IN THE

Supreme Court of Virginia

RECORD NO. 181002

YASHANA SPRUILL,

Appellant,

v.

BRENDON GARCIA and ANGELA TYLER,

Appellees.

BRIEF OF *AMICUS CURIAE*
VIRGINIA TRIAL LAWYERS ASSOCIATION
IN SUPPORT OF APPELLANT

Roger T. Creager (VSB No. 21906)
The Creager Law Firm, PLLC
1500 Forest Avenue, Suite 120
Richmond, Virginia 23229
Telephone: (804) 747-6444
Facsimile: (804) 747-6477
rcreager@creagerlawfirm.com

Counsel for Amicus Curiae
Virginia Trial Lawyers Association

LANTAGNE LEGAL PRINTING
801 East Main Street Suite 100 Richmond, Virginia 23219 (804) 644-0477

SCV: Submitted on 04-22-2019 15:03:15 EDT for filing on 04-22-2019

TABLE OF CONTENTS

Table of Authorities ii

Nature of the Case and Material Proceedings 1

Statement of Facts 2

Standard of Review 8

Argument 9

1. This case involves fundamental principles of justice. 9

   a. The vital importance of the Rule Against Hearsay. 9

   b. The BRE exception is applicable only when the factual predicates of the hearsay exception are proved. 13

2. The documents that were introduced constituted hearsay. 21

3. The use of a hearsay affidavit to authenticate and lay a foundation for the documents was improper. 22

4. The hearsay Acknowledgement was deficient as a matter of law. 23

5. The hearsay documents contained inadmissible hearsay opinions. 25

6. The common law, the Rules of this Court, and the statutes enacted by the General Assembly, require enforcement of the Rule Against Hearsay and insistence on the requirements of the business records exception. 26

Conclusion 33

Certificate of Service 34

TABLE OF AUTHORITIES

CASES

"Automatic" Sprinkler Corp. v. Coley & Petersen, Inc., 219 Va. 781 (1979) 24

Bostic v. About Women OB/GYN, P.C., 275 Va. 567 (2008) ... 11, 30, 31, 32

CSX Transp. v. Casale, 250 Va. 359 (1995) 27

Claiborne v. Parrish, 2 Va. 146 (1795) 10

Commonwealth v. Wynn, 277 Va. 92 (2009) 29, 30

Frank Shop v. Crown Cent. Petroleum Corp., 261 Va. 169 (2001) 15, 21

Harman v. Honeywell Int'l, Inc., 288 Va. 84 (2014) ..... *passim*

McMunn v. Tatum, 237 Va. 558 (1989) ..... *passim*

Neeley v. Johnson, 215 Va. 565 (1975) 6, 25

Norfolk & W. Ry. v. Puryear, 250 Va. 559 (1995) 8, 27

Tyger Constr. Co. v. Pensacola Constr. Co., 29 F.3d 137 (4th Cir. 1994), *cert. denied*, 513 U.S. 1080 (1995) 28

Weinberg v. Given, 252 Va. 221 (1996) 32

STATUTES AND RULES

Va. Code § 8.01-4.3 ..... 5, 19

Va. Code § 8.01-390.3 ..... 19, 20, 24, 32

Va. Code § 8.01-391(D) 5, 7, 20

Va. Code § 8.01-401.1 ..... 30, 31

Va. R. Evid. 2:802 10

Va. R. Evid. 2:803(6) ..... *passim*

Va. R. Evid. 2:902 32

Va. R. Evid. 2:1005 7

OTHER AUTHORITIES

5 *Wigmore on Evidence* § 1530 (Chadbourn rev. 1974) 25

James A. Mays and Patrick C. Mathias, "Measuring the Rate of Manual Transcription Error in Outpatient Point-Of-Care Testing,"*Journal of the American Medical Informatics Association*, Vol. 26, No. 3 (2019) 17

Justin M. Weis & Paul C. Levy, "Copy, Paste, and Cloned Notes in Electronic Health Records," *Chest Journal*, Abstract, Volume 145, Issue 3 (2014) 17

Kenric W. Hammond, Susan T. Helbig, et al., "Are Electronic Medical Records Trustworthy? Observations on Copying, Pasting and Duplication," *AMIA Annual Symposium Proceedings* (2003) 18

The Virginia Trial Lawyers Association (the "VTLA"), pursuant to its Motion for Leave to file Brief *Amicus Curiae*, files this Brief *Amicus Curiae* in support of the Appellant's position that the trial court erred in admitting inadmissible hearsay into evidence in this case.

Nature of the Case and Material Proceedings

The appellant, Yashana Spruill, filed a personal injury Complaint in the Circuit Court of the City of Norfolk against the defendants Brendon Garcia (legal name Brandon Gennette) and Angela Tyler. Yashana Spruill was a passenger in a vehicle operated by the Defendant Tyler which collided with a vehicle operated by Garcia. Spruill's Complaint alleged that she sustained injuries in a collision which occurred due to the negligence of both Garcia and Tyler. After a two-day trial the jury returned a verdict in favor of the Defendant Garcia, and in favor of the plaintiff against the Defendant Tyler but the verdict awarded Spruill zero damages. Plaintiff appealed the judgment in favor of the Defendant Garcia and the judgment against the Defendant Angela Tyler on several grounds. This Court granted an appeal limited to the following Assignment of Error in the Petition for Appeal:

> The trial court erred in allowing the admission of the plaintiff's medical records without testimony as to its authenticity and over plaintiff's hearsay objection. A552.

