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.

BRIEF OF APPELLANT

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SUBJECT INDEX

TABLE OF CITATIONS ii

NATURE OF THE CASE 1

ASSIGNMENTS OF ERROR 3

QUESTIONS PRESENTED 4

MATERIAL PROCEEDINGS BELOW 5

STATEMENT OF FACTS 7

ARGUMENT 11

I. The Trial Court erred in finding corroboration as a matter of law and in refusing to instruct the jury on the Dead Man's Statute. 11

A. Standard of review. 11

B. Under the Dead Man's Statute, corroboration is ordinarily a jury question. 12

C. The Trial Court erred in finding corroboration as a matter of law. 16

II. The Trial Court should have granted Defendant's Motion to Strike because the allegedly corroborative evidence came from witnesses who had an interest in the case. 21

A. Standard of review. 22

B. Nurse McGuirt's own testimony and the note that she authored could not corroborate her because they were not "independent" of her. 22

C. Johnny's parents could not corroborate Nurse McGuirt because they, too, were interested parties. 25

CONCLUSION 27

CERTIFICATE OF COMPLIANCE WITH RULE 5:26(d) 29

TABLE OF CITATIONS

Cases

Bitar v. Rahman, 272 Va. 130, 630 S.E.2d 319 (2006) 22

Brooks v. Worthington, 206 Va. 352, 143 S.E.2d 841 (1965) 13

Carter v. Carter, 19 Va. App. 501, 453 S.E.2d 295 (1995) 26

Diehl v. Butts, 255 Va. 482, 499 S.E.2d 833 (1998) 15

Hancock-Underwood v. Knight, 277 Va. 127, 670 S.E.2d 720 (2009) 11

Hereford v. Paytes, 226 Va. 604, 311 S.E.2d 790 (1984) 13, 24

Holmes v. Levine, 273 Va. 150, 639 S.E.2d 235 (2007) 12

Johnson v. Raviotta, 264 Va. 27, 563 S.E.2d 727 (2002) ..... passim

McClung v. Commonwealth, 215 Va. 654, 212 S.E.2d 290 (1975) 12

Merchant's Supply Co., Inc. v. Hughes' Ex'rs, 139 Va. 212, 123 S.E. 355 (1924) 21, 26

Moses v. Akers, 203 Va. 130, 122 S.E.2d 864 (1961) 26

Ratliff v. Jewell, 153 Va. 315, 149 S.E. 409 (1929) 21, 23, 25

Rice v. Charles, 260 Va. 157, 532 S.E.2d 318 (2000) 13, 15

Sunrise Continuing Care, LLC v. Wright, 277 Va. 148, 671 S.E.2d 132 (2009) 22

Taylor v. Mobil Corp., 248 Va. 101, 444 S.E.2d 705 (1994) ..... passim

Varner's Ex's v. White, 149 Va. 177, 140 S.E. 128 (1927) 23, 24

Virginia Home for Boys and Girls v. Phillips, 279 Va. 279, 688 S.E.2d 284 (2010) 17, 23, 25

Watson v. Daniel, 165 Va. 564, 183 S.E. 183 (1936) 26

Whitmer v. Marcum, 214 Va. 64, 196 S.E.2d 907 (1973) 16

Statutes

Va. Code § 8.01-243.1 10

Va. Code § 8.01-397 ..... 12, 13

NATURE OF THE CASE

This is the rare medical-malpractice Dead Man's Statute case in which it was the doctor, not the patient, who died before trial. Plaintiff, an infant, brought a medical-malpractice case alleging injury during childbirth. The obstetrician who delivered him passed away before Plaintiff commenced his action, so Plaintiff sued the administrator of his estate. As an action against the personal representative of a deceased person, the case implicates the Dead Man's Statute, Va. Code § 8.01-397.

The Dead Man's Statute forbids a court from entering judgment against a decedent's personal representative where that judgment is founded on the "uncorroborated testimony" of an interested party. This case falls squarely within the statute. It involves a judgment entered against a personal representative. And Plaintiff based his case on the testimony of an interested party, i.e., the nurse who performed the allegedly inappropriate procedure (allegedly at the deceased doctor's direction). This appeal raises three issues concerning the Dead Man's Statute's corroboration requirement.

First, it asks whether it is the judge or the jury who should decide if evidence is sufficiently "corroborated" for purposes of the Dead Man's Statute. Corroboration is usually a factual question for the jury. This is

especially so where, as here, the sufficiency of corroboration depends on judgments about the corroborating witnesses' credibility and biases. The Trial Court, however, took the corroboration issue away from the jury, decided "as a matter of law" that the evidence had corroborated the testimony of a key witness—the nurse—and then refused to instruct the jury on the Dead Man's Statute. This was error. The sufficiency of corroboration presented a question of fact for the jury, *not* a question of law for the Trial Court. For this reason alone, this Court should reverse.

