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## Week of August 5

*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 based on my own particular field of practice, so you will not find distillations of the many criminal and matrimonial law decisions on this page. I may from time to time add commentary, and may even criticize a decision's reasoning. Such commentary is solely my opinion . . . and when mistakes of trial counsel are highlighted because they triggered a particular outcome, I will try to be mindful of the adage . . . "There but for the grace of God . . ." I hope the reader finds these summaries helpful. – Edward P. McCreery*

Posted August 5, 2014

- SC18979 - MSO, LLC v. DeSimone

Tenant sued landlord for unreasonably withholding consent to assign its lease. Two years into the case, the landlord moved for a stay on the grounds that the lease agreement contained an arbitration clause. The plaintiff objected, claiming the plaintiff had waived the right to enforce the arbitration clause. The Trial Court granted the stay, with the simple ruling that the parties were bound by the contractual provision, and he has always granted such requests in the past. On appeal, the Appellate Court refused to reverse, claiming that there was an inadequate record for failure to seek an articulation of the Trial Court's decision which did not specifically address the waiver argument of the defendants. The Supreme Court reversed, stating that it was enough for the Trial Court to have stated it "always" enforces arbitration clauses no matter what the circumstances because that meant it did not care that the defendant was raising the issue of a "waiver." Case law is clear, however, that a party may implicitly waive the right to enforce an arbitration clause, and the matter was remanded to the Trial Court to conduct a new hearing as to whether the defendant waived its rights.

The Court also took the opportunity to clarify the standard for showing a waiver of a right to arbitrate which now requires the objecting party having to show substantial prejudice and unjustifiable delay. Requiring an element of "prejudice" is consistent with the majority of Federal Court decisions. Such prejudice may be

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either procedural, or substantive. [A Footnote indicates that in the interim, the arbitration did proceed, and the defendant prevailed. But the Court held that the Appeal was not rendered moot because if the defendants had, in fact, waived the right to arbitrate, the Trial Court must as part of the remand also vacate the arbitration award.

Another Footnote also dispelled the suggestion that merely arguing participating in the underlying Court proceedings for two years was enough to establish waiver. The Footnote says that facts must be presented to the Trial Court to establish waiver consistent with requirements of a showing of prejudice. Some relevant factors to prejudice may include: participating in lengthy pre-trial discovery; extensive pre-trial motion practice; seeking continuances; seeking arbitration only on the eve of trial; seeking discovery in the litigation that would have been unavailable in arbitration to be used in the arbitration; causing the opponent to expend undue time and expense in the Court proceedings before seeking arbitration; and etc.

- SC18745 - State v. Crenshaw
- AC36159 - Kinsey v. World Pac

Worker was injured during the course of his employment, and was receiving temporary total disability payments, when the employer suddenly discontinued the payments. The worker then filed a motion for benefits, sanctions, interest and attorney's fees. Finding this was not the first time that the employer had failed to make timely payments, the Commissioner awarded attorneys' fees, even though by then the employer had caught up on the payments. The attorney's fee awarded, however, was only \$525, because the respondent had already paid \$1,000 voluntarily, and a large portion of the remaining claim was for paralegal fees. The Commissioner determined there was no statutory authority for an award of paralegal fees or charges. The Appellate Court reversed holding that the provisions of C.G.S. § 31-300, *et. seq.*, that deal with awarding "reasonable attorney's fees" includes authority to award paralegal fees. While paralegals are not mentioned in the statute, "reasonable attorney's fees" has acquired a judicially settled meaning that includes fees accrued by an attorney's paralegal in aid of the attorney in the representation of his or her client. Since the charge for the attorneys reasonably takes into account the work of secretaries and others behind the scenes whose labor contributes to the attorney work product, there is no reason why the work of paralegals should not be similarly compensated. The Court states: "We thus take as a starting point the self-evident proposition that the "reasonable attorney's fee" provided for by statute should compensate the work of paralegals, as well as that of attorneys." ....citing to prior Connecticut Supreme Court precedent.

