NINETEENTH JUDICIAL CIRCUIT OF VIRGINIA

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Re: ***Geneva Enterprises, Inc., et. al. v. Donald B. Bavely,***
Case No. CL–2018–18124[1]

Kathryn Lohman, Personal Representative of the Estate of Donna Lee Lohman v. Reston Hospital Center, LLC, et. al.
Case No. CL-2017-14850

Dear Counsel:

The issue in all these matters concern the practical application of the "Dead Man's Statute." VA. CODE ANN. § 8.01-397; VA. SUP. C. R. 2:804(b)(5). The Supreme Court of Virginia clarified this statute in 2018, *Shumate v. Mitchell*, 296 Va. 532 (2018), but the lawyers in these several cases—all lawyers with tremendous experience—still disagree on how to apply the statute in practice.

Virginia is the only state in the United States to have a Dead Man's Statute such as ours—complete with an almost limitless hearsay license for the admissibility of anything someone claims the decedent[2] said or wrote when alive, if relevant, coupled with a complex, corroboration requirement for surviving adverse and interested parties. Effectively, Virginia is the only state in the U.S. to invite the jury, by design, to see and hear evidence the Court may later have to strike wholesale so that the Court can fulfill its mandate of waiting until the close of the evidence to decide if a party properly corroborated his testimony.

The General Assembly considered repealing the statute last year, but ultimately declined to do so. VA. GEN. ASS. SB 144 (2022). Naturally, the Court takes no position on the policy behind the Statute. The legislature implicitly weighed the benefits of the Dead Man's Statute against any disadvantages. When a statute is constitutional, the Court always seeks to faithfully apply the law. There is some elegance to the direction to admit into evidence the hearsay of the deceased witness who cannot speak for himself, and make the surviving witness corroborate his own testimony to mitigate his advantage as a survivor. However, the Court must answer the litigants' proper procedural concerns and make evidentiary rulings despite any practical complexity.

I. OVERVIEW.

Presently before the Court is an alleged medical malpractice case, *Lohman v. Reston Hospital*, CL-2017-14850 ("*Lohman*"), and seven cases consolidated for trial involving

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[1] The Court consolidated this case for trial along with the following cases which, for ease, the Court refers to as the "Rosenthal/Bavely Cases": *RBD of Virginia, LLC, et. al. v. Donald B. Bavely*, CL-2018-11424; *Donald Bavely v. Geneva Enterprises, Inc., et. al.*, CL-2018-13979; *AV Automotive, .L.LC., et. al. v. Donald B. Bavely, et. al.*, CL-2019-2804; *Donald Bavely v. Jaguar Land Rover of Chantilly, LLC, et. al.*, CL-2019-13200; *Donald Bavely v. DealerPPC, LLC*, CL-2020-7497; *Donald Bavely v. Fairfax Imports, Inc, et. al.*, CL-2020-18740.

[2] The Court refers solely to "decedents" in these cases because all the cases involve a dead person. However, the Statute applies equally to all those "incapable" of testifying, such as from a disability. VA. CODE ANN. § 8.01-397.

ownership and employment disputes among the owners and employees of various car dealerships, *RBD of Virginia, Inc. v. Bavely*, CL-2017-11424, *et al.* ("*Rosenthal/Bavely*").

In *Lohman*, Donna Lee Lohman died after being diagnosed with lung cancer. Her Personal Representative, Kathryn Lohman, sued Ms. Lohman's medical providers, claiming that they knew of the diagnosis but did not advise her of it, leaving it fatally untreated. The surviving doctors deny malpractice.

In *Rosenthal/Bavely*, Robert Rosenthal, the founder and chairman of a car dealership empire, died. His estate and the then-president of the car dealership empire, Donald Bavely, sued each other in several law and equity cases connected to breach of contract and improper behavior.

In *Lohman*, the parties filed cross motions *in limine* related to the Dead Man's Statute. Ms. Lohman seeks to exclude certain testimony of her medical providers—Dr. Anila Mehta, Dr. Padmavathi Murakonda, and Dr. Hima Rao.

Specifically, Ms. Lohman wants the Court to exclude conversations Dr. Mehta and Dr. Murakonda say they had with the decedent prior to her death wherein they claim they each informed the decedent of an x-ray showing an opacity on her lung and advised of the need to seek follow-up care. Ms. Lohman points to the corroboration requirement of the Dead Man's Statute and asserts that discovery shows the doctors cannot corroborate their statements. She objects as insufficient the doctors' proffered corroboration—their notes in the medical chart. The notes indicate the opacity and, in the notes of Dr. Murakonda, the need for a follow-up CT scan. However, the notes do not contain any reference that the doctors told the decedent of the opacity and the need for a follow-up scan.

As to Dr. Rao, Ms. Lohman wants to exclude testimony that the doctor has a pattern of telling patients of a new opacity. She objects to Dr. Rao's proffered corroboration—an allegedly vague statement in the medical records that she counseled the decedent about test results that do not expressly reference the opacity.