The second question this case raises is whether an interested party may corroborate her own testimony with a note that she authored. The Trial Court allowed the nurse to corroborate her testimony with her own notes, which appear on the fetal-monitor strip for the birth. But it is well-settled that corroboration must be wholly "independent" of the witness who is to be corroborated. A note authored by the very witness to be corroborated manifestly is not "independent" of her. For this reason, too, the Court should reverse.

Finally, the case presents the question whether the testimony of one interested party can corroborate the testimony of another interested party. In the present case, the witnesses who allegedly corroborated the nurse's testimony were the infant Plaintiff's mother and father. Both parents had a

pecuniary stake in the case's outcome. Yet the Trial Court credited their testimony as sufficient corroboration of the nurse's testimony. The decisions from this Court make it clear that the testimony of one interested party cannot corroborate the testimony of another interested party. Corroboration must come from outside the circle of interested parties. As there was no such disinterested corroboration in this case, and as the nurse's testimony was critical to Plaintiff's case, the Trial Court wrongly denied Defendant's motion to strike.

For all of these reasons, this Court should reverse the Trial Court and enter judgment in Defendant's favor. Alternatively, it should remand for a new trial.

ASSIGNMENTS OF ERROR

1. The Trial Court erred in finding that Plaintiff presented competent corroboration evidence and in denying Defendant's Motions to Strike based on the Dead Man's Statute issue.

2. The Trial Court erred in deciding, as a matter of law, that Nurse McGuirt's testimony was corroborated and in refusing Defendant's proposed jury instruction on the Dead Man's Statute.

QUESTIONS PRESENTED

1. Where the probative force of corroborating evidence depends on judgments about the corroborating witnesses' credibility and bias, may the Trial Court take the corroboration issue away from the jury, decide as a matter of law that the testimony of an interested or adverse party has been corroborated, and refuse to give Dead Man's Statute instructions requested by the opposing party? (Assignment of Error #2).

2. Under the Dead Man's Statute, can an interested or adverse party corroborate her own testimony with a note that she authored where that note is identified by, introduced through, and explained by the very same witness? (Assignment of Error #1).

3. Under the Dead Man's Statute, can one adverse or interested party corroborate the testimony of another adverse or interested party? (Assignment of Error #1).

4. Under the Dead Man's Statute, is evidence sufficient corroboration where it fails to support the key allegations made by the adverse or interested party requiring corroboration? (Assignment of Error #1).

MATERIAL PROCEEDINGS BELOW

Plaintiff Johnny Williams, suing by his mother and next friend, filed the Complaint in this case on October 24, 2007. Defendant is Virginia Jones, the personal representative of Dr. Paul Jones, the obstetrician who delivered Plaintiff.

The matter was tried to a jury between April 27, 2009 and May 1, 2009. Plaintiff's principal fact witness was Nurse Martha McGuirt, who had assisted Dr. Jones with the birth. Defendant argued that judgment was barred by the Dead Man's Statute and moved to strike at the close of Plaintiff's evidence and again at the close of all evidence. (Joint Appendix ("App.") at 458-62, 757-58). The Trial Court denied both motions. (App. 464-65, 760).

Defendant further requested that the Court instruct the jury on the Dead Man's Statute's corroboration requirement. (App. 689-98). Again the Trial Court refused. The Trial Court did not dispute the correctness of Defendant's Dead Man's Statute instruction.[1] Nor did it accept Plaintiff's

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[1] The proposed instruction appears in the record as Defendant's Refused/Rejected Instruction #2. It reads:

> 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

(note continued on following page . . .)

argument that Nurse McGuirt was not an interested party.[2] Instead, applying the Dead Man's Statute's corroboration requirement to Nurse McGuirt's testimony, it found that there was sufficient corroboration as a matter of law:

> ***The Court's going to find as a matter of law corroboration has been established*** and it's going to refuse the proposed instruction . . . .
>
> . . .
>
> The testimony received thus far from Nurse McGuirt and the other persons who were present at the time

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(. . . note continued from previous page)

> who stands to benefit in any way from a jury verdict for the plaintiff, whether directly or indirectly, or whether in fact or potentially.
>
> A confidential (physician-patient) relationship existed in this case. Confidential relationships require a higher degree of corroboration than otherwise would be required.
>
> Corroborating evidence is evidence that tends to confirm and strengthen or to show the truth or probability of the testimony of the witness who must be corroborated. Such evidence need not come from a witness; it may be furnished by physical facts or from other circumstances adequately proven.

