

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

*Statute of Limitations: Three-Year Statute of Limitations Will Apply to Negligence Cases, as Long as the Allegations of Negligence Are Not “Fatally Intertwined” With Intentional Tort Counts*

*Stewart-Veal v. D.C.*, 896 A.2d 232 (D.C., April 13, 2006). Opinion by Reid, joined by Farrell and Fisher. Trial Judge: Wright.

**FACTS:** On November 12, 2002, plaintiff, an electrical contractor, had an altercation with the owner of the business where she was working. The police responded, and plaintiff was arrested. On May 3, 2003, plaintiff filed suit against D.C. and the arresting officer for false arrest, other intentional torts, and negligence arising out of the police officer’s response to the altercation. The complaint was dismissed (without prejudice) for insufficient service of process. On September 29, 2004, plaintiff filed a new lawsuit for negligence. Two months later, she amended her complaint. The amended complaint set forth two negligence theories. Theory 1 related directly to the conduct of the arresting officer, and theory 2 was for negligent training and supervision of the officer. Defendants moved to dismiss the amended complaint on the grounds that it was barred by the one-year statute of limitations for false arrest. The trial court granted the motion and denied plaintiff’s motion for reconsideration.

**OUTCOME:** Judgment for the defendant REVERSED on the negligent hiring, training and supervision claim, but AFFIRMED as to the negligence claim based on the alleged false arrest by the arresting police officer.

**HOLDING:** (1) The court found no error in dismissing plaintiff’s negligence claim insofar as it was based on the alleged negligence of the arresting officers in conducting the arrest. The court reasoned that this was “not separate and distinct from the false arrest claim; rather, it was intertwined with and dependant on that claim.” As such, the one-year statute of limitations for false arrest claims was applicable.

(2) The trial court did err in dismissing the negligent hiring, training and supervision claim as untimely. That claim was a separate and distinct cause of action, because plaintiff alleged that she was owed a duty from the District of Columbia to recruit, train, supervise and re-train its police force, and that this duty went beyond the engagement on November 12, 2002 where she was arrested.

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### *Evidence: Evidence That Physician May Have Committed the Same Surgical Error on a Patient Other Than the Plaintiff Is Admissible Where Defendant Takes Unfair Advantage of Evidentiary Ruling.*

*Henderson v. George Washington University*, 449 F.3d 127 (D.C. Cir., June 2, 2006). Opinion by Edwards, joined by Griffith and Silberman.

**FACTS:** Plaintiff sued physician, physician's group, and hospital for surgical negligence arising out of gastric bypass surgery. Original suit was filed by three plaintiffs arising out of three different surgeries, all performed by the same surgeon. All three plaintiffs alleged that the same surgical error had occurred. One main issue of surgical negligence dealt with the size of the anastomosis performed in each surgery. Defendant testified that he made each anastomosis the same size. A surgical report for one of the patients (not Henderson) stated that defendant had created a three-centimeter anastomosis. All parties agreed that a three-centimeter anastomosis would violate the standard of care. Defense successfully moved to sever the cases for trial. Defense moved to keep the surgical report of the now-severed patient out of evidence. The trial court granted defendant's motion, ruling that the prejudice from the possibility the jury would figure out that another patient had sued the doctor outweighed any probative value. Counsel for the defense then used this admissibility ruling as a sword, cross-examining plaintiff's experts on the grounds that the expert had no evidence that the anastomosis in the plaintiff's case was too big, calling witnesses to testify that the defendant physician always made smaller anastomoses, and arguing to the jury that the plaintiff had no evidence about the size of the anastomosis. After a seven-day trial, the jury found for the defendant. Plaintiff appealed, arguing that the exclusion of the report containing the evidence of the three centimeter anastomosis was reversible error.

**OUTCOME:** Jury verdict vacated, judgment for the defendant REVERSED, case remanded for new trial.

**HOLDING:** Where (1) the excluded evidence goes to the heart of the party's case and appears crucial to the outcome of the case, (2) the opposing party has used the excluded evidence as a shield to enhance his case and effectively destroy the other side's claim, and (3) the prejudice to the party opposing the admission of the evidence appears minimal, the district court abused its discretion in excluding the disputed evidence.

