Appellate Notes

PULLMAN & COMLEY

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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

Posted September 15, 2014

- SC19088 - White v. Mazda Motor of America, Inc.
- SC19088 Dissent - White v. Mazda Motor of America, Inc.

The majority concluded the plaintiff never properly asserted his claim of defective product at the trial court level because he never pled reliance on the malfunction theory of liability...i.e., where a product causes injury but the exact cause is not known.... but the injury would not have happened but for a malfunction. Here a new car suddenly exploded into flames. The complaint asserted that the car was defective because of deficiencies in its fuel delivery system and the plaintiff hired and disclosed a fire expert who concluded the fire was caused by a defective fuel line clip... but the expert also admitted he was not an expert in the design of automobiles. In opposition to the defendant's summary judgment the plaintiff's fall back argument was even if his expert was no good, there was plenty of circumstantial evidence that a fairly new car should not just catch on fire. The majority concluded this was not enough to raise the "malfunction theory" before the trial court and the actual theory was not asserted until the appellate briefing. It's a distinct claim with its own elements that need to be specially pled (just as the elements for a res ipsa negligence claim must be), even though it can be made part of the underlying defect count. Even the brief mention in the opposition to the SJ motion stating cars should not just explode unless there is a defect did not properly raise the claim. Similarly it is insufficient to raise a claim for the first time in a Motion to Reargue the SJ motion. The majority of the court also seem to be recognizing this as a viable claim in Connecticut, but conclude it just wasn't pled

properly. The majority also criticizes the dissent in a series of footnotes suggesting that to allow an argument to be raised (even if imperfectly) for the first time in opposition to a SJ Motion would turn pleadings on their head as a party is supposed to plead their claims in their complaint. The majority also felt the dissent did not understand the Malfunction Theory as it's not a substitute for having an expert but rather is its own unique claim that more likely than not would require its own expert to establish. The dissent of course felt the issue was raised by the oblique mention of the concept in opposition to SJ. [This decision seems to put the brakes on a series of recent decisions allowing parties to raise almost any claim on appeal so long as it was touched upon in the slightest manner before the trial court below.]

• SC19090, SC19091 - FairwindCT, Inc. v. Connecticut Siting Council

This was a big win for Lee Hoffman and Mike Kurs concerning the Siting Council's authorization to a client to install wind turbine electrical generation facilities in Colebrook, Connecticut. The approval was challenged by Environmental Intervenors. First, the Intervenors challenged whether wind turbines qualified as *electric generation facilities* under the Grid Resources Exemption from the need to obtain Certificates of Need and Environmental Compatibility. The court agreed with the Agency that the Legislature intended to include all types of electric generating facilities within the exemption. Next, the Intervenors challenged the conditions that the Agency attached to the approval permit. These conditions required such things as buffers, a management plan, noise controls, etc. The court said that Environmental Intervenors do not have standing to challenge conditions which themselves do not cause pollution. The Environmental Intervenors did have standing, however, to raise the fact that attaching conditions might reflect that the agency never fulfilled its role to insure the project complied with the Regulations. Reviewing the record, however, the court concluded that there was evidence to support the Agency's approval subject to environmental conditions. This case was distinguished from an earlier Inland/Wetlands decision where that agency simply ruled that a project was approved *subject to complying with all Inland/Wetland Regulations*. Such a simplistic approval suggests that the agency did not first reach a conclusion whether the Regulations were being satisfied. The court added that if the Environmental Intervenors felt that conditions were not being complied with, they had several remedies, including: bringing a declaratory ruling petition before the agency; bringing a nuisance claim; or bringing a CEPA claim.

Next, the court concluded that the Siting Council is not bound by state noise regulations. The agency can consider state noise laws, but it is not required to reject a project that does not comply with them.

Next, the court ruled that Environmental Intervenors do have standing to raise claims of procedural irregularities that impact fundamental fairness, such as the right to cross-examine witnesses and review evidence. Nonetheless, the Environmental Intervenors lost on the merits over these claims with a finding that they had no right to cross-examine the agency's engineering consultant, simply because they submitted required reports to the agency, but did not testify during the public hearing. Additionally, the court held that even if the agency had improperly granted a protective order to limit access to the applicant's trade secret materials, the Intervenors had failed to show any harm because their expert never took advantage of the

access that was granted. Similarly, they failed to show any harm over the denial of their request for continuances.

