# RECENT CASES
# Trial Lawyers Association of Metropolitan Washington, D.C.
# September 2005

## *Proximate Cause: Plaintiff Had Enough Evidence to Show that Diving Board's Unsafe Position Caused His Fall and $5 Million in Damages*

*District of Columbia v. Zukerberg*, No. 03-CV-729, 2005 WL 1949656 (D.C. Aug. 11, 2005). Opinion by Washington, joined by Ruiz and King. Trial court: Burgess.

**FACTS:** Ten-year-old Jacob Miles-McLean climbed onto the 3-meter diving board at a family swim night at the Wilson High School pool in June 1999. He lost his balance and fell to the concrete deck, suffering severe injuries. In a suit against the District, the plaintiff called two diving experts who opined that the fulcrum on the diving board had been improperly set to its rear-most position (and frozen into place by rust). This put the board into its most springy and wobbly condition, which is unsafe for non-competitive divers. The District conceded negligence but contended the fall could have been caused by many things for which the District wasn't at fault, including the boy's failure to use the handrails and his balance and coordination problems that existed before he climbed onto the board. The jury awarded $5 million.

**OUTCOME:** Judgment for plaintiff AFFIRMED.

**HOLDING:** Plaintiff offered sufficient evidence to prove that the fulcrum position on the diving board was a substantial factor in causing the fall, and mere fact that there were other possible causes doesn't mean that the plaintiff's evidence is necessarily not substantial.

**QUOTE:** "The plaintiff was not required to show that the negligent condition of the diving board was the only possible cause of the fall, or that injury must necessarily follow from its use, but that the negligence substantially increased the chances of the harm that resulted from the use of the board."

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## *Hit-and-Run Motorist was not "Uninsured" Because Plaintiff Could Identify the Vehicle*

*Burke v. Maryland Auto Insurance Fund,* No. 03-CV-1445, 2005 WL 1846959 (D.C. Aug. 4, 2005). Opinion by Terry, joined by Wagner and Glickman. Trial court: Wright.

**FACTS:** Plaintiffs were rear-ended on an exit ramp by a car that then sped away. Plaintiffs got the license tag number and traced the owner of the car but were unable to locate or serve her. They then sued to collect under plaintiff's uninsured motorist coverage. At trial, plaintiff tried to introduce a Maryland Motor Vehicle Administration report showing that the vehicle was uninsured as of six months before the accident. Court refused to admit the document because it was uncertified and plaintiff failed to call any witness from MVA to authenticate the document, plus the document didn't prove the absence of insurance as of the date of the accident. Court then granted judgment to the defendant at the end of plaintiffs' case.

**OUTCOME:** Directed verdict for defendant AFFIRMED.

**HOLDING:** Plaintiff failed to prove that the striking car was uninsured. Plaintiff could not rely on the part of the statute that said a vehicle was uninsured if its owner or operator "cannot be identified," since the plaintiff in fact did identify the owner. Having identified the owner, it was the plaintiff's burden to prove that the vehicle in fact was uninsured.

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## *Expert Witnesses: Trial Court Did Not Err in Excluding Experts for Lack of Direct Experience*

*Jung v. George Washington University,* 875 A.2d 95 (D.C. 2005). Opinion by Wagner, joined by Farrell and Pryor. Trial court: Bowers and Mize.

**FACTS:** University terminated plaintiff from its Ph.D. program in international relations after he failed comprehensive examination twice. Student sued and case was settled by giving him a third chance. After he failed again, he sued a second time. At trial, court refused to let plaintiff's two experts testify that plaintiff met the university's standards because they lacked knowledge and experience with doctoral-level examinations and because the evaluative judgments of academic performance are necessarily subjective. Court also would not let the experts testify that plaintiff's performance on the exams was better than two Caucasian students. Jury returned verdict for university on plaintiff's discrimination claim.

**OUTCOME:** Judgment for defendant AFFIRMED.

**HOLDING:** Court did not abuse its discretion in limiting the experts' testimony. While both experts had Ph.D degrees in fields related to plaintiff's, neither had given a doctoral-level examination and neither was specifically familiar with the university's standards for passing such an exam.

**COMMENT:** Case shows importance of expert selection. An expert can be superficially qualified in the general subject of a lawsuit, but needs to also have specific qualifications in the exact topic at issue. Trial court has broad discretion to exclude experts who lack the requisite "fit" with the facts of the case.

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## *Failure of Service: Trial Court Abused Discretion in Refusing to Reinstate Case*

*Packheiser v. Miller,* 875 A.2d 645 (D.C. 2005). Opinion by Reid, joined by Schwelb and Washington. Trial court: Bush.

**FACTS:** Pro se plaintiff sued plastic surgeon for malpractice. She tried to serve him by certified mail. Postal Service failed to return green cards on multiple mailings, although its web site showed the documents had been delivered. Surgeon then moved to quash service and dismiss complaint. Plaintiff then had the doctor served personally by a private process server, but service took place after expiration of the extra 60 days the trial court had granted for service. Court then granted, without explanation, defendant's motion to quash and dismiss. Court rejected plaintiff's motion to reinstate pursuant to Rule 41(b).

