In the

Supreme Court of Virginia

At Richmond

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.

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STATEMENT OF THE CASE
Nature of the Case

This case comprises a medical malpractice action for permanent injuries sustained by the infant plaintiff, Johnny Williams, now 4 years old, as a result of Johnny's obstetrician's negligence during Johnny's delivery.

More specifically, the defendant Administrator's decedent, Dr. Paul Jones, applied excessive downward force upon Johnny's head during a vaginal delivery procedure, in violation of the standard of care, when Johnny's right shoulder became stuck during delivery. This excessive force in turn caused certain nerves from the right side of Johnny's spine to be stretched and damaged, which resulted in a pathological condition known as Erb's Palsy. Johnny's Erb's palsy is permanent, and substantially diminishes the normal functioning of his right arm and hand.

After a five-day trial, the jury returned a verdict for the infant plaintiff in the amount of $1.75 million, the equivalent of the applicable medical malpractice damages cap.

Plaintiff's Claims

The plaintiff advanced two (2) specific claims at trial.

First, the plaintiff contended in its evidence that Dr. Jones had negligently applied excessive force to Johnny's head in delivering Johnny,

in violation of the applicable standard of care, which in turn directly caused the injuries comprising Erb's palsy.

Second, the plaintiff contended in its evidence that Dr. Jones had negligently failed to execute certain obstetrical maneuvers to safely free Johnny's lodged shoulder, also in violation of the standard of care.

The plaintiff also contended in its evidence that after Johnny's shoulder became lodged, Dr. Jones ordered an assisting hospital nurse to apply "fundal pressure" to the upper abdominal area of the mother, a violation of the standard of care, because such pressure during a shoulder dystocia can actually exacerbate the potential nerve injury that leads to Erb's Palsy.

However, the establishment of the application of fundal pressure was neither necessary nor sufficient for, nor essential to, either of plaintiff's medical malpractice claims described above upon which judgment was sought. Rather, the fundal pressure evidence, discovered late in the discovery process and which comprises the essence of the evidence challenged by defendant in this Appeal, merely reinforced the previously formed opinion of one of plaintiff's experts.

Defendant's Defenses To Plaintiff's Claims

The defendant's experts agreed with the plaintiff that Johnny presented a shoulder dystocia during delivery. They also agreed with the plaintiff that Johnny suffered from an Erb's Palsy that occurred during birth.

In conflict with plaintiff's expert testimony, however, the defendant's experts blamed Johnny's Erb's Palsy, not on excessive force upon the head by Dr. Jones, but upon what they claimed were "maternal forces." These defense experts posited that the internal forces naturally occurring within the mother's body and organs during birth alone, had stretched and damaged Johnny's nerves to cause his Erb's Palsy.

Defendant's experts also testified, in further conflict with plaintiff's expert evidence, that Dr. Jones utilized appropriate maneuvers to dislodge the shoulder, including fundal pressure, and that his delivery of Johnny was within the standard of care.

MATERIAL PROCEEDINGS IN THE TRIAL COURT

A jury trial was conducted from April 27-May 1, 2009. On the morning of trial, the defendant filed a pleading entitled "Motion To Exclude All Evidence Regarding Fundal Pressure." More specifically, the Motion sought *in limine* to exclude plaintiff's anticipated evidence from Delivery Nurse Martha McGuirt that Dr. Jones ordered fundal pressure, as well as plaintiff's lay witness testimony about fundal pressure-related events in the delivery

room. (App. 6). Defendant contended that such anticipated evidence was barred from admissibility for certain purported reasons under Virginia's dead man's statute.

The Trial Court declined to rule at that time, deferring consideration of the Motion To Exclude until a later time in the trial.

During the plaintiff's case-in-chief, prior to the testimony of plaintiff's obstetrical expert Dr. Jeffrey Soffer, the defendant again raised *in limine* its Motion To Exclude All Evidence Regarding Fundal Pressure, seeking to preclude testimony from Dr. Soffer regarding same. (App. at 198-215). Defendant argued, *inter alia*, that Dr. Soffer's expected testimony regarding fundal pressure should be excluded because the evidence of Dr. Jones' statements supporting it was purportedly both subject to, and insufficiently corroborated under, the dead man's statute. The Trial Court denied the defendant's Motion, <u>specifically finding as a matter of law that</u>, "There is sufficient corroboration regarding the statements made by the decedent" for dead man statute purposes. (App. at 214-215). At the conclusion of the plaintiff's evidence, the defendant moved to strike the plaintiff's evidence on the grounds, *inter alia*, of "the hearsay testimony concerning the use of fundal pressure." (App. at 460). Defendant objected to the testimony of Nurse McGuirt about Dr. Jones' orders/statements about fundal pressure,

claiming that the dead man's statute required her testimony about fundal pressure to be corroborated and further claiming that it was not. Defendant objected to the testimony of Johnny's mother and the father, who witnessed the delivery, as also requiring corroboration and as lacking same. (App. at 460-61). The Trial Court denied the defendant's Motion on this ground, stating that, "As it relates to the issue of the hearsay testimony regarding fundal pressure…the Court's going to note your exception for the reasons previously stated," (App. at 464), a reference to the Court's earlier finding as a matter of law that sufficient corroboration existed as to Dr. Jones' statements about fundal pressure. (App. at 214-215).

Furthermore, at the conclusion of the plaintiff's evidence, the Trial Court granted the plaintiff's motion to voluntarily dismiss with prejudice the mother Dosshandra Williams' claim against the defendant, thereby leaving only the infant Johnny's claim before the jury. (App. at 456.)

At the conclusion of all of the evidence, the defendant renewed its Motion To Strike on grounds, *inter alia*, of "the Court allowing any testimony about fundal pressure because of the dead man's statute," which Motion the Trial Court denied. (App. at 757-60).