• SC19043 - Ferraro v. Ridgefield European Motors, Inc.

This decision held that interest can be assessed against the prior insurance company in a workers' compensation claim, when such insurer agrees to apportion liability with another insurer, but prior to the final findings in order of the commissioner.

• AC36030 - Robaczynski v. Robaczynski

• AC35510 - Dinardo Seaside Tower, Ltd. v. Sikorsky Aircraft Corp.

Defendant entered into a lease with plaintiff with an annual rent of $1.2 million. The parties agreed that the lease was completed and terminated however, they then revoked the completion agreement, and extending the old lease until 2007, with a monthly rent of $100,000 with the right of the tenant to construct improvements, which were to become property of the landlord at the end of the lease, unless designated in writing that they could be removed. At the end of the lease, the plaintiff claimed the tenant had not properly maintained the property, construction had taken place without the landlord's required pre-approval, and items were removed without the landlord's consent. The landlord sued in two counts. The first count claimed breach of the lease, and the second count claimed CUTPA, based on intentional destruction of property with malice. At the conclusion of the trial, the Trial Court granted a motion for directed verdict on the CUTPA count, holding that the defendant is not in the true business of leasing property. Here, the defendant was in the business of manufacturing aviation equipment, with leasing being incidental to its business. The jury returned a verdict in favor of the defendant on the remaining count, and this appeal followed.

The Supreme Court agreed that a CUTPA claim may not be alleged for activities that are incidental to an entity's primary trade or commerce. The Trial Court also had the right to raise that issue, *sua sponte*, by asking the parties to brief whether CUTPA applied to this claim. Neither party voiced objection to the Judge's inquiry or handling of the matter in that manner. The first time the plaintiff complained about the manner in which the Trial Court raised the issue was in its Appellate Brief. Therefore, it was not properly presented for review.

Next, the decision held that the Trial Court was not obligated to charge the jury to consider ambiguities in the contract against the tenant as its drafter because, in fact, the Trial Court did not find there were any ambiguities. It only found that the plaintiff and the defendant differed on their interpretation of the contract. Therefore, the jury charge of how on interpret a contract was appropriate. The Trial Court also property refused to charge the jury that removal of walls with attached wiring amounted to the removal of fixtures. It was again sufficient for the Court to provide general instructions on contract interpretation without any specific instruction of what amounted to a fixture. Further, in light of the defendant's verdict, it is hard to

fathom what the harm to the plaintiff was.

As a lesson not to alter proposed photographic exhibits, this decision also held the Trial Court properly excluded the admission of photographs that were pre-labeled by the plaintiff's consultant. Additionally, the photographs being offered at trial were not Bate Stamped, and were so numerous, they could not be matched with the photographs provided in discovery. Finally, dates appended to the photographs did not match the metadata dates. Attempts to print out new photographs without notations on them, and which matched the discovery compliance exhausted the Trial Court's patience, who finally precluded the evidence. Further, photographs that were either doctored to show the location of items or where the items themselves were labeled before the photograph was taken, would tend to highlight those items to the jury to the prejudice of the defendant. Additional photographs were properly excluded because they were taken a long period of time after the tenant vacated the property.

Next, the plaintiff challenged the Trial Court's admission into evidence of letters written by the defendant's counsel directly to the plaintiff. Defendant offered these during cross-examination of the plaintiff. Plaintiff objected, saying that they did not qualify as business records and they would require cross-examination of defendant's counsel. While concluding the letters were not business records, the Court admitted them and also stated this did not require defense counsel to be a witness. The Appellate Court held that even if that evidentiary ruling was improper (as it seems by this author to be), it was not harmful. The Court also addressed whether or not the plaintiff should have been allowed to call and cross-examine the defendant's attorney, *i.e.*, whether he was a necessary witness now that his letters had been admitted into evidence. Merely declaring an intention to call opposing counsel as a witness is an insufficient basis for a disqualification, even if that attorney should give relevant testimony. The attorney is only required to testify when the information would be unobtainable elsewhere. Here, the Trial Court found that the information was obtainable from other sources, and therefore, defendant's counsel was not a necessary witness. [So, basically, what the Court is saying is that the letters probably should not have been admitted on their own without a foundation, but once having been admitted, the plaintiff did not necessarily get to call the attorney and cross-examine him because the defendant's other representatives could have testified that the letter was sent. With that said, another lesson from this decision is that it is always advisable to have your client send a letter when you anticipate it will be used at the time of trial. Otherwise, it will just create headaches for you.]

