

2008

CONNECTICUT SUPREME COURT

A Special Supplement to the Connecticut Law Tribune

PUTTING RESTRAINTS ON KIDNAPPING PROSECUTIONS

Confinement must now be act of 'independent criminal significance'

By PROLOY K. DAS

The Supreme Court has issued more than three dozen decisions in the last 12 months shaping our criminal law jurisprudence in a variety of different areas. Here are the highlights, starting with three significant appeals from kidnapping convictions.

The kidnapping statute does not provide any minimum time or distance specifications with respect to the restraint of the victim. Thus, if a person threw an individual to the ground in order to punch her, or held someone down for the purpose of committing a sexual assault, he was also

CRIMINAL LAW

guilty of kidnapping. The court had reaffirmed this rule numerous times since 1977, most recently in *State v. Luurtsema*, 262 Conn. 179 (2002). With the penalties for kidnapping being more severe than those for assault, sexual assault, and robbery, prosecutors would frequently charge kidnapping in any case involving one of these crimes. No more. In *State v. Salamon*, 287 Conn. 509 (2008), and *State v. Sanseverino*, 287 Conn. 608 (2008), both released on the same day, the court overruled its prior decisions and held that, in order for a defendant to be convicted of kidnapping, the victim must have been "moved or confined in a way that has independent criminal significance, that is, the victim was restrained to an extent exceeding that which was necessary to accomplish or complete the other crime."

Determination of whether the restraint was not merely incidental to the commission of some other crime is a factual question for the jury to decide. The prosecutor's charging decision cannot sidestep the requirement of independent criminal significance. Thus, even if a defendant is charged only with kidnapping and not assault, if the restraint imposed on the victim is merely incidental to the uncharged assault, he is not guilty of kidnapping. The future applicability of the *Salamon/Sanseverino* rule remains to be seen but, in applying *Salamon* to *Sanseverino*, the court made clear that that retroactive application of this construction of the kidnapping statutes is appropriate in "pending cases." However, as the dissent noted, there is no constitutional bar to applying the rule in prior cases.

In *State v. DeJesus*, 288 Conn. 418 (2008), the first case to apply the rule, the court resolved a tension between the cases and held that the appropriate remedy for a *Salamon/Sanseverino* error is a remand for a new trial, with appropriate instruc-

tions to the jury on the need for restraint beyond that necessary to commit the other crime. But ultimately, *DeJesus* will be best known for its philosophical debate about the authority of the court to develop and change the rules of evidence after the adoption of the Evidence Code in 2000. Overruling its decision in *State v. Sawyer*, 279 Conn. 331 (2006), the court held that that the code was adopted for ease and convenience, and that it did not divest the Supreme Court of its authority to develop and change law of evidence. The court then adopted an exception to

the code, allowing for the admission of prior misconduct evidence to establish propensity in sex-related cases. The general rule that prior misconduct evidence in non-sex crime cases is inadmissible, except in a few limited circumstances, remains intact as evidenced by *State v. Randolph*, 284 Conn. 328 (2007). There, the court reversed a robbery conviction because evidence of the commission of a different robbery was improperly admitted because it was not sufficiently similar to the charged robbery to prove a common scheme. However, in *State v. Griggs*, 288 Conn. 116 (2008), the admission of the defendant's four prior domestic violence convictions in an attempted murder trial was not erroneous where the defendant had opened the door by testifying on direct examination to having "a couple domestics with the wives" and the trial court instructed the jury against using that evidence for propensity.

Sex Offenders

On the topic of sex crimes, in *State v. Arthur H.*, 288 Conn. 582 (2008), the court held that a finding that a defendant committed a felony for a sexual purpose, without a further finding of public danger, is not sufficient to require the defendant to register as a sex offender. In *State v. Boyle*, 287 Conn. 462 (2008), the court vacated for mootness and eliminated the precedential value of an Appellate Court decision that had held the imposition of sex offender evaluation and treatment for a defendant convicted of a DUI to be improper. The court held in *State v. T.R.D.*, 286 Conn. 191 (2008), that the crime of failing to comply with the sex offender registry requirements is a strict liability offense, though it ultimately reversed the defendant's conviction because the trial court failure to apprise the defendant of the possible term of incarceration rendered his waiver of counsel inadequate.

Other Crimes

Kidnapping was not the only crime to receive the court's attention. In *State v. Cook*, 287 Conn. 237 (2008), the court held that an elderly man who had waved a table leg at his roommate and threat-

ened him with it could not be convicted of carrying a dangerous weapon unless the jury found his threat to be a "true threat" (unprotected speech), rather than simply idle talk or banter. *State v. Lynch*, 287 Conn. 464 (2008), affirmed the defendant's conviction for failure to pay wages and clarified that, although an agreement to defer the accrual of future wages until an employer receives income is not contrary to public policy, an agreement to defer back wages does violate public policy and, therefore, is not a valid defense to the crime.

