University of Baltimore Law Forum

Volume 36
Number 2 *Spring 2006*

Article 9

2006

Recent Developments: Landon v. Zorn: Inquiry about Potential Bias against Plaintiffs in Malpractice Cases Is Not Sufficiently Connected with the Issue of Tort Reform to Generate a Required Voir Dire Question

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RECENT DEVELOPMENT

LANDON v. ZORN: INQUIRY ABOUT POTENTIAL BIAS AGAINST PLAINTIFFS IN MALPRACTICE CASES IS NOT SUFFICIENTLY CONNECTED WITH THE ISSUE OF TORT REFORM TO GENERATE A REQUIRED *VOIR DIRE* QUESTION

By: Melyssa Morey

The Court of Appeals of Maryland held that a question regarding potential bias against plaintiffs in malpractice cases is too general in nature to constitute a required *voir dire* question. *Landon v. Zorn*, 389 Md. 206, 223, 884 A.2d 142, 152 (2005). In Maryland, the scope of *voir dire* is limited and must be designed to elicit responses about the biases of the jurors.

On the morning of January 8, 2001, Richard Landon ("Landon") went to the emergency room at Atlantic General Hospital complaining of leg pain and flu-like symptoms. Dr. Pamela Zorn ("Dr. Zorn") evaluated Landon, and initially diagnosed him as suffering from a flu-like syndrome, and indicated that a flare up from an old leg injury was causing the leg pain. However, Dr. Zorn was not completely satisfied with the diagnosis, and asked Landon to undergo a CAT scan. He refused, stating he wanted to go home and sleep, and was discharged at 12:15 p.m. with a prescription for a muscle relaxant and instructions to return to the hospital if his condition worsened.

At 4:45 p.m. the next afternoon, Landon's wife called Dr. Zorn with a question, at which time Dr. Zorn reiterated that she would like to perform a CAT scan. Mrs. Landon said she would try to persuade her husband to have one. Approximately seven hours later, Dr. Zorn learned that Landon had not returned for the test and called Mrs. Landon, instructing her to bring her husband back to the hospital even if she had to call 911. Landon returned to the hospital just before midnight, and was transferred to Maryland's Shock Trauma Center. He was diagnosed with a group A beta hemolytic streptococcal infection and underwent multiple surgeries, including the amputation of his leg at the hip.

The Landons sued Dr. Zorn in the Circuit Court for Worcester County, claiming medical negligence. A jury found in favor of Dr. Zorn, determining that she did not breach the standard of care in her treatment of Landon. The Landons appealed and the Court of Appeals of Maryland granted *certiorari* prior to the Court of Special Appeals' consideration of the matter.

The Landons presented two questions on appeal: "[d]id the circuit court err by failing to *voir dire* the prospective jurors on the issue of tort reform?" and "[d]id the circuit court err by failing to give a requested jury instruction and the Maryland Pattern Jury Instruction on informed consent?" *Id.* at 211, 884 A.2d at 144-45.

The Court initially stated that the first question presented by the Landons on appeal was not reflective of their proposed *voir dire* question, which was not connected to the issue of tort reform. *Id.* at 217, 884 A.2d at 148. The *voir dire* question that the Landons wanted asked read:

> Does any member of the jury panel have any preconceived opinion or bias or prejudice in favor of, or against plaintiffs in personal injury cases in general and medical malpractice cases in particular? If yes, please explain. Would this prevent you from fairly and impartially trying the facts and circumstances presented in this matter?

Id. at 214, 884 A.2d at 146. The Court noted that *voir dire* is limited in scope in Maryland, and courts have the discretion to ask or not ask proposed *voir dire* questions. *Id.* at 216, 884 A.2d at 148. Unless a *voir dire* question is properly formed to determine a potential cause for disqualification, it can be excluded absent any prejudice to the plaintiffs. *Id.* at 218, 884 A.2d at 149 (citing *Kujawa v. Baltimore Transit Co.*, 224 Md. 195, 167 A.2d 96 (1961)). The Landons argued that their question was "designed to uncover potential prejudice against them and in favor of doctors in medical malpractice cases." *Id.* at 217, 884 A.2d at 148.