In its Order dated March 11, 2019 which granted the appeal, this Court stated: "This appeal, however, is limited to the consideration of assignment of error No. II, as it pertains to appellee Angela Tyler, as set out in the petition for appeal."

Statement of Facts

Spruill claimed that the collision which occurred on December 5, 2016 resulted from Tyler's negligence and caused her to sustain personal injuries. Spruill's evidence of her injuries included testimony of Dr. Jay Berkowitz, a chiropractor, who evaluated and treated her following the collision. Dr. Berkowitz testified that the plaintiff complained of neck pain, left shoulder pain, arm pain, upper back pain, and lower back pain radiating into her left leg. A333. He ordered physical therapy. A342. Spruill reached maximum medical improvement on February 10,2017. A343.

At trial, the defense contended that the injuries allegedly suffered by Spruill were actually caused not by the collision but instead were due to pre-existing conditions. On cross-examination, Tyler's counsel questioned Spruill extensively about various detailed aspects of her previous medical history as reflected in purported medical records from the Consultants in Pain Medicine, Inc.. A454-473. A fair reading of Spruill's cross-examination testimony in response to Tyler's questioning indicates that a)

Tyler did in fact recall a number of details regarding her past medical history and treatment and when she did she readily admitted those matters (*e.g.*, A470 ("Yes", "Yes", "Yes", "yes", and "Yes") and b) she simply did not recall other matters (*e.g.,* A463, 469). Notably, with respect to the asserted details which she did not recall, she usually did not deny those details – she simply said she did not recall them. *See, e.g.,* A463 ("Q Are you saying you don't recall or it didn't happen? These are two different things. A I'm saying I don't recall that.").

In his questioning of Spruill, Tyler's counsel used documents which he claimed were part of Spruill's medical records from the Consultants in Pain Medicine, Inc.. Tyler's counsel handed the documents to Spruill in an unsuccessful effort to refresh Spruill's recollection. A457-458. Garcia's counsel later also unsuccessfully sought to use documents in the same manner. A467. When Garcia's counsel attempted to refer to the hearsay documents, Spruill's counsel raised a hearsay objection which the trial court sustained. *See, e.g.,* A466 (hearsay objection), A467 (objection sustained). Late in the trial, however, the trial court admitted numerous hearsay documents (the purported records of Consultants in Pain Medicine, Inc.) into evidence as Defendant's Exhibit 3 (A538-548) over the extensive objections of Spruill, including the objection that the documents

were inadmissible hearsay that had not been proved to fall within any hearsay exception. A503-534. Although defense counsel argued at times that the document could properly be used for impeachment, the trial court ruled that the document could be introduced as an exhibit and furthermore ruled that defense counsel could "use it for any purpose in his argument." A534.

The exhibit contained page after page of double hearsay. Each page of the document was itself hearsay, and the entries on each page were hearsay. No witness testified at trial to prove that the documents met the factual predicates of the business records exception to the Rule Against Hearsay (hereinafter sometimes referred to as the "BRE").

The trial court allowed the records into evidence even though Spruill's counsel objected that the documents were not listed on any Defendant's pretrial exhibit list, were hearsay, and no testimony had been offered to prove that the factual predicates of the BRE. A503-534. Defense counsel contended that a document which he submitted to the Court and to Spruill's counsel for the first time in the midst of trial which was allegedly signed by a records custodian was sufficient to prove that the document met the requirements of the BRE. The document was entitled, "Authenticity of Medical Records." A538. The document was not sworn to under penalty of

perjury; it was merely "acknowledged" by the custodian; it thus did not constitute an affidavit. *See Va. Code* Section 8.01-4.3 (affidavit or declaration must be "subscribed by the maker as true under penalty of perjury"). The document will hereinafter be referred to as the "Acknowledgement."

The Acknowledgement merely stated that the custodian of records of Consultants in Pain Management had compared the attached documents with the original records and they were "true and correct" copies of the originals. A538. In effect, it was an Acknowledgement which at most (if it had been sworn to under penalty of perjury) could have addressed the "best evidence" problem (i.e., could have established that the copies were true copies of the originals) in accordance with the provisions of *Virginia Code* Section 8.01-391(D).

Nothing in the Acknowledgement asserted (not even in a deficient form) as to each page of the attached documents (as required by *Va. R. Evid.* 2:803(6)) that:

- The record was made at or near the time of the acts, events, calculations or conditions that it records;
- The record was made by, or from information transmitted by, a person with knowledge of the matters recorded;
- The record was made and kept in the course of a regularly conducted activity or business;

- Making and keeping the record must have been a regular practice of the activity.

Va. R. Evid. 2:803(6) (all emphasis is added).

Spruill objected that the Acknowledgement failed to bring the hearsay documents within the BRE for numerous reasons. Spruill observed that the Acknowledgement signed by the custodian was not an affidavit – it was not sworn to under penalty of perjury, but was merely "acknowledged." A513 ("we do not have any sworn affidavit from anyone. That's not under oath. It's not subject to perjury. It is simply a notary of the signature"). Spruill further argued that the Acknowledgement did not even purport to establish the factual predicates of the BRE. A513.