During the jury instruction conference, the defendant proffered an instruction pertaining to the corroboration requirements of the dead man's

statute. (App. at 686-88; 689-98). The Court refused this instruction, ruling, again, "as a matter of law corroboration has been established" and, therefore, that no jury issue was presented on that question. (App. at 697).

After deliberating for approximately 30 minutes, the jury returned a verdict for the infant plaintiff in the amount of $1.75 million. (App. at 801-806). The defendant moved to set aside the verdict "as being contrary to the law and the evidence in the case," including renewing "the motion that I had as far as fundal pressure," which Motion the Court denied. (App. at 807-10).

The final Judgment Order was entered by the Court on May 27, 2009, and this appeal ensued.

A Panel of this Court found no reversible error in the judgment below and denied a Petition For Appeal by Order dated December 16, 2009. By Order dated March 15, 2010, this Court granted a rehearing and awarded an appeal to the defendant.

QUESTIONS PRESENTED

1. Whether the Trial Court correctly denied the defendants' Motions To Strike for plaintiff's alleged failure to corroborate Nurse McGuirt's fundal pressure testimony under the dead man's statute , where

Nurse McGuirt was not an “interested party” under the statute, and where her testimony did not comprise an essential element that, if not corroborated, would be fatal to plaintiff’s case? (Assignments of Error Nos. 1. and 2.)

2. Whether the Trial Court correctly refused the defendant’s proposed jury instruction regarding corroboration, where the challenged testimony was not subject to dead man’s statute corroboration in any event, where the Court found corroboration as a matter of law, where there was sufficient corroboration to remove the question from the jury, and where the proposed instruction was not a correct statement of the law? (Assignments of Error Nos. 1 and 2).

STATEMENT OF FACTS

The material facts for this appeal, viewed in the light most favorable to the plaintiff, whose evidence the jury accepted, are as follows:

Johnny Williams was born on June 4, 2005 to his mother Dosshandra Williams. (App. at 439-40). The delivering obstetrician was Dr. Paul Jones. (App. at 395). The attending delivery nurse was Martha McGuirt (App. at 393-94).

During the delivery, a shoulder dystocia situation developed. (App. at 230-31; App. at 397-98). Plaintiff’s obstetrical expert, Jeffrey Soffer, M.D.,

testified that shoulder dystocia "is difficulty in delivering the child once the head is delivered…the shoulders are stuck and you can't get the rest of the body out once the head is delivered." (App. at 229).

Dr. Soffer testified that Dr. Jones recorded that there was a "Difficult shoulder delivery…," which note "to every obstetrician in the country means that a shoulder dystocia was encountered…" (App. at 221-222, 228-29).

Moreover, the defense's own expert case admitted that such shoulder dystocia is "something that every obstetrician should be ready for," "should be trained for," "[a]nd should know how to handle correctly." (App. at. 607).

As to plaintiff's claim of negligent action, Dr. Soffer testified that upon encountering a shoulder dystocia, the standard of care directs that the obstetrician "not put any pressure on the baby's head." (App. at 232). More specifically, Dr. Soffer testified as to the standard of care as follows:

> The right shoulder is stuck under this bone. In order to deliver it safely, you can't just pull the baby's head down, which I believe was done in this case, and, therefore, you stretch the nerves coming off the neck going into the arm. That's an absolute contraindication when you have a shoulder dystocia to do any lateral or downward pulling or traction on the baby's head.

(App. at 231).

Dr. Soffer testified that, in this specific case, Dr. Jones violated the standard of care, which in turn caused Johnny's Erb's Palsy, as follows:

> Based on the records I initially reviewed, there was a departure in that Dr. Jones exerted traction, in other words, pulling down on the baby's head in order to deliver the baby but, unfortunately, caused this injury to the baby's nerves which is permanent.

(App. at 243-44). Significantly, Dr. Soffer arrived at this opinion well before he had many months later received additional nursing notes indicating that fundal pressure had been applied as well, which notes merely "reinforced" his opinion as to excessive lateral force but were not essential to it. (App. at 244).

Likewise, Dr. Soffer testified that there were "no other causes for this injury" other than excessive traction on the baby's head. (App. at 251-52). "The injury is too severe" to be caused by anything other than excessive head traction. (App. at 250).

As to plaintiff's claim of negligent omissions by Dr. Jones, Dr. Soffer also testified that rather than pulling down on the head, the appropriate standard of care is to execute a variety of maneuvers for which obstetricians are trained to effect release of the blocked shoulder during a dystocia. (App. at 233-34). Dr. Jones failed to adequately apply this series of accepted and appropriate maneuvers to dislodge the baby' shoulder,

which in turn would have effected the normal delivery of Johnny without the excessive pressure applied to his head.

Dr. Ralph Northam, Johnny's pediatric neurologist, also testified as to the plaintiff's injuries. Dr. Northam testified that Johnny suffers from Erb's Palsy. He explained that the brachial plexus is a cluster of 5 nerve roots, including C5, C6, and C7, which cluster "connects the brain and the spinal chord with the arm." Johnny "had damage to the top three of those five nerve roots, so C5, C6, and C7 was injured." (App. at 313-15).

Dr. Northam also testified, as to Dr. Soffer, that Johnny's brachial plexus Erb's Palsy injury, and resultant permanent right arm dysfunction, was the direct result of Johnny's head being "displaced down with traction" by Dr. Jones during the shoulder dystocia. Such downward traction, "opens this angle up between the neck and the shoulder" where the five nerve roots of the brachial plexus lie. "If the head is down and stretched, then those nerves roots are stretched, starting with the top C5,C6…so with opening that angle up in this manner that stretches the plexus, and that's how Erb's palsy occurs." (App. at 331-32). "The injury occurred as a result of that opening of the angle with traction during the delivery process." (App. at 335-36).

ARGUMENT
I.