The court also issued some noteworthy decisions in the area of search and seizure. In *State v. Grant*, 286 Conn. 499 (2008), the court held there is no constitutional requirement that all potentially exculpatory evidence be included in a search warrant affidavit. The defendant in *State v. Kalphat*, 285 Conn. 367 (2008), did not have any expectation of privacy in a box containing marijuana that had been shipped through and partially opened by a shipping facility because it was addressed to another person. He therefore lacked standing, and the court did not have to address the defendant's claim that the shipping company employ-

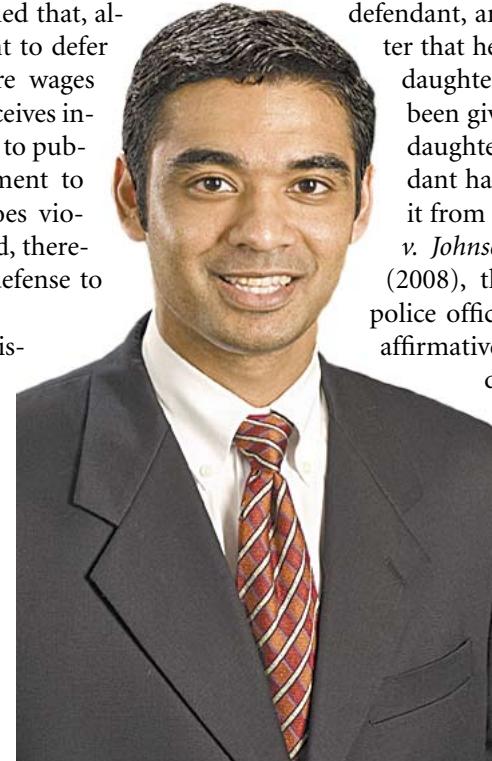
ees were acting as agents of the police. However, in *State v. Betts*, 286 Conn. 88 (2008), the court rejected the defendant's claim that his fiancée was acting as an agent for the state when, at the request of a police officer, she looked for and found,

in the bedroom she shared with the defendant, an incriminating letter that he had written to her daughter. The fiancé had been given the letter by her daughter before the defendant had taken and hidden it from her. Finally, in *State v. Johnson*, 288 Conn. 236 (2008), the court held that police officers do not have an affirmative duty to create evidence and, thus, they

are not constitutionally required to take notes or otherwise record communications with witnesses.

The past year saw the further development of search and seizure jurisprudence and

interpretation of a number of criminal statutes. But the impact of the 2007-08 year on criminal jurisprudence will be remembered for its scholarly majority, concurring, and dissenting opinions in *Salamon*, *Sanseverino*, and *DeJesus*, where the court changed the crime of kidnapping and retained its authority over the law of evidence. ■



MOVING IN NEW DIRECTIONS

Welcome to the *Law Tribune's* annual Supreme Court Year In Review, covering the period from Sept. 1, 2007 to Aug. 31, 2008.

As you will read in these pages, the Connecticut Supreme Court has made a number of decisions that have shaken up the legal landscape, from a redefinition of kidnapping, to paving the way for employers to give negative job references, to making it more difficult, at times, for injured workers to collect damages for workplace-related accidents.

The authors were invited by the *Law Tribune* to provide an analysis of decisions in their practice areas. They were empowered to not only choose which cases to discuss, but to offer their own take on the decisions. Obviously, there is often some subjectivity involved in such an exercise. A management-side employment attorney, for example, might view a ruling differently than someone who represents employees. And so we welcome rebuttal to, or comment on, any of these articles in the form of letters to the editor or guest commentaries.

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COVER PHOTO: GARY LEWIS

SHAPING THE NATURE OF ARBITRATION CASES

Court clarifies standards on time limits, vacating of awards

By **JEFFREY J. WHITE**

As in past years, the Connecticut Supreme Court decided a slew of cases that directly or indirectly affect the business community. Often, attention is paid to the so-called “hot button” cases, such as when the court creates new business torts, expands or restricts the rights of class action plaintiffs, or imposes personal liability on corporate officers. Just as important, however, are the opinions that influence the basic choices made by business leaders each day, such as: (1) Do I litigate or arbitrate?; and (2) Should I expend the resources to obtain a prejudgment remedy prior to trial in order to secure assets? The Supreme Court issued decisions in 2007-08 that will have a lasting impact on both of these questions.

BUSINESS LAW

Arbitration Applications

In *Town of Bloomfield v. United Electrical*, 285 Conn. 278 (2008), the court held that the 30-day limitations period for filing an application to vacate an arbitration award extends to *all* applications — regardless of whether they are based upon grounds enumerated in the Connecticut arbitration statutes (see General Statutes § 52-418(a)) or simply at common law.

The case arose out of the termination of a police officer by the Town of Bloomfield after the officer allegedly fabricated witness statements and later lied during a subsequent internal affairs inquiry. The officer’s union representative demanded arbitration in order to challenge the termination. Although the arbitration panel agreed that the officer’s conduct justified immediate termination, it reduced the penalty to a suspension in light of the prior disciplinary decisions of the town.

The town moved to vacate the panel’s award based on the common law ground that the award violated public policy, and also, on the statutory ground, that the panel had exceeded its powers. The town, however, failed to file its application within 30 days of receiving notice of the award as required by General Statutes § 52-420(b). This failure to file timely created the question of whether the court had jurisdiction to review the award in the first place.

Although the trial court held that it lacked subject matter jurisdiction to consider the town’s statutory claim, it concluded that the town’s claim that the award violated public policy was a separate “common law action” that was not governed by the arbitration statutes. The

Supreme Court reversed. It found that the 30-day limitations period set forth in General Statutes § 52-420(b) applies broadly to *all* applications to vacate — regardless of the particular grounds relied on. Significantly, the court commented that its seminal decision of *Garrity v. McCaskey*, 223 Conn. 1 (1992), which established that a public policy violation is a

separate common law ground for vacatur, “does not stand for the proposition that a separate body of procedural law” must apply to such claims. In the court’s view, to find otherwise would undermine the goal of facilitating the economical and rapid resolution of disputes.

