



CONNECTICUT SUPREME COURT 2011

A CHANGING CAST MAKES QUICKER DECISIONS

Justices jump into politics and welcome two new members

By DAN KRISCH

Two events dominated the past year for the state Supreme Court: Its involvement in the 2010 election cycle and the sudden retirement of Justice Joette Katz to become Commissioner of the Department of Children and Families.

The former serves notice that, for better or worse, our courts have become the forum of last resort for election disputes; the latter marks the end of a long and brilliant judicial career and the departure of arguably the Court's last liberal justice.

Before I turn to those subjects, however, an update: Last year in this publication, I lamented the "snail's pace" at which the Court issued a significant number of its opinions. I am happy to report — without claiming *post hoc, ergo propter hoc* credit — that the Court radically improved this aspect of its work in 2010-11.

Between Sept. 14, 2010, and Aug. 30, 2011, the Court issued 127 opinions. Only two of these took more than a year from the time of argument to be officially released (compared with 20 out of 147 the previous year), while an additional four took between 10 and 11 months. In addition, the Court issued 76 of the 127 opinions, nearly 60 percent, in less than four months and another 38 opinions, or about 30 percent, in five to eight months.

To the extent that, as I posited last year, lengthy delays in the issuance of opinions breed disrespect for the Court as an institution, or invite legislative interference with the appellate process, the Court has taken enormous strides to alleviate the problem.

Indeed, alacrity was a hallmark of the Court's handling of two of the cases that made the biggest headlines in 2010: *Bysiewicz v. Dinardo*, 298 Conn. 748 (2010), and *Foley v. State Elections Enforcement Commission*, 297 Conn. 764

in on two statewide elections of such note.

First, while *Bysiewicz* and *Foley* involved unrelated issues of statutory construction, the one thing they had in common was the laudable dispatch with which the Court heard and resolved them. In *Bysiewicz*, the intervenor Republican Party appealed on May 11; the plaintiff moved to expedite the appeal on May 12; the Court immediately granted the motion and ordered simultaneous briefs to be filed on May 14; the Court heard oral argument on May 18 at 2 p.m., and announced its decision on the merits at 4:30!

Foley moved with the same speed from appeal (July 20) to decision (July 27). Although in each case, the Court did not issue its full opinion until later — August in *Foley* and October in *Bysiewicz* — the Court showed a commendable willingness to set aside its other business in order to resolve these pressing disputes.

'Active Practice' Ruling

On their merits, *Bysiewicz* was by far the more important of the two cases, both in its immediate impact and probable long-term consequences. A 5-2 majority of the Court held that the phrase "ten years' active practice at the bar of this state" in Connecticut General Statutes § 3-124, which governs the qualifications for attorney general, means both a minimum of 10 years as a member of the Connecticut bar and at



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The immediate impact of *Bysiewicz* was to knock the plaintiff, the front runner for the Democratic nomination, out of the race. However, the decision also sparked a fairly intense debate in legal circles about whether, in this day and age, only a litigator should be qualified to be attorney general. The debate led to proposed legislation, H.B. 6342, that would have eliminated the "active practice" requirement from § 3-124 and, instead, simply required the attorney general to be a member of the Connecticut bar for at least 10 continuous years. However, while the House passed the bill in May, it died in the Senate.

Foley, in contrast, concerned a narrower issue with less potential for long-term effect: whether Michael Fedele, one of the candidates for the Republican gubernatorial nomination, had received enough independent, small contributions to qualify for matching funds under Connecticut's recently-passed public financing law. The Court gave a generous reading to the relevant statutes, Conn. Gen. Stat. §§ 9-702 & 9-704, which allowed Fedele's campaign to get matching funds and continue in the race (although he lost the August primary to the plaintiff).

Changing Of Guard

The other noteworthy happening for the Court in 2010-11 was a changing of the guard: First, two new justices joined the Court: In June 2010, Justice Dennis Eveleigh replaced Justice Christine Vertefeuille, who took senior status. In March 2011, Justice Lubbie Harper was elevated from the Appellate Court to replace Justice Katz, who had stepped down two months earlier.

Justice Eveleigh, who spent a number of years on the Complex Litigation Docket before his elevation to the Supreme Court, already has displayed an independent streak unusual in a new justice. In his short tenure, he has authored four dissents on a wide range of topics; it will be interesting to see if he continues to forge a sometimes lonely path in the tradition of such thoughtful dissenters as Justice Joseph Bogdanski.

Meanwhile, Justice Harper, who spent almost six years on the Appellate Court before his promotion, is likely to remain what he was for those six years: an extremely active and incisive questioner at oral argument and a generally moderate swing vote.

It is fitting, then, to end this article with an ending. After nearly 19 years on the Court, Justice Katz abruptly retired in January to take on the arduous and unenviable task of reforming the Department of Children and Families. While the announcement shocked the bar, it is an apt change of office — if one had to come — for a justice who wrote numerous important opinions concerning children.

For those who practiced in front of her, it seems too much an empty truism merely to

note that the Court's loss is DCF's gain. Justice Katz's keen intellect, eloquent pen and pointed sense of humor ensure her a place among the Court's greatest modern Justices.

While she asked few questions at oral argument, there was no more terrifying sight for a lawyer who had just cited a past decision than to see her rise from her chair, walk to the bookshelves behind the bench, take down a volume of the Connecticut Reports and begin thumbing through its pages while nodding to herself, or whispering a comment to the justice next to her. A lawyer in that position knew that, more than likely, disaster loomed in the form of a softly-intoned, but slightly sardonic, question.

Final Clash

Fittingly for someone who, before becoming a judge, spent most of her career as a public defender, Justice Katz's tenure closed with one final clash in a controversial criminal appeal: *State v. Kitchens*, 299 Conn. 447 (2011) (and its related progeny), which rewrote the rules for appellate review of unpreserved constitutional claims. The Court held, by a 4-3 vote, that

if a defendant's trial counsel has a "meaningful" opportunity to review a draft of the court's proposed charge and the court solicits comments about that draft, the subsequent failure to voice an objection acts as an implied waiver of any constitutional challenge on appeal.

Although Justice Katz moved slightly to the center — as did the Court as a whole — after her first few years on the bench, she has remained a reliably pro-defendant vote in criminal cases during her two decades on the Court. She often dissented by herself on such topics as the burden of proof for the voluntariness of a confession. However, even as the Court grew increasingly unfriendly to criminal defendants over the past decade, Justice Katz never gave into the temptation to resort to Berdon-ian language in dissent.

Kitchens, though, proved to be the straw that broke the camel's back of Justice Katz's patience and she left the Court with harsh words for what she termed the majority's "evisceration" of *Golding*. Usually averse to showy rhetoric, Justice Katz opened her separate opinion in one of the companion cases to *Kitchens* in acerbic, albeit Bardic, fashion: "To paraphrase William Shakespeare, I write to bury [*Golding*], not to praise it." *State v. Brown*, 299 Conn. 640, 662 (2011) (Justice Katz,, concurring). As befits a reference to the most famous funeral oration in Western literature, Justice Katz's words were more lament than dissent for the apparent emasculation of *Golding* review and the ascendance of a new, and less sympathetic, criminal jurisprudence.

Whether Justice Katz's dire predictions come to pass or not, one thing is clear: Her departure marks a sea change for the Court she has left behind. ■

OVERVIEW

Fittingly for someone who, before becoming a judge, spent most of her career as a public defender, Justice Katz's tenure closed with one final clash in a controversial criminal appeal.

(2010). (The author represented the plaintiff in both cases.)