AS A THRESHOLD MATTER, DEFENDANT'S ASSIGNMENTS OF ERROR, BASED UPON THE DEAD MAN'S STATUTE, MUST FAIL, BECAUSE THE CHALLENGED TESTIMONY REGARDING FUNDAL PRESSURE DID NOT COME FROM AN INTERESTED PARTY AS DEFINED BY THE STATUTE.

Because the witness through whom the fundal pressure evidence was adduced was not an "interested party" as defined by the dead man's statute, the plaintiff respectfully submits that the dead man's statute is not implicated, and that defendant's Assignments must therefore be rejected.

Virginia Code Section 8.01-397 (also known as the dead man's statute) states, in pertinent part, as follows:

> In an action by or against any person who, from any cause, is incapable of testifying, or by or against the committee, trustee, executor, administrator, heir, or other representative of the person so incapable of testifying, no judgment or decree shall be rendered in favor of an adverse or interested party founded on his uncorroborated testimony.

(emphasis added).

The defendant's Assignments Of Error contend that the witness called by the plaintiff who testified about fundal pressure, Nurse Martha McGuirt, is an "interested party" for purposes of the dead man's statute.

The plaintiff, however, respectfully submits that the law of Virginia makes clear that Nurse McGuirt was not an "interested party" for purposes of the dead man's statute, that her testimony therefore is received without

being subject to the statute's corroboration requirements, and that defendant's Assignments Of Error, founded as they are on such an assertion, must fail as a threshold matter.

As an initial procedural matter, defendant erroneously, and without authority, asserts in its Opening Brief that, "By reaching the corroboration issue and by making an explicit corroboration finding, the Trial Court plainly found that Nurse McGuirt was an interested party," and further that "Appellee has not cross-appealed the Trial Court's rejection of his argument that Nurse McGuirt's testimony did not need to be corroborated." Brief of Appellant at p.6 n.2.

First, the Trial Court never expressly found that Nurse McGuirt was an interested party, but only found that if corroboration were necessary, it existed as a matter of law. This Court (and other appellate courts) often "assumes without deciding" the existence of a particular fact, circumstance or condition without expressly holding, and then decides a case on the basis of another principle or rule against the backdrop of the hypothetical "assumption" or construct. Likewise, in the instant case, the Trial Court may simply have "assumed without deciding" that Nurse McGuirt were an interested party, and then deemed that actually deciding such status was

immaterial or unnecessary, since corroboration existed as a matter of law in any event.

Second, even if, *arguendo*, the defendant's unsupported contention about the Trial Court's reasoning were nevertheless assumed to be correct, no cross-error is required in this instance. This Court's well-established doctrine of "right result-wrong reason" would fully apply here under such circumstances. *See Whitehead v. Commonwealth, 278 Va. 105, 114-15, 677 S.E. 2d 265, 270 (2009); Davis v. American Interinsurance Exchange, 228 Va. 1, 5, 319 S.E. 2d 723, 725 (1984); Robbins v. Grimes, 211 Va. 97, 100, 175 S.E. 2d 246, 248 (1970).*

Otherwise stated, the Trial Court correctly ruled that no corroboration issue was presented for the jury, even if, *arguendo*, the decision should have been based upon an express finding that as a threshold matter the dead man's statute did not apply to Nurse McGuirt, as opposed to a finding that adequate corroboration had been presented in any event. Under either reason, the same, right result would have been reached by the Trial Court, i.e., that there is no submissible issue of corroboration for the jury to decide as to Nurse McGuirt's testimony.

As this Court said in *Johnson v. Raviotta*, *264 Va. 27, 32, 563 S.E.2d*

727, 731 (2002), "testimony is subject to the corroboration requirement if it is offered by an adverse or interested party…" (emphasis added).

In *Merchants Supply Co. v. Ex'rs of the Estate of John Hughes*, *139 Va. 212, 216, 123 S.E.355, 356 (1924)*, this Court stated the following definitions pertinent to the dead man's statute:

> An adverse party, within the meaning of this section, is one who is a party to the record, against whom or in whose favor a judgment is sought. An interested party is one, not a party to the record, who is pecuniarily interested in the result of the suit.

(emphasis added). Indeed, in *Johnson, supra*, this Court reiterated this definition, stating that, "An interested party is 'one, not a party to the record, who is pecuniarily interested in the result of the suit;" (emphasis added), and cited the *Merchants Supply Co., supra* case as support for this definition.

Nurse McGuirt is not an adverse party. Her status is neither as a named defendant in this action, nor is it derivative of any named defendant.

Moreover, she is not an interested party. There is no evidence in the record that Nurse McGuirt has any pecuniary interest "in the result of the suit." Indeed, defendant's only argument that Nurse McGuirt was "pecuniarily interested in the result of the suit" against Dr. Jones by Johnny is its claim that, "McGuirt, who admitted applying fundal pressure, was an

obvious target of a malpractice claim by Plaintiff. She had a substantial pecuniary interest in shifting blame away from herself and onto Dr. Jones." Petition at p. 20. This assertion is simply incorrect as a matter of law.

Plaintiff did not contend that Nurse McGuirt was in any way negligent or responsible legally for Johnny's injuries. Rather, the plaintiff contended, and the jury accepted, that Nurse McGuirt was simply following orders from the physician to whom she had a duty to follow. Any negligence in Johnny's delivery causing his injuries was attributed solely and exclusively by plaintiff's experts to Dr. Jones' negligent acts and omissions, not to anything that Nurse McGuirt did or did not do.