(App. 117). Plaintiff did not offer any alternative Dead Man's Statute instruction.

[2] By reaching the corroboration issue and by making an explicit corroboration finding, the Trial Court plainly found that Nurse McGuirt was a interested party. Appellee has not cross-appealed the Trial Court's rejection of his argument that Nurse McGuirt's testimony did not need to be corroborated.

> in the delivery room is more than sufficient corroboration, both the documentary evidence as well as the testimonial evidence as to what they heard and saw.

(App. 697). So it refused to give *any* Dead Man's Statute instruction.

The jury returned a verdict for Plaintiff for $1.75 million, the amount of the applicable medical-malpractice cap. (App. 142). The Trial Court entered judgment on that verdict on May 27, 2009. (App. 142-43). Defendant filed her Notice of Appeal on June 22, 2009.[3] This Court granted Ms. Jones's Petition for Appeal on March 15, 2010.

STATEMENT OF FACTS

Defendant-Petitioner Virginia Jones is the widow and personal representative of Dr. Paul Jones. Dr. Jones was the obstetrician who delivered Johnny Williams ("Johnny"), the Plaintiff below and the Respondent-Appellee in this appeal. During Johnny's delivery, there was a "shoulder dystocia"—i.e., the infant's head was delivered but his shoulder got stuck. (App. 228-29). The condition makes breathing difficult or impossible for the baby. (App. 233, 297). Once a physician encounters a shoulder dystocia, he has only three to five minutes to complete delivery before the baby begins to suffer injuries from oxygen loss. (App. 233-34).

[3] Appellees did not assign any cross-error in their opposition brief.

It is an "obstetrical nightmare" that can result in the infant's death. (App. 297, 572).

Dr. Jones was able to free Johnny's shoulder and to extricate him from the birth canal before the onset of any injury from oxygen deprivation. (App. 298). Shortly after the birth, however, it became clear that Johnny had abnormal motor function in his right arm. (App. 166). His "brachial plexus"—a group of nerve roots connecting the arm nerves to the spinal cord and brain—had been injured by stretching, a condition known as "Erb's palsy." (App. 313-14, 332). During childbirth, this stretching can be caused either by maternal forces or by forces exerted by persons assisting with the delivery. (App. 334-36, 718-22).

In his lawsuit, Plaintiff claims that Dr. Jones negligently handled the dystocia, that Dr. Jones's negligence caused the Erb's Palsy, and that the injury was serious and permanent. (App. 3-4). At trial, Plaintiff's expert testified that Johnny's injuries were caused by the combination of "fundal pressure"—pressure on the upper abdomen—with excessive traction during birth.[4] (App. 246-48). Plaintiff's standard-of-care expert, Dr. Soffer,

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[4] In his opposition to the Petition for Appeal, Plaintiff argued that fundal pressure was not an essential part of his malpractice case. This is not true. Fundal pressure played a central role in Plaintiff's negligence and causation arguments--elements that were essential to his medical-

(note continued on following page . . .)

contended that, instead of using fundal pressure, Dr. Jones should have directed Nurse McGuirt to use "suprapubic pressure." (App. 238). He described the use of fundal pressure during a shoulder dystocia as an "absolute no-no," which "only makes the pressure worse." (App. 244).

After Johnny's birth, but before suit was filed, Dr. Jones died. Thus, Dr. Jones was unable to explain his actions to the jury. Nor were there any fact witnesses to present Dr. Jones's version of events. The three other persons in the delivery room were:

(1) Plaintiff's mother, Dosshandra Williams,

(2) Plaintiff's father, Johnny Custis, and

(. . . note continued from previous page)

malpractice cause of action. Plaintiff's expert, Dr. Jeffrey Soffer, M.D., clearly testified that applying fundal pressure was a deviation from the standard of care, (App. 239; 243-44), and that it caused Johnny's injury. (App. 246-48). Indeed, Dr. Soffer said that by applying fundal pressure, Dr. Jones made matters "much worse" than if he had merely applied traction during the birth. (App. 247).

During closing argument, Plaintiff's 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).

Fundal pressure was the centerpiece of Plaintiff's case, not an ancillary matter.

(3) The nurse who assisted Dr. Jones, Martha McGuirt.

Each of these persons had an interest in ascribing liability to Dr. Jones. Johnny's parents had a clear pecuniary interest in the outcome of the case.[5] But Nurse McGuirt, too, had an interest in pinning liability on Dr. Jones. She was the health care provider who actually performed the procedure that Plaintiff claims caused his injury (i.e., application of "fundal pressure"). (App. 399-401). Nurse McGuirt therefore had an interest in seeing that Dr. Jones, not she, be held responsible for Johnny's injury.[6]

At trial, Nurse McGuirt maintained that Dr. Jones had instructed her to apply fundal pressure.[7] (*Id.*). And during her testimony, she read to the jury a note that she had written on the fetal-monitoring strip, which stated:

> Head Delivered. McRoberts maneuver done.[8]
> Fundal pressure, not suprapubic pressure for

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[5] *See infra*, Section II.C.

