



COLORADO SUPREME COURT EXPANDS THE APPLICABILITY OF DEAD MAN'S STATUTE TO ALL CIVIL ACTIONS

Colorado's Dead Man Statute is a legislatively enacted rule that prevents a party from offering self-serving testimony about alleged statements made by a person that is incapable of testifying and unable to confirm or rebut his alleged statement. The issue is often litigated when a person attempts to testify about statements made by someone who cannot testify on their own behalf for a variety of reasons, including death or incapacitation.

Recently, the Colorado Supreme Court issued an opinion in *Estate of Daniel Brookoff, M.D., v. Clark*, 2018 CO 80, which interprets Colorado's Dead Man's Statute, C.R.S. § 13-90-102 ("Statute"), considering recent amendments language limiting the Statute's reach to matters in which a decedent's estate was a party. Discerning no ambiguity in the current version of the Statute, the court held that these amendments expanded the scope of the Statute such that it is now applicable "in all civil actions." Moreover, the court held that the existence of insurance coverage is not a factor militating for or against the Statute's applicability. This is welcome news for parties in litigation who are defending disputed claims based on what a deceased person allegedly said. Now, unless there is corroboration for the alleged statement of a person incapable of testifying, the alleged statement is not admissible in any civil action.

The Statute was amended several times over the years, most recently in 2002 and 2013, and it was those amendments the Court considered of vital importance to its decision.

In 2002, the legislature amended the Statute by eliminating language limiting its application only to civil suits involving executors and administrators of wills and estates. The amended Statute expressly provides that it applies to, "any civil action by or against a person incapable of testifying." See Ch. 13, sec. 1, § 13-90-102(1), 2002 Colo. Sess. Laws 31, 31-32.

In 2013, the legislature again amended the Statute, striking yet another limitation – namely, that the civil action must be one "by or against a person incapable of testifying," see Ch. 190, sec. 1, § 13-90-102(1), 2013 Colo. Sess. Laws 766, 766-67. In other words, the Statute was now applicable "in any civil action." C.R.S. § 13-90-102(1). Nothing in the current version of the Statute limits the meaning of "any civil action" or suggests the Statute is designed to apply only in limited types of civil cases.

The issue in *Estate of Brookoff* involved a plaintiff who in 2016 sued the Estate of his deceased pain management physician for lack of

informed consent and negligence related to ketamine treatments. The plaintiff wanted to introduce testimony about alleged conversations among him, the deceased physician, and his mother, that allegedly occurred before and during treatment. Before trial, the Estate moved to exclude the testimony of pursuant to the Dead Man's Statute, and the trial court excluded the evidence. The plaintiff abandoned his informed consent claim, being unable to present it without evidence of the conversations, and proceeded on the negligence claim. After judgment entered for the Estate, the plaintiff appealed the trial court's order barring him or his mother from testifying about their conversations with the deceased physician.

Initially, the Colorado Court of Appeals relied on pre-2003 and 2013 cases to reverse the trial court despite the existence of the amendments to the Statute, held the Statute was not applicable "in any civil action" but only when the outcome of a lawsuit would increase or diminish an estate, and reasoned because the Estate had insurance, any liability would be covered by insurance and thus would not diminish his estate.

In contrast, the Colorado Supreme Court chastised the Court of Appeals for relying on case law interpreting the Statute as it existed before the 2003 and 2013 amendments to it. The Court reasoned the clear and unambiguous language of the amended Statute meant it is applicable "in all civil actions." The Court reasoned, "These recent amendments expanded the scope of the Dead Man's Statute, removing language that limited its application to only certain types of cases. Today, self-serving testimony from a party about what a now-deceased person allegedly once said is permitted 'in any civil action' only when specific, statutorily-prescribed conditions are met."

The decision is consistent with the long-standing purpose of the Statute to prevent perjury in civil cases. The Court's decision will impact all litigated cases where any theory is supported by uncorroborated alleged statements of any person who is incapable of testifying. Parties should carefully consider whether their case relies upon statements made by persons incapable of testifying, and if so, whether corroboration for those statements exist.

A copy of the opinion can be found [here](#).

If you have any questions about this update, please contact Jason Krueger, kruegerj@hallevans.com.

