Appellate Notes

PULLMAN & COMLEY

A publication of Pullman & Comley, LLC

Week of April 25, 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 31, 2016

Supreme Court Advance Release Opinions:

• SC19232 - Izzarelli v. R.J. Reynolds Tobacco Co.

Plaintiff obtained a judgment against a tobacco company upon a claim that it put in additives and manipulated the nicotine content, such that it increased the user's addiction and thus their risk of cancer. The Plaintiff used tobacco from 1956 until the late 1990s. She asserted that the manufacturer modified the makeup of Salem cigarettes with more "free nicotine" to give the brain a quicker and bigger "kick." This was achieved, *inter alia*, by adding ammonia and other chemicals that had the known side effect of enhancing addictive properties which in turn, meant the smoker would need to smoke more to satisfy the addiction which, in turn, would expose her to more "tar" and other carcinogens. The plaintiff was diagnosed with cancer of the larynx in 1996. At trial, one of the primary defenses of the cigarette manufacturer was based upon the commentary to Section 402(a) of the Restatement Second that suggested what the plaintiff suffered is an inherent risk common to all tobacco products. The Restatement's commentary provided that an ordinary, unadulterated cigarette is not reasonably dangerous because the risks are known.

The Trial Court rejected that defense, on the grounds that these cigarettes were manufactured in a unique way, so as to make it different from other cigarette products, and there was no evidence Connecticut had adopted the "Good Tobacco Exception" to product liability law. The Trial Court instructed the jury on both

tests under the product liability law, (the "ordinary consumer expectation test" and the "modified consumer expectation test") and told the jury that the cigarettes could not be deemed defective just because they contained nicotine and tar, which may be carcinogenic. All cigarettes have those elements. The jury returned a verdict in favor of the plaintiff for net $8 million (after 42% comparative negligence reduction) and awarded punitive damages, as well.

Upon appeal to the Second Circuit, it certified an issue to the Connecticut Supreme Court whether or not the cause of action for strict liability can be maintained against a cigarette manufacturer under Connecticut's Product Liability Law in light of the Restatement Second Torts Commentary that precludes claims of strict liability against "good tobacco." This, in turn, caused the Connecticut Supreme Court to revisit its 1997 Potter Product Liability decision to ascertain whether Connecticut would follow the "ordinary consumer expectation test" or the "modified consumer expectation test." The Court said now with the advantage of hindsight, it could reevaluate the Potter decision and conclude that it established the proper test for Connecticut product liability actions.

The Court noted that there were many products that can be dangerous in the long run, which simply cannot be made safe. But when such products are altered, they may be unreasonably dangerous for the purpose of product liability law. Thus it would be improper to have a rule that just because something is inherently dangerous, the manufacturer should be let off the hook no matter how they altered it.

The Court noted that the old consumer expectation test lost ground during the 1980s when Courts started considering the issue of design defects being subject to product liability law, where a risk-utility analysis was better suited. In 1997, however, the Connecticut Supreme Court in the Potter decision, declined to abandon the ordinary consumer expectation test in favor of a pure risk-utility test, because they felt at the time it would put an unreasonable burden upon the plaintiffs to show a feasible alternative. But the Potter decision did modify Connecticut's consumer test slightly . . . which it called a "modified consumer expectation test" where the jury would weigh the product's risks and utility and inquire in light of those factors, whether a reasonable consumer considered the product design was unreasonably dangerous. The availability of a feasible alternative design would be simply a factor that a plaintiff may offer to prove that the product's risks outweighed its utility. The Court also determined that in certain circumstances the old simple consumer expectation test would apply where the product caused the injury in such a bizarre manner, that the jury could evaluate the situation without the need for expert testimony. This allowed room to keep the ordinary consumer expectation test in place when an ordinary consumer's minimal safety expectations are being violated, more like a *res ipsa* type case.

In this case, the Connecticut Court said no jury could reasonably conclude that simply because cigarettes cause cancer, they fail to meet a consumer's minimum safety expectations. Therefore, the plaintiff in this case could only proceed and prevail under the *modified consumer expectation test*. The Court noted that there will be no bright line rule to decide whether or not the Trial Court should apply a risk/utility analysis or a pure consumer expectation analysis. The key will be whether or not it is apparent that the product's design

performed well below legitimate commonly expected safety assumptions.

