Week of September 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 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 28, 2014

- SC19027 - Lane v. Commissioner of Environmental Protection
- SC19027 Concurrence - Lane v. Commissioner of Environmental Protection

Plaintiff's property had a gravel path that extended through the tidal marsh to a dock dating back to 1937, but its existence in the late 80's was questionable, with some aerial photos suggesting the dock was gone by 85. In 1986, a hurricane took out part of the dock that remained, and it was replaced with a floating dock in 88, and a new boardwalk to a new dock were installed in 1988..... but without the permits required by the DEP (now DEEP) per CGS 22a-32 & 22a-361. When discovered, a notice of violation and order for removal was issued in 2007. The homeowner claimed the dock and boardwalk were grandfathered as they predated 1939 and had been in continuous existence ever since. This decision agreed that 22a-362b could not be applied retroactively, but the administrative decision was not based on that premise because the agency concluded the dock had not been continuously maintained since 1939. So that statute did not even apply. The Court also rejected the argument that no permit was required when an owner is replacing an existing structure and had no intent to abandon the pre-existing structure. If a new structure is to be built for any purpose, a permit is required. The principals of abandonment of a nonconforming use found in zoning law simply do not apply to the heavily regulated field of tidal wetlands and navigable waterways.

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The concurrence agreed with the result, but objected to the majority agreeing to review an unpreserved claim upon which a party cannot prevail as being a total waste of the Court's time.

• AC35937 - 710 Long Ridge Operating Co. II, LLC v. Stebbins

Plaintiff filed its first collection action but returned the pleadings to court after the return date. When the defendant refused to waive the defect, the plaintiff served & filed a second action to correct the problem, but failed to withdraw the first lawsuit. The plaintiff obtained a judgment after default on the second lawsuit. The defendant then appeared and moved to dismiss the second lawsuit on the grounds of the prior pending action doctrine. Before the motion was heard, the plaintiff withdrew the first lawsuit. Nonetheless the trial court dismissed the second lawsuit. The Appellate Court reversed. The trial court was without jurisdiction to dismiss the lawsuit after judgment had been rendered absent the defendant first moving to reopen the judgment.

• AC34624 - State v. Michael D.

• AC35409 - Altraide v. Altraide

• AC35415 - Giordano v. Giordano

• AC35263 - State v. Peterson

• AC35263 Dissent - State v. Peterson

• AC35868 - Heyman Associates No. 5, L.P. v. FelCor TRS Guarantor, L.P.

LLC and a related entity owned two hotels, one a Marriott (upscale) and one a Ramada (midscale). When the LLC sold the Ramada property in 1996 to the defendants, who wanted to use it as a Holiday Inn Express, it required a 15-year deed restriction that the property could not be used for an upscale hotel so as not to compete with its sister property occupied by a Marriott. The "sale" involved the assignment of a sublease and a ground lease that were in turn supposed to merge after the closing followed by a dissolution of the LLC seller. Only the sublease made reference to the restrictive covenant. Twice the defendant asked for the restrictive covenant to be released and it was refused. A lucrative offer to buy the Holiday Inn property by an upscale hotel operator fell through when the buyer discovered the restriction. Then the defendant obtained an attorney's opinion that the lease mergers terminated the recorded restrictive covenant and they followed that with a unilateral recordation of termination notice. (I must have slept through that Real Property class. Good grief. Nothing like self-help.)

The trial court declared the restriction binding and awarded $1.5 million in legal fees to the plaintiffs who were members of the now dissolved LLC seller. On appeal it was held the plaintiffs as former members of the LLC had standing to bring the lawsuit notwithstanding the LLC dissolution because per CGS 34-210 assets of an LLC pass to its members upon winding up and this restriction was an asset. It did not have to be

specifically transferred. The sister LLC which owned the Marriot also had standing as a co-plaintiff as clearly it was the intended **third party beneficiary of the restrictive covenant**.

The language in the lease assignments that deal with their merger was deemed ambiguous as to the merger's intended impact on the restrictive covenant and it made no sense why the seller would insist upon a restriction, only to then wipe it out, so the trial court properly admitted extrinsic evidence to show that the parties never meant the merger to amount to a termination of the restriction.

Finally the trial court awarded attorney fees because the assignment of the leases required the defendant to "hold harmless & indemnify" the seller from any failure to abide by the agreement, including attorney fees. The Appellate Court reviewed the propriety of using the terminology of *hold harmless & indemnify* in a contract in this context which is not really an indemnification claim. The Court concluded that while not ideal, such language does not magically mean only one thing, but rather intent must be given to the contract as the parties intended. Clearly here they were using broadly worded language to impose the obligation to pay attorney fees if the buyer breached the agreement. The restrictive covenant was part of the deal so breaching it was akin to breaching a clause in the agreement. The LLC / Seller members also had standing to enforce the attorney fee clause as they succeeded to that right, too, when the LLC was dissolved. It did not matter that their sister LLC that owned the Marriott actually paid for the legal fees because the membership makeup was identical, and that meant they really were out of pocket those sums, one way or another.

AC36405 - State v. Davallo