

CONNECTICUT SUPREME COURT

2006

September 2006

A SPECIAL SUPPLEMENT TO THE
CONNECTICUT LAW TRIBUNE

SKAKEL

Supreme Court ruling in sensational case posed an interesting legal question regarding the retroactive application of criminal statutes of limitations. **p.4**

Also:

Business competitors may sue for CUTPA violations—even without statutory standing—if the claim falls within CUTPA’s “penumbra.” **p.2**

Attorneys appointed to represent children in dissolution of marriage and other cases now have absolute immunity. **p.6**

Sampling The Smorgasbord: Supreme Court Review

The articles in this supplement review many of the important cases decided during the 2005-2006 Connecticut Supreme Court term.

The summaries are grouped alphabetically by practice area, and each was written by an attorney who practices in that area. The contributing authors were also responsible for selecting the cases to include, and for the comparative weight given to each of the chosen cases—within a prescribed word limit.

The practice areas represented were selected by *The Law Tribune* editorial staff. The list includes: Business Law; Civil Practice; Criminal Law; Employment Law; Family Law; Professional Responsibility; Real Property; and Torts/Insurance Law.

What cases would you choose as the top ones in your practice area? Compare your list with that of a fellow practitioner—and maybe catch up with some cases that decided new law in other areas, as well.

CASE *Law* REVIEW

BUSINESS LAW

Rivals Have Standing To Sue For Statutory Violations

CUTPA grants standing for competitors to sue for broad range of conduct

By JONATHAN M. FREIMAN

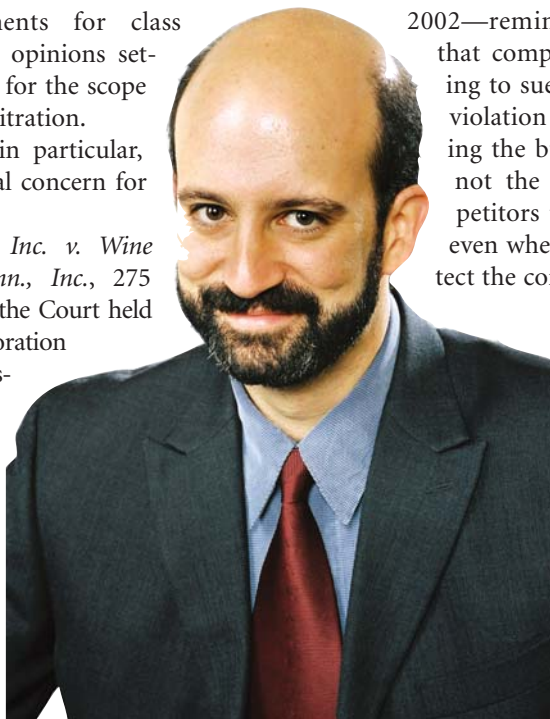
Over the last year, the Connecticut Supreme Court released a thick folder full of cases important to the business community, ranging from a decision bolstering requirements for class action lawsuits to opinions setting new contours for the scope and bounds of arbitration.

Two decisions in particular, though, are of vital concern for companies.

In *Eder Bros., Inc. v. Wine Merchants of Conn., Inc.*, 275 Conn. 363 (2005), the Court held that a plaintiff corporation could sue its industry rival for violation of an industry-regulating statute, even where the legislature vested enforcement power solely in a state official and did not give competitors the right to sue.

The case involved an act that prohibits distributors from offering certain pricing discounts to retailers. When a distributor allegedly offered the forbidden discounts, its competitor filed suit under both the discount law and CUTPA. The trial court dismissed the suit, finding that the discount law created no cause of action for competitors and that the rival could not piggyback on CUTPA to bring its discount law claim.

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The Supreme Court reversed. It found that while the competitor had no standing to sue under the discount law, it could sue under CUTPA. *Eder Brothers* reaffirmed prior case law—the court decided a similar issue in the insurance context in 2002—reminding businesses that competitors have standing to sue under CUTPA for violation of any statute binding the business, whether or not the statute gives competitors the right to sue, or even whether it aims to protect the competitors.

In fact, competitors can sue under CUTPA even for conduct that the legislature did not prohibit in the other statute at all, but which comes within the statute's "penumbra." Such claims pass muster, the Court reiterated, when they are

"consistent with the regulatory principles established by the underlying statute."

Personal Liability

If the specter of competitors and consumers filing suit for violation of statutorily-undefined "regulatory principles" isn't enough to convince businesses to keep things above-board, their officers and directors might want to review *Ventres v. Goodspeed*, 275 Conn. 105 (2005), a decision with important consequences for the personal liability of officers.

Ventres involved an individual who, act-

ing on behalf of his airport-owning company, directed a contractor to cut down trees near the airport's runway. The trial court concluded that the clear-cutting of trees violated Connecticut environmental and wetlands laws.

'Immaterial' Distinction

On appeal, the owner claimed that he could not be held personally liable because he had acted on behalf of his company, not in his individual capacity. The Supreme Court rejected that distinction as flatly "immaterial," emphasizing the continuing vitality of the common-law principle that a corporate officer is liable for torts in which he directly participates.

The owner had claimed that the Court's adoption of the "responsible corporate officer" doctrine in *BEC Corp. v. DEP*, 256 Conn. 602 (2001), had superseded the long-standing "direct participation" principle. *BEC* had created a new source of individual officer liability in Connecticut. Relying in part on a statute that explicitly defined "person" to include corporate officers, the Court found that an individual officer commits a tort whenever he had "a position of responsibility and influence from which he could have prevented the corporation from engaging in the [prohibited] conduct." *Ventres*, 275 Conn. at 144.

BEC emphasized that it was "by no means establishing the responsibility of corporate officers in general with respect to corporate activity." But while the *BEC* Court did not create a sweeping doctrine of vicarious officer liability for all corporate conduct, it did create liability for omissions, i.e., for failures to stop others from committing torts for the company.

Omission liability is a significant step

beyond direct participation liability. Perhaps mindful of this significant expansion, the *BEC* Court framed its holding narrowly, stating that it "restrict[s] the application of the responsible corporate officer doctrine solely to violations of the [Water Pollution Control] act."

