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## Week of April 11, 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](mailto:emccreery@pullcom.com) I hope the reader finds these summaries helpful. – Edward P. McCreery*

Posted May 5, 2016

### Supreme Court Advance Release Opinions:

- SC19233, SC19234 - [State v. Wright](#)
- SC19233, SC19234 Concurrence - [State v. Wright](#)
- SC19382 - [State v. Anthony D.](#)
- SC19382 Dissent - [State v. Anthony D.](#)
- SC19523 - [Hart v. Federal Express Corp.](#)

The worker's compensation claimant was a driver for FedEx. He claimed that a change in management resulted in increased demands being placed upon the drivers, in particular, requiring more and more stops and a rushed schedule, more than one person could humanly complete in one working day. As he fell further and further behind, his once-stellar employment record became filled with written warnings, making him extremely nervous, until one hot day he simply could not complete all of his assigned tasks, causing him to go into a panic. When his request for a replacement driver was refused, he went into an abnormal heart rhythm and was taken to the emergency room, where he was diagnosed with hypertension and given medication that brought his heart rhythm back to normal, albeit with residual effects. The worker was also treated for anxiety and depression, claiming he felt overwhelmed, humiliated, embarrassed and resentful of how he had been treated by management. He was diagnosed with PTSD with anxiety and depression. Medical providers opined

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that the working conditions aggravated the pre-existing condition of his heart and were a significant factor in the development of his depression, and that he was temporarily totally disabled for about one year, even though he continued to regularly go to the gym, as he had before the incident.

The worker filed a Worker's Compensation claim against FedEx. The Worker's Compensation Commissioner found that the worker was totally incapacitated, and entitled to benefits for approximately one year.

FedEx appealed, and the Supreme Court upheld the award. FedEx argued it was ridiculous to conclude that a healthy individual could get stressed out by having to run back and forth to their truck carrying heavy packages, and that such stress is nothing out of the ordinary for a FedEx worker. The court disagreed, noting that compensation is justified when the injury arises out of employment that proximately caused it, even if it is aggravating a pre-existing condition. Almost all adults have pre-existing conditions of some nature. The same often applies to the condition of the heart. The commissioner was not required to reject the opinions of five medical experts. The court also rejected the idea that a claim of post-traumatic stress disorder is not compensable under the act. Further, the mere fact that the employee was able to resume some workouts at the gym did not mean he was not totally incapacitated during the time periods he was able to return to the gym. That was a matter for the experts to opine on, and for the commissioner to evaluate. A footnote adds that a Worker's Compensation Commissioner can rely upon a physician's recommendation that an employee remain out of work for a specified time as evidence of total disability, without an independent opinion from the physician that the employee was unable to work in any capacity.

### Appellate Court Advance Release Opinions:

- AC35974 - [Spearman v. Commissioner of Correction](#)
- AC36371 - [State v. Bardales](#)
- AC37712 - [Do v. Commissioner of Motor Vehicles](#)
- AC37712 Dissent - [Do v. Commissioner of Motor Vehicles](#)
- AC37537 - [Fisk v. Redding](#)

This is the case we previously reported on where an inebriated pedestrian walking along a street, continued up a recently-constructed retaining wall, walked off the end of it, fell down and was injured. In this decision, the injured plaintiff was appealing the grant of summary judgment to the defendant, BL Companies, which was the design contractor for the project, which claimed it was not a *user* of the wall, and *not in control* of the wall, and therefore could not be liable for the public nuisance claim of the plaintiff.

The plaintiff claimed that it was a public nuisance because it had been designed without a guard rail at the top for anyone else who might clumsily walk up it while inebriated in the dark not know where they are going.

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The Appellate Court upheld the grant of summary judgment. The defendant argued whether the design of the wall or whether it still had a role in the finishing details of the construction project was irrelevant. The only thing that mattered was whether it was in control of the wall for purposes of nuisance liability. The Appellate Court agreed. To establish a claim for negligence: (1) the condition must be likely to cause injury; (2) it is a continuing threat; (3) the use of the land was unreasonable; and (4) the nuisance caused the injury . . . And when it is a public nuisance, there are two additional elements of proof: (5) that the condition interfered with a common use of the public; and (6) that the nuisance was created by the defendant's intentional conduct. For the use of the land to be unreasonable in the third condition, the defendant must be a "user." To be a "user," one must exercise control over the property where the nuisance is located. Designing a project, even if its design results in the creation of a nuisance, is not the same as controlling the nuisance. There was no evidence that the town delegated authority over the wall to the engineering firm. Therefore the defendant firm was not a "user" of the property.

Similarly, contractual requirements that the engineering firm periodically inspect the work were not the same as delegating control. (An interesting footnote tries to decide whether there is a bright line between the law of nuisance and the law of negligence, and ends with concluding such a lien may not exist depending on the case, but they need not go into it for this matter.)

- AC37756 - [Profetto v. Lombardi](#)

Ex-husband appealed the granting of a foreclosure by sale of a judgment lien when the judgment lien was securing a dissolution decree that the defendant pay the plaintiff \$70,000. The basis for the appeal was that foreclosing a judgment lien was not an appropriate vehicle to enforce a family support judgment. The Appellate Court disagreed, noting that the Trial Court determined that the Court's Order was for a judgment for a sum certain. Here. The judgment of dissolution contained no orders for alimony or child support. Accordingly, a money judgment may be enforced as in any other case by post-judgment proceedings. It does not come under the exception that precludes judgment liens for family support orders. A family support judgment order is an order for payment of legal obligation for support or alimony for a spouse or child.