Spruill further objected that the proffered medical records must be excluded as inadmissible hearsay unless live witness testimony proved the factual predicates of the BRE and no such proof had been provided. A502-503 ("There is no procedure in circuit court for the admissibility of medical records based upon an affidavit"); A504 (there must be a "witness who will testify" regarding the factual predicates of the BRE); A507. Spruill also objected that even if the BRE predicates were proved (which had not occurred), the opinions in them would still be inadmissible under *Neeley v. Johnson*, 215 Va. 565, 566 (1975). A507.

Despite the fact that there was no evidence which proved that the hearsay documents satisfied the requirements of the BRE (or any other exception to the Rule Against Hearsay), and even though the hearsay documents included opinions, the trial court ruled that the documents were admissible, and allowed them to be introduced into evidence as Defendant's Exhibit 3. A510-517. The trial court ruled that the documents were admissible under the provisions of *Virginia Code* Section 8.01-391(D) and Rule 2:1005 of the *Virginia Rules of Evidence* which is based on the statute. *Id.* Those provisions, however, merely address the "best evidence" rule – they address whether a copy of a document can be used as evidence instead of an original. No showing was made that the document itself (whether the original or a copy) satisfied the requirements of the BRE.

Standard of Review

The issue in this case is whether the trial court erred in ruling that hearsay documents were admissible as evidence. This issue constitutes an issue of law which is reviewed by this Court *de novo*. "'[A]dmissibility of evidence depends not upon the discretion of the court but upon sound legal principles.'" *Norfolk & W. Ry. v. Puryear*, 250 Va. 559, 563 (1995) (quoting earlier decision). *See Harman v. Honeywell Int'l, Inc.*, 288 Va. 84, 92 (2014) ("a trial court has no discretion to admit clearly inadmissible evidence"; the trial court committed reversible error in allowing the introduction of hearsay).

Argument

1. This case involves fundamental principles of justice.

a. The vital importance of the Rule Against Hearsay.

This case presents an important opportunity for the Court:

- to address the increasingly frequent attempts to evade the Rule Against Hearsay and violate the fundamental principles of justice that it serves.
- to make clear that authentication of a document as a "business record" is not accomplished by proof that merely shows that the document is an accurate copy of a record contained in the files of XYZ Business. Rather, authentication of a document as a "business record" requires proof that the document satisfies all the factual predicates of the business records exception (the "BRE") to the Rule Against Hearsay.
- to make clear that business records cannot be authenticated by a custodian's hearsay affidavit or declaration if any party objects to the use of that procedure.

Enforcement of the Rule Against Hearsay does not favor plaintiffs, defendants, big businesses, individuals, or any other group. Rather, enforcement of the Rule Against Hearsay favors the interests of justice.

This Court has long recognized that the introduction of hearsay as evidence poses serious dangers to the just and fair determination of issues raised in judicial proceedings. As a result, the burden is not on the opposing party to prove facts showing that the hearsay should not be admitted. Instead, the proponent of a hearsay document must meet its burden of proving facts which establish that the document falls within an exception to the Rule Against Hearsay.

For over 200 years, this Court has steadfastly embraced and applied the Rule Against Hearsay. *See, e.g., Claiborne v. Parrish*, 2 Va. 146, 147 (1795) ("by the general rules of law, hearsay evidence is inadmissible"); *Harman v. Honeywell Int'l, Inc*., 288 Va. 84, 92 (2014) (" Hearsay statements generally are inadmissible").

Hearsay is inadmissible unless the proponent of the evidence first lays a foundation proving that the hearsay falls within an exception to the rule against hearsay. *Va. R. Evid.* 2:802 ("Hearsay is not admissible except as provided by these Rules, other Rules of the Supreme Court of Virginia, or by Virginia statutes or case law"). "[A] trial court has no discretion to admit clearly inadmissible evidence." *Harman v. Honeywell Int'l, Inc*., 288 Va. at 92.

The Rule Against Hearsay is not a merely technical matter. Instead, it is based upon and vindicates fundamental principles of justice. The admission of hearsay "'without the testing safeguard of cross-examination is fraught with overwhelming unfairness to the opposing party.'" *Harman v. Honeywell Int'l, Inc.*, 288 Va. 84, 93 n.4 (2014) (holding admission of hearsay was reversible error, and quoting *McMunn v. Tatum*, 237 Va. 558, 566 (1989)).

Hearsay documents and hearsay entries constitute statements made by people whose personal knowledge cannot be ascertained, "whose demeanor cannot be observed . . . , and whose pronouncements are immune from cross-examination." *McMunn*, 237 Va. at 566. In the case of hearsay from experts, an additional problem is that the qualifications of the expert are unknown. *Id.* No litigant in our judicial system should be required to contend with this type of "evidence" unless the proponent proves that a hearsay exception is applicable. *Id.*

The problems posed by hearsay are so serious that this Court has referred to them as "evils." *See Bostic v. About Women OB/GYN, P.C.*, 275 Va. 567, 577 (2008) (overturning the jury verdict because the trial court allowed an expert to bolster his opinions by referring to inadmissible hearsay).