Ventres abandoned the narrowness. The Court held that the responsible corporate officer doctrine applies to all "strict liability public welfare offenses committed by the corporation." That was so even though the statutes at issue in *Ventres* did not define "person" to include corporate officers, contrary to the Water Pollution Control Act; and even though the *BEC* Court had thought that inclusion of officers in the statutory definition of "person" in the Water Pollution Control Act was significant.

Moreover, the *Ventres* Court made clear that the two kinds of officer liability are cumulative. Even when the responsible corporate officer doctrine does not apply, a corporate officer may still find herself liable for torts in which she directly participates. The *Ventres* Court thus reaffirmed the "black letter principle that a corporate officer may be held personally liable for tortious conduct in which the officer directly participated, regardless of whether the statutory basis for the claim expressly allows liability to be imposed on corporate officers."

Further litigation will likely clarify what statutes fall within the category of "strict liability public welfare offenses." For now, the state's businesses and their officers would be wise to bear in mind that competitors and consumers can wield potent legal tools, as *Eder Bros.* and *Ventres* made clear. ■

CIVIL PRACTICE

Supreme Court Settles Trial Court Procedural Problems

Court tackles numerous compelling issues of civil procedure

By **JOYCE YOUNG**

Under what circumstances may a court act on a case after entry of judgment? In two decisions in the last year, the Connecticut Supreme Court cast a generous eye on issues relating to post-judgment jurisdiction.

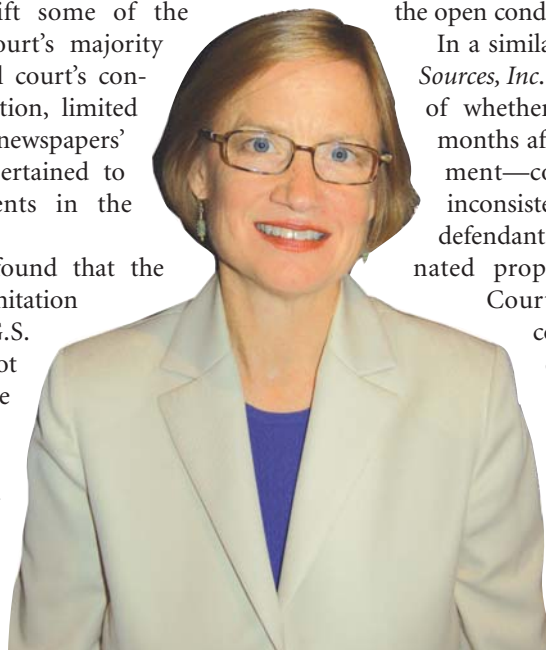
In *Rosado v. Bridgeport Roman Catholic Diocesan Corp.*, a divided Court held on first impression that a trial court has jurisdiction to restore settled and withdrawn cases to its docket in order to consider a motion by intervenors seeking to vacate protective orders.

The protective orders had barred disclosure of documents and information obtained in discovery, and required protected documents to be filed under seal in actions alleging sexual abuse by members of the clergy. The actions were settled and withdrawn.

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Over a year later, newspapers sought to intervene to lift some of the orders. The Court's majority upheld the trial court's continuing jurisdiction, limited to deciding the newspapers' motion as it pertained to sealed documents in the court's files.

The Court found that the four month limitation period of C.G.S. §52-212a did not apply because the orders were injunctive in nature and therefore fell under the continuing jurisdiction exception to C.G.S. § 52-212a. It found the inherent power to revisit protective orders when equitable to be especially compelling in view of the court's supervisory authority over



court documents and the public interest in the open conduct of the judiciary.

In a similar vein, *Rocque v. Light Sources, Inc.* presented the question of whether the trial court—six months after entry of final judgment—could modify earlier, inconsistent orders directing the defendants to clean up contaminated properties. The Supreme Court upheld the trial court's continuing jurisdiction because the earlier judgments were injunctive and would not be vindicated if they were not clarified.

Trial By Jury

Evans v. General Motors Corporation

decided another issue of first impression: whether a plaintiff is entitled to a jury trial for claims under the Connecticut Unfair Trade Secrets Act. The plaintiff, an inventor,

alleged that defendant had misappropriated a cooling system he had developed. The Supreme Court concluded that trade secret claims were recognized at common law and tried before juries in English courts before the Connecticut constitution was adopted in 1818, and therefore remanded the case for a jury trial.

Evans is also notable for its affirmation of the lower court's sanctions order. On the eve of trial, counsel for the defendant informed the court that two of its employees had fabricated "evidence" that defendant had independently developed the cooling system. The court imposed sanctions of \$556,000 in attorneys' fees but declined to grant a default. The Supreme Court upheld the refusal to enter a default on the grounds that forfeitures on liability claims are disfavored; the employees acted independently, without the involvement of superiors; the plaintiff had the opportunity to reopen discovery into the defendant's involvement in the tampering of evidence; and the defendant

■ See **NEXT PAGE**



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■ From **SUPREME** on page 3

immediately disclosed the deception.

Class Certification

Macomber v. Travelers Property and Casualty Corporation provides a comprehensive primer on class certification. *Macomber* was a nationwide class action alleging that the insurance defendants, in structuring settlements to personal injury claims, had routinely engaged in rebating and short changing schemes. To reduce the burden of producing thousands of claim files, the trial court chose a random sample of 28 claims files to evaluate the class criteria. The Supreme Court ruled that this sampling provided an inadequate factual basis upon which to rule on class certification.

Personal Jurisdiction

The Supreme Court in *Reiner v. The Cadle*

Company affirmed the entry of default judgments against an Ohio corporation, even though the parties had agreed to a contractual forum selection clause granting Ohio courts exclusive jurisdiction. The Court concluded that a forum selection clause does not divest Connecticut courts of personal jurisdiction but, rather, gives those courts discretion to decline jurisdiction in recognition of the parties' choice of a different forum.

Reiner provides important guidance on proof of service. The Supreme Court found a signed return receipt card sufficient to prove the defendant's actual notice of the Connecticut actions. The defendant never questioned the veracity of the card and therefore did not overcome the presumption of receipt. Admonishing that "common sense is not to be left at the courthouse door," the Supreme Court upheld as reasonable the lower court's inference that an individual would not sign a return receipt with-

out having a connection to the addressee.

