RECENT CASES
Trial Lawyers Association of Metropolitan Washington, D.C.
September 2004

New Maryland Rules Let Witnesses Change Substantive Deposition Answers and Requires Court to Strike Affidavits Contradicting Deposition Testimony Not Timely Corrected

The Maryland Court of Appeals has adopted new rules for changing deposition testimony effective July 1, 2004. Deponents can now make substantive changes in deposition answers, but only within 30 days by following the procedures in the rule and creating a "correction sheet." Parties can automatically re-depose anyone who makes substantive changes in a deposition. The summary judgment rule has been amended to provide that anyone who fails to correct a deposition according to the rules cannot later contradict the deposition with a new affidavit. Courts are empowered to strike such affidavits.

> Rule 2-415(d) now states, in part: "Within 30 days after the date the officer mails or otherwise submits the transcript to the deponent, the deponent shall (1) sign the transcript and (2) note any changes to the form or substance of the testimony in the transcript on a separate correction sheet, stating the reason why each change is being made."
>
> Rule 2-415(i) states: "If a correction sheet contains substantive changes, any party may serve notice of a further deposition of the deponent limited to the subject matter of the substantive changes made by the deponent unless the court … enters a protective order precluding the further deposition."
>
> Rule 2-419(a)(1) now says that a deposition and "any correction sheets" may be used to contradict or impeach the testimony of the deponent.
>
> Rule 2-501(e) now states that on summary judgment, a party may move to strike any sworn statement of a witness that contradicts prior deposition testimony that was not corrected within the time allowed by Rule 2-415. The rule requires the court to strike the contradictory sworn statement unless the court determines that the witness reasonably believed the prior statement to be true based on facts known to the person when the prior statement was made and the new statement is based on facts not known and not reasonable knowable at the time the prior statement was made.

PRACTICE NOTE: This rule is consistent with federal common law, where courts often reject a late affidavit that tries to qualify or change deposition testimony. If your witness makes a potentially fatal error in deposition, you **must** correct it with an errata sheet within 30 days or face summary judgment.

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

Joint Tortfeasor Settlement: Pro Rata Credit Disallowed Because Non-Settler Had No Viable Contribution Claim against Settler

Chidel v. Hubbard, 840 A.2d 689 (D.C. 2004). Opinion by Washington, joined by Steadman and Ferrell. Trial court: Wolf.

FACTS: Plaintiff sued her internist, the D.C. government clinic where internist worked, and a radiologist (plus radiologist's employer) for not informing her of a suspicious report of a mammogram and delaying diagnosis of her breast cancer. Plaintiff settled on first day of trial with two tortfeasors: the District of Columbia government and its employee, Dr. King, for $500,000 total. (The District and Dr. King were counted as separate tortfeasors because the plaintiff had independent liability theories against each.) A third tortfeasor, Dr. Chidel (and his employer Wener, which did not count as a separate tortfeasor) did not settle, and Chidel and his employer were found liable at trial for a total award of $1 million. Trial court first held that non-settlers were entitled to complete indemnification from settling tortfeasors, and thus plaintiff was entitled to no recovery. Plaintiff appealed and won reversal on that issue. On remand, trial court held that non-settlers were entitled to a two-thirds *pro rata* credit for each of the settling tortfeasors, thus reducing plaintiff's recovery to $333,333. Both sides appealed.

OUTCOME: Trial court reversed and judgment entered giving non-settling tortfeasors only one-third credit.

HOLDING: Non-settling tortfeasors are entitled to a *pro rata* credit against the judgment **only** for those settling tortfeasors against whom the non-settlers have a valid contribution claim. Since neither non-settler had a valid claim against the District (due to defective or untimely 12-309 notices), they could claim a credit only against the one settler, the D.C. employee Dr. King, as to whom they did have a valid contribution claim.

NOTE: This outcome gave the plaintiff a total recovery greater than the jury verdict ($500,000 settlement plus $666,667 judgment on verdict of $1 million), a result permitted under *Berg v. Footer*, 673 A.2d 1244 (D.C. 1996).

See summary of joint tortfeasor settlement rules for District of Columbia on next page.