Another arbitration case that warrants attention is *State v. Connecticut State Employees Association*, 287 Conn. 258 (2008), in which the court reaffirmed how difficult it is for a party to vacate an arbitration award on the ground that the arbitrator’s decision was in “manifest disregard of the law.” Although most of the opinion involves circumstances that are not particularly relevant to the business community (as it pertains to the termination of a state corrections officer), the court’s analysis of the arbitrator’s actions are significant. The court held that, at best, the state had shown that the arbitrator had misapplied Supreme Court law regarding the vacatur of arbitration awards on public policy grounds. Nevertheless, the court held that the misapplication of law does not support vacatur as it does not “demonstrate the arbitrator’s egregious or patently irrational rejection of clearly controlling legal principles.” Therefore, the standard for vacating an arbitration award remains extraordinarily high. See *Economos v. Liljedahl Bros. Inc.*, 279 Conn. 300, 307 n.8 (2006) (noting that the court has yet to conclude that an arbitrator manifestly disregarded the law).

is even off the ground. In *TES Franchising LLC v. Feldman*, 286 Conn. 132 (2008), the court reversed a trial court decision that granted a prejudgment remedy for attorneys’ fees that the plaintiff corporation claimed it would recover at trial. Following the execution of a settlement agreement by the plaintiff franchisor and defendant franchisee, the defendant allegedly made disparaging remarks about the plaintiff to as many as 30 state agencies. Not surprisingly, the settlement agreement prohibited such remarks and contained a liquidated damages clause and allowed for attorneys’ fees for each violation. The problem for the plaintiff franchisor was that the attorneys’ fees provision in the settlement agreement only applied if the dispute was resolved through arbitration. Therefore, the Supreme Court held that the plaintiff had not proven, by probable cause, that it would prevail on its claim for attorneys’ fees at trial. More significant, however, to all corporations, is that the court cast doubt on whether any party could secure assets for attorneys’ fees prior to trial. The court commented that such fees may always be unduly speculative or premature at the prejudgment remedy stage. Therefore, the court sent a clear signal that it may be impossible for a party to secure assets in advance of trial from a breaching party for the fees required to litigate the action. For those businesses that desire to pursue vexatious litigation actions, careful attention should be paid to *Bernhard-Thomas Building Systems Inc. v. Duncan*, 286 Conn. 548 (2008), which held that the pursuit of a prejudgment remedy did not constitute the “prosecution of a civil action.” Therefore, even if a party’s application for a prejudgment remedy is ultimately meritless, such conduct does not expose that party to an action for vexatious litigation unless a civil action is subsequently initiated and prosecuted. The 2007-08 term of the Supreme Court was not dominated by show-stopping decisions for the business community. Yet, the decisions made will influence the fundamental litigation decisions of business leaders for years to come. ■



Prejudgment Remedies

The costs of obtaining a prejudgment remedy can be exorbitant, almost invariably requiring a mini-trial before the case

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HIGH COURT CONSIDERS PREJUDGMENT REMEDY ISSUES

Other cases involved mortgage liens, foreclosure proceedings

BY JOYCE YOUNG

The Connecticut Supreme Court settled a wide array of civil practice issues in the context of applications for prejudgment remedies, tort cases, mortgage-related proceedings, and arbitration.

In *TES Franchising, LLC v. Feldman*, 286 Conn. 132 (2008), the court thoroughly reviewed the lenient probable cause standard for issuing prejudgment remedies.

TES claimed that Feldman had made disparaging remarks and disclosed confidential information about TES in violation of a settlement agreement between the parties. The trial court granted a prejudgment remedy in the amount of \$245,000, which was computed by applying a liquidated damages provision in the settlement agreement and adding an unspecified amount of attorneys' fees. In its memorandum of decision, the trial court did not separately address each of Feldman's counterclaims and special defenses, but noted that it had considered them.

On appeal, Feldman challenged the prejudgment remedy on grounds that the memorandum of decision did not discuss each of his defenses and counterclaims and the prejudgment remedy should not have included attorneys' fees. The Supreme Court found that the trial court sufficiently had "taken into account any defenses, counterclaims or set-offs," as required by Connecticut General Statutes §52-278d(a), by generally

considering them. As to the attorneys' fees, however, the court concluded there was no probable cause to include them in the prejudgment remedy, because the attorneys' fees provision of the settlement agreement provided for such an award only if the parties resolved their dispute through arbitration. Significantly, the

court left "to another day" the question of "whether an award of attorneys' fees at a prejudgment remedy hearing, even when a plaintiff can demonstrate probable cause that she will be entitled to receive attorney's fees at trial, is unduly speculative or premature because it necessarily would occur before the attorney's representation is over."

In *Bernhard-Thomas Building Systems LLC v. Dunican*, 286 Conn. 548 (2008), the court held that service of a prejudgment

remedy application with an unsigned writ of summons

and complaint did not commence a civil action for the purposes of a subsequent vexatious litigation claim. The court cited extensively the Appellate Court's 2005 decision in *Raynor v. Hickock Realty Corp.*, 61 Conn. App. 234, which held that the filing of a prejudgment remedy application with an unsigned writ of summons and complaint did not commence an action for statute of limitations purposes.

Mortgage Liens

Argent Mortgage Co. v. Huertas, 288 Conn. 568 (2008), and *Bellemare v. Wachovia Mortgage Corp.*, 284 Conn. 193, resolved procedural issues arising out of mortgage liens and proceedings. In *Bellamere*, the court held that claims against mortgagors for failing timely to execute and deliver a release upon satisfaction of a mortgage, as required under Connecticut General Statutes 49-8(c), are subject to the three-year statute of limitation for tortious conduct in CGS

§ 52-577. Because the failure to release a mortgage lien is akin to the tort of slander of title, the tort statute of limitation should control, not the six-year statute of limitations for contractual disputes. The court also rejected the argument that the statutory penalty under CGS §49-8(c) for failing to release the lien was akin to a contractual liquidated provision which might arguably justify application of the six-year statute of limitations for breach of contract claims.

