Appellate Notes

PULLMAN & COMLEY

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Week of November 3

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 November 3, 2015

Appellate Court Advance Release Opinions:

- AC36382, AC36387 - Hilton v. Commissioner of Correction
- AC36922 - Nationwide Mutual Ins. Co. v. Pasiak

This was Round Three of a case previously reported on. An intruder broke into the boss's home where he maintained his office and demanded the secretary open a safe or he would kill her and her family. The secretary did not know how to open the safe, and the intruder tied her up. The boss then arrived and was assaulted by the intruder. During the struggle, the intruder's mask came off, revealing him to be a friend of the boss. Leaving the secretary tied up, the boss talked him out of robbing the place, and when he left, would not let the secretary go home. He spent several hours with her, trying to talk her out of reporting the incident to the police.

The secretary later turned around and sued her boss for false imprisonment and other claims, with a jury awarding the former employee over $1 million in damages. The boss's insurance companies provided a defense, but otherwise disclaimed coverage. The insurers brought a declaratory judgment action seeking a determination that they owed neither a defense nor indemnity on the claims of the secretary.

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The umbrella policy contained an exclusion for any claims arising out of the business pursuits of the boss The Trial Court, however, refused to grant summary judgment on the duty to defend because the allegations of the former secretary regarded tortious conduct of the boss in connection with an attempted robbery of his home, not the conduct of business.

Thereafter, the Trial Court considered a supplemental motion for summary judgment, and granted it in favor of the primary (homeowner's) insurer because that policy excluded coverage for damages arising out of pure emotional distress. The Court still refused, however, to grant summary judgment on the umbrella policy, as it did not have the same emotional distress exclusion.

Thereafter, the Trial Court found that the umbrella policy did cover the secretary's claim, and the Business Pursuit Exclusion did not apply. The umbrella insurer appealed, and the Appellate Court reversed. The Appellate Court noted that such Business Pursuit Exclusions are considered under an expansive causation analysis. Homeowners policies typically exclude claims arising out of any business engaged in by the insured. If homeowner's policies were deemed to cover business pursuits, the premiums charged could not be kept at reasonable levels.

The term "arising out of" in an insurance policy is to be interpreted broadly. No one can dispute that the secretary was at her boss's home, because that is where his office was located, and she was there for the purpose of performing duties of the business. Thus, the only reason she was assaulted was because she was at the insured's business fulfilling her responsibilities as an employee. Thus, her boss's conduct of which she complained in keeping her on the premises – were connected with and had their origins in and grew out of and flowed from – the defendant's business purposes.

The Trial Court improperly sought to ascertain whether the defendant was motivated by profit in his conduct, and further inappropriately sought to delve into the boss's mental state of whether he was trying to protect a lifelong friend from police involvement. Whether or not an "Occurrence" arose out of the defendant's business pursuits is not dependent upon either his motivations, nor his state of mind. The decision of the Trial Court was reversed with the direction to find that there was no coverage under the umbrella policy for the claims of the secretary.

• AC36921 - Sowell v. DiCara

Plaintiff sued for wrongful termination after she claimed she reported suspicions of violations of state law and regulations. The defendant's counsel filed a counterclaim, asserting that on days she claimed to be out sick, the plaintiff was actually involved in a private practice of her own. Plaintiff's counsel then sent a letter to each member of the Board of Directors of the defendant suggesting they could be personally liable for having allowed their attorney to file a counterclaim without their permission unless they directed a withdrawal of it. Defendant's counsel then filed a motion for an emergency protective order to enjoin plaintiff's counsel from contacting members of the Board of Directors without prior permission of counsel. The motion asserted that

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the plaintiff's counsel had violated Rule 4.2 of the Rules of Professional Conduct, and that rule covers members of the Board of Directors of the defendants, as they have managerial responsibility. The Motion did not seek sanctions.

Plaintiff's counsel filed an objection, containing a host of arguments why defense counsel was conflicted, and/or he could not represent the individuals of a corporation going through dissolution, etc., etc. During oral argument, the Trial Court chastised plaintiff's counsel for thinking he had the right to communicate with board members of an entity represented by an attorney. The Court noted that simply because he copied defense counsel does not make his communication correct. When counsel continued to argue the point with the Judge, the Judge ended the proceedings saying that she was not sure whether she would have granted sanctions or not, but defense counsel was acting professionally in not requesting them, and therefore at a minimum, she was granting the emergency motion for protective order "enthusiastically."

