

RECENT CASES
Trial Lawyers Association of Metropolitan Washington, D.C.
Spring 2006

D.C. Consumer Act Applies to Claims Arising out of Medical Services, but Consumer Claim Must be Distinct From Malpractice Claim

Caulfield v. Stark, 04-CV-548, 2006 WL 564049 (D.C., March 9, 2006). Opinion by Ferren, joined by Glickman and Farrell. Trial Judge: Blackburne-Rigsby.

FACTS: Plaintiff sued gastroenterologist, alleging doctor told her he would obtain approval from her medical insurance carrier for a colonoscopy. Approval was never obtained. Three years later plaintiff discovered a mass in her rectum. Plaintiff required various surgeries including removal of a large portion of her rectum. Plaintiff filed suit alleging fraud, unlawful trade practices, and negligence. Plaintiff's fraud claim alleged defendant (1) misrepresented that he would obtain authorization from insurance carrier, (2) improperly billed insurance carrier for the wrong services, and (3) submitted a bill to insurance carrier for an unjustified diagnosis. At close of plaintiff's case, trial court directed verdict for defendant on the fraud and Consumer Protection Procedures Act (CPPA) claims. The jury found negligence, but no proximate cause.

OUTCOME: Judgment for the defendant AFFIRMED.

HOLDING: (1) No claim for fraud is stated where doctor's office stated it would obtain insurance authorization for a procedure, but negligently failed to follow through. (2) Ambiguities in a doctor's billing entry did not amount to fraud. (3) The D.C. CPPA applies to medical services. (4) There must be a clear basis for distinguishing a misrepresentation claim under the CPPA from a medical negligence claim. (5) Trial court's refusal to allow defendant to be impeached by medical treatise would not be revisited because there was no offer of proof as to how the impeachment with the treatise would have gone.

COMMENT: (1) While the CPPA does apply to medical services, questions whether the CPPA applies to personal injury damages and what showing must be made to distinguish the CPPA claim from a regular medical negligence claim remain undecided. (The court declined to adopt Judge Urbina's "entrepreneurial nexus requirement" test from *Dorn v. McTigue*, 157 F. Supp. 2d 37 (D.D.C. 2001).) (2) If the trial court excludes important evidence, it is crucial to make a proffer about what that evidence would have shown.

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Medical Malpractice: Plaintiff's Experts Established a National Standard of Care and Causation through Combined Testimony of Two Experts

Snyder v. George Washington University, 890 A.2d 237 (January 12, 2006). Opinion by Washington, joined by Ruiz and Glickman. Trial Judge: Graae

FACTS: Plaintiff in medical malpractice case asserted that his paralysis was caused by defendant's failure to diagnose and treat post-surgical bleeding that compressed spinal cord. Plaintiff named two experts on standard of care and causation. In deposition, plaintiff's expert (Dr. Brownlee) testified that standard of care had been violated and violation caused plaintiff's injuries. During the deposition, defense counsel did not object to the expert's qualifications or to his testimony as to standard of care and causation. The expert died before trial. Trial court refused to let plaintiff use deposition testimony because transcript did not show an adequate foundation for his testimony. The trial court also ruled that testimony of plaintiff's sole remaining expert (Dr. Hoffler) was insufficient because expert stated "he didn't know what the mechanism of causation was here." The trial court therefore granted defendant's Motion for Judgment at end of plaintiff's case.

OUTCOME: Judgment for the defendant REVERSED. Case remanded for new trial.

HOLDING: (1) Where expert testifies based on 40 years of practice, continuing education, his training, frequent meetings of the American College of Surgeons, and references to the literature, the expert has been adequately qualified to testify as to the national standard of care. (2) Expert who testified in deposition that he performed in excess of 1,200 to 1,500 surgical cases in the last 10 years was qualified to testify on causation. Expert does not have to give precise testimony about the causal mechanics for his opinion to be admissible concerning a causal link between the negligence and the injury. (3) Plaintiff's two experts, taken together, provided sufficient evidence that defendant breached the national standard of care and that the breached caused plaintiff's injuries.

