Appellate Notes

PULLMAN & COMLEY

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Week of May 29, 2017

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 July 6, 2017

Supreme Court Advance Release Opinions:

• SC19577 - Estate of Brooks v. Commissioner of Revenue Services

Husband died in Florida in 2000 and left a large amount of securities in two QTIP trusts for the benefit of his wife who moved to Connecticut and died there in 2009. Wife had been co-trustee with an attorney who had the only power to invade for her benefit. Her Executor paid a preliminary estate tax bill of $1.5 million, but later filed a return seeking $800,000 of it back claiming the assets of the QTIP Trusts should not have been included in her estate for tax purposes. The Department of Revenue services disagreed. The executor appealed. The case discusses the rise and purpose of QTIP trusts to avoid taxation upon death of the first spouse to die with the granting of a life use to the surviving spouse. Absent life-time transfers, which would trigger a gift tax, the assets of the trust are then included in the estate of the second spouse to die. The executor conceded that is how it worked for the federal estate tax, but disputed that Connecticut's tax worked the same way. The Court disagreed noting that the "gross estate" is deemed the same for both federal and state purposes. (CGS 12-39(c)(3)) To the extent prior Connecticut case law could be interpreted to support the plaintiff's argument that 12-391 incorporated the federal tax code provisions, including the definition of gross estate, the Court rejected that argument. The Court also rejected the argument that the trust assets were not taxable because they were not "owned" by the decedent-wife. The term "owned" is not to be so narrowly construed for tax purposes. The decision also held that a post-death statutory amendment

only clarified existing law on the topic. It was not a retroactive tax that violated due process. Finally the Court held that the decedent's death did trigger a taxable transfer event as the assets were now being transferred to the beneficiaries named in the husband's will upon the wife's estate. It mattered not that she only had a life-use in the assets.

• SC19797 - Lyme Land Conservation Trust, Inc. v. Platner

Most of a large waterfront estate along the Connecticut River was encumbered by a detailed conservation easement in favor of the local Land Trust which protected a combination of tidal waterfront, forest, and meadow. The easement did allow "mowing" of the field, but that had always been interpreted for years as end-of-season mowing to keep it a wild meadow without impacting the nesting season. Then along came the defendant who bought the property and then went on a landscaping spree: relocating her driveway into the restricted zone, adding tons of sand to create a beach, cutting out the understory of the forest and planting lawn; bringing in tons of top soil and an irrigation system to turn the meadow into a meticulous lawn that was mowed twice per week. The Land Trust sued. This decision rejected the defendant's claims that she did nothing wrong and agreed with the Trial Court that she had intentionally destroyed the whole intent of the easement. She was properly ordered to restore the property; pay ~$300,000 in legal fees to the Land Trust; and will have to pay a multiple of the restoration costs to the Land Trust as damages as provided for by statute against those who encroach upon a conservation easement.

• SC19712 - State v. Reyes
• SC19707 - In re Natalie S.
• SC19844 - In re Natalie S.

Appellate Court Advance Release Opinions:

• AC38263 - Kruger v. Grauer

Plaintiff ex-husband – sued ex-wife for negligent and intentional infliction of emotional distress after she filed a complaint that the plaintiff might have sexually molested their child. She did this after a therapist extracted the same story from the child, but the charges were nonetheless found to be unsubstantiated and dropped. When her Motion for Summary Judgment on the grounds of absolute immunity was denied, the defendant appealed. Noting that a defense based upon absolute immunity entitled the defendant to appeal an otherwise interlocutory court order, the Appellate Court held that the absolute immunity the defendant would have been entitled to under common law had been abrogated by statutes passed by the legislature. Thus the defendant could only claim qualified immunity for filing a complaint of child abuse and the matter had to be remanded for a trial.

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- AC38214 - Haughey v. Commissioner of Correction
- AC38217, AC38365 - American First Federal, Inc. v. Gordon

Assignee of $3 million loan sued to collect. The note had been lost by the assignor, so in conjunction with a Sale of Asset and Purchase Agreement between the assignor and the assignee, copies of the note and other loan documents were turned over to the assignee/plaintiff. The borrower/defendant argued there could be no "assignment" without an associated Bill of Sale, absent the actual notes being assigned. The Court agreed that the Sale Agreement alone could not establish that an "assignment" had occurred, but once a closing took place and the loan documents were turned over, and the assignee made demand upon the borrower, and the borrower actually made a payment or two to the assignee, the totality of those circumstances evidenced that an "intent" to assign existed and had been carried out.