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**COMMENT:** In this case, the plaintiff's attorney made the Court of Appeals' job easy by revisiting the excluded evidence every time the defendant tried to take advantage of the trial court's incorrect ruling. The plaintiff's attorney argued that the evidence should come in to prove that the anastomosis was too big, to rehabilitate the plaintiff's expert, and to impeach the defendant and the defense witnesses, thus demonstrating the trial court's error in excluding the disputed evidence.

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***“Relating Back” under Rule 15/Statute of Limitations: In the Absence of Prejudice, Where the Wrong Defendant is Named in the Original Complaint, and Then the Correct Defendant is Named in an Amended Complaint, the Amended Complaint Will “Relate Back” to the Filing Date of the Original Suit***

*Zuurbier v. MedStar Health, Inc.*, 895 A.2d 905 (D.C., April 6, 2006). Opinion by Schwelb, joined by Washington and Fisher. Trial Judge: Boasberg.

**FACTS:**

Sex discrimination lawsuit filed by physician against her former employer, MedStar Georgetown. Plaintiff worked for MedStar Georgetown from 1993 until October 14, 2002. Plaintiff submitted her resignation on July 15, 2002, and remained at Georgetown pursuant to contractual requirements. Plaintiff filed her Complaint on July 15, 2003, alleging discriminatory underpayment, constructive discharge, sex discrimination in employment, and hostile work environment, in violation of the D.C. Human Rights Act, which has a one-year limitations period. Plaintiff originally filed suit against a MedStar entity that was not her employer. On October 9, 2003, plaintiff filed her first Amended Complaint in which she joined two MedStar subsidiaries. These subsidiaries were the correct defendants as they employed the plaintiff. The two MedStar subsidiaries filed a Rule 12 Motion asserting that plaintiff’s claims were untimely because they were made more than one year after the plaintiff submitted her resignation on July 15, 2002. Defendants also moved for judgment on plaintiff’s disparate pay case, asserting that each separate paycheck was a distinct discriminatory act and that only paychecks pre-dating October 14, 2002 (i.e., one year before plaintiff filed her Amended Complaint) were timely under the one year statute of limitations applicable to that claim. Trial court granted both motions, and dismissed the lawsuit except for the disparate pay case arising out of the paycheck received on October 31, 2002. Plaintiff dismissed this remaining portion of her case and took an appeal.

**OUTCOME:**

Judgment REVERSED as to constructive discharge claim, but AFFIRMED (as corrected) as to the disparate pay claim. Remanded.

**HOLDING:**

(1) Plaintiff correctly argued that her first Amended Complaint related back to the date of the initial Complaint filed on July 15, 2003. It was apparent that plaintiff and her attorneys attempted to sue the MedStar corporate entity that operated Georgetown University Hospital, but they got the name wrong. Plaintiff’s decision to sue the wrong corporate entity was not “strategic or

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intentional,” but was rather a simple attorney mistake. Defendant could show no prejudice arising out of this mistake. In the absence of such prejudice, the amended complaint adding the two correct defendant entities related back to the date of the initial timely filing. It is clear from the court’s reasoning that the absence of prejudice to the defendant is the key factor in determining whether an amended complaint that names the correct defendant will relate back to the original Complaint.

(2) Because each paycheck received by the plaintiff was a discrete discriminatory act of disparate pay, the “continuing violation” or “continuing tort” theory did not apply, and one year statute of limitations barred all disparate pay claims except claims arising out of checks paid within one year before the filing of the complaint. The court relied heavily on the Supreme Court’s recent decision in *National Railroad Passenger Corp. v. Morgan*, 536 U.S. 101 (2002), which had prompted many circuit court’s of appeal to repudiate the rule that had treated pay discrimination claims as continuing violations.

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### *Prospective Releases/Limitations on Damages: Clause in Home Inspection Contract Prospectively Limiting Damages Was Not Enforceable to the Extent the Damages Flow from Grossly Negligent, Reckless, or Intentional Misconduct*

*Carleton v. Winter*, No. 04-CV-768, 2006 WL 1652640 (D.C., June 15, 2006). Opinion by Kern, joined by Farrell and Kramer. Trial Judge: Wright.