This Court has made clear: the Rule Against Hearsay is not a suggestion or a guidepost. It is an absolute ban of hearsay unless the proponent properly proves that a hearsay exception is applicable. Discussion of the Rule and its exceptions by trial lawyers and trial judges often overlooks the imminently good reasons for the Rule. When documents are introduced which contain assertions about hearsay observations, statements, findings, opinions, impressions, or diagnoses allegedly made by other persons:

- The jury hears about "evidence" offered by absent witnesses who never appear at the trial.
- The qualifications of the absent witnesses are never established and cannot be challenged.
- The nature and extent of the absent witness's personal knowledge is never established and cannot be challenged.
- Whether the absent witness had a sufficient foundation to testify on the matters he addressed is never established and cannot be challenged.
- The jurors never have the opportunity to see and hear the absent witnesses and view their demeanor in order to evaluate credibility.
- The opposing party is deprived of all opportunity to question the absent witnesses in order to bring out other facts, observations, findings and opinions which would provide more complete information regarding the matters addressed by hearsay entries in hearsay documents which may have been "cherry-picked" by counsel to support a particular position.

- No questions can be asked to show the bias, interest, or prejudice of the absent witness.

These are not matters of slight significance—instead hearsay directly implicates **all** of the foregoing concerns which lie at the very heart of a just and fair trial.

b. The BRE exception is applicable only when the factual predicates of the hearsay exception are proved.

The fundamental public policies served by the Rule Against Hearsay obviously would be disserved by a failure to enforce the requirements which must be met for an exception to apply. Despite the clear pronouncements of this Court, however, the Rule Against Hearsay and its exceptions are frequently insufficiently understood and improperly applied. This case presents one typical scenario. A plaintiff in a personal injury action claims to have sustained certain injuries in a crash or other tortious occurrence. Defense counsel issues subpoenas duces tecum seeking prior medical records. The defense believes that the subpoenaed documents contain some entries that support a contention that the injuries the plaintiff claims to have sustained in the tortious occurrence were pre-existing conditions or problems.

In other typical scenarios, the plaintiff is the party who hopes to introduce hearsay records in support of an injury claim. The defendant

faces the danger of having the existence and nature of the plaintiff's injuries established by means of entries made by healthcare providers who never appear in court and are immune from cross-examination.

Documents and the entries in them involve multiple layers of hearsay. At trial, the proponent of the hearsay often fails to lay a proper foundation to bring the documents within the BRE to the Rule Against Hearsay. Counsel insists, however, that it is clear that the documents were produced by a business in response to a subpoena, and the trial court should thus allow introduction of the documents into evidence. Counsel may argue, in effect: "Judge, there is no question these are the records of XYZ Corporation." Counsel sometimes relies upon a records custodian's hearsay affidavit or perhaps offers live testimony of the custodian confirming that the documents are from the files of XYZ Corporation. But an affidavit, if objected to, cannot be used to prove the predicates of the BRE. Furthermore, very often, neither the affidavit nor the testimony or the records custodian even purports to establish the numerous factual predicates of the BRE.

All too often, trial courts may misunderstand or misapply the BRE authentication requirements and allow the hearsay documents into evidence. Courts sometimes overlook the fact that <u>it is not enough for a</u>

records custodian to establish that the documents are true and accurate copies of the records of a particular medical facility or other business. *See Frank Shop v. Crown Cent. Petroleum Corp*., 261 Va. 169, 176 (2001) (even though an affidavit established that a record was a true copy of the original record of the entity, the trial court erred in admitting the record under the BRE since there was no proof that the factual predicates of the BRE were met).

The authentication and foundation required to bring a document within the BRE must establish that:

- The record was made at or near the time of the acts, events, calculations or conditions that it records;
- The record was made by, or from information transmitted by, a person with knowledge of the matters recorded;
- The record was made and kept in the course of a regularly conducted activity or business;
- Making and keeping the record must have been a regular practice of the activity.

Va. R. Evid. 2:803(6).

From a policy standpoint, there is no reason why a hearsay record should qualify for an exception to a fundamental rule of evidence when these basic, reasonable requirements are not met. In this case, defense counsel wanted to introduce documents, which were allegedly obtained

from a previous healthcare provider of Spruill, in order to prove alleged details of previous medical conditions, care, and treatment which Spruill testified she was not able to recall.

The documents contained in Defendant's Exhibit 3 perhaps might have satisfied the requirements of the BRE – the documents appear to be medical records from the medical practice involved. But the law does not presume that documents satisfy all the numerous requirements of the BRE merely because they may seem to be from the records of a business. Instead the proponent of the documents must prove facts establishing that the documents satisfy all the requirements of the BRE – there is no provision in the Rules, the statutes, or the common law governing the BRE for the admission of documents merely because they may look like they might satisfy the requirements of the BRE.

Tyler may argue that Spruill's objections to the documents sought to prevent the jury from learning important information about Spruill's previous medical history and medical care. But if either of the Defendants deemed the information in the documents significant, they had every right to call the healthcare providers or the records custodians to testify or to attempt to introduce the documents in accordance with the rules and law of evidence in Virginia. Instead, the Defendants pursued neither course. The failure to

prove the factual predicates of the BRE was the fault of the Defendants, not Spruill. Spruill had every right to insist that the requirements of evidence law must be applied and enforced.

