

## Civil Process and Procedure

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### Series of Rulings Show that While Protections of the Dead Man’s Act are Alive and Well, Applicability of the Act is Not Guaranteed

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The Dead Man’s Act, 735 ILCS 5/8-201 *et seq.*, is a statute that limits the evidence that is admissible in matters involving a deceased party. The purpose of the Dead Man’s Act is “to protect decedent’s estates from fraudulent claims and to equalize the position of the parties in regard to giving testimony.” *Bramlett v. Vandersand*, 2020 IL App (5th) 180307, ¶ 40. In the interest of fairness, the Act prevents an interested witness from testifying adversely about matters that occurred in front of the decedent or conversations with the decedent because the decedent is not alive to refute the testimony. *Bramlett*, 2020 IL App (5th) 180307, ¶¶ 40-41.

Specifically, the Dead Man’s Act states, with limited exceptions, that: “In the trial of any action in which any party sues or defends as the representative of a deceased person or person under a legal disability, no adverse party or person directly interested in the action shall be allowed to testify on his or her own behalf to any conversation with the deceased or person under a legal disability or to any event which took place in the presence of the deceased, or person under legal disability.” 735 ILCS 5/8-201; *see also Bramlett*, 2020 IL App (5th) 180307, ¶¶ 39-41.

The Dead Man’s Act is frequently used by defendants, often in automobile cases, to bar a plaintiff from testifying about the circumstances of the accident. If there are no other witnesses to the accident, then defendants can move for summary judgment and argue that plaintiff cannot establish liability without relying on testimony that is barred by the Dead-Man’s Act. A recent series of rulings from the Illinois Appellate Court highlights the fact specific circumstances where the court will, and will not, apply the Act.

#### *Richardson v. Ward*, 2019 IL App (5th) 180444-U

On August 26, 2019, the Fifth District issued an unpublished opinion in *Richardson v. Ward*, 2019 IL App (5th), 180444-U. In *Richardson*, the plaintiff alleged that a collision occurred when the defendant, John Fitzpatrick (“Fitzpatrick”), backed out of a parking space and collided with the plaintiff’s vehicle. *Richardson*, 2019 IL App (5th), 180444-U, ¶ 4. The defendant driver died before the lawsuit was filed for reasons unrelated to the collision. *Id.* ¶ 5. While the decedent was not deposed, the plaintiff did give his discovery deposition and testified as to the collision, including that after the accident he and Fitzpatrick went to State Farm Insurance and that State Farm settled the property damage claim on behalf of Fitzpatrick by paying money to plaintiff. *Id.*

The defendant successfully moved for summary judgment arguing that there were no eyewitnesses to the accident and plaintiff, therefore, could not establish defendant’s negligence without relying on plaintiff’s own testimony. *Id.* ¶ 7. That testimony would be inadmissible under the Dead-Man’s Act. *Id.* Plaintiff argued that the defendant had waived the protections of the Dead Man’s Act because the defendant (via State Farm) paid the property damage claim, and defendant had deposed the plaintiff and elicited statements about the accident. *Id.* ¶ 9. Plaintiff further argued that he could establish defendant’s negligence by calling the State Farm employees as witnesses. *Id.* ¶ 10.

On appeal, the court held that the Dead Man's Act *did* apply and would bar plaintiff from testifying about the collision itself and conversations about the collision because plaintiff was seeking to testify on his own behalf about a conversation with the deceased about events that took place in the presence of the deceased. *Id.* ¶ 18. The court distinguished these facts by noting that the decedent had not made any admissions, thus plaintiff's testimony about the accident and conversations about the accident were both properly excluded under the Dead Man's Act. *Id.* ¶¶19-20.

The court also rejected plaintiff's argument that a statutory exception applied because: (a) State Farm paid the property damage claim of plaintiff; and (b) by deposing the plaintiff and eliciting statements about the accident the defendant waived the protections of the Dead-Man's Act. *Id.* at ¶¶ 21-24. Specifically, the court rejected that section 8-201(a) applied. Section 8-201(a) states:

If any person testifies on behalf of the representative to any conversation with the deceased or to any event which took place in the presence of the deceased, any adverse party or interested person if otherwise competent, may testify concerning the same conversation or event.

