Appellate Notes

PULLMAN & COMLEY

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Week of March 3

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

Posted March 3, 2015

• SC18928 - Rathbun v. Health Net of the Northeast, Inc.

In Connecticut, the Department of Social Services manages the federal Medicaid act and awards contracts to Medicaid managed health care providers. The defendant had such a contract which included an assignment of the State's statutory rights to seek reimbursement of medical payments from responsible third parties, such as tortfeasors who injured the insured. The defendant in turn subcontracted out the function of pursuing such collections and that subcontractor followed all the appropriate steps to notify the parties and the attorneys involved that they were entitled to be reimbursed from any pending tort claim.

The plaintiffs brought a class action seeking a declaration that the defendant did not have a right to demand reimbursement by way of subrogation for their medical expenses from their personal injury (P.I.) attorneys, and if they had any rights, they, or the State, would have to commence their own lawsuit directly against the tortfeasor. Both the trial court and the Appellate Court disagreed, holding the plaintiffs were misconstruing past precedent and statutory language. The rights of subrogation of the State, which in turn were assigned to the defendant, allowed either a direct action against the tortfeasor, or intervention into the tort action, or to simply claim a lien in any judgment or recovery.

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On further appeal, the Supremes agreed with the Appellate Court that 17b-265(a) confers the right upon the State or its assignee to pursue the recovery and in fact such protocol is mandated by the federal regulations that mandate that Medicaid be the payor of last resort. The court was not persuaded by the argument that 17b-94 places some limits on the State's ability of recovery because as a practical matter that statute can only apply to purely State claims, not monies that are part of the federal Medicaid program which in turn mandates a protocol for recovery.

[Comment: This is entirely consistent with any number of situations where a P.I. attorney must be cognizant of who is entitled to be paid back whenever they win a recovery in a P.I. claim.]

- AC35848 - Sellers v. Sellers Garage, Inc.

Upheld workers comp decision

- AC36420 - State v. Cruz
- AC36196 - Verrillo v. Zoning Board of Appeals

Attorneys who practice in the land-use arena know that there is often a divergence between how local Zoning Board of Appeals ("ZBAs"), comprised of lay members, view requests for variances and how long established Connecticut law requires that they be treated. As a general rule the law is much harsher than most local boards. Very often a local ZBA will first consider whether anyone is objecting. Next they may look to see if the proposal is consistent with the neighborhood. Lastly they may consider whether the request is "reasonable." The law however suggests that variances should be treated much more harshly with a goal of avoiding or eliminating non-conformity. This clash of ideals flood the courts with appeals over the denial and granting of variances.

With this decision, the Appellate Court seemed to be screaming ....ONE MORE TIME, TO GET A VARIANCE, THE LAW REQUIRES YOU TO PROVE A LEGAL HARDSHIP! The applicant in this case owned a small waterfront cottage in a neighborhood developed in the 1920s, before the town's zoning laws were enacted. The regulations took into account that this was an older, densely packed neighborhood, but the applicant's parcel was small by even those standards. As such it was a pre-existing non-conformity, both as to lot and house size. The owner wanted to replace the tired old cottage with a shiny new home, and reasoned if they were to put all that effort in to it, they would want something bigger and better than was there now. The ZBA obviously felt sympathetic with the owner's plight and granted the owner eight variances, covering setbacks, coverage, height, size, etc., so that the owner could build a new, larger, taller and less prone to floods, house. The neighbor was none too happy and appealed. The Superior Court found that the owner had failed to establish any legal hardship as there already was a house there, and disappointment with the ability to build a bigger house has never been a legitimate basis for a hardship.

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The matter was then appealed to the Appellate Court which rendered this lengthy opinion. The court started out explaining **variances are to be granted sparingly because the whole fabric of a town's zoning system can be unraveled if they are handed out willy nilly**. (Not a quote.) Even though several board members explained why they thought the variance was justified, no explanation of the hardship found was stated in the Motion to Approve. The court said such **discussions cannot be deemed the collective wisdom of the zoning agency**. Thus the court concluded that at no time did the Commission as a whole make a finding of what the claimed hardship was.

