Appellate Notes

PULLMAN & COMLEY

A publication of Pullman & Comley, LLC

Appellate Court Notes: Week of July 20

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 20, 2015

Supreme Court Advance Release Opinions:

• SC19203 - Tilcon Connecticut, Inc. v. Commissioner of Environmental Protection

Applicant sought a water diversion permit for some of its quarries for water used in its rock removal and dewatering efforts. DEP demanded all sorts of records, details, and remediation plans about the scope and extent of the applicant's quarrying operations at several of its sites and said it would hold up a pending separate water discharge permit application until compliance took place. The applicant brought a declaratory action seeking to ascertain the scope of the DEP to demand such things. This decision held that seeking a water diversion permit does not permit the DEP, now DEEP, to regulate all of the applicant's excavation activities and the documents & plan demands were excessive. To interpret the Act otherwise would suggest that the DEEP Commissioner's jurisdiction was unlimited. For the same reasons, the Courts do not allow inland wetlands commissions to deny a permit simply because the development will cause a reduction in a species dependent upon the wetlands. Similarly, that too would make a wetlands commission's jurisdiction unlimited.

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The Court also held that DEEP did not have authority to demand a wetlands mitigation plan when the municipal wetlands commission had already authorized the removal of the wetlands years earlier. DEEP had argued that it essentially had concurrent jurisdiction over wetlands with local town authorities. But the applicant said that essentially was reopening an old permit than had long-since expired, and the work was long done.

The Court noted that while DEEP certainly had the authority to seek any information it wanted about the wetlands to the extent it affected the diversion permit requested, it certainly could not demand a wetlands remediation plan. Once again the Court said, DEEP was attempting to inappropriately regulate the excavation activities of the applicant.

Finally, the Court noted that an agency can certainly hold up an application until it is deemed "complete" by the agency, but may not use that to hold up a separate and distinct application. Here, the DEP was holding up the issuance of a Water Discharge Permit Application filed years earlier because it was waiting for more information on the Water Diversion Permits.

The exception would be when the agency determines that there is another pending application that is associated with the one being delayed. An agency can delay one application when an associated application is incomplete. But the associated application must be of the same kind, i.e., in this case - another Discharge Permit Application. This is the only way the regulations make sense, whereby the DEEP should be concerned when there are multiple applications for multiple discharges into the same water system. Only then could the applications be deemed associated with one another.

Similarly, multiple discharge permit applications to the same water system could be considered as a whole to avoid piecemeal decision making. The Court noted that there is a logical relationship between diversion and discharge permits where you might want to hold one up for the other, but the regulatory scheme would have to be modified to allow an agency to hold up one permit for one in another category of permitting.

- SC19250 - State v. Williams
- SC19250 Dissent - State v. Williams

Appellate Court Advance Release Opinions:

- AC35191 - Atkins v. Commissioner of Correction
- AC35832 - Tiplady v. Maryles

Plaintiff went to the ER of Stamford Hospital complaining of vomiting and headaches. After being treated for the pain, she was discharged and told to follow up with her physician, and tests were sent out to the lab. The following day, she was found driving the wrong way on the highway, and taken to the Emergency Room at Bridgeport Hospital, where they diagnosed her with Encephalitis (viral brain infection), where she died a few

days later. Such a viral infection tends to last three to seven days. The Administrator of the Estate sued Stamford Hospital for failure to diagnose and treat the condition.

Prior to trial, the Court granted a defense motion in limine to preclude evidence that the treating physician had been previously subject to discipline for failure to maintain proper records and pass the ER test. Even though the plaintiff did not disclose the defendant physician as an expert, he proceeded to ask about opinion testimony without objection. The defendant then sought to rehabilitate the doctor by going through his credentials in preparation for asking a rebuttal opinion, and the Judge warned that if he proceeded down that path, he would reverse his ruling on the motion in limine and allow the cross-examination on the prior discipline.

Defense stopped before seeking an opinion, and only got through the credentials. Plaintiff then wanted all of the doctor's testimony stricken. The Trial Court refused, saying all it covered was his educational background, and juries know that doctors have to go to school. Resuming the testimony, the defense then did elicit extensive medical opinions from the treating physician over the plaintiff's objections, on the ground that the plaintiff had asked medical opinions, and thus opened the door.