[6] Va. Code § 8.01-243.1 gives a minor until his "tenth birthday" to bring a medical malpractice lawsuit. At the time of trial, Johnny was not quite four. Plaintiff did not give McGuirt a release or otherwise foreclose any future action against her. To this day, McGuirt still could be sued for her involvement in the birth.

[7] Defendant filed a pre-trial motion to exclude evidence of fundal pressure. (App. 6). The trial court denied that motion and allowed the evidence to come in. Defendant has not assigned error to that ruling.

[8] The "McRoberts maneuver" is where the mother's legs are bent back against her chest in an attempt to facilitate delivery. (App. 408-09). This was unsuccessful in the present case.

shoulder dystocia. Vacuum delivery, male infant.
Cord around neck times one.

(App. 402).[9] Plaintiff's counsel used McGuirt's testimony to argue that Dr. Jones had deviated from the standard of care and that this negligence had caused Johnny's injuries.

This was, in short, a classic Dead Man's Statute case. Plaintiff brought his action against the personal representative of a deceased person, and based his claim on the testimony of Nurse McGuirt, an interested party.

ARGUMENT

I. The Trial Court erred in finding corroboration as a matter of law and in refusing to instruct the jury on the Dead Man's Statute.

A. Standard of review.

The trial court found corroboration as a matter of law and so denied Defendant's request that the jury be instructed on the Dead Man's statute. In deciding whether a party is entitled to a proffered instruction, all evidence and the inferences therefrom are construed in light the light most favorable to the party requesting the instruction—in this case, Defendant. *Hancock-Underwood v. Knight*, 277 Va. 127, 130, 670 S.E.2d 720, 722 (2009)

[9] Although McGuirt's note was shown on a screen and read verbatim to the jury, it was never formally introduced as a trial exhibit.

("When we review a trial court's decision to refuse jury instructions, the evidence is viewed in the light most favorable to the proponent of the instruction."). "If a proffered instruction finds any support in credible evidence, its refusal is reversible error." *Holmes v. Levine*, 273 Va. 150, 159, 639 S.E.2d 235, 239 (2007) (quoting *McClung v. Commonwealth*, 215 Va. 654, 657, 212 S.E.2d 290, 293 (1975)).

B. Under the Dead Man's Statute, corroboration is ordinarily a jury question.

Under Virginia's Dead Man's Statute, a party may not obtain a judgment against the personal representative of a dead person based on "uncorroborated" testimony from an adverse or interested party. Va. Code § 8.01-397.[10] The statute recognizes the inherent unfairness of a trial in which one side is able to present its version of events while the other side is left "silenced by death." *Hereford v. Paytes*, 226 Va. 604, 610, 311

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[10] The relevant portion of § 8.01-397 is as follows:

> In an action by or against a 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. . . .

In addition to the corroboration requirement, § 8.01-397 contains a hearsay exception. That aspect of the statute is not at issue in this case.

S.E.2d 790, 793 (1984). But rather than completely bar testimony by the surviving parties—as was the case at common law—the statute requires only that such testimony be independently "corroborated."

This Court repeatedly has held that "[t]he sufficiency of corroborative evidence under Code § 8.01-397 is usually a question for the jury." *Johnson v. Raviotta*, 264 Va. 27, 33, 563 S.E.2d 727, 731 (2002) (citing *Brooks v. Worthington*, 206 Va. 352, 357, 143 S.E.2d 841, 845 (1965) and *Taylor v. Mobil Corp.*, 248 Va. 101, 110, 444 S.E.2d 705, 710 (1994)). *See also Rice v. Charles*, 260 Va. 157, 167, 532 S.E.2d 318, 324 (2000) ("Generally . . . whether testimony has been sufficiently corroborated is an issue for the jury to resolve.").

Thus, even if a party offers some evidence to corroborate the testimony of an adverse or interested party, the jury generally is free to reject that evidence or to draw opposing inferences from it. This is particularly so where the corroborative evidence is challenged on grounds of bias. *Taylor*, 248 Va. at 111, 444 S.E.2d at 710 ("[G]iven the nurse's possible bias . . . the jury was not required to accept the nurse's testimony").