The Court has put its oar into election waters in the past, most recently to resolve allegations of polling place irregularities in Bridgeport's 2008 municipal primaries. See *Caruso v. Bridgeport*, 285 Conn. 618 (2008); *Simmons-Cook v. Bridgeport*, 285 Conn. 657 (2008). But it has been more than a century — since the Court's ill-fated non-intervention in the 1892 gubernatorial contest between Luzon Morris and Morgan Bulkeley — that the justices have weighed

least some experience litigating cases in court.

The two concurring justices agreed with the former, but not with the latter, and would simply have held that the plaintiff's eight years of practice and 12 years as secretary of the state did not qualify her for the office because the latter role did not constitute the "active practice" of law — and therefore she fell two years short of the statutory threshold. (The court also held, unanimously, that the statute was not unconstitutional under Article Sixth, § 10 of the Connecticut Constitution.)

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PARSING THE 'SIMILAR PROVIDER' STATUTE

After series of split decisions, the edge goes to the plaintiff

By CAREY REILLY

In the last year, the arena of medical practice was dominated by four state Supreme Court cases representing the Court's on-going wrestling match with the 2005 amendments to Connecticut General Statutes § 52-190a.

While the heats split, with two going to the defendant and two going to the plaintiff, the final — and perhaps most important one moving forward — was won by the plaintiff. The only other case of serious note was one in which the Court held that a plaintiff's expert, who was properly disclosed on the issue of what was the cause of the plaintiff's injury, could likewise testify as to what was not the cause of the same. Further, despite the fact that the jury did not find a breach of the standard of care, the plaintiff's claims related to causation were reviewable since the standard of care and causation were inextricably intertwined.

To understand the cases decided under § 52-190a, it is necessary to parse the language of the statute first. A plaintiff cannot sue a health care provider for malpractice unless he has first "made a reasonable inquiry...to determine that

there are grounds for a good faith belief that there has been negligence in the care or treatment of the" plaintiff. The complaint must contain a certificate of the attorney that such "reasonable inquiry gave rise to a good faith belief that grounds exist for an action against each named defendant."

To show the existence of such good faith, the plaintiff's attorney "shall obtain a written and

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signed opinion of a similar health care provider, as defined in section 52-184c...that there appears to be evidence of medical negligence and includes a detailed basis for the formation of such opinion."

Finally, a copy of the written opinion, with the name and signature of the similar health care provider redacted must be attached to the attorney's certificate of good faith and the "failure to obtain and file the written opinion...shall be grounds for the dismissal of the action."

In *Bennett v. New Milford Inc.*, 300 Conn. 1 (2011), the Court determined that "in cases of specialists, the author of an opinion letter pursuant to § 52-190a (a) must be a similar health care provider as that term is defined by § 52-184c (c) regardless of his or her potential qualifications to testify at trial pursuant to § 52-184c (d)." Furthermore, § 52-190a (c) requires dismissal if the opinion letter does not comply with § 52-190a.

In *Bennett*, because the plaintiff alleged that the defendant Dr. Frederick Lohse was a specialist in emergency medicine, the author of the opinion letter had to be a similar health care provider as defined in § 52-184c (c), i.e. a board certified emergency medicine physician. Because the opinion author was not properly qualified, § 52-190a (c) required dismissal of the plaintiff's action. In other words, for purposes of the opinion letter in a case against a medical specialist, there must be an apples-to-apples pairing.

Hope For Plaintiffs

Immediately following *Bennett*, the Supreme Court gave plaintiffs a glimmer of hope that all perhaps was not lost if they had not initially selected the correct type of health care provider to author the pre-suit opinion letter. In *Plante v. Charlotte Hungerford Hospital*, 300 Conn. 33 (2011), the Court determined whether the accidental failure of suit statute, General Statutes

§ 52-592, can save an otherwise time barred medical malpractice action commenced after the dismissal of a prior action pursuant to § 52-190a for failure to attach the opinion of a similar health care provider.

In short, the answer was a big "maybe" depending on how egregious the misconduct of plaintiff's counsel was in choosing the expert he did. The best-case scenario arises when the opinion letter author likely would have been qualified to testify under the "overlap" section of the § 52-184c (d) (2), i.e., a non-similar health care provider with sufficient training, experience and knowledge in a related field.

Shortly thereafter the Court decided *Shortell v. Cavanagh*, 300 Conn. 383 (2011), in favor of the plaintiffs. In this case, the Supreme



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EXPERT WITNESSES, LETTERS COME UNDER SCRUTINY

Court clarifies scope of physician testimony in medical case

By BRENDEN LEYDON

The Supreme Court decided many interesting cases regarding tort and insurance issues this year. Two cases dealing with medical negligence claims shed new light on a variety of complex issues. The first, *Klein v. Norwalk Hospital*, 299 Conn. 241 (2010) dealt with two significant issues regarding experts. In *Klein*, a plaintiff underwent emergency surgery at Norwalk Hospital to remove his burst appendix. Following the surgery, one of the hospital's nurses, Patricia De Paoli, decided to switch the location of an intravenous line of antibiotics in Eric Klein's left arm.

As she attempted to insert the new IV, Klein reported feeling a sharp pain, after which his arm felt numb. Klein continued to struggle with pain and use of his arm, which impacted his work and quality of life.

Klein sued Norwalk Hospital for medical malpractice, citing the nurse's inappropriate IV insertion as the cause for his condition, diagnosed as anterior interosseous nerve palsy.

The plaintiff disclosed Dr. Clifford Gevartz, an anesthesiologist specializing in pain management, as his expert. Dr. Gevartz was disclosed to testify on matters concerning the standard of care, causation and damages. The plaintiff's claim of negligence was that Nurse De Paoli departed from the standard of care in placing the IV line and that this caused Klein's injuries. The

defendant disclosed Dr. Robert Strauch, an orthopedic surgeon, to testify that the plaintiff's injury was caused by a condition called Parsonage Turner Syndrome (PTS). The plaintiff did not file a supplemental disclosure specifically noting that Dr. Gevartz would rebut that assertion. During his direct examination of Dr. Gevartz, plaintiff's counsel asked him if he was familiar with PTS. The trial court sustained the

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defendant's objection to this question on the ground that the plaintiff's disclosure of Gevartz did not specifically declare that he would be testifying about the syndrome. In a proffer, the plaintiff established that Dr. Gevartz would have 1) described PTS; 2) established his familiarity with it which included a published article, and 3) stated and explained his opinion that the syndrome was *not* the cause of plaintiff's injury.

Subsequently, the defense called Dr. Strauch to testify on standard of care and causation. Prior to his testimony before the jury, the trial court conducted a Porter hearing to explore the methodology that would allow Dr. Strauch to proclaim plaintiff's injury as being caused by PTS, despite having never examined him. The

court ultimately allowed Dr. Strauch to testify, over plaintiff's objection, that the plaintiff's condition was caused by PTS. The jury returned a defense verdict, and the trial and Appellate Court sustained a judgment on that verdict.

The Supreme Court reversed. As to the issue of the sufficiency of the disclosure, the Court held that "insofar as the plaintiff's disclosure of Gevartz made clear that he would testify as to what *was* the cause of the plaintiff's alleged injury, the disclosure implicitly indicated that Gevartz also could be expected to testify about what was *not* the cause of the plaintiff's alleged injury. . . This court never has articulated a requirement that a disclosure include an exhaustive list of each specific topic or condition to which an expert might testify as the basis for his diagnosis; disclosing a categorical topic such as 'causation' generally is sufficient to indicate that testimony may encompass those issues, both considered and eliminated, necessary to explain conclusions within that category." (Italics in original.)

