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IN THIS ISSUE


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Dead Man Talking

By Mark S. Lindensmith

Here is a peculiar feature of Virginia evidence law that might seem counterintuitive to some attorneys, or even downright baffling to others. Sometimes a Dead Man can tell tales, but a survivor cannot. Let's take an example.

I.M. Oldman, is preparing to check his mailbox which is next to the street. C. Les Driver comes along in his light blue Toyota pickup truck, driving too fast and distracted by a text message on his cell phone. His truck veers slightly off the road and brushes the side of Mr. Oldman, just enough to spin Mr. Oldman around and knock him to the ground, where he strikes his head hard on the pavement. Driver gets about halfway down the block, glances in his review mirror, and sees Mr. Oldman lying on the ground. By the time he goes around the block and gets back to Mr. Oldman lying by his mailbox, several minutes have passed, and he sees Mrs. Oldman and her next-door neighbor bending down and talking to Mr. Oldman.

Continued on next page

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When Driver pulls up and gets out of his Toyota truck, Mr. Oldman's neighbor says to Driver, "Oldman just told us a light blue Toyota truck suddenly swerved off the road and hit him, and then he hit his head."

Driver doesn't say anything, but turns to Mr. Oldman to question him, to ask if he's sure about what happened, but Mr. Oldman is now unresponsive. The rescue squad arrives and rushes Mr. Oldman to the hospital, but he dies on the way there without regaining consciousness. About 20 minutes later, as the police are taking statements at the scene, Driver tells the police that he didn't do anything wrong, that he was traveling normally in his lane of travel, and that Mr. Oldman just suddenly stepped into the side of his truck without any warning, and that's how he ended up injured at the side of the road.

The Administrator of Mr. Oldman's Estate later files a civil case against Driver alleging that Driver wrongfully caused Mr. Oldman's death by driving in a negligent manner. At trial of that action, Mr. Oldman's (the Dead Man's) side of the story can come into evidence (through the hearsay testimony of Mr. Oldman's neighbor), but Driver (the person who survived the pedestrian-truck encounter) most likely will not be able to tell his side of the story to the jury. This comes about through the operation of a Virginia statute (appropriately referred to as Virginia's Dead Man's Statute), *Virginia Code* Section 8.01-397, which provides in two pertinent parts:

> **[1]** In an action by or against a person who, from any cause, is incapable of testifying, or by or against the committee, trustee, executor, administrator, heir, or other representative of the person so incapable of testifying, no judgment or decree shall be rendered in favor of an adverse or interested party founded on his uncorroborated testimony. **[2]** 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.

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Va. Code § 8.01-397 (bracketed numbers added). *See also Va. R. Evid.* 2:804(b)(5) (hearsay exception for statements made by person no longer capable of testifying). In this instance, Mr. Oldman (the Dead Man) is the person or party who is **"incapable of testifying"** at trial regarding what happened at the mailbox that day – because he is dead.

At trial, Driver wants to testify about his version of events. Driver wants to tell the jury: "Here is what actually happened. I saw this elderly man near his mailbox as I was approaching the area. I was driving within the speed limit and carefully. I even beeped my horn to make sure the old guy stayed out of the road. But at the last instant the man suddenly turned towards the mailbox. Without paying any attention he suddenly backed out into the road and into the side of my truck. There was not enough time for me to avoid him." Driver's testimony, if believed, would defeat the Administrator's claim since it would show that Driver was not at fault and instead Mr. Oldman's death was caused by his own contributory negligence. But there is no physical evidence and no other eyewitness testimony which corroborates Driver's version of events.

Driver is the defendant in the lawsuit by Mr. Oldman's administrator, and is thus an adverse or interested party. Due to the provisions of the first part of the statute, **"no judgment or decree shall be rendered in favor of an adverse or interested party [Driver] founded on his uncorroborated testimony."** If there is no eyewitness testimony (other than Driver's testimony) or physical evidence to corroborate Driver's testimony about what happened when he drove by Mr. Oldman's mailbox then, under the first part of the Dead Man's Statute, Driver must not be allowed to obtain a judgment in his favor based on his uncorroborated description of the incident – that Mr. Oldman just stepped suddenly into the side of his truck, and that he (Driver) did nothing wrong. The uncorroborated testimony by Driver (the survivor of the mailbox encounter) should not be admitted into evidence to be considered by the jury in the case. *See Shumate v. Mitchell*, 296 Va. 532, 548, 822 S.E.2d 9, 16-17 (2018); and *Johnson v. Raviotta,* 264 Va. 27, 36, 563 S.E.2d 727 (2002) ("Corroboration for purposes of the dead man's statute cannot come 'from the mouth of the witness sought to be corroborated'") (citing and applying *Varner's Ex'rs v. White*, 149 Va. 177, 185, 140 S.E. 128 (1927); and *Ratliff v. Jewell*, 153 Va. 315, 326, 149 S.E. 409 (1929)).