Just as it took a pragmatic view of proof of service in *Reiner*, the Supreme Court in *Fedus v. Planning Zoning Commission of Colchester* cautioned against imposing draconian consequences for technical writ defects. The Court resolved considerable disagreement among trial courts by clarifying that the failure to name the town clerk in the citation on a zoning appeal does not deprive courts of subject matter jurisdiction. The decision cited a liberal modern trend away from stripping courts of subject matter jurisdiction for writ defects.

The Court's analysis in *Board of Education v. Tavares Pediatric* limits the utility of C.G.S. §52-148e, the statutory provision authorizing out of state depositions in "a civil action or probate proceeding." The Court ruled that the trial court should have quashed deposition subpoenas in *Tavares* as improperly issued because the Rhode Island special education administrative

proceeding to which the subpoenas related was not a "civil action" under the statute.

No Weeding Allowed

On the eve of trial, the court in *Vertex, Inc. v. City of Waterbury* decided *sua sponte* to winnow out certain claims in a "case management" order based on legal arguments in the parties' pre-trial memoranda of law. No dispositive motions were pending.

The Supreme Court reversed and remanded. It reasoned that courts are generally limited to adjudicating issues raised by the parties and practice rules do not authorize deciding dispositive legal questions absent a motion. The parties did not knowingly waive the applicable practice rules, and the plaintiff *Vertex* was not afforded notice or a fair opportunity to respond because it was never informed that the pre-trial briefs would be used to rule on the sufficiency of its claims. ■

CASE Law

R E V I E W

CRIMINAL LAW

Skakel: Crown Jewel Of Criminal Jurisprudence

But Supreme Court term filled with cases that created new law

By **PROLOY K. DAS**

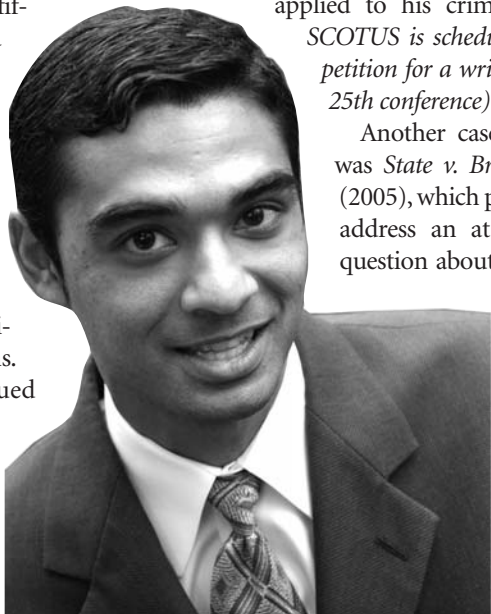
The Connecticut Supreme Court advanced several new principles in its criminal law jurisprudence during the past year.

The most anticipated decision of the year was the 131-page opinion in *State v. Skakel*, 276 Conn. 633 (2006), Kennedy cousin Michael Skakel's appeal from his conviction for the 1975 murder of fifteen-year old Martha Moxley. While media interest in the case focused on the allure of a high-society murder prosecution, the case posed an interesting legal question regarding the retroactive application of criminal statutes of limitations.

The defendant argued that his murder prosecution was barred by the five-year statute of limitations that was in effect in 1975. A 1976 amendment to that statute excepted all class A felonies, including murder, from the limitation period. In arguing that his murder prosecution was time-barred, the defendant, who was arrested in 2000, relied primarily on the Court's holding in *State v. Paradise*, 189 Conn. 346 (1983), that the 1976 amendment had only prospective effect.

The Court concluded that *Paradise* was

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"wrongly decided" and that, because the five-year limitation period for the murder had not yet expired when the statute was amended in 1976, the new statute applied. It reasoned that because criminal statutes of limitations are remedial rather than penal in nature, they could be applied retroactively and that a criminal defendant has no legitimate expectancy interest in a limitation period applied to his criminal conduct. (*Note: SCOTUS is scheduled to review Skakel's petition for a writ of certiorari at its Sept. 25th conference.*)

Another case to garner attention was *State v. Brunetti*, 276 Conn. 40 (2005), which permitted the Court to address an at-the-time unresolved question about the scope of authority to consent to a warrantless search. The police had asked the defendant's parents to sign consent forms to permit a search of their home. The father signed the form; the mother did not. A plurality of the five-judge panel determined that, when joint occupants with equal control over the premises are present, both must consent to the search for it to be valid under the state constitution. Subsequently, in March 2006, the U. S. Supreme Court reached this same conclusion in *Georgia v. Randolph*, and held that a search that is conducted over a present objector is invalid under the federal constitution. However, in July 2006, upon *en banc* reconsideration of the matter by Connecticut, the majority in *State v. Brunetti*, 279 Conn. 39 (2006), reinstated the defendant's conviction after concluding that the record was inade-

quate to review the defendant's unpreserved claim because the mother's decision not to sign the consent form was not tantamount to an objection to the search.

Two other cases are of note in search and seizure jurisprudence. In *State v. Nash*, 277 Conn. 620 (2006), the Court held that police officers may, during an investigative stop, transport the suspect in handcuffs to another location (in this case a police substation) to complete a patdown if the removal of the suspect is motivated by objectively reasonable safety concerns (i.e. the gathering of a crowd). The Court held in *State v. Gonzalez*, 278 Conn. 341 (2006), that a person does not have a reasonable expectation of privacy in a telephone conversation where he fails to ascertain the identity of the person with whom he is speaking. The police had just seized a cellular phone when the defendant called it and placed an order for narcotics.

Web Of Deceit

State v. Sorabella, 277 Conn. 155 (2006), illustrates the relatively new area of Internet criminal activity. The defendant entered an AOL chatroom and began communicating with an undercover police detective who had assumed the persona of a thirteen-year-old girl. After several conversations involving sexually explicit themes, the defendant agreed to meet the "victim" in person for purposes of engaging in sexual relations. Upon arrival, he was arrested and charged with attempt to commit statutory rape, which he argued was not a cognizable crime. The Court held that attempt to commit statutory rape is a recognized offense and that, where the "victim" is not a real person, the state must prove only that the defendant believed that there was a real person under sixteen with whom he was going to engage in sexual relations.