735 ILCS 5/8-201(a).

The court relied on *Pink v. Dempsey*, 350 Ill. App. 405, 410 (1st Dist. 1953), and held that disqualifying a witness under the Dead Man's Act is not waived by a pretrial examination and that taking plaintiff's deposition did not act as a waiver of plaintiff's incompetence under the Dead-Man's Act. *Richardson*, 2019 IL App (5th), 180444-U, ¶ 24.

Finally, the court held that the documents from State Farm that purportedly showed it paid for the property damage to plaintiff's vehicle on behalf of Fitzpatrick did not fall under the provisions of the Dead-Man's Act because the documents did not contain any admission by Fitzpatrick, summaries of Fitzpatrick's statements, nor a description of events that occurred in Fitzpatrick's presence. *Id.* 25. Nonetheless, the court held that even if these documents were admissible they did not create an issue of material fact to defeat summary judgment. *Id.* ¶¶ 25, 38.

### ***Eyster v. Conrad*, 2020 IL App (5th) 180261**

Only five months after *Richardson v. Ward*, the Fifth District issued an order pursuant to Supreme Court Rule 23 in *Eyster v. Conrad*, 2020 IL App (5th) 180261, holding that defendant had waived the protection of the Dead Man's Act by relying on the defendant-decedent's testimony about the collision, including his belief that plaintiff caused the accident in support of his motion for summary judgment. The primary distinction between *Richardson* and *Eyster*, is that in *Richardson* the plaintiff attempted to rely on his own testimony about events that took place in the presence of the decedent, while in *Eyster* the defendant waived the protections of the Dead-Man's Act by relying on the decedent's own testimony about events. *Eyster*, 202 IL App (5th) 180261, ¶ 11.

In *Eyster*, the plaintiff alleged that the defendant negligently entered his lane of travel and sideswiped plaintiff's vehicle. *Id.* ¶ 1. The defendant died while the suit was pending for reasons unrelated to the collision and defendant eventually moved for summary judgment. *Id.* In support of defendant's motion, he attached the transcript of the defendant-decedent's discovery deposition and an affidavit of the responding police officer. *Id.* ¶ 5. Defendant argued that plaintiff could not testify about the accident itself under the Dead Man's Act. *Id.* ¶¶ 6-10. In response, plaintiff argued that he could establish negligence because the defendant waived the protections of the Dead-Man's Act by attaching the affidavit of the responding officer, thereby introducing facts about the accident, and the responding officer was not a

party or otherwise directly interested in the case, so his testimony would not be barred under the Dead-Man’s Act. *Id.* ¶ 12. The trial court granted summary judgment. *Id.* On appeal, the Fifth District reversed and remanded. *Id.*

On appeal, the Fifth District reiterated that “the representative [of the decedent] may waive the protections of the Dead Man’s Act either by offering testimony about an event or conversation that took place in the presence of the decedent or by admitting the deposition of the decedent in evidence.” *Id.* ¶ 20. While plaintiff’s arguments were focused on the testimony of the responding officer, the court held that by attaching the defendant-decedent’s deposition transcript, and invoking the decedent’s testimony in arguing the merits of the motion, which included testimony by decedent as to why he believed the plaintiff caused the accident, the defendant waived the Dead-Man’s Act. *Id.* The court explained that by relying on the decedent’s discovery deposition, “defendant ‘called’ the decedent as his own witness to provide specific testimony about an event that occurred in decedent’s presence to support his motion for summary judgment and thereby waived the protections of the Act. *Id.* As a result, the plaintiff should have had the opportunity to present evidence on the same subjects.” *Id.* ¶ 20. The court held that it was error to bar plaintiff’s testimony about the accident and any conversations he had with the decedent, and that if it had been considered, plaintiff’s testimony created a genuine issue of material fact sufficient to overcome summary judgment. *Id.* The court further held that the responding officer was not an adverse party or person directly interested in the action and his testimony would not be barred by the Dead-Man’s Act. *Id.* ¶¶ 30-32.