Under the second part of the Dead Man's Statute, however, even though Mr. Oldman is no longer around to testify about what happened at the mailbox that day, and even though the out-of-court statements he made to his wife and neighbor about the light blue Toyota truck veering off the road, hitting him and knocking him to the pavement might otherwise be considered to be inadmissible hearsay,[1] Mr. Oldman's neighbor (but maybe not his widow, since she is an "interested" party) should be allowed to testify about what he heard Mr. Oldman say: that the light blue Toyota suddenly veered off the road and knocked him down. It should be noted that the hearsay exception in the Dead Man's Statute applies to statements made by the Dead Man whether his estate is the plaintiff or

[1] "'Hearsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." *Va. R. Evid.* 2:801(c). In this particular scenario, Mr. Oldman's statements made immediately after the incident (before the dust had settled, so to speak), and while the wings of the Angel of Death were beating about his head (anticipating his own death), could be considered statements that come within exceptions to the rule against hearsay. Therefore, the statement about the blue Toyota truck hitting him might come into evidence even without the hearsay exception contained in the Dead Man's Statute, i.e., under (1) the exception for *res gestae* or an excited utterance [*Va. R. Evid.* 2:803(2)], or (2) the exception for a statement made in anticipation of impending death [*Va. R. Evid.* 2:804(b)(2)]. Even if one of these exceptions weren't applicable, though, the hearsay exception built into the Dead Man's statute (*see* § 8.01-397; and *Va. R. Evid.* 2:804(b)(5)) would allow the neighbor to testify about what Mr. Oldman told them about the blue truck hitting him, as long as the evidence is considered relevant. *See Shumate*, 296 Va. at 546, 822 S.E.2d at 15-16.

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the defendant in the lawsuit. *See Shumate*, 296 Va. at 548, 822 S.E.2d at 16-17 (the circuit court did not err in admitting the testimony of a decedent's son recounting the defendant decedent's description of a collision because the Dead Man's Statute applied, and the decedent's hearsay statements were admissible into evidence; also, the son had no pecuniary interest in the case).

Thus, under Virginia statutes and the *Virginia Rules of Evidence*, sometimes a Dead Man can tell tales that will later be admissible into evidence in litigation involving an encounter with a Live Man, but the Live Man will not be able to tell a tale about what happened without other evidence corroborating the survivor's side of the story. To some, this might seem counterintuitive or unfair, but as the *Shumate* Court pointed out, that is, in essence, what the Dead Man's Statute provides. 296 Va. at 548, 822 S.E.2d at 16-17. Regardless of whether "the party asserting the Dead Man's Rule could bring in a plethora of out of court, unreliable hearsay of what the decedent said to others to bolster unfairly the decedent's case" – that "is actually an accurate statement of the statute." *Id*. The Court also stated: "Regardless of whether the rule is just or even justified, 'we have long concluded that it is the role of the General Assembly, not the courts, to change a rule of law that has been relied upon by the bench and bar for many years.' *Van Dam v. Gay*, 280 Va. 457, 463, 699 S.E.2d 480 (2010). In this case, 'many years' is a century." *Id*.

Several years ago, a proposal was made at Virginia's Boyd-Graves Conference to "amend" the Dead Man's Statute. The proponents argued the statute is unfair and is based on an old principle that has no logical support and has been rejected by other states. The opponents of the proposal argued that there clearly was a just and fair reason for the statute, which had stood the test of time for over 100 years. They argued that a person who has negligently caused the death of another person should not be able to avoid responsibility by relying on his own uncorroborated, self-serving version of events since his own wrongful conduct has prevented the other person from disputing that version at trial. See *Hereford v. Paytes*, 226 Va. 604, 610, 311 S.E.2d 790, 793 (1984) (stating that the salient purpose of *Virginia Code* Section § 8.01-397 is "to prevent [] an opportunity for the survivor to prevail by relying on his own unsupported credibility, while the opponent, who might alone have contradicted him, is silenced by death"). The opponents also argued that the statutory amendments which were proposed would not merely "amend" the Dead Man's Statute but would virtually abolish it. The proposal failed to win approval by the Boyd-Graves Conference and the statute has remained largely unchanged.