Two significant jury instruction cases were

decided this term. *State v. Patterson*, 276 Conn. 452 (2005), held that a defendant is entitled to have the trial court issue a special credibility instruction, similar to instructions issued for accomplices and complaining witnesses, cautioning the jury to scrutinize a jailhouse informant's testimony. *State v. Montanez*, 277 Conn. 735 (2006), held that a defendant who is charged as an accessory may have the jury instructed on self-defense considered from the perspective of the principal.

Worthy Of Mention

Some other cases from the term are worthy of mention. In *State v. Stevens*, 278 Conn. 1 (2006), the Court held that enforcement of a "no arrest" condition of a plea agreement was proper when the arrest is supported by probable cause. In *State v. Pierre*, 277 Conn. 42 (2006), the Court observed that a defendant's right to counsel does not attach when a prosecutor signs the information. Rather, it attaches after the arrest warrant has been filed with the court at arraignment. In *State v. Tutson*, 278 Conn. 715 (2006), the Court concluded that the notice of alibi requirement under the Practice Book includes any claim, direct or inferential, that the defendant was in a place different from the scene of the crime. Finally, in *State v. Sawyer*, 279 Conn. 331 (2006), the Court resolved the inconsistency in between its two harmless error standards by rejecting both and adopting the federal standard under which nonconstitutional error is harmless when the defendant proves that there is a "fair assurance that the error did not substantially affect the verdict."

The 2005-06 term will be remembered for its crown jewel—*State v. Michael Skakel*. But the term was filled with cases that advanced propositions that will continue to influence our criminal law jurisprudence for years to come. ■

EMPLOYMENT LAW

State Employment Law Advanced By Three Key Decisions

High court considers leave rights, overtime hours and lay witness testimony

By **DEBORAH MCKENNA**

During the last term, the Connecticut Supreme Court determined three cases of importance in the area of labor and employment law, including a case involving the interpretation of the Connecticut Family and Medical Leave Act's provisions regarding reinstatement of an employee following leave; a case involving the interpretation of work for the purposes of overtime pay; and a case involving the admissibility of lay witness testimony as to the legitimacy of the defendant's proffered legitimate non-discriminatory reason in an employment discrimination case.

In *Cendant Corp. v. Commissioner of Labor*, 276 Conn. 12 (2005), the Court considered the proper framework for analyzing a claim in which an employee alleged that her employer had interfered with her right to reinstatement, following exercise of leave rights pursuant to the Connecticut Family and Medical Leave Act (FMLA), C.G.S. § 31-51kk *et. seq.*

The appropriate standard of review to apply to interference claims was a question of first impression for the Court. In conducting its review, the Court noted the legislature's intent to incorporate the provisions of the federal FMLA with that of Connecticut's FMLA, and determined it was therefore appropriate to look to federal jurisprudence for guidance on such claims.

Cendant's attorneys argued that the appropriate analysis was the analysis used in discrimination cases and set out by the U.S. Supreme Court in 1973's *McDonnell*

Douglas Corp. v. Green. Commonly known as the *McDonnell Douglas* analysis, this approach would have placed the burden upon the employee to demonstrate that she was entitled to reinstatement, and required that the employee prove discriminatory intent was the basis for the employer's failure to reinstate her.

The state Supreme Court determined that the majority of federal courts had rejected this approach, instead adopting a "strict liability" analysis. Under the "strict liability" analysis, the burden falls to the employer to demonstrate that it has a legitimate business reason for not reinstating the employee at the end of her leave. The Court acknowledged that this approach does not require a finding of liability on the part of an employer without first considering the employer's reasoning, but ultimately places the burden squarely on the employer.

Timing Is Everything

In *Cashman v. Town of Tolland*, 276 Conn. 12, the state Supreme Court affirmed a lower court decision about Tolland's policy regarding payment of overtime for employees called into work once their shift has ended. The Department of Labor (DOL) had determined that Tolland's policy of paying overtime wages from the time an employee punched in and received his assignment, rather than when the employee was notified that he must report to work, violated C.G.S. § 31-72.

Connecticut General Statutes § 31-76b(2)(C) defines hours worked for overtime purposes and, in relevant part, states:

"When an employee is subject to call for emergency services but is not required to be at a location designated by the

employer but is simply required to keep the employer informed as to the location at which he may be contacted, or when an employee is not specifically required by his employer to be subject to call but is contacted by his employer or on the employer's authorization directly or indirectly and assigned to duty, working time shall begin when the employee is notified of his assignment and shall end when the employee has completed his assignment."

C.G.S. § 31-76b(2)(c).

The DOL argued that "working time" began when Tolland called the employees and told them to report to work, because that was when the employees were "notified of their assignments." Tolland claimed that an employee was not notified of his assignment until he punched in at the garage.

Both parties filed for summary judgment, and the trial court, relying upon the principles of statutory interpretation, granted judgment for Tolland. In its decision, the trial court noted the significance of legislature's use of the term "contacted" in the statute and the fact that it preceded the definition of "when work began." The court then concluded that, had the legislature meant to define "when work began" as from the time an employee was contacted, it would have and could have done so. In affirming the lower court's decision, the Court explicitly adopted that lower court's analysis of the statute.

'Naked Speculation'

In *Jacobs v. General Electric Co.*, 275 Conn. 395 (2005), the Supreme Court reviewed the sufficiency of a jury charge in a discrimination claim and analyzed the standard for admitting lay witness testimony.

The plaintiff had challenged the jury

charge on two grounds. First, the court stated that the plaintiff was required to prove that the defendant's proffered reason was false. Second, the court failed to distinguish between direct and indirect proof in employment discrimination claims.

Upon review, the Court agreed that it was contrary to established law to require that the plaintiff prove that the defendant's stated reason was false. Furthermore, the Court concluded that a jury must be instructed that there are two ways in which a plaintiff can prove intentional discrimination—either by direct evidence of a discriminatory motive; or indirectly, relying upon circumstantial evidence to show that the defendant's legitimate non-discriminatory reason is pretextual.

The Court then considered the admissibility of testimony given by two lay witnesses, who the defendant offered in support of its legitimate non-discriminatory reason, but who had not participated in the decision to select the plaintiff for lay off. The Court looked to both Section 7-1 of the Connecticut Code of Evidence as well as Section 701 of the Federal Rules of Evidence in reaching its conclusion. Additionally, it considered the holding of the U.S. Court of Appeals for the 2nd Circuit that "in an employment discrimination action, Rule 701(b) bars lay opinion testimony that amounts to a naked speculation concerning the motivation for a defendant's adverse employment decision..."