The court then search the record to see if there was any evidence of a hardship that would have justified the ZBA's grant of a variance. In concluding there was no evidence of a hardship, the court struck down the numerous arguments of the owner to the contrary. It was if the court were saying ....**Look, we see these same arguments to justify a variance over and over again, so let us try to put them to rest once and for all.** The court went on to hold:

[1] Being an existing non-conformity does not form the basis for a hardship. You are already protected with a vested right to keep your existing use.

[2] Since a house already exists, this is not an application to build on a vacant non-conforming lot where the hardship argument might have been the inability to use the land for any purpose. That argument won't hold water here.

[3] The desire to build a modern, new, and bigger house are all personal desires, not a legal hardship peculiar to the land. So we don't want to hear arguments that newer is better, as a basis to claim a variance.

[4] Claiming that the variances requested were "de-minimus" is not the basis for a hardship. We hear that all the time.

[5] The court was also skeptical of the argument that a new building was required to comply with modern "codes", but rather than throw that argument out entirely, the court decided to kick it down the road for another day when evidence of the actual code issues is put before a court.

[6] The court acknowledged that sometimes the position of an easement might form the basis for a hardship if it constricts development, but said no evidence was shown in this case as to how it would negatively impact the building area.

[7] The court agreed that a hardship might be based upon a "practical" or "tantamount" confiscation caused by imposition of the regulations that makes it almost impossible to use the property, but reviewed that law extensively and noted that there is a high burden of proof to assert such a claim. In any even such an argument could not work here where they can still use the existing house. They just want a newer house.

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[8] The court then turned to the statements of some of the commissioners that the owner was entitled to a ***reasonable use*** of their property. Hinting this is an overused phrase when it comes to variances, the court held that phrase is all about personal preferences of an owner, and not a true hardship the law requires. An owner is not entitled to a new modern and more roomy house just because the old one is small and cramped by today's standards. The existing house was a "reasonable use" which may continue for years. Responding the owner's suggestion that the law should be changed to take into account the "reasonable use request" of an owner, the Appellate Court added that only the Supreme Court can change the standards for a variance to import a consideration of current preferences of an owner. The decision then goes on to comment why that would be a foolish change in the law.

[9] Next the court addressed the claim that the parcel's small size justified the variance. The decision held that being a small property alone does not justify a hardship claim, especially here where there are many properties in the neighborhood which were equally undersized.

[10] The court also rejected the argument that encouraging renovation of smaller properties should be a consideration for upholding a variance. With this argument the Court said the owner was confusing the role of the ZBA with the PZC.....and in any event..... this case was about expansion....not repair.

[11] Finally, the Court held this case does not fit the rule that forgives the need to show a hardship where the new application will lessen the overall non-conformity of the site in accordance with the comprehensive plan. Here they would be expanding the nonconformity in violation of the stated principals of the comprehensive plan of this town.

The decision of the Superior Court was affirmed.

- AC35878 - Conee v. Dept. of Social Services
- AC35471 - Saggese v. Beazley Co. Realtors

Real estate broker was not required to turn over lawyer's threatening letter to prospective buyer of property just because the lawyer demanded she do so. Nor did the letter's claim that lawyer's client had a right to pass over the subject property listed for sale impose such an obligation. The broker was not a lawyer and was not required to legally dissect the claims contained in the letter. In any event, based upon the totality of the circumstances, the prospective buyer was on notice of the claims of third parties that they had the right to use the waterfront of the parcel because before the closing, the buyer's attorney had reviewed records that should have shown waterfront access was shared; the buyers were told of the existence of the threatening letter; the seller told the buyer he did not own to the water's edge; and they were told there was a lawsuit over access. Thus the buyers could not maintain a claim for fraud and CUTPA against the broker after they closed and found out interior lots had access to what the buyers thought was their front yard and for which they paid more than $1 million.

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- AC34577 - State v. Nowacki
- AC36059 - State v. Gemmell
- AC36647 - Harnage v. Torres

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.