Argent arose out of an attempt to va-

luation a judgment of strict foreclosure. The defendant homeowner, Huertas, was incarcerated at the time the foreclosure complaint was served at her home. She failed to appear and a judgment of strict foreclosure entered. Huertas later returned home, where she received, in error, a form letter of default from the lender. She then moved to vacate the judgment more than five months after title in the property had vested in the lender.

In moving to vacate, Huertas argued that the trial court lacked *in personam* jurisdiction because the abode service was invalid, and that, even if the trial court had jurisdiction, the judgment should be vacated because it was waived by the lender in erroneously sending the default letter. The trial court upheld the service and denied the motion to vacate. On appeal, the Supreme Court held that service at Huertas' home was proper because the record demonstrated that she continued to maintain her residence there. As to the motion to vacate, the court went further than the trial

court, holding that the motion should have been dismissed altogether as moot.

The court continued its broad deference to arbitration in *HH East Parcel Inc. v. Handy & Harman, Inc.*, 287 Conn. 189 (2008). *HH East Parcel* concerned a challenge on the grounds of public policy to an arbitrator's award of *per diem* charges under a construction contract. Several Appellate Court decisions had held that, in instances where an award is challenged on the grounds of public policy, an arbitrator's findings of fact are to be reviewed to determine whether they are supported by substantial evidence. The court disagreed, ruling instead that courts are bound by the arbitrator's factual findings when conducting a *de novo* review of claims that an arbitration award violates public policy. Applying the arbitrator's factual findings, the court upheld the *per diem* delay clause as a valid liquidated damages provision.

Amended Complaints

The court in *Dimmock v. Lawrence and Memorial Hospital Inc.*, 286 Conn. 789 (2008), reviewed the principles governing amendment of complaints. *Dimmock* was a medical malpractice action

arising out of a spinal surgery which resulted in severe post-operative infection. The operative complaint alleged a "failure to adequately and properly care for, treat, monitor, diagnose and supervise the plaintiff for problems with her back and post operative care," and a failure "to adequately and properly assess and inform the plaintiff of the risks involved in the surgery." Regarding the surgery, the theory of the operative complaint was that spinal fusion surgery should not have been performed because plaintiff

did not have spinal instability. Plaintiff sought to amend the complaint, based upon its expert's opinion, to allege instead that the spinal fusion *should* have been performed with instrumentation.

In a split decision, the court affirmed the trial court's refusal to permit the amendment as time barred.

The majority reasoned that the allegations of the amended complaint did not relate back to the theory asserted in the operative complaint because the amended

complaint sought to posit an entirely new, and inconsistent, theory of negligence. While past decisional law had allowed the pleading of alternative theories of negligence, the majority noted, the pleading of theories that contradicted previously pleaded theories was impermissible.

In dissent, Justice Barry Shaller reframed the issue as whether the proposed allegations of negligence arose from an entirely different set of facts. Since all revised allegations involve some new facts and somewhat alter evidentiary requirements, he wrote, the determinative factor should be whether the new allegations present an entirely new factual situation. He concluded that the defendants had adequate notice that a claim was being asserted against them based on a claim of negligence in the performance of medical services culminating in a spinal fusion and that the claims concerned spinal stability following the surgery. While the new allegations did present a different configuration of the factual situation, they did not negate "the identity of the cause of action" and defendant had fair notice of the plaintiff's claim. ■

CIVIL PROCEDURE

THE SUPREME COURT IN DIMMOCK, A MEDICAL MALPRACTICE ACTION ARISING OUT OF A SPINAL SURGERY, REVIEWED THE PRINCIPLES GOVERNING AMENDMENT OF COMPLAINTS.

EMPLOYERS CAN GIVE NEGATIVE JOB REFERENCES

Other decisions involve workplace violence, accommodating disabilities

By **ROBERT G. BRODY** and **DAVID A. ROBINSON**

From Sept. 1, 2007, to Aug. 28, 2008, the Connecticut Supreme Court decided 21 employment cases. A summary of the key issues follows.

Job References

In *Miron v. University of New Haven Police Dept.*, 284 Conn. 35 (2008), the court held that when an employee consents to a prospective employer contacting current or former employers for a reference, those current or former employers enjoy a qualified privilege to make negative comments. However, if the reference is made with knowledge that it is false, with reckless disregard as to whether the statement is true, or “with the intent to prevent an employee from securing employment,” the privilege is lost. Thus, an employer can speak negatively about an employee with a prospective employer so long as 1) the speaking employer is being honest and within the general bounds of reasonableness (that is, not reckless), 2) the speaking employer is genuinely trying to help the prospective employer make an informed hiring decision, not just trying to prevent the employee from landing a job (otherwise the employer may violate Connecticut’s blacklisting statute, Connecticut General Statute § 31-51), and 3) the employee consented to the “old” employer communicating with the prospective employer.

The *Miron* opinion laments the unnecessary “culture of silence”—whereby employers are so fearful of getting sued for defamation that they refuse to provide useful references. The opinion states that the lines of communication among employers can be much more open without increasing liability.

Workplace Violence

Gallo v. Barile, 284 Conn. 459 (2007), also pertained to an employer’s privilege to speak. A supervisor and employee got into an argument. The supervisor told the human resources manager that during the argument, the employee was aggressive, menacing, frightening, and possibly on the verge of physical violence. The HR

manager called the police. The supervisor then repeated his story to the police. As a result, the police charged the employee with breach of the peace.