- AC36472 - [Farmassony v. Farmassony](#)

As part of a divorce decree, husband was ordered to pay child support. Child care expenses ended in 2006, but the husband kept making payments. He then filed a motion with the Court for a retroactive credit for the overpayments. The Trial Court ordered reimbursement of \$20,000 in overpayments, despite its concern that C.G.S. § 46(b)-86 prohibited retroactive modifications.

The Appellate Court agreed with the ex-wife that C.G.S. § 46(b)-86 precludes retroactive modifications of support orders and reversed. Here, the payment was partially determined by analysis to the Guidelines which, in turn, incorporated the terminology Child Care Costs, and therefore, the payments by the non-custodial parent to the custodial parent for such costs is part of an overall "Child Support Award," which is

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something that cannot be retroactively modified.

- AC37461 - [Morquecho v. Commissioner of Correction](#)
- AC37691 - [Brown v. Otake](#)

A doctor who was becoming disabled hired a broker to find a buyer for his plastic surgery practice. The broker located a doctor who currently had privileges at local hospitals who was interested. There were several communications back and forth between the two doctors, to the point where the selling doctor introduced the buying physician to his contacts at the local hospital. Ultimately, the defendant doctor decided not to buy the practice, and instead, took a paid position for plastic surgery at the local hospital.

The selling doctor sued, claiming that he had an agreement with the defendant doctor to buy his practice group and, in fact, had kept his operations going longer than he planned, so as to be able to turn over the practice to the new doctor, and incurred office expenses, salary, overhead rent, utilities and malpractice insurance. He also claimed that the defendant doctor did not let on that he was secretly negotiating a deal with the hospital while talking to him. The plaintiff asserted claims for breach of contract, unjust enrichment, and various misrepresentation claims. He also sued the hospital for tortious interference.

The Trial Court granted a motion to strike most of the claims because the complaint had never alleged there was an actual final contract reached between the two doctors. The Trial Court also struck the claim for fraudulent concealment, asserting there is no such cause of action in Connecticut except in the context of concealing a statute of limitations. Further, the fact that the hospital hired the defendant doctor does not create a situation of “unjust enrichment” for the doctor.

The Trial Court left intact a tortious interference claim against the hospital and a negligent misrepresentation claim against the defendant doctor. The plaintiff filed a revised complaint, and this time all defendants responded with a motion for summary judgment. The plaintiff’s opposition contained no opposing affidavits or documentary proof or deposition extracts. The Trial Court granted the summary judgment, noting that even the purchase price had not been agreed upon, and thus, there had been no meeting of the minds between the doctors and no contract reached. There was no evidence of misrepresentations or tortious interference.

On appeal the plaintiff claimed that the “law of the case” precluded the Trial Court from granting summary judgment on *all* the counts for the lack of a contract when, in fact, the non-contractual counts had already survived a motion to strike. The Appellate Court noted that the plaintiff was mischaracterizing the doctrine of “The Law of the Case.”

The court held that the issue is not whether or not the views of the law expressed by one judge at one stage of the proceedings differ from a subsequent judge. Rather, the important question is which view is right. The Law of the Case Doctrine only comes into play when one judge changing an earlier ruling would cause an injustice.

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Merely because a Trial Court refuses to strike non-contractual claims does not mean that later on in a summary judgment proceeding, the lack of a contract might not be detrimental to those claims. In any event, the Trial Court's grant of a summary judgment on the non-contractual claims was not based solely upon the lack of a contract. The court went on to review the law of negligent misrepresentation, and agreed with the Trial Court that the plaintiff offered no evidence that such misrepresentations had been made. A review of the law of the tortious interference claims against the Hospital had the same result.

- AC37459 - [Hines v. Commissioner of Correction](#)
- AC37792 - [Magana v. Wells Fargo Bank, N.A.](#)

The plaintiff, a former tenant on the property, sued Bank of America, pro se, claiming that after they foreclosed upon the property she occupied, she had entered into an option to purchase with the bank, which the bank was now refusing to honor. The bank filed discovery requests upon the plaintiff, and then when she did not comply, obtained an order from the court. The plaintiff filed a certificate of compliance with the discovery order by the court-ordered deadline, but the defendant's counsel asserted she had not complied, and filed a motion for nonsuit. The Trial Court entered a new discovery order directing the plaintiff to file verified responses to all discovery by a certain deadline. The plaintiff again filed a verification, claiming she had complied; but again, the bank's attorneys claimed that was not true and filed a new request for nonsuit. This time, the Trial Court granted the motion for judgment of nonsuit.

The plaintiff appealed, claiming that the Trial Court should not have entered a nonsuit without an evidentiary hearing. The Appellate Court agreed. Discovery orders that include sanctions must: (1) be reasonably clear; (2) show that the order was violated; and (3) include a sanction that is proportional the violation. But whether there was a violation requires an evidentiary hearing when it is disputed. In this case, all the Trial Court had before it was the representations of the bank's counsel that she had not complied, and the representations of the plaintiff that she had. The court noted that representations of counsel are not evidence. The Trial Court did not have any evidence before it to make a credibility determination. Therefore, the matter was remanded to the Trial Court to hold an evidentiary hearing.

- AC37538 - [Weyher v. Weyher](#)

The Appellate Court rejected the ex-husband's pro se appeal, seeking to vacate an arbitration award that divided personal property of the marital estate. The ex-husband had argued that the Trial Court should not have unilaterally ordered binding arbitration with respect to the division of personal property; claimed that the arbitration proceeding had not been conducted in accordance with C.G.S. §46b-66(c); claimed that the arbitrator had exceeded his authority; and claimed that the arbitrator was biased against him.

- AC36496 - [Nuzzi v. Nuzzi](#)
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*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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