Thus, the plaintiff's own evidence and position in this litigation eliminated anything done, or not done, by Nurse McGuirt, as a contributing factor to Johnny's injury, and thereby precludes the plaintiff from later seeking a judgment from Nurse McGuirt. To do so would run afoul of, and be otherwise precluded by, the rule set forth by this Court in *Rohanna v. Vazzana, 196 Va. 549, 553, 84 S.E.2d 440, 442 (1954)*, as follows:

> "In Virginia, we have also approved the general rule that a party is forbidden to assume successive positions in the course of a suit, or series of suits, in reference to the same fact or state of facts, which are inconsistent with each other, or mutually contradictory. A litigant is estopped from taking a position which is inconsistent with one

> previously assumed, either in the course of litigation for the same cause, or in dealings *in pais*.

Thus, the plaintiff's position in this litigation regarding the causation of Johnny's injuries excludes Nurse McGuirt as someone liable therefor, and would preclude the plaintiff from later seeking a judgment from her on the inconsistent theory that she was so liable. Accordingly, defendant's asserted premise upon which its entire "interested party" argument as to Nurse McGuirt is based, is simply legally incorrect.

Moreover, even if, *arguendo*, the defendant could somehow nevertheless assert that Nurse McGuirt "was an obvious future target of a malpractice claim by Plaintiff, (which she was not), that characterization is still insufficient to make her an "interested party" for dead man's statute purposes. This Court has never held that a witness allegedly possessed of some interest or bias, other than a pecuniary interest in the outcome of the judgment in the case in which the witness testifies, is an "interested party" for dead man's statute purposes. That Nurse McGuirt is alleged to be concerned about a subsequent suit against her is a far cry from establishing the request pecuniary interest "in the result of the suit" at hand, to-wit, a money judgment for Johnny Williams.

Defendant can point to nothing in the record of this case which constitutes Nurse McGuirt as in any way "pecuniarily interested in the result

of the suit." Accordingly, defendant's Assignments, which are predicated upon Nurse McGuirt being such an "interested party" as a threshold matter, must fail.

II.
AS AN ADDITIONAL THRESHOLD MATTER, DEFENDANT'S ASSIGNMENTS OF ERROR, BASED ENTIRELY UPON THE DEAD MAN'S STATUTE, MUST ALSO FAIL, BECAUSE THE CHALLENGED TESTIMONY REGARDING FUNDAL PRESSURE DID NOT COMPRISE AN ESSENTIAL ELEMENT OF PLAINTIFF'S CLAIM WHOSE ABSENCE WOULD BE FATAL TO PLAINTIFF'S CASE.

In *Johnson, supra*, this Court held that there are two essential conditions which must be extant in connection with challenged testimony in order to be subject to the dead man's statute corroboration requirements:

> Thus, testimony is subject to the corroboration requirement if it is offered by an adverse or interested party and if it presents an essential element that, if not corroborated, would be fatal to the adverse party's case.

264 Va. at 32, 563 S.E.2d at 731 (emphasis added).

Thus, the defendant's Assignments must fail for an additional, alternate threshold reason: the challenged testimony about fundal pressure does not, as articulated by *Johnson, supra*, comprise "an essential element that, if not corroborated, would be fatal to the adverse party's case."

As plaintiff has amply demonstrated throughout its earlier Statement Of Facts at pp. 6-10, *supra,* plaintiff's case rested upon two core claims of negligence on the part of Dr. Jones, to-wit: (1) his negligent act of applying

excessive force to Johnny's head at delivery when presented with the shoulder dystocia; and (2) his negligent omission to perform the accepted series of shoulder-dislodging maneuvers that would have obviated the need for a distressed delivery of the head to begin with.

Neither of these claims contained the application of fundal pressure as an essential element. Regardless of the existence or not of fundal pressure, Dr. Soffer's testimony was that the nature and circumstances of this injury itself were such that excessive force upon the head at delivery caused the injury. (App. at 231, 243-244, 249-252). Indeed, when Dr. Soffer first reviewed the medical records and concluded that excessive head traction caused this injury, he had not yet even seen the later nursing notes that referenced fundal pressure. (App. at 244). Likewise, Dr. Northam, a plaintiff causation expert, testified similarly that excessive head force in delivery caused the injuries, not even mentioning fundal pressure whatsoever. (App. at 331 – 332, 335-336).

While Dr. Soffer did reference the fundal pressure nurse's note in his testimony, it was neither central nor essential to his opinions, testifying that it merely "reinforced my opinion that much too much lateral traction or pressure was applied to the baby's head…" (App, at 244).

Accordingly, Nurse McGuirt's testimony regarding fundal pressure did

not comprise "an essential element that, if not corroborated, would be fatal to" Johnny's case. Therefore, for this additional and alternate reason, the corroboration requirements of the dead man's statute also did not apply to this challenged evidence.

III.
THE TRIAL COURT PROPERLY REFUSED DEFENDANT'S PROPOSED JURY INSTRUCTION REGARDING CORROBORATION.

Even if, *arguendo*, the challenged fundal pressure evidence were subject to the statute's corroboration requirements, the Trial Court correctly refused the defendant's Refused Jury Instruction #2, for the reasons stated below.

A. The Trial Court's earlier findings as a matter of law that Nurse McGuirt's fundal pressure testimony had been sufficiently corroborated, precluded the giving of the defendant's proposed jury instruction on the same subject.

While this Court has previously said that, "The sufficiency of corroborative evidence under Code § 8.01-397 is usually a question for the jury," *Johnson, supra*, *264 Va. at 33, 563 S.E.2d at 731*(emphasis added), this is far from a universally and uniformly applicable rule. A number of dead man's statute decisions of this Court have indicated the appropriateness in specific circumstances of the trial court deciding the corroboration question as a matter of law. *See, e.g., Rice v. Charles, 260 Va. 157, 167-68, 532 S.E.2d 318, 323 (2000)*(affirming trial court's striking

of contributory negligence defense for failure to present corroboration as a matter of law); *Diehl v. Butts, 255 Va. 482, 490, S.E.2d 833, 838 (1998); Whitmer v. Marcum, 214 Va. 64, 68-69, 196 S.E.2d 907, 910 (1973)*(reversing trial court for giving a corroboration instruction where the trial court had earlier found corroboration as a matter of law). *See also Shelton v. Chippenham & Johnston Willis Hospitals, Inc. et. al., 68 Va. Cir. 468 (2005 Rich. Cir. Ct.)*("while the sufficiency of corroborative evidence under the statute is usually a question for the jury…it is not always so.") Indeed, the *Johnson, supra*, Court itself held that corroboration questions regarding certain challenged evidence should have been decided by the trial court as a matter of law.

