
Week of August 22, 2016

Welcome to our Supreme and Appellate Court summaries webpage. On this page, I provide abbreviated summaries of decisions from the Connecticut Appellate Courts which highlight important issues and developments in Connecticut law, and provide practical practice pointers to litigants. I have been summarizing these court decisions internally for our firm for more than 10 years, and providing relevant highlights to my municipal and insurance practice clients for almost as long. It was suggested that a wider audience might appreciate brief summaries of recent rulings that condense often long and confusing decisions down to their basic elements. These summaries are limited to the civil litigation decisions. I may from time to time add commentary, and may even criticize a decision's reasoning. Such commentary is solely my own personal opinion. Pullman & Comley's Appellate Practice Group of which I am a member includes experienced appellate advocates in almost every area of the law. Should you have a need to consult about a potential appeal, please email me at emccreery@pullcom.com. I hope the reader finds these summaries helpful. – Edward P. McCreery

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Appellate Court Advance Release Opinions:

- AC37588 - [Prime Locations of CT, LLC v. Rocky Hill Development, LLC](#)

When a commercial condominium unit owner's association refused to grant their approval for a crematorium to be erected upon one of the lots, the owners of that and two other lots with greater than 50% of the vote filed an amendment to the declaration withdrawing their lots from the owner's association and its purported restriction on uses which give off smoke or offensive odors. The remaining unit owners brought a declaratory judgment and injunctive claim, seeking a declaration that the purported withdrawal was unenforceable. The Trial Court concluded that although the defendants controlled more than fifty percent of the vote of the association, the withdrawal was not authorized by the condominium declaration, which had no provision for withdrawing. The Trial Court then granted an injunction precluding construction of the crematorium. On appeal, the defendants first claimed that the Trial Court lacked subject matter jurisdiction because the condominium declaration only authorized a declarant or the owner's association as a whole, to enforce the restrictions. The Appellate Court disagreed and held that just because the declaration gave enforcement rights to the association or the declarant, that did not preclude unit owners from bringing an enforcement action. The declaration provided that it would run with the land and be binding on all grantees to create a uniform development scheme and shall be for the benefit of all unit owners. Thus any unit owner could enforce the declaration provisions.

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But the Appellate Court did agree with the defendants that the Trial Court's conclusion that the declaration did not permit lot owners to withdraw from the association had not been affirmatively pled by the plaintiffs, had not been briefed by the plaintiffs, and had not been argued before the Trial Court. Rather, the plaintiffs' affirmative allegations were that the attempted withdrawal did not comply with the statutes, was not supported by sufficient votes and altered the boundaries of the property without unanimous consent.

The Appellate Court concluded that the Trial Court's findings had never been directly asserted by the plaintiffs, and notwithstanding the rule that declaratory ruling requests should be liberally construed, the Court concluded that the judgment could not stand. The Appellate Court even brushed aside prior Supreme Court precedent from 1928 that held in an action for declaratory judgment that a court was not limited to the issues joined by the claims of counsel. Luckily for the plaintiffs, however, the case was reversed with a direction for a new trial.

- AC37385 - [Robinson v. Commissioner of Correction](#)
- AC37413 - [Gagliano v. Advanced Specialty Care, P.C.](#)

Plaintiff underwent a hernia surgery at the defendant hospital by a physician who is not employed by the hospital but maintained staff privileges there. Without plaintiff's knowledge, the doctor had a fourth-year medical resident assist him. That medical resident was enrolled in a surgical medical residency sponsored by a New York medical facility, which included rotations at the defendant, Danbury Hospital. The primary doctor had the resident start to insert a medical device, but became concerned that it was being utilized improperly and took over the surgery. Thereafter, the plaintiff exhibited signs of infection and her body went into septic shock. It was thereupon discovered that her colon had been perforated during the surgery. As a result of the infection, a major part of the plaintiff's large intestine had to be removed, resulting in permanent digestive problems. After settling with the primary doctor, the plaintiff continued her case against the hospital, claiming that the medical resident was the hospital's agent. The medical resident's rotation at the hospital was to last one to two months, where fifty percent of his time would be spent at the hospital. The resident testified that he does not recall if he ever received the hospital's manual, but assumed he was obligated to comply with it. When the hospital admitted that the manual was distributed to all residents, the Trial Court deemed that fact relevant to whether the resident was an agent of the hospital. Although the manual contained references to salary and benefits, the resident in this case testified he was not, in fact, paid by the hospital. The manual also made reference to the hospital's expectations for residents to become proficient in certain core competencies.

At the end of the case, the defendant hospital moved for a directed verdict which was denied. Thereafter the jury returned a verdict of over \$10 million, with a finding that the resident was an actual agent of the hospital. The hospital, in turn, was found to be 80% liable for the verdict. The Appellate Court reversed the jury's verdict, holding that for the hospital to be vicariously liable for the resident's conduct, it must have controlled the situation. Thus, as a general rule, when employers exert control, fictional or otherwise, over an employee

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acting within the scope of their employment, they may be held responsible for the wrongs of the employee. Before vicarious liability can be imposed, however, there must be sufficient evidence to warrant a finding of an agency between the parties. The burden of proving an agency is on the party asserting its existence.

After reviewing the elements of agency under the Restatement, the Appellate Court concluded that as a matter of law, the Trial Court should not have denied the hospital's motion to set aside the jury's verdict. There was insufficient evidence from which the jury could have reasonably concluded that the resident was the hospital's agent for the purpose of assisting in the plaintiff's surgery. It was not enough for the plaintiff to show evidence that the hospital controlled some aspects of the resident's work at the hospital. Focusing on that alone took the matter out of context. But when viewed in the context of, and focused on the plaintiff's surgery alone, it was not enough to establish an agency relationship.

The Court noted that medical residency programs are unique in that they have both academic and employment characteristics. Here, the plaintiff relied primarily upon circumstantial evidence extracted from portions of the hospital's manual to show an employment relationship, but failed to appreciate what she really needed to put into evidence was the residency agreement that would have more clearly defined the relationship between the resident and the hospital. The manual alone did not clarify whether the relationship between the hospital and the resident was primarily an academic relationship or an employment relationship. The need for the residency agreement was even more crucial here to ascertain the true relationship of the resident when three medical institutions were sharing the residency program. Judgment against the hospital reversed.

- AC37390 - [Kitchens v. Commissioner of Correction](#)
- AC36362 - [Allen v. Commissioner of Correction](#)

The facts and holdings of any case may be redacted, paraphrased or condensed for ease of reading. No summary can be an exact rendering of any decision, however, so interested readers are referred to the full decisions. The docket number of each case is a hyperlink to the Connecticut Judicial Department online slip opinion. © 2016 Pullman & Comley, LLC. All Rights Reserved.

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