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RECENT DEVELOPMENT

MARCANTONIO V. MOEN: AN EXPERT'S AFFIDAVIT MATERIALLY CONTRADICTS A PRIOR SWORN STATEMENT ONLY WHEN THERE IS AN IRRECONCILABLE STATEMENT OF MATERIAL FACT.

By: Joseph Maher

The Court of Appeals of Maryland held that an affidavit is a material contradiction of prior deposition testimony, under Maryland Rule 5-201(e), when it creates an irreconcilable factual discrepancy of consequence to the expert's previous sworn statement. *Marcantonio v. Moen*, 406 Md. 395, 959 A.2d 764 (2008). Upon finding a material contradiction, the court may strike the disingenuous affidavit. *Id.* at 412, 959 A.2d at 774.

In August 2000, Sherri Schaefer ("Schaefer") informed her gynecologist, Melissa Moen, M.D., ("Dr. Moen") that she was experiencing abnormal vaginal bleeding. The next month, Dr. Moen performed an ultrasound; however, she did not perform a biopsy at this time. Paula DeCandido, M.D., ("Dr. DeCandido") interpreted the ultrasound. Dr. DeCandido failed to report a 1.5 centimeter mass located on Schaefer's right ovary. Continuing to experience physical ailments, Schaefer returned to Dr. Moen and underwent a biopsy in April 2001. Schaefer was diagnosed with cancer and received treatment until her death on May 18, 2005.

Prior to her death, Schaefer and her husband, Charles Marcantonio ("Marcantonio"), filed a claim in the Circuit Court for Anne Arundel County against Drs. Moen and DeCandido ("Medical Providers") for negligently failing to diagnose and treat Schaefer's cancer in 2000. After Schaefer's death, Marcantonio added wrongful death and survivorship claims against the Medical Providers in an amended complaint.

Two expert witnesses for Marcantonio were deposed. The first expert, Dr. Hutchins, testified that he reasonably believed that Dr. Moen departed from the applicable standard of care, but he would not render an opinion as to the cause of Schaefer's death. In a subsequent affidavit, Dr. Hutchins rendered an opinion, within a reasonable

degree of medical probability, that Dr. Moen's failure to diagnose Schaefer's condition in 2000 was the proximate cause of her death.

Dr. Shmookler, Marcantonio's second expert, testified in his deposition that he did not have an opinion of the staging or prognosis of Schaefer's cancer, within a reasonable degree of medical probability, during May and July 2001. However, in a subsequent affidavit, Dr. Shmookler stated that the failure to properly diagnose the ovarian tumor in September 2000 was a substantial factor which proximately caused Schaefer's death.

The Medical Providers filed a motion to strike the affidavits of Drs. Hutchins and Shmookler. The circuit court granted the motion on the basis that the affidavits materially contradicted the prior deposition testimony of the experts, in violation of Maryland Rule 2-501(e) ("Rule 2-501(e)"). As a result, the circuit court granted summary judgment in favor of the Medical Providers. On appeal by Marcantonio, the Court of Special Appeals of Maryland affirmed. Marcantonio petitioned for a writ of certiorari to the Court of Appeals of Maryland, and the court granted the petition.

In its analysis, the Court of Appeals of Maryland determined under what circumstances, pursuant to Rule 2-501(e), an affidavit materially contradicts an expert's prior deposition testimony. *Marcantonio*, 406 Md. 405 n.8, 959 A.2d at 769 n.8. The Medical Providers argued that the plain language of Rule 2-501(e) requires its application to any contradiction found in an affidavit which conflicts with a prior sworn statement. *Id.* at 407-08, 959 A.2d at 771. In contrast, Marcantonio argued that Rule 2-501(e) only applies to contradictions of material fact between deposition testimony and an affidavit. *Id.* at 409, 959 A.2d at 772.