Not giving up (and not appreciating what the Rule means or how it works), Plaintiff's counsel filed a Petition for Writ of Error with the Supreme Court, claiming that the Trial Court violated the Federal and State Constitutions by refusing his offer to present testimony to establish that the attorney did not yet represent the board members individually with respect to the counterclaim issue.

First, the Appellate Court said that the attorney had standing to file the Writ of Error. He is aggrieved, even though the Court did not impose sanctions. An attorney has standing to seek Appellate Review of assertions they have committed an ethical violation, notwithstanding the fact that if no sanction has been imposed because the determination reflects adversely on the attorney's professional reputation.

Nonetheless, the Trial Court had clear and convincing evidence that the attorney violated the Rules of Professional Conduct, and it was within its inherent authority to compel compliance. The attorney admittedly sent the letter, and admitted he did not have permission of the board members' counsel when he sent the letter. A corporate entity does not exist in a vacuum. Clearly, when a corporate entity is a client under Rule 1.13, it can only act through its officers, directors, employees and shareholders.

Here, the Corporate Bylaws specifically provided that the corporation was to be managed by its Board of Directors. As such, they had managerial responsibility under Rule 4.2. Therefore, they, too, should have been considered clients of the lawyer representing the corporate entity. It matters not that the defendant corporate entity was in the process of winding down. It equally matters not that the Court declined to allow the plaintiff's counsel to put on an evidentiary hearing.

Counsel accused of misconduct are only entitled to notice informing them of the accusations against them, so that they can meet the charges. Due process, however, does not always entitle a party to an evidentiary hearing. That is especially true here, where the key evidence that formulated the issue was not in dispute.

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In a Footnote, the decision notes that the plaintiff's counsel's Writ only ended up forcing the Trial Court's hand to find he had violated the RPC in an articulated finding. Had he just lived with the Court's original Order, there would not have been any risk of reputational damage.

[Editor's Note: This case just boggles my mind. How can you possibly think it is okay to send a threatening letter to the board members of the corporate entity represented by your opposing counsel?]

- AC36681 - JPMorgan Chase Bank, National Assn. v. Simoulidis

This was a foreclosure action with yet another attempt to dismiss the action on the grounds that the entity foreclosing the mortgage did not have standing. The motion to dismiss for lack of standing was filed three and one-half years after the foreclosure was commenced, asserting the plaintiff was neither the owner nor holder of the promissory note. The plaintiff responded that the original lender (Washington Mutual) failed, the FDIC was appointed as receiver, that the plaintiff obtained the assets from the failed bank from the FDIC, with a blank endorsement, and that it had possession of the note prior to commencing the action.

This decision reiterated a whole host of prior decisions that the holder of a note is presumed to be the rightful owner. The production of the note establishes the plaintiff's case prima facie. The burden then switches to the debtor/defendant to demonstrate that the right to enforce the debt belongs with someone else, and even such evidence only switches the burden of proof back to the plaintiff to justify their right to collect on the debt.

- AC37164 - State v. Faust
- AC37164 Concurrence - State v. Faust
- AC34082 - Zavala v. Office of Adult Probation
- AC36376 - Otto v. Commissioner of Correction
- AC36958, AC36959 - Baker v. Whitnum-Baker
- AC36958, AC36959 Appendix 1 - Baker v. Whitnum-Baker
- AC36958, AC36959 Appendix 2 - Baker v. Whitnum-Baker

Eighty-six year old husband married a fifty-two year old wife, and they lived together for a whopping ten days after the wedding. Seventy-seven days later, the husband brought an action to dissolve the marriage. The wife filed a pro se appearance, and participated in the first day of proceedings, but did not return to Court for follow-up proceedings. The Court rendered a judgment of dissolution, and found that the marriage had broken down irretrievably.

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In addition to multiple failed appeals, the now ex-wife filed a motion to open the judgment and/or grant a new trial. When those requests were denied, she filed an appeal of those efforts. The Appellate Court simply adopted the Trial Court's reasons for denying a motion to open and a petition for a new trial. The underlying Trial Court decisions are attached as Exhibits. (If you can't sleep some night, feel free to read those attached decisions outlining multiple appeals, multiple motions, and multiple efforts to delay the prosecution of the dissolution action, etc.)

[I do like the ending of the Trial Court's Decision however, which noted the point in law that, In considering a petition for a new trial, Trial Judges must give first consideration to the proposition that there must be an end to the litigation. The Trial Court ended saying, "The time has come for this dissolution action to end."]

- AC37028 - Oliphant v. Commissioner of Correction
- AC36952 - King v. Commissioner of Correction