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Stein, Mitchell & Mezines
1100 Connecticut Avenue, N.W.
Suite 1100
Washington, D.C. 20036
(202) 737-7777

www.Steinmitchell.com
pmalone@steinmitchell.com

The Basic Rules of Joint Tortfeasor Settlements in the District of Columbia

Basic broad rule: Where a plaintiff settles with a joint tortfeasor, the non-settling tortfeasor obtains a *pro rata* credit for the settling party's proportional share of the judgment. *Martello v. Hawley,* 112 U.S.App. D.C. 129, 300 F.2d 721 (1962). If the settler is not found to be a tortfeasor, then the credit is a dollar-for-dollar *pro tanto* credit. *Snowden v. D.C. Transit Sys., Inc.,* 147 U.S.App. D.C. 204, 454 F.2d 1047 (1971).

Chidell v. Hubbard helps us understand the basic logic of the D.C. joint tortfeasor rule: *A credit that a losing defendant gets for a settling defendant's payment to the plaintiff is a substitute for the non-settler's right of contribution against the settler.* The settlement has given the settling tortfeasor immunity under D.C. law from any contribution claim by the non-settler. If the non-settler has no valid contribution claim, then the settlement has not prejudiced him in any way and he is entitled to no credit (except a dollar-for-dollar credit that the court awards to prevent the plaintiff from obtaining a "double recovery"). But if the settlement has eliminated the non-settler's ability to spread the cost of the judgment equally among liable defendants, then the non-settler is entitled to a credit that makes up for the *pro rata* piece of the judgment that he would have been legally entitled to try to collect from the settlers.

Application of this rule requires answering three basic questions:

Question one: Is the settler a tortfeasor? If not admitted to be a tortfeasor in the settlement agreement, or not found to be a tortfeasor by an adjudication on a timely cross-claim filed by the non-settler, the settler is a mere contributor to the plaintiff's settlement, for which the non-settler gets a dollar-for-dollar *pro tanto* credit.

Question two: Was the settlement for the same injury? If the injuries subject to settlement are different from those still at issue, then this is not a "joint tortfeasor" settlement, which applies only where two or more tortfeasors contribute to the same injury. In that case, no credit at all may be given. See *District of Columbia v. Wash. Hosp. Center,* 722 A.2d 332 (D.C. 1998) (en banc) (hospital which allegedly aggravated initial injury is not a joint tortfeasor).

Question three: How many tortfeasors are there? This is important because the amount of a *pro rata* credit depends on how many "shares" of the case have been sold by the plaintiff. Basic rules: employer and employee count as only one tortfeasor where claims against employer are based only on *respondeat superior*, but where plaintiff has independent theory of negligence against employer itself, that party may count as a separate tortfeasor (as long as there is an adjudication or admission that affirms that separate theory). *See Chidel v. Hubbard.*

> **Practice Note**: To limit the non-settling defendant to the smallest possible credit, the plaintiff will want to: (A) put generous settlements (predicted to be more than

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pmalone@steinmitchell.com

that party's eventual proportional share of the judgment) into the "joint tortfeasor" category – which limits the credit to a *pro rata* share, and (B) place low settlements into the "mere contributor/non-tortfeasor" category, which limits the credit to dollar-for-dollar. A non-settling defendant who files a timely cross-claim against the settler (see cases mentioned below) can take this out of the plaintiff's control. BUT, the plaintiff has some control over settlement language. The plaintiff who achieves a generous settlement with a joint tortfeasor will want to make sure that the settler admits to being a joint tortfeasor in the settlement agreement. This requires avoiding the usual boilerplate language denying liability.

For timeliness of cross-claim, see *Washington v. Washington Hospital Center,* 579 A.2d 177 (D.C. 1990)*; Paul v. Bier,* 758 A.2d 40 (D.C. 2000). Where party settles and then is dismissed from a case without a ruling about its culpability, the *pro tanto* rule will generally apply. Settling defendant must admit to being a joint tortfeasor in settlement agreement (or some other pleading) if plaintiff wants to claim applicability of *pro rata* credit.

