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Recent Developments: Wilson v. Morris: Evidence of Prior and Subsequent Patient Monitoring Policies Is Admissible to Demonstrate the Standard of Care

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cerned with whether Kosmas' credibility was a crucial issue. The state's case depended on circumstantial evidence that the defendant mistreated his wife and that he tried to put out a contract for her murder. The court said the evidence of Kosmas' refusal to take a lie detector test "cut to the heart of the defense." *Id.* at 597, 560 A.2d at 1142.

Finally, the curative effect of the jury instruction was addressed. Judge McAuliffe opined that the instruction was insufficient to cure the substantial prejudice poisoning the jurors' opinion of the defendant. He relied on *Bruton v. United States,* 391 U.S. 123 (1968) to support this position. In that case, the Supreme Court said, "[t]here are some contexts in which the risk that the jury will not, or cannot, follow instructions is so great, and the consequences of failure so vital to the defendant, that the practical and human limitations of the jury system cannot be ignored." *Kosmas,* 316 Md. at 597, 560 A.2d at 1143 (quoting *Bruton,* 391 U.S. at 135).

Accordingly, *Kosmas v. State* indicates that Maryland courts are becoming increasingly intolerant of any evidence that a defendant refused to take a polygraph exam. This case also warns prosecutors not to ask open-ended questions on direct examination unless they are confident that the information solicited will not be substantially prejudicial to the defendant.

—Gregory R. Smouse

Wilson v. Morris: EVIDENCE OF PRIOR AND SUBSEQUENT PATIENT MONITORING POLICIES IS ADMISSIBLE TO DEMONSTRATE THE STANDARD OF CARE

In *Wilson v. Morris,* 312 Md. 284, 563 A.2d 392 (1989), the Court of Appeals of Maryland held that evidence of prior and subsequent procedures for transporting patients was relevant and admissible as a consideration of the required standard of care. Thus, the court of appeals affirmed the decision of the court of special appeals, which had remanded the case for a new trial.

Irene Ragland, appellee, brought an action against a hospital director and a county health department receptionist as a result of personal injuries sustained while she was a patient in the Western Maryland Adult Day Care Treatment Center ("the Center"). *Wilson,* 312 Md. at 287, 563 A.2d at 393. Ragland was returning from a doctor's office adjacent to the Center when Ann G. Wilson, the receptionist, temporarily left Ragland unattended in a wheelchair at the top of a handicapped access ramp. When the wheelchair rolled down the access ramp, Ragland fell forward on to the pedals and fractured two vertebrae. Approximately eighteen months prior to the accident, and again, beginning the day after the accident, the Center's policy was for an attendant to remain with a patient while transporting the patient between the two facilities. *Id.* at 288, 563 A.2d at 393. At the time of the accident, however, the Center's policy was to have an attendant accompany the patient to and from the adjacent facility, but not to wait there during the course of treatment. *Id.* at 288 n.5, 563 A.2d at 393 n.5. The trial court refused to admit the evidence of the Center's prior and subsequent practices and concluded that such evidence was irrelevant and inadmissible. *Id.* at 288, 563 A.2d at 393. The court of special appeals reversed the trial court's ruling. The intermediate appellate court held that the Center's prior and subsequent procedures demonstrated a pattern of conduct which made those procedures relevant and admissible. *Id.* at 288, 563 A.2d at 394 (citing *Morris v. Wilson,* 74 Md. App. 663, 668, 539 A.2d 1151, 1153-54 (1988)).

The Court of Appeals of Maryland granted certiorari to consider the law under which evidence of prior and subsequent practices is admissible to prove an alleged breach of the applicable standard of care. *Id.* at 289, 563 A.2d at 394.

The issue concerning the admissibility of prior policy evidence was one of first impression in Maryland. Consequently, the court examined the case law of other jurisdictions. In *Welsh v. Burlington N. R. R.,* 719 S.W.2d 793 (Mo. App. 1986), an injured employee provided evidence that a railroad company had abandoned a policy that supplied employees with carts for the purpose of loading propane tanks. The Missouri Court of Appeals held that the testimony regarding the previous use of the carts to load propane tanks was relevant and probative on the issue of whether the defendant was negligent in failing to provide reasonably safe employee equipment. *Wilson,* 317 Md. at 292, 563 A.2d at 396 (citing *Welsh,* 719 S.W.2d at 797). In another case, a woman tripped and fell upon a store entrance floor mat. *Id.* (relying on *Swiler v. Baker's Super Market, Inc.,* 277 N.W.2d 697 (Neb. 1979)). In *Swiler,* the evidence revealed that on wet and rainy days, it was the store owner's usual practice to tape the mat to the floor to protect against slipping. The Supreme Court of Nebraska ruled that the trial court properly allowed the plaintiff to introduce evidence relative to the store-owner's past practice of taping or securing the mat in question to the floor to prevent bulging. *Wilson,* 317 Md. at 294, 563 A.2d at 396 (citing *Swiler,* 277 N.W.2d at 700).