The Court then concluded that, since neither witness participated in the layoff decision or had first hand knowledge of the basis for the decision, the potential "helpfulness of the testimony" was outweighed by the potential for prejudice, and held that such testimony was inadmissible. ■

Deborah McKenna is a partner with the Hartford employment law firm Livingston, Adler, Pulda, Meiklejohn & Kelly, P.C., in Hartford, which represents employee and union clients.

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FAMILY LAW

Two Decisions Dominate Past Court Term

Both cases likely to have lasting impact on practice of family law

By **GAETANO FERRO**
and **NORMAN A. ROBERTS II**

During the past twelve months, the Connecticut Supreme Court issued two opinions which will have a lasting impact on the practice of family law.

In one of the Supreme Court's most important family law decisions in decades, *Carrubba v. Moskowitz*, 274 Conn. 533 (2005), the Court created absolute immunity for attorneys appointed under C.G.S. § 46b-54 to represent children in dissolution of marriage and other cases. In *Carrubba*, the plaintiff father sued a court-appointed attorney for infliction of emotional distress

and for legal malpractice because of her actions in his dissolution of marriage case.

The trial court granted the defendant's motion to dismiss. The Appellate Court affirmed, holding that the attorney for the minor child (AMC) was entitled to qualified, quasi-judicial immunity. The Supreme Court affirmed, concluding that AMCs are entitled to absolute quasi-judicial immunity. The Court also, for the first time, clarified the AMC's role.

In reaching the determination that an AMC performs a function that is "integral to the judicial process," the Court prioritized the functions of the AMC:

... [W]e recognize that such attorneys perform a hybrid role because of their simultaneous duty to function as an advo-

cate for the child. That function, however, must always be subordinated to the attorney's duty to serve the best interests of the child. . . . Thus, even the advocacy role of the appointed attorney for the minor child may be reconciled with the attorney's primary duty—to assist the court in serving the best interests of the child.

Id. at 546-47.

As a result of *Carrubba*, AMCs will be able to perform their invaluable and often thankless functions with minimal concern for a disgruntled parent's litigation or threats of litigation against them. AMCs will be free to advocate their clients' best interests, even if in conflict with the client's stated preference, which may be influenced by their immaturity or by parental pressure.

The most discussed recent Supreme Court family law decision is *Weinstein v. Weinstein*, 275 Conn. 671 (2005). In *Weinstein*, the

defendant valued his interest in a closely-held company (PTI) at the time of trial (April 16-17, 1998) at \$40,000. On May 12, 1998, the trial court issued judgment. On May 29, 1998, the defendant filed a motion for reconsideration, claiming that the court's orders would "strip him bare."

On June 15, 1998, while that motion was pending, the defendant received an offer to purchase PTI for \$2.5 million. Had that offer been accepted, the defendant would have netted approximately \$500,000. The defendant and his

partners,

however, rejected that offer as being "too low." The defendant did not bring the offer to the attention of the court or the plaintiff.

On June 16, 1998, the day after the \$2.5 million offer was rejected, the trial court denied the motion for reconsideration. About five months later, PTI was sold for \$6



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... [W]e recognize that such attorneys perform a hybrid role because of their simultaneous duty to function as an advo-

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million and the defendant realized approximately \$1,450,000. The plaintiff learned of the sale and moved to open the judgment on the basis of fraud.

The trial court denied the motion. The Appellate Court affirmed. In a 3-2 decision, the Supreme Court reversed. The majority appropriately framed the question before it as:

... whether the trial court *reasonably* could have concluded that there was not clear and convincing evidence that: (1) a fiduciary would have had a duty to disclose the withheld information to a beneficiary; and (2) a fiduciary would have committed fraud in withholding that information from a beneficiary.

Id. at 691.

The Court's answer to this question entangled the defendant in his own valuation of his interest in the company. "[T]he fact that the defendant based his valuation *solely* on the company's book value simply means that his valuation patently was flawed for the same reason he said [the \$2.5 million offer] was flawed—it failed to account for the worth of the intellectual property asset." *Id.* at 690.

The Court also addressed the claim that the defendant was obligated to disclose the \$2.5 million offer made—and rejected—while the motion for reconsideration was pending, concluding that the defendant's

failure to disclose the offer was fraudulent. The Court interpreted the continuing duty to disclose "prior to and during trial," contained in P.B. § 13-15, to mean that disclosure was mandated even after trial, until judgment is final. A scathing dissent excoriated the majority for many, if not all, of the analyses in its opinion—including having, in effect, amended the plain language of P.B. § 13-15.

Reasonable persons will differ about the decision in *Weinstein*. Its likely impact on the day-to-day practice of family law will be to increase the discovery burdens on the parties and their lawyers by requiring them to provide information through the

time a judgment becomes final, if a party learns of "additional or new material or information . . . or discovers that the prior compliance was totally or partially incorrect or, although correct when made, is no longer true and the circumstances are such that a failure to amend the compliance is in substance a knowing concealment . . ." P.B. §13-15.

Of course, while *Weinstein* increases the discovery burdens in dissolution cases it also promotes the policy of full and frank disclosure in marital actions. Only time will tell whether the requirement of post-trial disclosure proves to be a burden that outweighs its salutary effects. ■

CASE Law

R E V I E W

PROFESSIONAL RESPONSIBILITY

Judicial Decisions Less Important Than New Rules

The year's highlight was adoption of major changes to Rules of Professional Conduct

By **WESLEY W. HORTON**
and **KIMBERLY A. KNOX**

The most important event of the past year regarding the professional responsibility of lawyers was the adoption in June 2006 of massive changes in the Rules of Professional Conduct, mostly effective Jan. 1, 2007. Most of these changes—all approved by the superior court judges—were adopted on the recommendation of the Connecticut Bar Association and its Committee on Professional Ethics; and most of the recommendations were based on changes in the Model Rules adopted by the American Bar Association in 2002 and 2003.

These changes are beyond the scope of this brief article, but all judicial decisions concerning the Rules need to be read carefully to see if the revised Rules would alter the outcome. Three amendments to note particularly are: random audits under Rule 1.15; new confidentiality parameters under Rule 1.6; and mandatory filing of attorney advertising, P.B. § 2-28A.

