Appellate Notes

PULLMAN & COMLEY

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Week of June 29

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 30, 2015

Supreme Court Advance Release Opinions*:*

- SC19305 - State v. Francis
- SC19305 Dissent - State v. Francis

Appellate Court Advance Release Opinions:

- AC36500 - Castro V. Mortgage Lenders Network USA, Inc

The Appellate Court held that a person claiming an interest in land, whether by virtue of being a mortgagor, or one who is adversely possessing the property, has standing to bring a quiet title action. They do not have to be the legal owner of the property under C.G.S. § 47-31. The Court also noted that since it was the mortgagor trying to bring a quiet title action against their mortgagee, whether or not a proper cause of action could be stated for such a claim might be the subject of a motion to strike, but the Trial Court should not have granted a Motion to Dismiss for lack of standing.

- AC36178 - State v. Fuller

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• AC36639 - Morgillo v. Empire Paving, Inc

When the defendant settled the plaintiff's lawsuit over the alleged defective installation of a driveway by agreeing to repair the driveway, that settlement agreement amounted to a contract. And, as with any contract for services, it carries an implied covenant of good faith and fair dealing that the contractor will exercise the degree of skill normally possessed by members of the trade, including an implied warranty of workmanship and fitness. Accordingly, when the settlement repairs failed to accomplish their intended purpose, the plaintiff could amend its complaint and sue the contractor for breach of contract for failure to comply with the requisite standard of workmanship.

Next, this decision held it was acceptable for the Trial Court to render judgment in favor of the plaintiff, both on the original contract claim and the settlement breach claim, so long as only one single award of damages was granted to the plaintiff. When the defendant breached the settlement agreement, the plaintiff was permitted to seek enforcement of the original contract.

Finally, the contractor argued that it should only have been liable for the diminution in value of the driveway, and not the cost to totally replace it. On this issue, the Court said that the original breach of contract claim entailed the installation of the driveway, so the cost to replace it was a proper measure of damages. Further, while diminution in value is a proper measure of damages for injury to real property, there is an exception to the rule.....and that is when the cost of repair is the best way to ascertain the monetary damages so long as such costs do not exceed the value of the property, and do not enhance its value over its original value.

The Court then turned its attention to who has the burden of proof to show that the costs of repair will result in economic waste, such that only diminution of value may be relied upon to prove damages. Up until 1998, the burden in Connecticut was always upon the plaintiff to prove the cost or repair will not result in economic waste. Subsequent decisions now suggest that the burden of proving economic waste should fall upon the defendant. Therefore, defendants who do not approve of the plaintiff's calculation of their damages on the cost of repair must put on evidence that the costs are either exceeding the value of the land or are enhancing the value of the land over what it was before.

• AC36924 - State v. Swebilius

• AC36906 - Araujo v. Araujo

Appeal from the financial orders of the Trial Court in conjunction with the dissolution of a marriage.

• AC34193 - Mukhtaar v. Commissioner of Correction

• AC36319 - Disciplinary Counsel v. Parnoff

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Attorney represented client in a worker's compensation claim, with a 40 percent contingency fee agreement that that did not comply with the personal injury fee cap statute. After a $1.1 million arbitration award, the attorney claimed a fee of $438,000. The client disagreed but agreed that he could take an advance of $125,000, and the balance would be escrowed for a determination by a court of the proper fee. The attorney then filed a declaratory judgment action claiming he was entitled to the full fee, and the jury ruled in favor of the attorney. Immediately, the attorney caused the $363,000 balance in escrow to be transferred to his personal savings account.

One week later, the client filed an appeal, wherein the Appellate Court determined that the fee agreement that exceeded the contingency fee caps permitted by C.G.S. § 52-251 was void as against public policy. The matter was remanded to the Superior Court to determine whether the attorney was owed any sums in excess of the $125,000 agreed upon.

The former client demanded the rest of the escrow only to learn the attorney spent it. The former client filed a grievance against the attorney for failing to continue to hold the sums in escrow while the appeal was pending. Upon presentment, the Trial Court made a finding that there was clear and convincing evidence that the attorney violated Rule 1.15 in not keeping the funds in escrow, but added that there was no proof that the attorney acted willfully or with intent to deceive the client, and rejected disciplinary counsel's recommendation that the attorney's actions violated Rule 1.15 amounted to a ***knowing misappropriation of client funds*** that deserved mandatory disbarment.

The Trial Court noted that there was a clean disciplinary record for 43 years, and that the attorney had properly held the funds in escrow for nine years, and only took the funds when he thought he had won the dispute with the client. While also acknowledging that the client was severely harmed by the attorney's conduct, and that the lawyer had been dishonest in not admitting the funds had been transferred immediately upon the verdict to his personal account, the Trial Court only issued a reprimand.

Outraged at the apparent slap on the wrist for stealing client funds, the Disciplinary Counsel appealed to the Appellate Court, claiming that the sanction of the Trial Court was inadequate. The Appellate Court said that the Trial Court was aware of, and correctly applied the standards contained in Practice Book 2-47(A), which no appellate decision has heretofore interpreted. That provision provides that when a Court finds that an attorney has knowingly misappropriated client funds, **there shall be disbarment**. But it is not enough to show the attorney intentionally engaged in an effort to remove the funds, but rather, that he or she engaged in such conduct knowing that the misappropriation would be a taking funds that did not belong to him or her.

The attorney had acted upon the unreasonable belief that he was no longer required to maintain the disputed funds, and while that was careless, and maybe even reckless, it was within the discretion of the Trial Court to find that the attorney did not knowingly take funds he felt belonged to the former client. The Practice Book provision refers to a "knowing misappropriation." The decision agreed that New Jersey precedent applied, including the Rule that mitigating factors should rarely be permitted to override the need for disbarment, the

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Court said those decisions provided no guidance on whether an attorney's misappropriation was "knowing."

While it is no excuse for a lawyer to claim they are "borrowing" their client's money..... and such an act would be a knowing misappropriation ..... there may be times when a lawyer's beliefs as to his rights to the funds may be relevant. It is entirely possible, as this case shows, that an attorney may take a client's funds on the basis of an unreasonable belief that they are entitled to those funds, and in fact, may have been reckless or negligent in doing so, but may not trigger the disciplinary action of disbarment required under Practice Book § 2-47(A) because it was not done "knowing" they were taking the client's monies.

Finally, the Court noted that in attorney grievance cases, there is an absence of mandatory statutory sanctions if this Practice Book rule does not apply. Therefore, the Trial Court's imposition of a reprimand as a sanction could not be challenged on appeal, even if the Appellate Court felt a harsher punishment was called for.
