Appellate Notes

PULLMAN & COMLEY

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Week of March 7, 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

Posted May 4, 2016

Supreme Court Advance Release Opinions:

- SC19493 - Standard Oil of Connecticut, Inc. v. Administrator, Unemployment Compensation Act
- SC19493 Dissent - Standard Oil of Connecticut, Inc. v. Administrator, Unemployment Compensation Act

The plaintiff, Standard Oil, convinced a majority of the Supreme Court justices that the state agency had incorrectly concluded that certain workers were, in fact, plaintiff's employees for purposes of unemployment compensation taxes under C.G.S. § 31-222. The plaintiff was a home heating oil company, who classified the individuals who cleaned, serviced and installed the HVAC systems as independent contractors. The Department of Labor disputed that, and asserted that the company owed unemployment taxes. To be considered an independent contractor, the person must: (A) be free from control and direction; (B) perform their services outside the business premises of the company; and (C) be engaged in an established trade. The statute is drafted in a manner to presume employment status. The company claiming exemption must prove all three parts of the "ABC Test." Part "C" was not in dispute in this case.

The Court agreed with the plaintiff that the installers retained control and direction over the means of their work under Test "A," even though the oil company: obtains the assignment; makes the appointment with the customer; does not permit the installers to subcontract; encourages the installers to wear apparel bearing

the plaintiff's name; can demand the installer return to correct deficiencies; pays the installers at a set rate; requires the installers to only install equipment provided by the company; and requires use of equipment provided by the company.

On the other side of the equation, the installers signed independent contractor agreements, stating they would exercise independence and be free to reject assignments and determine the days they could work, and would not be supervised while performing their work; the plaintiff would not check on their work; they agreed to be independently licensed; they were not provided a handbook or training; they could hire whomever they wanted as assistants; and they had to provide their own transportation and insurance.

Under the "Right to Control" test, the issue is ***who has the right to direct what shall be done, and when, and how it shall be done***. The Court acknowledged that merely putting in a contract that the workers would be deemed independent contractors does not keep an employer outside the purview of the statute. After reviewing numerous cases deciding the issue of "control," the Court said that the factual findings above did not support a conclusion that the installers were ***employees***. The company did not own or operate the tools, machinery or heavy duty vehicles required for the installation work. It contracted with licensed installers, which is a trade routinely performed by self-employed individuals, and provided that they were to exercise their independent judgment and control of the execution of the work. In fact, each installer had independent businesses that provided the same type of services they were providing under subcontract to the company. In other words, they did not work solely for the company. It did not matter that the company acted as a conduit to both arrange for the appointments and to funnel complaints of customers after the work was done.

While wearing clothing with the company logo on it was encouraged, (in part, to alleviate customer concerns when an installer showed up at their front door) it was not required. There was no reimbursement of transportation expenses by the company, and being paid a set rate for each piece of work meant that the worker had to ascertain how best to realize a profit from the job. Requiring the installers to remit invoices in a timely manner was not indicative of control. Limiting the installers to the work specified by the company does not indicate control; nor does prohibiting the installers from subcontracting out their work. Providing the installers with the equipment to be installed and even the tools to be used, did not evidence "control." Thus, Part A of the test as to whether or not the installers were employees was not met.

Turning to Part B of the test, it was incorrect for the agency to conclude that the company's "places of businesses" included the homes of residential customers where the independent contractors would be working under the board's interpretation of places of businesses, it would be all but impossible to have an independent contractor relationship.

Finding no Connecticut case or agency interpretation directly on point, the Court reviewed numerous other jurisdictions' case law and concluded that the better interpretation of the meaning of the Connecticut statutes when read together was that an employee would have to be on premises under the employer's control, otherwise the exemption would be rendered meaningless. The homes of plaintiff's customers were

under the homeowners' control, not the company's control. The majority criticized the dissent's heavy reliance on prior cases that declared the statute to be remedial, agreeing with the United States Supreme Court that the term "remedial" has been vastly overused and often misunderstood, because almost every statute is essentially for a remedial purpose. An agency cannot treat a statute as authorizing an indefinite march in a single direction.

The plaintiff had proven Parts A and B of the "ABC Test," so the judgment was reversed. Justices Rogers, Palmer and McDonald dissented. The dissenters would have held that if the company itself does not provide the service, but rather acts as a referral for other individuals doing it, the place where the service is performed is the "place of business."

- SC19524 - State v. Maietta
- SC19199 - State v. Rodriguez
- SC19464 - Lewis v. Clarke

Defendant was a Connecticut resident with a Connecticut driver's license, and driving a limousine owned by the Mohegan Tribe, and was an employee of the Mohegan Tribe. Defendant was driving patrons of the Mohegan Sun Casino to their homes. The defendant rear-ended plaintiff's motor vehicle that was going southbound on Route 95. Plaintiff sued the defendant for negligence, and the defendant moved to dismiss for lack of subject matter jurisdiction on the basis of tribal immunity. The Trial Court bought the argument of the plaintiff that sovereign immunity did not extend to the driver who was being sued in his individual capacity when the Tribe was not named as a defendant.