During the past year, the Supreme and

Appellate Court decisions regarding ethics were of only modest significance. *Shelton v. Statewide Grievance Committee*, 277 Conn. 99 (2006), and *Notopoulos v. Statewide Grievance Committee*, 277 Conn. 218 (2006), which were decided a week apart, are at the tipping edge—on each side—of what constitutes substantial evidence to sustain a finding of a violation. The complainant did not testify in either case, and the complaint was considered by the committee as evidence.

The Tipping Edge

The lawyer in *Notopoulos* lost; the lawyer in *Shelton* won. The former concerned a letter making unfounded accusations against a probate judge; the latter concerned an oral statement that the lawyer testified he never made. So a complaint based on a document whose authenticity is not denied is sufficient; a complaint based on an oral statement denied by the lawyer is not.

We agree with that distinction, although it would have been nice if

the later case, *Notopoulos*, had at least recognized the existence of *Shelton*.

A similar decision by the Appellate Court, *Irving v. Statewide Grievance Committee*, 96 Conn. App. 335 (2006), reversed a reprimand where the lawyer testified in court that he did not receive notice of the Grievance Committee's hearing.

Notopoulos reiterates prior holdings that the Rules apply to a lawyer acting *pro se* and expressly applies that holding to Rules 8.2(a) and 8.4(4). The case also clearly holds that a violation of 8.2(a) is sufficient to find a violation of 8.4(4) as well.

Lawyers who aren't sure what to do when a client has perpetuated a fraud on the

court should read Rule 3.3 and *Evans v. General Motors Corp.*, 277 Conn. 496, 521-22 (2006). There the lawyers, within one day of discovering the fraud, notified the court of the ethical issues under 3.3. This prompt action, along with the fact that the fraud was perpetrated only by two low-ranking employees of the defendant, convinced the trial court and the Supreme Court not to enter judgment against the defendant.

The final Supreme Court decision of note is *State v. Perez*, 276 Conn. 285 (2005). *Perez* had lost his appeal in the Appellate Court, and his lawyer filed a sizzling motion to reargue. The Appellate Court responded with its own sizzling order accusing the lawyer of misrepresenting a fact. The lawyer succeeded in getting the order reversed in the Supreme Court, but not before the Supreme Court worked the lawyer over in its opinion. Upset lawyers drafting motions for reconsideration would be well advised to seek a second opinion before filing.

In The Pipeline

The three most interesting Appellate Court decisions were all issued over a year ago but certification was granted in September 2005: *Falls Church v. Tyler*, 89 Conn. App. 459, *cert. granted*, 275 Conn. 908 (2005); *Fontanella v. Marcucci*, 89 Conn. App. 690, *cert. granted*, 275 Conn. 901 (2005); *Statewide Grievance Committee v. Burton*, 88 Conn. App. 523, *cert. granted*, 276 Conn. 901 (2005). *Fontanella* was argued to the Supreme Court in March 2006; the other two are on the September 2006 docket.

Falls Church is a very scholarly opinion by Judge Grundel holding that a claim of vexatious litigation is judged by a wholly objective standard. The court also properly concurred that introducing a subjective standard would turn virtually every vexatious litigation case into an issue of fact and

chill the bringing of novel issues.

Fontanella is a questionable decision by Judge Flynn holding that the statute of limitations for a legal malpractice action, where the malpractice claim concerns damages only, does not run until the underlying claim is disposed of. But suppose no underlying case is brought. What then? The authors are not persuaded by the argument in *Fontanella* distinguishing prior precedent to the contrary.

Burton concerns the obscure but academically interesting question whether the Committee can discipline a disbarred lawyer. The Appellate Court said yes (2-1), but stay tuned.

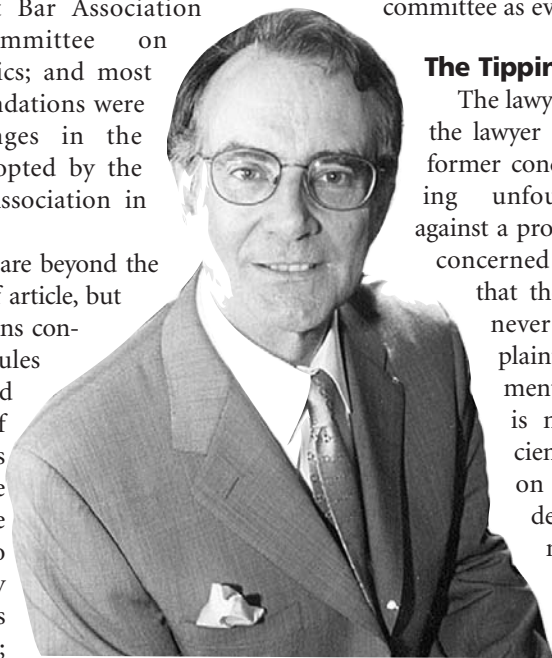
Three recent Appellate Court decisions are of modest note.

One is *Vines v. Commissioner of Correction*, 94 Conn. App. 288, *cert. denied*, 278 Conn. 922 (2006), discussing perils of representing two criminal defendants, one of whom may be a

witness in the other case. No conflict was in fact found, but lawyers need to be very careful before becoming involved in two such cases.

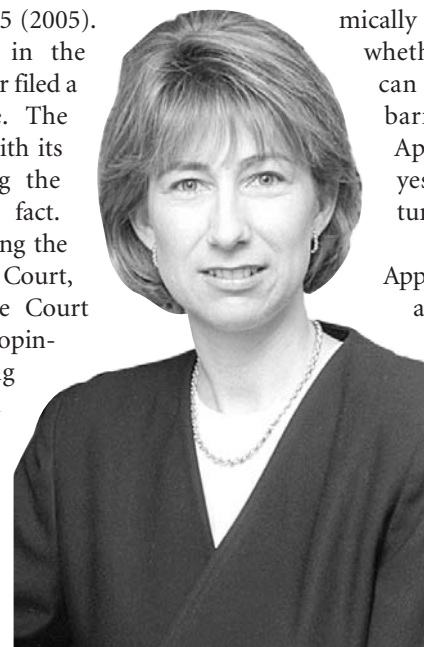
A second recent case is *Machado v. Statewide Grievance Committee*, 93 Conn. App. 832 (2006), holding that a lawyer acting beyond his initial authority is in violation of Rules 1.2 and 1.4.