The Court also found error with regard to the Porter issue raised by the plaintiff. That issue concerned a claim that Dr. Strauch's testimony was erroneously admitted, regarding the cause of plaintiff's injury. Dr. Strauch was permitted to testify, solely on a document review, that the plaintiff's injury had been caused by PTS. During the plaintiff's examination of Dr. Strauch at the Porter hearing, he acknowledged that diagnosis by document review is not his normal method, that the only peer review he could point to was a single article that considered diagnoses made both by examination and by consideration of medi-

cal records, and that he could not speculate as to the rate of error in diagnoses by such a method.

The Supreme Court concluded that the trial court's admission of that portion of Dr. Strauch's testimony was improper as without any real articulated methodology his opinion "was nothing more than his *ipse dixit*." The decision also contains an interesting discussion on the topic of harmful error.

Opinion Letter

Bennett v. New Milford Hospital, 300 Conn. 1 (2011) dealt with the requirement of a written opinion from a similar health care provider as required by the 2005 amendments to General Statutes § 52-190a. In *Bennett*, the plaintiff filed suit against Dr. Frederick Lohse, who was not a board certified emergency medicine doctor although he held himself out as a specialist in emergency medicine. The complaint alleged that Dr. Lohse failed to diagnose plaintiff's decedent's multiple fractures.



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RELIGION CASE LEADS TO INTERLOCUTORY RULING APPEAL

Court also expands doctrine of former adjudication

By JAMES F. SULLIVAN

In the past year, the Supreme Court made few decisions regarding civil procedure, and the few areas that were addressed did not make for landmark cases on civil procedure (although they may be landmark cases on other issues of substantive law).

Final Judgment Rule

In *Dayner v. Archdiocese of Hartford*, 301 Conn. 759 (2011) the Supreme Court addressed whether the defendants could appeal the trial court's denial of a motion to dismiss on the basis that the court's entertainment of the plaintiff's claims violated the First Amendment by impermissibly entangling the court in religious matters.

In *Dayner*, the plaintiff had been a principal of a Catholic school. She was terminated from her position by the defendants. She brought various employment claims against various defendants including the Archdiocese of Hartford. The defendants moved to dismiss the action on First Amendment grounds, seeking to apply the ministerial exception that prohibits courts from resolving issues of a religious nature.

The trial court denied the motion to dismiss, finding that although the Appellate Court had adopted the ministerial exception, this specific court action did not give rise to claims or defenses that were religious in nature and therefore would not require the court to inquire into competing interpretations of church law and policy.

The plaintiff appealed the denial of the motion to dismiss. Hence, it was technically an appeal not from a judgment but from an interlocutory

order. Therefore, the Supreme Court addressed the issue of whether, under the standards articulated in *State v. Curcio*, 191 Conn. 27, 30-31 (1983), the denial of the motion to dismiss based on First Amendment grounds rooted in the ministerial exception was appealable. In *Curcio*, the Supreme Court ruled that "[a]n otherwise interlocutory order is appealable in two circumstances: (1) where the order or action terminates a separate or distinct proceeding, or (2) where the order or action so concludes the rights of the parties that further proceedings cannot affect them."

In *Dayner*, the Supreme Court addressed the second prong of *Curcio*. In resolving this issue,

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the Supreme Court focused on the nature of the right involved, and observed that the ministerial exception provides the defendant religious organization with immunity from suit and deprives the court of subject matter jurisdiction.

The *Dayner* concluded that the right to be free from suit should be protected from immediate and irrevocable loss in the event that one had to defend an action. Supporting its decision was a District of Columbia Court of Appeals decision permitting an appeal of a trial court's denial of a motion to dismiss based on First Amendment protections because the essence of the right in question is an entitlement not to stand trial and be burdened with litigation. The Supreme Court therefore held that it had jurisdiction under the

second prong of *Curcio* and the defendants could take an appeal from the trial court's denial of their motion to dismiss.

Flexible Doctrines

In *Ventres v. Goodspeed Airport*, 301 Conn. 194 (2011), the Supreme Court showed that the doctrines of res judicata and collateral estoppel are broad and flexible.

The procedural background of *Ventres* is complex. It was like a hydra. It consisted of three actions in state court involving an airport and related parties on the one hand, and an inland wetland and watercourses commission and its enforcement officer on the other. (There was an enforcement action by the commission, a violation of procedural due process claim by the airport and others, and an abuse of process claim brought by the airport and a related party.)

There were also two actions in federal court — a federal due process action and federal preemption action by the airport and related parties.

The state court actions and counterclaims were all consolidated and the trial court granted the defendants' motion for summary judgment on the basis that the claims and issues were barred by doctrines res judicata and collateral estoppel.

The Supreme Court affirmed, holding that these doctrines apply to the case even if all the

parties were not also parties in the other actions, and even where some of the issues were not associated with the same type of claims.

For instance, the commission, which was not a party to the federal cases, could invoke the doctrine of res judicata based on judgments in the federal cases because it was in "privity" with the enforcement officer, who was a party to those actions.

And even though one of the federal actions involved a claim of due process, the federal court finding in that due process claim that a cease and desist order had been used for its proper purpose collaterally estopped the plaintiffs from relitigating in their state court abuse of process claim the issue of improper purpose, which is the gravamen of an abuse of process claim.

So the federal court's finding of proper purpose in connection with the due process claim served also as a finding in the state abuse of process claim and was dispositive of that claim. ■



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TIMING OF PAYMENTS AT HEART OF KEY DECISIONS

Justices synthesize case law and apply it in next contexts

By LIVIA BARNDOLLAR

This past year's Connecticut Supreme Court family law cases encompass the application of the Connecticut child support guidelines; the interpretation and application of Connecticut General Statutes Section 37-3a concerning interest on money justly due but withheld; the enforceability of postnuptial agreements; and the enforcement of a stipulation for judgment against a challenge of voidness for public policy reasons.

In *Kiniry v. Kiniry*, the appealed property orders were affirmed. The child support orders were reversed because the court did not establish a presumptive child support amount and did not establish medical reimbursement orders at the time of the dissolution judgment.

The Court's explanation of the trial court's obligations in applying the child support guidelines (as codified in the statutes and regulations) is instructive. So are the references with docket numbers to five Superior Court cases noting whether child support was or was not ordered in cases of shared custody.

At the close of this year-end 2010 case, the Court referred to the venerable mosaic rule but

also to the discussion of the severability of certain financial orders in the 2010 cases of *Matturo v. Matturo* and *Misthopoulos v. Misthopoulos*. Following the *Matturo/Misthopoulos* reasoning, the Court determined that the child support orders could be remanded without remanding the entire judgment.

Matter Of Interest

In *Sosin v. Sosin*, the Court rejected Howard Sosin's argument that "an award of interest pursuant to Section 37-3a is improper if the liable party has withheld payment but not unreasonably or without justification."

While the case does not establish a new principle, the detailed analysis of the application of this

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section with helpful discussion of many cases both confirming and distinguishable is very much worth reading. The Court upheld the Appellate Court decision that the trial court could award interest to Susan Sosin pursuant to 37-3a "even if the plaintiff withheld payment on the basis of a good faith belief that the defendant was not entitled to" it.

Mr. Sosin challenged the trial court's dissolution judgment, in particular the calculation of the property distribution, through motions to reargue and appeal. He held back a portion of the property distribution while doing so. Mrs. Sosin filed a motion for contempt when Mr. Sosin did not pay her the full amount due her. The trial court did not hold Mr. Sosin in contempt but awarded interest on the amount that Mr. Sosin "unilaterally withheld."