Medical records, like any other business records, are governed by the evidentiary requirements of the BRE, and for good reason. Indeed, studies have shown that medical records are affected by transcription errors. *See* James A. Mays and Patrick C. Mathias, "Measuring the Rate of Manual Transcription Error in Outpatient Point-Of-Care Testing," *Journal of the American Medical Informatics Association*, Vol. 26, No. 3 (2019) (online at https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6351970/pdf/ocy170.pdf).

"Medical documentation has evolved with the rapid growth in the use of electronic health records (EHRs). The medical software industry has created new tools and more efficient ways to document patient care encounters and record results of diagnostic testing. While these techniques have resulted in efficiencies and improvements in patient care and provider documentation, they have also created a host of new problems, including authorship attribution, data integrity, and regulatory concerns over the accuracy and medical necessity of billed services." Justin M. Weis & Paul C. Levy, "Copy, Paste, and Cloned Notes in Electronic Health Records," *Chest Journal*, Abstract, Volume 145, Issue 3 (2014).

A study of computerized medical records at the Veterans Administration facilities in one area of the country found:

> Investigators at a VA center recognized for pioneering a fully electronic record system analyzed author copying and template-generated duplication with adapted plagiarism-detection software. Nine percent of progress notes studied contained copied or duplicated text. Most copying and duplication was benign, but some introduced misleading errors into the record and some seemed possibly unethical or potentially unsafe. High-risk author copying occurred once for every 720 notes, but one in ten electronic charts contained an instance of high-risk copying.

Kenric W. Hammond, Susan T. Helbig, et al., "Are Electronic Medical Records Trustworthy? Observations on Copying, Pasting and Duplication," *AMIA Annual Symposium Proceedings* at 269–273 (2003) (available online at https://www.ncbi.nlm.nih.gov/pmc/articles/PMC1480345).

Records custodians often do not know whether all of the requirements of the BRE are satisfied with respect to a particular record. And yet, the proponent's argument – "Judge, it is clear these are true copies of the original records of XYZ medical practice" – somehow may seem to some trial courts sufficient to allow the documents to be introduced. Some trial courts are also inclined, despite objection, to allow the custodian's assertions to be established by affidavit or declaration, even though the law of Virginia requires all facts to be proved by live

witness testimony unless some special statutory provision authorizes proof by affidavit or declaration.

There is no statute which permits the factual predicates of the BRE to be proved by affidavit or declaration despite objection. Instead, a statute enacted in 2014 expressly reaffirms the long-standing requirement of the common law that facts must be proved by live witness testimony if the opponent insists upon it. *Va. Code* Section 8.01-390:3. Rule 2:902(6)(a) of the *Virginia Rules of* Evidence, which tracks the statute, provides:

> (6) Certified Records of a Regularly Conducted Activity.
>
> (a) In any proceeding where a business record is material and otherwise admissible, authentication of the record and the foundation required by subdivision (6) of Rule 2:803 may be laid by (i) witness testimony, (ii) a certification of the authenticity of and foundation for the record made by the custodian of such record or other qualified witness either by affidavit or by declaration pursuant to Code § 8.01-4.3, or (iii) a combination of witness testimony and a certification.
>
> (b) The proponent of a business record shall (i) give written notice to all other parties if a certification under this section will be relied upon in whole or in part in authenticating and laying the foundation for admission of such record and (ii) provide a copy of the record and the certification to all other parties, so that all parties have a fair opportunity to challenge the record and certification. The notice and copy of the record and certification shall be provided no later than 15 days in advance of the trial or hearing, unless an order of the court specifies a different time. Objections shall be made within five days thereafter,

> unless an order of the court specifies a different time. **If any party timely objects to reliance upon the certification**, **<u>the authentication and foundation required by subdivision (6) of Rule 2:803 shall be made by witness testimony</u>** unless the objection is withdrawn.
>
> (c) A certified business record that satisfies the requirements of this section shall be self-authenticating and requires no extrinsic evidence of authenticity.
>
> (d) A copy of a business record may be offered in lieu of an original upon satisfaction of the requirements of Code § 8.01-391(D) by witness testimony, a certification, or a combination of testimony and a certification.

Va. R. Evid. 2:902(6). *See Virginia Code* Section 8.01-390.3.

Use of an affidavit to prove the factual predicates of the BRE results in the paradoxical (and expressly prohibited) situation that <u>inadmissible hearsay is used to establish the basis for admitting inadmissible hearsay into evidence</u>. These types of laxity seem to be based, whether consciously or unconsciously, on a failure to fully recognize the "evils" posed by hearsay evidence and a con-commitment failure to understand and enforce the requirements for application of a hearsay exception.

The documents (Defendant's Exhibit 3) involved in this case do not appear to have involved cloned entries or other computerized records. They may <u>appear</u> to have been created contemporaneously. They may <u>appear</u> to have been made by a person with knowledge. They may <u>appear</u> to have been made and kept in the regular course of business. But the law

does not provide that hearsay records can be admitted if they appear to fall within the BRE. Instead, the factual predicates of the BRE must be proved.

In this case, no hearsay exception was shown to be applicable, but the trial court inexplicably admitted the hearsay documents and hearsay entries they contained. The Virginia Trial Lawyers Association asks the Supreme Court of Virginia to issue an opinion in this case which makes clear that:

- Hearsay must not be admitted unless the proponent has established by admissible evidence that each layer of hearsay falls within an exception to the Rule Against Hearsay;
- The BRE exception is not applicable unless each of the numerous factual predicates is properly proved by admissible evidence;
- Rule, statute, and common law all forbid the use over objection of a hearsay affidavit to prove the factual predicates of the BRE.