Alistair D. Edwards

Short-term Property Rentals: Premises Liability and Duties of Care

By Alistair D. Edwards

Short-term rentals through online sites operated by Airbnb, Vacation Rental By Owner (VRBO), and realty companies are becoming more and more commonplace around the Commonwealth. These internet sites allow a property owner to list her property for rent on a short-term basis (even for one night) and for a fee the company operating the internet site handles the transaction. Sometimes, the persons and entities providing these short-term rentals do not do an in-depth check on the condition of the properties between rentals.

Personal injuries to guests are bound to happen at some of these properties. These incidents may give rise to premises liability claims against those involved in providing the short-term rentals. These claims raise questions regarding the nature of the legal relationship between the parties involved and the duties owed to the guest. The relationship may be that of a landlord and tenant, with the landlord therefore owing only very limited duties to the renter. Or maybe, in some circumstances, the relationship will be viewed as that of an innkeeper and guest, casting upon those who provide the rental property an elevated duty of care with respect to the condition of the property.

In *Haynes-Garrett v. Dunn*, 296 Va. 191, 818 S.E.2d 798 (2018), the Virginia Supreme Court dealt with the nature of a short-term rental relationship and the duty owed by an owner of a short-term vacation rental to a guest. Drew and Cynthia Dunn owned a second home ("Dolphins Paradise") in Virginia Beach which they sometimes made

available for short-term rental. They contracted with Sandbridge Properties, Inc. d/b/a Siebert Realty to rent and manage the property. June Haynes-Garrett did online research to find a vacation rental for her extended family. Based on that research, Haynes-Garrett chose Dolphins Paradise. She sent a check to Siebert Realty for the rental fee. She never spoke directly with anyone from Siebert and never met with or had any communication with the Dunns before she rented the home. At the beginning of the rental, a relative of Haynes-Garrett went to the realty office, picked up the keys and instructions, and picked up two tubs of linens provided by Siebert. Later that day, Haynes-Garrett tripped on a raised strip on the flooring, fell onto the ceramic tile floor, and was injured. Haynes-Garrett sued both Siebert and the Dunns for negligence. Haynes-Garrett contended that the flooring was in a dangerous condition and Siebert and the Dunns had breached duties owed to her.

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At trial, at the end of Haynes-Garrett's evidence, Siebert and the Dunns both filed motions asking the trial court to strike the evidence on the grounds that as a matter of law it was insufficient for a jury to impose liability upon them. The trial court granted both motions to strike and entered judgment in favor of Siebert and the Dunns. On appeal, the Supreme Court of Virginia upheld the trial court's judgment.

Does the *Dunn* decision mean that the persons and entities involved in providing short-term rentals can never be held liable for personal injuries to guests who suffer injuries due to dangerous conditions on the premises? The decision certainly should not be read that broadly. But it undoubtedly will make recovery by guests more difficult in many cases.

The only issue the *Dunn* case decided was whether under the common law the Dunns owed to Haynes-Garrett the duty owed by a landlord to a tenant or the duty owed by an innkeeper to a guest. The Supreme Court held, "under the evidence presented by Haynes-Garrett, that the Dunns only owed her the duty of care that a landlord owes its tenant." 296 Va. at 200, 818 S.E.2d at 802 (emphasis added). Under the common law a landlord owes almost no duty to a tenant with respect to the condition of the property.[1] On the other hand, an "innkeeper owes a duty 'to take every reasonable precaution to protect the person and property of their guests and boarders.'" 296 Va. at 201, 818 S.E.2d at 803 (quoting *Crosswhite v. Shelby Operating Corp.*, 182 Va. 713, 716, 30 S.E.2d 673 (1944)).

The Supreme Court held that under the particular facts of the case the Dunns, the owners, only owed a duty of care to the plaintiff that was commensurate with that of landlord and tenant. The Court noted that the owners lived far away from Virginia Beach in Northern Virginia, the owners were not allowed to enter the premises without prior notification to the realty company managing the property, and the owners provided no food service, room service, daily maid service or security for the premises. The Court concluded that, "the evidence shows the parties intended for Haynes-Garrett and her family to have the right of exclusive possession and enjoyment of the leased premises during the term of their occupancy." 296 Va. at 203, 818 S.E.2d at 804. As a result, the Court held that the Dunns and Haynes-Garrett were in a landlord-tenant relationship.