The Supreme Court affirmed the Appellate court and held that the trial court was not foreclosed from awarding interest "even if the plaintiff had withheld" monies due Mrs. Sosin "on the basis of a good faith belief." The Court determined that the term "wrongful" in the statute means "unlawful;" that the purpose of the statute is "to compensate parties that have been deprived of the use of their money" and that wrongful as used in the statute means that "the act [of withholding] is performed without the legal right to do so."

Untimely Payments

Dougan v. Dougan involves a stipulation for judgment that was incorporated by the court into its orders upon dissolution of the marriage. In *Dougan*, the parties came to an agreement in their dissolution of marriage action through negotiation and mediation. Both parties were represented by experienced counsel and the mediator, too, was a longtime practitioner with a wealth of knowledge of Connecticut divorce law.

The parties' negotiated stipulation for judgment fully disposed of their nearly \$80 million of assets. As a part of that division, Brady Dougan agreed to pay \$15,325,000 in two installments. The second installment of \$7.5 million was due on or before June 16, 2006. The stipulation further provided that if payment was not made when due, interest would be payable at the rate of 10 percent per annum from the date of the stipulation for judgment until fully paid.

At the time of the dissolution hearing, Mr. Dougan acknowledged that "time was of the essence" and that he understood the consequences of his failure to pay on time. The trial court reviewed the agreement and accepted it, finding that it was fair and equitable, pursuant to Conn. Gen. Stat. Section 46b-66.

Mr. Dougan paid the second lump sum 12



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A FAVORABLE RULING FOR PRODUCT MANUFACTURERS

Other key decisions made on arbitration and workplace issues

BY JEFFREY J. WHITE

It is no secret that Connecticut product liability law develops at a glacial pace because many manufacturers wisely decide not to jeopardize their product lines by litigating a case at the trial level — let alone at the appellate level. As a result, it is a significant event when the Supreme Court issues a product liability decision that could possibly influence pending cases.

Metropolitan Property & Casualty Insurance Co. v. Deere & Company, 2011 Conn. LEXIS 317 (Aug. 16, 2011) is such a case and, therefore, is a must read for any attorney involved in product-related litigation. *Metropolitan*, authored by Justice Peter Zarella, contains a detailed and scholarly analysis of the “malfunction doctrine,” which is implicated when a plaintiff is unable to produce direct evidence of a product defect because of the loss of the essential components of the product (for example, through fire, explosion, or breakage). In such cases, the malfunction doctrine allows a plaintiff to use circumstantial evidence to establish that a defect existed at the time of sale or distribution.

Metropolitan is a subrogation case arising out of a fire at the home of the plaintiff’s insureds. The plaintiff alleged that the fire, which started in the garage, was caused by a defect in the electrical system of a lawn tractor manufactured by the defendant. For over four years, the homeowners owned the tractor without any issues. In the spring of 2003, the dealer performed maintenance on the tractor, which reportedly led to operational problems in the following months.

On the day of the fire, the insured had attempted to use the tractor, but had returned it to the garage after it did not operate properly. As is common in malfunction cases, many of the tractor’s components were damaged or destroyed during the fire, and thus, the plaintiff’s expert had to speculate as to the exact cause of the fire and could give no opinion as to whether there was any defect attributable to the tractor’s manufacturer. Nonetheless, the plaintiff prevailed at trial.

Based on these facts, the Supreme Court provided a detailed description of the malfunction doctrine. The Supreme Court began its analysis by noting that proof of an accident alone is insufficient to establish a manufacturer’s liability.

Significantly, the Court emphasized the dangers of applying the doctrine in a liberal manner (most notably, that it can convert manufacturers to insurers of their products).

Unlike other jurisdictions, the Supreme Court rejected the temptation to apply the principles underlying the negligence doctrine of *res ipsa loquitur* because the manufacturer does not have exclusive control over the product. (Many courts have improperly injected *res ipsa loquitur* into malfunction doctrine cases, which is leading to a confusing line of case law.)

In addition, the Supreme Court noted that while many courts have justified adopting the malfunction doctrine by pointing to the harm that can be caused to a plaintiff’s case if evidence is destroyed, the destruction of evidence also can prevent a manufacturer from defending itself. Accordingly, “courts must be cautious not to diminish a plaintiff’s burden of proof in such cases.” Of particular note is that the plaintiff must present evidence that establishes the probability, and not the mere possibility, that the plaintiff’s injury resulted from a product defect.

Applying these rigid standards to the facts in *Metropolitan*, the Court held that the trial court should have granted defendant’s motion for a directed verdict. Although there were several reasons for its decision, it appears that the Court was particularly troubled by the fact that the tractor operated without issue for four years, and problems only developed after the dealer performed maintenance on it.

Ultimately, manufacturers and other businesses involved with products should not be lured into a false sense of security — cases will still be filed under the auspices of the malfunction doctrine. However, the Supreme Court has provided guidance on the doctrine that will have a dramatic impact on how the cases are



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litigated in our state court, including by providing avenues for manufacturers to seek summary judgment or a directed verdict.

Arbitration

In the last few years, the Supreme Court has issued several important arbitration decisions. Although no blockbuster decisions affected the business community this year, one decision deserves attention. *Farrell v. Twenty-First Century Insurance Co.*, 301 Conn. 657 (2011) serves as a reminder about the rules on obtaining an enforceable written agreement to arbitrate.

In *Farrell*, the parties agreed in principle to arbitrate the plaintiffs’ claims, and thereafter, their respective attorneys exchanged at least 14 letters on the subject in an attempt to hammer out the parameters of the arbitration itself. The plaintiffs moved to compel arbitration based upon this purported agreement. Ultimately, the defendant prevailed on summary judgment after it argued that there was no express agreement on the terms on which the arbitration would take place.

After winning at trial, the defendant won again at the Appellate Court, and thereafter, the Supreme Court granted certification. The Supreme Court affirmed the Appellate Court’s decision. The Court’s analysis was guided by the principle that arbitration agreements must be in writing to be enforceable and that the parties must agree to submit to the same arbitration. Although the plaintiffs argued that the totality of the correspondence revealed they had a “deal,” the Court found that the “cumulative effect of the correspondence reflects that the plaintiffs and the defendant failed to reach a written agreement on a single parameter or condition of arbitration that either counsel had identified as necessary to the agreement.” The plaintiffs tried to save their case by relying on inferences which could be drawn from the purported intentions of counsel, but the Court rejected those argu-

ments. Ultimately, the lesson to be learned is that an agreement to arbitrate is not an agreement to arbitrate until the parties have executed a final, written arbitration agreement.

Workplace Injury

Finally, the Supreme Court issued a decision that reaffirms how difficult it is for employees to bypass the exclusivity provision in the Connecticut Workers’ Compensation Act and be permitted to sue their employers for workplace injuries. In *Motzer v. Haberli*, 300 Conn. 733 (2011), the plaintiff filed suit against his employer after he was injured during the installation of electrical wiring at an apartment complex. As part of his complaint, the plaintiff claimed that his employer engaged in misconduct, including by failing to train employees and violating applicable state and federal safety regulations.

During trial, the court granted the defendant’s motion for directed verdict in part because the plaintiff had failed to establish (as required by *Suarez v. Dickmont*, 229 Conn. 99 (1994)) that his employer intentionally created a dangerous condition that made the employee’s injuries

“substantially certain” to occur. Indeed, the Court noted that the failure to comply with safety regulations or to train

employees is not enough unless there was further evidence “that the employer knew or believed that injury to the employee is substantially certain to occur.” Because the plaintiff failed to present such evidence, the Supreme Court affirmed the trial court’s decision granting the motion for directed verdict. Accordingly, the standard remains high for those employees seeking to skirt the Workers’ Compensation Act.