The Court went on to state that just because a person holds a particular belief does not mean it will affect his ability to consider evidence fairly and impartially in reaching a conclusion. *Id.* at 215, 884 A.2d at 146 fn.3. If jurors were excluded for their beliefs, the public policy of having a jury that represents a cross section of the

community would be nullified. *Id.* Jurors cannot be automatically excluded from the jury pool simply based on their beliefs about a law or policy, so long as they feel they can reach a fair and impartial conclusion based on the law. *Id.* at 219, 884 A.2d at 149.

The Landons also asked the Court to apply the principles of *Borkoski v. Yost*, 594 P.2d 688 (Mont. 1979) to "*voir dire* questions involving medical malpractice and tort reform." *Landon*, 389 Md. at 220, 884 A.2d at 150. Borkoski sued a hospital and two doctors following the death of his wife. *Id.* The insurance company that provided malpractice insurance to the doctors had been involved in an advertising campaign that targeted jurors and claimed that "[l]arge jury awards would result in everyone paying higher insurance premiums." *Id.* (quoting *Borkoski*, 594 P.2d at 689-90). Borkoski proposed a *voir dire* question, which the trial court declined to ask, inquiring whether potential jurors had been exposed to these advertisements. *Id.* On appeal, the Supreme Court of Montana affirmed the trial court's ruling, but noted that "upon a proper showing of possible prejudice" it may be appropriate to give a *voir dire* question that asked whether jurors had heard or read anything indicating that plaintiff's verdicts in personal injury cases resulted in higher insurance premiums for everyone, if they believed it, and if they thought it would interfere with their ability to render a fair verdict. *Id.* at 220-221, 884 A.2d at 150. (quoting *Borkoski*, 594 P.2d at 694). The Court of Appeals of Maryland refused to adopt the principles of *Borkoski* stating that, unlike in *Montana*, *voir dire* in Maryland is limited in scope and that the Landons' case did not warrant expansion of the scope. *Id.* at 222-23, 884 A.2d at 151-52.

Regarding jury instructions, the Landons challenged the trial court's refusal to give two instructions, one regarding contributory negligence and the other informed consent. *Id.* at 224, 884 A.2d at 152. According to Maryland Rule 2-520(c), the court does not need to give a requested jury instruction if the matter is covered by other instructions actually given. *Id.* at 224, 884 A.2d at 153. Instead of giving the Landons' requested jury instruction, the trial court gave an instruction based on the Maryland Pattern Jury Instructions on contributory negligence. *Id.* at 225, 884 A.2d at 153.

The Court of Appeals affirmed the trial court's decision because the Landons could not show that they had been prejudiced by the failure to give their requested jury instruction. *Id.* at 227, 884 A.2d at 154. The jury did not reach the question of contributory negligence, as the verdict sheet instructed them not to answer any further questions if

they answered "No" to the first question concerning the breach of standard of care. *Id.* at 228, 884 A.2d at 154, 155.

As to the trial court's failure to give an instruction on informed consent, the Court ruled that in Maryland a cause of action for lack of consent can only be based on failure to get consent before performing an affirmative act on a patient. *Id.* at 229, 884 A.2d at 155. Dr. Zorn did not undertake an affirmative act, but merely recommended a diagnostic test. *Id.* at 230, 884 A.2d at 156. Even if this could be considered an affirmative act, the Landons did not establish that the standard of care required Dr. Zorn to inform Landon of the risks of not having the test, thus they were not entitled to the informed consent instruction. *Id.*

While the Court stated the Landons' proposed *voir dire* question was too general and had no clear connection to the issue of tort reform, it did not address how specific a question must be for there to be a connection. The Court also did not delve into what facts in a case may warrant an expansion of the scope of *voir dire* in Maryland, along the lines of *Borkoski*. Finally, the Court's repeated admonition that a person may be able to fairly render a verdict despite a particular bias they have about tort reform seems to ignore basic human nature. A person who believes that medical malpractice lawsuits are driving up the cost of insurance and healthcare across America is not very likely to find for the plaintiff just because the current law allows them to do so.