Appellate Notes

PULLMAN & COMLEY

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Week of February 16

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 February 16, 2015

- SC18927 - State v. Gonzalez
- AC35406 - Rodriguez v. State
- AC35570 - Tremper v. State
- AC35972 - Bouchard v. Deep River

[Dumpster diving can be hazardous to your health. As a devotee of the treasured Saturday morning dump run to minimize the clutter that has multiplied around our home over a short 10 years, I took great interest in this one.] After bringing a load of debris to the town transfer station, the plaintiff climbed up onto the platform next to the dumpster and peered in to see if any goodies in there might be retrieved. Something must have caught his attention because he leaned in too far and fell into the dumpster sustaining injuries. He promptly sued the town claiming it had failed to comply with an OSHA regulation to install railings and warnings. [Now how on earth would one deposit large bulky waste into a dumpster with a railing in the way? And warnings for the obvious? Good grief.] The trial court granted summary judgment to the town asserting whether putting up a railing or warnings were discretionary functions entitling the town to immunity. The Appellate Court affirmed but on different grounds. They held that OSHA regulations, even if they applied here, imposed a duty upon employers to their employees, not to the general public. The decision adds that even though not decided by the trial court, the parties are not prejudiced by a decision on alternate grounds as it was raised

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below and they both briefed the issue.

- AC36021 - State v. Nicholson
- AC34625, AC34838 - Nelson v. Tradewind Aviation, LLC

Plaintiff was hired by the defendant as a co-pilot and flew 137 flights without a written warning or ever violating any drug policy, though a few senior pilots verbally complained about him. He was then approached by the company president who told him he would be laid off for the upcoming slow season but it would be better "if he resigned." When he refused to resign he was let go and given paperwork that said "due to lack of work." But when his next prospective employer asked for a copy of his personnel records (as required under federal regs), the defendant sent the new company paperwork stating he was terminated involuntarily after repeated failed efforts to improve performance to company standards and while he passed a drug test they suspected his poor performance was due to abusing drugs. They also failed to send a copy of that file to the plaintiff at the same time as required by federal regulations so he was at first unaware of what had happened. (Ouch - our employment lawyers are all cringing!) The new company revoked its job offer and the plaintiff sued for defamation. The jury found the defendant acted with actual malice and tortuously interfered with the new job offer and awarded $600,000 in damages to which the trial judge added $100,000 in punitive damages, but no prejudgment interest.

On appeal the Appellate Court rejected defendant's arguments that most jurisdictions would consider the employer's statements to be pure opinion and immune from liability and instead held Connecticut considers as libel per se, statements that impugn one's trade or occupation. Under CT law, providing intentionally false information to a prospective employer without providing the required copy to the employee shall be actionable. The Court refused to consider whether the mandatory reporting requirements under the federal regulations granted any absolute privilege, as it was not raised before the trial court. Turning to the claim of qualified privilege afforded to former employers to avoid a culture of silence, that was easily overcome the Court said by the abundance of evidence of malice. That finding of malice also justified the award of punitive damages. Further, the trial court judge was the best to decide an appropriate amount of punitives having just sat through the trial, so in this case that judge was fully within his discretion to reduce the request from $120,000 in attorney fees to $100,000. Finally the Appellate Court rejected the plaintiff's argument that the trial court should have let the jury decide whether to award prejudgment interest under CGS 37-3a. The Court held that the statute does not even apply to a tort case like this. The amount of money to be awarded in a personal tort case is uncertain until a verdict is rendered, so how could it be wrongfully detained before then?

- AC35407 - Andrews v. Commissioner of Correction
- AC36354 - State v. Walczyk
- SC19274 - Cuozzo v. Orange

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The plaintiff was injured on a pothole in a private access way leading into a Sam's Club and sued the town for failure to maintain it in safe condition. The town moved to dismiss claiming the lawsuit fell within the purview of § 13a-149, not § 52-557n, and thus the plaintiff should have issued a notice of highway defect before initiating the suit, and failure to do so deprived the trial court of jurisdiction. The trial court agreed and dismissed the case. Both the Appellate and Supreme Court however felt it was too premature to dismiss the case as it was unresolved whether the access way was a public highway subject to 13a-149 or private driveway owned by the town subject to 52-557n as the plaintiff contended in the complaint. (The Appellate Court mused that it's probably going to turn out to be public if people are using it to get to a Sam's Club.)

In rendering its decision, the Supremes noted that a challenge to subject matter jurisdiction can be resolved by: (a) consideration of just the complaint; or (b) the complaint with supplemental undisputed facts; or (c)…. and this one we often forget….the complaint and undisputed facts ….AND…..disputed facts which the court has resolved in a mini-trial like hearing.

For option (c) the trial court has the discretion to either schedule a hearing early, on or wait and combine the hearing with the full trial of all issues. Here the disputed fact of whether this was private property owned by the town or a thoroughfare open to the use of the public had not yet been resolved by the trial court in an evidentiary hearing. Dismissal was therefore premature.

[Hmmm- an access way to a shopping center…..I suspect all the plaintiff has done is delay the inevitable……. especially based on the IN and OUT arrows visible from a satellite photo of the site.]

• SC19227 - Howard-Arnold, Inc. v. T.N.T. Realty, Inc.

In this case the lease gave the tenant the option to buy the leasehold property for a certain price. A separate clause obligated the landlord to environmentally remediate the property by a certain deadline. The landlord started the remediation and claimed it was finished, but it was not, and the deadline to complete it passed. The option clause and the remediation clause were not otherwise tied to one another. The tenant issued a notice that it was exercising its option to purchase but demanded the landlord first complete the clean-up operations before they would close. The tenant never tendered the purchase price, nor put it in escrow. The landlord refused to do further clean up, or sell the property. The tenant sued. The trial court held that there had not been an effective exercise of the option and the remaining cleanup required did not absolve the tenant from tendering the purchase price.

First the Appellate Court agreed with that outcome, and then in this decision, the Supreme Court agreed as well. The Supremes reviewed the rules applicable to properly exercising an option to purchase. They noted that an option is like an open offer. [T]o be effective, an acceptance of an offer under an option contract must be unequivocal, unconditional, and *in exact accord with the terms of the option*. . . . If an option contract provides for payment of all or a portion of the purchase price, in order to exercise the option, the optionee . . . must not only accept the offer but pay or tender the agreed amount within the prescribed time.'' In order to

properly exercise the option here, the tenant should have tendered the full option price to the landlord. Nonperformance of an unrelated lease term did not excuse the tenant from that obligation. Nothing in the lease stated that the cleanup had to be done before or upon the exercise of the option.