### ***Bramlett v. Vandersand, 2020 IL App (5th) 180307***

On February 18, 2020, the Fifth District issued another ruling in *Bramlett v. Vandersand, 2020 IL App (5th), 180307*. Unlike *Richardson* and *Eyster*, this case did not involve an automobile accident and was published. *Bramlett v. Vandersand, 2020 IL App (5th), 180307, ¶ 1.*

The plaintiff, Phil Bramlett, filed a negligence action against his mother-in-law, Dorothy Jean Edwards, alleging that he sustained injuries as a result of Dorothy’s failure to turn off the power to an outdoor light fixture that Dorothy asked plaintiff to repair. *Bramlett, 2020 IL App (5th), 180307, ¶ 3.* Before filing the lawsuit, plaintiff’s counsel went to Dorothy’s home, at Dorothy’s request, and took her statement regarding the incident, including Dorothy’s statement that plaintiff had asked her to turn off the power but she forgot and failed to do so. *Id.* ¶ 4. Dorothy passed away after the lawsuit was filed. *Id.* Defendant filed a motion for summary judgment asserting that Dorothy’s statement was barred by the Dead Man’s Act. *Id.* ¶ 24. The trial court granted the motion, and the plaintiff appealed. *Id.* On appeal, the Fifth District held that Dorothy’s statement was not barred by the Dead Man’s Act because “an admission made by a party is admissible against that person’s estate after death,” and cited to *In re Estate of Rennick, 181 Ill. 2d 395, 405 (1998).* *Id.* ¶¶ 40-44. The court held that Dorothy’s statement contained admissions, and thus, were not barred by the Dead Man’s Act. *Id.*

### ***Mossholder v. Statler, 2020 IL App (3d) 190340-U***

On July 22, 2020, the Third District issued an unpublished opinion in *Mossholder v. Statler, 2020 IL App (3d) 190340-U, ¶ 1*, holding that the Dead Man’s Act did not bar the defendant-decedent’s widow from testifying as to her observations of the decedent’s condition moments before a fatal collision.

The plaintiff, William Mossholder, was the administrator of the estate of the plaintiff-decedent Alice Mossholder, and alleged that defendant-decedent, Norbert Statler, was negligent when he ran a red light and struck Alice’s vehicle.

*Mossholder*, 2020 IL App (3d) 190340-U, ¶¶ 4-5. Alice died at the scene while Norbert was transported to the hospital and died six weeks later. *Id.* Thus, both Alice and Norbert were deceased prior to the lawsuit being filed. *Id.* The matter proceeded to trial where the defendant raised an “act of God” defense and argued that Norbert suffered a sudden and unexpected seizure shortly before the collision. *Id.* ¶ 5.

Norbert’s wife, Mary, was a passenger in the vehicle at the time of the accident. *Id.* ¶ 11. After the accident, Mary gave statements to a responding officer about what happened in the vehicle leading up to the collision, including that Norbert had a washed look on his face, a tight grip on the steering wheel, and that she yelled at Norbert to slow down but he gave no response. *Id.* ¶¶ 9-11. The emergency room records documented similar statements made by Mary. *Id.*

Mary testified at trial via evidence deposition. *Id.* ¶ 11. Her testimony was consistent with the statements she gave the officer and documented in the medical records. *Id.* The jury returned a verdict in favor of the defendant and plaintiff appealed, arguing that the trial court erred in allowing Mary to testify in violation of the Dead Man’s Act. *Id.* at 20, 23.

On appeal, the Third District first held that plaintiff forfeited the issue by failing to object to Mary’s testimony during trial, but nonetheless explained that the Dead Man’s Act did not bar Mary’s testimony. *Id.* ¶¶ 24-25. The court reiterated that the Dead Man’s Act “bars only that evidence the decedent could have refuted,” and in this case, Alice (the plaintiff-decedent) was in a different vehicle than Norbert (defendant-decedent) and Alice could not have refuted testimony about Norbert’s condition leading up to the collision even if she were alive. *Id.* ¶ 27. Thus, the court held that Mary’s testimony was not barred because “it pertained to the period, however brief, before the collision, and it could not have been refuted by Alice.” *Id.*

## Conclusion

Most recently, the Fifth District heard oral arguments in *Hood v. Leighty* involving the Dead Man’s Act, once again in the context of an automobile collision where the defendant argued on a motion for summary judgment that plaintiff could not establish the decedent’s liability because the evidence was barred by the Dead Man’s Act. Oral argument was heard on June 4, 2020. The court permitted the parties to supplement their briefs to add argument based on the recent rulings in *Bramlett v. Vandersand*, 2020 IL App (5th), 180307 and *Eyster v. Conrad*, 2020 IL App (5th), 180261, as both rulings were issued after the parties filed their respective briefs. As of the date this column was submitted, the Fifth District has not yet issued its ruling. Irrespective of how the *Hood* case comes out, the Dead Man’s act is a rule that should be considered and analyzed whenever handling case in which a party is deceased.

## About the Authors

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