In a prior case, the Court of Appeals of Maryland decided that the sham affidavit rule did not mesh with Maryland law because it shifts the determination of credibility from the trier of fact to the judge on summary judgment. *Id.* at 407, 959 A.2d at 771 (citing *Pittman v. Atl. Realty*, 359 Md. 513, 540-42, 754 A.2d 1030, 1041 (2000)). The sham affidavit rule, which has been adopted by every federal circuit, provides the trial court with discretion to disregard an affidavit that materially contradicts prior sworn testimony when afforded no explanation. *Marcantonio*, 406 Md. at 405, 959 A.2d at 770 (citing *Pittman*, 359 Md. at 529, 754 A.2d at 1038). Subsequently, in 2003, the Rules Committee examined the issue of sham affidavits and recommended that a subsection be added to Rule 2-501. *Marcantonio*, 406 Md. at 407, 959 A.2d at 771. The Court of Appeals of Maryland

accepted the Rules Committee's recommendation to include subsection (e), which now reads in pertinent part, that "[i]f the court finds that an affidavit or other statement under oath materially contradicts the prior sworn statement, the court shall strike the contradictory part." *Id.* (citing Md. Rule 2-501(e)).

The rule does not define "material contradiction" so the court examined the ordinary meaning of the words. *Marcantonio*, 406 Md. at 409, 959 A.2d at 772. The court explained that a "material contradiction," under Rule 5-201(e), occurs when a statement is "irreconcilable" to the affiant's prior sworn statement because a factual assertion is "significantly opposite." *Id.* at 410, 959 A.2d at 773. The court provided an example involving an individual's exposure to lead paint where the deposition provided a specific time period; however, the later affidavit set forth a different length of time. *Id.* at 406, 410, 959 A.2d at 770-71, 773 (citing *Pittman*, 359 Md. at 518, 523-26, 754 A.2d at 1032, 1035-37). There was a clear material contradiction of the amount of time because both statements could not be true; therefore, the court may properly strike an affidavit under such a circumstance. *Marcantonio*, 406 Md. at 410, 959 A.2d at 773.

In comparison, the court looked to the District of Columbia Court of Appeals for an example of what is not considered a material contradiction. *Id.* at 411, 959 A.2d at 773 (citing *Hinch v. Lucy Webb Hayes Nat. Training*, 814 A.2d 926 (D.C. 2003)). In that case, the initial deposition stated that the expert could not "tease apart" the exact cause of the plaintiff's injury from the several possible causes; however, the affidavit stated, to a reasonable degree of medical certainty, that the defendant's negligence caused the plaintiff's injuries. *Marcantonio*, 406 Md. at 411, 959 A.2d at 773 (citing *Hinch*, 814 A.2d at 931). The court held that this did not constitute a "clear and explicit contradiction." *Marcantonio*, 406 Md. at 411, 959 A.2d at 773-74 (citing *Hinch*, 814 A.2d at 931).

The Court of Appeals of Maryland continued to cement its definition of a material contradiction through rulings of other jurisdictions and the purpose of the Maryland summary judgment procedure. *Marcantonio*, 406 Md. at 411-12, 959 A.2d at 774. Upon this justified definition, the court held that the affidavits of Drs. Hutchins and Shmookler did not materially contradict their prior deposition testimonies. *Id.* at 413-14, 959 A.2d at 775. Dr. Hutchins' affidavit was viewed to supplement his deposition, demonstrating a change in intention and not a factual contraction. *Id.* at 413, 959 A.2d at 774-75. Dr. Shmookler's affidavit was deemed to be, at best, a

credibility issue and not an issue of fact. *Id.* at 414, 959 A.2d at 775. The absence of an opinion as to Schaefer's prognosis or staging did not prohibit Dr. Shmookler from making an opinion pertaining to the failure of the treating physician's diagnosis of the tumor. *Id.*

While the court clearly elucidates the definition of a "material contradiction" under Maryland Rule 2-501(e), the court's interpretation in this matter greatly affects the current practitioner in his approach to depositions and summary judgment proceedings. This ruling allows an expert to give vague and indirect answers in the early stages of a lawsuit to avoid claims of summary judgment. Although this approach to the discovery process may in some ways affect judicial economy, it promotes justice by focusing summary judgment only on material facts, not on the existence of mere contradiction or witness credibility.