After a defense verdict, the plaintiff appealed, claiming the Trial Court had improperly allowed the defendant to offer the treating physician as an expert, and that the plaintiff should have been allowed to fully cross-examine the physician, including his prior disciplinary sanctions. The Appellate Court agreed. While here, the plaintiff "opened the door" by asking the opinion of the physician, allowing the defendant to cross-examine on that, the defendant's cross-examination should have been limited to the topics raised by plaintiff's counsel.

Opening the door..... only allows cross-examination to the point necessary to remove unfair prejudice and does not allow a party to exceed the scope beyond that of the direct examination. The doctor's opinion testimony should have been stricken, and when it was not, the Trial Court should have allowed extensive cross-examination, to include the prior disciplinary actions.

The Court went on to explain why it considered the improper admission of the added testimony of the defendant treating physician to be harmful, and thus justify a new trial.

The Court next addressed a side issue, and that was whether or not Stamford Hospital could be deemed liable for the actions of the physician who was an employee of Emergency Medicine Physicians of Fairfield County, which contracted to provide emergency room doctors to Stamford Hospital. The issue was whether or not Stamford Hospital could be liable when the treating physician had been hired by an outside contracting authority. But since that issue was not directly a matter of the appeal, the Court decided that it would be inappropriate to review this novel issue until it came up on appeal again. To do otherwise would be rendering an advisory opinion.

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Next, the Court took up another related issue it thought would come up again in the new trial – and that was the attempt by the plaintiff to allege that Stamford Hospital had a non-delegable duty to patients who are treated under its emergency room pursuant to certain regulations.

The Trial Court had granted a motion to strike these claims, asserting that Connecticut does not recognize a claim based on a non-delegable duty against Connecticut hospitals for the negligence of physicians hired by the independent contractor, EMP. As a general rule, employers are not liable for the negligence of independent contractors unless they owe the invitee a non-delegable duty. The Court rejected the plaintiff's arguments that certain state and federal regulations requiring hospitals to provide emergency room services to the public impose upon hospitals a non-delegable duty for malpractice committed by independent physicians working in the ER.

First, the federal regulations cited are designed to serve a basis to survey activities under Medicare and Medicaid. Second, the state regulations could not have been meant to alter the total lack of authority under Connecticut statutory or common law to impose such a duty upon hospitals. Thus, the claim cannot be raised at the retrial.

• AC36711 - Berkshire Bank v. Hartford Club

The Court affirmed a judgment of foreclosure by sale rendered in favor of Berkshire Bank against The Hartford Club on its $1 million mortgage originally granted by CBT. In a classic foreclosure defense that has been repeatedly unsuccessful, the mortgagee challenged the proof of ownership of the promissory note. On appeal, the plaintiff contended that such ownership was still an issue, because the Trial Court should not have admitted an Affidavit from the bank's officer with an attached letter from the Massachusetts Department of Banking, certifying the merger between CBT and Berkshire Bank, claiming that such documents were inadmissible hearsay, especially as to the alleged merger.

The Appellate Court disagreed, saying that such documentary evidence was sufficient to grant summary judgment to Berkshire Bank. They were based upon the personal knowledge of the affiant, and the defendant offered no counter-affidavits or no counter-documents.

The Appellate Court said it could not be disputed, but that Berkshire Bank merged with CBT, and is thus the successor-in-interest to the Note, and thus was now the owner of the Note and had the right to enforce it. It is not necessary for the holder of the Note to present testimony showing the chain of custody of the Note from the time of its creation to the point it is introduced at trial. It was also sufficient for the Affiant to state that he had reviewed Berkshire Bank's records in making his affirmations under oath. There is no authority that precludes an affiant from obtaining personal knowledge of an underlying transaction by reviewing the business records of the institution. Such review entitles the affiant to state that the information is based upon their personal knowledge.