In turn, the doctors seek to exclude certain statements of the decedent at trial. While conceding the broad hearsay exception for the declarations of a decedent, the doctors insist that the exception is limited to hearsay, and that they can attack the statements on other evidentiary grounds—such as personal knowledge, foundation, or speculation. Succinctly stated, the doctors argue that if the deceased witness could not have testified to a certain statement if alive, she should not be able to effectively introduce the same statement after her death simply because of the hearsay exception within the Dead Man's Statute.

In *Rosenthal/Bavely*, the parties and the Court are struggling with drafting a Dead Man's Statute jury instruction. Mr. Bavely wants to make clear he is relieved of corroborating his own testimony if an interested party testifies on behalf of Mr. Rosenthal's estate. Both sides want clarity on who is an interested party and how the Court should make rulings in a case such as the

present one where the deceased is just one of over a dozen parties. The parties also want clarity as to what exactly a surviving adverse or interested party must corroborate—everything sworn by the survivor, rebuttals to the decedent's hearsay statements, or something else. The decedent's estate in *Rosenthal/Bavely* argues that corroboration is necessary for events that only the survivor and the decedent witnessed unless the decedent's hearsay statements of the event are admitted.

Relatedly, the parties in *Rosenthal/Bavely* want clarity on what can be used to corroborate a survivor's testimony. The decedent's estate objects to anything depending upon the survivor's credibility, such as a memorandum he wrote, even if the writing was years before the dispute. The decedent's estate also objects to corroboration that the survivor can manufacture—such as testifying that a second witness was present at an event that the purported witness denies attending.

And the decedent's estate in *Rosenthal/Bavely*, as do the doctors in *Lohman*, asserts that the hearsay exception is neither mandatory nor absolute— that not everything the decedent said while alive can be admitted at trial.

II. ANALYSIS.

As one can see from the many disputes between counsel in the present cases, the Dead Man's Statute can be complex to apply in practice. Fortunately, in concept, the statute is easy to understand. In a simple case involving a survivor and a decedent who witnessed a single event, the survivor has a tremendous advantage. The survivor can testify as to a key fact without easy rebuttal. So, to offset the disadvantage, the Dead Man's Statute permits the hearsay statements of the decedent to be admitted over the normal evidentiary hearsay rules, and then mandates that the survivor corroborate his or her own testimony.

The Dead Man's Statute reads in relevant part:

> In an action by or against a person who, from any cause, is incapable of testifying . . . no judgment or decree shall be rendered in favor of an adverse or interested party founded on his uncorroborated testimony. In any such action, whether such adverse party testifies or not, all entries, memoranda, and declarations by the party so incapable of testifying made while he was capable, relevant to the matter in issue, may be received as evidence in all proceedings including without limitation those to which a person under a disability is a party.
>
> For the purposes of this section, and in addition to corroboration by any other competent evidence, an entry authored by an adverse or interested party contained in a business record may be competent evidence for corroboration of the testimony of an adverse or interested party. If authentication of the business record is not admitted in a request for admission, such business record shall be authenticated by a person other than the author of the entry who is not an adverse

or interested party whose conduct is at issue in the allegations of the complaint. VA. CODE ANN. § 8.01-397; VA. SUP. CT. R. 2:804(b)(5).

Thus, the Dead Man's Statute has two prongs. First, it contains a broad hearsay exception for statements from a decedent. Second, it contains a requirement that an adverse or interested survivor witness corroborate his or her testimony. *Id.*

A. The Dead Man's Statute Hearsay Exception.

Under the hearsay prong of the Dead Man's Statute "all entries, memoranda, and declarations by [a deceased party], relevant to the matter issue, may be received as evidence." *Id.* Stated differently, all statements of the deceased are admissible if relevant. *Shumate*, 296 Va. at 548 ("[w]e noted that since the 1919 version of the [Dead Man's] statute created the general hearsay exception, *relevance is the only statutory limit.*") (Emphasis supplied). *Shumate* relied on *Gelber v. Glock*, 293 Va. 497, 509-12 (2017), which stated "[u]nder the plain language of the statute, 'all entries, memoranda, and declarations' by [the decedent] prior to her death are admissible to the extent they are 'relevant to the matter in issue.'" *Gelber*, 293 Va. at 509.

Neither *Shumate* nor *Gelber*, nor any other case taken up by the Virginia Supreme Court in interpreting the Dead Man's Statute, has gone further than stating that a decedent's hearsay statement need only be relevant to be admissible. No case has looked at whether such a statement would be inadmissible due to issues with the foundation of the statement or if the statement was hearsay-within-hearsay. No case has considered whether a non-evidentiary rule of court, such as the rules governing proper depositions, supersedes this broad grant of admissibility. VA. SUP. CT. R. 4:5.

The doctors in *Lohman* raise two arguments. First, they argue that the Dead Man's Statute applies only to hearsay. Second, the doctors argue that any hearsay statement admitted must be one the decedent could have offered into evidence if alive. Practical questions these arguments beg include: does this really mean that any statement someone claims a decedent said is admissible if relevant even if the decedent would have been prohibited from offering the statement herself if alive? What about hearsay within hearsay? What about statements obviously lacking in foundation? Are they admissible simply because a decedent purportedly said them? What about statements from the decedent improperly obtained through a deposition in violation of VA. SUP. CT. R. 4:5? (In the *Lohman* case, counsel for the decedent's estate conducted a deposition of the decedent before her death, without giving notice to counsel for the doctors so they could be present and ask questions). The answer to all these questions, briefly stated, is "yes." If the decedent said or wrote something, and it is relevant, then that statement is admissible.

