit. Plaintiffs' theory of this case was that the use of fundal pressure jammed Johnny's shoulder into his mother's pelvis, exacerbating the shoulder dystocia and leading Dr. Jones to use excessive force in extricating Johnny from the birth canal. Nurse McGuirt was not a

bystander in all this. She was the one who, by her own admission, actually applied the fundal pressure (though she now claims that she did so at the direction of Dr. Jones). As the person who performed the key procedure, Nurse McGuirt had significant exposure.

This potential liability was real and ongoing. Because Johnny was an infant at the time of the incident, the statute of limitations on his medical malpractice claims will not expire until June 4, 2015, when he turns 10. Va. Code § 8.01-243.1; App. 439-40. Thus, at the time Nurse McGuirt testified, she was still subject to suit. And not only *could* Plaintiffs bring a lawsuit based on the conduct of nursing staff, they already had done so. In a prior, nonsuited, action, Plaintiffs had sued Nurse McGuirt's employer, Bon Secours DePaul Medical Center.[2] Further evidencing Nurse McGuirt's continuing concern over liability was the fact that, in the present case, she was represented by counsel during her deposition and at trial. (App. 844).

The outcome of the present suit had a substantial effect on Nurse McGuirt's pecuniary interests. It completely eliminated her liability exposure to Plaintiff. The jury returned a verdict in the full amount of the applicable medical-malpractice cap: $1.75 million. Under *Bulala v. Boyd*, a medical-malpractice

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[2] City of Norfolk Circuit Court Case No. CL07000333-00 (filed Jan. 22, 2007 and nonsuited August 16, 2007). Plaintiff refiled the present suit on October 24, 2007 and did not name Bon Secours DePaul Medical Center as a defendant.

plaintiff is entitled to only one statutory cap, regardless of the number of alleged tortfeasors. 239 Va. 218, 228, 389 S.E.2d 670, 675 (1990). So Plaintiff cannot now recover anything from McGuirt. Pecuniary means "of or relating to money." BLACK'S LAW DICTIONARY 1167 (8th Ed. 2004); WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1663 (1993). Reducing potential liability from $1.75 million to $0 is a "pecuniary" benefit. *See Ratliff v. Jewell*, 153 Va. 315, 322, 149 S.E. 409, 411 (1929) (wife of counterclaimant was interested party because her husband's success on counterclaim would extinguish a joint debt that she owed with her husband).

With verdict in hand, however, Plaintiffs now argue that McGuirt had no pecuniary interest because, they claim, Plaintiffs' evidence and arguments in the present case would judicially estop them from later suing McGuirt. (Br. of Appellees at 15). This is not so. For judicial estoppel to apply, "the proceeding must involve the same parties." *Matthews v. Matthews*, 277 Va. 522, 529, 675 S.E.2d 157, 161 (2009). Moreover, "the party asserting the inconsistent position must have also persuaded the court to accept that earlier position." *Id. See also Bentley Funding Group, L.L.C. v. SK&R Group, L.L.C.*, 269 Va. 315, 327, 609 S.E.2d 49, 55 (2005) ("Absent success in a prior proceeding, a party's later inconsistent position introduces no risk of inconsistent court determinations, and thus poses little threat to judicial integrity."). Thus, if the jury in the present case

had returned a defense verdict, the law of judicial estoppel would not have barred Plaintiff from later proceeding against Nurse McGuirt.

In addition to being factually groundless, the argument that Nurse McGuirt was not an interested party is procedurally barred because Plaintiffs did not cross-appeal the Trial Court's implicit ruling that Nurse McGuirt was an interested party. The Dead Man's Statute's corroboration requirement comes into play only when the witness in question is an "adverse or interested party." Va. Code § 8.01-397 ("[N]o judgment or decree shall be rendered in favor of an adverse or interested party founded on his uncorroborated testimony."). Corroboration is unnecessary if the witness is not an adverse or interested party. The Trial Court, by reaching the corroboration issue, implicitly found that Nurse McGuirt *was* an interested party whose testimony needed to be corroborated. To challenge this determination that Nurse McGuirt was an interested party, Plaintiffs needed to assign cross-error to it in their Brief in Opposition to the Petition for Appeal. Rule 5:18(b) ("[N]o cross error not then assigned will be noticed by this Court."). They did not do so. Thus, they may not now argue that Nurse McGuirt's testimony did not need to be corroborated.