Avoiding a grievance is often just a matter of communication, communication, communication. The third recent case is *Dixon v. Bromson & Reiner*, 95 Conn. App. 294 (2006), reminding us that expert testimony is normally required in a legal malpractice case, even in a courtside case, on both negligence and causation. ■



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REAL PROPERTY

Court Tackles Multiple Real Property Issues

Smorgasbord of decisions includes eminent domain, sovereign immunity

By **EDWARD V. O'HANLAN**

This article highlights decisions by the Connecticut Supreme Court from August 2005 to August 2006 in the area of Real Property Law. There is not space for a comprehensive discussion of any single case, but the significant decisions are summarized below, grouped by issue.

Eminent Domain

In 2005-2006, the Court continued to deal with issues of eminent domain, particularly valuation. In *Albahary v. City of Bristol*, the Court ruled in 2005 that a property owner's pre-taking environmental

injury was appropriately included in the valuation of the taking. In *Comm'n of Transp. v. Rocky Mt. LLC*, the Court upheld the trial court's valuation of an easement for commercial billboards. The billboards constitute personal property that is not subject to the condemnation action, and future business income from the billboards—while a factor in valuing the easement itself—is not separately compensable.

The Court also heard one case involving economic development agencies, *Maritime Ventures v. Norwalk*, in which it affirmed that a redevelopment agency has no duty to integrate non-substandard properties into its redevelopment plan when the plan does not permit the uses exercised by that property; further, that the redevelopment agency, in amending its development plan, as distinct from adopting a new plan, is not required to make a new finding of blight.

Zoning

In *Lewis v. Planning & Zoning Commission*, the Court ruled in 2005 that the plaintiff lacked standing under C.G.S. § 22a-416, in accordance

with its 2003 decision in *Connecticut Coalition Against Millstone v. Rocque*. In *Jalowiec Realty Associates v. Planning & Zoning Commission*, the Court reaffirmed the mandatory statutory time frames in C.G.S. § 8-3(g) for decisions on site plans applications, and the appropriateness of the remedy of mandamus for a zoning commission's failure to act.

In *City of Bridgeport v. Planning & Zoning Commission*, the Court ruled that the notice requirement under C.G.S. § 8-3(a) for zone change applications is jurisdictional and also requires strict compliance. Adopting the reasoning of two Appellate Court cases, the Court found that a notice's reference to the

maps located in other Town Hall offices is not sufficient. In *Fedus v. Planning & Zoning Commission*, the Court confirmed the post-*Simko* liberal approach to pleading defects in administrative appeals, and reversed the dismissal of an appeal that failed to name the municipal clerk in the citation.

In *Moutinho v. Planning & Zoning Commission*, the Court addressed statutory and classical aggrievement. First, it reiterated earlier holdings that the owner of a property that is the subject of the application—even if not a party to the application—is nevertheless statutorily aggrieved. Second, the Court adopted an Appellate Court ruling that, when the evidence establishes the existence of an oral agreement and the intent of the parties to abide by that agreement, “a substantial and legitimate interest” in the property exists so as to meet the first prong of the test for classical aggrievement.

In *Campion v. Board of Alderman*, the Court reversed the Appellate Court and expressly found that planned developed districts, like floating zones, are among the legitimate zoning choices the City of New Haven may exercise pursuant to its 1925 Special Act. In *Graff v. Zoning Board of Appeals*, the Court reasoned that pets are regulated as accessory uses on residential property, that the ZBA's setting of an enforceable limit on pets was a clarification, not a substantive change in the regulations, and that the zoning regulation regarding accessory uses was

not unconstitutionally vague for not addressing pets specifically.

Conveyances

In *Alexson v. Foss*, the Court discussed the favored nature of alternate dispute resolution and the law for examination of challenges to arbitration awards. Specifically, C.G.S. § 47-28, an 1841 statute requiring that agreements to arbitrate over real property be executed with the same formality as deeds conveying real property—and that both the agreement and award be recorded—is not jurisdictional in nature, but simply a “recording statute.”

In *Henry Morganbesser, et al. v. Aquarion*, the Court interpreted a restrictive covenant that limited use of a nonconforming residential lot to “water supply purposes or purposes incidental or accessory thereto” to exclude a wireless communication antenna attached to the water tower and related equipment on the ground below. In *Socha v. Bordeau*, the Court overturned summary judgment in a property dispute over ownership of land beneath Gardner Lake in the town of Bozrah. The Court distinguished between concepts of title and possession as affecting remedies for trespass, including injunction and damages.

Inland Wetlands/Environmental

In *Ventres v. Goodspeed*, and its companion *Rocque v. Mellon*, the Court rejected claims that Federal Aviation law preempted local wetland jurisdiction, interpreted C.G.S. § 22a-42(c) to include the removal of trees, and held that under the Inland Wetlands and Watercourses Act (IWWA), C.G.S. § 22a-36 *et seq.*, “land” includes the vegetation and any other things “of a permanent nature affixed thereto or found therein.”

Easements

In *McBurney v. Cirillo*, the Court discussed the circumstances of how an implied easement may be created by the filing of a map. It also rejected a prescriptive easement theory because the lower court improperly allowed the “tacking” of periods of time without evidence of privity between successive land owners.

Real Property Liens

In *D'Angelo Development & Const. Co. v. Cordovano*, the Court found that the New Home Construction Constructors Act is not analogous to the Home Improvement Act in terms of invalidating contracts by reason of noncompliance. Accordingly, a mechanic's lien was properly filed for nonpayment, and the brief technical violation of the New Home Construction Constructors Act was not a defense to that lien.

Sovereign Immunity

In *Martel & Metropolitan District*, the Court clarified that the exception to sovereign immunity for a proprietary function must be pleaded with specificity and demonstrate “an inexplicable link or inherently close connection between the plaintiff's specific allegations of negligence and the defendant's proprietary operation of the property.” ■



In Fedus v. Planning & Zoning Commission, the Court confirmed the post-*Simko* liberal approach to pleading defects in administrative appeals, and reversed the dismissal of an appeal that failed to name the municipal clerk in the citation.