In sum, although the vast majority of decisions released by the Supreme Court were outside the business realm, the 2010 to 2011 Court year produced interesting decisions that will have a future effect on the business community. ■

BUSINESS LAW

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Court held that § 52-190a does not apply to a claim of lack of informed consent. The decision turned on the Court’s previous construction of the phrase “medical negligence” in the statute, which did not include a claim alleging lack of informed consent. Thus, there is no requirement of a pre-suit opinion letter in such a case.

Most recently, in *Morgan v. Hartford Hospital*, 301 Conn. 388 (2011), the Court concluded that because the attachment of a good faith certificate and a written opinion letter are requirements of process, the failure to attach a proper written opinion letter constituted insufficient service of process and implicated the personal jurisdiction of the Court. Therefore, the 30-day waiver rule set forth in Practice Book §§ 10-30 and 10-32 for challenging sufficiency of service of process applied to the defendant’s motion to dismiss. Thus, the Supreme Court held that the trial court improperly dismissed the plaintiff’s complaint, the

defendants having waived their right to file the motion to dismiss by waiting approximately 19 months after the filing of the initial complaint to file their untimely motion to dismiss.

Despite these four cases, the play is far from over. Still in the Supreme Court’s pipeline are at least two more cases under § 52-190a: one concerning the sufficiency of the detail in the opinion letter (*Wilcox v. Schwartz*, 119 Conn. App. 808, cert. granted, 296 Conn. 908 (2010)); and the second involving the issue of whether *res judicata* applies to a prior action stricken for failure to comply with § 52-190a (*Santorso v. Bristol Hospital*, 127 Conn. App. 606, cert. granted, 301 Conn. 918 (2011)). Many other cases presenting a wide array of issues under the statute continue to work their way up through the lower courts.

Excluded Testimony

On a completely different topic, the Court in *Klein v. Norwalk Hospital*, 299 Conn. 241

(2010), rendered a long-overdue decision regarding expert testimony and causation. The case involved a determination that the trial court improperly precluded plaintiff’s expert from testifying that the defense theory of causation was incorrect.

“Insofar as the plaintiff’s disclosure of [his expert] made clear that he would testify as to what was the cause of the plaintiff’s alleged injury, the disclosure implicitly indicated that [he] also could be expected to testify about what was not the cause of the plaintiff’s alleged injury. ‘Critical to establishing specific causation is exclusion of other possible causes of symptoms.’...As this court recently acknowledged, ‘differential diagnosis is a method of diagnosis that involves a determination of which of a variety of possible conditions is the probable cause of an individual’s symptoms, often by a process of elimination.’” (Emphasis added.)

In *Klein*, the Supreme Court also rejected the

defense argument that the excluded testimony of plaintiff’s expert dealt only with the question of causation and that, therefore, the excluded testimony was irrelevant because the jury did not find a breach of the standard of care and, thus, did not reach the question of causation.

The basis for the court’s rejection of this argument was that it “fail[ed]...to account for the nature of a differential diagnosis....Because the present case essentially presented a choice as to the causation of the plaintiff’s alleged injury between the defendant’s theory... and the plaintiff’s theory..., breach of the standard of care and causation were intertwined not only in [the plaintiff’s expert’s] differential diagnosis, but also in the framing of the case generally. The determination of whether the defendant had breached the standard of care could be reduced to the question of what caused the plaintiff’s alleged injury...” Therefore, the plaintiff’s claims regarding causation were not subject to the harmless error rule. ■



CONNECTICUT SUPREME COURT 2011

COURT FOCUSES ON PUBLIC SECTOR ISSUES – FOR NOW

Workers' comp, legal fees, union issues come to the forefront

By **ROBERT G. BRODY** and
ALLISON SMITH

Labor and employment law is usually a hot topic in the courts. This past session, the U.S. Supreme Court decided several important cases affecting employers and employees throughout the country. In Connecticut, new employment laws are being passed and the state is aggressively enforcing its wage and hour laws.

Despite all this activity, the Connecticut Supreme Court has remained quiet on the labor and employment law front for the second year in a row. What few cases were decided in this past session mostly focused on the public sector. Below is an overview of Court decisions that affected public and private employers in the state.

Ministerial Exception

The Supreme Court adopted a rule currently followed by most federal circuit courts which declares the court will not interfere with a religious institution's employment decisions which affect clergy. Since a religious institution's religious beliefs can greatly influence its employment decisions, courts are generally wary to intrude.

In *Dayner v. Archdiocese of Hartford*, the Court laid out a two-part analysis to decide whether this "ministerial exception" will ap-

The court did recognize that there are certain circumstances which may allow an employee to bring a cause of action in court. However, the bar is set high as the plaintiff must show that the employer acted intentionally to cause the injury or intentionally made conditions at the workplace so dangerous that it was almost certain to allow an injury to happen. There was no such showing here. While

EMPLOYMENT LAW

employees will continue to try to avoid the exclusivity of workers' compensation, this decision reinforces that their chances of success remain low.

Collecting Attorney Fees

In a decision which may alleviate some of the stress of litigation for public employers, the Supreme Court in *Singhaviroj v. Board of Education* awarded defendant employer attorneys' fees under Section 1983 of the Civil Rights Act of 1871. If pressed for a confession, many plaintiffs' lawyers would have to admit to unnecessarily drowning defense counsel in paperwork in order to increase litigation costs and force the defendant to settle. Usually, de-

terminations. A teacher left in the middle of the school year, so the unionized teachers agreed with the administration to split his workload. However, when the workload became more than they anticipated, they asked their union to intercede.

When an administrator found out about their request, she encouraged the teachers not to go through the union to resolve the issue. The union brought suit, claiming the school violated the law by making a unilateral change in employment, and by dealing directly with employees who were represented by the union.

The Supreme Court looked to the federal National Labor Relations Act for guidance. On the one hand it found the school did not make a unilateral change to the conditions of employment in violation of labor law, because the teachers' hours did not increase so much as to significantly alter their employment conditions.

However, the Court did find the school engaged in unlawful direct dealing with the teachers because even after the administrator learned the teachers wanted union intervention, she continued to discuss the issue directly with them. So while mid-year changes in workload might be permissible without consulting with the union, avoiding the union on this point is not allowed. This case should remind employers that any attempt to resolve an issue directly with unionized employees is risky, but once the employees ask for union representation, continuation of direct dealing is foolhardy.

Administrative Remedies

The Supreme Court decided two cases which clarify when a public employee is required to exhaust administrative remedies under a collective bargaining agreement before resorting



ROBERT G. BRODY



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to state court. In *Piteau v. Board of Education*, the Court held the plaintiff had to exhaust his administrative remedies first, because his claim for breach of duty of fair representation by the union stemmed from the collective bargaining agreement.

In contrast, in *Nyenhuis v. Metropolitan District Commission*, the Supreme Court found no exhaustion was required because she had an independent cause of action under a state statute. In this case, the plaintiff was a police officer who was arrested for allegedly assaulting a citizen. The charges against her were ultimately dismissed, and she brought a claim in court for economic losses which resulted from her arrest. The Court agreed her claim was not, as the defendant argued, stemming from a violation of the collective bargaining agreement, and she therefore had the right to bring these claims directly in court.