Applying the holdings in *Welsh* and *Swiler,* the court of appeals held the prior practice of the Center was relevant under the circumstances. *Id.* at 295, 563 A.2d at 397. The court also found the evidence of the prior policy a material fact to be considered in analyzing whether the current policy was reasonably safe or whether other methods could have been easily adopted. *Id.* Moreover, the court stated that the trial judge should consider the following test for determining whether prior policies should be allowed as evidence:

> 1) The remoteness in time of the prior policy;
>
> 2) The degree and significance of the change in relation to the substantive issues presented;
>
> 3) The reasons for the change in policy; and
>
> 4) The likelihood that any prejudicial effect of the proffered evidence will outweigh the probative value of the evidence.

Id. Thus, the court held that the Center's prior policy of remaining with patients taken for medical care was probative in revealing the Center's knowledge and perception of its duty to patients. *Id.* at 294-95, 563 A.2d at 397.

Next, the court discussed whether subsequent policy evidence was admissible to prove the scope of the duty of care owed to the plaintiff. The court recognized that there was "a standard of care exception" to the general rule excluding evidence of subsequent remedial measures when such evidence "provides circumstantial proof that the applicable standard of care had not been met at the time of the accident or other occurrence in question." *Id.* at 298, 563 A.2d at 395 (quoting 5 L. McLain, Maryland Practice: Maryland Evidence § 407.1 (1987, 1989 Supp.)). The court's opinion stated that although a jury should not consider the evidence of the immediate change in patient monitoring policies as an admission of negligence, it was admissible as evidence of the standard of care required under the circumstances. *Id.* at 301, 563 A.2d at 400. Therefore, the court ruled that the trial judge erred in precluding counsel from offering the

proper grounds for which evidence of subsequent conduct should be admitted. *Id.*

Finally, the *Wilson* court was careful to reconcile its holding with the federal rule on subsequent remedial measures. The federal rule reasonably restricts the admissibility of such evidence to those situations where needed; that is, "when offered for another purpose such as providing ownership, control or feasibility of precautionary measures, if controverted, or impeachment." Fed. R. Evid. 407. However, the court pointed out that the advisory committee's note to Federal Rule 407 expressly lists "existence of duty" as a valid basis for admitting evidence of subsequent remedial measures. *Wilson*, 317 Md. at 297 n.8, 563 A.2d 405 n.8. Thus, the court restated the principle that evidence of subsequent conduct should not be received as an admission of negligence or liability, but that the standard of care exception is Maryland law. *Id.* at 300-01, 563 A.2d at 400.

In *Wilson*, the Court of Appeals of Maryland held that evidence of prior and subsequent hospital practices were relevant and admissible to prove the alleged breach of the applicable standard of care. In addition, the court provided a test to determine admissibility of such prior evidence. However, the danger inherent in following the *Wilson* standard is that the allowability of prior or subsequent evidence could provide indirect proof of causation, or in effect, the exception could "swallow the [general] rule" prohibiting the admission of such evidence. *Id.* at 300, 563 A.2d at 400 (quoting 5 L. McLain, Maryland Practice: Maryland Evidence § 407.1 (1987, 1989 Supp.)). Consequently, to allow both prior and subsequent evidence might make such evidence tantamount to an admission of negligence, which the court of appeals has expressly precluded.

—Stephen E. Cohill

Andresen v. Andresen: MARYLAND COURTS NOT PERMITTED TO REDETERMINE MARITAL PROPERTY MORE THAN 30 DAYS AFTER FINAL DIVORCE DECREE

In *Andresen v. Andresen*, 317 Md. 380, 564 A.2d 399 (1989), the Court of Appeals of Maryland considered the power of a court to modify a 1981 divorce decree, which would have allowed a former spouse to share her former husband's military pension. The court held that the petitioner had not established any grounds upon which the trial court's final judgment could have been reexamined. *Id.* at 391, 564 A.2d at 405. The court reasoned that there was no authority under Maryland law which allowed a court to redetermine marital property more than thirty days after the decree became final except in cases of fraud, mistake, irregularity or clerical errors. *Id.* at 387, 564 A.2d at 403. Thus, the Court of Appeals of Maryland affirmed the trial court's ruling.