Special note: *Every* settlement agreement/release must explicitly preserve claims against non-settling tortfeasors and release only the parties paying the settlement (and their employees, agents, etc.). A general release will extinguish all claims even against non-settlers.

Bottom line: Avoid partial settlements whenever possible because of the legal difficulties in knowing in advance how these complex rules will play out, and because of the uncertainty in knowing tactically how a case will turn out at trial when there is an obviously absent party.

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Stein, Mitchell & Mezines
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Suite 1100
Washington, D.C. 20036
(202) 737-7777

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pmalone@steinmitchell.com

Bus Passenger Fall-Down: Jury Must be Instructed on Contributory Negligence Where There Is Any Basis for the Defense

WMATA v. Cross, 849 A.2d 1021 (D.C. 2004). Opinion by Glickman, joined by Steadman and Ruiz. Trial court: Bayly.

FACTS: Elderly woman was hurt when she fell on a moving Metrobus. Plaintiff testified the driver seemed in a hurry after she boarded, and took off suddenly before the passenger could sit down, then stopped abruptly, causing her to lose her balance. Driver claimed passenger was already seated and must have stood to move to another seat when a car cut in front of the bus, requiring driver to brake suddenly. Judge denied Metro request for contributory negligence instruction. Jury returned verdict for plaintiff for $100,000.

OUTCOME: Judgment for plaintiff REVERSED and new trial ordered.

HOLDING: Metro was entitled to contributory negligence instruction. If jury credited driver's testimony that passenger got up to move after bus was already moving, and it also credited passenger's testimony that bus took off suddenly, then it could have concluded she should not have left her seat when the bus was accelerating so rapidly.

COMMENT: Case is an example of a difficult situation for plaintiff's counsel at trial. If there is any factual basis, however thin, for a party's theory of defense, failure to instruct the jury on that defense is reversible error. In hindsight, plaintiff's counsel here would have been better off to accede to the contributory negligence instruction (with a special interrogatory to obtain the jury's finding on the specific issue), while preserving the argument that the evidence was insufficient to allow it. Then counsel could have highlighted the weakness of the defense in closing argument and, if the jury rejected the defense in the special interrogatory, the case would have been over. Trial court's denial of the instruction left the parties to speculate about what the jury would have done, a situation where the appellate court felt compelled to order a new trial.

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Suite 1100
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pmalone@steinmitchell.com

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Legal Malpractice Statute of Limitations: Plaintiff's Discharge of Lawyer Didn't Start Clock Because Actual Harm Hadn't Yet Occurred

Wagner v. Sellinger, 847 A.2d 1151 (D.C. 2004). Opinion by Ferren, joined by Glickman and Washington. Trial court: Edwards.

FACTS: Wagner became paralyzed from the waist down after back surgery at Georgetown. She sued for malpractice, and her original lawyer deposed the defendant surgeons for about an hour each. Wagner then fired this lawyer after he tried to persuade her to accept a small settlement. Her new lawyer tried to redepose the defendants, believing that key facts about the surgery had not been discovered, but motion was denied. During trial, it was disclosed that the defendant had used a different type of instrument for the laminectomy than the plaintiff had believed. Jury found for the defense. Less than one year after the verdict, but more than three years after first lawyer was fired, Wagner sued first lawyer for legal malpractice. Trial court granted summary judgment to defense on statute of limitations.

OUTCOME: Judgment for defendant REVERSED and case remanded for further proceedings.

HOLDING: When dissatisfied plaintiff fires lawyer in mid-suit, statute of limitations does not start to run until successor lawyer loses the case. Date of firing does not trigger the clock because at that point, only a potential injury has occurred, and actual injury is required for claim to accrue.

COMMENT: D.C. also has the rule that limitations period does not start to run until the lawyer's representation ends, but court notes that rule is intended to extend the applicable limitations period, not limit it. Holding that actual injury from losing the lawsuit for which the attorney was fired is necessary to start the clock is a logical extension on the "triple trigger" limitations doctrine in the District of Columbia: a plaintiff must know, or by reasonable diligence should know of: (1) an injury, (2) its cause, and (3) some evidence of wrongdoing. *Bussineau v. President and Dirs. Of Georgetown College,* 518 A.2d 423, 435 (D.C. 1986).

