Doctors vs. the Dead Man: Why Application of North Carolina Rule of Evidence 601(c) Breeds Injustice in Wrongful Death Suits Arising from Alleged Medical Malpractice*

Dead man's statutes were once a popular method to regulate the competency of witnesses and protect estates against fraudulent claims. By prohibiting individuals from testifying about conversations and transactions with a decedent, states effectively ensured that estates were not targeted by claims that were perhaps made in bad faith. The statutes, however, have been heavily criticized. Not only do the statutes usurp a jury's role in assessing credibility of testimony, but any party or witness who aims to recover from the estate on the basis of a fraudulent claim will often attempt to do so regardless of their ability to testify. Finally, the statutes exclude evidence that may be probative, thus depriving the jury of the benefit to hear all testimony related to the dispute and delegitimizing any judgment reached.

In the face of this criticism, North Carolina opted to recodify its dead man's statute as a substantively identical rule of evidence. While the general criticisms still apply, there are particular injustices that arise when the rule is applied in wrongful death suits arising from alleged medical malpractice. In such cases, the decedent's estate is the plaintiff and thus does not need protection from the fraudulent claims that led to the enactment of dead man's statutes originally. Instead, the rule as applied in these cases permits the plaintiff to bring suit but prohibits the defendant from testifying about their interactions with the plaintiff which, in medical malpractice suits, are the very interactions at issue.

In addition to the unique problems posed by the rule's application in wrongful death suits arising from alleged medical malpractice, courts continue to misstate the rule, leading to further confusion among litigants. Although the best alternative is for North Carolina to simply repeal the rule as many other states have, the hearsay exception also poses an attractive solution. At bottom, this Recent Development explores a significant gap in North Carolina case law and aims to provide a path forward for confused litigants and judges alike.

 An abbreviated version of this Recent Development appears in the North Carolina Bar Journal. *See* Adam Peoples & Taylor Belknap, *Doctors vs. The Dead Man: Why Application of North Carolina Rule of Evidence 601(c) Breeds Injustice in Wrongful Death Suits Arising from Alleged Medical Malpractice*, 26 N.C. BAR J. 3 (2021).

INTRODUCTION

State laws that govern the competency of witnesses are necessary to preserve the integrity of the judicial process. Dead man's statutes, which govern the competency of a witness to testify regarding transactions or oral communications with a decedent, were once a popular method of state regulation aimed at doing just that.[1] The purpose of dead man's statutes is to protect the estate from fraudulent claims by survivors that are often made in contractual disputes and will proceedings.[2] Although the statutes vary by state, dead man's statutes generally accomplish this purpose by prohibiting any testimony that recalls oral communications with a decedent. In other words, the dead man's statute is applicable in situations in which "[t]he survivor could testify though the adverse party's lips would be sealed in death."[3] These statutes have been subject to substantial criticism, and as a result, only a handful of states have retained them.[4]

Although North Carolina opted to repeal its dead man's statute in 1983, it was promptly replaced with its substantive equivalent, Rule of Evidence 601(c). Rule 601(c) provides that "a party shall not be examined as a witness in his or her own behalf or interest . . . against the executor, administrator or survivor of a deceased person . . . concerning any oral communication between the witness and the deceased."[5]

Considering only contractual transactions or will proceedings—the typical cases in which the dead man's statute applies—the application of the rule seems justified.[6] For example, an interested party may claim that contractual obligations accepted by the decedent have not been fulfilled.[7] In such a case, the allegation is that the estate must perform the obligations on behalf of the decedent or be held liable for breach of contract. Similarly, during a will proceeding, an interested party may attempt to testify that they are owed some asset of the estate. In these situations, the logic behind Rule 601(c) is sound, as it functions to prohibit testimony that recounts oral communications with the

1. KENNETH S. BROUN, GEORGE E. DIX, MICHAEL H. GRAHAM, D.H. KAYE, ROBERT P. MOSTELLER & E.F. ROBERTS, MCCORMICK ON EVIDENCE 92 (John W. Strong ed., 4th ed. 1992).

2. *See In re* Will of Lamparter, 348 N.C. 45, 49, 497 S.E.2d 692, 694 (1998).

3. BROUN ET AL., *supra* note 1, at 92.

4. Many states that repealed their dead man's statute recodified it in some fashion into their rules of evidence. Often, however, these versions contain additional requirements and exceptions that effectively prevent the issues discussed in this Recent Development. Herbert E. Tucker, *Colorado Dead Man's Statute: Time for Repeal or Reform?*, 29 COLO. LAW. 45, 48 (2000); *see also* JOHN HENRY WIGMORE, WIGMORE ON EVIDENCE: EVIDENCE IN TRIALS AT COMMON LAW § 578 (4th ed. 1985); BROUN ET AL., *supra* note 1, at 93; Ed Wallis, *Outdated Form of Evidentiary Law: A Survey of Dead Man's Statutes and a Proposal for Change*, 53 CLEV. ST. L. REV. 75, 82 (2005). These additional requirements and exceptions are discussed in Part IV.

5. *See* N.C. R. EVID. 601(c).

6. *See id.*

7. *See* BROUN ET AL., *supra* note 1, at 92.

decedent.[8] After all, without the decedent present to testify otherwise, a jury hears only the plaintiff's allegations of the decedent's contractual obligations or promises to bequeath certain assets. However, in a specific subset of legal actions, particularly wrongful death suits arising from alleged medical malpractice ("WDMM suits"), the application of Rule 601(c) proves problematic.

