



CONNECTICUT SUPREME COURT 2010

A SMART COURT SOMETIMES MOVES AT A SNAIL'S PACE

Delays in rendering decisions could undermine respect for institution

By DANIEL J. KRISCH

There is an anecdote from Andrew Jackson's first term as president that illustrates one of the inherent limitations of judicial authority: In 1832, the Supreme Court heard a case arising from Georgia's wanton violation of federal treaties with the Cherokee Tribe and its eviction of the Cherokees from their lands. The Court, in an opinion by Chief Justice John Marshall, ruled in the Cherokees' favor, but President Jackson, who had provided Georgia with federal troops to assist in the eviction, reportedly said, "Marshall has made his decision. Now let him enforce it."

Jackson's comment brings the boundaries of judicial power into sharp focus – lacking troops, like the executive, or the power of the purse, like the legislature, courts have only their moral authority and the respect of the public to support their judgments. Over the past year, our Supreme Court has maintained its public reputation as intellectual, fair-minded and forthright through the substance of its opinions.

However, one growing problem – the significant number of cases that languish for too long before being decided – is a dark cloud in an otherwise very bright sky and one with the potential to undermine the Court's authority and effectiveness.

First, the happy news: Last year in this publication, I described the Court as being "at its intellectual peak," and that has not changed a whit. While 2009-10 saw no cases of national prominence like *Kerrigan v. Commissioner of Public Health*, 289 Conn. 135 (2008), and no hydra-headed and thoughtful debates on the

a justice who turned 70 could continue to deliberate about, vote on, and participate in the consideration of, any appeal heard prior to that justice's 70th birthday. It prompted vigorous dissents from Justices Joette Katz and Peter Zarella over the majority's construction of the relevant statute and its historical contexts.

The *Connecticut Coalition* case, in addition to setting the record for most unwieldy citation, expanded on *Horton v. Meskill*, 172 Conn. 615 (1977), and held that the Connecticut Constitution guarantees public schoolchildren an education guided by "suitable" educational standards and funded by "suitable" resources (without deciding whether the current standards and resources were "suitable.")

Finally, *Marquez*, although an affirmation, foreshadowed the coming revolution in the use of eyewitness identifications in criminal cases. All four opinions suggest that, once researchers reach a "consensus" on the most reasonable and accurate manner in which to conduct such identifications, the Court would consider imposing a mandatory identification protocol based on that consensus.

Moreover, while a running battle between Justices Richard Palmer and Peter Zarella dominated 2008-09's crop of cases, the past year saw a much wider distribution of the most prominent opinions. Chief Justice Chase Rogers wrote *Honulik*, for example, and Justice Fleming Norcott wrote the *Connecticut Coalition* decision.

More recently, Justice Katz authored another important criminal decision, *State v. Outing*, 298 Conn. 34 (2010), and Justices Christine Vertefeuille and Zarella wrote the two most important family cases of the year, *Misthopoulos v. Misthopoulos*, 297 Conn. 358 (2010), and *Maturo v. Maturo*, 296 Conn. 80 (2010).

This sharing of the wealth reinforces the important, and accurate, public image of a Court made up of many strong intellects.

Paralysis Of Pen

Now, the bad news: While the Court issued lots of thoughtful opinions, it sometimes did so at a snail's pace. The numbers are stark and surprising: Between Sept. 1, 2009, and Sept. 14, 2010, the Court issued 147 opinions, of which 20, or about 15 percent, took *more than a year* from the time of argument to be officially released.

The average time from argument to release was over 18 months, with several cases nearing, or in one instance – *State v. Courchesne*, 296 Conn. 622 (2010) – exceeding, two years to be decided. (By way of comparison, the U.S. Supreme Court issues every opinion of each court year, almost without exception, by June 30.)

To be fair, these cases are the exception and not the rule. The Court decides most appeals with dispatch; according to Chief Justice Chase Rogers' recent testimony before the legislature, the average amount of time over the last five years from argument to release of an opinion is about five months. Nor is it fair to paint with a broad brush and question the overall speed with which the entire Court works because the prob-



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lem cases fall into two narrow categories.