**FACTS:** Plaintiffs sought to purchase a home in D.C. Plaintiffs hired defendant real estate agent to accomplish that goal. Plaintiffs found a house built in the early 1900's and conditioned their offer to buy that house on a satisfactory home inspection. Defendant real estate agent sent them to the defendant home inspector. Defendant real estate agent described home inspector as "great" and particularly well suited for young people who were first-time home buyers, such as plaintiffs. One wall of the home sagged noticeably. Despite this sagging, the home inspector gave a favorable report. Plaintiffs settled on the house. Shortly after settlement, they commenced certain renovations. All of the contractors who came to the house commented immediately that the "sagging" was caused by a serious structural flaw. Soon thereafter, the entire sagging wall of the house collapsed. Plaintiff sued the real estate agent for consumer protection violations, fraud and negligence arising out of the recommendation of the home inspector. Plaintiff sued the home inspector for negligence. Both defendants moved for summary judgment. The trial court dismissed the consumer protection and fraud claims against the real estate agent, reasoning that the act of recommending another professional is not actionable under those statutory and common law theories. The trial court dismissed the negligence case against the real estate agent because plaintiff did not have an expert to testify as to the applicable standard of care. The trial court dismissed the negligence claim against the home inspector because the contract between plaintiff and the home inspector contained a clause limiting the home inspector's liability for damages to the price of the inspection, or \$420.

**OUTCOME:** Judgment REVERSED as to the home inspector, and AFFIRMED as to the real estate agent.

**HOLDING:** (1) Prospective releases limiting damages are not enforceable in claims arising out of gross negligence, recklessness or intentional misconduct. Agreements prospectively limiting damages are, however, likely enforceable in claims for simple negligence. Trial court erred in entering judgment for the defendant without considering whether defendant's assessment of the

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sagging wall amounted to more than simple negligence. Case remanded for that determination.

(2) Real estate agent's representations that home inspector did a "great job" when she had used him "a few times previously" was not actionable in common law fraud or under the Consumer Protection and Procedures Act, D.C. Code §§ 28-3901, *et seq.* There can be no fraud for "a prophecy or prediction of something that is merely hoped or expected to occur in the future." The Court of Appeals affirmed its prior ruling in *Howard v. Riggs National Bank*, 432 A.2d 701 (D.C. 1981) that the CPPA does not "impose liability as a guarantor upon any private individual who recommends the goods or services of a particular merchant" or professional.

(3) An expert was required to set forth the applicable standard of care for recommending a professional. Because the plaintiff did not name an expert who could testify that the real estate agent deviated from the standard of care in vouching for the home inspector, and because expert testimony was required to establish that standard of care for a real estate agent, judgment in favor of the real estate agent was affirmed.

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### *Briefs*

***Trial court erred in considering an affidavit when adjudicating a Rule 12 motion and erred in making a choice of law determination without giving the parties a chance to take discovery on key issues that would show which forum had the greatest interest in applying its laws to the dispute.*** This class action case was filed against Sallie Mae arising out of the way Sallie Mae charged late fees. This was the second trip to the Court of Appeals for this case. Plaintiffs alleged that the District of Columbia Consumer Protection Procedures Act applied and that defendant breached the CPPA by concealing the way it charged and collected late fees. Defendant moved to dismiss, arguing that the plaintiffs' claims were preempted and arose out of conduct that occurred outside the District of Columbia and therefore D.C. law should not apply. Defendants submitted an affidavit from a Sallie Mae managing employee stating that none of the loans in question had been processed in D.C. or mailed to/from D.C., and that the decision to implement the alleged late fee scheme did not take place in D.C. The trial court credited this affidavit and granted the motion to dismiss. The Court of Appeals for the D.C. Circuit ruled that the trial court erred in considering this affidavit in a Rule 12 setting. Without the affidavit, and considering that the proceedings were in the Rule 12 stage, and considering that forum law should be applied if the forum and another venue have equivalent interests in the dispute, the trial court erred in concluding at this stage that Wisconsin law applied instead of D.C. law. *Washkoviak v. Student Loan Marketing Association*, 2006 WL 1547363, (D.C. Cir., June 8, 2006).