Taylor illustrates these principles. In that case, a Mobil executive consulted a company cardiologist, who gave him a stress test. The doctor

misread the electrocardiogram results and found no evidence of heart disease. A week later, the patient died of a massive heart attack. His personal representative brought a medical malpractice action against the doctor and Mobil. At trial, the doctor testified that the decedent did not report chest pains during the stress test. 248 Va. at 110, 444 S.E.2d at 710. He attempted to corroborate this statement with (1) a nurse's testimony that she heard no complaints during the stress test and (2) evidence that the decedent did not report any chest pain to his wife, his secretary, or to his business associates. *Id.* at 111, 444 S.E.2d at 710. The defendants argued that this was sufficient corroboration *as a matter of law*. The trial court disagreed and instructed the jury on the Dead Man Statute's corroboration requirements. *Id.* at 110, 444 S.E.2d at 710. The jury returned a verdict for the plaintiff.

On appeal, this Court affirmed. It held that the jury was not required to accept the evidence as sufficient corroboration of the doctor's statement. Among other things, the jury might have chosen to disbelieve the nurse because of her potential partiality as a Mobil employee. *Id.* at 111, 444 S.E.2d at 710. Or it could have drawn a different inference from the fact that the decedent had not reported his chest pain to his wife and colleagues. *Id.* Because the strength of the allegedly corroborative

evidence depended on the credibility of Plaintiff's witnesses and on inferences to be drawn from their testimony, this Court held that the matter was a subject for the jury, not the trial court, to resolve: "the issue of corroboration was correctly submitted to the jury." *Id.* at 111, 444 S.E.2d at 711.

It is true that this Court has, in a few cases, found the issue of corroboration to present a question of law. *See, e.g.*, *Rice*, 260 Va. at 167-68, 532 S.E.2d at 324 (finding, as a matter of law, that there was insufficient corroborative evidence); *Diehl v. Butts*, 255 Va. 482, 490, 499 S.E.2d 833, 838 (1998) (same). But this typically involves circumstances in which the party that is required to present corroborating evidence fails to muster even a scintilla of it. In such cases, it is the *absence* of any corroborative evidence, not any affirmative factual finding of corroboration, that transforms the issue into a legal question. This Court has *never* upheld a refusal to instruct a jury on the Dead Man's Statute where the trial court—weighing the biases and credibility of the corroborating witnesses for itself—held that the testimony of the adverse or interested party was

corroborated as a matter of law.[11] As *Taylor* makes clear, doing so invades the "province of the jury." 248 Va. at 111, 444 S.E.2d at 710.

C. The Trial Court erred in finding corroboration as a matter of law.

In the present case, too, it should have been up to the jury—not the Trial Court—to determine whether there was sufficient unbiased evidence to corroborate Nurse McGuirt's testimony. But unlike the court in *Taylor*, the Trial Court refused to give a Dead Man's Statute instruction. Instead, it found that Plaintiff had established corroboration as a matter of law. In

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[11] The case that Respondents cited in their opposition brief, *Whitmer v. Marcum*, 214 Va. 64, 196 S.E.2d 907 (1973), is not to the contrary. *Whitmer* was an odd case in which the trial court found, as a matter of law, that there was sufficient corroboration yet *still* instructed the jury on the Dead Man's Statute issue. The Court noted that these actions presented it 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. Accordingly, it reversed.

The case is also distinguishable on its facts. *Whitmer* was a motor-vehicle-accident case and the corroborating witness was a law-enforcement officer who had investigated the accident scene. The officer found tire marks and other evidence that supported the defendant driver's version of events. ***Unlike the present case, there was no issue in* Whitmer *about the credibility and bias of the corroborating witness.*** Indeed, the trial court directly challenged the litigants to explain why the officer's testimony did not corroborate the defendant's testimony: "if you would explain to me why that isn't corroboration I would be happy to learn why it isn't." *Id.* at 68, 196 S.E.2d at 910. The reported opinion does not reflected any response to the trial court's challenge.

effect, the Trial Court granted partial summary judgment for Plaintiff on this issue.

This was error. The Trial Court's finding of corroboration improperly invaded the "province of the jury." *Taylor*, 248 Va. at 111, 444 S.E.2d at 710. It was a disputed factual issue whether the evidence sufficiently corroborated Nurse McGuirt's testimony.

Take, for instance, McGuirt's note stating "Fundal pressure, not suprapubic pressure for shoulder dystocia." (App. 402). There are several reasons why the jury could have chosen not to credit this note as corroboration of McGuirt's testimony.[12]

To begin, the jurors might have chosen to give it less weight because the note's author had a personal stake in the matter. McGuirt admitted that *she applied the fundal pressure* that Plaintiff contended caused his injuries. (App. 399-401). She therefore was an obvious future target of a malpractice claim by Plaintiff.[13] As such, she had a substantial interest in shifting liability away from herself and onto the deceased Dr. Jones. Like

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[12] As argued *infra*, Section II.B, the note was not even competent corroboration because its probative force depended on McGuirt's "credibility or upon circumstances under [her] control." *Virginia Home for Boys and Girls v. Phillips*, 279 Va. 279, 286, 688 S.E.2d 284, 288 (2010).