First, by far the most frequently dilatory of the justices is Justice Palmer. Of the 20 opinions that took more than a year, he wrote the majority opinion in 12 and the principal, and usually lengthy, concurrence or dissent in five others.

In some instances, the amount of time likely was a necessity. *Courchesne*, which Palmer authored, for instance, was a death penalty appeal in which no stone should be left unturned, no matter how long that requires. Likewise, in *Skakel v. State*, 295 Conn. 447 (2010), which saw 13 months pass between argument and decision, Justice Palmer's 103-page dissent was necessitated by

its basis – newly-discovered evidence that, *in his view*, justified ordering a new trial (supportable only by a lengthy discussion of that evidence). But many of the other delays are simply inexplicable: In *State v. Pentland*, 296 Conn. 305 (2010), for example, Justice Palmer took almost 20 months to write an eight-page opinion about the defendant's obligation to register as a sex offender. In *State v. Grant*, 294 Conn. 151 (2009), 13 months were required for a nine-page opinion holding that a BB gun is a firearm. And, in perhaps the most curious example of all, in *DiNuzzo v. Dan Perkins Chevrolet Geo, Inc.*, 294 Conn. 132 (2009), 21 months passed between argument and decision for a one-issue, certified appeal – and a substantial portion of the 14-page opinion was a block quotation of the facts from the Appellate Court opinion. Moreover, *Pentland*, *Grant* and *DiNuzzo* all were unanimous; indeed, all 12 of Justice Palmer's opinions were – so the delay was not the result of waiting for the dissenter(s) to respond to the majority opinion.

None of this makes Justice Palmer any less of a thoughtful, scholarly justice, which he is; nor does it suggest that he does not care about the litigants whose cases are delayed, because undoubtedly he does. On those two fronts, his opinions and genuinely inquisitive manner at oral argument speak for themselves. But his pen paralysis has grown to a scale where it threatens to overshadow all of that because it has the potential to distort the public perception of his work and of the Court.

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Family Appeals

The second problem area – and one with the potential to harm the justice system – is family law appeals, especially if the panel is divided.

In *Maturo*, for example, the Court took 20 months to issue a mildly complex opinion on child support, with two concurrences and a dissent – none of which were authored by Justice

Palmer. *Maturo* was followed, two months later, by a companion appeal argued the same day and with similar issues, *Misthopoulos*, which was unanimous. And there are similar examples from recent years: *Friezo v. Friezo*, 281 Conn. 166 (2007), which took 16 months, and *Ramin v. Ramin*, 281 Conn. 324 (2007), which took 17 months.

While the complex financial details of family appeals can make for delays in opinion-writing, as noted below, in the family realm in particular, speed is essential.

In none of the 20 cases was justice delayed literally justice denied; i.e., the delay between argument and decision did not render any of the appeals moot. However, the impact on the parties, and the collateral damage to the Court as a respected and self-governing institution, is a real concern.

There is a great emotional cost to litigants, and, for criminal appeals, to the victims and their families, of having to wait, in many instances, nearly two years for a final resolution. The Court hears appeals on many sensitive and

life-altering subjects: divorce, child custody, criminal convictions and major medical malpractice,

to name just a few. A delay of this length must seem Kafka-esque to those personally affected by the result and may well foster disrespect for the Court as an institution out of the mistaken belief that delay equals laziness, or signifies lack of concern for the parties' problems.

No one who knows the justices, or practices in front of the Court on a regular basis, ever would think either of those things. However, for almost all litigants, their appeal is their first, and only, interaction with the Court and the sour taste of such a delay might give a false impression.

Given that, in family cases, for example, respect for the Court is a key in coaxing obedience to the judgment out of reluctant and angry ex-spouses, anything that undermines that respect is a serious problem. What was true for John Marshall two centuries ago is still true today: The Court has only its moral authority with which to enforce its judgments and that authority rests largely on public esteem and the collective belief of Connecticut's citizens that the justices are doing their work honestly, fairly and with dispatch.

In addition, the past decade saw several notable clashes between the Judicial Branch and the legislature over the boundaries of their respective authority and this growing problem of delayed opinions has raised the specter of yet another.