The minimal nature of the duty owed by a landlord to a tenant obviously means that a person obtaining a short-term rental of property who is injured by a dangerous condition on the property will often be unable to recover unless he can present evidence which is sufficient to allow a jury to reasonably find that the parties were involved in an innkeeper-relationship rather than a landlord-tenant relationship. The *Dunn* holding thus will be a serious obstacle to recovery by a short-term lessee in cases where the facts involved are essentially the same as those involved in that case.

The *Dunn* holding can perhaps be avoided, however, in future cases if a guest injured on a short-term rental property can establish facts distinguishable from the facts involved in Dunn. The details of the short-term rental agreement and the actual conduct of those involved in the performance of the agreement may provide evidence that could allow a jury to reasonably find that the rental relationship should be treated as involving an innkeeper/guest relationship. For example, Airbnb allows an owner to rent out a room in a house while the owner remains on the premises. In this situation, the guest could argue that unlike *Dunn* she was not in exclusive possession and enjoyment of the rented area. Also Airbnb and similar rentals have a designated host who stands ready to provide assistance to the guest upon short notice throughout the rental (thereby resembling the "front desk" or concierge at a hotel). The host may sometimes, upon request, provide items and services to guests during the stay, such as bringing

[1] *See Isbell v. Commercial Inv. Assocs.*, 273 Va. 605, 611, 644 S.E.2d 72, 74 (2007).

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to the property a broom, a coffeemaker, or toaster. The host may also provide suggestions to the guest for dining choices and local attractions. The host is often responsible for cleaning bed linens and towels. These and other circumstances would make the relationship more like an innkeeper/guest relationship than a landlord-tenant relationship.

It should also be noted that the *Dunn* holding may have only a limited effect at the demurrer stage since the *Dunn* decision did not involve a demurrer but instead involved a motion to strike the evidence at trial. Even if the only duty owed is the duty that a landlord owes to a tenant, allegations that this limited duty was breached may sometimes be sufficient to survive a demurrer. Furthermore, a carefully drafted complaint may contain allegations which, viewed favorably at the demurrer stage, are sufficient to create the inference that the relationship the parties intended was that of innkeeper-guest. *See, e.g., Occidental Fire & Cas. Co. v. AREVA Inc.*, 102 Va. Cir. 34 (Nelson County Cir. Ct. 2019) (court distinguishing Dunn on the basis that it was decided on a motion to strike and finding that plaintiff's complaint, directly or by inference, alleged that the property was available to the public for lodging and that the relationship was intended to be that of an innkeeper-guest and overruling the defendant's demurrer).

Lawyers representing lessees injured due to dangerous conditions at short-term rental properties will also want to be sure to emphasize that the *Dunn* opinion made clear that the Supreme Court did not decide numerous issues. The Supreme Court observed that Haynes-Garrett had not preserved for appeal the issue of whether there was sufficient evidence to prove that the Dunns had breached the landlord-tenant duty they owed to Haynes-Garrett.[2]

The Supreme Court also made clear that the issue of **whether a duty of care was owed and breached by Siebert Realty was also not preserved for appeal**. This limitation of the decision is very important since it means that **the *Dunn* opinion actually did not address at all the question of what duty of care is owed to short-term rental guests by entities like Airbnb, VRBO, realty companies and others who are involved in facilitating these short-term rentals.**[3] That issue will have to be litigated and decided based upon the evidence presented in future cases.

[2] The opinion explained:

> The Dunns asserted that Haynes-Garrett's evidence established that they only owed a duty of care to Haynes-Garrett that a landlord owes its tenant and that they did not breach this duty. The circuit court sustained the Dunns' motion to strike on these grounds. Haynes-Garrett does not assign error to the circuit court's ruling that the Dunns did not **breach** their duty of care to her.
>
> Accordingly, the sole issue before us on appeal is whether the circuit court erred in ruling that the Dunns only owed a duty of care to Haynes-Garrett commensurate with that of landlord and tenant.