2. The documents that were introduced constituted hearsay.

Documents constitute hearsay since they are out-of-court statements which are offered to prove the truth of the matters asserted. *Frank Shop v. Crown Cent. Petroleum Corp*., 261 Va. 169, 176 (2001) (trial court erred in admitting document as evidence; the document constituted hearsay and was not proved to fall within any exception). The entries contained in the

documents also constitute hearsay since those entries are each out of court statements offered to prove the truth of the matters asserted. The documents contained in Defendant's Exhibit 3 thus constituted double hearsay. Some of the entries contained in the documents (for example handwritten entries which appear to be statements written by Spruill on intake forms) may have fallen within the hearsay exception for statements or admissions of a party. But there was never any proof offered to establish that the documents themselves (that layer of hearsay) fell within the BRE. Nor did the defense ever have Spruill authenticate any of the handwritten entries in the documents.

3. The use of a hearsay affidavit to authenticate and lay a foundation for the documents was improper.

The only means by which the defense attempted to establish the required factual predicates of an exception to the Rule Against Hearsay was the Acknowledgement, which itself was hearsay (and was not even sworn to). As a matter of law, a hearsay affidavit cannot be used to authenticate business records when objection is made to the use of that procedure.

Defense counsel argued that the documents had been authenticated as records which fell within the BRE. But no testimony was introduced to prove that the requirements of the BRE were met. The attempt to use the

Acknowledgement to authenticate the documents as records which fell within the BRE was procedurally defective and insufficient as a matter of law because:

a. The Acknowledgement did not even constitute an affidavit or declaration.

b. The Acknowledgement did not even claim that each page of the documents satisfied all of the factual predicates of the BRE.

c. Defense counsel failed to give notice to all parties not later than 15 days before trial that the defense intended to use an affidavit or declaration to certify the documents.

b. Defense counsel failed to provide to all parties not later than 15 days before trial a copy of an affidavit or declaration and the specific documents which were purportedly certified.

c. Spruill objected to use of the Acknowledgement and as a result the authenticity and foundation of the documents could only be established by means of live witness testimony.

As a matter of law, the use of Acknowledgement was improper and insufficient on each and all of these grounds.

4. The hearsay Acknowledgement was deficient as a matter of law.

Even where a hearsay affidavit or declaration can properly be used to bring a document within the BRE, the affidavit or declaration must contain statements which establish the "authentication of the record and the

foundation required by subdivision (6) of Rule 2:803." *Va. R. Evid.* 2:902(6); Va. Code § 8.01-390.3. The authentication and foundation required by subdivision (6) of Rule 2:803 (and by the corresponding statute) must establish that:

> (A) the record was made at or near the time of the acts, events, calculations, or conditions by--or from information transmitted by-- someone with knowledge;
>
> (B) the record was made and kept in the course of a regularly conducted activity of a business, organization, occupation, or calling, whether or not for profit;
>
> (C) making and keeping the record was a regular practice of that activity;
>
> (D) all these conditions are shown by the testimony of the custodian or another qualified witness, or by a certification that complies with Rule 2:902(6) or with a statute permitting certification; and
>
> (E) neither the source of information nor the method or circumstances of preparation indicate a lack of trustworthiness.

Va. R. Evid. 2:803(6). This Rule mirrors the requirements of the business records exception as set forth by this Court. *See "Automatic" Sprinkler Corp. v. Coley & Petersen, Inc.*, 219 Va. 781, 793 (1979) (holding that the exception applies "'where an entry is made by one person in the regular course of business, recording an oral or written report, made to him by other persons in the regular course of business, of a transaction lying in the

personal knowledge of the latter persons'") (quoting 5 *Wigmore on Evidence* § 1530 at 451 (Chadbourn rev. 1974)).

As previously discussed in the Statement of Facts, the Acknowledgement asserted that the "copy of medical records received by Fraim & Fiorella, P.D." are true copies of the "originals," presumably meaning the originals of documents which were contained in the files of Consultants in Pain Management. This Acknowledgement fails to make any statements asserting that:

> (A) the record was made at or near the time of the acts, events, calculations, or conditions by--or from information transmitted by-- someone with knowledge;
>
> (B) the record was made and kept in the course of a regularly conducted activity of a business, organization, occupation, or calling, whether or not for profit;
>
> (C) making and keeping the record was a regular practice of that activity;

Va. R. Evid. 2:803(6).

5. The hearsay documents contained inadmissible hearsay opinions.

Even where the predicates for application of the business records hearsay exception are properly established (not done here), any opinions contained in the documents remain inadmissible. *See Neeley v. Johnson*, 215 Va. 565, 571 (1975) ("We . . . refuse to extend the exception to include

opinions and conclusions of physicians or others recorded in hospital records"). The documents introduced as Defendants' Exhibit 3 included hearsay opinions which would not have been within the business records exception even if it had been shown to apply. *See, e.g.,* A545 (Defendants' Exh. 3, document dated September 8, 2011 at page 5 (containing the opinion of Martin V. Ton, M.D., that an MRI which he viewed showed "[t]he patient has evidence of degenerative disk disease at the L4-L5 level" and "also has disk bulges noted at both L4-L5 and L5-S1"). These and other hearsay opinions were improperly introduced into evidence even though the witness never appeared in court, the jury had no opportunity to observe the demeanor of the witness, the court and jury had no information on the qualifications and personal knowledge of the witness, and the witness was entirely shielded from cross-examination.