Allowing cases to proceed under a risk analysis test will be an incentive to improving product safety, and is consistent with the overwhelming trend of other jurisdictions to allow consumers to pursue defective product design claims despite a product's otherwise open and obvious danger. Thus, going forward, the modified consumer expectation test will be the default test for design defect claims in Connecticut, and the ordinary consumer expectation test will be reserved for those cases where the product fails any ordinary consumer expectation. Further, jurors should be allowed to consider both tests which are alternate methods of proving the same standard with the consumer expectation test, being the lesser hurdle for the product to clear. For that lower hurdle, expert testimony on product design is not required.

A Footnote adds that the plaintiff introduced a twenty-four page list of additives to Salem Cigarettes that includes solvents, glue, coolants and Freon. Wow! Another Footnote suggests Jury Instructions. In yet another Footnote, the Majority noted the concurring Justices would go further and take this occasion to adopt the test in the Restatement Third of Torts. The Majority declined to consider that issue, because neither party sought to have the jury charged on the Restatement Third Torts, which would have required the jury to make a finding that there was a more feasible, safer alternative.

Yet another Footnote adds that there is another recognized test in Connecticut called the "malfunction theory," where an unspecified defect was the most likely cause of the malfunction, and other causes had been ruled out, and under such claims, an expert witness is generally required.

The most shocking Footnote is the last one, wherein the Court's Majority noted that they were not oblivious to the irony that the cigarette industry which, for decades disputed the addictive effect and dangerous hazards of smoking, now seeks to shield itself from liability, asserting just those claims. The Majority suggested their approval, with a Comment by the Court of Appeals for the Second Circuit that the company is lucky there is not such a thing as "moral estoppel," and by taking this stand, the cigarette makers were either suffering from amnesia, or acknowledging that their years of propaganda had been ineffectual. But it is not up to the Courts to punish hypocrisy the quote adds. Wow again!

Appellate Court Advance Release Opinions:

• AC37266 - HSBC Bank USA, N.A. v. Lahr

Plaintiff commenced a residential real estate foreclosure against husband and wife. While the case was pending, the husband died. Prior to the plaintiff moving for judgment, the wife filed a Notice of Suggestion of Death. Over objection of the defendant, the plaintiff proceeded with obtaining a judgment of strict foreclosure.

Week of April 25, 2016

On appeal, the defendant claimed that all the proceedings should have stopped upon the filing of the Notice of Suggestion of Death, until such time as the plaintiff substituted the executor as a defendant. The Court disagreed but upon a ground not identified by the parties or the Trial Court, specifically, C.G.S. § 52-600, which provides, that even if one defendant dies, the cause of action survives as against the remaining defendants and will not be abated by the death. The death does not stay the proceedings, nor deprive the Trial Court of jurisdiction as against the remaining defendants.

A Footnote adds that the Notice of Suggestion of Death is not a formally recognized term under the Practice Book, but it is the generally-accepted method of compliance with the written notice requirement of C.G.S. § 52-599 (part of Connecticut's long and proud tradition of unwritten rules).

• AC36622, AC37203 - Malpeso v. Malpeso

The parties agreed to $20,000 per month for unallocated alimony and child support. Thereafter, the defendant made several efforts to seek a modification of the original decree on the grounds that the children had reached majority and were no longer living with either parent, and he was paying for three colleges, and his financial circumstances of his New York job had deteriorated since the 9/11 event.

The Trial Court eventually reduced the award to $12,000 per month, but also held the defendant in contempt and ordered to pay arrearage of $400,000 for unilaterally stopping payments of the prior monthly award amount. Several rearguments later, the Court further modified its decree, reducing the payments further, and making the reduction retroactive, but still upholding the contempt without specifying the reduced amount of arrearage owed based on retroactivity of the reduction.

On appeal, the Appellate Court found fault with almost all of the Trial Court's rulings. First it applied the wrong legal standard in modifying the alimony and child support. The Trial Court just utilized the Child Support Guidelines. But where the divorce decree incorporates an agreement of unallocated alimony and child support, the Trial Court must first determine which part of the original decree constitutes modifiable child support, and what part constitutes non-modifiable alimony. Only when the Court unbundles the child support from the alimony, should it them turn to the Guidelines to provide guidance. Those Guidelines in turn apply regardless of the high net worth or income of the participants, but provide for a case-by-case analysis for incomes in excess of $2,500 per week. Above that amount the Guidelines only provide a floor monetary amount, but also set forth the equitable standards upon which decisions are to be made. Other factors to be considered include age, health, station, occupation, earning capacity, sources of income, estate, employability of the parents and the children, and must be evaluated on a case by case basis. The Trial Court should not have relied simply on the Child Support Guidelines, but should have taken into account all of the other criteria, because the net income of the parties exceeded $2,500 per week, and therefore, the decision should have been made following the "case-by-case" analysis.