296 Va. 191, 199, 818 S.E.2d 798, 802 (emphasis added).

[3] The Supreme Court stated:

> Haynes-Garrett's assignment of error is limited to the issue of whether the circuit court "erred in granting the defendants' motion to strike at the end of Mrs. Haynes-Garrett's evidence *on the grounds the defendants only owed Mrs. Haynes-Garrett a duty of care commensurate with that of landlord and tenant*." (Emphasis added [by the Supreme Court in its opinion].) Siebert did not assert that it owed a duty of care commensurate with that of landlord and tenant. Rather, Siebert asserted that it owed no duty of care to Haynes-Garrett because it had no relationship with her. The circuit court sustained Siebert's motion to strike on the grounds it asserted. Therefore, the circuit court's ruling as to Siebert, that it owed no duty of care to Haynes-Garrett, is not before us on appeal.

296 Va. at 199, 818 S.E.2d at 802 (italics emphasis by Supreme Court; underlining emphasis added).

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Even in cases involving facts similar to those involved in *Dunn*, guests making short-term rentals of property will have good reason to argue that the *Dunn* holding should be modified or at least strictly limited to its facts. In *Dunn*, the Supreme Court of Virginia felt obligated to apply traditional common law principles of property law to modern short-term rentals. But those traditional common law principles governing leases of property originated at a time and under circumstances which were far different from those involved in modern short-term rentals of residential property. *See, e.g., Lindsey v. Normet*, 405 U.S. 56, 86, 92 S. Ct. 862, 881, 31 L. Ed. 2d 36, 58 (1972) (noting that the traditional common law principles of landlord-tenant law have ancient origins in the "feudal culture in which property law evolved"). In those ancient times, a lease of property was treated as the conveyance of an estate in land. *Id*. As a result, under the old common law the tenant was viewed as the party responsible for the condition of the premises and the landlord owed almost no duty regarding the condition of the premises.

But modern short-term rentals of residential property bear little or no resemblance to the circumstances under which the common law governing leases of property evolved. These modern relationships often do not clearly fall into either the landlord-tenant category or the innkeeper/guest category. The parties to a rental contract which lasts only a month, or a week, or merely a day clearly do not actually expect that the person staying at the property will inspect and maintain the property. Certainly, the guest expects the opposite – that the persons providing the rental of the property will inspect and maintain it in good condition.

Despite the very different circumstances involved in modern short-term residential rental contracts, however, the ancient and outdated common law principles may continue to be applied to these modern relationships unless legislative changes in the law are made. Continuing application of these hoary principles of the common law to these new internet-assisted relationships may no longer adequately address the realties and may lead to numerous problems.[4]

With the increasing popularity of short-term residential rentals around the Commonwealth, it may be necessary for the General Assembly to step in and take up this issue. Other states have addressed vacation rentals by enacting specific legislation on the subject. This point was even noted by the Court in *Dunn* at fn. 7 of the Court's opinion. Perhaps the time has come for the Virginia General Assembly to enact legislation addressing these modern relationships and transactions.

Finally, it should be noted that even the persons and businesses providing short-term rentals of property may ultimately have reason to regret decisions like the *Dunn* opinion, which view the relationship as a landlord-tenant relationship. For instance, if the renter in a short-term rental overstays the period of the rental and refuses to vacate the premises, **would all of the requirements that apply to evictions of tenants have to be met in order for the "landlord" to force the renter to leave the property?** What if the renter has few assets and is essentially judgment-proof, so that the owner or "landlord" has little or no remedy for the damages caused by the "holdover tenant"? *See* Article: "iTenant: How The Law Should Treat Rental Relationships In The Sharing Economy," 59 *Wm. & Mary L. Rev.* 731 at fns. 2 to 7 and accompanying text (2017). These and other potentially serious problems were not considered by the Supreme Court of Virginia in *Dunn*. They may cause the Court to modify its approach to modern short-term rentals in future cases.

[4] One scholarly article asserts: "The result for Airbnb hosts is a legal limbo: either they are treated as landlords, subject to burdensome eviction laws, or they are considered black-market hoteliers, hesitant to use local law enforcement to evict guests because regulators have outlawed short-term rentals. This limbo has created a quasi-underground marketplace, with unclear legal and regulatory guidelines--an unacceptable approach to a fast-growing sector of the modern economy." Article: "iTenant: How The Law Should Treat Rental Relationships In The Sharing Economy," 59 *Wm. & Mary L. Rev.* 731, 733 (2017).

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