However, the employee was acquitted at trial. The employee then sued the supervisor for defamation, alleging that the supervisor’s statements to the police, if not the supervisor’s statements to the HR manager, were defamatory. The trial court granted summary judgment for the supervisor but the Supreme Court remanded the case for further findings. The Supreme Court held that the statements made by the supervisor to the police had a qualified privilege, but not an absolute privilege. A question of fact exists as to whether the supervisor abused the privilege. The lesson, in our view, is that if an employee accuses a co-worker of minor misconduct, the employer should exercise some caution when deciding whether to call the police or, instead, handle the matter internally.

Pre-Existing Condition

The court decided several workers’ compensation cases involving causation (occupational or non-occupational) of injuries and diseases. In *Birnie v. Electric Boat Corp.*, the court held that an injury arises “out of and in the course of employment,” and thus entitles the employee to workers’ compensation, only if the employment was a “substantial factor,” not merely a “contributing factor,” in causing the injury.

In *Deschenes v. Transco Inc.*, the court held that apportionment of permanent partial disability benefits is appropriate when an employer is able to prove that 1) a disability has resulted from the combination of two concurrently developing diseases, one that is non-occupational and

the other work-related; and 2) the conditions of the claimant’s occupation have no influence on the development of the non-occupational disease. In *Deschenes*, the employee suffered a 25 percent permanent partial disability in each lung, caused in part by work-related

asbestos exposure and in part by cigarette smoking. The employer must fully compensate the employee for a work-related injury or disease even if the injury or disease was made worse by a pre-

existing injury or disease. But where an injury or disease has two causes contemporaneously—one occupational and the other non-occupational—the compensation required of the employer is reduced.

Accommodating Disabilities

In *Curry v. Allan S. Goodman*, 286 Conn. 390 (2008), the court held that even though Connecticut’s disability discrimination law does not explicitly impose a duty of reasonable accommodation on an employer (a duty to make a reasonable effort to try to help a disabled employee perform a job), the “bona fide occupational qualification” section of Connecticut’s law is tantamount to imposing a duty of reasonable accommodation on an employer. If an employee has a disability and requests an accommodation, the employer must discuss this with the employee.

While it is up to employee, not the employer, to initiate this dialogue, no magic words are necessary. Once alerted, the employer has a duty to ascertain what accommodations are available, whether they are reasonable, and whether the employer has another job available that the employee can perform.

If an employee has a disability, an employer’s refusal to engage in the dialogue is sufficient evidence to warrant a trial on the issue of whether the employer violated the state disability discrimination law. Another issue in *Curry* was whether, as a reasonable accommodation, the employer must offer permanent light duty and/or permanently reassign the disabled employee to a job he is able to perform. *Curry* holds that the employer has an obligation to at least discuss with the disabled employee – and not reject categorically – the possibility of permanent

light duty if the employee requests such duty. Further, job restructuring or transfer to another position may be a required accommodation.

Other Cases

McCann v. Department of Environmental Protection: An employee’s personal use of the employer’s computer is “just cause” for termination, even if the employee is a government employee covered by a union contract, if he was clearly and repeatedly warned that personal use of the computer could lead to discharge.

McWeeney v. City of Hartford, 287 Conn. 56 (2008):

To have

standing to file a Commission on Human Rights and Opportunities complaint, a person must have been an employee of, or job applicant of, the respondent employer. The mere fact that a person is, or feels, aggrieved by a company’s discriminatory practices is insufficient to confer standing. Thus, the spouse of a deceased employee had no standing to complain that the employer, on the basis of marital status, stopped paying for the spouse’s health insurance after spouse remarried.

Ravetto v. Triton Thalassic Technologies, 285 Conn. 716 (2008): An award of double damages in a nonpayment-of-wages case is discretionary, not mandatory, where a company, due to financial difficulties, stops paying its employees but allows the employees to continue working with the hope that the company will eventually obtain funds to pay them. Triton told the employees that it would make every effort to obtain funding to pay them but that funding and payment were not guaranteed and that anyone who wanted to could resign. The plaintiffs voluntarily chose to remain and continue working. The plaintiffs sued and eventually were paid their unpaid wages (single damages). But they demanded double damages and attorney fees as well, citing C.G.S. § 31-72. The Superior Court declined to award them double damages and attorneys fees, holding that it was not unreasonable or in “bad faith” for Triton to allow the plaintiffs to continue to work with the hope of future payment. The Supreme Court affirmed. ■

Robert G. Brody is the founder of Brody and Associates, which focuses on employment and labor issues on behalf of management. David A. Robinson is a labor & employment attorney in the firm.

EMPLOYMENT LAW

IF AN EMPLOYEE HAS A DISABILITY, AN EMPLOYER’S REFUSAL TO ENGAGE IN THE DIALOGUE IS SUFFICIENT EVIDENCE TO WARRANT A TRIAL ON THE ISSUE OF WHETHER THE EMPLOYER VIOLATED THE STATE DISABILITY DISCRIMINATION LAW.

DISSIPATION, CONTEMPT, AND THIRD-PARTY CUSTODY

Justices clarify guidelines on 'intentional waste' of couples' assets

By GAETANO FEERO

The state Supreme Court's family law opinions made new law and clarified existing law in ways not easy to predict.

Waste Not

In *Gershman v. Gershman*, 286 Conn. 341 (2008), the court held that in dividing assets at the time of the decree of dissolution, the trial court may not base a finding of dissipation upon a bad investment or upon responsibility for cost overruns in the construction of a residence. Dissipation may include gambling, support of a paramour, or a transfer of an asset for little or no consideration. "[A]t a minimum, dissipation in the marital dissolution context requires financial misconduct involving marital assets, such as intentional waste or a selfish financial impropriety, coupled with a purpose unrelated to the marriage."

