

RECENT CASES

Trial Lawyers Association of Metropolitan Washington, D.C. January 2006

Tenant Does Not Have to Prove Landlord Knew of Lead Paint in Apartment, Because Housing Regulation Imposes Duty to Inspect

Childs v. Purll, 882 A.2d 227(D.C. 2005). Opinion by Glickman, joined by Washington and Terry. Trial court: Long.

FACTS: Mother sued apartment building owner and management company for lead paint poisoning suffered by her children. Trial court granted summary judgment for defendants after plaintiff failed to respond (for three months) to SJ motion, and then denied plaintiff's motion to reconsider. Court held it was undisputed that landlord had no notice, actual or constructive, that lead paint was chipping from the walls while tenants lived there. Trial court did not consider applicability of D.C. Housing Regulations that required that rental properties with tenants under eight years of age be free of lead in their interior and exterior surfaces. D.C. Mun. Regs. Tit. 14 § 707.3. Court also dismissed claims under consumer protection statute and claims against individual owners of management company.

OUTCOME: Summary judgment for defendants REVERSED in part.

HOLDING: (1) While housing regulations impose only a duty of reasonable care on landlords, which usually requires notice of a hazard before landlord will be held liable, in this situation the regulation imposes a duty to furnish lead-free premises for children under eight and thus imposes an antecedent duty to make sure the premises are in fact lead-free. Once a landlord knows that children will be occupying the apartment, as was known here, the landlord is on constructive notice of any lead paint hazard.

(2) Plaintiff's claim under Consumer Protection Procedures Act fails because statute then in effect (amended in 2000 but not to be applied retroactively here) limited claims to those within jurisdiction of Department of Regulatory Affairs, which was specifically barred from landlord-tenant disputes.

(3) Plaintiff's claim against individual owners of management company is reinstated. Trial court incorrectly applied doctrine of "piercing the corporate veil," whereas plaintiff's claim was for the owners' personal involvement in the tortious conduct of renting a hazardous apartment without inspecting it.

Recent Cases Reported By:
PATRICK A. MALONE
Stein, Mitchell & Mezines
1100 Connecticut Avenue, N.W.
Suite 1100
Washington, D.C. 20036
(202) 737-7777

www.Steinmitchell.com
pmalone@steinmitchell.com

RECENT CASES

Trial Lawyers Association of Metropolitan Washington, D.C.

January 2006; Page 2

No Proximate Cause as a Matter of Law in Suicide Malpractice Case

Garby v. George Washington Univ. Hospital, 886 A.2d 510 (D.C. 2005). Opinion by Farrell, joined by Blackburne-Rigsby (sitting by designation); Schwelb dissenting. Trial court: Rankin.

FACTS: Middle-aged electrical engineer presented to hospital emergency room on a Saturday night depressed and with paranoid, delusional thoughts. Outside his wife's presence, he told two emergency physicians and a psychiatric resident that he had thought about suicide and had a plan to jump off a bridge. The resident consulted with his attending on the telephone and decided that Mr. Garby did not meet the statutory criteria for involuntary commitment. They urged him to voluntarily admit himself to the hospital, but he refused. Hospital then released patient to his wife's custody without telling her of his suicidal thoughts. They walked home to their high-rise apartment building, where a few hours later, as his wife was in the shower, Mr. Garby jumped to his death off their eighth-floor balcony. Wife sued hospital and attending psychiatrist. She conceded husband did not meet the statutory standard for involuntary commitment, under D.C. Code § 21-522(a)(2) ("likely to injure himself or others if not immediately detained"). But plaintiff contended that if doctors had told her of husband's suicidal thoughts, especially about leaping off a bridge, she would not have taken him back to their eighth-floor apartment and would have taken other steps to protect him. Jury could not agree on a verdict. Trial judge granted defendants' motion for judgment as a matter of law, for inadequate proof of either negligence or proximate cause.

OUTCOME: Judgment as a matter of law for defendants AFFIRMED.

HOLDING: Concession that husband did not require voluntary commitment left plaintiff with alternative theories of how his suicide could have been prevented, all of which were too speculative to go to the jury. Plaintiff's main theory, that she could have taken steps to protect him if informed of his suicidal plans, failed because she and her expert didn't specify anything she could have done that would have been effective.

COMMENT: Judge Schwelb writes lengthy dissent arguing that majority in effect determined that being not dangerous enough for involuntary commitment was the same as not being dangerous at all.

Recent Cases Reported By:
PATRICK A. MALONE
Stein, Mitchell & Mezines
1100 Connecticut Avenue, N.W.
Suite 1100
Washington, D.C. 20036
(202) 737-7777

www.Steinmitchell.com
pmalone@steinmitchell.com

RECENT CASES

Trial Lawyers Association of Metropolitan Washington, D.C.

January 2006; Page 3

Expert Not Required for Police Excessive Force Claim Involving Chokehold

Jesse Smith v. District of Columbia, 882 A.2d 778 (D.C. 2005). Opinion by Reid, joined by Wagner; Glickman concurring in the judgment. Trial court: Turner.