In *Whitmer, supra, 214 Va. at 68, 196 S.E.2d at 910*, a case neither discussed nor mentioned in defendant's Petition, this Court held that it was error for the trial court to have given a corroboration instruction similar to defendant's Refused #2, where the trial court had earlier found that the requisite corroboration had been established as a matter of law. Similar to the case at bar, the *Whitmer, supra* defense moved to strike plaintiff's evidence at the conclusion of all of the evidence, on grounds including that plaintiff's "testimony was not corroborated as a matter of law." *Id*. The trial

court overruled the motion, making certain findings tantamount to finding that the testimony had been corroborated as a matter of law. *Id.*

The *Whitmer, supra*, Court first noted that corroboration issues are not always jury questions:

> Whether the requirement of corroboration… has been satisfied is usually an issue for the jury….But corroboration need not always present a jury issue; a trial judge is not precluded from a determination that the witness's testimony has been corroborated as a matter of law, and "questions of law are never for the jury."

The jury ultimately returned a verdict for the defendant. In finding the trial court's propriety in finding that corroboration existed as a matter of law, this Court nevertheless reversed the judgment for defendant, for error in giving a corroboration instruction at all, as follows:

> On the issue of corroboration, we are thus presented 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. We can only assume that the trial court found as a matter of law that Whitmer's testimony was corroborated. Therefore the issue of corroboration was erroneously submitted to the jury.

214 Va. at 68, 196 S.E.2d at 910.

The plaintiff respectfully submits that a nearly identical situation is presented in the case at bar. During the trial, the Trial Court denied defendant's Motion in limine regarding Dr. Soffer's anticipated fundal

pressure testimony, specifically finding as a matter of law that, “There is sufficient corroboration regarding the statements made by the decedent” Dr. Jones for dead man statute purposes (App. at 214-215), a ruling not challenged by defendant on appeal. Having made such a finding, the Trial Court surely would have run afoul of the *Whitmer, supra* holding if it had then nonetheless given the jury an instruction on an issue of law that the Court had already decided.

Moreover, the Trial Court’s subsequent denial of defendant’s Motion To Strike at the conclusion of plaintiff’s evidence (App. at 460-461), made in part on the same grounds as the *Whitmer, supra*, defendant, to-wit, failure of corroboration as a matter of law, is equally compelling. In denying the Motion, the Trial Court made reference to its “reasons previously stated,” (App. at 464), referring to its earlier finding as a matter of law that, “There is sufficient corroboration regarding the statements made by the decedent” for dead man’s statute purposes. Having repeatedly and consistently made these findings of corroboration as matter of law, the Trial Court would have committed the same reversible error as the *Whitmer, supra* trial court, had the Trial Court given the defendant’s requested corroboration instruction.

Accordingly, for the reasons stated above, the Trial Court correctly

refused the defendant's Refused Instruction # 2 on corroboration, having ruled as a matter of law that corroboration had been established.

B. Sufficient corroboration of Nurse McGuirt's fundal pressure testimony existed to remove it as a jury question.

Even if, *arguendo*, Nurse McGuirt could somehow be construed to be an "interested party," and even if, *arguendo*, the Trial Court's specific findings of corroboration as matter of law are not otherwise dispositive, sufficient corroboration existed in any event to remove this issue as a jury question.

In *Johnson v. Raviotta, supra*, this Court explained the corroboration requirement as follows:

> If corroboration is required, such corroboration must be supplied by evidence which tends in some degree to independently support the element essential to the adverse or interested party's case, but the testimony need not be corroborated on all material points. *Rice, 260 Va. at 165-66, 532 S.E. 2d at 323; Brooks v. Worthington, 206 Va. 352, 357, 143 S.E. 2d 841,845 (1965*). Corroborating evidence may be circumstantial evidence or come from other witnesses.

264 Va. at 32; 563 S.E. 2d at 731.

Moreover, as *Johnson v. Raviotta, supra* further indicates, "This question may be unanswerable until the close of evidence because only at

that point can all evidence be surveyed to determine if sufficient corroboration exists." *264 Va. at 33, 563 S.E. 2d at 731-32.*

The defendant waived its motion to strike on alleged lack of corroboration grounds, made at the conclusion of plaintiff's evidence, by electing thereafter to present defense evidence of its own. *Carroll v. Richardson, 201 Va. 157, 158, 110 S.E.2d 193, 194 (1959)*. In light of this waiver, and this Court's observation that the corroboration question may well have to be reserved until all of the evidence has been concluded, the plaintiff respectfully submits that the trial evidence as a whole clearly established independent corroboration of Nurse McGuirt's testimony as to fundal pressure as a matter of law.

Nurse McGuirt's Testimony

Nurse McGuirt testified that she went "to give suprapubic pressure first," but was "ordered to discontinue doing that and do fundal pressure instead." (App. 399). She was ordered by Dr. Jones to apply fundal pressure during the period of Johnny's shoulder dystocia (App. 401), which dystocia period lasted somewhere between 1 minute 30 seconds to 2 minutes. (App. 397-98). At some point during the period of dystocia, Dr. Jones had his hands "on the baby's head." In performing the ordered fundal

pressure, Nurse McGuirt testified that she "used my forearm on top of the uterus…30 seconds to a minute max." (App. 411).