Imagine a scenario in which, prior to surgery, a doctor and her patient discuss the operative plan, the expected results, and other pre-procedure plans via phone call. There are no other individuals on the call, just the doctor and the patient having a final conversation prior to surgery. During the phone call, the doctor informs the patient that she will perform the surgery on her own but will have other senior doctors available for help if necessary. During surgery, complications arise and the primary surgeon calls for help, but ultimately none of the doctors can revive the patient. Years after the operation and the patient's death, the decedent's estate files a wrongful death suit against the doctor, alleging that she negligently performed the surgery because her decision to operate alone did not meet the requisite standard of care. In her deposition, the doctor attempts to discuss the phone conversation that she had with her patient, during which they both agreed that the doctor would proceed alone. However, when the doctor attempts to deliver this testimony, plaintiff's counsel objects on the basis of Rule 601(c). The judge rules that the doctor is prohibited from mentioning the phone call with the patient because it is a recollection of oral communications with the decedent.[9] The doctor here is subjected to a lawsuit that both requires her to recall the traumatic emotional experience of losing a patient and questions her professional judgment while her career hangs in the balance. Even worse, during the course of that lawsuit, the doctor cannot defend herself by recounting the private conversations between her and the patient that led to the course of action in question.

Although the dead man's statute nobly seeks to prevent fraudulent or unfounded claims against the estate, any application of these statutes or substantively similar rules of evidence in WDMM suits is simply counterintuitive and problematic. While many jurisdictions have repealed or amended their dead man's statutes,[10] North Carolina has effectively retained its version, and case law fails to address many of its associated problems.

This Recent Development proceeds in four parts. Part I introduces dead man's statutes generally. Part II outlines North Carolina's Rule of Evidence 601(c) and its underlying purpose. Part III examines the problems that occur when Rule 601(c) is applied in WDMM suits, and Part IV discusses potential

8. N.C. R. EVID. 601(c).

9. *Id.*

10. *See, e.g.*, N.H. R. EVID. 804(b)(5), 807(a); TEX. R. EVID. 601(b)(3)(A); ALA. R. EVID. 601.

solutions for North Carolina based on approaches adopted in other jurisdictions.

I. A BRIEF HISTORY OF DEAD MAN'S STATUTES

Dead man's statutes originate from English common law.[11] To prevent self-interested perjury, the statutes excluded as incompetent any witnesses who had a pecuniary or proprietary interest in the outcome.[12] In the United States, most statutes limit the scope of competency requirements by providing instead that a witness is incompetent only when their testimony concerns transactions or communications with a deceased person and when the decedent's estate or representatives are parties.[13] These limited versions of the statutes are now known as dead man's statutes.

Dead man's statutes have been the subject of criticism for years, with most scholars agreeing that rejecting the testimony of a survivor is a "blind and brainless" technique.[14] One critic asserts that "in seeking to avoid injustice to one side, the statute makers ignored the equal possibility of creating injustice to the other" by limiting the survivor's ability to offer testimony.[15] Another common criticism is that one of the fundamental roles of a jury is to listen to witness testimony with a cautious ear and make their own judgments about witness credibility, thus negating any need for a rule that prohibits these survivors from testifying altogether.[16] Others have suggested that "the statute has fostered more injustice than it has prevented and has led to an unholy waste of the time and ingenuity of judges and counsel. The situation calls for more than legislative tinkering. What is needed is repeal of the statute."[17] In other words, because dishonesty can be revealed upon cross examination or suspected by an attentive jury, dead man's statutes are overbroad. The statute functions only to restrict the *honest* testimony of a survivor because anyone who aims to commit perjury will find a way to do so regardless of the limitations imposed by the dead man's statute.[18]

Criticism by scholars and courts alike has resulted in a move away from dead man's statutes in several jurisdictions.[19] Some states, including Virginia, now allow interested survivors to testify if their testimony is corroborated by

11. *See* BROUN ET AL., *supra* note 1, at 92.
12. *Id.*
13. *See id.* at 93.
14. *Id.*
15. *Id.*
16. *Id.*
17. ROBERT P. MOSTELLER, DONALD H. BESKIND, CATHERINE C. EAGLES, THOMAS W. ROSS & EDWARD J. IMWINKELRIED, NORTH CAROLINA EVIDENTIARY FOUNDATIONS app. at 39 (2d ed. 2006).
18. *See* BROUN ET AL., *supra* note 1, at 93.
19. *See id.* at 92–93.

other evidence.[20] Other states allow interested survivors to testify when permitting them to do so is necessary, in the judge's view, to prevent injustice.[21] North Carolina, however, has not followed suit.

II. NORTH CAROLINA'S FORMER DEAD MAN'S STATUTE AND RULE OF EVIDENCE 601(C)

North Carolina's former dead man's statute, originally codified at Section 8-51 of the General Statutes of North Carolina, has since been repealed and replaced by Rule of Evidence 601(c).[22] The report of the Legislative Research Commission did not contain subsection (c) of the rule at all, nor did the original versions of House Bill 96 and Senate Bill 43.[23] Had this rule passed in its original form, the dead man's statute would have been eliminated completely. However, subsection (c) was added to the rule because of a concern for fraud and hardship to estates if an interested party could testify concerning an oral communication with the deceased.[24] Despite the addition, Rule 601(c) does narrow the scope of the former Section 8-51, limiting the rule's application only to testimony about *oral communications* between the survivor and the decedent rather than *all transactions* between them.[25] Specifically, Rule 601(c) provides that "a party shall not be examined as a witness in his or her own behalf or interest . . . against the executor, administrator or survivor of a deceased person . . . concerning any oral communication between the witness and the deceased."[26] Rule 601(c) applies to will contests and suits involving contract and tort actions when the personal representative of the decedent is a party to the suit.[27] To overcome the application of this rule, the opponent must show that one of the following applies: (1) an element of the rule is missing; (2) the rule does not apply to the type of action; (3) the witness is not an interested person; or (4) the witness is not testifying about an oral communication with the decedent.[28]

20. *Id.* at 93. Many jurisdictions that have adopted this approach refine the corroborated evidence standard in their case law, thus the type of evidence that is necessary varies by jurisdiction. In Virginia, for example, the corroborating evidence must always be independent of the surviving witness such that the evidence cannot rely upon the witness' credibility. *See* Va. Home for Boys & Girls v. Phillips, 688 S.E.2d 284, 288 (Va. 2010).