[13] As explained *supra*, note 6, the statute of limitations has not yet run on Plaintiff's claim against Nurse McGuirt.

the nurse in *Taylor*, she was biased. Because of her interest in the matter, the jury could have determined that McGuirt wrote a self-serving note in an attempt to insulate herself from any liability arising out of Johnny's birth. And it could have determined that McGuirt's trial testimony about the note was tainted by her desire to avoid being a future defendant in a lawsuit brought by Plaintiff. So the jury could have found that the note did not significantly corroborate McGuirt's testimony.

In addition, the note's actual content does not support Plaintiff's argument on key material issues. It does not, for example, state *who* decided to apply fundal pressure. Instead, it simply states that fundal pressure was applied. McGuirt admitted that she applied fundal pressure. So Plaintiff's case against Dr. Jones hinged on whether *Dr. Jones ordered* McGuirt to apply fundal pressure. The note is silent on this. *It does not corroborate McGuirt on this essential point*. Accordingly, the jury was free to disregard it when evaluating the corroboration issue.

Finally, the note does not say *when* fundal pressure was applied—i.e., whether it was before or after Johnny's shoulder had been dislodged. This point, too, is critical. Plaintiff's own expert, Dr. Soffer, conceded that fundal pressure would have been appropriate after the shoulder was released: "Once the shoulder is released, I have no objection." (App. 286-

87).[14] Thus, without stating *when* the fundal pressure was applied, the note does not support an essential aspect of McGuirt's testimony. For all these reasons, the Trial Court erred in finding, as a matter of law, that the note corroborated McGuirt's testimony.

The jury likewise could have rejected the other allegedly corroborative evidence upon which the Trial Court relied—i.e. the testimony of Johnny's parents. For example, the jury could have chosen to discredit Dosshandra Williams's testimony on the grounds that she was biased. As Johnny's mother and primary caregiver, Dosshandra had a substantial interest in obtaining a judgment for herself and for her son.[15] Her testimony also does not mesh with McGuirt's account of events. Dosshandra never testified that Dr. Jones told McGuirt, "Apply fundal pressure." Indeed, Plaintiff's counsel admitted that Dosshandra did not even know what fundal pressure was. (App. 206).

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[14] Defendant's theory of the case was that the brachial-plexus injury had occurred before the application of any traction or fundal pressure. (App. 660) ("I think it's the internal forces of the amniotic fluid, the contractions and the mother pushing that injured this baby's nerve and not what the doctor did once the head was out.").

[15] In addition to suing as next friend, Dosshandra also brought a claim in her own right to recover for Johnny's medical expenses. Although she later voluntarily dismissed this claim, this was only *after* she testified.

The other potential corroborating witness was Johnny Custis, Plaintiff's father. But his testimony was even more unreliable than Dosshandra's. As with McGuirt and Dosshandra, Custis had a obvious bias—i.e., to obtain a favorable judgment for his son. In addition, Custis was a two-time convicted felon, a fact that the jury could have considered in assessing his truthfulness. (App. 427-28). Finally, Custis's account of the birth is inconsistent with McGuirt's. For example, Custis claims that after Johnny's shoulder became stuck, McGuirt actually *sat* on Dosshandra's chest and that the dystocia lasted anywhere between "five and fifteen minutes." (App. 432-33). This does not square with McGuirt's account of events. McGuirt never said she "sat" on the patient. And she testified that Johnny was stuck, at most, for two minutes. (App. 364). Had the Trial Court given a Dead Man's Statute instruction, the jury could have chosen to discredit Johnny's father's inconsistent and improbable testimony and found no corroboration of Nurse McGuirt's testimony.

* * *

To summarize, this case presents a circumstance in which *all* of the allegedly corroborative evidence came from witnesses whose testimony the jury was free to discount—either because of bias, lack of credibility, or inconsistent testimony. Under *Taylor*, this meant that corroboration was, at

best, a jury question. The Trial Court, however, refused Defendant's proposed Dead Man's Statute instruction and decided the corroboration issue "as a matter of law." This was error. This Court should reverse the Trial Court's decision to take the corroboration issue out of the jury's hands.

II. The Trial Court should have granted Defendant's Motion to Strike because the allegedly corroborative evidence came from witnesses who had an interest in the case.

