

Evidence Corner:

Virginia Supreme Court Decides New Case Concerning the Dead Man's Statute

by Kevin W. Holt

The Virginia Supreme Court recently interpreted Virginia's Dead Man's Statute, Va. Code § 8.01-397, and, in the process, upheld a \$1.75 million jury verdict.

Jones v. Williams, Record No. 091745 (Nov. 4, 2010) was a medical malpractice case. An infant, through his next friend, filed a complaint against Mrs. Jones, who was personal representative of Dr. Paul Arbon Jones's estate. Plaintiff alleged that Dr. Jones had breached the standard of medical care in performing his delivery.

During the delivery, there was a shoulder dystocia—a potentially fatal emergency condition in which the baby's shoulders become obstructed within the birth canal, thereby depriving the baby of oxygen. An obstetric nurse who assisted with the delivery testified that she initially attempted to resolve this dystocia by pressing Williams's legs against her chest. The nurse testified that when this maneuver failed, Dr. Jones manually attempted to rotate the child's shoulders inside the birth canal. According to the nurse's testimony, Dr. Jones ordered her to press her forearm forcefully on top of Williams' uterus, a maneuver called "fundal pressure." The child was delivered successfully. But he had severe and permanent damage to the nerves of his right arm, a condition known as Erb's Palsy.

Dr. Jones died shortly after Johnny was delivered.

In due course, the medical malpractice case went to trial. At the close of plaintiff's case in chief, defendant moved to strike the evidence. Jones argued that the testimony concerning the order to apply pressure to the mother's uterus was inadmissible under Va. Code § 8.01-397, the Dead Man's statute. Jones asserted that the nurse's testimony could not corroborate Johnny's claim because she was an "interested party" within the meaning of the statute.

The statute provides:

[i]n 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 previous decisions, the Virginia Supreme Court had held that 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. Similarly, the Court has previously held that the testimony of the adverse party may not be corroborated by an interested party, or vice versa.

In *Jones*, the Virginia Supreme Court held that the nurse was not an "interested party" within the meaning of the statute. Jones had argued that the nurse was an interested party because Johnny's recovery against Dr. Jones relieved her of potential liability.

The Court disagreed, citing *Johnson v. Raviotta*, 264 Va. 27, 32, 563 S.E.2d 727, 731 (2002). The Court held in *Johnson* that a witness whose testimony provides the basis for his or her own liability is not an "interested party" for purposes of the statute. At oral argument, counsel for Jones conceded that the nurse's testimony may provide a basis for a claim of contribution. Jones also conceded that the fundamental question for establishing his liability was whether the fundal pressure was applied before or after he had dislodged Johnnie's shoulder. On that issue, the nurse testified that she did not know whether Dr. Jones has succeeded in manually rotating Johnny's shoulders prior to ordering the application of fundal pressure. Accordingly, the Virginia Supreme Court found that the nurse's testimony was neutral regarding the dispositive issue in the case. Thus, the Supreme Court affirmed the decision below and held that the trial court had committed no error in denying defendant's motions to strike or in refusing to instruct the jury on the statute. ☒