As to the doctor's first argument—that the Dead Man's Statute only applies to hearsay, leaving all other non-hearsay evidentiary rules intact—they cite to the placement of the statute in the Virginia Rules of Evidence within Article VIII, which is limited to the topic of hearsay. VA.

SUP. CT. R. 2:801, *et. seq*. They note that *Shumate* and *Gelber* only considered hearsay. Thus, they argue, the other rules of evidence are unaffected by the Dead Man's Statute.

The Dead Man's Statute and the Supreme Court of Virginia disagree with the doctor's arguments. The Dead Man's Statute itself carves out only one exception to its broad hearsay grant—relevance. VA. CODE ANN. § 8.01-397. By listing one exception and no others, the principle of *expressio unius est exclusion alterius*[3] cautions a court against creating new exceptions in a statute beyond what the legislature provided. *C.f., Miller & Rhoads Building, L.L.C. v. City of Richmond*, 292 Va. 537, 543-44 (2018). *Shumate*, interpreting this statute, expressly recognized that it permits "a plethora of out of court, *unreliable* hearsay of what the decedent said to others to bolster *unfairly* the decedent's case." *Shumate*, 296 Va. at 548 (internal quotation marks omitted) (emphasis supplied).

Fatal to the doctor's argument that the Dead Man's Statute only affects the hearsay rule is the fact that "relevance" is not a hearsay rule yet is expressly included as the one exception to the Dead Man's Statute. The rules on relevancy are not grouped with the rules on hearsay—they are, instead, found in the Virginia Rules of Evidence within Article IV. VA. SUP. CT. R. 2:401, *et. seq*. Additionally, the Supreme Court of Virginia separately held the Dead Man's Statute superseded the evidentiary rule on "habit." *See Johnson v. Raviotta*, 264 Va. 27, 36 (2002). *But see Kimberlin v. PM Transport*, 264 Va. 261 (2002) (decided the same day as *Johnson* yet implicitly condoning habit evidence of a decedent if the habit was regular and numerous, but not referencing the Dead Man's Statute). Ordinarily, habit is an exception to the relevance rule and by statute a proponent need not corroborate the evidence. VA. CODE ANN. § 8.01-397.1; VA. SUP. CT. R. 2:406. However, *Johnson* elevated the Dead Man's Statute over this other evidentiary rule even though both rules are based in statute. *Id.* Since the General Assembly found a limitation to the hearsay exception outside the normal hearsay rules, and since the Supreme Court held that the Dead Man's Statute supersedes yet another non-hearsay evidentiary rule—habit—the Statute is not limited to hearsay as the doctors wish it was.

Second, the doctors argue that any hearsay statement admitted must be one the decedent could have offered into evidence if alive. To support this argument, they point to *dictum* in *Adams v. Adams*, 233 Va. 422, 428 (1987) that reads:

> "In effect, the General Assembly made a decedent a witness in any action by or against his personal representative as to any evidence relevant to *a matter in issue which he could have given had he been alive at the time of trial*."

Id. (Emphasis supplied). However, in context, the *Adams* Court did not hold that a decedent's hearsay statements are admissible only if he could have offered them into evidence if alive. Rather, the Court held the decedent was effectively a witness in a case and, therefore, the decedent's reputation for integrity and veracity were at issue. In any event, *Shumate* clarified that

[3] The Court understands the translation of this phrase from Latin to mean: "the expression of one thing is the exclusion of the other."

the Dead Man's Statute contains only one exception to its general principle—relevance. It cited with approval Professor Kent Sinclair's observation that the present Dead Man's Statute "allows the use of any and all hearsay, *regardless of circumstances whether the declarant had personal knowledge of the topics opined upon.*" *Shumate*, 296 Va. at 546(*citing* Kent Sinclair, THE LAW OF EVIDENCE IN VIRGINIA § 10-7[f], at 605 (8th ed. 2018)) (emphasis supplied).

The doctors try to use the statutory text to bolster their argument that a decedent's hearsay testimony must be limited to that which the decedent could testify if alive. They highlight the term "capable" in the clause "all . . . declarations by the party so incapable of testifying made while he was capable, relevant to the matter in issue . . . may be received as evidence" as an exception other than relevance to the broad hearsay grant. They reason that if the decedent tried to give expert testimony on the applicable medical standard of care, she should be deemed "incapable" of doing so because she is not a doctor.