Ruth and Ralph Andresen were divorced in Maryland on November 13, 1981. The divorce decree provided for alimony and payment of attorney's fees but did not include sharing Mr. Andresen's military pension benefits, which at that time could not have been subjected to division upon divorce according to federal law.

On March 12, 1986, Ms. Andresen filed a motion in the Circuit Court for Montgomery County to modify the 1981 divorce decree to allow her to share Mr. Andresen's military pension. Because Ms. Andresen's motion failed to specify the procedural mechanism by which a court could reopen the four-year-old divorce decree, Mr. Andresen's motion to dismiss was granted. Ms. Andresen appealed, and the Court of Appeals of Maryland granted certiorari prior to a decision by the intermediate appellate court to consider whether Mr. Andresen's motion to dismiss was properly granted. On appeal, Ms. Andresen argued that the changes in the law constituted sufficient justification to reopen the enrolled divorce decree to allow sharing of Mr. Andresen's military pension benefits. *Id.* at 383, 564 A.2d at 401.

The court of appeals began its discussion of the applicable law by reviewing the changes in federal law. "On June 26, 1981, the United States Supreme Court ruled that, as matter of federal law, courts could not subject military retirement pay to division upon divorce." *Id.* at 382, 564 A.2d at 400 (citing *McCarty v. McCarty*, 453 U.S. 210 (1981)). After the Andresen's divorce became final in 1981, federal statutory law changed thereby allowing courts to consider military pensions as marital assets for distribution in divorce proceedings. *Id.* In response to the *McCarty* decision, Congress enacted the Uniformed Services Former Spouses' Protection Act (USFSPA) on September 8, 1982, effective February 1, 1983. The Act was codified in pertinent part as 10 U.S.C.A. § 1408 (c)(1). The USFSPA provided:

> Subject to the limitations of this section, a court may treat disposable retired or retainer pay payable to a [service] member for pay periods beginning after June 25, 1981, either as property solely of the member or as property of the member and his spouse in accordance with the law of the jurisdiction of such court.

317 Md. at 383, 564 A.2d at 401.

The court noted that the purpose of the USFSPA was to overrule the *McCarty* decision thereby allowing state law to determine whether military pensions were marital property. *Id.* at 384, 564 A.2d at 401. In addition, the court examined the legislative history which revealed that the USFSPA was retroactive and allowed divorce decrees entered between the date of the *McCarty* decision and the effective date of the USFSPA to be reopened. *Id.*

Furthermore, the court noted that under Maryland law, as construed in *Deering v. Deering*, 292 Md. 115, 437 A.2d 883 (1981), pensions, including military pensions were marital property. In addition, the Maryland General Assembly had confirmed, as now codified in the Family Law Article, that a military pension shall be considered as any other pension or retirement benefit. Md. Fam. Law Code Ann. § 8-203(b) (1984).

Pursuant to the USFSPA, the court found approximately thirty-five state courts had reopened divorce decrees. However, these jurisdictions followed Federal Rule 60(b)(5) and/or 60(b)(6), which allowed post-final judgment relief. 317 Md. at 386, 564 A.2d at 402. Additionally, it was found that eight states reserved equity or other broad powers to revise a final judgment. *Id.* at 386-87, 564 A.2d at 403. Although the majority of courts had reopened finalized divorce derees to permit a former spouse to share military pension proceeds, the Court of Appeals of Maryland held that Maryland law did not allow a Maryland court to reopen a divorce decree, which had been enrolled for more than thirty days, except as provided by Maryland Rule 2-535. *Id.* at 387, 564 A.2d at 403.

In support of its decision, the court of appeals reiterated its earlier decision in *Platt v. Platt*, 302 Md. 9, 485 A.2d 250 (1984), where it had held that the trial court lacked the power to revise a five-year-old divorce decree. *Andresen* 317 Md. at 388, 564 A.2d at 403. In *Platt*, the court had emphasized that there was no authority under Maryland law which would allow a re-examination of marital