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Civil Liability for Criminal Acts of Others: Expert Testimony Insufficient to Establish National Standard of Care for Student Discipline

Varner v. District of Columbia, 891 A.2d 260 (February 2, 2006). Opinion by Judge Schwelb, joined by Farrell and Nebeker.

FACTS: Two students were murdered on the Gallaudet University campus between September 2000 and February 2001. The same student committed both crimes. After the first murder, police and the University overlooked the murderer, despite clues that he was involved such as his use of victim's ATM card. The survivors of the second victim sued the University for failing to discipline the defendant for past disciplinary violations and sued the District of Columbia for failing to apprehend him before the second murder. Plaintiff's expert could not testify to any recognized national standard on how a University student who has committed various offenses, including theft, should be disciplined. The trial court granted summary judgment for the University and for the District. Summary judgment for the District was based on the public duty doctrine.

OUTCOME: Summary Judgment for defendants AFFIRMED.

HOLDING: (1) Expert testimony was required on whether University breached the national standard of care by suspending the student for one year for prior thefts. (2) The University's internal manual on student discipline may be admissible as evidence of the standard of care, but is not sufficient to establish a national standard of care. Such a standard must be established by competent expert testimony and other evidence. (3) Under the public duty doctrine, the police department did not owe an actionable duty to the students in general or to the second victim to perform a competent murder investigation. Fact of investigation created no "special relationship" triggering a duty.

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Agency Relationship May be Established Even Though Written Contract States That Agent is "Independent Contractor"

Schechter v. Merchant's Home Delivery, Inc., 892 A.2d 415 (February 9, 2006). Opinion by Schwelb, joined by Glickman and Kramer. Trial Judge: Wright.

FACTS: A widow in northwest Washington sued delivery company because delivery men stole from her while they installed a washing machine in her home. Plaintiff alleged that the thieves were employees of the delivery company and brought claims for negligence (vicarious liability) and negligent hiring/supervision. The delivery company and one culprit had entered into a written "independent truckman's agreement," which stated that the man was an independent contractor and not an employee of the delivery company. Despite the agreement, there was evidence that the delivery company retained significant control over the men, including the power to discharge them, discipline them, control delivery routes, control which driver delivered what, and required drivers to check in after each delivery. Plaintiff also produced evidence that delivery company failed to train the drivers, had no knowledge of their background, and did not adequately supervise the driver's activities. Defendant moved for summary judgment, arguing that delivery men were not employees but were independent contractors. Trial court granted defendant's motion, and dismissed all claims.

OUTCOME: Judgment for defendants REVERSED as to the negligent hiring/supervision claim and AFFIRMED as to vicarious liability claim.

HOLDING: Evidence that the delivery company had the right to control the culprits created a factual issue as to whether the two men were employees or independent contractors, in spite of contractual language stating that they were independent contractors. As such, summary judgment on issue of employer-employee relationship was error. However, in stealing from the customer, the men were not acting within the scope of their employment. Evidence of employer's lack of supervision and inadequate training required remand on the issue of negligent supervision.

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Briefs

Plaintiff's Uncorroborated Testimony is Enough to Establish a Contract of Employment with the Defendant. Plaintiff sued the owner of a restaurant for breach of an employment contract. Claimant alleged that he had reached an oral agreement with the defendant to work for that defendant personally at a rate of \$2,400 per month to be paid at the end of a six-month period. Plaintiff brought suit against defendant under the Wage Payment Act, D.C. Code §32-1301 *et seq.* (2001). Trial court granted defendant's motion for summary judgment because plaintiff failed to establish that defendant was his "employer" under the act. The Court reversed and held that plaintiff's uncorroborated testimony is enough to establish a contract of employment with the defendant. In opposing summary judgment, the plaintiff did not file a Rule 12-I(k) Statement of Disputed Facts. The appellate court overlooked this omission and found that the plaintiff had marshaled sufficient facts to overcome summary judgment. *Sanchez v. Magafan*, 892 A.2d 1130 (D.C., February 16, 2006).