However, the statutory term "capable" in this statute, in proper context, is the physical ability of one to testify live, as opposed to one "incapable" of testifying due to death or disability. This seems obvious considering all modifying words in the statute relate to death and disability, such as committee, trustee, executor, administrator, heir, representative, and suicide. There is nothing in the statute related to qualifications of a live and physically able declarant. *Shumate's* review of the historical context of the Dead Man's Statute focuses on death and disability and not qualifications. *Shumate*, 296 Va. at 545 (paraphrasing the phrase "by the party so incapable of testifying made while he was capable" to mean "of a decedent or incapacitated person."). In interpreting this statute, the Court relies on the contextual construction canons of *noscitur a sociis*. *See Norton v. Board of Supervisors of Fairfax County*, 299 Va. 749, 175 (2021) (defining *noscitur a sociis* to mean "associated words" and explaining the maxim to mean that "when general and specific words are grouped, the general words are limited by the specific and will be construed to embrace only objects similar in nature to those things identified by the specific words.") (*citing Martin v. Commonwealth*, 224 Va. 298, 301-02 (1982)). The Court cannot redefine "incapability" to mean anything other than death or physical or mental incapacity. Thus, it cannot define "capable" to mean "qualified."

The Supreme Court of Virginia accepted, as this Court must, that the General Assembly understands that the Dead Man's Statute could be unfair in application. Implicitly, the legislature balanced this unfairness against the unfairness of a decedent being unable to testify due to his or her demise, and the duty of an adverse or interested party to corroborate competing testimony. *See* part II(B) of this Opinion Letter, *infra*. Thus, the Dead Man's Statute is as broad as the doctors in *Lohman* fear. If the decedent's statement is relevant, it is admissible.

It is important to remember that admissibility does not equal believability. A fact finder receiving an unreliable hearsay statement can consider the unreliability, the credibility of the relator of the statement, and the circumstances surrounding the statement in determining what weight, if any, to apply to it.

In the *Lohman* case, due to the broad nature of the hearsay exception, the doctors' motion *in limine* to limit the hearsay testimony from the decedent will be denied.

B. The Dead Man's Statute Corroboration Mandate.

Per the corroboration prong of the Dead Man's Statute, "[i]n any action by or against a [deceased person], no judgment or decree shall be rendered in favor of an adverse or interested party founded on his uncorroborated testimony." VA. CODE ANN. § 8.01-397. Stated differently, under the Dead Man's Statute a judgment cannot be entered for or against the deceased person based on the testimony of either an adverse or interested party, unless the interested or adverse party's testimony has been corroborated.

In both *Loham* and *Rosenthal/Bavely* the parties raise questions and seek clarification on various aspects of the corroboration prong of the Dead Man's Statute, including who qualifies as an "interested" or "adverse" party, who must corroborate testimony, when during the trial must evidence be corroborated, what testimony must be corroborated, and what constitutes sufficient corroboration.

Specifically, the parties in *Rosenthal/Bavely* seek clarity regarding who is an interested party in a case where there are over a dozen parties—both individuals and entities—across several consolidated cases, and the deceased party is just one of those parties. Not all the parties involved are adverse to the deceased party, but if all parties were found to be interested then corroboration would be required for all testimony of other parties.

In both *Rosenthal/Bavely* and *Lohman* the parties need to know what exactly must be corroborated – whether all testimony of an adverse or interested party, or whether there is a narrower scope to the corroboration requirement.

The parties in both *Rosenthal/Bavely* and *Lohman* also seek clarification regarding what can be used to corroborate testimony.

In *Lohman* Ms. Lohman seeks to exclude alleged conversations between the doctors and Ms. Lohman regarding the results of an x-ray of her lung, arguing that under the corroboration prong of the Dead Man's Statute the doctors cannot corroborate their own statements with their own notes. Ms. Lohman also uses the corroboration prong of the Dead Man's Statute to object to testimony of Dr. Rao's pattern of telling patients about opacity found in x-rays.

In *Rosenthal/Bavely* the estate of the deceased party objects to corroboration that has been created by a surviving party or that relies on the surviving party's credibility – such as a memorandum written by the surviving party.

1. Who is considered an adverse or interested party under the Dead Man's Statute?

The corroboration prong of the Dead Man's Statute only applies to adverse or interested parties—no other testifying party need corroborate their testimony. An "adverse party" is a party to the actual case opposed to the decedent—a party of record who is seeking judgment or whom judgment is sought from. *Stephens v. Caruthers*, 97 F. Supp.2d 698, 705 (E.D. Va. 2000). In contrast, an "interested party" is a person or entity who "who is pecuniarily interested in the result of the suit." *Id.* (quoting *Merchants' Supply Co., Inc., v. Hughes' Ex'rs*, 139 Va. 212, 216 (1924)).

Since an "adverse party" is a party of record in the case opposite the decedent, identifying the adverse parties in *Lohman* is easy. The doctors and the medical practice are adverse to the Lohman estate. Similarly, in *Rosenthal/Bavely*, one need only look for a person or entity opposite the "versus" from the Rosenthal estate to find the adverse party with a possible corroboration duty. Of the seven *Rosenthal/Bavely* cases, the only case with the Rosenthal estate as a party is *Geneva Enterprises, Inc., et. al. v. Donald B. Bavely*, CL-2018-18124. Thus, the adverse party to the estate is Donald Bavely.