Shortly after the events themselves, Nurse McGuirt charted the delivery as follows:

> Head delivered. McRobert's maneuver done.
> Fundal pressure, not suprapubic pressure for
> shoulder dystocia. Vacuum delivery, male infant.
> Cord around neck times one.

(App. 401-02). The note were recorded by Nurse McGuirt long before she ever knew that there was any neurological problem with Johnny, about which she learned only when the instant suit was filed. (App. 412). Nurse McGuirt further testified that in 33 years of work as a Registered Nurse in the labor and delivery field, she could not recall any other physician ever ordering her to apply fundal pressure during a shoulder dystocia. (App. 400).

Independent Corroborative Evidence of Nurse McGuirt's Testimony in Plaintiff's Case

The plaintiff's case established that Dr. Jones' own medical records prepared at the time of the delivery corroborated significant parts of Nurse McGuirt's testimony. Plaintiff's obstetrical expert Dr. Soffer testified about Dr. Jones' notes as follows:

> Really, the important part of this note is the last
> sentence where the doctor writes, "Difficult shoulder

> delivery, without sequelae."…Difficult shoulder delivery to every obstetrician in the country means that a shoulder dystocia was encountered which means there was difficulty delivering the rest of the child after the head was delivered…In other words, the shoulders are stuck and you can't get the rest of the body out once the head is delivered.

(App. 228-29).

As previously noted, Dr. Soffer opined that one independent cause of the baby's brachial plexus injury was that, "There was certainly excess traction and force used to deliver this child's head and subsequent shoulders and body." (App. 247). That force came from Dr. Jones pulling too forcefully upon the baby's head during the dystocia. (App. 248-49).

In addition, however, according to Dr. Soffer's testimony, the very nature, extent, and presentation of Johnny's specific injuries, reflecting damage to three different cervical nerves at C5, C6, and C7, also circumstantially corroborates Nurse McGuirt's testimony about the order for, and the application of, fundal pressure during the shoulder dystocia (App. 248-53; 300-01), and including as well testimony developed by the defendant through cross-examination. (App. 286-87; 293-94).

For example, Dr. Soffer testified that Johnny's clinical presentation indicated that much more pressure was applied to his head at delivery than

even is ordinarily seen with other brachial plexus injuries caused by excessive force on the head. (App. 251-52). Dr. Soffer observed:

> In order for all three nerves, 5, 6, and 7, especially 7 to be injured, there has to be a tremendous amount of pressure applied to that nerve and stretched. A lot of times in these brachial plexus injury situations just 5 and 6 are affected which is also excessive pressure, but 7 doesn't usually get affected, the third nerve in the line, unless a great amount of traction is being applied, much more than ever should be applied.

(App. 252). In this regard, on cross-examination by the defense, Dr. Soffer indicated that fundal pressure itself "doesn't stretch the brachial plexus nerve," but, rather, the application of such a maneuver at the time of the stuck shoulder further drove the shoulder into the mother's pelvic structure thereby requiring even more force to dislodge the now severely stuck shoulder. (App. 293; 239; 247-48). The following exchange on cross-examination is illustrative:

> Q. Doctor, fundal pressure doesn't stretch the brachial plexus, does it?
> A. No.
> Q. So if I understand your opinion, it might have made the shoulder be further impacted but it doesn't do anything to this brachial plexus nerve?
> A. No, but the excess force used by the obstetrician did injure the brachial plexus, and as a result of the further impacted shoulder, more force was needed by the obstetrician to deliver the baby.

(App. 293). Dr. Soffer stated that this opinion was “based on what I’ve read and what I gleaned from the records.” (App. 294).

Accordingly, entirely independent of Nurse McGuirt’s own testimony about fundal pressure being applied, Dr. Soffer described a brachial plexus injury much more severe than is typically seen with excessive head traction during a shoulder dystocia. He further opined that such a severe injury is the result of “a tremendous amount of pressure applied” to the cervical nerves at delivery. That unusually excessive pressure stems, in this specific case, from the more severely impacted anterior shoulder, rendered unusually stuck due to the fundal pressure that pushed the shoulder more deeply into the pelvic bones.

The defendant did not dispute that Johnny had received a brachial plexus injury to C5, C6, and C7. The clinical picture described by Dr. Soffer precisely and entirely corroborates Nurse McGuirt’s testimony about the order for, and the application of, fundal pressure, at the critical moment of the shoulder dystocia. It is that fundal pressure, that likely caused the even more severe neurological injuries on Johnny than normally seen with a shoulder dystocia injury. As noted above, this Court has said that, “Corroborating evidence may be circumstantial evidence,” *Johnson v. Raviotta, supra, 264 Va. at 32, 563 S.E. 2d at 731*; and in this instance,

Johnny's indisputable clinical picture independently corroborates Nurse McGuirt's testimony. If Nurse McGuirt's testimony is true, it is utterly and completely supported by Johnny's undisputed clinical presentation of a C5, C6, and C7 nerve root damage.

Likewise, Dr. Ralph Northam, Johnny's pediatric neurologist, testified that the quantum of force necessary "from the doctor's hands to do permanent damage to a brachial plexus" is "adult strength force." (App. 338, 343). Thus, taking Drs. Soffer's and Northam's testimony together, if adult strength force of an excessive nature on the baby's head during a shoulder dystocia delivery causes a brachial plexus injury, then an even greater amount of such adult strength force would be expected to cause an even more severe such injury. Again, this is exactly what Dr. Soffer opined in this case, and which opinion is explained by, and corroborative of, Nurse McGuirt's fundal pressure testimony.

