Appellate Notes

PULLMAN & COMLEY

A publication of Pullman & Comley, LLC

Week of June 1

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 June 1, 2015

Supreme Court Advance Release Opinions:

• SC19422 - Awdziewicz v. Meriden

Certain police officers retired, entitling them to pension benefits under the City Charter as previously modified in a separate lawsuit settlement agreement. This included the right to participate in group health policies, or receive a cash payment in lieu thereof, equivalent to presently hired officers of the same rank. Subsequently, a new police union contract provided that officers had to pay a portion of their health care insurance, and the City then imposed that same change upon the retired officers.

The retired officers sued. The Trial Court ruled in favor of the City because the retired officers were to receive health benefits equivalent to actively working officers, and they did. The Supreme Court agreed with the Trial Court that the broad language in both the settlement agreement and the City's charter, allowed the Court to decide the issue as a question of law. When both were read together, the Court said that the answer was plain and unambiguous – that retired police officers were to receive one-half of the compensation of an active employee of the same rank, and the same health insurance benefits. It does not matter that the retirees did not participate in the collective bargaining process that resulted in the subsequent modification to the health insurance benefits.

Week of June 1

The Trial Court also properly excluded offers of evidence from the retired officers that new retirees received enhanced pension benefits that they were not entitled to. They had not made a claim for enhanced pension benefits, so that was not relevant to whether or not their insurance benefits could be reduced based upon current collective bargaining agreements.

Finally, the Trial Court also refused to take judicial notice of § 7-450(c), because no claim had been made under this Statute, and the Statute was not affirmatively pled as required under Practice Book Section 10-3 (a). While the failure to comply with that Practice Book requirement does not preclude a claim where the defendant has been sufficiently apprised of it, the plaintiffs are nonetheless limited to the allegations of their complaint, and they never put the City on notice of a claim under this Statute. An argument for judicial notice cannot circumvent the pleading requirements. Pleading rules require issues to be properly framed.

• SC19423 - Kiewlen v. Meriden

In the companion Meriden decision, the Court disagreed with the Trial Court, with respect to widows of police officers and firemen. Widows were entitled to one-half of the same insurance benefits that their spouse was receiving from the City. When a City worker died, however, the City would remove the widow from the family insurance plan and place them in an individual insurance plan with half the value being the benefit. The widows objected, claiming that they were entitled to the same insurance benefits that their spouse had at the time of their death, i.e., a family plan, and then apply the half value. The City responded that would be ridiculous, because they would have to buy the more expensive insurance plan for insuring the health of one person, and would, in essence be paying for insuring the health of the deceased employee.

The Supreme Court disagreed and said that the widows were entitled under the City Charter to the exact same health insurance benefits of the spouse. The claim that the City would, in essence, be paying insurance for the health of a deceased person was obviated by the fact that the widow was only entitled to half of the health insurance premium cost. Further, the City always had the option of paying the difference between a single insured plan and a family plan as a cash dividend to the widow. [Sounds like Meriden needs to go and revise its Charter to fix this ridiculous outcome.]

Appellate Court Advance Release Opinions:

• AC36516 - Ogden v. Zoning Board of Appeals

Property owner was issued a cease and desist order for the operation of a contractor's yard without a permit and so applied to the planning and zoning commission for a permit, and it approved the request subject to landscape and buffering conditions, as shown on the site plan submitted with the application. But the applicant never satisfied the conditions of approval, and so was issued a second cease and desist order by the ZEO. The property owner then appealed to the ZBA and then to the Trial Court which sustained the appeal, holding that the town's regulations on contractor yards were ambiguous as the term was not defined,

and there was no substantial evidence that it was being unlawfully used in that manner, in any event.