The defendant appealed, and the Supreme Court reversed. First the Court noted that the general rule is that denials of motions to dismiss are interlocutory and not appealable, but the denial of a motion to dismiss based upon sovereign immunity is an immediately appealable final judgment. Next, the Court noted that Congress has granted sovereignty to certain tribes, which carries with it immunity from suit. Tribal immunity extends to individual tribal officials acting in their representative capacities, and to individual employees acting within the scope of their employment. The defendant here was acting within the scope of his employment of the Mohegan Gaming Authority, which, in turn, was an arm of the Mohegan Tribe. While claims of gross negligence might take the employee's actions outside the scope of his employment, this case involves allegations of generic negligence, without claims of malice or reckless conduct which has, on occasion, been deemed an exception to sovereign immunity.

Appellate Court Advance Release Opinions:

- AC37697 - Midland Funding, LLC v. Mitchell-James

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Midland Funding sued the defendant, claiming they were the owner of a $24,000 credit card debt from Chase Bank run up by the defendant. Defendant answered the complaint with *insufficient knowledge* responses. The plaintiff moved for summary judgment, and attached an affidavit by an employee of yet another company, purporting to be the servicer of the account, and averring that the defendant owed the money. The defendant filed an opposition, saying that the plaintiff had not established how they came to own the account, and that the affidavit was hearsay. The Trial Court granted summary judgment to the creditor, and the defendant appealed.

The Supreme Court agreed with the defendant's arguments that the plaintiff never established that it was a successor-in-interest to the account beyond a question of fact. The Court noted that only evidence that would be admissible at trial may be used to support or oppose a motion for summary judgment. When affidavits are relied upon, they must be made upon personal knowledge, and when exhibits are attached to the affidavit, they must be accompanied by sworn or certified copies of the original papers. When attaching purported business records, the affidavit must set forth the components of the business record exception to the hearsay rule, and when the records come from a computer, they must establish that the basic elements of the computer systems are reliable, although it is not necessary for the witness to be the keypunch operator who actually entered the information or designed the program.

While most of the tests for admissibility of the affidavit of the plaintiff were satisfied, the Court concluded that it did not establish the basic elements of the computer system were reliable. To do that, it is not enough to have a person familiar with computerized records as a user, but also someone who has a working acquaintance with the methods by which the records were made. Here, the affidavit failed to suggest that the witness understood how the original bank transmitted their electronically-stored business records to the now-claimed owner of the debt.

The Court said they were not suggesting defendants who default on their credit card payments can defeat summary judgment by simply denying that the creditor owns the debt. They are merely saying that the creditor needs to substantiate its claims with sufficient evidence.

• AC36593 - Adler v. Rosenthal

Plaintiff sued the defendant, claiming that he breeched an agreement to form a law partnership. Plaintiff had proposed to the defendant that they start a law firm together, and defendant indicated he was interested. They started to look for space, and discussed details of what their law firm would look like. They went so far as to sign a one-page preliminary partnership agreement. They reserved the name of the partnership, and the plaintiff began to negotiate for office space, payroll, insurance, phones, open bank accounts, etc. Two days before the contemplated start date with movers lined up, the defendant backed out. The plaintiff sued and the Trial Court awarded him $42,000 in damages consisting of $3,000 out of pockets and $39,000 lost anticipated profits.

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First the defendant claimed that the lawsuit should have been dismissed because the plaintiff failed to serve the complaint and return it to Court within thirty days as required by C.G.S. § 52-278(j). The Supreme Court noted that the thirty day requirement in C.G.S. § 52-278 does not require dismissal of the entire civil action for lack of subject matter jurisdiction. Rather, missing the thirty day deadline only requires the Trial Court to consider the application for the PJR to be withdrawn.

Next, the defendant claimed that the lawsuit should have been dismissed because the plaintiff had not attached a return date that was within two months of service. The plaintiff tried to cure that defect by seeking to amend the return date. The defendant failed to object to the amendment. The Court noted that while an absence of a return date is unforgiveable, and while return dates may be amended, they must still comply with the time limitations of C.G.S. § 52-48(b). But the Court declined to consider this issue because the proper remedy of the defendant was to object to the attempt to amend the return date outside the two month limit, as opposed to moving to dismiss the action.

However, the Court did agree with the defendant that the award of lost profits for a law firm that never got off the ground, which amounted to $39,000 worth of the damage award, was pure speculation, and had to be set aside. While lost profits may provide an appropriate measure of damages for the destruction of an unestablished enterprise, it must be based upon solid evidence. Here, the plaintiff was only deducing what the defendant might have contributed to the future partnership from loose banter of what the defendant had told him, not upon actual numbers of net profit the defendant had earned in the past. In other words, future lost profits of a non-established enterprise must be proven to a reasonable degree of certainty. The defendant work was largely contingency-fee based, so it was inappropriate to rely upon the plaintiff's testimony of what he thought the defendant would bring to the firm.