21. BROUN ET AL., *supra* note 1, at 93.

22. N.C. R. EVID. 601(c).

23. N.C. LEGIS. RSCH. COMM'N, EVIDENCE LAWS: REPORT TO THE 1983 GENERAL ASSEMBLY OF NORTH CAROLINA 48 (1982), https://www.ncleg.gov/Files/Library/studies/1983/st10189.pdf [https://perma.cc/2GB7-W772].

24. MOSTELLER ET AL., *supra* note 17, at app. at 40.

25. *Id.* at app. at 39.

26. N.C. R. EVID. 601(c).

27. MOSTELLER ET AL., *supra* note 17, at app. at 39.

28. *See generally id.* (describing the applicability of the rule).

Alternatively, the opponent can show that an exception applies. Rule 601(c) explicitly provides three exceptions to the rule's applicability, preserving the exceptions that were included in the repealed Section 8-51 and adding a third. The first is when the executor is examined on her own behalf regarding the subject matter of the oral communication. The second is when the testimony of the decedent is given in evidence concerning the oral communication. The third is when "[e]vidence of the subject matter of the oral communication is offered by the executor . . . ."[29] The second exception refers to situations in which there are specific records on hand that may be placed into evidence and that illustrate the decedent's intentions. This occurs so rarely that it is not addressed in this Recent Development. The first and third exceptions are commonly referred to as the estate "opening the door" to otherwise incompetent testimony.[30] Hence, if the plaintiff estate opens the door to incompetent testimony by being examined on its own behalf about the subject matter of the oral communication or when it offers or elicits evidence about the subject matter of the communication, any protection afforded to the estate by Rule 601(c) is waived, and the opposing party may then also testify about oral communications with the decedent. Such a waiver of Rule 601(c) occurs when the objecting party *first succeeds* in supplying the incompetent evidence and continues throughout the proceeding.[31] Thus, a waiver that occurs during the serving of interrogatories or a deposition is in effect for the remainder of the dispute.

On its face, Rule 601(c) appears to pursue an admirable purpose—to prevent self-interested perjury against decedents' estates. However, despite the exceptions included within the rule itself, its application in WDMM suits poses substantial issues that have not been addressed by North Carolina courts.

III. THE PROBLEMS WITH APPLICATION OF RULE 601(C) IN WDMM SUITS

A. *The Application of Rule 601(c) in WDMM Suits Is Inconsistent with the Stated Purpose of the Rule*

Rule 601(c) was included in the North Carolina Rules of Evidence because of a concern that "fraud and hardship could result if an interested party could testify concerning an oral communication with the deceased."[32] The Supreme Court of North Carolina further detailed the purpose of Rule 601(c) in *Carswell*

29. N.C. R. EVID. 601(c)(3).

30. *See* Breedlove *ex rel.* Howard v. Aerotrim, U.S.A., Inc., 142 N.C. App. 447, 452, 543 S.E.2d 213, 216 (2001).

31. *See id.*; *see also* Wilkie v. Wilkie, 58 N.C. App. 624, 627, 294 S.E.2d 230, 231 (1982).

32. N.C. R. EVID. 601(c).

v. Greene.[33] In *Carswell*, the court admitted the defendant's testimony because the plaintiff estate waived Rule 601(c) when it first provided testimony about the same event.[34] The court recognized the defendant's right to present his side of the dispute and discussed the purpose of the statute at length,[35] ultimately issuing an opinion that is widely quoted throughout North Carolina case law:

> [The dead man's statute] is intended as a shield to protect against fraudulent and unfounded claims. It is not intended as a sword with which the estate may attack the survivor. . . . In offering evidence of [the transaction] and objecting to the evidence of [the defendant,] the plaintiff sought to pick up the shield, having first used the sword. This the law does not permit.[36]

Similarly, in *Smith v. Dean*,[37] the court upheld a defendant's testimony when the plaintiff had already entered an eyewitness's testimony about a car accident that caused the decedent's death.[38] The eyewitness claimed that after the accident, the defendant admitted he was operating the vehicle.[39] When the defendant entered his own testimony regarding this conversation, the plaintiff objected pursuant to the dead man's statute.[40] The court noted that the plaintiff attempted to use the defendant's admission as a sword while also seeking to use the shield of the statute to prevent the defendant from testifying about the same event.[41] According to the court, "Such a construction of the statute would permit the plaintiff to open the door as to who was driving wide enough for him to enter but deny the defendant the right to enter at the same door."[42]

WDMM actions are unique because they are suits in which the plaintiff is always the estate or some representative of the decedent and the doctor or hospital is always the defendant. In other words, WDMM suits are, by necessity, suits in which a deceased patient sues their medical provider for improper care. As such, there is typically no counterclaim available to the defendant doctor or hospital that has the potential to affect the rights or the value of the estate. Instead, any defense used by the doctor or hospital will

33. 253 N.C. 266, 116 S.E.2d 801 (1960).

34. *See id.* at 270, 116 S.E.2d at 804 (applying North Carolina's former dead man statute, N.C. GEN. STAT. § 8-51 (repealed 1983), which prohibited testimony recalling transactions and oral communications with the deceased).

35. *See Carswell*, 253 N.C. at 270, 116 S.E.2d at 804.

36. *Id.*

37. 2 N.C. App. 553, 163 S.E.2d 551 (1968).

38. *Id.* at 562, 163 S.E.2d at 556. The court applied North Carolina's former dead man's statute and defined a transaction with the decedent as "that which is done by one person which affects the rights of another, and out of which a cause of action has arisen." *Id.* at 558, 163 S.E.2d at 554. Thus, the car accident and the associated testimony at trial was within the scope of the statute. *Id.*

39. *Id.* at 559, 163 S.E.2d at 554.

40. *See id.*

41. *See id.* at 559, 163 S.E.2d at 555.