Determining "interested parties" is more difficult. An "interested party" is not a party of record. *Johnson,* 264 Va. at 34-35. To determine if one is an "interested party" a court may consider the following nonexclusive factors: "(a) being liable for the debt of the party for whom he testified, (b) being liable to reimburse such a party, (c) having an interest in the property at issue in the action, (d) having an interest in the money being recovered, (e) being liable for the costs of the suit, or (f) being relieved of liability to the party for whom he testified if such party recovered from the incapacitated party." *Jones v. Williams*, 280 Va. 635, 639 (2010) (*citing Ratliff v. Jewell*, 153 Va. 315, 325-26 (1929)). Thus, in *Ratliff,* the Court ruled the deceased party's wife needed to corroborate her testimony, since she had a vested pecuniary interest in the outcome of the case even though she was not adverse to the decedent. *Ratliff*, 153 Va. at 322. As in *Ratliff*, the interested party may be—and often is—on the same side as the decedent. Similarly, while a personal representative of the estate of a decedent is normally treated separate from the decedent, where an estate has financial ties to the lawsuit, the personal representative is deemed an interested party. *See Johnson,* 264, Va. at 34-35.

In *Lohman*, Kathryn Lohman, the late Donna Lee Lohman's Personal Representative, is an interested party, assuming she will benefit financially if the plaintiff prevails. *See Paul v. Gomez*, 118 F.Supp.2d 694, 696 (W.D. Va. 2000). There may be other interested parties unknown to the Court at this time.

Rosenthal/Bavely is a tougher case with its seven cases consolidated for trial with over a dozen parties. While there is only one case with the decedent's estate as a party—*Geneva Enterprises, Inc., et. al. v. Donald B. Bavely*, CL-2018-18124—there are a lot of possible interested parties who would benefit from a Rosenthal estate victory. These include Robert Rosenthal's beneficiaries such as his widow, children, and grandchildren. *See Gomez*, 118

F.Supp.2d at 696. Some interested parties are interested in multiple ways. Marion Rosenthal, for example, is the estate's Personal Representative, and the estate has an interest in the outcome of the trial. Therefore, she is an interested party on that basis. *See Johnson,* 264 Va. at 34-35. She is also an interested party as the decedent's widow. *See Ratliff*, 153 Va. at 322.

2. What testimony must be corroborated under the Dead Man's Statute?

Under the corroboration prong of the Dead Man's Statute, the parties in *Rosenthal/Bavely* seek clarity regarding how much of the testimony of the adverse or interested party must be corroborated. The Statute itself simply says that the judgment in favor of the interested or adverse party cannot be "founded on his uncorroborated testimony." VA. CODE ANN. § 8.01-397.

A survivor need not corroborate his entire testimony. Rather, "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." *Johnson*, 264 Va. at 32 (emphasis supplied). *See also Vaughn v. Shank*, 248 Va. 224 (1994); *Hereford v. Paytes*, 226 Va. 604, 608 (1984); *Burton's Ex'r v. Manson*, 142 Va. 500, 508 (1925). Therefore, not everything that the adverse or interested party swears to need be corroborated, rather just testimony toward an essential element of a claim or defense.

Further, and importantly, an adverse or interested party need not corroborate all material points to satisfy the corroboration requirement of the statute. *Penn v. Manns*, 221 Va. 88, 94 (1980) (quoting *Brooks v. Worthington*, 206 Va. 352, 357 (1965)); *see also Rice v. Charles*, 260 Va. 157, 166 (2000).

This last point is critical. In the *Rosenthal/Bavely* cases the Rosenthal parties assert an exacting transactional component to the corroboration rule. They interpret the corroboration requirement as requiring a surviving adverse or interested party to corroborate every hearsay statement the party offers as a statement from the decedent. Consistent with this theory, the Rosenthal parties have repeatedly moved the Court to strike each hearsay statement from adverse party Mr. Bavely purporting to come from decedent Mr. Rosenthal as soon as evidence suggests Mr. Rosenthal made the alleged statement to Mr. Bavely unwitnessed and without corroboration of that specific statement.[4]

However, the Dead Man's Statute corroboration requirement is not a "hearsay statement-by-hearsay statement" corroboration requirement. It is a much more general requirement. An adverse or interested party need only corroborate *essential elements* of the claim, not all hearsay *statements* of the decedent. In *Penn*, the Supreme Court affirmed a trial court for admitting hearsay statements of the decedent offered by the adverse party where the adverse party separately corroborated his theory of the case but not the decedent's hearsay statements. *Penn*,

[4] The Court in each instance deferred ruling on these motions to strike as being premature. Courts determine adequate corroboration at the close of the evidence. *Johnson*, 264 Va. at 33. For a fuller discussion of this see part II(B)(5) of this Opinion Letter, *infra*.

221 Va. at 94. In that case, where an adverse party/driver's excessive speed caused a single vehicle accident killing his passenger, the driver testified that the decedent told him to "[d]rive faster man . . . drive faster." *Id.* at 91. The trial court properly refused the estate's motion to strike that uncorroborated hearsay testimony because of other "attendant circumstances"—the decedent's then desperate medical condition. Clearly, the decedent's medical condition could not corroborate the allegation from the survivor that the decedent urged the speeding. Without the hearsay statement it was just as likely that the decedent's obvious condition panicked the surviving driver to speed on his own volition. The hearsay statement was, therefore, self-serving by the surviving driver to the degree that it persuasively invited the fact finder to consider that the decedent passenger assumed the risk of the accident by urging the driver to speed. The *Penn* Court did not require a specific corroboration of the hearsay statement so long as the survivor separately corroborated an essential element of his claim.