Assistant Police Chief Does Not Have Qualified Immunity for Ordering Mass Arrest of Protesters Without Previously Asking the Protesters to Disperse. On September 27, 2002 a large anti-globalization protest was held in Pershing Park. Assistant Police Chief Newsham cordoned off the park and ordered everyone's arrest, without first ordering the crowd to disperse. Police Chief Ramsey did not question or overrule Newsham's order. A class action was filed alleging violations of the protesters' Fourth Amendment rights. Newsham and Ramsey moved for summary judgment on the issue of qualified immunity. Trial court denied the motion and defendants appealed. The court of appeals affirmed the trial court's decision. The court held that Newsham's ordering of the mass arrest without first requesting them to disperse "violated clearly established constitutional law," and therefore the defense of qualified immunity did not apply. Qualified immunity also did not apply as a matter of law to Chief Ramsey because a factual question remained as to whether Chief Ramsey knew that the park had not been cleared of law-abiding bystanders. *Barham v. Ramsey*, 434 F.3d 565 (D.C. Cir. January 13, 2006).

Dismissal Under Rule 12 is Improper as Long as Plaintiff in Legal Malpractice Case has Alleged That Damages Were Suffered, Even Though Plaintiff had Likely not yet Incurred any Damage as of the Time of Filing Suit. Plaintiff's decedent was a postal worker who contracted anthrax in October 2001 and died. Defendant, a law firm, agreed to provide pro bono legal services to the decedent's widow, including "initial counseling regarding potential claims arising out of the death of her husband." Plaintiff (the widow) later engaged different counsel to file a medical malpractice action arising out of her husband's death. While the malpractice action was pending in the U.S. District Court for the District of Maryland, plaintiff sued pro bono law firm for legal malpractice, presumably arising out of its handling of potential third party claims. Defendant law firm moved to dismiss under Rule 12, arguing that because the medical malpractice action was still pending, no damages had been incurred. The appellate court characterized plaintiff's action as a "anticipatory claim of legal malpractice," and expressed

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doubt as to whether plaintiff could prove any damages at present, but nevertheless held that plaintiff's complaint for legal malpractice contained sufficient allegations to survive a Rule 12 motion and reversed the judgment of dismissal entered by the trial court. *Curseen v. Buchanan Ingersoll*, 890 A.2d 191 (D.C. January 12, 2006).

The District of Columbia Courts Lack Personal Jurisdiction Over Foreign Company That had Only Two or Three Contacts With the District Over the Previous 17 Years and Litigation did not Arise out of Those Contacts. Plaintiff was injured on an elevator in the U.S. Embassy in Mexico City. Plaintiff brought suit in D.C. against a company that manufactures elevator parts. Defendant's only contacts with the District of Columbia were two or three elevator part orders made over the previous 17 years. Those contacts had no connection to the plaintiff's injuries in Mexico City. The trial court held that it lacked personal jurisdiction over the defendant under either general personal jurisdiction or specific personal jurisdiction. The appellate court affirmed. This opinion contains an instructive discussion of general personal jurisdiction law under D.C. Code §13-334. The defendant must be served in the District of Columbia and must do substantial business in the District of Columbia for jurisdiction to exist under §13-334. The court also engaged in a lengthy discussion of when an agent may be subject to jurisdiction by virtue of its principal's contacts with a forum. *Gonzalez v. Internacional De Elevadores, S.A.*, 891 A.2d 227 (January 31, 2006).

When Defendant Moves for Dismissal for Lack of Personal Jurisdiction and for Dismissal on the Merits, the Trial Court Must Make a Jurisdictional Determination Before Reaching the Merits Decision. Plaintiff filed suit against an insurance company alleging that the lead paint exclusion in the general liability insurance policy issued to her landlord was void as against public policy. Defendant moved to dismiss for lack of personal jurisdiction and later moved for summary judgment on the merits. The trial court never ruled on the jurisdictional motion, and granted the motion for summary judgment on the merits. There was a substantial question in the case as to whether plaintiff had sued the correct defendant; defendant contended it was mere holding company for correct defendant that had not been sued. The appellate court reversed, holding that the trial court erred in declining to determine whether there was personal jurisdiction over defendant before granting summary judgment on the merits. *Hawkins v. W.R. Berkley Corporation*, 889 A.2d 290 (D.C. 2005).

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