**OUTCOME:** Dismissal REVERSED and case remanded for "an informed exercise of discretion."

**HOLDING:** Trial court's unexplained dismissal of case and unexplained refusal to reinstate was an abuse of discretion. Plaintiff proffered reasons why her failure to obtain service should be excused and why it would hurt her and not hurt the defendant if the case was not reinstated. Lack of explanation meant that trial court either did not recognize its discretion or refused to exercise it. In either case, trial court was wrong.

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## *District Showed Deliberate Indifference to Welfare of Juvenile Delinquent and Is Liable for His Murder by Unknown Assassin*

*Smith v. District of Columbia*, 413 F.3d 86 (D.C. Cir. 2005). Opinion by Tatel, joined by Edwards; Ginsburg dissenting.

**FACTS:** Seventeen-year-old Tron Lindsey was shot and killed late one night in the apartment he shared with a roommate in a program for delinquent youths. The District government had placed Tron in this "independent living" facility operated by a private contractor chosen by the District. In violation of a 1986 law, the Mayor had never issued standards for selecting or supervising the providers of residential facilities for District juveniles. This particular program, called ESA, was run by two men with no experience in independent living programs for youth. They chose Queenstown Apartments in Mt. Ranier, Md., as location for the program but never inquired into safety or security issues. The complex had poor lighting, few locks, no guard services, and a reputation, unknown to ESA, as an open-air drug market. ESA placed up to 16 youths at a time in the Queenstown Apartments, for which the District paid ESA $110 per day per youth. Tron was in the program less than two months and during that time, missed a 7 p.m. curfew on 50 out of 51 days, for which he was docked his allowance but was not otherwise disciplined. ESA also failed to notice several armed robberies and assaults at the complex. The District, for its part, did little to monitor ESA even after two assaults on youths in ESA's custody. On the night of April 28, 1999, Tron and his roommate let into their apartment someone who killed each of them with a single shot to the head from a silencer-equipped gun. Tron's grandmother sued the District and ESA for violation of Tron's substantive due process rights under the Fifth Amendment, pursuant to 42 U.S.C. § 1983. After a 12-day trial, jury found against both District and ESA and awarded $72,000 in damages. District appealed.

**OUTCOME:** Judgment for plaintiff AFFIRMED.

**HOLDING:** (1) The District had sufficient control over Tron as his legal custodian and primary caregiver, placing him in a program that constrained where he lived and what he could do, that the District had a constitutional duty not to be deliberately indifferent to his safety. *See DeShaney v. Winnebago County Dept. of Social Services*, 489 U.S. 189, 196 (1989). Comparing these facts to subsequent appellate decisions, this case is more like the foster care cases where courts have found such a duty than the public school cases where no duty has been found.
*(continued)*

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(2) Facts were sufficient to show deliberate indifference by District to its duties. Expert testimony showed District fell far below national standards of care for provider selection and monitoring in, among other things, District's 12-year failure to promulgate standards for youth residential facilities, its hiring of a new company with no experience in youth residential programs, its lack of criteria for site selection, its failure to make sure that ESA monitored crimes in the complex, and its lack of response to prior assaults on ESA youths.

(3) Evidence was sufficient to show that District's deliberate indifference caused the death of Tron and that his death was foreseeable. Lack of supervision of the youth and questionable site selection in themselves could be predicted to put these troubled youths in harm's way.

**COMMENT:** This is a significant Section 1983 case on governmental liability for negligent retention and supervision of an independent contractor, as well as liability for criminal conduct by an unknown assailant.

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# *Briefs*

**Illegal alien who fraudulently concealed his illegal status cannot sue his lawyer for failing to procure worker's compensation benefits to which he was not entitled**. *Marboah v. Ackerman,* 877 A.2d 1052 (D.C. 2005).

**Statute of limitations on unjust enrichment claim begins to run on date of last service performed and date when payment is refused** (not on later date when defendant actually used the ideas that plaintiff had sold it). *News World Communications Inc. v. Thompsen*, 878 A.2d 1218 (D.C. 2005) (reversing two trial court rulings).

**Attorney's fee motion in Section 1983 case must be filed within 14 days of entry of original judgment, not after appeal is concluded.** *District of Columbia v. Jackson,* 878 A.2d 489 (D.C. 2005) (vacating award of $200,000 in fees and holding plaintiff should have filed fee motion after original judgment or at least should have moved for extension of time).

**Plaintiff who contracts asbestosis decades after working with defendants' products does not have to give detailed information about the particulars of his contact with the defendants as long as he can generally show contact sufficient to cause him harm.** *Weakley v. Burnham Corp.*, 871 A.2d 1167 (D.C. 2005) (reversing summary judgment and vacating protective orders against discovery by plaintiff).

**Prisoner can sue for damages for unlawful confinement for being placed in the D.C. Central Detention Facility rather than a halfway house as ordered by the court.** *Taylor v. U.S. Probation Office,* 409 F.3d 426 (D.C. Cir. 2005) (reversing trial court and reinstating case for pro-se prisoner).

**Lawyer is liable for compensatory and punitive damages to foreign government for his breach of fiduciary duty by using government's money to pay for unauthorized personal services for its ambassador.** *Government of Rwanda v. Johnson,* 409 F.3d 368 (D.C. Cir. 2005).

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