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• AC36823 - Perez v. Carlevaro

Plaintiff was awarded $14,000 in damages and $60,000 in legal fees. The defendant challenged the award of attorney fees. Plaintiff had agreed to buy out defendant out from a partnership, and when he failed to do so, plaintiff sued for breach of the agreement and attorney fees. The award of attorney fees was made pursuant to a provision providing the defendant agreed to indemnify and keep plaintiff harmless from any costs, liabilities, expenses or damages arising from the conduct of the business. The decision reversed the award of attorney fees holding this clause did not entitle either of the parties to an award of attorney fees for their personal dispute over the buy-out agreement. First, the clause made no mention of attorney fees, and secondly, the clause was clearly intended to only indemnify the plaintiff from conduct arising out of the business.

It matters not that the defendant was defaulted and the allegation of the entitlement to attorney fees was included in the complaint. As a pure legal interpretation of the contract clause, it did not provide for an award of attorney fees in this case. A defendant's default does not obligate the Trial Court to accept a plaintiff's incorrect legal assertions in its complaint.

• AC36748 - DiMichele v. Perrella

As near as I can tell, the sequence of events is that the wife had two children, but knew that the husband was not the father. The actual father knew that he was the father, and the mother would secretly bring the children over to visit him. Years later, when the husband found out, he sued the father of the children for intentional infliction of emotional distress. The father of the children then sought to implead the wife for apportionment.

The Trial Court granted judgment to the plaintiff based upon fraud and deceit in the amount of $30,000 against both the wife and her boyfriend. The defendant/boyfriend/father appealed, claiming that he cannot be liable for fraud based on silence or concealment without a duty to disclose, and that he had no duty to disclose to the husband that he (the husband) was not the father of the children.

The Appellate Court agreed, and reversed the judgment, noting that mere nondisclosure does not ordinarily amount to fraud unless the law imposes a duty to speak. A duty to speak can be imposed by statute, regulation, beginning to make partial disclosure, or such a special relationship as imposes a duty to speak, such as principal and agent, majority and minority stockholders, old friends, fiduciary relationships, confidential relationships and even sometimes contractual relationships. There is simply no authority to suggest a special relationship exists between someone who thinks he is the father of his children, and the actual biological parent.

• AC36693 - Lisko v. Lisko

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Trial Court properly refused to set off against child support arrearage by the amount of dependency benefits paid because the defendant had obligated himself to pay the entire arrearage based upon the party's prior arrearage, which had been included as an order of the Court.

• AC36839 - Delahunty v. Targonski

Plaintiff sold an abutting lot to the defendant with a right-of-way between the two parcels. The defendant thought he was getting access across the right-of-way as a driveway to his property, but it was not in the deed. When he went ahead and built a paved driveway within the right-of-way, along with an abutting stone wall on the plaintiff's property, the plaintiff sued. The defendant counterclaimed, and cited in a third party defendant. That third party defendant filed a claim for a jury trial, but later the claims against that third party defendant were withdrawn.

The matter proceeded to a Courtside Trial, with no one complaining of their right to a jury trial. The Trial Court found that the defendant was entitled to an easement by estoppel across the driveway, but did encroach upon the plaintiff's property by installing the stone wall, and so awarded nominal damages of only $100. Clearly attempting to get a second trial, the plaintiff appealed, claiming that their right to a jury trial had been violated, and that even though not reserved, this issue of was of such Constitutional importance they could raise it on appeal.

The Appellate Court disagreed, noting that while a criminal defendant must make an explicit waiver of his or her right to a jury trial, because it is a fundamental right, a lower standard applies to the right to jury trials in civil cases. The right to a jury trial in a civil case may be forfeited if it is not asserted in a timely manner, where it is otherwise deemed waived.

Here, the plaintiff had multiple opportunities to claim he was still entitled to a jury trial, even after the dismissal of the third party defendant, but failed to raise it, prior to or during the presentation of evidence. To preserve the issue on appeal, the party must place a formal objection on the record and seek a finding by the Court why they would not otherwise be entitled to a jury trial. To rule otherwise would reward the plaintiff with a new trial, when the situation was caused by their own failure to raise a timely objection. The right to a jury trial was deemed waived here.