Plaintiffs protest that "This Court (and other appellate courts) often 'assumes without deciding' the existence of a particular fact, circumstance or condition." (Br. of Appellees at 12). And they speculate that "the Trial Court may

simply have 'assumed without deciding' that Nurse McGuirt were [sic] an interested party." (*Id.*) It is true, of course, that courts sometimes make hypothetical rulings—assuming, without deciding, certain factual or legal propositions. But when courts do so, they make it plain what they are doing. In the present case, by contrast, the Trial Court did *not* state that it was "assuming without deciding" that Nurse McGuirt was an interested party. Nor was there any other indication that its corroboration decision was predicated on a hypothetical assumption of interested-party status. Instead, the Trial Court addressed the corroboration issue directly, brushing aside Johnny's earlier—and erroneous—contentions that Nurse McGuirt did not need to be corroborated because she was not a named "party" in the case. (App. 693-97). The Record belies Plaintiffs' current arguments that the Trial Court merely "assumed without deciding" that McGuirt was an interested party.

As a last resort, Plaintiffs invoke the "right result wrong reason" doctrine to excuse their failure to cross-appeal the Trial Court's implicit ruling that Nurse McGuirt was an interested party. (Br. of Appellees at 13). This rule applies where a trial court renders a correct decision, but does not state the proper reason for it. The doctrine does not apply in this case because the Trial Court's ruling—the finding of corroboration as a matter of law—was *not* a correct decision. No alternate argument exists that could justify it. Even if Nurse McGuirt

were disinterested, which she is *not*, that still would not license the Trial Court to find corroboration as a matter of law.[3] Simply put, in deciding the corroboration issue as a matter of law, the Trial Court reached the wrong result for the wrong reasons.

III. The expert-witness testimony did *not* corroborate Nurse McGuirt.

Plaintiffs spend much of their brief arguing that expert-witness testimony corroborated Nurse McGuirt's account of events. (Br. of Appellees at 25-36). The testimony they recite, however, either did not corroborate Nurse McGuirt on the material points at issue or relied on Nurse McGuirt to supply the factual predicates for the expert's opinion. Either way, it was not competent corroboration.

Take, for example, Plaintiffs' claim that Dr. Soffer's testimony corroborated Nurse McGuirt. Plaintiffs point out that Dr. Soffer testified that Johnny's injuries were consistent with a shoulder that was "further impacted" by fundal pressure. (Br. of Appellees at 27). But this testimony does not corroborate Nurse McGuirt's testimony on the key issue of *who decided to apply fundal pressure*.

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[3] The argument regarding Nurse McGuirt's status as an interested party also raises factual questions that make it inappropriate to apply the "right result, wrong reason" doctrine. *Whitehead v. Commonwealth*, 278 Va. 105, 115, 677 S.E.2d 265, 270 (2009) (noting that the rule does not apply "where further factual resolution is needed before the right reason may be assigned to support the trial court's decision").

For the jurors to have returned a verdict against Defendant, they had to have believed Nurse McGuirt's testimony that Dr. Jones *ordered her* to apply fundal pressure. Yet Dr. Soffer does not speak to that point at all. Nor could he, as he was not in the delivery room at the time of Johnny's birth.

Plaintiffs also claim that Defendant's own experts corroborated McGuirt's testimony.[4] Thus, they point to the testimony of Dr. Buchanan, who defended the use of fundal pressure. But the factual foundation for Dr. Buchanan's testimony about fundal pressure was Nurse McGuirt's own account of the delivery—found in the medical records and McGuirt's testimony. As such, Dr. Buchanan's testimony ultimately depended on Nurse McGuirt's credibility and on circumstances under McGuirt's control. It therefore was not competent corroboration of Nurse McGuirt's testimony. *Virginia Home for Boys and Girls v. Phillips,* 279 Va. 279, 286, 688 S.E.2d 284, 288 (2010). *See also Diehl v. Butts*,

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[4] Without citing any authority to support their position, Plaintiffs argue that Appellant's experts' discussion of McGuirt's account of Johnny's birth—statements that already had been introduced into evidence—somehow prevented Appellant from arguing that McGuirt's testimony had not been corroborated. (Br. of Appellees at 30-35). Appellant is unaware of any such exception to Va. Code § 8.01-397's corroboration requirement.

Notably, this is *not* a circumstance where "another interested party testified to a version of the facts on behalf of the decedent." *Johnson v. Raviotta*, 264 Va. 27, 34, 563 S.E.2d 727, 732 (2002). The experts were not "interested." And because they lacked personal knowledge, they were not even competent to give their own "version of the facts." They simply gave opinion testimony based on alleged facts introduced through the testimony of Nurse McGuirt.

255 Va. 482, 491, 499 S.E.2d 833, 839 (1998) (experts could not base their opinions on the uncorroborated testimony of interested parties).