With several new laws passed in Connecticut recently, including paid sick leave and protections against gender identity discrimination, employment related litigation is likely to increase over the coming months. However, it may be a while until those issues make their way to the Connecticut Supreme Court. We look forward to next year's update. ■

Religious institutions in the state now have more freedom to align their employment decisions with their religious beliefs.

ply. First, the court must decide if the employee's actual job functions classify him/her as a "minister." Then, the court looks at whether "adjudicating the particular claims and defenses in the case would require the court to intrude into a religious institution's exclusive right to decide matters pertaining to doctrine or its internal governance or organization." This exception has wide breadth, as the Court applied it to the plaintiff's discrimination, tort and contract claims. Religious institutions in the state now have more freedom to align their employment decisions with their religious beliefs.

Workers' Compensation Exclusivity

In *Motzer v. Haberli et al.*, the Supreme Court affirmed that workers' compensation is meant to be the exclusive remedy for employees injured on the job, save a few rare exceptions. Here, the plaintiff, an electrician's apprentice, stuck his finger in a hole to clean out debris at the same time that another apprentice drilled into the hole from the other side. The plaintiff lost the tip of his finger and claimed the injury resulted from the lack of adult supervision on the job. Instead of filing for workers' compensation, he brought an action in court.

defendants have no redress, as they cannot collect attorneys' fees under most statutes. However, Section 1983 allows a defendant to collect attorney's fees if the plaintiff's case is found to be frivolous or baseless. Such a case finally came before the Court.

In this case, the plaintiff's original complaint and four subsequent amended complaints were dismissed by the trial court. Each time, the court told the plaintiff he failed to state specific facts to substantiate his claims. After the fifth dismissal, the defendant brought an action for the \$16,000 in attorneys' fees incurred defending the four frivolous amended complaints.

The trial court granted defendant \$3,000 in fees. The plaintiff appealed. Again the plaintiff lost, and the Supreme Court affirmed the trial court's award. While this will not stem the tide of excessive discovery requests and motion practice, it does offer public employers in Connecticut some solace knowing this remedy is available.

Unionized Employees

Employers often struggle with when and how they can communicate with their unionized employees. This issue came to head in *Board of Education v. State Board of Labor Rela-*

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Pursuant to the statute, the plaintiff attached a written opinion letter from a board certified general surgeon, with added qualifications in surgical critical care, and who engaged in the practice of trauma surgery. The defendant moved to dismiss on the grounds that the opinion letter was not from a similar health care provider as defined in Connecticut General Statutes § 52-184c because its author was not board certified in emergency medicine, and the trial court accepted that argument and dismissed the case. The Supreme Court upheld the dismissal.

The Court concluded that § 52-190a (a) requires the plaintiff to supply an opinion letter authored by a board certified health care provider with the exact same board certification or specialty as the defendant, even if that defendant is not board certified. The Court rejected the argument proffered by the plaintiff that the same rules regarding who may testify at trial should apply to resolving the sufficiency of the pre-suit similar health care provider opinion letter.

Thus, even though a non-similar health care provider may testify at trial under § 52-184c (d), only a similar health care provider, defined as meaning the exact same board certification as

the specialty area of defendant — even if the defendant is not board certified, may author a pre-suit opinion letter. The Court further held that if the proper opinion letter is not submitted with the complaint, the trial court is obligated to dismiss the action. The Court did recognize the harshness of this result, but noted that relief from that was available in the form of a new action under the accidental failure of suit statute, as further established in *Plante v. Charlotte Hungerford Hospital*, 300 Conn 33 (2011), a companion case decided by the Court the same day as *Bennett*. Mercifully, in *Bennett v. New Milford Hospital*, 2011 WL 3891352, the court just ruled that the accidental failure of suit statute did allow the plaintiff to proceed in that case.

Each of these cases resolved some important and complex issues with regard to medical negligence cases, and will provide guidance to counsel and trial courts in many situations in the future. Additionally, there is some expectation for a legislative fix to some of the harsher aspects of the similar health care opinion letter requirement in the next session. In the interim, plaintiff's counsel are well warned to be extra vigilant with regard to expert issues in medical negligence cases, to avoid the minefield that has become of this area of practice. ■

CONNECTICUT SUPREME COURT 2011

DECISIONS CREATE AN EVER-CHANGING LANDSCAPE

Wetlands, docks, high water marks are focus of key cases

By DWIGHT H. MERRIAM

This last term of the Connecticut Supreme Court brought practitioners of real estate and land use law a few developments of interest. At least the Court has given us something to do as we while away the hours, checking our phones to see if we have accidentally turned off the ringers, and contemplating what a double-dip recession could do to the already-moribund world of real estate development.

The state of our business reminds me of the Coroner's pronouncement in the film "The Wizard of Oz" concerning the demise by house of the Wicked Witch: "As Coroner I must aver, I thoroughly examined her. And she's not only merely dead, she's really most sincerely dead."

By the way, have any of you real property mavens ever fully considered the implications of this wrongful death by house dropping? Affirmative defense: act of God? Does insurance cover improvements doing damage off-site? Did Auntie Em and Uncle Henry have tornado coverage? All the more relevant to today are the financing issues Uncle Henry faced later. As you know if you have read L. Frank Baum's "The Wonderful Wizard of Oz" (1900) and other volumes in the 14-book series, Uncle Henry had to mortgage the farm to build a new house to replace the one that went missing with his beloved niece aboard. He fell into financial ruin and was about to be foreclosed when Dorothy took him off to Oz to live. Homeowners in 2011 should have such luck.

Back to the Land of Steady Habits. This summary does not include every real estate and land use case argued and decided during the last term, just the ones of some interest that may change the law or improve our understanding of it. It does not include any of the many related

is estopped to deny approval of the two additional houses.

Here is the rule reiterated by the court: "[I]n order for a court to invoke municipal estoppel, the aggrieved party must establish that: (1) an authorized agent of the municipality had done or said something calculated or intended to induce the party to believe that certain facts existed and to act on that belief; (2) the party had exercised due diligence to ascertain the truth and not only lacked knowledge of the true state of things, but also had no convenient means of acquiring that knowledge; (3) the party had changed its position in reliance on those facts; and (4) the party would be subjected to a substantial loss if the municipality were permitted to negate the acts of its agents. . . ."

Rapoport v. Zoning Board of Appeals of City of Stamford 301 Conn. 22 (2011)

State has exclusive jurisdiction over improvements below high water mark: The plaintiff opposed the expansion of the neighborhood association dock next door to his home and complained to the zoning enforcement officer, but the ZEO said he did have jurisdiction because the dock was below the high water mark



DWIGHT H.
MERRIAM

wetlands commission held there was no automatic exemption for filling of wetlands for the roads and the courts agreed, construing state statutes and local regulations.

There have been many of these farming-exemption wetlands cases and it appears that the trend in local regulation and the courts is to limit the extent of as-of-right alteration.

Camini v. Troy 300 Conn. 297 (2011)

An owner of littoral rights can acquire rights by adverse possession: In a decision creating new precedent and likely some problems in application, the Court held that a waterfront owner with a dock built in 1957 partially in the immediate neighbor's littoral area had rights by adverse possession to maintain the fixed dock, ramp, float and pilings. The case has a somewhat complex factual and legal history and it deserves close reading.

The Appellate Court decision includes a useful discussion of laches as an equitable defense as compared with its use a defense at law. *Camini v. Troy*, 112 Conn. App. 546 (2009).

There are problems with the decision. First, when should the 15-year statutory period start? The encroaching dock was not built in accordance with the state-approved plans and the discrepancy was not discovered until 2000. The boundary was not firmly established until the trial court rendered its decision in 2007.