First, the Appellate Court said while it was unclear whether the plaintiff was claiming the regulations were ambiguous, or void for vagueness, it is clear that the Trial Court concluded the regulations were unconstitutionally vague. Thus, the Appellate Court first had to decide whether or not this issue had been properly raised before the Trial Court. A party to an administrative proceeding cannot raise on appeal, claims that were not asserted before the municipal agency below. But when claims arise to a constitutional level, this is an exception to that rule, and trial courts may consider such matters, even if it was not raised before the agency. It would be pointless to require an applicant to bring a Constitutional issue before the ZBA, because a municipal agency would lack authority to determine Constitutional questions. Therefore, the Trial Court properly considered this claim, even though not raised before the ZBA.

As a fallback, the ZBA argued that the Trial Court should not have considered this issue, because it had not been pled in the complaint. The Trial Court ruled that it could consider the issue because it had at least been raised in the trial brief. The Supreme Court noted that it did not condone the practice of raising claims for the first time in a trial brief. Pleadings are supposed to provide adequate notice of facts, claims and issues to be tried so as to prevent surprise upon a defendant. An appeal to the Appellate Court, however, should not be utilized as a way to correct pleading deficiencies that could have been remedied before the Trial Court. Here, it was determined that the trial brief put the defendant ZBA on notice that the plaintiff intended to raise the claim of vagueness at trial. Thus the ZBA had the opportunity to respond to those claims in its brief, but failed to do so. The attorney for the ZBA never objected before the Trial Court that new claims not in the complaint were being made. Therefore the issue was sufficiently raised for consideration by the Trial Court.

Next, the Appellate Court turned to whether or not the regulations on a contractor's yard were vague, and thus, unenforceable. To be unconstitutionally vague, a plaintiff must demonstrate without reasonable doubt that there was inadequate notice of what was prohibited under the regulations. If the statutory meaning can be fairly ascertained, it will not be void for vagueness. All statutes have some inherent vagueness and uncertainties in them. A plaintiff must also show that the regulation is overly vague when applied to their actions. Unconstitutional vagueness is always a question of law.

Turning to the issue at hand, the Appellate Court held that the regulations on contractor's yards **were not void for vagueness** simply because they did not define the term contractor's yard. From the facts of this case, the plaintiff clearly knew what was meant as a contractor's yard based upon two cease and desist orders, his own application for a permit to use his property as a contractor's yard, and the ZBA hearing evidence.

The decision also reversed the Trial Court's refusal to enforce the cease and desist order. The testimony of the Zoning Enforcement Officer clearly established that construction company equipment and employee vehicles were constantly going in and out of the plaintiff's property and being parked there when not in use. The property owner contended that he was not using his property as a contractor's yard, but rather was

Week of June 1

getting it ready as a farm. [Heard that one before!] But the Trial Court should have been bound by the conclusions reached by the ZBA which disbelieved those claims. The ZBA had the exclusive right to determine the credibility of witnesses, and its conclusions must be sustained so long as there was substantial evidence to support them. It was not the function of the Trial Court to retry the case previously heard by the ZBA. Using the property as a place to meet with employees and go over the next job, and then move tools and equipment to that job, is sufficient to establish the property's use as a contractor's yard. The ZBA was not required to believe the statements of the property owner.

• AC36436 - Peruta v. Freedom of Information Commission

This case held that applications for state permits to carry pistols and revolvers are exempt from FOIA disclosure demands. The FOIA request to the Department of Emergency Services sought all pending applications for pistol permits, which were awaiting FBI background checks. The Department submitted the information, but redacted all names and addresses. This was upheld as proper. The applicant tried to argue that the Statute only precludes disclosure of those who have been issued permits, not those who are applying for permits. But that interpretation of the Statute would thwart the purpose of the Statute and lead to bizarre results, both the FOIC and the Trial Court concluded.

Here, the Agencies conclusion that while the statute may seem ambiguous, it was clearly meant to keep confidential the names of permit applicants and permit holders, was both time-tested and reasonable in light of the legislative history of the Statute. Accordingly, the Trial Court properly concluded that the Agency's decision interpreting the Statute must stand.

• AC36003 - Diaz v. Commissioner of Correction

• AC36619 - Townsend v. Sterling