

RECENT CASES

Trial Lawyers Association of Metropolitan Washington, D.C. April 2005

Written “High-Low Agreement” Controls Because Oral Modification in Open Court Had No Consideration

Amatangelo v. Schultz, __ A.2d __ (D.C. 2005). Opinion by Terry, joined by Reid and Washington. Trial court: Winston.

FACTS: Plaintiff and defendants in auto accident case entered a “high-low agreement” that provided that, if plaintiff prevailed on liability, she would receive a minimum of \$20,000 and a maximum of \$300,000 (the defendants’ policy limits). Defense counsel filed the agreement as a written stipulation (signed by him for both sides) two days before trial. On the morning of trial, the lawyers recited their understanding of the agreement to the trial judge, and plaintiff’s counsel said plaintiff would receive \$20,000 even if there was a defense verdict. This was contrary to the written stipulation that said plaintiff had to prevail on liability to be entitled to the minimum \$20,000. Defense counsel said nothing to counter plaintiff’s counsel’s statement. For his part, plaintiff’s counsel did not dispute that the text of the written stipulation reflected the parties’ agreement. Jury found for defendants. Trial court awarded costs to defendants based on the written agreement. After obtaining transcript of the hearing at which the parties described the agreement, plaintiff’s counsel moved to enforce the oral agreement. The trial court reversed itself and held that the parties had modified their written agreement as reflected by the transcript. Trial court ordered defendants to pay the \$20,000. Defendants appealed.

OUTCOME: Judgment for plaintiffs on oral agreement REVERSED.

HOLDING: Exchange of correspondence between counsel five months before trial resulted in a written contract that clearly stated plaintiff would be entitled to the \$20,000 only if she prevailed on liability. This contract controlled because there was no consideration for the oral modification stated in open court. Court distinguishes *Clark v. Clark*, 535 A.2d 872 (D.C. 1987), where oral modifications to a written alimony agreement were enforced because the new alimony payment level was accepted without protest by the party receiving alimony, and thus the oral modification was “fully executed.” Here, there was no “execution” of the oral modification, and so the written agreement still controlled. Court also rejects the argument that an oral recitation of an agreement made in open court should automatically trump the parties’ written agreement, noting that the argument “ask[s] us, in effect, to hold that a previous contract whose provisions have already been presented to the court in writing can be altered simply because its terms are poorly explained by counsel in a courtroom proceeding.”

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Difference of Opinion by Experts on Same Side Is Not Fatal to That Side's Case

Burke v. Scaggs, 867 A.2d 213 (D.C. 2005). Opinion by Ruiz, joined by Terry and Glickman. Trial court: Graae.

FACTS: Parents sued obstetrician for allegedly causing brachial plexus palsy when delivering their daughter. After her shoulder became stuck in the birth canal, he allegedly applied excessive traction to the head and shoulder to dislodge the shoulder. At trial, one obstetrician testified for the plaintiff that the delivering doctor should have used no traction at all. Another plaintiff's expert obstetrician testified that gentle traction would have been okay, but only as a last option after trying other techniques. Defendant moved for judgment as a matter of law on the grounds that the difference between the two experts meant that plaintiff had failed to make a *prima facie* case of what *the* standard of care was. Trial court denied motion, and jury found for plaintiffs.

OUTCOME: Verdict for plaintiffs AFFIRMED.

HOLDING: (1) "Different opinions of expert witnesses as to the standard of care presented by the plaintiff do not defeat a *prima facie* case and are properly submitted to a jury, just as differing opinions of experts by opposing parties are submitted for the jury's evaluation." Disagreement between plaintiff's experts "will necessarily show that there is a wide range of medical opinion as to the proper course of action," and plaintiff in such a case has the burden of convincing the jury either "that the applicable standard of care is the one breached by the defendant or to show that the defendant's actions fell below all of the acceptable options."

(2) Court rejects alternative argument of defendant that multiple theories on the standard of care may have left the jury unable to agree on a single standard of care that the defendant violated. Defendant waived this argument by failing to ask for a special verdict form on the alternative theories.

COMMENT: Court notes that this was not a case where the plaintiff's experts presented starkly contradictory standards of care, but rather subtle differences that the jury could easily have seen as complementary and not contradictory. See fn. 7. A more difficult issue would have been presented if the experts had disagreed on such fundamental points that they essentially neutralized each other's opinions.

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Complaint against D.C. Properly Dismissed Where Plaintiff Failed to Serve Summons and Complaint on Designated Person in Mayor's Office

Eldridge v. District of Columbia, 864 A.2d 140 (D.C. 2004). Per curiam (Farrell, Glickman and Pryor). Trial court: Clark.