• AC35313 - Thoma v. Oxford Performance Materials, Inc.

A company's lender required that, as a condition of the loan, employment contracts be entered into with key employees. Plaintiff's Employment Agreement provided for six months' (no cause) severance and six months' non-compete after any termination. The lender then thought the severance component was too rich, and urged the borrower/company to delete it. This they did with an amendment to the Employment Agreement, which was now called a Noncompetition Proprietary Information and Inventions Agreement, and converted the relationship with the plaintiff employee to a pure employment-at-will. When the defendant company

terminated the plaintiff, she sued for breach of contract under the first Agreement. The defendant employer claimed that the second Agreement superseded the first Agreement.

Both the Trial Court and the Appellate Court held that the second Employment Agreement was invalid because it was not supported by consideration. It did not matter that the second Employment Agreement included an integration clause. It also did not matter that the second Employment Agreement eliminated the six month non-compete clause. That change did not amount to consideration because the language used in the second Employment Agreement was so vague, the Trial Court could not tell whether the employee's prohibition on non-competition was only during the period of employment, or continued indefinitely after termination. The Appellate Court said it was proper to hold that ambiguity against the employer. Inconsistent language in an employment contract, like insurance policies, should be interpreted against the drafter. Further, the clauses were so inconsistent in this case that there was no reasonable middle ground for the Court to adopt as its interpretation. The defendant failed to argue before the Trial Court that the doctrine of *contra proferentem* should only be used as a last resort. This was raised for the first time on appeal and thus would not be considered.

Whereas, the first Employment Agreement provided for severance if termination was without cause, the second Employment Agreement made the plaintiff an employee-at-will. Thus, the second Employment Agreement interfered with the plaintiff's rights as promised in the first Employment Agreement, and eliminated the severance payment. For this, there must be adequate consideration. Further, the employer could not argue that the altered terms were a requirement of its lender, because while the lender may have recommended it, there was no evidence the lender actually required it as a condition of financing. [Query - would that have sufficed as consideration....the continued viability of the company....and thus your job?] It also did not matter that the second Employment Agreement contained recitals of consideration. This only shifts the burden of proof to the plaintiff to rebut the stated consideration. While the Trial Court did not make a specific finding that the plaintiff met the burden of no consideration, the record is clear that that was the conclusion of the Trial Court.

- AC35018 - State v. Reddick

- AC34977, AC36100 - WiFiLand, LLP v. Hudson

Both the plaintiff and the defendant appealed the Trial Court's award of $1.00 in nominal damages, and $5,000 in attorney's fees to the plaintiff. Plaintiff was hired to install wireless service at an RV campground. However, the service was continuously interrupted after its installation, so the defendant refused to pay. The plaintiff 1st said that it had given up hope of trying to make it work right...but then it sued for money owed. The Trial Court concluded that the defendants breached the contract by demanding removal of the plaintiff's equipment without providing a formal 45-day notice & opportunity to cure, but it also found that the plaintiff had failed to prove damages, and so only awarded $1.00. The plaintiff then moved for an award of $50,000 in attorneys' fees, but was only awarded $5,000.

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On appeal, the Appellate Court held that the defendant offered no viable argument why it did not comply with the 45-day written notice and opportunity to cure clause in the contract. It cannot simply argue that giving notice to cure would be futile because of the constant breakdowns in the system and the plaintiff's statement they had given up, because in fact, the system had operated appropriately for some period of time. So it might have been possible to fix it.

Next, the decision addressed the fact that defendant's counsel in fact stipulated on the Record that $23,000 would be the proper "calculation" of damages. The problem was that the contract provided that damages for breach would be the lesser of $50,000 or the six month period of average monthly ____. The blank was a missing term in the contract, and the defendant never stipulated what the missing term was. This was found to be an ambiguity which could be charged against the plaintiff as the drafter of the contract, and that the defendant's stipulation to an amount was only a stipulation to end the testimony of the defendant's witness as to his mathematical calculations of what six months of average monthly ***revenues*** would have amounted to. There was a difference between getting the plaintiff to stipulate to a mathematical amount than stipulating as to what the missing term was in the contract. He never stipulated the missing term was "revenues".