Second, the decision does not address access to the encroaching dock, but expressly limits the adverse possession to the littoral area under it and the pilings. Third, the major problem for waterfront buyers is that in nearly every instance there are no definitive littoral boundaries. It takes either an express agreement of the neighboring owners or a declaratory judgment action to establish the boundary. How are lawyers to counsel their clients in selling or buying waterfront homes or where abutters have docks or are proposing docks?

Harbour Point LLC v. Harbour Landing Condominium Association Inc 300 Conn 254 (2011)

A condominium declaration is to be interpreted as a contract: This case tells the story of a conflict seen before and certain to be seen again: what happens to the declarant developer's property rights with an older condominium when the initial developer's expansion rights expire under the statute, years go by, and some new developer steps in to complete the project? The developer of the remaining land succeeded in its claim that the initial developer's access and utility easements survived.

What is important is the Court's holding that the declaration should be interpreted solely as a contract.

Justice Christine Vertefeuille dissented. She sees the condominium declaration as a hybrid of

both contract and property law governed by the enabling statute and advocates that it be interpreted against the backdrop of the statutory scheme. If you practice in this area, it will be worthwhile to read her opinion along with that of the majority and consider how they will affect your counseling of clients and document drafting.

Connecticut National Bank v. Rehab Associates 300 Conn. 314 (2011)

If you are sophisticated lender and you do not want to release a partner of your debtor, you need to make sure that limiting language is in the settlement with the other partner: So said the court, in essence, about Shawmut's release of a deficiency judgment as part of the final settlement of "indebtedness" by two partners who had guaranteed a mortgage, later fore-

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closed, when one of those partners entered into the settlement. The case arises out of the last real estate recession 1989-1992, so you can expect a decade hence we may see something like this again.

Paul Bonington v. Town of Westport 297 Conn. 297 (2010)

Town zoning officials have immunity for discretionary acts: Paul Bonington complained about a neighbor's alleged zoning violations in filling land which caused drainage problems. He urged town officials to act. The zoning enforcement officer and zoning enforcement inspector investigated and found no violations. They refused to bring an enforcement action. Bonington took matters into his own hands, sued the neighbor and ultimately settled. He then sued the town officials for negligence for their failure to enforce.

If in law school, like many of us, you never could quite figure out how to draw the line between ministerial and discretionary acts — the crucial factor in determining immunity — and were thankful it was not on the bar exam, you may wish to read this decision which offers this helpful guidance: "Nevertheless, even when the duty to respond to a violation of law is ministerial because that specific response is mandated, the predicate act — determining whether a violation of law exists — generally is deemed to be a discretionary act." Okay, now I completely get it.

And if you cannot get enough of this discretionary act business, see also *Peter Benedict v. Town of Norfolk*, 296 Conn. 518 (2010).

That should be enough to keep us busy for a while. Now back to reengineering my real estate and land use practice to include some dog bite and slip and fall cases. ■

The state of our business reminds me of the Coroner's pronouncement in the film 'The Wizard of Oz' concerning the demise by house of the Wicked Witch: 'As Coroner I must aver, I thoroughly examined her. And she's not only merely dead, she's really most sincerely dead.'

civil procedure, tax appeal, brokerage agreement, and construction law cases.

Scott Levine v. Town of Sterling 300 Conn. 521 (2011)

Zoning estoppel stumps town: Professor Leon Lipson of Yale Law School told us the grammatically correct use of "estoppel" is as in "the town was estopped to enforce the zone change against Scott Levine." It is not, he said "stopped from." The "estopped to" form shows up mostly in older cases and "estopped from" predominates today.

Either way, it is a great word for lawyers to use and a powerful trump card if a government induces a property owner to do something to his or her ultimate detriment through a series of affirmative actions. Town of Sterling officials approved building of two more houses on Levine's 10 acres. In reasonable reliance, he engaged professional help and spent money on the project as well as 400 hours of his own time. Then the town amended its ordinance to limit development to one house per lot and rescinded the approval. Too late, said the court. The town

and the City of Stamford had not adopted a harbor management plan. The court agreed.

The decision leaves open the fact-driven question of whether impacts landward of the state's jurisdiction — such as traffic, parking, and boat storage — could be the basis for a claim of local zoning control.

James Taylor v. Conservation Commission of the Town of Fairfield 2011 Conn. LEXIS 315, Conn. (2011)

No one, as of right, may fill wetlands to construct roads, even if the roads are directly related to a farming operation: James Taylor (no, not that James Taylor) owns six acres, some of it wetlands, and to improve his property he "proposed activities [which] included the removal of stones, the construction of stone walls, a fence, a dug well, an addition to an existing barn and three access roads, the planting of a nursery, a fruit farm and flower, herb and vegetable gardens and the maintenance of a grassed way."

Taylor claimed he could construct the roads as of right as an exempt farming activity. The

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CONNECTICUT SUPREME COURT 2011

'KITCHENS' SETS TABLE FOR SLEW OF KEY RULINGS

Burden put on defense to note errors in jury instructions

By PROLOY K. DAS

This past term appears to have been the most significant in terms of impact jurisprudence in recent memory. Leading the list is a set of waiver decisions that fundamentally alter appellate relief for constitutional errors.

Under the *Evans/Golding* doctrine, an appellate court can reverse a conviction that resulted from a constitutional error in the trial even if the error was not preserved below so long as the error was not harmless. Through the years, the State has in some instances argued for an elimination or restriction of *Golding* review. That effort came to fruition in the context of claims that a jury was misled by the instructions in a set of five cases that were decided on the same day.

In *State v. Kitchens*, 299 Conn. 447, a majority of the Court agreed with the State that the defendant had forfeited any claims of instructional error by failing to object to proposed jury instructions.

The majority opinion, authored by Justice Peter Zarella and joined by Chief Justice Chase Rogers and Justices Christine Vertefeuille and Ian McLachlan, specifically concluded that when a defendant's lawyer has

an opportunity to review the court's proposed instructions and fails to object or, as in *Kitchens*, affirmatively accepts the instructions, any claim the defendant may have had of constitutional error in those instructions is implicitly waived and not subject to appellate review.

Within its extensive policy analysis for this new standard, the majority noted that trial counsel is presumed to be competent in waiving challenges to instructions and that a defendant retained a remedy through the writ of habeas corpus for grossly improper waivers. Justice Joette Katz authored a concurrence, joined by Justices Flemming Norcott and Richard Palmer, that criticized the majority's decision new bright line rule that where defense counsel participates in a charging conference and fails to object to instructions proposed by the court or the State, erroneous and prejudicial instructions are immune from appellate review.

Justice Katz noted that this was the issue that *Golding* had been adopted to rectify. Justice Palmer authored a separate concurrence, joined

by Norcott and Katz, the emphasized that a waiver of a constitutional right must be knowing, intelligent, and voluntary, and that the new rule of implicit waiver of constitutional instructional error claims could not be reconciled with the well-settled requirements for such waivers. Justice Palmer noted concern about presuming that trial counsel intentionally seeks to waive the defendant's right to a fair trial simply by failing to object to a proposed charge.

Four other decisions were released the same day as *Kitchens*: *State v. Akande*, 299 Conn. 551; *State v. Collins*, 299 Conn. 567; *State v. Brown*, 299 Conn. 640; and *State v. Mungroo*, 299 Conn. 667. The majority, concurring, and dissenting opinions continue to explore and define the *Kitchens*' holding, with *Collins* and *Mungroo* in particular explaining when defense counsel is said to have a "meaningful opportunity for review and comment" of proposed instructions for purposes of the waiver rule. In *Collins*, counsel was not presented with an advance

copy of the proposed charge and, therefore, claims of instructional error were not waived. In *Mungroo*, the claims were waived even where the specific portion of the challenged instruction was not discussed at the charging conference.