In *Finan v. Finan*, the court addressed a question it thought left unanswered in *Gershman*, i.e., whether a court may consider a party's pre-separation dissipation of assets. The *Finan* court held that the trial court should do so as long as "the actions constituting dissipation occur either: (1) in contemplation of divorce or separation; or (2) while the marriage is in serious jeopardy or

is undergoing an irretrievable breakdown." To do otherwise could turn dissolution courts into auditing agencies. Moreover imposing a "temporal restriction" makes it easier for the trial court to determine whether the action was carried out, at least in part, to deprive the other spouse of assets which would otherwise be available in equitable distribution.

Finan holds that financial impropriety not in contemplation of divorce or separation or during a time in which the marriage isn't in serious jeopardy may not be considered. In other words, huge gambling losses throughout the marriage are to be disregarded except to the extent that they occurred after the marriage fell into difficulty.

Contempt Clarified

The Supreme and Appellate courts have repeatedly held that a necessary predicate to a contempt adjudication is a clear and unambiguous court order. But in two decisions, *Sablosky v. Sablosky*, 258 Conn. 713 (2001), and *Eldridge v. Eldridge*, 244 Conn. 523 (1998), the Supreme Court had upheld contempt findings despite ambiguous or unclear court orders. In *re Leah*, 284 Conn. 685 (2007), gave the justices an opportunity to clarify those apparent contradictions. Because the underlying orders were not sufficiently clear and unambiguous, the *In re Leah* court reversed the Appellate Court

which had upheld a trial court's contempt adjudication. The orders, which had been directed to the Department of Children and Families, and which were made on a judicial department preprinted form, gave the department discretion in determining what were "necessary measures" and what were "appropriate services." As a result of that discretion, they were deemed to be unclear. In reaching that conclusion, the court greatly limited *Sablosky* and *Eldridge* to situations where clear orders supposedly became unclear because of changed circumstances. In *Sablosky*, a child's ceasing to attend college full time was deemed to have made unclear an order that a party pay tuition. In *Eldridge*, the former husband's learning, years after the fact, that the former wife was employed full time as a teacher was deemed to have made unclear an order that his alimony be reduced by one-half of the former wife's annual earnings in excess of \$25,000.

Something Fishy?

In *Fish v. Fish*, 285 Conn. 24 (2008), a split court concluded that a third-party, post-judgment child custody proceeding requires allegations of a parent-like relationship with the child and of clear damage, injury or harm if the child were to remain in the parent's custody. The court also held that the fair preponderance of the evidence standard should be applied in such a proceeding. While agreeing that the trial court's judgment should be reversed, Justice Joette Katz, in a cogent concurrence, opined that the requirements imposed upon third-party visitation proceedings in *Roth v. Weston*, 259 Conn. 202 (2002),

should also apply in third-party custody proceedings. Katz reasoned that because the intrusion on constitutionally-protected parental interests is greater in post-judgment custody proceedings than in post-judgment visitation proceedings, a lesser standard should not apply. Her view is that a third party should be required to plead and prove by clear and convincing

evidence that he or she has a parent-like relationship with the child and that the child would suffer real and substantial harm if custody is not changed.

As a result, practitioners may need to advise clients seeking third-party visitation that a third-party custody proceeding may stand a better chance of success because of the lower standard of proof and the requirement of less "harm." To a large extent, the *Fish* decision reflects the failure of our third-party custody and visitation statutes to acknowledge that physical custody and visitation are imprecise points on a continuum. While having a child 50 percent of the time is joint custody and having a child 25 percent is visitation, there is no particular percentage at which point joint physical custody ceases and visitation begins. Could a trial court, in light of the differences in standard of proof and requirement of harm, award visitation in a post-judgment third-party custody proceeding or award custody in a third-party visitation proceeding? That *Fish* suggests that the answer to the former question is "no" but the answer to the latter question is "yes" is troublesome.

Conclusion

The Supreme Court's opinions continue to change the landscape of family law. ■



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EASEMENTS, BUDDHISTS AND SEXUALLY-ORIENTED BUSINESSES

Decision on proposed temple a 'must-read' for land use lawyers

By EDWARD V. O'HANLAN and TYISHA S. HOVANEK

Real property law and land use law continue to occupy important positions in Connecticut Supreme Court and Appellate Court jurisprudence. Since August 2007, a number of decisions have clarified and refined the law in several areas. For example, in *Stefanoni v. Duncan*, the Supreme Court ruled that an access easement, by itself, does not convey riparian or littoral rights. Further, in *Smith v. Muellner*, Chief Justice Chase T. Rogers clarified the law regarding the extinguishment of easement rights, abandonment of easement rights, and the standard of proof

for prescriptive easement claims.

Further, the Supreme Court in *Cambodian Buddhists Society of Connecticut Inc. v. Planning and Zoning Commission of the Town of Newtown*, carefully analyzed the legislative history behind the federal Religious Land Use and Institutionalized Persons Act (RLUIPA), as well as Connecticut's statute against governmental burdening of the exercise of religion, in addition to several standard factors for special exception applications that were cited in denying an application for a special exception to build a Buddhist temple. This decision is a must-read for land use lawyers.

Justice Richard Palmer, writing for the court, found that, for land use regulation purposes, RLUIPA and Connecticut's statute provide the same pro-

tections. He then adopted the reasoning of certain federal circuits in finding that land use regulations are neutral and generally applicable, notwithstanding individual scrutiny in procedures for obtaining special use

permits or variances. This means that the "substantial burden" balancing that is required under RLUIPA for "individualized assessments" for government benefits does not apply. Thus, the burden is not shifted to a zoning commission to justify its decision. RLUIPA also expressly prohibits discrimination, so that an "as applied" analysis of a zoning decision will ensure that there has not been an abuse of discretion or application of a regulation in a discriminatory manner. But the burden for this claim lies with the claimant, not the commission.

