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Week of July 30

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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

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- SC19162 - C & H Electric, Inc. v. Bethel

Electrical contractor agreed to perform work on school addition for \$3mm with a clause that excluded any damages due to delay of the project, except **actual interference** by the Town of Bethel in the performance of the work. This **No Damages For Delay Clause** also said rescheduling of work by the Town would not equate to active interference. The Town had to delay the contractor's work by several months because the asbestos abatement project was delayed and took longer than anticipated. The Town never sent a specific warning to the plaintiff that asbestos remediation might delay his work, but concerns over a potential delay were openly discussed in public meetings even before the plaintiff's contract was executed. The plaintiff sued for delay damages. During trial, the

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plaintiff admitted that there can always be instances where asbestos is discovered in unanticipated areas that might in turn cause a delay but he simply did not pay attention to the issue. The Trial Court held the plaintiff failed to show malicious intent or bad faith on the part of the town and therefore the clause was enforceable and the Town prevailed.

On appeal, the Supremes upheld the Trial Court's ruling in favor of the Town, but partially disagreed with his ruling and took the opportunity to clarify the law in this area. The Court held there were two exceptions to enforcement of such **No Damages For Delay** clauses that applied to this case. First is the one in the contract precluding enforcement if there was active interference. Second was a case-based exception from the **White Oak** decision that precluded enforcement in instances of: (1) the owner's bad faith; (2) unanticipated delays; (3) abandonment by owner; or (4) owner's breach of a fundamental obligation.

While the parties stipulated the contract clause was adopted to get around the White Oak decision, the court ignored that stipulation and said more of the drafter's intent would've had to been shown, and went on to hold that the contract clause "active interference" was ambiguous. Then, looking to decisions outside of CT to interpret the clause, it concluded the clause means **an affirmative willful act by the owner that is more than mere negligence or mistake in judgment**. The contract language here further restricted the exception so that only truly unreasonable conduct by the Town would void the clause, not just ordinary construction delays. Clauses like the one in the Town's contract envision there might be delays and a contractor must know that going in to the deal. Here the evidence did not show that the Town knew that the asbestos work would delay the plaintiff. To the contrary, the Town officials kept expressing optimism that the work would get done in time. Secondly, the evidence did not establish that the Town tried to conceal the risk of a delay from the plaintiff. Thus there was no affirmative act by the Town above ordinary and expected construction delays which caused a delay in the plaintiff's work.

Next, the Court turned to two of the four White Oak exceptions which the plaintiff claimed were alternate reasons not to enforce the No Damages For Delay clause. The Court said neither the Bad Faith Exception, nor Owner's Breach of a Fundamental Obligation Exception would be of help to the plaintiff. The Town's conduct did not rise to the level of either exception.

There were three important footnotes to this decision. One said that the Court will hold off for another day whether to establish the Active Interference Exception as a case-based fifth exception to the four listed in the White Oak decision. Another footnote said they did not mean to diminish the importance of the trial court also finding the contractor failed to give written notice of his delay claim within the period allowed under the contract. Such notice requirements & deadlines are important to towns and should be enforced, the footnote added. Here they just didn't have to rule on that issue. Finally a footnote added that if you want to put on parole evidence to clarify an ambiguous term, you have to put the witness on the stand and ask them what did they intend the term to mean.

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[Note: It was unclear to me if now, you can, or cannot, contract away the White Oak exceptions. While the attorney was trying to draft around the four White Oak exceptions, it seems all he did was manage to add a fifth exception, which soon may become a CT judicially recognized one. Ha.]

- SC18849 - State v. Kelly
- SC18849 Dissent - State v. Kelly

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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