- AC35606 - Stave v. Buhl
- AC35713 - Historic District Commission v. Sciamè

Defendant installed four granite pillars at the end of his drive that were not depicted in plans previously approved by the Historic District Commission. The Commission gave the owner an opportunity to file an application for their approval, and ultimately granted approval, provided they were lowered from five feet to

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four feet. The defendant did not appeal that decision, but also failed to lower the height. The Historic District Commission initiated an action to enforce the condition, and sought fines and attorney's fees under C.G.S. § 7-147(h). The defendant counterclaimed, asserting the Commission had acted beyond its powers, and sought damages for intentional infliction of emotional distress. The counterclaims were eventually stricken, and judgment was entered in favor of the Commission, but the Trial Court declined to impose fines for non-compliance. The defendant continued to ignore the Trial Court decree that the pillars had to be lowered, until the plaintiff filed a motion for contempt. This time the Commission also sought an award of its attorney's fees in excess of \$40,000, noting that a substantial amount of the fees arose because of the counterclaims. When an intervening appeal came down in favor of the plaintiff, the commission increased its request for attorney's fees to \$50,000. The Trial Court awarded over \$50,000 in fees and expenses, noting that it was the legislative intent to allow the award of attorney's fees in Historic District Commission enforcement proceedings under C. G.S. § 7-147(h). The Trial Court also noted that it would be unfair to place the burden on the taxpayers to sustain the costs of a successful enforcement action, and that the counterclaims were of dubious merit.

On appeal, the defendant claimed that attorney's fees cannot be awarded unless fines are also imposed. This decision held that the statute was plain and unambiguous. The statute does not mandate the imposition of fines in order for an owner to be deemed a "violation." Despite the use of the word "shall" in the statute, the provision authorizing the imposition of fines is directory, rather than mandatory. Thus, whether to impose fines under the statute was within the discretion of the Trial Court. Refraining to do so did not preclude the Trial Court from moving on to make an award of just attorney's fees. It was further not necessary for the Trial Court (Holzberg, J.) to specifically find that the defendants were "violators." Directing the defendants to comply with the Commission's order implicitly included the Court's authority to impose attorney's fees under the statute. Additionally, the award of attorney's fees for efforts expended defending the counterclaim was proper because it was part of the defendant's litigation strategy in defense to the enforcement action. The statute allows the award of attorney's fees for any proceedings "in connection with" the enforcement action. The result may have been different, had the counterclaim been asserted as a stand-alone lawsuit.

- AC35704 - Avoletta v. State
- AC35318 - Valente v. Securitas Security Services, USA, Inc.

Employee found a note on her desk asking for a copy of her underwear, and signed your "Secret Admirer." Similar, and even worse, harassing incidents took place over a one month time frame. In the meantime, the employer conducted an investigation and finally with the help of a secret camera ascertained that it was an outsourced evening security guard who was responsible. The employee sued the security company and the security guard for invasion of privacy and extreme emotional distress. She did not name her employer as a defendant. The security company filed a third party complaint against the employer, seeking apportionment and indemnification under the security contract, claiming that the employer had been negligent in not

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discovering earlier who the offender was. The security company settled with the plaintiff-employee and then the Trial Court granted summary judgment to the employer.

On appeal by the security company, the Appellate Court held that granting summary judgment on the claim for common law indemnification against the employer was proper. Indemnification is proper from a third party only if that third party's negligence was the active cause of the injury while it was in control of the situation and without knowledge on the part of the indemnitee. Here, the security guard's conduct was the dangerous condition that caused the legal injury and the damages, and the employer did not have exclusive control over the security company's employee. Further, the security company seemed to ignore the fact that some of the harm (the first letter) had taken place before the employer knew anything was amiss. The fact that the harassment continued over another month while the company investigated who was responsible did not amount to the company having exclusive control over the situation. Nor was indemnification under the security contract justified. The contract only required indemnification if the employer exhibited gross negligence or willful misconduct. The employer undertook reasonable steps to investigate, and eventually uncover, who was harassing their employee. Under no circumstances could this arise to the level of *gross negligence*.

- AC34758 - Ham v. Commissioner of Correction
- AC35614 - Tonghini v. Tonghini
- AC35119, AC35120 - Torla v. Torla
- AC36439 - State v. Rivera

*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. ©2014 Pullman & Comley, LLC. All Rights Reserved.*

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