• AC36546 - Beyor v. Beyor

The Appellate Court upheld the Trial Court's enforcement of a prenuptial agreement, despite defendant's claim that the agreement was unconscionable. The agreement had been entered into four days' prior to their wedding ceremony which, in turn, was four years prior to the commencement of the dissolution action.

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In the agreement, the parties waived any ability to receive alimony or other support. At the time of the marriage, the plaintiff earned about $250,000 per year, and had a net worth of about $4.5 million. The defendant earned about $30,000 and had a net worth of about $26,000. Both were in good health, and both were represented by attorneys.

Rendering its decision, the Appellate Court reviewed the standards of Connecticut's Pre-Marital Agreement Act, § 46b-36(a), et. seq. Here, the disparate economic circumstances of the parties at the time of the marriage were essentially the same as at the time of the divorce. Therefore, it could not be said that the economic circumstances of the parties could not have been envisioned, especially here where financial disclosures were appended to the prenuptial agreement, thus making full disclosure to both sides. Such disclosures do not have to be exact or precise, but rather, fair and reasonable. In a footnote, the Court also focused on a clause in the prenuptial agreement that said each party had the right to request additional documentation from the other regarding their financial status or to obtain independent valuations or appraisals, and that the wife did not seek to take advantage of that clause, with respect to her claim now that the full economic potential of the husband had not been revealed to her.

• AC34565, AC35005 - Burns v. Adler

This case deals with a contractor's right to claim attorney's fees in conjunction with the foreclosure of a mechanic's lien, and the bad faith exception to the obligation that the contractor should have complied with the Home Improvement Act before being entitled to recover on its claim.

The Trial Court had found that the property owner's bad faith exempted the contractor from the obligation to comply with the Home Improvement Act, but declined to award attorney's fees to the contractor.

The defendant was a lawyer and an investment banker, and orally contracted for major renovations to a lake house for about $1 million. Defendant claimed he was owed a balance of $200,000. The contractor had done an amateur job in writing out a contract, attempting to comply with the Home Improvement Act, of which he was only generally familiar, including a cancellation notice.

The Trial Court found that the owner essentially gave the contractor the runaround, continuously adding to the project, continuously demanding acceleration, not keeping track of the expenditures, yet falsely claiming they had agreed to a fixed-price contract, imposing obligations upon the contractor that were never envisioned by the contractor, not paying the contractor in a timely fashion for work done, constantly changing the plans, and having multiple people bark out orders to the contractor. Therefore, while the contractor had failed to comply with the Home Improvement Act, which should have contractually barred his claims, the defendant allowed the contractor to continue working, notwithstanding mushrooming expenses and a claim that they had agreed upon a fixed-price contract. The homeowner never asked for change orders, cost figures or receipts (even though the contractor kept telling the owner that the costs were exceeding each estimate). At the same time, the owner kept having work orders sent to the contractor, and asking that additional work

be done, while the contractor was pleading for payments, and claiming that subcontractors were screaming for their money.

Even after allegedly terminating the contractor, the property owner kept asking for him to come back and do more work. Thus, the Trial Court concluded that when the property owner made his last payment, he had no intention of making further payments, yet demanded that more work be performed.

The Trial Court found that a person of less sophistication than the defendant should have known that he was putting the plaintiff at serious risk of going out of business, which was the end result of his failure to pay the $200,000+ balance to the contractor. In fact, the fear of losing his business is what gave the property owner such leverage over the plaintiff to keep compelling him to return to do more work.

The Appellate Court said that the Trial Court was justified in finding that the homeowner had taken advantage of the fact that his contactor had limited assets and desperately needed to be paid. The homeowner's approach constituted a design to mislead and/or deceive the contractor. The decision not to make further payments to the contractor was not prompted by an honest mistake, but rather to use the contractor to finish the project at no further expense for his own financial gain, even to the point of putting the plaintiff out of business.