FACTS: Sidewalk slip-and-fall plaintiff filed timely six-month notice with D.C. government but then waited until just before three years before the incident to file suit. She sent the complaint by certified mail to the Mayor and Corporation Counsel, and promptly filed an affidavit of service with copies of the return receipts from the certified mailings. District moved to dismiss on the grounds that the persons who signed the certified mail receipts were not designated by the Mayor or Corporation Counsel to receive service of process. Trial court granted motion.

OUTCOME: Dismissal AFFIRMED.

HOLDING: Super. Ct. Rule 4(j)(1) says the Mayor and Corporation Counsel may each designate an employee for receipt of service of process by filing a written notice with the Clerk of the Superior Court. Failure to serve on the correct designee in those offices is a failure to effect proper service. Rule is necessary because mayor and corporation counsel receive lots of official mail, and rule assures that lawsuit papers will get to the proper destination.

COMMENT: Case again illustrates the danger of filing suit just before expiration of the statute of limitations, when defects in service can be fatal because of the inability to file another timely lawsuit. Here, plaintiff compounded the error by making no effort to correct the defective service despite notice. Thus court concludes plaintiff lacked "good cause" under Rule 41(b) for a lesser sanction than dismissal. See fn.2.

PRACTICE TIP: Correct designees (according to telephone calls to the respective offices) are:

for the Mayor:

Gladys Herring or Tabitha Braxton
Office of the Secretary
1350 Pennsylvania Ave, N.W. Room 419
Washington, D.C. 20004

For the D.C. Attorney General:

Darlene Fields
Office of the Attorney General, Civil Litigation Division
441 4th St. NW, Room 600-South
Washington, D.C. 20001

Notices under section 12-309, however, must go to: District of Columbia Office of Risk Management, 441 Fourth Street, NW, Suite 800 South, WDC 20001, Att'n: Claims Bureau.

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Civil Rights: Police Officers Working for Federal Agencies Are Not “Acting Under Color of” State Law When They Make Arrests for Violations of Local Statutes

Williams v. United States, ___ F.3d ___ (D.C. Cir. 2005). Opinion by Tatel, joined by Henderson and Rogers.

FACTS: Police officer employed by Government Printing Office got in altercation with GPO employee, then arrested the employee for disorderly conduct in violation of a D.C. statute. Employee then sued the United States and the officer for deprivation of his Fourth and Fifth Amendment rights in violation of 42 U.S. Code § 1983. Defendants were granted summary judgment.

OUTCOME: Summary judgment for defendants AFFIRMED.

HOLDING: The “under color of” requirement of 42 U.S. Code § 1983 requires conduct by state officials or conspiracy with state officials in committing the alleged illegal acts. Merely arresting someone for violation of a local statute does not satisfy the “under color of” requirement, because the authority under which the federal police officer made the arrest was granted to him by the federal agency, not the local government.

PRACTICE TIP: A plaintiff alleging unconstitutional abuses by federal officials has a cause of action under *Bivens v. Six Unknown Named Agents*, 403 U.S. 388 (1971). Plaintiff here failed to make that claim.

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Plaintiff with Damaged Car Can Recover for Loss of Residual Value after Repairs

American Service Center Associates v. Helton, 867 A.2d 235 (D.C. 2005). Opinion by Ruiz, joined by Glickman and Washington. Trial court: Bush and Goodbread (magistrate judge).

FACTS: A Mercedes E 320, owned by American Service Center, was out on a test drive by a prospective buyer when it was hit by another car. The insurer for the other car paid the repair costs on the ASC car. ASC then sued for the residual diminution in the value of the Mercedes after the repair. Magistrate judge and then trial judge gave summary judgment to the defendant on the ground that plaintiff could elect either diminution of value or cost of repairs, but not both.

OUTCOME: Summary judgment for defendant REVERSED.

HOLDING: Residual diminution in value of personal property after repair is compensable. Plaintiff is not obtaining a double recovery. In the old cases, compensation for repair costs and for gross diminution in value were considered mutually exclusive remedies because repair costs were considered a part of gross diminution in value. But because the goal of tort damages is to make the injured party whole, there is no need to make these remedies exclusive of each other as long as there is no double recovery. Since residual diminution in value does not duplicate the cost of repair, but is calculated based on comparing the value of the property before the damage to its value after repairs are made, there is no double recovery.

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Federal Government Is Immune from Liability for Toxic Chemicals in Spring Valley Under Discretionary Function Doctrine

Loughlin v. United States, 393 F.3d 155 (D.C. Cir. 2004). Opinion by Edwards, joined by Randolph and Williams.

FACTS: In World War One, U.S. Army Corps of Engineers used ground in Spring Valley neighborhood that it had leased from American University to develop and test chemical weapons. Chemical munitions remained buried there and were not discovered until excavation began for new homes in the early 1990s. Initial tests for soil contamination at property the Loughlins wanted to buy were negative, so they went ahead with purchase in 1994. Later testing found arsenic in the soil, and they were required to move out permanently in 1999. Family sued under Federal Tort Claims Act for failing to warn them sooner of the contamination. Government obtained summary judgment on “discretionary function” immunity under 28 U.S.C. § 2680(a).