6. The common law, the Rules of this Court, and the statutes enacted by the General Assembly, require enforcement of the Rule Against Hearsay and insistence on the requirements of the business records exception.

The common law, the Rules of this Court, and the statutes of Virginia, have already clearly answered the question presented in this case – hearsay documents must be excluded unless the proponent proves that the documents and the entries they contain fall within an exception to the Rule Against Hearsay. An objection to hearsay presents a threshold issue which

the trial court must decide in its role as the evidentiary gatekeeper. Evidence which is inadmissible hearsay must be excluded. *Harman v. Honeywell Int'l, Inc.*, 288 Va. 84, 92 (2014); *Norfolk & W. Ry. v. Puryear*, 250 Va. 559, 563 (1995).

The Court has expressly rejected the notion that a trial court can permit the introduction of defective evidence on the theory that the weaknesses and deficiencies can be brought out upon cross-examination. *See*, *e.g.*, *CSX Transp. v. Casale*, 250 Va. 359, 367 (1995). In *Casale*, in the trial court the defendant objected to certain testimony on the basis that it was inadmissible because it lacked sufficient foundation. The trial court overruled the objection and ruled that "it was for the jury to determine whether a proper foundation had been laid for" the testimony at issue. 250 Va. at 365. On appeal, the Supreme Court reversed and remanded the case for a new trial. The Supreme Court held that the "the question before the trial court was one of the admissibility of evidence, not its weight -- a strictly legal question. It was for the trial court, therefore, not the jury, to decide" whether the evidence was admissible. *Id.* at 367. The trial court "'may not abdicate its responsibility to ensure that only properly admitted evidence is considered by the jury[.]'" *Id.* at 366 (quoting with approval

Tyger Constr. Co. v. Pensacola Constr. Co., 29 F.3d 137, 143 (4th Cir. 1994), *cert. denied*, 513 U.S. 1080 (1995)).

For many years, litigants and their attorneys have sometimes sought to inject hearsay into Virginia trials. This Court has resoundingly rejected those attempts and has done so precisely because testimony regarding hearsay violates fundamental truth-seeking principles. For example, in *McMunn v. Tatum* 237 Va. 558 (1989), the defendant argued that the trial court had erred in refusing to allow a defense medical expert to attempt to support his opinion by referring to opinions which the plaintiff's hearsay medical records indicated had been reached in the past by some of plaintiff's health care providers. The trial court specifically precluded the defense medical expert "from giving the opinion of the physician at the Mayo Clinic to the effect that Mrs. Tatum [the plaintiff] might have experienced 'factitious disease' while there in 1981, and from telling the jury, in effect, that 'other doctors agree with me.'" *Id.* at 566.

The Court upheld the trial court's ruling and declared in the strongest possible terms:

> No litigant in our judicial system is required to contend with the opinions of absent 'experts' whose qualifications have not been established to the satisfaction of the court, whose demeanor cannot be observed by the trier of fact, and

> whose pronouncements are immune from cross-examination.

237 Va. at 566.

For a number of years after the *McMunn* decision, litigants and their attorneys sometimes tried to do an end-run around the clear holding in *McMunn* by arguing that because *McMunn* involved testimony regarding the 'hearsay opinions' of non-testifying experts it was not applicable to 'hearsay facts.' This proposed distinction never made any sense, since almost all the problems that *McMunn* noted are posed whether the testimony concerns hearsay opinions or hearsay facts. In *Commonwealth v. Wynn*, the Court rejected the proposed distinction and made clear the prohibition against testimony concerning hearsay records and entries **applies both to 'hearsay opinions' and to 'hearsay facts**.' *Commonwealth v. Wynn*, 277 Va. 92 (2009). The Court held:

> **The Commonwealth [the party offering the hearsay testimony], however, asserts that our holding in *McMunn* should be limited to 'hearsay matters of opinion'** upon which an expert relied. . . . . **We do not agree**. Whether an expert relies upon the opinions of others or allegations of sexual misconduct in formulating an opinion both constitute hearsay. While certain information may be of the type routinely used by experts in a given field of expertise when formulating their opinions, a litigant, nevertheless, should not be required to contend with such hearsay information because the trier of fact cannot observe

> the demeanor of the speaker and the statements cannot be tested by cross-examination.

277 Va. at 100-101.

The Court has continued to view the exclusion of testimony regarding hearsay as critically important. In *Bostic v. About Women OB/GYN, P.C.*, 275 Va. 567, 577 (2008), the Court overturned a verdict and granted a new trial because the trial court had allowed an expert to bolster his opinions by referring to inadmissible hearsay. In *Bostic*, the Court even referred to the fundamental problems posed by hearsay as "**the evils** mentioned in *McMunn*." 275 Va. at 577. Few, if any, other kinds of evidentiary defects have ever been referred to by the Court as giving rise to "evils."