Independent Corroborative Evidence of Nurse McGuirt's Testimony in Defendant's case

As previously noted, the defendant elected to waive its initial motion to strike at the conclusion of plaintiff's case as to the alleged absence of corroboration of Nurse McGuirt's testimony, and, instead, present defense evidence. "The defendant did not stand on his motion and elected to put on evidence in defense, thus waiving the effect of the motion." *Carroll,*

supra, 201 Va. at 158, 110 S.E. 2d at 194. In doing so, the defendant itself presented further evidence of corroboration of Nurse McGuirt's testimony. Having presented such evidence of corroboration, the defendant can hardly at the same time be permitted to challenge its own evidence of corroboration, ask the Court and ultimately the jury to reject and disbelieve its own corroborative evidence, and complain that a jury question on corroboration was presented. Otherwise stated, in addition to the independent corroboration in the plaintiff's case, the defendant itself foreclosed the corroboration question as a matter of law with its own evidence.[1]

The defendant called Dr. Camillia Buchanan, a pediatrician, as an expert witness. On direct examination, the defendant elicited from Dr. Buchanan her opinion, after reviewing medical records including those of "the labor nurse, Martha McGuirt" and the other labor and delivery medical records, that Dr. Jones had at all times acted within the standard of care in

[1] The defendant, of course, could have elected to rest on its initial motion to strike, present no defense evidence, and argue the insufficiency of the record on that basis. The defense could also conceivably have presented defense evidence that did not address, rely upon, or otherwise touch upon Nurse McGuirt's testimony, in an alternate effort to preserve and argue the alleged insufficiency point. However, where, as here, the defendant squarely presented evidence of the fundal pressure order and application, and even went so far as to adopt it as a part of its case, commending Dr. Jones for in fact using such a maneuver, the defendant itself has corroborated the challenged testimony as a matter of law.

his delivery of Johnny. (App. 348-50). Dr. Buchanan further stated that, "I thought that Dr. Jones acted within the standard of care in all of his treatment of the patient," and that "the doctor's actions, in my opinion, did not cause the injury." (App. 551).

To support these opinions, the defendant elicited from Dr. Buchanan her review of nursing notes, about which Dr. Buchanan testified as follows:

> The things that are important when you're reviewing a case are the nursing notes during the labor…the fetal monitor tracing, the doctor's orders, the laboratory and the medications given, and then the doctor's progress notes. So those are the—the elements of a medical record that allow you to reconstruct what was happening during the time that the patient was in labor.

(App. 553). Indeed, on direct examination, the defendant went to great lengths to elicit from Dr. Buchanan just how important and telling are the nursing notes in a labor and delivery situation. (App. 554).

Moreover, during direct examination, Dr. Buchanan further corroborated the testimony of Nurse McGuirt about fundal pressure, during Dr. Buchanan's recitation of the expert's own reconstruction of the labor and delivery events, testifying that:

> And after she'd done that, according to the deposition of the labor nurse, Dr. Jones asked her

> to apply fundal pressure, so she applied fundal pressure.

(App. 571). Likewise, during cross-examination, when directed to the nursing notes that she had been utilizing in her direct testimony, Dr. Buchanan again stated as follows:

> Q. Is that evidence that Dr. Jones ordered fundal pressure?
> A. …Yes, that would indicate—that would seem logical to me that that's the nurse's note, that's what the nurse wrote, that she was asked to give fundal pressure.

(App. 611). That defense expert Dr. Buchanan relied upon the nursing notes to form her opinions, found those notes to be logical, and neither challenged nor impeached the credibility or reliability of Nurse McGuirt's notes, further corroborates Nurse McGuirt's notes and her very testimony about fundal pressure.

Most significantly, not only did Dr. Buchanan rely upon and accept Nurse McGuirt's notes as accurate, logical, and credible, she also adopted Nurse McGuirt's statements that she was ordered to give, and that she did apply, fundal pressure, as an integral part of her expert opinions! Dr. Buchanan testified that the maneuvers utilized by Dr. Jones, including "fundal pressure," "were…appropriate and within the standard of care." (App. 571-72). When further addressing the maneuvers used by Dr. Jones

to deliver the baby including fundal pressure, Dr. Buchanan testified that "Dr. Jones did what every reasonable doctor would do when encountering a shoulder dystocia." (App. 588-89). In fact, Dr. Buchanan praised Dr. Jones for using fundal pressure and the other maneuvers, declaring that, "He would have violated the standard of care if he hadn't tried the maneuvers that he tried." Thus, according to the defendant's evidence, not only did Dr. Jones order, and have applied, fundal pressure during the shoulder dystocia event, just as Nurse McGuirt testified, but Dr. Jones was supposed to utilize fundal pressure, and his failure to do so would have been negligence.

Therefore, having abandoned its earlier motion to strike as to an alleged absence of corroboration, the defendant then reversed its tack, presented affirmative evidence of the fundal pressure order and application in its own case, and sought to defeat contentions of negligence as to Dr. Jones by proffering that fundal pressure was the right thing to do. The defendant cannot incorporate the giving of fundal pressure into its own case-in-chief, cite such a maneuver as evidence of Dr. Jones' good medical judgment and actions, and yet later complain that such testimony of the maneuver was not adequately corroborated and that their own expert thus should not be believed.

Further foreclosing their corroboration complaint as a matter of law, just as the Trial Court ruled, the defendant also presented yet a second expert witness in their case-in-chief, who, just as with Dr. Buchanan, accepted the fundal pressure testimony as fact, stated that it was indeed the right thing for Dr. Jones to do, and opined that such actions were in fact within the standard of care.

This second expert, Dr. John Partridge, like Dr. Buchanan, also testified that he, too, had reviewed pertinent labor and delivery records, as well as various depositions including Nurse McGuirt's. (App. 631-32). He specifically noted that he had read the 23-page packet of nursing notes that included Nurse McGuirt's charting of the fundal pressure order and application. (App. 633-34).