Next, the decision held that the Trial Court was justified in only awarding $5,000 in legal fees, despite a prevailing party clause, because the trial was over a one count breach of contract claim, and both parties shared responsibility for the failure of the contractual relationship. The Trial Court may consider not only the parameters of Section 1.5(a) of the Rules of Professional Conduct, but also its general knowledge of the proceedings before them, including the nature of the litigation, the conduct of the parties, the history of the case, the rates charged, the number of hours billed, and the results obtained. Reducing the legal fees is appropriate when the victory is essentially Pyrrhic.

Finally, the defendant failed on his cross-appeal seeking to enforce a settlement agreement because, while it appeared the parties had agreed on the terms, the defendant tried to insert a confidentiality clause at the last minute, which the plaintiff had not agreed to. Thus, all the essential terms of a settlement had not been agreed upon.

- AC34684 - State v. Opio-Oguta

- AC35824 - Jalbert v. Mulligan

Plaintiffs, husband and wife, sued their former attorney who had represented them as a close friend over a ten year period on multiple real estate matters. The defendant represented the plaintiffs in the purchase of their house, and later, in a dispute with the neighbors over an easement. For the latter representation, the client and the lawyer agreed on a barter, whereby the lawyer would provide legal services in return for construction services by the plaintiffs. It was agreed, however, that the lawyer would pay for the construction services if the title company would not pay his legal fees. The title company hired its own attorney to defend

the easement claim, and the defendant attorney misrepresented to the plaintiffs that said attorney had been hired by the title company to "help him." Next, claiming that he had to show the title company he was being paid, the defendant lawyer asked the plaintiffs for an $85,000 check that he would return. Instead, he kept these funds. Ultimately, the easement dispute was settled, with all the litigation handled by the attorney hired by the title company. The defendant attorney filed no pleadings. As part of the settlement, $100,000 was to be paid to the plaintiffs, but it was deposited into the defendant's trustee account, where he retained $50,000 of it for his *fees*. The plaintiffs then asked that the $85,000 fund advanced to the lawyer to make it look like he was being paid by them - be returned. But the lawyer refused.

The Trial Court found the defendant's testimony to be not credible, and found that he had misappropriated $135,000 from the plaintiffs, including $50,000 from the settlement proceeds, as well as an additional $85,000 due and owing for construction services provided by the plaintiffs. The Trial Court then trebled the damages to $746,000, due to theft and CUTPA, and granted an award of attorneys' fees. Most of the appeal challenged factual findings, and many of those challenges were not adequately briefed. Appellate briefs require analysis, not mere abstract assertions. An appellant may not merely cite legal principal without analyzing the relationship between the facts of the case and the law cited. Such claims are not reviewed, especially when no legal authority is cited. The appellate brief here consisted almost entirely of bald assertions, without any analysis. In any event, the Record here was replete with evidence justifying the Trial Court's decision. It is insufficient for an appellant to merely point to conflicting testimony that they offered at trial. The Appellate Court will not engage in an independent review of the credibility of parties. The defendant's claim of extensive time spent defending the litigation was not only unsupported by contemporaneous time records, but included in an inordinate amount of time of over 700 hours just reviewing deeds.

[Proving that an attorney who represents themselves represents a fool, a footnote tried to untangle the mess created by the fact that the defendant attorney was represented by independent counsel. It notes that the defendant attorney moved to withdraw the brief filed by his attorney and substitute his own, along with filing an appearance on behalf of himself pro se, in addition to his attorney's appearance. He then appeared before the Appellate Court, claiming he was a self-represented party. We will never know what the original brief filed by his actual attorney said.]

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The factual summary, or even the legal conclusions, of any case may be summarized, redacted, paraphrased or altered at the author's discretion for ease of reading. Accuracy of the summary cannot be guaranteed and the viewer is referred to the actual case for an exact reading. The Docket number should be a link to the full decision.