Plaintiffs' argument concerning Dr. Partridge suffers from a similar flaw. Dr. Partridge testified that Dr. Jones "had the nurse use fundal pressure to help" with the delivery. (App. 650). But Dr. Partridge was not in the delivery room. He had no personal knowledge of who ordered fundal pressure to be given. He relied—as did all the experts—on Nurse McGuirt's account of the delivery. So, again, this is a circumstance where the allegedly corroborative testimony depended for its force on Nurse McGuirt's own testimony.

By relying on expert testimony to corroborate Nurse McGuirt, Plaintiffs essentially argue in a circle. The experts *relied* on Nurse McGuirt's testimony and notes to supply the factual foundation for their testimony. Yet Plaintiffs turn around and use that same expert testimony to *corroborate* Nurse McGuirt. The Court should not allow Plaintiffs to bootstrap their way out of the Dead Man's Statute in this way.

IV. Plaintiffs' reliance on *Whitmer v. Marcum* is unwarranted.

As anticipated, Plaintiffs rely on *Whitmer v. Marcum*, 214 Va. 64, 196 S.E.2d 907 (1973), to support their claim that the Trial Court correctly decided the corroboration issue as a matter of law. This reliance is misplaced. In *Whitmer*, the defendant—the personal representative of the deceased driver—

requested a Dead Man's Statute instruction at the close of evidence. The trial court, however, found as a matter of law that plaintiff's testimony had been sufficiently corroborated. Nevertheless, it delivered a Dead Man's Statute instruction to the jury. These contradictory actions presented this Court with a "paradox": "The trial court declares that it has decided an issue as a matter of law, yet it submits the issue to the jury as a question of fact." *Id.* at 69, 196 S.E.2d at 910. Because it was impossible to determine what led the jury to render a defense verdict, this Court reversed and remanded for a new trial.

The decision in *Whitmer* makes sense. It is incoherent for a trial court to take an issue away from the jury by deciding a factual question as a matter of law and then to submit the very same question to the jury. Such a ruling is erroneous no matter how one looks at it.

Plaintiffs wrongly equate the facts in the present case with those in *Whitmer*. They point out that Defendant had—at the *outset* of trial—made a motion *in limine* to exclude all fundal pressure evidence on Dead Man's Statute grounds. (App. 6-13). They then argue that the Trial Court's denial of that motion *in limine* somehow prevented the Trial Court from later instructing the jury on the Dead Man's Statute. (Br. of Appellee at 22).

This is not so. The flaw in Plaintiffs' argument is that the Trial Court's denial of the pretrial[5] motion *in limine* to exclude fundal-pressure evidence was not equivalent to the finding in *Whitmer*—at the *close of all evidence*—that there was corroboration as a matter of law. Indeed, this Court has stated that the sufficiency of corroboration ordinarily cannot be determined until all the evidence is in. *Johnson*, 264 Va. at 33, 563 S.E.2d at 731-32. Thus, it usually is appropriate for the trial court to admit all the allegedly corroborative evidence before deciding a Dead Man's Statute issue—a point that the Trial Court noted during arguments on the motion *in limine*: "That's why we allow all the evidence in and make the decision later as to corroboration." (App. 203).

Plaintiffs, however, mischaracterize the Trial Court's denial of the motion *in limine* as a determination "as a matter of law" that there was sufficient corroboration of Nurse McGuirt's testimony.[6] The Trial Court, however, made no such finding. Nor could it possibly have done so, *as no evidence relating to fundal pressure had yet been admitted*. The *in limine* ruling, which merely allowed fundal-pressure evidence to be presented to the jury, in no way

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[5] The motion was made pre-trial, though the Trial Court ruled on the matter at the beginning of the second day of trial, before *any* testimony about fundal pressure.

[6] Contrary to Plaintiffs suggestion on pages 4 and 22 of their brief, the Trial Court did *not* use the words "as a matter of law" in denying the motion *in limine* to exclude fundal pressure evidence. (App. 214-15).

compelled the Trial Court later—at the end of trial—to take the corroboration issue away from the jury by deciding, as a matter of law, that Nurse McGuirt's testimony had been corroborated.[7] The Trial Court's statement that there was "sufficient evidence regarding the statements made by the decedent" was simply a ruling that the Plaintiffs had forecast sufficient evidence of corroboration to entitle them to introduce fundal-pressure evidence in their case-in-chief. Even after allowing this evidence in, it would have been consistent with *Whitmer*, *Johnson*, and *Taylor*, for the Trial Court—at the close of all evidence—to have determined that corroboration was a jury issue and instructed the jury on it. In fact, the Trial Court erred in not doing so.