OUTCOME: Summary judgment for government AFFIRMED.

HOLDING: Government’s initial decision to bury the munitions secretly was made by balancing competing considerations of national security and public health, and thus was an immune discretionary decision. Courts should not force the government to revisit such discretionary decisions periodically over the years, because that would insert the courts into prioritization and resource allocation decisions. When the government on its own accord revisited the decision not to warn of the hazards, this too was a protected discretionary decision because the risk to the public health was speculative before better testing was conducted. Court distinguishes its decision in *Cope v. Scott*, 45 F.3d 445 (D.C. Cir. 1995), where the absence of a warning sign on Rock Creek Parkway was held to be non-discretionary because of the abundance of other signs on the same strip of road.

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Defense Attorney Is Fined nearly \$50,000 for Improper Closing Argument that Caused Mistrial

Manion v. American Airlines and Krieger, 395 F.3d 428 (D.C. Cir. 2004). Opinion by Edwards, joined by Rogers and Roberts. Trial court: Magistrate Judge Robinson.

FACTS: Roy W. Krieger represented American Airlines in defense of a personal injury case brought by a man who claimed that excess engine noise on a flight caused him to develop tinnitus. Trial judge barred Krieger from examining plaintiff on why he had “waited” 15 months after the incident to file suit and also ruled that it would be improper to argue any adverse inference from this alleged delay, inasmuch as defense had never pleaded laches. In his closing argument, Krieger referred multiple times to the 15-month “delay” and said that the airline had lost its engine logs by not having more timely notice. Plaintiff’s counsel moved for corrective instruction at end of defense argument, and then, after the jury returned a defense verdict, moved for mistrial. Trial court granted mistrial and ordered sanctions pursuant to 28 U.S.C. § 1927, which provides: “Any attorney ... who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorney’s fees reasonably incurred because of such conduct.” Court granted plaintiff \$53,984, including counsel fees, trial expenses, and the expense of defending against an interlocutory mandamus petition by Krieger on the issue. Krieger conceded his conduct was sanctionable and appealed only the amount.

OUTCOME: Sanction award to plaintiff AFFIRMED except for \$5,800.

HOLDING: Sanction awarded was not an abuse of discretion, except for two items: \$2,600 awarded to the plaintiff for his personal time attending the trial, and \$3,200 for the interlocutory proceedings in the Court of Appeals. Court says it would be too chilling on litigants to allow a district court to include in sanctions award the cost of interlocutory appellate proceedings.

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Briefs

Orthodox Jewish Congregation Can Be Compelled to Submit to Binding Arbitration before a “Beth Din” as Required by the Congregation’s Bylaws. Three members of the congregation sued to force the congregation to participate in a Beth Din before a panel of Orthodox rabbis. Trial court dismissed on grounds that religion clause of the First Amendment barred it from entangling itself in ecclesiastical matters. Court of appeals reverses, holding that “well-established, neutral principles of contract law can be used to determine whether the Beth Din provision in the bylaws is an enforceable arbitration agreement,” and that in fact this provision is such, and the congregation must be ordered to submit to the arbitration before a panel of rabbis. *Meshel v. Ohev Sholom Talmud Torah*, __ A.2d __ (D.C. 2005).

Insurance policy for Bingo Parlor that Hired Driver to Bring Players to Parlor Could Not be Tapped for “Hired Auto” Coverage. Bingo World had a commercial insurance policy with “the Brethren” insurance company that included a “hired auto” provision covering vehicles “leased, hired, rented or borrowed” by Bingo World. The bingo parlor hired a business that used drivers to bring players to the parlor for a payment of \$15 cash per player. Parlor did not control any aspect of the delivery work (type of vehicle, route, driver’s identity, number of players, etc.). HELD: Since Bingo World had no control over the delivery of players to its parlor, its “hired auto” insurance coverage did not apply to cover injury of player hurt on trip home. *Holmes v. The Brethren Mutual Ins. Co.*, 868 A.2d 155 (D.C. 2005).

Attorney fee arbitration panel doesn’t have to give reason for decision. Court agrees that the reason for the board’s award is unclear, but says for that reason, since the arbitrator is not required to explain a ruling, the lawyer’s challenge to the ruling must fail. Arbitration had been ordered under Rule XIII of D.C. Bar rules, which states that attorneys licensed in D.C. are deemed to have consented to arbitration of fees if the work was for a D.C. resident or a substantial part of the work was done in D.C. Client requested arbitration, triggering jurisdiction of the Attorney-Client Arbitration Board. *Schwartz v. Chow*, __ A.2d __ (D.C. 2005).

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