Next, the Appellate Court held that until the Supreme Court holds otherwise, the Appellate Court has consistently held that Public Act 93-215 did not abrogate the Bad Faith Exception to the requirement to comply with the Home Improvement Act. The Court also disagreed with the contention that the Bad Faith Exception only applies when the homeowner invoked the Act after knowing about the statute and how to trick the contractor into doing the work, and then seeking to avoid payment therefor.

Every contract carries an implied covenant of good faith and fair dealing, and the parties should not be entitled to repudiate a contract when it would work an injustice. Otherwise, an outcome such as here, would be grossly unfair. There is no specific type of bad faith conduct that is applicable. All that was required was that the homeowner acts with some dishonest or sinister motive when they invoke the Act to repudiate the contract. But that bad faith does not have to be contemplated at the initiation of the contract as argued by the lawyer-defendant. This was more than a refusal to pay situation. It was a course of conduct on the homeowner's part to serve his own financial interest at the expense of the plaintiff.

The Appellate Court also rejected the claim for attorney's fees for the foreclosure of the mechanic's lien, because the parties had agreed to bifurcate the trial. Part A was the Trial on the Merits; Part B was the Foreclosure. Part B, had proceeded by stipulation without a hearing. The award of attorney's fees in a foreclosure action requires a hearing. Therefore, there was never a hearing on the entry of a foreclosure order. Even while agreeing with the contractor that the hearing on bifurcated Part A was necessary to establish the essential elements of the foreclosure claim, there was a requisite that there be a "hearing" before attorney's fees could be awarded on Part B. Therefore, after such a great victory and having been put

out of business, the plaintiff contractor was denied the right to recover attorney's fees simply because they had bifurcated the hearing.

[Comment: This is a warning going forward that you cannot agree to bifurcate your trial if you are representing a contractor in the foreclosure of a mechanic's lien. Otherwise a wronged contractor may forfeit a legitimate right to recover attorney fees.]

- AC36359 - State v. Scott
- AC36269 - Furbush v. Commissioner of Correction
- AC36088 - Hammel v. Hammel

Trial Court's dissolution of marriage decree was reversed when the Trial Court incorrectly found that the wife had completed her Bachelor's Degree during the marriage. After a Trial Court fails to reconsider its financial orders after it is made aware that they are based upon a significant error, that failure amounts to an abuse of discretion, which can be raised on appeal. Here, the Court was made aware of the error less than one month after Judgment, when a pleading was filed seeking articulation and clarification of the Court's findings as to the plaintiff's educational background.

- AC36637 - Savalle v. Hilzinger

Plaintiffs sued for declaratory relief that they had the right to pass across an old town road that proceeded adjacent by the defendant's property. Defendant objected, claiming that the town had already closed the road in 1937, and a more recent town meeting action to abandon the road did nothing to revive the right of the plaintiffs' predecessors to pass and repass across the roadway.

The Trial Court agreed and ruled in favor of the defendants. The Plaintiffs then filed a petition for a new trial pursuant to C.G.S. § 52-270 on the grounds of newly discovered evidence comprised of town meeting minutes from the 1920s, as well as new testimony from an expert witness, who was a land surveyor, to try to show that what the town meant by closing the road in the 1930s, was not the same as what today we would call abandonment of the roadway.

Plaintiffs claim that they only recently discovered these records, along with a specialized expert who focused on ancient highways and turnpikes. This expert was prepared to opine that the town still owned title to the underlying roadbed.

The Appellate Court agreed with the Trial Court that this did not amount to newly discovered evidence that could not have been discovered in the exercise of due diligence in preparation for the original trial. Due Diligence means doing everything reasonable, albeit not everything possible. The plaintiffs knew from the get-go that the defendants' contentions were based upon an assumption that the town's actions in 1937 amounted to a discontinuance of the roadbed. Thus, a plaintiff in the same position exercising due diligence,

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would have pursued evidence of other instances where the town discontinued or abandoned its roads during the relevant time frame. Not only did the plaintiffs not do this, they did not attempt to locate a title searcher or land historian who could testify as an expert. Yet, here the public records were available at all times to any party, and although the plaintiffs' expert witness was found by chance, the plaintiffs never established how their expert or one of similar knowledge and experience could not have been located through reasonable diligence beforehand.

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.