42. *Id.* at 560, 163 S.E.2d at 555.

simply diminish any extra gain available to the estate due to a finding of negligence and will not take from the assets originally included in that estate. Thus, a doctor does not have a stake in the litigation aside from avoiding liability and is merely playing defense in these suits, leaving the estate to seek some sort of gain. Any claim by the doctor or hospital will likely be some version of comparative fault, which is merely an affirmative defense, not a counterclaim that functions like a sword and puts the assets of the estate at risk.[43] Consequently, any WDMM suit will necessarily be an instance of the estate first seeking to use the rule as a sword rather than a shield, running contrary to the rule's stated purpose according to the aforementioned case law and presenting a unique scenario that remains largely unaddressed by North Carolina courts.

B. *North Carolina Case Law Is Silent Regarding the Application of North Carolina Rule of Evidence 601(c) to WDMM Suits*

The principal case in North Carolina that applies the former dead man's statute to a WDMM suit is *Spillman v. Forsyth Memorial Hospital*.[44] In *Spillman*, the plaintiff administratrix brought a wrongful death action against the hospital and the treating doctor because of alleged medical malpractice in the care of her deceased son.[45] The doctor was also deceased at the time of the suit.[46] The court applied North Carolina's former dead man's statute, which prohibited testimony regarding transactions as well as oral communications with decedents.[47] The court ultimately admitted the mother's testimony because it concerned a transaction between the doctor and the decedent, rather than between herself and the decedent.[48] Thus, she could recount what she had observed.[49]

Consequently, there are no North Carolina cases that *specifically* address the unique issues associated with the application of the former dead man's statute, nor Rule 601(c), in a WDMM suit. Thus, we must instead examine the patterns of the application of Rule 601(c) in cases with plaintiff estates generally, beyond only medical malpractice cases. Cases with plaintiff estates

43. To avoid or limit liability on the basis of a patient's negligence, a physician sued for malpractice must show that the patient failed to adhere to the appropriate standard of care and that the patient's negligence was a proximate or contributing cause of his or her injury. With respect to a defense of assumption of the risk, the patient's knowledge or awareness of the adverse consequences of his or her action must be shown. Kurtis A. Kemper, Annotation, *Contributory Negligence, Comparative Negligence, or Assumption of Risk, Other than Failing To Reveal Medical History or Follow Instructions, as Defense in Action Against Physician or Surgeon for Medical Malpractice*, 108 A.L.R.5th 385 (2003).

44. 30 N.C. App. 406, 227 S.E.2d 292 (1976).

45. *Id.* at 407, 227 S.E.2d at 294.

46. *Id.*

47. *See id.* at 409, 227 S.E.2d at 295; *see also* N.C. GEN. STAT. § 8-51 (repealed 1983).

48. *Spillman*, 30 N.C. App. at 409, 227 S.E.2d at 295.

49. *Id.*

are functionally similar to WDMM suits because in both scenarios the estate is the plaintiff. In other words, the only distinguishing factor between these suits is that the defendant is not a doctor and the basis for wrongful death is not alleged medical malpractice. This broader category of cases helps illuminate the functional application of Rule 601(c) in WDMM suits where North Carolina case law is unable to do so.

1. Waivers as Saviors in Wrongful Death Suits with a Plaintiff Estate

North Carolina courts rely heavily on facts and circumstances in their application of the exceptions contained in Rule 601(c). This mode of analysis has resulted in a body of case law that stretches to its limits to find a waiver that ultimately allows the testimony at issue.

For example, in *Estate of Redden ex rel. Morley v. Redden*,[50] the decedent's estate sued the decedent's wife for a fraudulent transfer of money, and the plaintiff estate failed to object to her statement during the deposition that she was merely doing "what [her husband] directed."[51] Although the court ultimately held that the estate had not waived Rule 601(c) because of its failure to object to the aforementioned statement, the court's opinion illustrated the minimal requirements of a waiver.[52] The court noted that it was unclear whether the wife's testimony referenced oral communications with the decedent or if the directives she referred to were contained in the written power of attorney executed in her favor.[53] The written power of attorney was not in the record, so it remained unclear whether the wife's testimony was in reference to oral communications at all and thus whether the testimony was even within the scope of Rule 601(c).[54] The court left open the possibility that if it were proven that the directives the wife referred to were, in fact, given via oral communication, the estate's failure to object to the testimony could have been a waiver of Rule 601(c).[55]

In *Redden*, the wife's mere mention that she did what her husband directed was enough for the court to concede that if these directives were in the form of oral communications, a waiver may have occurred because of the estate's failure to object.[56] The exception contained within Rule 601(c) states that a waiver occurs when the testimony concerns the "subject matter of the oral communications with a decedent."[57] Therefore, *Redden* sets a low bar for the

50. 194 N.C. App. 806, 670 S.E.2d 586 (2009).
51. *Id.* at 807, 809, 670 S.E.2d at 587, 589.
52. *Id.* at 808, 670 S.E.2d at 588.
53. *Id.* at 809, 670 S.E.2d at 589.
54. *Id.*
55. *Id.*
56. *Id.*
57. N.C. R. EVID. 601(c)(1).

finding of a waiver by conceding that a mere mention of directives provided by the decedent could constitute testimony that concerns the subject matter of oral communications with a decedent such that it triggers Rule 601(c).[58] When considered in conjunction with the numerous other North Carolina cases that have used a waiver to admit otherwise incompetent testimony,[59] it is clear that the application of Rule 601(c) is, to some extent, within the discretion of the courts. Because of these supererogatory efforts by the courts to find waivers and ultimately admit testimony, the purpose of the rule is diminished. What good is a rule that limits testimony if the courts are eager to apply the exceptions and will stretch their reasoning to do so?