As with Dr. Buchanan, Dr. Partridge equally asserted that Dr. Jones' delivery of Johnny, including the ordering of fundal pressure as testified by Nurse McGuirt, was all within the standard of care. (App. 635-36; 649-50; 654). Specifically, Dr. Partridge said that the application of fundal pressure "was reasonable and within the standard of care." (App. 635). He further asserted that Dr. Jones needed to have fundal pressure applied in this delivery, as follows:

> This baby was in stress, needed to be delivered and the mother was not able to push well enough and so

> the doctor used the vacuum extractor to help and had the nurse use fundal pressure to help.

(App. 654). Similarly, Dr. Partridge testified, again on direct examination, that this baby "needed the fundal pressure" in order to be delivered. (App. 654).

Accordingly, as with Dr. Buchanan's expert testimony, the defendant again proffered an expert, through Dr. Partridge, who not only testified that fundal pressure was given in fact, but that such a maneuver was reasonable, necessary, and absolutely indicated by the standard of care. To endeavor thereafter to object to the sufficiency of plaintiff's case based on an alleged absence of corroboration of Nurse McGuirt's fundal pressure testimony flies squarely in the face of the defendant's own case-in-chief, in which Nurse McGuirt's testimony was not only <u>not</u> challenged on this point, but adopted and then held up as a model of a delivering obstetrician under the pressure of a shoulder dystocia.

In light of such independent corroboration from both the plaintiff's case, as well as from the defendant's own evidence, the plaintiff respectfully submits that the Trial Court acted correctly in finding that corroboration as to Nurse McGuirt's testimony existed as a matter of law. To hold otherwise would have been error, and would have permitted the defendant to ask the jury to reject and disbelieve that which the defendant

itself had just adopted, vouched for, and developed in their own case-in-chief.

C. The Court also properly refused defendant's Refused Instruction #2, because it was not a correct statement of the law.

The Trial Court also properly refused Defendant's Refused Instruction # 2 (App. 117), because it was not a correct statement of the law.

In *Holmes v. Levine, 273 Va. 150, 159, 639 S.E.2d 235, 239 (2007)*, a case relied upon by the defendant at p. 12 of its Opening Brief, this Court stated that:

> "[a] litigant is entitled to jury instructions supporting his or her theory of the case if sufficient evidence is introduced to support that theory and if the instructions correctly state the law."

(emphasis added). Thus, even if, *arguendo*, the defendant has otherwise established that both the law and sufficient evidence (which plaintiff contests) supported a corroboration instruction, the proffered instruction must still "correctly state the law," which Defendant's Refused Instruction # 2 did not.

The first paragraph of the proffered instruction states as follows:

> There can be no verdict against the estate of a person now deceased which is based upon the uncorroborated testimony of the plaintiff and/or an interested person. An interested person is a person who stands to benefit in any way from a jury verdict

> for the plaintiff, whether directly or indirectly, or whether in fact or potentially.

Defendant's Refused Instruction #2 (App. 117). (emphasis added).

The underlined language represents that portion of the instruction which incorrectly states the law. First, the statute itself at §8.01-397 speaks, not in terms of just any "interested person," but specifically in terms of an "interested party." Plaintiff objected to this proposed language for this very reason during the instruction conference. (App. at 686-688, 689-698). In this respect, plaintiff also sharply contests defendant's footnote 7 at page 10 of its original Petition (and apparently abandoned in its Opening Brief), in which defendant contended that, "It was undisputed that the instruction…was an accurate statement of the law." Defendant's proposed "interested person" language is simply not a correct statement of the law, and the plaintiff made its objection to that language clear.

Second, as has been extensively discussed earlier in this Brief, this Court in *Johnson, supra*, and its predecessor decisions, has defined "interested party" as one "'who is pecuniarily interested in the result of the suit.'" *Id., 264 Va. at 35, 563 S.E.2d at 732*. However, the defendant's proposed instruction, referring as it did to an "interested person," defines such an "interested person" as "a person who stands to benefit in any way from a jury verdict for the plaintiff, whether directly or indirectly, or whether

in fact or potentially." This definition is much broader than this Court's description of "pecuniary interest," and vastly expands this Court's well-established definition of "interested party" for dead man's statute purposes, far beyond any decision has ever done from this Court. The proposed instruction is simply not a correct statement of the law, and was properly refused by the Trial Court.

IV.
FOR THE REASONS PREVIOUSLY STATED ABOVE, THE TRIAL COURT CORRECTLY DENIED THE DEFENDANT'S MOTIONS TO STRIKE THE PLAINTIFF'S EVIDENCE

For the reasons stated above, the plaintiff respectfully submits that (1) the corroboration requirements of the dead man's statute did not apply to Nurse McGuirt because she was not an "interested party" under the statute; (2) the corroboration requirements also do not apply because Nurse McGuirt's fundal pressure testimony did not comprise "an essential element that, if not corroborated, would be fatal to" Johnny's case; (3) even if, *arguendo*, the dead man's statute corroboration requirements applied, the Trial Court correctly ruled as a matter of law that corroboration had been sufficiently established; and (4) independent of the Trial Court's specific finding, sufficient corroboration was established by all of the evidence in any event to remove the corroboration issue from jury consideration. The foregoing arguments are incorporated herein by

reference, all of which justified denial of defendant's Motions To Strike on corroboration grounds.

CONCLUSION

For the foregoing reasons, the plaintiff respectfully prays that the Court affirm the judgment below, on the grounds that there is no reversible error in the judgment.

JOHNNY WILLIAMS, an infant, who
sues by his mother and next friend,
DOSSHANDRA WILLIAMS

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CERTIFICATE

The undersigned certifies pursuant to Rule 5:26 (a) that:

1. Fifteen copies of the foregoing Brief were filed in the office of the Clerk of this Court on this 21st day of May, 2010 by mail;

2. On this same date, three copies of the brief were mailed or delivered to:

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3. An electronic copy was filed with the Court as well on this date.

/s/ Andrew M. Sacks
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