V. Contrary to Plaintiffs' current arguments, fundal-pressure evidence was essential to their case.

Plaintiffs argue that Nurse McGuirt's testimony about fundal pressure did not need to be corroborated because fundal pressure was not an essential component of their case. (Br. of Appellees at 17). This argument is a nonstarter. Fundal pressure played a central and inextricable role in Plaintiffs' negligence and causation arguments—elements that were essential to their medical-malpractice cause of action. Plaintiffs' expert, Dr. Jeffrey Soffer, M.D., clearly testified that applying fundal pressure was a deviation from the standard of care

[7] And even if the Trial Court had made such a ruling—which it did not—it could have modified that ruling before instructing the jury.

(App. 239; 243-44) and that it caused Johnny's injury. (App. 246-48). Dr. Soffer explained that fundal pressure caused Johnny's injuries because it made matters "much worse" than if Dr. Jones had merely applied traction without fundal pressure. (App. 247-48).

During closing argument, Plaintiffs' counsel gave the following nutshell summary of the case against Dr. Jones:

> Soffer and Northam told you that ***fundal pressure made it worse.*** Dr. Buchanan all but laid down and told you ***fundal pressure makes it worse. . . . [Dr. Jones] told [Nurse McGuirt] to give fundal pressure.*** It was wrong. It made things worse. This comes from stretching of those nerves. That's how it happened. That's how it happened in this case, and all that other stuff that it might happen some other way got nothing to do with this case.

(App. 800-01) (emphasis added). Although Plaintiffs now wish to deny it, fundal pressure clearly was at the heart of their case.

VI. Given the Trial Court's erroneous corroboration ruling, no Dead Man's Statute instruction would have sufficed.

Finally, Plaintiffs argue that the Trial Court properly refused to instruct the jury on the Dead Man's Statute because, they claim, the particular instruction that Defendant offered was wrongly worded. Plaintiffs contend that the instruction incorrectly used the term "interested person" rather than "interested party." (Br. of Appellees at 36-37). And they further contend that the rejected

instruction's definition of "interested person" was too broad—a point that they never argued to the Trial Court.[8] (*Id.* at 37-38).

This line of argument misses the point of the Trial Court's ruling. Given the finding, as a matter of law, that Nurse McGuirt's testimony had been corroborated, *no* Dead Man's Statute instruction—no matter how carefully crafted—would have been given. Moreover, the Trial Court never ruled that the instruction was incorrectly worded. Had it done so, the Trial Court could have corrected the alleged problem itself or given the parties the chance to do so. Plaintiffs' belated critique of Defendant's instruction does not justify the Trial Court's decision, on unrelated grounds, to remove the entire Dead Man's Statute issue from the jury.

CONCLUSION

Because the Trial Court's corroboration finding is not defensible—either on the grounds that the Trial Court asserted or on the grounds asserted in Plaintiffs' brief—this Court should reverse the judgment below, find that there was no competent corroboration of Nurse McGuirt's testimony, and either order that the action be dismissed or remand the matter for a new trial.

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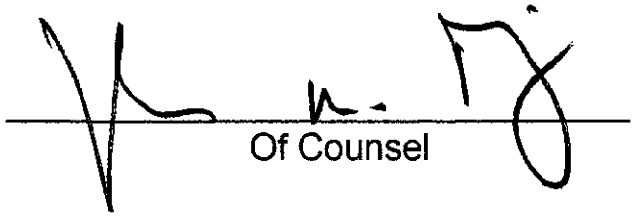
[8] Tellingly, Plaintiffs do not argue that they presented a correct Dead Man's Statute instruction to the Trial Court, or identify where in the record such an instruction can be found. A party who fails to tender an instruction on a legal issue fairly raised in the case should not later be heard to complain about the precise wording of the instruction offered by opposing counsel.

Respectfully submitted,

VIRGINIA S. JONES, Administratrix of the Estate of PAUL ARBON JONES, JR., deceased,



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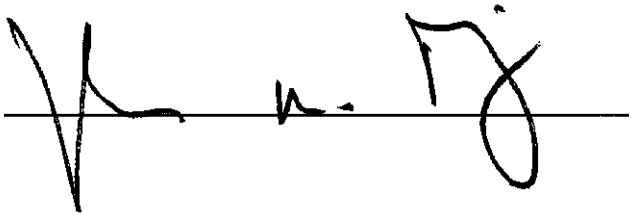
The undersigned hereby certifies that he has complied with the requirements of Rule 5:26(d) by having 15 copies of this brief hand-filed with the Clerk and 3 copies mailed to opposing counsel on this 4th day of June, 2010.