Not only was it improper for the Court to weigh the evidence for itself and to find corroboration, but the evidence that Plaintiff presented was legally insufficient to corroborate Nurse McGuirt's testimony because *all of it came from interested parties*.[16] Because there was no independent evidence to corroborate Nurse McGuirt's testimony, the Trial Court should have granted Defendant's motion to strike.

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[16] Although the statute uses the term "party," it is well-settled that the phrase "adverse or interested part[ies]" encompasses more than just the actual parties to the lawsuit. Where a witness has a pecuniary interest in the outcome of the suit, he is an "interested party" and, thus, his testimony must be corroborated. *See, e.g.*, *Johnson*, 264 Va. at 34, 563 S.E.2d at 732 (2002) (defining "interested party" as "one, not a party to the record, who is pecuniarily interested in the result of the suit") (quoting *Merchant's Supply Co., Inc. v. Hughes' Ex'rs*, 139 Va. 212, 216, 123 S.E. 355, 356 (1924)); *Ratliff v. Jewell*, 153 Va. 315, 325, 149 S.E. 409, 411 (1929) (holding that corroboration requirement applied to wife of counterclaimant, noting that "[h]er interest in the results is plainly manifest and it is not necessary that the judgment as entered be in terms in her favor.").

A. Standard of review.

The standard of review for a denial of a motion to strike is well-settled: "[W]here the trial court has declined to strike the plaintiff's evidence or to set aside a jury verdict, the standard of appellate review in Virginia requires this Court to consider whether the evidence presented, taken in the light most favorable to the plaintiff, was sufficient to support the jury verdict in favor of the plaintiff." *Sunrise Continuing Care, LLC v. Wright*, 277 Va. 148, 154, 671 S.E.2d 132, 135 (2009) (quoting *Bitar v. Rahman*, 272 Va. 130, 141, 630 S.E.2d 319, 325-26 (2006)).

B. Nurse McGuirt's own testimony and the note that she authored could not corroborate her because they were not "independent" of her.

The Trial Court found that Nurse McGuirt's testimony was corroborated, based on "[t]he testimony . . . from Nurse McGuirt and the other persons who were present at the time in the delivery room . . . both the documentary evidence as well as the testimonial evidence." (App. 697). None of this was competent corroboration.

As an initial matter, the trial court's reliance upon Nurse McGuirt's own testimony and notes as corroboration was plain error because, under this Court's settled precedent—reiterated as recently as this past February—a witness cannot corroborate her own testimony:

> Corroboration for purposes of the dead man's statute cannot come "from the mouth of the witness sought to be corroborated."

Johnson, 264 Va. at 36, 563 S.E.2d at 733 (quoting *Varner's Ex's v. White*, 149 Va. 177, 185, 140 S.E. 128, 130 (1927)). *See also Virginia Home for Boys and Girls v. Phillips,* 279 Va. 279, 286, 688 S.E.2d 284, 288 (2010) (holding that the plaintiff could not corroborate his own testimony because "evidence, to be corroborative, must be independent of the surviving witness.").

Indeed, under the Dead Man's Statute, corroborating evidence must be entirely independent of the witness whose testimony is to be corroborated:

> One essential requirement is implicit in all our cases: evidence, to be corroborative, must be independent of the surviving witness. *It must not depend upon his credibility or upon circumstances under his control.* It may come from any other competent witness or legal source, but *it must not emanate from him.*

Virginia Home for Boys and Girls, 279 Va. at 286, 688 S.E.2d at 288 (emphasis added). *See also Ratliff v. Jewell*, 153 Va. 315, 326, 149 S.E. 409, 412 (1929) ("[S]upport must come from some outside source.").

To allow an interested witness to corroborate her own testimony would defeat the entire purpose of the Dead Man's Statute. Such

bootstrapping would enable an interested party to "prevail by relying on his own unsupported credibility"—exactly what the Dead Man's Statute is designed to prevent. *Hereford*, 226 Va. at 610, 311 S.E.2d at 793. For this reason, a party may not "corroborate" an interested witness's testimony with evidence that originates from the same witness.

The Trial Court clearly erred in relying on Nurse McGuirt's testimony as corroboration. "Corroboration for purposes of the dead man's statute cannot come 'from the mouth of the witness sought to be corroborated.'" *Johnson*, 264 Va. at 36, 563 S.E.2d at 733 (quoting *Varner's Ex's*, 149 Va. at 185, 140 S.E. at 130).