Additionally, the frequent occurrence of unintentional waivers on the part of plaintiffs, and the fierce litigation that ensues, indicates that parties often lack an understanding of the rule in the first place. The facts-and-circumstances approach used to discern a waiver is unpredictable, making it difficult for parties to navigate litigation. Finally, the facts-and-circumstances approach is also cumbersome and inefficient. Often, individual lines of deposition transcripts or a single interrogatory response form the basis of an entire proceeding to determine whether there was a waiver.[60]

Although courts are receptive to arguments by defendants that Rule 601(c) has been waived, it would be unwise for doctors in WDMM suits to rely on this defense to render the rule inapplicable simply because of the court's discretion in applying it. So what reliable options does a doctor have to defend themselves in a WDMM suit when the estate seeks to bar them from testifying about their oral communications with the decedent? As the rule stands now, not many. Accordingly, it is important to distinguish WDMM suits from other cases in which testimony has been rejected to support the argument that doctors' testimony in WDMM suits ought to be accepted and that, categorically, Rule 601(c) should not apply to these actions at all.

2. The Role of Counterclaims in Rejected Testimony

In North Carolina wrongful death actions, only when there has been a counterclaim by the defendant has testimony been rejected on the basis of Rule

58. *See Redden*, 194 N.C. App. at 808, 670 S.E.2d at 588. Factors of importance to the *Redden* court in its holding that the dead man's statute had not been waived were the timeliness of the estate's objections on the record, and the estate's motion to strike. *Id.* However, the court noted that in the instance of the wife's testimony regarding her husband's "directives," because the estate had elicited the testimony and had not objected to the wife's answer, then if the communications were found to be oral, the conduct would constitute a waiver, and any protection of the dead man's statute would be unavailable to the estate. *Id.*

59. *See, e.g.*, Carswell v. Greene, 253 N.C. 266, 270, 116 S.E.2d 801, 804 (1960); Brown v. Moore, 286 N.C. 664, 679, 213 S.E.2d 342, 352 (1975); Bryant v. Ballance, 13 N.C. App. 181, 182, 185 S.E.2d 315, 316–17 (1971); Hayes v. Ricard, 244 N.C. 313, 323, 93 S.E.2d 540, 548 (1956).

60. *See Redden*, 194 N.C. App. at 808, 670 S.E.2d at 586.

601(c).[61] Although the rejection of testimony in wrongful death actions on the basis of Rule 601(c) is rare because courts are routinely willing to find a waiver, the rare occurrences where the testimony *has* been rejected show a clear pattern.

In *Redden*, the decedent's wife was sued by her husband's estate for constructive fraud, conversion, and breach of fiduciary duty.[62] In addition to the issue related to the testimony mentioned previously, the decedent's wife also provided direct testimony about a conversation with the decedent in which the decedent told her to move the money at issue.[63] This testimony was found incompetent when the plaintiff estate objected in a timely manner and the defendant wife had previously filed a counterclaim against the estate.[64] Because the defendant filed a counterclaim, the purpose of the rule—to protect estates from fraudulent and unfounded claims—was pertinent. The counterclaim put the assets of the estate in jeopardy such that the underlying purpose of the rule effectively justified the ultimate exclusion of the testimony in this case.

Similarly, in *Weeks v. Jackson*,[65] interrogatory responses by defendant debtors recalling oral communications with the decedent about the terms of a loan were rejected where the defendant debtors had filed a counterclaim against the estate.[66] The court reasoned that no waiver had occurred because the interrogatories served on the defendants targeted the "genuineness" of the note and did not request any specific admissions about conversations with the decedent.[67] As in *Redden*, the defendants in *Weeks* had filed a counterclaim against the estate;[68] thus, the rights of the estate were vulnerable to a judgment when the judge decided whether to admit the evidence.

Although North Carolina case law has not explicitly discussed the application of Rule 601(c) to WDMM suits, the plaintiff estate line of cases presents two patterns of application for Rule 601(c) in a similar context. The first is for courts to find a waiver and allow the testimony. The second is for courts to reject the testimony, but as discussed in this section,[69] this has only occurred when the defendant filed a counterclaim putting the assets of the estate at risk. Because WDMM suits can be distinguished from those where testimony has been rejected,[70] application of Rule 601(c) in WDMM suits is unnecessary.

61. *See, e.g.*, *id.*; Weeks v. Jackson, 207 N.C. App. 242, 249, 700 S.E.2d 45, 49–50 (2010).

62. Est. of Redden *ex rel.* Morley v. Redden, 179 N.C. App. 113, 114–15, 632 S.E.2d 794, 796 (2006).

63. *Id.* at 114, 632 S.E.2d at 769.

64. *Redden*, 194 N.C. App. at 807, 670 S.E.2d at 587–88.

65. 207 N.C. App. 242, 700 S.E.2d 45 (2010).

66. *Id.* at 248–49, 700 S.E.2d at 49–50.

67. *Id.*

68. *Id.* at 242–43, 700 S.E. 2d at 46.

69. *See supra* notes 62–68 and accompanying text.

70. As discussed in this section, testimony has only been rejected in cases with a counterclaim by the defendant.

C. *What Makes WDMM Suits Unique?*

Weeks and *Redden* are the principal cases in North Carolina involving a plaintiff estate and testimony rejected on the basis of Rule 601(c). In both of those cases, the defendants filed a counterclaim against the estate, creating a risk of loss to the estate in the event of a fraudulent or unfounded claim. Thus, the rule as applied in counterclaim cases is consistent with the intended function and underlying purpose of the rule.

WDMM actions are distinguishable from the cases mentioned above where the defendant filed a counterclaim.[71] In WDMM suits, doctors and hospitals merely defend using claims of comparative fault. Comparative fault simply prevents a finding of negligence as well as any judgment award to the estate. The filing of a counterclaim, however, is distinct because unlike a mere comparative fault defense used by doctors and hospitals, a counterclaim affects the rights of the estate and its assets. A counterclaim creates a possibility that the defendant may obtain a judgment against the estate. Therefore, the judgment has the potential to diminish the estate. In short, the filing of a counterclaim activates the shield of Rule 601(c) and justifies its application on the basis of the rule's stated purpose—to protect the estate from unfounded and fraudulent claims.