In *Harman v. Honeywell Int'l, Inc.*, 288 Va. 84 (2014), the Court of Virginia once again overturned a verdict because the trial court erred in allowing hearsay to be introduced into evidence.

Attorneys sometimes argue that *Virginia Code* Section 8.01-401.1 allows an expert to make assertions about the contents of hearsay records. But that is obviously not the case. That statute allows an expert to **rely** upon hearsay (if of a type normally relied upon by experts in the pertinent field of expertise) **but it does not allow the expert to testify about the hearsay**. The statute provides in pertinent part:

> In any civil action any expert witness may give testimony and render an opinion or draw inferences from facts, circumstances or data made known to or perceived by such witness at or before the hearing or trial during which he is called upon to testify. The facts, circumstances or data relied upon by such witness in forming an opinion or drawing inferences, if of a type normally relied upon by others in the particular field of expertise in forming opinions and drawing inferences, need not be admissible in evidence.
>
> The expert may testify in terms of opinion or inference and give his reasons therefor without prior disclosure of the underlying facts or data, unless the court requires otherwise. The expert may in any event be required to disclose the underlying facts or data on cross-examination. . . . .

Virginia Code § 8.01-401.1.

In *Bostic*, a defense expert was allowed to support his opinions by referring to hearsay medical literature during his testimony. The defense argued that *Virginia Code* Section 8.01-401.1 allowed the testimony regarding hearsay. The Court rejected that argument and made clear that the statutory provision in *Virginia Code* Section 8.01-401.1 does not alter or relax the prohibition against testimony involving hearsay except "to the limited extent provided by the express statutory terms." 275 Va. at 577. In *Bostic*, the Court restated the long-standing principle: "'Statutes in derogation of the common law are to be strictly construed and not to be enlarged in their operation by construction beyond their express terms.'" 275 Va. at 576

(quoting previous decision). The Court held that "[a]ny enlargement of the statutory limitations leads to the evils mentioned in *McMunn* and *Weinberg* [*Weinberg v. Given*, 252 Va. 221 (1996)], which the General Assembly clearly sought to avoid." *Bostic*, 275 Va. at 577.

This case presents the same type of situation involved in all these previous decisions. The trial court allowed the introduction of hearsay as evidence despite objection and even though no hearsay exception was shown to be applicable. The hearsay was plainly prejudicial to Spruill. The trial court had no discretion to allow the hearsay into evidence. The trial court's decision was prejudicial error.

Furthermore, like the *Bostic* case, this case also involves statutory provisions. *Virginia Code* Section 8.01-390.3 and *Va. R. Evid.* 2:902 clearly provide that if objection is made to the use of an affidavit or declaration to authenticate a business record, <u>the authentication requirements of Rule 2:803(6) must be proved by live witness testimony</u>. As in *Bostic* those statutory provisions must be applied and enforced as written – any enlargement of them by judicial construction would be improper and would lead to the "evils" involved in allowing hearsay into evidence.

Conclusion

Wherefore, for all the foregoing reasons, the Virginia Trial Lawyers Association respectfully requests that the Supreme Court of Virginia reverse the order and judgment of the trial court and grant Appellant Yashana Spruill a new trial on the issue of damages only on her personal injury action against Appellee Angela Tyler.

Respectfully submitted by *The Virginia Trial Lawyers Association,*

By: /s/ Roger T. Creager
Roger T. Creager

Roger T. Creager (VSB No. 21906)
The Creager Law Firm, PLLC
1500 Forest Avenue, Suite 120
Richmond, Virginia 23229
Telephone: (804) 747-6444
Facsimile: (804) 747-6477
rcreager@creagerlawfirm.com
Counsel for *Amicus Curiae*
Virginia Trial Lawyers Association

CERTIFICATE OF SERVICE

I hereby certify that on April 22, 2019, three copies of the above Brief *Amicus Curiae*, together with VTLA's Motion for Leave to File Brief *Amicus Curiae*, have been hand-delivered to the Clerk's office of the Supreme Court of Virginia for filing and a copy of each has also been electronically filed with the Clerk of the Court. I further certify that counsel for all parties have been informed of the intended filing of this Brief *Amicus Curiae*, and I have obtained the consent of all counsel for the remaining parties to this appeal to the granting of the VTLA's Motion for Leave to file this brief; specifically, Appellant Yashana Spruill, by counsel, and Appellee Angela Tyler, by counsel, have consented to the granting of the VTLA's Motion for Leave to file this brief. I further certify that on this same date, one copy of this Brief *Amicus Curiae* has been e-mailed and sent via first-class postage prepaid mail to each counsel for the parties in this case at the mailing addresses and the e-mail addresses shown below:

William D. Breit (VSB No. 17814)
BREITLAW PC
5544 Greenwich Road, Suite 100
Virginia Beach, Virginia 23462
(757) 456-0333 (Telephone)
(757) 456-0002 (Fax)
bbreit@breitlawyer.com

Counsel for Plaintiff/Appellant Spruill

Christopher A. Zaleski (VSB No. 43698)
ALLSTATE STAFF COUNSEL
505 Independence Parkway
Suite 230
Chesapeake, VA 23320
(571) 758-7376 (Telephone)
(877) 873-6380 (Facsimile)
azalf@allstate.com

Counsel for Defendant/Appellee Tyler

/s/ Roger T. Creager
Roger T. Creager