Appellate Notes

PULLMAN & COMLEY

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Week of June 6, 2016

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

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Supreme Court Advance Release Opinions:

- SC19441 - State v. Brawley
- SC19443 - Cefaratti v. Aranow
- SC19443 Dissent - Cefaratti v. Aranow
- SC19444 - Cefaratti v. Aranow

The Supremes have recognized a new tort based cause of action allowing plaintiffs to try and get around the hospital practice of using outside corporations to hire the doctors so that they are not direct employees of the hospital. Here, the patient was suing after a sponge was left in her after surgery. She had selected the doctor on her own but had assumed the doctor was a hospital employee because he held all his seminars there, issued pamphlets with the hospital's name on them, performed the surgery at the hospital, was told the hospital's "team" would take good care of her, etc. She sued the doctor, his employer, and the hospital claiming it was vicariously liable for the doctor's actions. The Appellate Court upheld the dismissal of her case against the hospital on the grounds that the doctor was not an employee of the hospital and Connecticut does not recognize a cause of action for "apparent agency," similar to one for apparent authority.

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The Supreme Court reversed. First, it clarified that Connecticut does indeed recognize a cause of action for apparent authority whereby the principal may be liable for the acts of another whom it held out as having authority to do what they did. Then the court said there is no real difference between the doctrines of "apparent authority" and "apparent agency." No states were identified which distinguish the two doctrines. *Apparent agency* is merely a form of apparent authority whereby one holds someone out as an employee or agent who really is not. Liability can attach for the actions of that agent if the victim reasonably believed that they were the principal's agent or employee based upon the acts of the principal holding them out as such. Protest by the hospital that the doctors were independent contractors fell on deaf ears, as did the argument that hospitals don't practice medicine, only the doctors do, so the hospitals can't be liable for their negligence. The Court said hospitals are in the best position to prevent malpractice by doctors using their facilities with privileges.

The Court then went so far as to say that in hospital negligence cases, it is not even necessary for the patient to show reasonable and detrimental reliance on the representations of the hospital that the doctor was their employee. Such may be assumed, absent warnings from the hospital that they are not employees of the hospital when the hospital designates the doctor to perform the services. But when the patient has selected the doctor they want on their own (as occurred here) then they still would have to prove reasonable detrimental reliance on actions of the hospital to think the doctor was their employee and would not have availed themselves of the service had they known otherwise. In those situations it's not enough to simply claim the hospital held out the doctor as their employee.

The Court then laid out the two alternate tests that may be used to prove a claim of ***tort liability on the basis of apparent agency.*** One where the plaintiff choses to deal with the tortfeasor solely because of the employment representations of the apparent employer, and a second where they chose to deal with the tortfeasor on their own but then detrimentally relied upon the representations of the employer. The Court added that the plaintiff here could not meet the first, as she chose the doctor herself, but allowed that she may try to meet the second test, which the Court added should be much narrower than the first test and a harder burden to meet. So the case was remanded for further hearings.

In a separate decision, the Court had to deal with whether the patient's claim had been tolled because she had not discovered the sponge for six years after the initial operation. This time, the Court agreed with the Appellate panel that there were questions of fact whether the statute of limitations had been tolled as to all three defendants. The patient had yearly appointments with the doctor after the surgery and asserts she told the doctor of her continuing abdominal pain. Thus there was a question whether the continuing course of treatment doctrine was triggered so as to toll the statute. It was enough that the doctor was treating her and she complained of the abdominal pains. He did not have to be treating her specifically for surgery follow-up, nor was she required to show the doctor was negligent in responding to her complaints, or that the doctor was aware there was a sponge in her in order to toll the statute. Tolling would not occur had the patient not been complaining about the condition however.

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In yet a third decision, three justices dissented claiming it was up to the Legislature to make new laws, not the Courts. They did not agree that a new cause of action should be recognized. They also argued that hospitals are already highly regulated by the legislature and only it can balance the situations where hospitals should, and should not, be liable for the actions of non-employees. They also disputed the claim by the majority that Connecticut court decisions had in the past already recognized the "apparent authority" doctrine.

Appellate Court Advance Release Opinions:

- AC37288 - Steroco, Inc. v. Szymanski

This was a fairly important land use decision. The landlord here discovered that its 20 year liquor store tenant was planning to move next door only when the tenant posted its notice required by the Liquor Control Division (LCD) at the new location. Investigating further, the landlord discovered the town had issued a certificate of zoning compliance to the tenant to present to the LCD. The landlord filed a complaint with the Zoning Board of Appeals (ZBA) claiming the certificate was improperly issued as there was a church within 500 feet of the proposed new location. The ZBA refused to hear the complaint as untimely. Rather than appeal, the landlord brought a direct private zoning enforcement injunction action against the tenant and the Trial Court granted an injunction. The Appellate Court reversed. First, it agreed with the Trial Curt that absent a method spelled out in the local regulations, the distance requirements are properly measured by the straight line method, not the door to door method. Thus, the zoning certificate should not have been issued here as the new location was too close to a church when measured by the straight line method. The Zoning Enforcement Officer (ZEO) had used the door to door method.

They disagreed that an injunction should have issued. When a neighbor brings a private zoning enforcement action without exhausting their administrative remedies, proving the zoning violation only gets them in the door (i.e. establishes standing). To obtain an injunction they must still show [1] imminent injury [2] that is substantial and [3] irreparable. This includes the need to balance the harm to both sides. It is not enough to just show a zoning violation, nor that it might cause the landlord injury. It must be irreparable. Here, the landlord failed to put on any evidence that the injury would be irreparable and the court did not balance the harm to both parties. The case was remanded for a new trial. The Court also took the opportunity to reject a defense of municipal estoppel holding that even if it exists, it only applies when defending an enforcement action by a municipality.

- AC36185 - Johnson v. Commissioner of Correction
- AC36358 - State v. Leniart
- AC36358 Concurrence & Dissent - State v. Leniart

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• AC36973, AC37117 - Britto v Britto

Defendant husband could not be heard to complain about the Trial Court's finding of his assumed net income when he failed to produce his tax returns and records for the Trial Court to review. The Trial Court however, exceeded its authority when it concluded that certain properties owed by the defendant were greater than the parties stipulated to. No notice had been given to the parties that the court disagreed with the stipulation, but the order that the husband transfer 60% of the value of those properties to the wife was severable from the remaining financial orders, so the entire decree did not have to be revisited. The decision then rejected the defendant's last argument. He claimed he was being ordered to pay over certain property twice. He had secreted over $100,000 in violation of the automatic stay after being served with process by his wife. The Trial Court ordered all of that money paid back to the wife. He claimed that most of that money was in fact used to buy the same properties he was ordered to pay 60% of to his wife. The problem was, he used his girlfriend to buy those properties. Again the Court suggested the defendant made his own bed. He had gone to such lengths to hide and transfer his assets that it was not up to the Trial Court to untangle his fraudulent web of deceit and if he ended up having to pay twice as much.

• AC38313 - State v. Silva