Week of April 25, 2016

The next mistake of the Trial Court was its failure to apply the 1999 Guidelines when the original Decree was entered. Next, the Trial Court incorrectly used the parties' current financial affidavits to ascertain combined net income, when for the process of unbundling, should have looked at what was right and proper at the time of the original decree, including financial affidavits back then.

Next, the Trial Court applied the minimum child support to each child, rather than applying it to all three children. As part of the remand order, the Trial Court was instructed to also review the ambiguous language of the Settlement Agreement to ascertain the parties' intent and, after unbundling the alimony from the child support, must consider a new alimony order.

Next, the decision held that while it is true that the general obligation to supply support to a child ends at the age of majority, absent explicit language in the agreement, addressing what happens to the unallocated child support and alimony, a motion must be filed with the Court for modification of the ongoing payment obligations. The Trial Court here also made a mistake in not setting forth a clear date of retroactivity of the modification and not specifying the amount of arrearage due with certainty.

Next, the Trial Court also made a mistake when it concluded it did not have jurisdiction to terminate the alimony. C.G.S. §46(b)-86(a) conveys such jurisdiction. Thus, the Trial Court had jurisdiction, whether or not the agreement of the parties would allow such modification however was a different question. Here, the agreement allowed modification after 2012.

The one thing the Trial Court apparently did do correctly was hold the defendant in contempt for unilaterally deciding not to pay the agreed-upon amount, especially when he had assets he could have liquidated to raise the funds. The parties must comply with a court's order until modification, and may not utilize self-help. Failure to heed that warning may be sufficient grounds to be held in contempt.

Back to the losing side, the Trial Court also abused its discretion in awarding the wife her attorney's fees as a consequence of the contempt. In an important note for making accurate and detailed time entries (and breaking down your time by component of work), the Court noted that many of the wife's attorney's time entries referred to working on the wife's motion for modification when, in fact, it was not the wife who filed the motion, it was the defendant. Even if the wife's attorney was working on an opposition to the defendant's motion for modification, and simply made a Scribner's error, the Court noted that the only proper award of attorney's fees would be for the ex-wife's attorney's efforts to pursue the contempt motion. Accordingly, the award of attorney's fees was vacated for a re-hearing.

- AC37624 - State v. Warner
- AC36815 - State v. Carlos C.

PULLMAN & COMLEY

Week of April 25, 2016

• AC37398 - Rogan v. Rungee

Plaintiff sued the defendant, claiming she falsely accused him of a public disturbance that led to his arrest, which caused him emotional distress. The underlying incident in question arose when the plaintiff pointed strobe lights at the defendant's house, causing the defendant to call the police, who ordered the plaintiff to turn off the lights on more than one occasion. According to the published Decision, the defendant "upped the ante" by filing a counterclaim, asserting that the plaintiff's lawsuit was an abuse of the Court system designed to stop her from complaining to authorities about the plaintiff's bizarre, harassing and criminal misconduct.

By the time of trial, all of the plaintiff's claims had been stricken or disposed of by summary judgment, leaving only the defendant's counterclaim to be tried. The Trial Court found in favor of the defendant upon her claims of abuse of process and vexations litigation, and subsequently awarded damages of $35,000 for emotional distress, and then trebled the amount under C.G.S. § 52-568(2), and added $20,000 in attorney's fees as punitive damages for common law vexatious litigation, making the total award $125,000.

On appeal, the Appellate Court upheld the financial award for emotional distress, noting that damages caused by abuse of legal process can include injury to feelings, such as humiliation, disgrace, and indignity, so long as the abuse of process caused the emotional distress. There was evidence here of the impact of being sued by the plaintiff which caused her to be upset and suffer insomnia.

When the plaintiff claimed that there was no evidence he brought the malicious prosecution action in order to intimidate or harass the defendant, the Appellate Court responded by pointing out where the Trial Court had relied upon an e-mail he had sent to his original attorney, John Williams, stating that *the suit worked as far as he was concerned, because it kept the defendant at bay for four years*. That e-mail, the Court said, proved he had an improper purpose for bringing the initial lawsuit. The e-mail showed he did not bring the lawsuit for a proper purpose, but rather, to intimidate the defendant from making further lawful complaints to the Police Department. Combined with the adverse inference the Trial Court drew under C.G.S. § 52-216(c), when the defendant appeared at trial, but declined to testify, there was adequate support for the judgment.

Next, the Court said that the award of treble damages was proper. Despite the wording of the judgment, treble damages was would only have been proper under the statutory vexatious count, not the common law abuse of process count. Read as a whole, the only reasonable interpretation of the judgment was that the Trial Court was trebling the damages under the statutory count.