In the present cases, the Court will not require adverse or interested parties to corroborate each hearsay statement of the decedent on a rote transactional basis. At this stage the Court cannot even grant *in limine* relief as to what specifically must and need not be corroborated. The *Rosenthal/Bavely* trial is in progress and the *Lohman* has not yet started. *See* part II(B)(5), *infra*. Adverse or interested parties must be prepared to corroborate essential elements of their claim that, if not corroborated, would be fatal to the adverse party's case.

3. What is sufficient corroboration?

Under the corroboration prong of the Dead Man's Statute, both parties in *Lohman* and *Rosenthal/Bavely* seek clarification regarding what evidence is sufficient to corroborate the testimony of an interested or adverse party, both in terms of the type of evidence that can be used to corroborate, and the quantity of evidence required.

In general, "[c]orroborating evidence is such evidence as tends to confirm and strengthen the testimony of the witness sought to be corroborated — that is, such as tends to show the truth, or the probability of its truth." *Penn*, 221 Va. at 93 (quoting *Brooks*, 206 Va. at 357).

There is no firm rule in Virginia as to how much or what is sufficient evidence to be considered corroboration to satisfy the statute. Since each case is unique and is based on different facts, "[i]n considering whether the testimony of an adverse or interested party has been corroborated, it is not possible to formulate any hard and fast rule, and each case must be decided upon its own facts and circumstances." *Id.* (quoting *Brooks*, 206 Va. at 357). *See also Rice v. Charles*, 260 Va. 157, 165 (2000); *Noland Co. v. Wagner*, 153 Va. 254, 256-67 (1929). However, "[i]t is well established that corroboration may be shown by circumstantial evidence, that not every material point upon which the surviving party testifies must be corroborated, and that corroboration need not rise to the level of confirmation, but need only serve to strengthen the surviving witness' account." *Va. Home for Boys & Girls v. Phillips*, 279 Va. 279, 286 (2010).

Thus, the required corroboration of a surviving adverse or interested party does not have to be in the form of other testimony. Instead, testimony can be corroborated from the evidence

and circumstances. *Penn*, 221 Va. at 94. Corroboration of the testimony of an adverse party may be made by circumstantial evidence. *Keith v. Lulofs*, 283 Va. 768, 776 (2012), *Cooper v. Cooper*, 249 Va. 511, 516 (1995); *Penn*, 221 Va. at 94.

The "'quantity [of] this corroborative evidence must be more than a scintilla, but when it is, the issue is usually for the jury.'" *Brooks*, 206 Va. at 357 (quoting *Timberlake's Adm'r v. Pugh*, 158 Va. 397, 403 (1932).

However, while circumstantial evidence is sufficient to support the Dead Man's Statute's corroboration requirement, "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.'" *Jones*, 280 Va. at 639 (2010) (quoting *Va. Home for Boys and Girls*, 279 Va. at 286). Not only may the corroborating evidence not "emanate" from the survivor, but "'the testimony of the adverse party may not be corroborated by an interested party, or vice versa.'" *Jones*, 280 Va. at 639 (quoting *Ratliff*, 153 Va. at 325).

This "emanation rule" is not absolute, however. A business record may corroborate a surviving witnesses' testimony, even if authored by the surviving witness, if the record is a true business record authenticated by someone other than the author who is an adverse or interested party to the deceased. The Dead Man's Statute was amended in 2013 to create this exception. VA. CODE ANN. 8.01-397; VA. SUP. CT. R. 2:804(b)(5).

Thus, in *Lohman*, Ms. Lohman is wrong to argue the doctors cannot corroborate their testimony regarding an alleged conversation with Ms. Lohman with their own notes, since the 2013 amendment to the Dead Man's Statute creates this exception for business records. The admissibility of the notes under the business records exception to the hearsay rule remains subject to evidence at trial. VA. SUP. CT. R. 2:803(6). However, she is right that the notes in the present case do not alone corroborate Dr. Rao's testimony because they do not expressly confirm that Dr. Rao told the decedent of the cancer. The Supreme Court of Virginia directly held that a medical provider's notes must list the specific act at issue to be corroborative of testimony of an adverse or interested party. *See Johnson*, 264 Va. at 36.

Likewise, in *Rosenthal/Bavely*, the deceased party's estate is correct that almost anything that emanates from the surviving adverse or interested party, and therefore depending on his credibility, is insufficient to corroborate the testimony of the adverse or interested party. The corroboration must come from beyond the testifying individual. An exception could be business records authored by the adverse or interested party. In the present case Mr. Bavely seeks to testify to events and conversations in which he and Mr. Rosenthal, the deceased party, were the only participants or witnesses. To the extent these hearsay statements are the sole proof of an essential element to a claim, see part II(B)(2) of this Opinion Letter, *supra.*, Mr. Bavely must introduce sufficient corroboration independent of himself. There may be circumstances where interested parties to the Rosenthal Estate must, similarly, corroborate their testimony.