Note also the distinction between this case – where the lawyer is hired only for a piece of litigation and the limitations period for his malpractice doesn't start until case is lost – and the case where the lawyer negligently drafts a document. In latter case, limitations clock doesn't wait for subsequent lawsuit to confirm that document was poorly drafted, but clock starts when client realizes lawyer did a poor job. See *Wagner v. Sellinger* at n. 9.

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Suite 1100
Washington, D.C. 20036
(202) 737-7777

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pmalone@steinmitchell.com

HIPAA Bars Defense Ex-Parte Contacts with Treating Doctors

In two recent cases, trial courts in the District of Columbia and Maryland have held that the privacy regulations promulgated under the Health Insurance and Portability Accountability Act of 1996, 42 U.S.C. § 1320d, trump any contrary state law and ban *ex-parte* contacts between defense lawyers and treating health care providers.

The cases:

- *Law v. Zuckerman,* 307 F. Supp. 2d 705 (D. Md. 2004).
- *Mitchell v. Falk,* unpublished (D.C. Superior Court, July 23, 2004, Judge Kravitz), posted on TLA-D.C. web site.

Key aspects of the rulings:

- Health information about a patient includes both oral and recorded information. 45 C.F.R. § 160.103.
- HIPAA supercedes any contrary state law except provisions in state law that relate to privacy and that are "more stringent" than HIPAA in protecting privacy. 42 U.S.C. § 1320d-7(a)(2)(B); 45 C.F.R. § 160.203.
- HIPAA provides only three ways for obtaining protected health information during a judicial proceeding. 45 C.F.R. § 164.512(e). First, a court order may be obtained under which the health care provider may disclose "only the protected health information expressly authorized by such order." 45 C.F.R. § 164.512(e)(1)(i). Second: a covered entity may respond to "a subpoena, discovery request, or other lawful process," as long as the covered entity receives written assurance that the patient has been notified of the request and has been given an opportunity to object. Third, the patient can consent to any other disclosure method.

Practice Note: Prudent plaintiff's counsel will notify defense counsel at the outset of the case that the plaintiff does not consent to any *ex-parte* contacts and that such are banned under HIPAA and these cases.

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Suite 1100
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pmalone@steinmitchell.com

Briefs

Validity of D.C. Strict Liability Statute for Assault Weapons is Upheld. In *District of Columbia v. Beretta, U.S.A., Corp.,* 847 A.2d 1127 (D.C. 2004), the court throws out common-law claims of negligent distribution of firearms brought against a variety of manufacturers and distributors of firearms, but reinstates claims under D.C. Code § 7-2551.02 (2001). That statute states:

> "Any manufacturer, importer, or dealer of an assault weapon or machine gun shall be held strictly liable in tort, without regard to fault or proof of defect, for all direct and consequential damages that arise from bodily injury or death if the bodily injury or death proximately results from the discharge of the assault weapon or machine gun in the District of Columbia."

The court says this language, by its terms, requires "proof tying an assault weapon or machine gun that causes death or bodily injury to a particular manufacturer, importer, or dealer." But the court rejects constitutional challenges (commerce clause and due process).

See D.C. Code § 7-2551.01 for list of "assault weapons" included in the statute. "Machine guns" are defined in 7-2501.01(10).

Note: statute exempts assault weapons originally sold for law enforcement, and also disqualifies any plaintiff who was injured while committing a crime or who shot himself. D.C. Code § 7-2551.03.

How long is "three days"? Court says "three days" in Superior Court Civil Rule 6(e) – giving three extra days to respond where a notice or motion has been served by mail – means three ***business*** days. *Faggins v. Fischer,* __ A.2d __ (D.C. 2004). Thus defendant filing a motion for new trial under Rule 59(e) had ten business days after notice of entry of judgment was entered, plus three more business days. This is contrary to the federal rule, which doesn't add three days at all for a Rule 59(e) motion and, in any event, counts the three days of Rule 6(e) as three calendar days.

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Washington, D.C. 20036
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pmalone@steinmitchell.com