Sovereign Immunity

In *Jeanne Rivers v. City of New Britain*, the Supreme Court ruled that when a municipality adopts an ordinance shifting to the owner of land



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WORKPLACE ACCIDENT RULINGS FAVOR EMPLOYERS

High court decisions allow contractors to delegate safety responsibilities

By **BRENDEN LEYDON**

Three cases stand out in the tort and insurance arena for their common theme of significantly limiting the ability of injury victims to obtain a full recovery for tortious injury sustained in the workplace.

The first is *Pelletier v. Sordoni/Skanski Construction Co.*, 286 Conn. 563 (2008). In *Pelletier*, the plaintiff was catastrophically injured when an improperly welded steel beam collapsed on him. The plaintiff was employed by a subcontractor, Berlin Steel Construction Co., and brought his case against the general contractor, claiming that the company had negligently caused the injury. The jury accepted his claim and returned a verdict in excess of \$40 million.

The general contractor appealed, claiming it had no direct responsibility for the injuries because it had delegated those safety responsibilities to the plaintiff's employer and others. The Supreme Court had already reviewed the *Pelletier* case in 2003 in a decision which appeared to resolve these issues in the plaintiff's favor. However, this year's Supreme Court re-

versed the jury verdict for the plaintiff and directed judgment for the general contractor, essentially finding that the general contractor could and did delegate its responsibility to others who were immune from liability for the plaintiff's injury due to the workers' compensation exclusivity bar.

In *Archambault v. Soneco/Northeastern Inc.*, 287 Conn. 20 (2008), another worker was catastrophically injured, this time in a trench collapse. The plaintiff worked for a

subcontractor and brought a claim against the general contractor, claiming the general contractor was responsible for his injuries, as it had or assumed a duty to supervise safety at the worksite. The trial court instructed the jury that the general contrac-

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tor's responsibility for safety was non-delegable, and precluded the general contractor from attempting to shift the blame to the plaintiff's employer following the Supreme Court's decision in *Durniak v. August Winter & Sons, Inc.*, 222 Conn. 775 (1992), which seemed to suggest such a result.

The jury accepted the plaintiff's claim and returned a verdict in excess of \$3 million. The general contractor appealed, and the Supreme Court reversed, explaining that *Durniak* dealt with the rights of an intervening employer and was not applicable to the present case.

Summary Judgment Upheld

In *Jaiguay v. Vasquez*, 287 Conn. 323 (2008), the plaintiff's decedent - who worked for a New York landscaping company - was killed in the crash of

an overloaded pickup truck in Greenwich. The driver, a co-worker, knew the truck had bad brakes and was going about twice the speed limit. The plaintiff brought an action against the named defendant driver and the non-employer owner of the truck. The defendants raised the defense of the workers' compensation exclusivity bar and the trial court granted summary judgment for the defendants.

The plaintiff appealed, arguing that Connecticut law allowed an action against a co-employee operator of a motor vehicle, and that even if New York law applied, there were various exceptions to immunity or questions of fact as to whether the

bar even applied, as it was unclear whether the tortious actions in question were in the scope of employment. The Supreme Court's recent decision of *Johnson v. Atkinson*, 283 Conn. 243 (2007), seemed to unequivocally provide that *Jaiguay* would be allowed to pursue a recovery against the driver of the motor vehicle he was in since the injury occurred in Connecticut. But the state Supreme Court affirmed the summary judgment, expressly overruling that portion of *Johnson* that would have allowed the plaintiff to have his day in court.

In each of these cases, a worker was catastrophically injured or killed as a result of clearly tortious misconduct and denied a full and fair recovery due to a strict application of the exclusivity bar, a refusal to recognize duties or exceptions which would allow for recovery, and a policy of allowing the shifting of responsibility to an immune employer. In doing so, the court either expressly overruled or aggressively distinguished prior authority which seemed to allow for recovery and implicitly, if not explicitly, seemed to be promoting a public policy of maximizing the impact and reach of the exclusivity bar.

Calls For Reconsideration

In each of these three cases, a motion for reconsideration was filed; they remain pending in *Pelletier* and *Jaiguay*. The Connecticut Trial Lawyers Association has filed for amic-

us status in all three cases and joined the call for reconsideration. Allowing responsibility to be delegated to immune parties would minimize the incentive of everyone to avoid such injuries in the first place.

The workers' compensation exclusivity bar was largely devised to avoid a constitutional challenge to the entire scheme under *Lochner v. New York*, 198 U.S. 45 (1905). However, under modern constitutional doctrine, no one would seriously question whether a state could validly impose a workers' compensation insurance requirement without an exclusivity bar or one with significant exceptions designed to maximize the incentive to avoid catastrophic injury. As the Supreme Court of Washington has noted, while "in 1916 everyone 'agreed that the blood of the workman was a cost of production,' that statement no longer reflects the public policy or the law." *Birklid v. Boeing Co.*, 904 P.2d 278, 289-90 (Wash. 1995).

It is difficult to understand why the exclusivity bar is seen as good public policy at all, let alone why the decisions seem to seek to expand its reach, rather than narrowly and

strictly construe a statute which fundamentally undermines the basic purpose of tort law and rests on dubious policy grounds. Whether the Connecticut Supreme Court reconsiders any or all of these cases now or in the future, the legislature should consider analyzing whether maintaining the exclusivity bar still makes good policy sense given the damage it inflicts upon catastrophic injury victims. ■

IN ALL THREE CASES, A WORKER WAS CATASTROPHICALLY INJURED OR KILLED AS A RESULT OF CLEARLY TORTIOUS MISCONDUCT AND DENIED A FULL AND FAIR RECOVERY DUE TO A STRICT APPLICATION OF THE EXCLUSIVITY BAR.