Therefore, in both *Lohman* and *Rosenthal/Bavely* necessary corroboration of an adverse or interested party must include evidence or circumstances that do not generally come from themselves, and instead are independent of the witness and does not rely on the witness's credibility. The Court cannot make *in limine* rulings on this in any of the present cases. The parties need the trial to develop direct or circumstantial corroboration.

4. Special corroboration rules for the Dead Man's Statute.

There are at least two special rules for the corroboration prong of the Dead Man's Statute, under which corroboration may be excused or a heightened standard of corroboration may be imposed on the adverse or interested party. First, the adverse or interested party is relieved of a corroboration requirement if an interested party testifies on behalf of the decedent. Second, some parties with confidential relationships, such as doctors or those with fiduciary duties to a decedent, have an unspecified heightened corroboration requirement.

a. Corroboration is excused if a survivor testifies for the decedent.

The "corroboration requirement is inapplicable when another interested party whose interest derives from the decedent or incapacitated person testifies on that person's behalf." *Shumate*, 96 Va. at 546-57 (*citing Gomez*, 118 F.Supp.2d at 696) (adverse party doctor could testify without corroboration where decedent's wife testified on behalf of the decedent as to something the wife and decedent both witnessed)).

There is logic behind this exception. Where a living witness can testify about a transaction on the side of the decedent, the deceased party is no longer at a disadvantage in the case. *Paul*, 118 F.Supp.2d at 696. The Dead Man's Statute's purpose is to protect those who cannot testify for themselves – but when there is an interested party who is able to testify regarding a transaction that the adverse party wishes to testify about there is no need to corroborate the testimony of the adverse party. "[T]he statute is designed to avoid the unfairness of a situation where the jury only hears one version of the facts. Here, the jury will hear two versions of the facts from two opposing witnesses, one representing a view in the interest of the decedent's estate, the other representing a view in the interest of the defendant. It is difficult to see how any unfairness to the decedent's estate could result from this situation." *Id.*

Therefore, in *Rosenthal/Bavely*, Mr. Bavely is generally correct in believing that he is relieved from his corroboration requirement if an interested party testifies to the same essential element to a count. However, as discussed above, the other party would have to be an interested party under the statute, meaning that they have a financial or pecuniary interest in the matter. Not all the Rosenthal witnesses may be interested parties under the Dead Man's Statute, but in a situation where an individual testifying on behalf of Mr. Rosenthal has a pecuniary interest in the matter and testifies to an essential element of the case, Mr. Bavely is excused from corroborating his testimony as to that element.

b. Corroboration is "heightened" for certain survivors, such as doctors.

Where parties to a dispute have a confidential relationship, the surviving adverse or interested party has a heightened corroboration requirement. *Diehl v. Butts*, 255 Va. 482, 489 (1998). A doctor-patient relationship is such a relationship. *Id.*

The normal corroboration requirement is a scintilla of evidence supporting a surviving adverse or interested parties' testimony to an essential element of the cause of action that, if not corroborated, would be fatal to the decedent's case. *Johnson*, 264 Va. at 32. Since the Court found no guidance as to how much more evidence is necessary above a "scintilla" of evidence, it must conclude that the heightened requirement for corroboration for confidential relationships means more than a scintilla of evidence.

5. When during the trial must the Court rule on corroboration?

The timing of the corroboration requirement is the most unusual part of the Dead Man's Statute. Ordinarily, the Court takes great effort to keep the jury from seeing and hearing inadmissible evidence. It routinely takes objections out of earshot of the jury and makes appropriate rulings *in limine*.

However, the Court cannot rule on the sufficiency of corroborating evidence until after the close of the evidence after the jury has already heard and seen the testimony. *Johnson*, 264 Va. at 33; *Varner's Ex'rs v. White*, 149 Va. 177, 185-86 (1927). If, at the close of evidence in the case, evidence is not corroborated, the Court then is directed to "clearly and distinctly instruct[] [the jury] that [the evidence] is not to be considered for any purpose." *Id.*

While the Court is confident none of the lawyers in the present cases would knowingly introduce evidence that he or she could not corroborate, some may push the outer boundaries and cross the line in the heat of a trial. Or, in other cases with different lawyers, an unscrupulous lawyer may want to poison a jury with evidence that should not have been admitted hoping the jury will nullify the instruction to disregard it. There is a remedy to this, albeit a harsh one. In the event a party with a corroboration requirement fails to provide the required corroboration, and if the Court finds that a jury instruction to disregard the evidence cannot fairly offset the prejudicial weight of that evidence, the Court may declare a mistrial.

III. CONCLUSION.

The Dead Man's Statute contains a broad hearsay exception for almost all "entries, memoranda, and declarations" purportedly by a deceased or incapacitated person. VA. CODE ANN. 8.01-397; VA. SUP. CT. R. 2:804(b)(5). It also contains a general corroboration requirement for surviving adverse or interested parties. *Id.* The Court will apply the Dead Man's Statute in these trials as clarified herein to the best of its ability, recognizing the procedural complexity.