Next the Court ruled that the Trial Court had the discretion to reduce the $700,000 attorney fee request of the plaintiff to $450,000. While the plaintiff had the right to use two law firms, one in state and one out of state, each firm assigned three attorneys and one paralegal to the file and there clearly was overlap of effort. Further, the attorneys were a bit too overzealous in their time entry redactions in their affidavits of attorney fees, (claiming privilege), and making it look like a CIA report (my words), so the Trial Court was entitled to ding their fee request for that, too.

Finally, this decision held that CGS 37-1 applies to both pre- and post-judgment interest on money loaned. The Trial Court correctly applied a 9% interest post-judgment on the outstanding principal only, and not both the principal and interest that had accumulated up to that point in time as claimed by the plaintiff.

- AC38382 - Teixeira v. Home Depot, Inc.
- AC38165 - Bauer v. Bauer

Ex-husband's unexpected loss of his $400,000/year job justified the Trial Court refusal to hold him in contempt for failure to pay alimony once his severance payments ran out and to grant his request for modification based upon a *substantial change in circumstances*, as the separation agreement allowed.

- AC38025 - State v. Ruiz
- AC38027 - State v. Heath
- AC38208, AC38093, AC38094, AC38095, AC38097 - Girolametti v. Michael Horton Associates, Inc.
- AC38098, AC38099 - Girolametti v. VP Buildings, Inc.

In these consolidated actions, the plaintiffs/owners claimed the general contractor ("GC") owed it $700,000 for poor work and delayed completion of its commercial building addition and the GC claimed it was owed $500,000 for change order work. Two thirds through the arbitration, the owners walked out of the arbitration hearings and refused to participate further. Instead, the owners brought a series of lawsuits against the GC

and a series of subcontractors making the same or similar allegations of defective work asserted in the arbitration and adding claims of fraud against the GC.

The arbitrator proceeded ahead anyway and ruled for the GC and found the owner's claims of defective work unsubstantiated and the counterclaim for delay damages unproven due to the walk-out. The GC obtained confirmation of the award in Superior Court and dismissal of the lawsuit against it. The subcontractors moved for summary judgment asserting res judicata and collateral estoppel grounds. The Trial Court denied their motions ruling the subs were not in "privity" with the GC's agreement with the owner which contained the arbitration clause.

First, the Appellate Court noted that appealing the denial of a SJ premised upon collateral estoppel or summary judgment is another exception to the rule prohibiting appeals of interlocutory orders and thus the appeal was proper. Further when a court allows an appeal of a denial of a SJ under one of these exceptions, all the related grounds for SJ that also did not work may be considered as part of the same appeal. (The case discusses the distinctions between the two doctrines of res judicata and collateral estoppel).

Next the Court ruled that as against the GC, a party cannot seek to vacate an arbitration award simply by screaming "fraud" when they did not seek to vacate the award within the time period allowed by the statute. The Trial Court did properly grant summary judgment to the GC on that claim.

Next the Court looked at the issue of "privity" and noted it is a hard thing to define. Concluding that the "mutuality of the parties doctrine" is no longer good law in Connecticut to ascertain the existence of privity for purposes of "issue preclusion," the Court held that the proper test is whether the issue was fully and fairly litigated in the prior forum so as to obviate the need for a third party to be confronted with the same claim again. This in turn is consistent with the concept that the "defensive use of collateral estoppel" (here by the subcontractors) does not require a showing of privity.

The Court then went on to hold that each of the subcontractors were entitled to summary judgment, not necessarily based upon collateral estoppel if the issue was not actually ruled on by the arbitrator, but because either they were in fact in privity with the GC who made them all adopt his obligations to the owners in their subcontracts, or because privity was not required and the owners had a full and fair opportunity to raise the claims in the arbitration and failed to do so, and when they did, they lost their arguments.

• AC38810 - Fitzpatrick v. U.S. Bank National Assn.

Owner defaulted on his 30-year mortgage. Assignee of the mortgage started a foreclosure but it was dismissed under dormancy. The assignee did nothing. The owner waited six years and then filed suit to discharge the mortgage under 49-13. This decision held that the Trial Court properly struck the complaint for discharge as the six years does not start to run until the maturity date in the mortgage, which here would mean 30 years from the date of execution plus another six years without the lender taking action to enforce

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the mortgage. Not 6 years after a default or failed foreclosure effort.

- AC37568 - Thurlow v. Hulten
- AC37568 - Hulten v. Thurlow
- AC37568 Appendix - Thurlow v. Hulten
- AC37568 Appendix - Hulten v. Thurlow
- AC38254 - Brander v. Stoddard
- AC38254 Appendix - Brander v. Stoddard

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.