FACTS: Plaintiff was fighting with another man in front of an apartment building on Seventh Street Northwest. In pulling plaintiff off the other man, a police officer allegedly applied a chokehold around his neck and broke his jaw on both sides. According to one witness, officer continued pulling on plaintiff's neck after plaintiff had let go of the man he was fighting with. Officer denied using chokehold but admitted lethal force wasn't needed to break up the fight. Plaintiff offered into evidence D.C. Code § 5-125.01 (2001), in which the D.C. Council declared that chokeholds constitute lethal force and are prohibited except where lethal force is necessary to protect someone's life. At end of plaintiff's case, defendant was granted judgment as a matter of law on both battery and negligence claims, on ground that plaintiff had introduced no expert testimony to define the standard of care.

OUTCOME: Judgment as a matter of law for defendant **AFFIRMED** on negligence, **REVERSED** on battery.

HOLDING: Plaintiff had sufficient case to go to the jury on battery claim without an expert witness, inasmuch as standard for police restraint was articulated in statute and regulations. However, negligence claim failed because plaintiff had no independent theory for negligence apart from the intentional use of excessive force, which was part of his battery claim, and also did not call an expert to establish a standard of care.

COMMENT: Court criticizes both trial court and parties for failing to carefully distinguish between the elements of a battery claim and those of a negligence claim in a police excessive force case. It notes that the reasonableness of an officer's conduct as establishing the defense of privilege to a battery claim is different from reasonableness in a negligence context. Court quotes its case of *D.C. v. Chinn*, 839 A.2d 701 (D.C. 2003) as establishing the requirement that to justify a separate jury instruction on negligence in an excessive force case, plaintiff must establish an independent breach of a standard of care beyond the duty of avoiding excessive force in making an arrest.

Recent Cases Reported By:
PATRICK A. MALONE
Stein, Mitchell & Mezines
1100 Connecticut Avenue, N.W.
Suite 1100
Washington, D.C. 20036
(202) 737-7777

www.Steinmitchell.com
pmalone@steinmitchell.com

RECENT CASES

Trial Lawyers Association of Metropolitan Washington, D.C.

January 2006; Page 4

Subsequent Treating Doctor Should Not Have Been Allowed to Give Previously Undisclosed Causation Opinion at Trial

Gubbins v. Hurson, 885 A.2d 269 (D.C. 2005). Opinion by Glickman, joined by Terry and Wagner. Trial judge: Clark.

FACTS: Plaintiff underwent surgery for urinary stress incontinence. She woke up with marked weakness in both legs, which was later found to be due to nerve damage. She sued the gynecologist and the anesthesiologist who performed epidural anesthesia. At trial, plaintiff's first witness was the neurologist who did nerve testing showing the damage. Direct examination was limited to the facts of his testing, diagnosis and treatment. On cross-examination, over objection, the neurologist opined that the nerve damage was not likely due to any violation of standards of care, particularly in the positioning of the legs during the surgery, but was idiosyncratic and unpredictable. On redirect, neurologist admitted he had no specific information about the surgical technique or the placement of the epidural., and that he had said in his report that the cause was "not at all certain." Court ruled that the opinions were within the scope of the direct examination and so were fair game. Court also refused to instruct the jury on *res ipsa loquitur*. Jury returned defense verdict.

OUTCOME: Judgment for defendants REVERSED and remanded for new trial.

HOLDING: (1) Trial court erred in admitting expert opinion of subsequent treating neurologist, because evidence indicated he formulated the opinion for litigation and not in the course of his treatment (distinguishing *Adkins v. Morton*, 494 A.2d 652 (D.C. 1985)). Plaintiff did not "open the door" to such testimony because in direct examination, plaintiff never elicited any opinion about the cause of the injury. Trial court should have followed the factors set out in *Weiner v. Kneller*, 557 A.2d 1306, 1311-12 (D.C. 1989) in deciding whether to admit opinion testimony not described in a Rule 26b4 statement.

(2) Denial of *res ipsa loquitur* instruction was error, inasmuch as plaintiff had testimony that such an injury did not ordinarily occur unless caused by negligence, and the defense never rebutted this idea. The fact that defense experts disagreed with plaintiff over the specific cause of the injury does not establish a lack of medical consensus on whether the injury more likely than not was caused by some kind of negligence. Plaintiff was thus entitled to an instruction on this theory of liability. (Citing *Nelson v. McCreary*, 694 A.2d 897, 901 (D.C. 1997).)

Recent Cases Reported By:
PATRICK A. MALONE
Stein, Mitchell & Mezines
1100 Connecticut Avenue, N.W.
Suite 1100
Washington, D.C. 20036
(202) 737-7777

www.Steinmitchell.com
pmalone@steinmitchell.com

RECENT CASES

Trial Lawyers Association of Metropolitan Washington, D.C.

January 2006; Page 5

D.C. Statute on “Emergency Run” Is Defined Broadly; Driver Need Only Have an “Honest Belief” that the Situation Requires High Speed

Duggan v. District of Columbia, 884 A.2d 661 (D.C. 2005). Opinion *per curiam, en banc* (Steadman and Schwelb concurring in part and dissenting in part). Trial court: Eilperin.