Appropriate Orders are attached making rulings on the cross motions *in limine* in the *Lohman* matter and announcing the approved Dead Man's Statute jury instruction template for the *Rosenthal/Bavely* matter.

Kind regards,

[redacted]

David A. Oblon
Judge, Circuit Court of Fairfax County
19th Judicial Circuit of Virginia

Enclosures

OPINION LETTER

V I R G I N I A :

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

RBD OF VIRGINIA, *et. al.* Plaintiffs, v. DONALD B. BAVELY, Defendant.	)))))))	CL-2018-11424

DONALD B. BAVELY, Plaintiff, v. GENEVA ENTERPRISES, INC., *et. al.*, Defendants.	)))))))	CL-2018-13979

GENEVA ENTERPRISES, INC., *et. al.* Plaintiff, v. DONALD B. BAVELY, Defendant.	)))))))	CL-2018-18124

AV AUTOMOTIVE, L.L.C., *et al.* Plaintiffs, v. DONALD B. BAVELY, *et al.* Defendants.	)))))))	CL–2019–2804

DONALD B. BAVELY, Plaintiff, v. JAGUAR LAND ROVER OF CHANTILLY, LLC, *et. al.*, Defendants.	))))))))	CL-2019-13200

DONALD B. BAVELY, Plaintiff, v. DEALERPPC. LLC., Defendant.	))))))))	CL-2020-7497

DONALD B. BAVELY, Plaintiff, v. FAIRFAX IMPORTS, INC., *et. al.* Defendants.	))))))))	CL-2020-18740

ORDER

THIS MATTER came before the Court on the parties' mutual request for a ruling on the appropriate jury instruction concerning Va. Code § 8.01-397, Va. Sup. Ct. R. 2:804(b)(5) ("Dead Man's Statute").[1] And, for the reasons stated in the accompanying Opinion Letter issued this day, which is incorporated into this Order by reference, it is

[1] The Court made pre-trial rulings on all the expected jury instructions for these trials for efficiency purposes. All such rulings, including the present one, are without prejudice and are subject to events at trial that could make any instruction moot or in need of modification.

ORDERED the Court disavows and vacates any prior orders governing the Dead Man's Statute evidentiary procedure in these cases;

ORDERED the Court will instruct the jury as to the Dead Man's Statute as follows:

Instruction 503(B)

You cannot render a verdict for or against the Rosenthal Estate based on the uncorroborated testimony of Donald B. Bavely[2] [and any interested parties who testify].

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.

One who must corroborate testimony does not have to corroborate all of his or her testimony, but only testimony related to an essential element of a claim in the lawsuit; and

ORDERED the Court will determine at the close of the evidence (or a motion to strike), if requested by a party, (1) whether the record contains a scintilla of corroborating evidence supporting anyone required to corroborate testimony (or, evidence supporting heightened corroboration, if applicable); and (2) whether a party is relieved from a corroboration requirement due to the testimony of another adverse or interested party.

THIS CAUSE CONTINUES.

SEP 2 1 2022

Entered

[redacted]

Judge David A. Oblon

ENDORSEMENT OF THIS ORDER BY COUNSEL OF RECORD FOR THE PARTIES IS WAIVED IN THE DISCRETION OF THE COURT PURSUANT TO RULE 1:13 OF THE SUPREME COURT OF VIRGINIA. OBJECTIONS MUST BE FILED WITHIN 10 DAYS.

[2] This assumes the Court finds no interested party testifies on behalf of the Rosenthal Estate.

V I R G I N I A:

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

KATHRYN LOHMAN, Personal Representative of the Estate of DONNA LEE LOHMAN, Plaintiff,	)	
v.	)	CL–2017–14850
Reston Hospital Center, LLC, et. al. Defendants.	)	

ORDER

THIS MATTER came before the Court upon Defendant's Motion *in Limine* to Exclude Statements of Decedent at Trial, and upon Plaintiff's Motion *in Limine* to Exclude Certain Testimony of Dr. Mehta, Dr. Murakonda, and Dr. Rao, and for the reasons set forth in this Court's Opinion Letter of September 21, 2022, which is incorporated herein by reference, it is

ORDERED that the Defendant's Motion *in Limine* to Exclude Statements of Decedent at Trial is DENIED WITHOUT PREJUDICE; and

ORDERED that the Plaintiff's Motion *in Limine* to Exclude Certain Testimony of Dr. Mehta, Dr. Murakonda, and Dr. Rao is DENIED WITHOUT PREJUDICE.

THIS CAUSE CONTINUES.

[redacted]

Judge David A. Oblon

SEP 2 1 2022

Entered

PURSUANT TO RULE 1:13 OF THE RULES OF THE SUPREME COURT OF VIRGINIA, ENDORSEMENT OF THIS ORDER IS WAIVED BY DISCRETION OF THE COURT. ANY DESIRED ENDORSEMENT OBJECTIONS MAY BE FILED WITHIN TEN DAYS.