The Trial Court likewise erred in finding that the "documentary evidence"—i.e., Nurse McGuirt's note about fundal pressure—corroborated Nurse McGuirt's testimony. The note about fundal pressure was not competent corroboration because its evidentiary force depended entirely on the credibility of Nurse McGuirt, the "surviving witness." She was the one who authored the note, who identified and authenticated it at trial, and who explained the note's contents and the circumstances of its preparation. For the note to have any probative force, the jury would have had to have believed McGuirt's testimony about its origin and authorship. In other words, the note's evidentiary value "depend[ed] upon [her] credibility or

upon circumstances under [her] control." *Virginia Home for Boys and Girls,* 279 Va. at 286, 688 S.E.2d at 288. But this means that the note was not an "outside source" and, thus, cannot have corroborated Nurse McGuirt's testimony. The Trial Court erred by deeming it to be competent corroborative evidence.

C. Johnny's parents could not corroborate Nurse McGuirt because they, too, were interested parties.

Nor could the testimony of Johnny's parents, Dosshandra Williams and Johnny Custis, corroborate Nurse McGuirt's testimony as they, too, were interested parties. Under Virginia law, one adverse or interested party may not corroborate the testimony of another adverse or interested party. Instead, corroboration must come from outside the circle of interested witnesses. *Ratliff*, 153 Va. at 326, 149 S.E. at 412 ("Both must be corroborated and they cannot corroborate each other. *That support must come from some outside source.*") (emphasis added). *See also Johnson*, 264 Va. at 39, 563 S.E.2d at 735 n.2 ("[T]he testimony of one adverse witness cannot corroborate the testimony of another adverse or interested party."). This rule prevents parties with the same interests from accomplishing jointly what they each could not do individually—i.e., corroborate their own statements.

Johnny's parents were "interested parties" because they had a pecuniary stake in the case's outcome. *See, e.g.*, *Johnson*, 264 Va. at 34, 563 S.E.2d at 732 (2002) (defining "interested party" as "one, not a party to the record, who is pecuniarily interested in the result of the suit") (quoting *Merchant's Supply Co.* 139 Va. at 216, 123 S.E. at 356). Among other things, they had a legal obligation to provide their infant son with necessary medical care. *See, e.g.*, *Carter v. Carter*, 19 Va. App. 501, 507, 453 S.E.2d 295, 299 (1995) ("It is axiomatic that parents are responsible for the cost of necessities provided a child, including necessary medical expenses.") (citing *Moses v. Akers*, 203 Va. 130, 132, 122 S.E.2d 864, 866 (1961)). A parent suffers a pecuniary loss by being required to pay for his or her child's medical expenses. *Watson v. Daniel*, 165 Va. 564, 568-69, 183 S.E. 183, 185 (1936) (noting that a father suffers a "pecuniary loss" by being required to furnish medical treatment to his child.") (emphasis added). It follows that a parent obtains a pecuniary gain when his or her child obtains a judgment that pays for such treatment. Thus, Dosshandra Williams and Johnny Custis had a substantial pecuniary interest in the case's outcome.

This pecuniary interest made Johnny's parents "interested parties" for Dead Man's Statute purposes. *Johnson*, 264 Va. at 34, 563 S.E.2d at 732.

And as interested parties, Johnny's parents could not corroborate the testimony of Nurse McGuirt, another interested party. *Id.* at 39, 563 S.E.2d at 735 n.2 ("[T]he testimony of one adverse witness cannot corroborate the testimony of another adverse or interested party."). So the Trial Court could not have, and should not have, found the testimony of Johnny Custis or Dosshandra Williams to be proper corroboration of Nurse McGuirt.

In the final analysis, none of the evidence upon which the Trial Court based its corroboration finding—Nurse McGuirt's note, the testimony of Johnny's father, or the testimony of Johnny's mother—was even *competent* to corroborate Nurse McGuirt's testimony. Thus, far from finding corroboration as a matter of law, the Trial Court should have found that Plaintiff failed to present *any* competent corroboration of Nurse McGuirt's testimony. As such, the evidence was not sufficient to support a jury verdict in favor of the plaintiff. Accordingly, the Trial Court should have granted Defendant's motion to strike at the close of evidence.

CONCLUSION

This case presents the exact scenario that the General Assembly enacted the Dead Man's Statute to prevent: the Trial Court entered judgment against a decedent's personal representative based on the uncorroborated testimony of an interested party.

Because there was insufficient corroboration of Nurse McGuirt's testimony, this Court should reverse the Trial Court's denial of Defendant's motion to strike and should enter judgment in Defendant's favor. At the very least, the Court should find that the corroboration issue was a disputed question of fact—a question for the jury, not the Trial Court, to decide—and remand the case for a new trial.

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CERTIFICATE OF COMPLIANCE WITH RULE 5:26(d)

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.

/s/ Joseph M. Rainsbury