***Plaintiff in a medical malpractice action must establish national standard of care with something more than expert witness' say-so, even if expert's qualifications are undisputed.*** Plaintiff filed suit for alleged failure to diagnose a dissected aorta that took the life of plaintiff's daughter while she was approximately 30 weeks' pregnant. Plaintiffs called an expert, Dr. Robert Stark, in cardiology and internal medicine to testify that defendant deviated from the standard of care by failing to order an aortic angiogram with contrast dye or an MRI exam with contrast material. Expert was qualified to give a standard of care opinion. According to the appellate court, "even after explicit direction from the trial judge," plaintiff's expert "made no attempt to link his testimony to any certification process, current literature, conference or discussion with other professionals, any of which would have established a basis for his discussion of the national standard of care." The appellate court agreed with the trial court that this omission was fatal and that the plaintiff had not established the requisite national standard of care. Accordingly, the appellate court affirmed the trial court's decision to grant judgment as a matter of law at the close of the plaintiff's case. *Strickland v. Pinder*, 2006 WL 1418540, (D.C., May 26, 2006).

***Immigration attorney's failure to file a formal motion for reconsideration, contrary to administrative rule requiring such a motion, is not legal malpractice as a matter of law.***

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Plaintiff, a resident of Hong Kong, retained an immigration lawyer to assist her in obtaining a job as a seamstress in the Marine Shop in Quantico, Virginia. Plaintiff was living in Hong Kong at the time. The attorney filed the necessary applications, but the applications were denied based on an error made by the INS. The attorney wrote a letter to the INS in an attempt to correct the error. Federal regulations stated that such an error should be corrected by filing a motion for reconsideration within 30 days of the decision. The attorney later submitted a filing to the INS asking that her initial letter be treated as a motion for reconsideration. The INS denied the motion as untimely and declined to correct its original error, resulting in a 2-year delay in the plaintiff achieving proper immigration status. At trial, plaintiff asked for a jury instruction that the attorney's failure to file the motion for reconsideration was negligent *per se*. The trial court declined to read the *per se* negligence instruction, after allowing the parties to present conflicting expert testimony on the issue. The jury returned a verdict for the defendant attorney. Plaintiff moved for judgment notwithstanding the verdict on the issue of whether it was negligent as a matter of law not to file the reconsideration motion. Trial court denied the motion. The Court of Appeals ruled that the failure to file the motion for reconsideration was not "*per se* negligent," but was rather evidence of negligence. The doctrine of negligence *per se* only applies "where a particular statutory or regulatory standard is enacted to protect persons in the plaintiff's position or to prevent the type of accident that occurred," and the defendant's violation is unexplained. Here, the regulation was enacted to serve INS' interest in an orderly process, not to protect the plaintiff. In addition, defendant's violation was not "unexplained," but rather was a tactical decision and arguably was requested by the INS. Judgment on the jury verdict affirmed. *Liu v. Allen*, 894 A.2d 453 (D.C. March 16, 2006).

***The judicial proceedings privilege bars defamation claim against attorney where the lawyer sent a letter to an opposing party and to a proposed mediator/negotiator laying out potential allegations of wrongdoing.*** Plaintiff was engaged in a dispute against her business associate. Plaintiff's business associate hired the defendant attorney to advise her. Defendant attorney sent plaintiff a letter setting forth its client's understanding of the dispute, including several examples of alleged misconduct by plaintiff. The letter urged that an amicable resolution be reached. The letter noted that it was for settlement purposes only and was inadmissible in any legal proceeding. Defendant attorney also sent a copy of the letter to his client, and to a business-woman whom the attorney wanted to engage as a negotiator/mediator to assist in resolving the underlying dispute. Instead of replying to the attorney's letter, the plaintiff filed suit against the attorney for defamation. The attorney defended by raising the judicial proceedings privilege. Trial court found the privilege applicable and dismissed the lawsuit. The appellate court affirmed. The Court of Appeals held that the letter (1) "was made in the course of, or preliminary to judicial proceedings", and (2) was "related in some way to the underlying proceeding." The appellate court rejected plaintiff's argument that sending the letter to the proposed negotiator/mediator undercut the privilege argument. While it is true that publishing "to persons not having an interest in the litigation" may undercut the judicial proceedings

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privilege, sending the letter to a proposed mediator/negotiator does not fall within this exception to the privilege. *Messina v. Krakower*, 439 F.3d 755 (D.C. Cir., March 7, 2006).

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