Although North Carolina case law applying Rule 601(c) has not specifically addressed WDMM suits, the court opinions that do exist are useful in gaining insight to Rule 601(c) generally, and even these interpretations suggest that the rule is not meant to apply in circumstances like those in a WDMM suit.

D. *Courts' Inconsistent Recitation of Rule 601(c) and Its Implications*

North Carolina case law often paraphrases Rule 601(c) as applying only to *actions* against the estate rather than testimony against it.[72] For example, the *Godwin* court stated that witness testimony is incompetent when the witness is an interested party, the testimony relates to oral communications with the decedent, the witness is testifying on their own behalf, and when "the *action* is against the personal representative of the deceased."[73] This recitation of the rule appears in a number of North Carolina cases[74] and seems to require that the estate is the defending party. Although this is how some dead man's statutes

71. *See supra* Section III.B.2.

72. *See, e.g.*, Godwin v. Wachovia Bank & Tr. Co., 259 N.C. 520, 528, 131 S.E.2d 456, 462 (1963); *In re* Will of Hester, 84 N.C. App. 585, 595, 353 S.E.2d 643, 650–51 (1987); *In re* Will of Lamparter, 348 N.C. 45, 50, 497 S.E.2d 692, 695 (1998); *In re* Barnes, 157 N.C. App. 144, 152, 579 S.E.2d 585, 590–91 (2003); *In re* Will of Baitschora, 207 N.C. App. 174, 182, 700 S.E.2d 50, 56 (2010); Breedlove *ex rel*. Howard v. Aerotrim, U.S.A., Inc., 142 N.C. App. 447, 451–52, 543 S.E.2d 213, 216 (2001).

73. *Godwin*, 259 N.C. at 528, 131 S.E.2d at 462 (emphasis added).

74. *See, e.g.*, Hayes v. Ricard, 244 N.C. 313, 323, 93 S.E.2d 540, 548 (1956).

are written in other states,[75] this is an inaccurate recitation of Rule 601(c). Instead, Rule 601(c) only requires that the *testimony* be directed at the estate in order to fall within the scope of the rule, meaning that Rule 601(c) still applies when the estate is the plaintiff and the defendant merely testifies against it.[76] This erroneous recitation does, however, provide insight into courts' understanding as to just how this rule is meant to apply. Judges appear to recognize that the rule is intended to apply only when there is a claim (including a counterclaim) brought against the estate. In other words, judges perceive the rule in accordance with its purpose—to protect the estate like a shield—not to attack defendants as a sword.

While this erroneous paraphrasing helps illuminate judges' understanding of the rule, it further muddies the waters for litigants. Explicitly rejecting the rule's application in WDMM actions is in line with its underlying purpose and would create clarity for litigants with respect to its application.

IV. NORTH CAROLINA'S AVAILABLE ALTERNATIVES

States have taken varying approaches to dead man's statutes, providing North Carolina with a number of options for its own overhaul. These options include categorically rejecting the application of Rule 601(c) in WDMM actions, using judicial discretion, applying the corroborating evidence standard, or adopting a hearsay exception.

A. *Categorical Rejection of Rule 601(c) in WDMM Actions*

West Virginia has categorically rejected dead man's statutes in WDMM cases. In *Hicks v. Ghaphery*,[77] the West Virginia Supreme Court held that its dead man's statute did not bar any party in a WDMM suit from testifying about conversations with a deceased patient.[78] West Virginia's statute is comparable to North Carolina's Rule 601(c) as it reads: "No party . . . shall be examined as a witness in regard to any personal transaction or communication between such witness and a person at the time of such examination, deceased . . . ."[79] In finding the rule inapplicable, the *Ghaphery* court reasoned that the core issue in medical malpractice cases is the care and treatment of the patient and when the patient is deceased, "it would be patently unfair to exclude evidence of a

75. Roy R. Ray, *Dead Man's Statutes*, 24 OHIO ST. L.J. 89, 94 (1963).

76. N.C. R. EVID. 601(c). An interested person "shall not be examined as a witness in his or her own behalf or interest, or in behalf of the party succeeding to his or her title or interest, *against the executor*." *Id.* (emphasis added).

77. 571 S.E.2d 317 (W. Va. 2002).

78. *Id.* at 330 (applying W. VA. CODE § 57-3-1 (1937)).

79. *Id.* at 328.

patient's complaints . . . . In some cases, a patient's subjective description of their ailments may be the sole basis for a physician's diagnosis and treatment."[80]

The court further noted that "justice ordinarily will not prevail where only a part of the available evidence affords the only support for the judgment rendered."[81] In short, the *Ghaphery* court was of the opinion that testimony about doctor-patient conversations is crucial to understanding whether the medical care at issue satisfied the requisite standard of care, and it would be unjust to force the jury to make its decision based on only some of the relevant evidence.

Another West Virginia court later rejected the dead man's statute entirely, holding that the statute inaptly presumed that witnesses would commit perjury when asked to testify about communications with a decedent.[82] The court also noted that the rule "presumes that oath, cross-examination, and witness' demeanor will be insufficient to enable the trier of facts to detect the insincerity of the survivor witness."[83] The court's reasoning imparts the idea that doctors as witnesses and defendants in WDMM suits are under oath, cross examined, and scrutinized by a jury. These measures have effectively ensured truthful testimony on the part of witnesses for years. Therefore, there is no need for dead man's statutes generally, or Rule 601(c) specifically, to serve an identical purpose, especially when doctors in these cases have nothing to gain from fraudulent testimony and there are typically medical records that would support their account.