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TORTS

Private Wrongs Decided On Basis Of Public Policy

Court determines liability waiver, malpractice assignment cases on policy grounds

By **BRENDEN LEYDON**

This past year saw a number of interesting decisions in tort and insurance law by the Connecticut Supreme Court. Some of the more notable cases are discussed below.

In *Hanks v. Powder Ridge Restaurant Corporation*, 276 Conn. 314 (2005), the Court dealt *en banc* with the issue of a liability waiver prospectively releasing the defendant from liability for its own negligence. In particular, the plaintiff was using the Powder Ridge ski resort facility for snow tubing with his children. While snowtubing, the plaintiff's foot became caught between the snowtube and a man-made bank of the snowtubing run, resulting in serious injuries that required multiple surgeries.

The trial court granted summary judgment, holding that the liability waiver signed by the plaintiff as a condition of using the facility precluded him from

bringing the action, based on its 2003 decision in *Hyson v. White Water Mountain Resorts of Connecticut, Inc.*

In a vigorous dissent, Justice Flemming L. Norcott Jr., joined by Justices David M. Borden and Richard N. Palmer noted that they believed the waiver should be enforceable. The dissent's reasoning focused on contractual freedom, noting that "it is established well beyond the need for citation that parties are free to contract for whatever terms on which they may agree."

It is somewhat unclear how far this decision will reach in terms of the types of businesses that currently employ such liability waivers; but given the majority's fairly broad analysis and primary use of the terms "recreational operator" rather than ski resort or something more narrow, it appears that the scope is intended to be broad.

Commercialization Of Legal Malpractice

In *Gurski v. Rosenblum & Filan, LLC*, 276 Conn. 257 (2005), the Court unanimously held that the

underlying action creates a distortion that the profession cannot endure and thus should not tolerate." The Court did make clear that it was limiting its holding to voiding such assignments to the adverse party in the underlying litigation.

Hospital Drama

In *Sherwood v. Danbury Hospital*, 278 Conn. 163 (2006) (*Sherwood II*), the Court unanimously held that the plaintiff's surgeon, and not the hospital, had the duty to inform the plaintiff of the risks of a blood transfusion, including the risk of contracting HIV. This was actually the second trip to the Supreme Court for the case: in 2000's *Sherwood I*, the Court reversed a summary judgment granted on the grounds of a statute of limitations defense.

In *Sherwood II*, the plaintiff brought a claim against Danbury Hospital as a result of contracting HIV from blood given her as a result of a surgical

procedure performed by a nonemployee treating physician at the hospital. The trial court on remand determined that it is the duty of a nonemployee treating physician—and not the hospital—to inform the patient of the risks and benefits of, and alternatives to, a proposed medical procedure; and to obtain the patient's informed consent before performing any such procedure.

Justice Palmer, writing for the Court, explained that "it is not the hospital but the

patient's physician who, by virtue of his or her relationship with the patient and knowledge of the patient's medical condition and history, can best advise the patient of the risks and other pertinent information relative to a blood transfusion."

Carrano v. Yale-New Haven Hospital, 279 Conn. 622 (2006), decided August 22, 2006, is interesting for a number of reasons. In *Carrano*, the Court, in a 3-2 decision, reversed the Appellate Court and held that a trial court's discretionary determination to award additional peremptory challenges to one party is subject to harmless error review. As a result, in the absence of a showing of harm, the Court would not review the decision.

Furthermore, the Court reversed the lost wages and earning capacity award for \$738,029.85 on the grounds that "the plaintiff failed to present any evidence, expert or otherwise, from which the jury reasonably could determine the amount of the decedent's personal living expenses or income taxes."

The majority opinion was written by Justice Christine S. Vertefeuille, joined by Justice Katz and Judge Edward R. Karazin Jr. sitting by designation. Justice Peter T. Zarella, joined by Justice Borden, dissented on the harmless error determination. This case is something of an anomaly in that it is a 3-2 decision where a deciding vote was cast by a Superior Court judge sitting by designation, which would seem to call out for *en banc* review. ■



Writing for the majority in *Hanks*, Chief Justice William J. Sullivan noted that the law does not favor contract provisions that relieve parties from their own negligence.

bringing the action, based on its 2003 decision in *Hyson v. White Water Mountain Resorts of Connecticut, Inc.*

The Supreme Court, in a divided 4-3 decision, held that the liability waiver was void as against public policy. Writing for the majority, Chief Justice William J. Sullivan noted that the law does not favor contract provisions that relieve parties from their own negligence. This doctrine was employed by the Court earlier, in *Hyson*, to decide that the particular waiver in that case was ineffective, while expressly leaving open the question of whether such a waiver could ever be effective. When squarely compelled to answer that question in *Hanks*, the Court determined such a waiver is improper.

The Court reasoned that, due to the nature of the transaction, the plaintiff was under the care and control of the defendant. Furthermore, the plaintiff lacked the knowledge, experience and authority to determine, much less ensure, that the snowtubing runs were maintained in a reasonably safe condition. Therefore, the Court concluded it would be illogical to permit users of the facility, and the public generally, to bear the costs of risks they have no ability to control.

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assignment of a legal malpractice claim—or the proceeds from such a claim—to an adversary in the underlying litigation that gave rise to the malpractice is against public policy, and therefore unenforceable.

The underlying facts in *Gurski* were that the plaintiff had previously been sued by Susan Lee for podiatric malpractice. Ultimately a default judgment was entered against Dr. Gurski in the amount of \$152,000.00. Thereafter, as part of a settlement of Gurski's bankruptcy case, the bankruptcy estate assigned to Lee the estate's interest in a legal malpractice claim against Gurski's counsel in the podiatric malpractice case. After a jury trial, judgment was entered against the law firm for legal malpractice.

On appeal, the Court held that such an assignment was void as against public policy. Writing for the Court, Justice Joette Katz explained that "allowing assignments would: convert a legal malpractice claim into a commodity; undermine the sanctity of the attorney-client relationship; result in decreasing the availability of legal services to insolvent clients; impact negatively on the duty of confidentiality and further the commercialization of malpractice claims that in turn would spawn an increase in unwarranted malpractice actions."

Thus, the Court concluded "that the assignment of a malpractice action to an adverse party in the

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