• AC36919- Levine v. 418 Meadow Street Associates, LLC

This is a continuation of a prior case which determined that an LLC member who was the wife of the proposed defendant/tenant was disqualified from participating in the three member LLC membership vote on whether to sue her husband for back rent. The wife had held up the collection action for years and had worked with her tenant/husband to withhold other funds due to the LLC. The delays and litigation occasioned by the husband and wife caused the LLC's mortgage to go into default and the LLC's property was lost to foreclosure. As a result, the other two LLC members lost their $250,000 investment in the LLC. In this case, the two members were now suing the wife and husband for their shenanigans.

The jury returned a verdict against the wife and husband, finding they had breached their fiduciary and statutory duties and awarded the plaintiffs $260,000 in damages. The husband's and wife's motion to set aside the verdict was rejected by the Trial Court.

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On appeal it was held that while the forms filed with the Appellate Court did not properly reflect the nature of the appeal as being one from the denial of the motion to set aside the verdict as required by C.G.S. § 52-263, the preliminary statement of issues made it clear that is what the plaintiffs were pursuing. Therefore, the appeal was allowed to proceed. This decision went on to hold that the record was replete with evidence that the husband and wife's pattern of self-dealing and obstructive conduct caused the other two partners to lose their $250,000 investment in the property.

- AC37291 - State v. Celaj
- AC37931 - Multilingual Consultant Associates, LLC v. Ngoh

This decision held the Trial Court committed error in not opening a default judgment against several lay defendants after they filed their motion within the applicable deadline. The Trial Court excused the defendants for not filing a verified motion or affidavit with their motion to reopen because they were lay persons and not sophisticated lawyers, but then went on to chastise them for not adequately explaining their defenses to the Court, and then declined to grant their request. The Appellate Court noted that, in totality, the self-represented defendants had provided sufficient information to satisfy the requirement that they show they had a defense to the claims. The defaults should have been reopened.

- AC37729 - Property Asset Management, Inc. v. Lazarte

Another failed attempt to fight a foreclosure by asserting the plaintiff lacked standing because it had not proven ownership of the debt. The Court again stated that the plaintiff's possession of a note endorsed in blank is *prima facie* evidence that it is the holder and entitled to enforce the note, and thereby conferred standing to commence the foreclosure action.

- AC37243 - Bennett v. Bowditch

Plaintiffs owned their property since 1963. Defendants owned their property since 1995. The two properties abutted one another. There was also a right-of-way between the properties in favor of the defendant that was entirely located upon the plaintiff's property and accessed a rear parcel owned by the defendant. Since the 1950's, the plaintiffs had been occupying the rear parcel, landscaping it, living on it and maintaining a fence that blocked the access way. The Court held that this was sufficient dominion and control in the manner of ownership that was without the consent of the defendant, to establish extinguishment of the right-of-way through prescriptive use and ownership of the rear parcel by virtue of adverse possession.

- AC37491 - Fullenwiley v. Commissioner of Correction
- AC37728 - Rousseau v. Statewide Grievance Committee

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Plaintiff filed a grievance against his wife's matrimonial attorney. The attorney moved to have the grievance dismissed. The local grievance panel dismissed the complaint after it determined that no investigative hearing was necessary on allegations that the attorney abused the legal process and knowingly misrepresented facts known to be untrue. The plaintiff requested a review of that decision, and the Committee responded that pursuant to Practice Book § 2-32, it had no authority to review a decision. The plaintiff then filed a writ of error, writ of mandamus and an injunction action to require the Committee to conduct a formal hearing on his complaint.

The Trial Court granted a motion to dismiss all of the plaintiff's claims. The plaintiff appealed. This decision noted that Practice Book § 2-32 provides no right of review for such dismissals, and the plaintiff lacked standing to set the judicial machinery in motion. The statutes provide no appellate review of a decision of a grievance committee.

- AC37130 - State v. Miller
- AC36966 - Housing Authority v. Weitz

On the day of an eviction trial the defendant's counsel asked for a continuance due to the health condition of his client. Counsel indicated that if the continuance was denied, counsel would figure out a way to get her to Court. Plaintiff objected to the continuance request, but only on the grounds that the request was for too long a period of time and he wanted to get the case over with. The Court, on its own, then said that it was not satisfied with the defendant's inability to be present, and that the Court would enter a default against the defendant.

The defendant appealed. Distilled to its essence, the Appellate Court noted that the claim was that the Trial Court erred in defaulting the plaintiff for not appearing at trial when, in fact, she had appeared through counsel, who further indicated that he could have her brought to Court, despite her illness. The Appellate Court agreed that was an abuse of discretion and set aside the default judgment.

- AC36245 - State v. Anderson

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.