Finally, doctors do not sue the estate for personal gain. Instead, they are forced to defend themselves in actions that the estate has filed. In WDMM suits, the decedent's estate will not be diminished, nor can a judgment be rendered against it. Other states have recognized this circumstance and explicitly legislated around it.[84]

In accordance with the reasoning employed by other jurisdictions, North Carolina should categorically reject the application of Rule 601(c) in WDMM actions. Conversations with the decedent are at the core of most WDMM actions, and as the court in *Ghaphery* found, it is in the interest of the judicial system to admit relevant evidence that may help the jury deliver an informed verdict. Further, the system already has controls in place to gatekeep the credibility of witnesses, and in WDMM suits, the assets of the estate are not at risk, thus the credibility of the defendants is no more contentious than in any other proceeding.

80. *Id.* at 329.
81. *Id.* at 329–30.
82. *See* State Farm Fire & Cas. Co. v. Prinz, 743 S.E.2d 907, 915–18 (W. Va. 2013).
83. *Id.* at 915.
84. *See* Ray, *supra* note 75, at 94–95.

As an alternative to a categorical rejection, many of the jurisdictions that have opted to retain dead man's statutes seek to limit their application in a variety of ways. Some apply the dead man's statute or its rule equivalent only when the testimony at issue has the potential to increase or diminish the estate of the decedent.[85] Others apply the rule only when a judgment can be entered against the estate.[86] Although states address dead man's statutes' applicability in many ways, their approaches can be separated into three categories: judicial discretion, the corroborating evidence standard, and the hearsay exception.[87]

B. *The Judicial Discretion Model*

For the reasons stated above,[88] the simplest approach for North Carolina would be to follow West Virginia's lead and reject the application of Rule 601(c) in WDMM actions altogether. Other states, however, have taken varied approaches to the issue and presented possible alternatives.

The judicial discretion approach gives a trial court judge the discretion to decide whether an interested party is permitted to testify about oral communications with the decedent.[89] Arizona has adopted this model.[90] In the WDMM context, this approach would allow the trial court judge to use their discretion to decide whether a doctor may testify about their conversations with the deceased patient. This decision, however, is not entirely subject to the whims of a trial court judge's reasoning. Instead, the decision to allow a doctor's testimony is based on whether an injustice would occur if the testimony were rejected and whether there is evidence to corroborate the testimony.[91]

The discretionary approach mimics the way North Carolina courts have applied a waiver of Rule 601(c) previously,[92] and therefore still presents many of the same problems that already exist when Rule 601(c) is applied in wrongful death actions. For example, litigants would still lack clarity around the application of the rule, thus preventing proper preparation for trial.

85. *See* FLA. STAT. ANN. § 90.804 (Westlaw through Mar. 15, 2022, in effect from the 2022 2d Reg. Sess.).

86. *See* IND. CODE ANN. § 34-45-2-4(a)(3) (Westlaw through all legislation of the 2022 2d Reg. Sess. of the 122d Gen. Assemb. effective through Mar. 1, 2022); *see also* MD. CODE ANN., CTS. & JUD. PROC. § 9-116 (LEXIS through Ch. 2 of the 2022 Reg. Sess. of the Gen. Assemb.).

87. Ray, *supra* note 75, at 110.

88. *See supra* Section IV.A.

89. *See* Wesley P. Page, *Dead Man Talking: A Historical Analysis of West Virginia's Dead Man's Statute and a Recommendation for Reform*, 109 W. VA. L. REV. 897, 923 (2007).

90. ARIZ. REV. STAT. ANN. § 12-2251 (Westlaw through legislation effective Mar. 25, 2022 of the 2d Reg. Sess. of the 55th Leg. (2022)).

91. Est. of Mustonen *ex rel*. Mustonen v. Schroeder, 635 P.2d 876, 877 (Ariz. App. 1981).

92. *See supra* Section III.B.1. Discretion regarding the finding of a waiver of the dead man's statute has largely contributed to the problem that is the very subject of this Recent Development, making it difficult for litigants to navigate WDMM suits. As such, a judicial discretion approach would seem only to exacerbate the issues discussed here.

Additionally, the considerations of a trial judge in exercising this discretion, like corroboration and injustice, can be captured in the other alternatives that follow.

C. *The Corroborating Evidence Standard*

Another alternative is the corroborating evidence standard. This standard allows an interested party to testify about oral communications with a decedent when that testimony is corroborated by other admissible evidence.[93] Texas, among other states, has taken this approach.[94] The standard typically requires reference to the state's case law to inform litigants about precisely what evidence can sufficiently corroborate the testimony such that it may be admitted. Some states apply a strict standard and require that the evidence be sufficient to go to a jury.[95] Other states, like Texas, require only that the evidence "tend[s] to confirm and strengthen the testimony of the witness and show the probability of its truth."[96]

For WDMM actions, this is an appealing standard on its face. Typically, in medical malpractice suits, there is an abundance of medical records, logs, and other documents and notes that almost certainly would tend to meet a Texas-style standard for corroboration. It is worth remembering that the purpose of Rule 601(c) as it stands is to protect the estate from unfounded and fraudulent claims.[97] If the corroborating evidence standard is used, then these unfounded and fraudulent claims would not pass muster, the testimony would be rejected, and the estate would remain protected. Although the standard is attractive in WDMM actions because nearly all medical decisions are documented, the standard does not fully address criticism[98] of the logic behind the rule generally as it applies to all actions.

While the focus of this Recent Development is WDMM suits, it is important to consider the effects of these solutions as they would apply to litigation generally, beyond WDMM suits. In the event of uncorroborated testimony, this standard aligns with the (perhaps overbroad) logic behind the original dead man's statute, namely, the belief that some uncorroborated claims are fraudulent and unfounded, thus we must reject all uncorroborated claims.[99] Although the corroborating evidence approach does not negatively impact WDMM suits because most doctors will have evidence to corroborate their testimony, this solution may not be ideal when one considers its application to

93. BROUN ET AL., *supra* note 1, at 93.

94. TEX. R. EVID. 601(b)(3)(A); *see also* LA. STAT. ANN. § 13:3721 (Westlaw through the 2022 1st Extraordinary Sess.); VA. CODE ANN. § 8.01-397 (LEXIS through 2022 Reg. Sess. Acts effective May 31, 2022); WYO. STAT. ANN. § 1-12-102 (LEXIS through 2022 Budget Sess.).