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copy of the proposed charge and, therefore, claims of instructional error were not waived. In *Mungroo*, the claims were waived even where the specific portion of the challenged instruction was not discussed at the charging conference.

Attorney-Client Privilege

State v. Lenarz, 201 Conn. 417, was extraordinary both in substance and proceeding. Substantively, the Court solidified the sanctity of the attorney-client privilege.

In *Lenarz*, the police had seized the defendant's computer which contained documents that were clearly marked confidential and detailed the defendant's trial strategy. The State claimed on appeal that the prosecutor's review of the privileged communications was harmless because the defense strategy was predictable and, therefore, the prosecutor obtained no strategic advantage by reviewing the documents.

The Court disagreed. Recognizing the significance of the attorney-client privilege, the Court held that disclosure of privileged communica-

tions is "inherently prejudicial" and that the subjective intent of the prosecutor is not relevant to the deprivation of the defendant's constitutional right. Procedurally, the case made news when the Supreme Court issued a summary that directed the defendant's immediate release from prison the day after the oral argument.

Two habeas cases were of interest. The first is *Gould v. Commissioner*, where the Court explained the standards of proof in pursuing a new trial through a writ of habeas corpus based on a claim of actual innocence. The Court held that proof of actual innocence required affirmative evidence that the petitioners had not committed the subject crimes and not simply a discrediting of the evidence that served as the basis for the conviction. In *Gould*, a Superior Court judge had granted a new trial based on credible recantations of witness testimony.

Luurtsma v. Commissioner, 299 Conn. 740 (2011) was another substantive and procedurally interesting read. In *State v. Luurtsma*, 262 Conn. 179 (2002), the Court affirmed a kidnapping conviction where there was no allegation of kidnapping separate and distinct from the sexual assault charge. In *State v. Salamon*, 287 Conn. 509 (2008) and *State v. Sanseverino*, 287 Conn. 608 (2008), the Court overruled that precedent and determined that, in order to be convicted of kidnapping, the victim must have been "moved or confined in a way that has independent significance, that is, the victim was restrained to an extent exceeding that which was necessary to accomplish or complete the other crime."

The *Salamon/Sanseverino* Court did not

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opine on whether the ruling applied retroactively. *Luurtsma* filed a writ of habeas corpus based on the change in the law. In procedural first, the habeas court reserved the question of whether the ruling had retroactive effect to the Supreme Court. The Court answered the reserved questions and determined that the *Salamon/Sanseverino* holding did have retroactive effect.

Witness List

Three other interesting cases matters were *McCoy v. Commissioner*, 300 Conn. 144, *State v. Komisarjevsky*, 300 Conn. 162, and *State v. Ryder*, 301 Conn. 810.

In *Komisarjevsky*, the Court determined that it was improper for a trial court to issue an unsealing order which would result in disclosure to a newspaper of a witness list prepared in a murder trial. The disclosure could have irreparably deprived the defendant of his right to a fair trial.

In *McCoy*, a divided court determined that a second conviction for driving under the influence renders a person a "felon." The decision is significant in its impact on the decision of whether to plead to such offenses in light of the significant collateral consequences the conviction can have. Finally, no criminal review would be complete without a search and seizure issue, and the recent term did not disappoint. In facts more befitting of a state with a warmer climate, the Court determined in *State v. Ryder*, 301 Conn. 810, that a police officer's discovery of an illegally kept crocodile on the defendant's property had violated the Fourth Amendment. Specifically, the Court determined that the investigating officer's entry onto the curtilage to the defendant's home was an unjustified warrantless requiring suppression of discovery of the crocodile which had resulted in an illegal possession of a reptile conviction.

The past term will likely be remembered for *Kitchens* and its companion decisions. It will be interesting to see whether it will lead to increase in habeas litigation and what direction the Court will take with respect to *Golding* review in other contexts. ■

■ From TIMING on PAGE 16

days late and refused to pay interest other than from the date of breach. When his estranged wife, Tomoko Hamadaa Dougan, sought to enforce the interest provision, he claimed that the provision was void against public policy and an unenforceable penalty. The trial court denied the motion for enforcement and Mrs. Dougan appealed. The Appellate Court reversed the trial court with the majority holding the provision to be an enforceable discount for prompt payment, a concurrence and a dissent. Mr. Dougan's ensuing petition for certification for appeal to the Supreme Court was granted.

The Supreme Court affirmed the Appellate Court judgment, determining that the contested provision should be enforced on an alternative ground for affirmance — judicial estoppel. Justice Peter Zarella separately concurred, agreeing with the result but stating that he would have preferred to address the issues raised and argued before the Appellate Court and that he agreed with the "well reasoned opinions of the

Appellate Court majority and concurrence."

The Supreme Court found the stipulation to be a contract subject to relevant contract law. It also, however, stressed that an agreement of the parties, reviewed and entered by the court, is a judgment, "for a judgment by consent is just as conclusive as one rendered upon controverted facts."

The Court laid out the mosaic principle that a "judgment in a complicated dissolution case is a carefully crafted mosaic, each element of which may be dependent on the other." The justices also recognized that a stipulated dissolution agreement is "also a carefully crafted mosaic."

The Court went on to articulate the elements of the doctrine of judicial estoppel which doctrine essentially provides that a party may be held to his prior position taken in a legal proceeding when he attempts to take a subsequent inconsistent position. While the doctrine of equitable estoppel serves to "ensure fairness in the relationship between parties," the doctrine of judicial estoppel can be invoked to "preserve judicial integrity."

The Court determined that Mr. Dougan's claim of unenforceability was barred under the

doctrine of judicial estoppel. Mr. Dougan, who was highly educated and financially sophisticated, and was represented by experienced counsel throughout the proceedings, had testified that he understood and agreed to "each and every clause" of the stipulated agreement and had fully participated in assuring the trial court that the stipulation for judgment was fair and equitable.

In *Bedrick v. Bedrick*, the Court quietly made a material change to prior law. In the past, while there have been a smattering of cases involving postnuptial agreements and varying approaches to whether and if so, how fully they would be enforced, there has not been a case until now, much less one from our Supreme Court, that simply states that postnuptial agreements "are valid and enforceable." Finding that postnuptial agreements are consistent with public policy, the Court laid out the standards for their enforcement.

The Court reviewed the law of prenuptial agreements before and after the state's 1995 adoption of the Connecticut Premarital Agreements Act, Section 46b-36, *et. seq.*, explaining that postnuptial agreements must be considered

under the statute or the common law, depending upon a postnuptial agreement's execution date.

The Court stated that postnuptial agreements require more strict scrutiny than prenuptial agreements, given the relationship of the parties in a marriage and concluded that a court may enforce a postnuptial agreement "only if it complies with applicable contract principles and the terms of the agreement are both fair and equitable at the time of execution and not unconscionable at the time of dissolution." The case details the factors to be applied in determining whether a postnuptial agreement should be enforced as well as the law on what constitutes unconscionability. As a point of interest, in Footnote 5, the Court determines that a postnuptial agreement requires adequate consideration to be enforceable.

The past year of Connecticut Supreme Court opinions are encyclopedic, considering and synthesizing applicable case and statutory law and in some cases, applying the law in new contexts. If faced with one of the issues above, you will be well served by reviewing the opinions themselves. ■