FACTS: Plaintiff was injured when a car she was riding in was hit by a youthful driver who was being chased by a D.C. police officer. Jury deadlocked, and trial court granted judgment as a matter of law to the District, holding that no reasonable juror could find that the police officer was grossly negligent. Division of Court of Appeals reversed, holding that a rational juror could conclude the officer was grossly negligent. *En banc* court now reinstates first two parts of division’s opinion, *Duggan v. D.C.*, 783 A.2d 563, 565-70 (D.C. 2001), but replaces Part III on the issue of whether the police officer was on an “emergency run.”

OUTCOME: Judgment for defendant REVERSED and case REMANDED for new trial.

HOLDING: For gross negligence standard to apply to a D.C. official vehicle, the statute (D.C. Code § 2-411(4)) only requires that that the driver have a “genuine, honestly held belief” that he should proceed expeditiously. This belief does not have to be objectively reasonable. However, the justification for the driver’s belief that he confronted an emergency situation does come into the analysis of whether the driver was grossly negligent.

Recent Cases Reported By:
PATRICK A. MALONE
Stein, Mitchell & Mezines
1100 Connecticut Avenue, N.W.
Suite 1100
Washington, D.C. 20036
(202) 737-7777

www.Steinmitchell.com
pmalone@steinmitchell.com

RECENT CASES

Trial Lawyers Association of Metropolitan Washington, D.C.

January 2006; Page 6

Trial Court Abused Discretion in Dismissing Case for Failure of Service Without Giving Reasons for Its Refusal to Reinstate

Muhammad v. Village Learning Center, 884 A.2d 647 (D.C. 2005). Opinion by Reid, joined by Farrell and King. Trial court: Wright.

FACTS: Grandmother sued charter school for alleged campaign of harassment and abuse by teachers against her grandchildren. Complaint was filed three years after events. Case was dismissed without prejudice under Rule 4(m) for failing to file proof of service within 60 days. Plaintiff moved to extend time to serve summons and complaint and asked that case be reinstated. Trial court denied motion to extend time, noting that the case had been dismissed without prejudice, and did not address reinstatement.

OUTCOME: Dismissal REVERSED “for an informed exercise of discretion.”

HOLDING: Because refusal to reinstate case would in effect mean dismissal WITH prejudice, due to running of statute of limitations, it was abuse of discretion for trial court to refuse to reinstate on grounds that case had been dismissed without prejudice. Trial court needs to consider the reasons for plaintiff’s failure to serve the complaint on time and the prejudice to both sides from reinstating or not reinstating the case. Court cites its holding to the same effect in another case in 2005: *Packheiser v. Miller*, 875 A.2d 645 (D.C. 2005).

COMMENT: These two cases make the same point: A trial judge who refuses to reinstate a case automatically dismissed for failure of service within 60 days needs to give reasons for her ruling, and needs to consider the balance of harms to the litigants. This issue commonly arises with complaints that are filed on the eve of the expiration of the statute of limitations.

NOTE: In another recent case, Court of Appeals reversed a trial court’s refusal to vacate a default judgment, holding that the trial court abused its discretion in giving no reasons for denying the motion to vacate. *Nuyen v. Luna*, 884 A.2d 650 (D.C. 2005). The lesson from these and similar cases is that the Court of Appeals wants to see cases decided on their merits, not on procedural defaults, and will insist on a good articulation of reasons if a trial court refuses to vacate a default.

Recent Cases Reported By:
PATRICK A. MALONE
Stein, Mitchell & Mezines
1100 Connecticut Avenue, N.W.
Suite 1100
Washington, D.C. 20036
(202) 737-7777

www.Steinmitchell.com
pmalone@steinmitchell.com

RECENT CASES

Trial Lawyers Association of Metropolitan Washington, D.C.

January 2006; Page 7

Briefs

Substantial Compliance with Inmate Grievance Procedure

Prisoner's substantial compliance with Inmate Grievance Procedure warranted reversal of dismissal of his complaint. *Artis-Bey v. District of Columbia*, 884 A.2d 626 (D.C. 2005). Opinion by Ruiz, joined by Washington and Kern. Trial court: Clark.

Holding: Prisoner's failure to treat silence by D.C. officials as a denial of his administrative complaint, and thus to file an administrative appeal, did not warrant dismissal of his civil suit. Statute nowhere said that failure to act could be deemed a denial. D.C.'s interpretation of statute would convert language that said a prisoner "may" appeal to "must" appeal. Court's interpretation serves regulatory purpose of resolving grievances at the lowest possible level and not escalating everything to highest level. Moreover, inmate grievance procedure act only applies to federal claims, not those arising under D.C. law.

Recent Cases Reported By:
PATRICK A. MALONE
Stein, Mitchell & Mezines
1100 Connecticut Avenue, N.W.
Suite 1100
Washington, D.C. 20036
(202) 737-7777

www.Steinmitchell.com
pmalone@steinmitchell.com