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JUSTICE PALMER, WRITING FOR THE COURT, FOUND THAT, FOR LAND USE REGULATION PURPOSES, THE FEDERAL RLUIPA AND CONNECTICUT'S STATUTES PROVIDE THE SAME PROTECTIONS.

abutting a public sidewalk the duty of care and liability for that sidewalk, the State of Connecticut is not affected by such action. Analyzing the doctrine of sovereign immunity, the court found that the State of Con-

necticut did not waive immunity so as to be subject to these types of ordinances.

In *Pond View LLC v. Planning and Zoning Commission of the Town of Monroe*, the Supreme Court ruled that environmental in-

tervenors, acting under Connecticut General Statutes §22a-19, do not have standing to raise procedural defects in a zoning application that are not related to environmental issues within the scope of Section 22a-19. In *Rural Water Compan, Inc. v. ZBA of Town of Ridgefield* and *Durkin Village Plainville v. ZBA of Town of Plainville*, regarding variances, the Supreme Court and Appellate Court each affirmed the very rigorous application of the hardship standard to variance approvals, such that they continue to be the most vulnerable form of land use approval. In *VIP of Berlin, LLC, v. Town of Berlin, et al.*, the Supreme Court found that town ordinances restricting the

location of "sexually-orientated business" are valid exercises of the municipality's police power.

Finally, in *Gibbons v. Historic District Commission* and *Felician Sisters v. Enfield*, the Supreme Court sustained two appeals

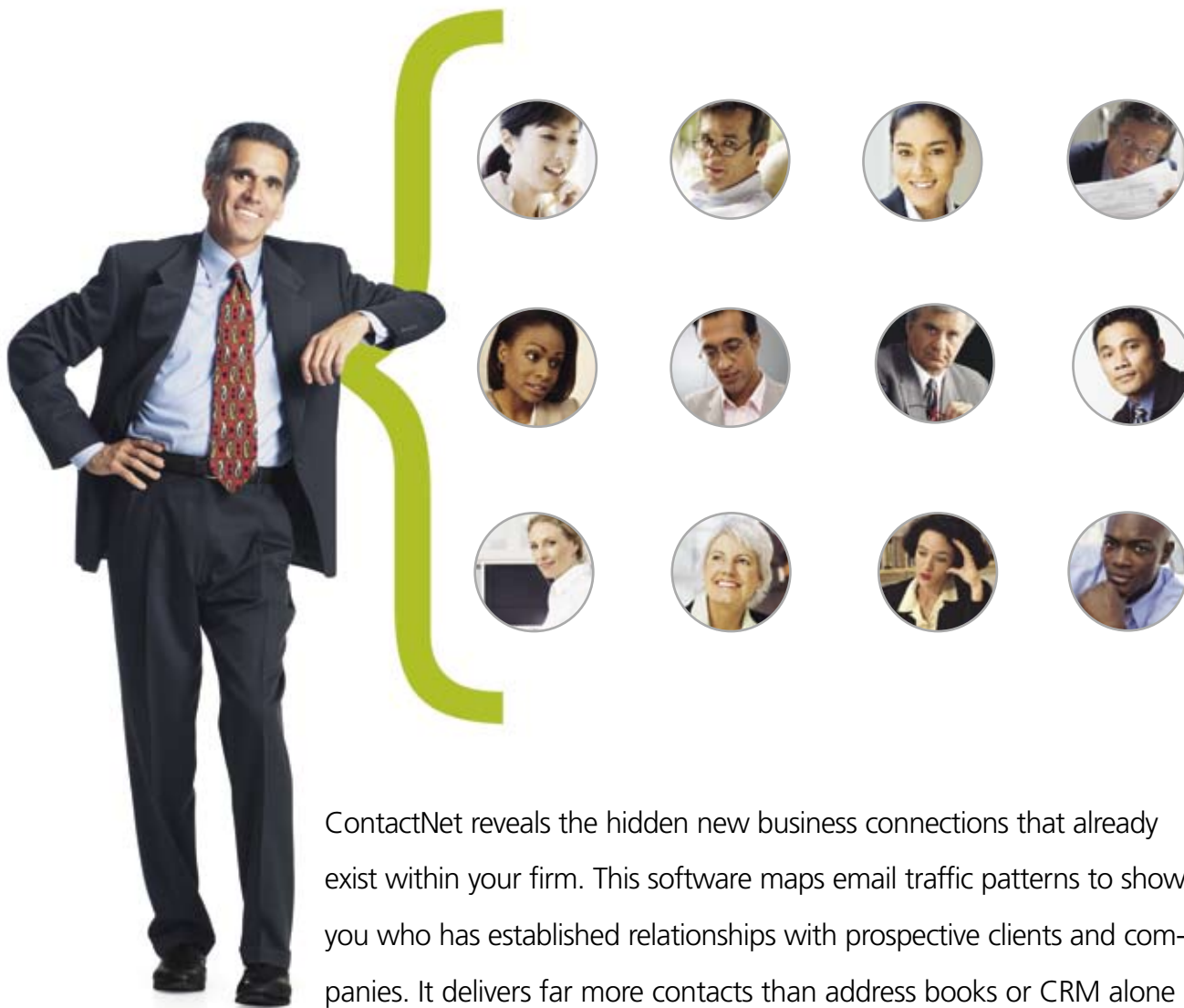
REAL PROPERTY

from denials of certificates of appropriateness, and reviewed in detail the "substantial evidence rule" that is applied to the articulated reasons for commission action.

There is no shortage of lessons learned for counsel and planner, in the variety of real property and land use decisions handed down this year by the Supreme Court and Appellate Court. ■

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