Finally, the *Advice of Counsel* defense was properly relegated to the junk pile by the Trial Court too, when the plaintiff chose not to testify, thus triggering the adverse inference rule. The plaintiff only offered (without objection) his deposition transcript but it did not discuss what he told his attorney, John Williams, prior to the filing of the complaint; nor did it discuss what advice Williams gave him, or how he relied upon that advice. Williams, in turn, testified that he assumed the lights were Christmas lights, as his client told him, and was not aware that the police report characterized the lights as strobe lights focused from plaintiff's house upon

defendant's house. Williams also claims he could not recall whether he had been informed of prior police warnings against his client to turn off the lights. Advice of counsel is a defense only when it is shown that the defendant instituted his action relying in good faith on such advice given after full and fair statement of all facts within his knowledge. Here, the Record supports the conclusion that the plaintiff failed to provide Attorney Williams with all of the key facts.

A Footnote adds that the plaintiff challenged the ability to assert both common law and statutory claims for vexatious litigation, citing 1836 precedent. The Appellate Court noted that this would have been more appropriate to raise in a motion to strike, and having failed to be raised in that manner, the issue was waived.

• AC37239 - Warren v. Cuseo Family, LLC

Decedent owned 57% membership in an LLC that owned commercial property in Westport, Connecticut, which it leased to a tenant. Her will bequeathed her membership interest to her son and her two grandchildren, who held the remaining membership interests. When the decedent's estate did not have sufficient assets to pay its expenses, the executrix/attorney of the estate brought an action to have herself appointed as receiver of the LLC to pursue its dissolution, so as to generate funds for the Estate to pay its bills.

The Trial Court issued a decision appointing the executrix as temporary receiver of the LLC. The Trial Court found that appointment of a receiver was necessary because: there was a question whether the LLC had been dissolved under the Operating Agreement upon the member's death; the membership had been deadlocked since 2010; the LLC had not filed tax returns or collected rent for three years; and the son had been making decisions for the LLC without consulting the other members for several years.

On appeal, the son challenged the legal standing of the executor to seek the appointment of a receiver claiming his mother's membership interest in the LLC was not properly considered part of her estate. The Appellate Court disagreed noting that executors are the legal representatives of a decedent's estate, and are charged with gathering up the personal estate of the decedent, which includes membership interest in any LLC. Executors are fiduciaries and, as such, are empowered under C.G.S. §45a-234 to retain property and participate in reorganizations, which include dissolution actions of property in which the decedent held an interest. The fiduciary becomes the legal successor to the deceased member of the LLC, and unless limited by the terms of the operating agreement, may exercise all the member's rights for the purpose of settling the member's estate. Just as any member of an LLC may seek dissolution under C.G.S. § 34-207, so may their executor in the stead.

The son's claim that the plaintiff lacked standing was based upon a misinterpretation of the operating agreement and a misunderstanding of the law regarding the administration of estates.

Week of April 25, 2016

Next, a defendant challenged whether the plaintiff should have been appointed as the receiver notwithstanding a claimed conflict of interest when, as an attorney, she had previously provided legal services to the son on unrelated matters and had drafted the LLC's Operating Agreement. This issue was not considered on appeal, however, because the defendant failed to seek an articulation of the Trial Court's refusal to address the claim.

In an interesting Footnote, the Court noted that an order appointing a temporary receiver is an appealable, final judgment, even though an order that grants a temporary injunction is not.

• AC37100 - Allied Associates v. Q-Tran, Inc.

Plaintiff's breach of lease action was dismissed by the Trial Court when it was discovered that the owner quitclaimed the property to a related entity before it started suit and subsequently merged into that related entity. The plaintiff both claimed it made a mistake and that it felt it had standing to bring the action as it was acting as the true owner's agent.....sort of a sub-landlord.....(but not seeming to appreciate what that term really means). So it asked the Trial Court to allow a substitution of the proper owner. The Trial Court denied the request on the grounds that it appeared plaintiff's counsel had been negligent in not naming the proper plaintiff. The plaintiff appealed the Trial Court's refusal to allow a substitution under CGS 52-109. The Appellate court held that the test under 52-109 used to be whether the "mistake" was the result of an honest conviction and not negligence on the part of the plaintiff. But recent decisions have called into question whether adding the concept of negligence was too restrictive and not allowing the statute to perform its remedial purpose to let matters proceed to trial and so the new definition of "mistake" will be an error, misconception, misunderstanding, or erroneous belief. The matter was remanded to the Trial Court to reconsider the issue with the new definition of "mistake" that does not require an absence of negligence.