95. BROUN ET AL., *supra* note 1, at 93.

96. Bobbitt v. Bass, 713 S.W.2d 217, 220 (Tex. App. 1986).

97. *See In re* Will of Lamparter, 348 N.C. 45, 49, 497 S.E.2d 692, 694 (1998).

98. *See supra* notes 14–18 and accompanying text.

99. Ray, *supra* note 75, at 111.

all litigation. In other words, in other litigation contexts, it may be more difficult to obtain corroborating evidence for the testimony at issue (one need only think of a dispute over an oral contract), in which case this standard quickly raises concerns about where to draw the line. How much corroborating evidence is enough? What is realistic in *all* litigation contexts, not just WDMM suits? Such considerations are beyond the scope of this Recent Development but certainly diminish the appeal of the corroborating evidence standard.

D. *The Hearsay Exception*

Finally, the last approach is the hearsay exception, which has been adopted in New Hampshire, among other states.[100] The hearsay exception functions in favor of both the decedent's estate as well as the defendant. Essentially, this approach allows an interested party to testify without restriction.[101] However, this approach minimizes any risk of unfounded or fraudulent claims by also permitting the estate to admit any writings or oral statements made by the decedent into evidence, which, under normal circumstances, would be excluded as hearsay.[102] In other words, the hearsay exception maintains protection for the estate by allowing it to introduce otherwise prohibited evidence of oral or written statements of the decedent. This solution effectively avoids injustice to either party, as it permits defendants to testify about their oral conversations, while the estate may rebut by introducing other evidence relating to the testimony that may otherwise be excluded.

The hearsay exception creates a clear, workable standard for judges and litigants alike. North Carolina courts issue muddied opinions when it comes to Rule 601(c) and often find a waiver of the rule to avoid its application, thereby refraining from issuing any opinions that are illuminating and helpful to litigants.[103] Here, the hearsay exception is a blanket permission for both sides to present otherwise inadmissible testimony. Not only does this create a clear standard for litigants, but it levels the playing field between estates and defendants. Under the hearsay exception, estates may remain protected in accordance with the purpose of the rule because they are permitted to enter their own evidence to rebut the testimony, and the inconsistent application of Rule 601(c) to testimony need not occur at all.

More specifically, in WDMM suits, this solution could be effective because doctors could testify about their conversations with deceased patients,

100. N.H. R. EVID. 804(b)(5), 807(a); *see also, e.g.*, HAW. R. EVID. 802(A)(3); OHIO R. EVID. 804(b)(5); R.I. R. EVID. 804(c); ALASKA R. EVID. 803(3); UTAH R. EVID. 803(3).

101. Page, *supra* note 89, at 922–23 (citing KENNETH S. BROUN, GEORGE E. DIX, EDWARD J. IMWINKELRIED, D.H. KAYE, ROBERT P. MOSTELLER & E.F. ROBERTS, MCCORMICK ON EVIDENCE § 65 (John W. Strong ed., 5th ed. 1999)).

102. *Id.*

103. *See supra* Sections III.B.1., III.D.

and estates could likewise offer any evidence they have regarding those same conversations, even if it would constitute hearsay. This facilitates thorough legal proceedings and provides both parties the ability to present as much evidence to the jury as possible, which further enhances the integrity of the judicial process whilst also functioning as a fair and clear exception for litigants.

Although many solutions have been employed by different states, the two most attractive solutions come from West Virginia and New Hampshire.[104] The easiest approach would be to mimic West Virginia, where North Carolina would simply disclaim any application of Rule 601(c) in WDMM actions.[105] This would remedy the issues discussed herein (namely, inconsistent application and an unclear standard for future litigants) with little to no consequences on the application of the rule in other circumstances. Furthermore, if North Carolina simply rejects application of Rule 601(c) in WDMM suits exclusively, the legislature could avoid sacrificing its desired protection of estates in other legal proceedings. Alternatively, North Carolina could change its rule altogether and mimic New Hampshire's approach by adopting a hearsay exception.

The hearsay exception has both advantages and disadvantages. Although this Recent Development considers WDMM actions exclusively, the hearsay approach would certainly impact the application of Rule 601(c) in other legal proceedings and thus would be a larger ask of the North Carolina legislature. In other words, such a change requires the North Carolina legislature to abandon its desired protection for estates in contractual and tort actions, or any other legal proceeding in which the rule may be applicable. Although many states have done this, North Carolina has thus far seemed averse to taking such drastic action.[106] However, the hearsay exception fosters easy application, clear legal standards, and equality among estates and defendants. Although both solutions have their merits, the West Virginia approach presents an attractive and simple opportunity for North Carolina to correct the injustice that occurs in conjunction with Rule 601(c) application in WDMM actions.

CONCLUSION

Although North Carolina has repealed its former dead man's statute in accordance with other jurisdictions, Rule 601(c) is functionally the same. Application of Rule 601(c) in WDMM actions is inconsistent with the rule's purpose and poses fundamental issues that have not been considered by North Carolina courts and are inconsistent with the rule's purpose. WDMM suits are distinguishable from case law in which Rule 601(c) has excluded testimony, and repeated interpretations of the rule state that it applies only in *actions* against

104. *See supra* Sections IV.A, IV.D.
105. *See supra* Section IV.A.
106. *See supra* Part II.

the estate. This is illustrative of the intended function of the rule and poses significant problems for litigants. Other jurisdictions have recognized the injustice precipitated by the application of dead man's statutes in WDMM suits. As such, the reforms implemented by these jurisdictions serve as models for alternatives that North Carolina must consider. In an effort to improve and limit Rule 601(c), North Carolina should either categorically reject the application of Rule 601(c) in WDMM actions or adopt a hearsay exception to ensure equality and protection for estates—a result that is certainly in accordance with North Carolina's initial endeavor.

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