Last spring, a bill found its way to the Judiciary Committee that would have required the Court to issue all opinions within one year of argument and would have mandated affirmance if that was not done. Leaving aside the thorny separation of powers and due process problems that such a statute would raise, the last thing the Court needs is to give the legislature reasons to interfere with how the Court does its work. Delays of the type discussed, sadly, do precisely that and the Court would be wise to solve this growing problem internally first. ■

OVERVIEW

The numbers are stark and surprising: Between Sept. 1, 2009, and Sept. 14, 2010, the Court issued 147 opinions, of which 20 took more than a year from the time of argument to be officially released.

source(s) of judicial power to draft a binding Code of Evidence as in *State v. DeJesus*, 288 Conn. 418 (2008), important and scholarly opinions abounded.

Other authors in this Section will have more to say about specific cases, but three top the charts: *Honulik v. Town of Greenwich*, 293 Conn. 641 (2009), *Connecticut Coalition for Justice in Education Funding, Inc. v. Rell*, 295 Conn. 240 (2010), and *State v. Marquez*, 291 Conn. 122 (2009).

Turning 70

Honulik, by far the most important procedural decision of the year – for that matter, potentially of any year – held, by a 5-2 vote, that

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HOSPITAL WAS FORCED TO DISCLOSE PHYSICIAN'S FILE

In other cases, 'offer of compromise' interest was at stake

By CAREY B. REILLY

It was a quiet year for the state Supreme Court in the field of medical malpractice with only a pair of cases concerning offer of compromise interest, a singleton involving jury interrogatories and remittitur and, the most interesting case in a med mal-related context, seeking a malpracticing physician's credentialing file under the Freedom of Information Act.

Continuing the tradition of its own version of *glasnost*, the Supreme Court in *Director of Health Affairs Policy Planning v. Freedom of Information Commission* held that the protections of the peer review privilege did not prevent Freedom of Information disclosure to a patient of his physician's credentialing file at the University of Connecticut Health Center. The Court reasoned: 1) UConn was a public agency subject to the mandatory disclosure requirements of FOIA; 2) UConn's file regarding its decision not to renew the doctor's clinical privileges was a public record under the FOIA; 3) the peer review privilege (Connecticut General Statutes § 19a-17b), which protects records of a medical review committee conducting a peer review, was inapplicable because proceedings pursuant to the Freedom of Information Act are not "civil actions." Undoubtedly such records will be helpful to a patient in building his medical malpractice case, but, the high court cautioned, they will not necessarily be admissible into evidence in the civil action against the health care provider.

Next, in a couple of cases, *DiLieto v. County Obstetrics and Gynecology Group P.C.*, and *Costantino v. Skolnick*, the Court examined offer of compromise interest, applying it in the former and disallowing it in the latter. In *DiLieto*, after several appeals and two trials — the second one resulting in a plaintiff's verdict of more than \$5 million — the case returned to the Supreme Court for the final time.

After reviewing the sufficiency of the evidence in many respects, the Court turned to an interest-



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ing question of first impression, i.e., whether interest could be calculated on an offer of compromise (formerly known as "offer of judgment") filed by a plaintiff who lacked the legal authority to do so. The problem was that the plaintiff in the malpractice

suit, Michelle DiLieto, mistakenly had filed an invalid offer of compromise (for \$1.5 million) within 18 months of her having commenced the action in 1997; the offer should have been filed by her trustee in bankruptcy. Once it was brought to DiLieto's attention that she lacked standing to bring the action, in January 2000, her trustee was substituted as plaintiff pursuant to the highly remedial C.G.S. § 52-109, which allows a court to substitute a plaintiff in an action mistakenly begun by the wrong person.

However, once substituted, the trustee did not file a new offer of compromise. After delving into the policy and the language of this statute, as well as the offer of compromise statute, C.G.S. § 52-192a, the Court concluded that interest should run from the date the trustee was substituted, not the date the action was commenced. To avoid any possible confusion in future cases, however, the Supreme Court stated "a party that is substituted as a plaintiff under § 52-109 shall either repudiate the original offer of judgment upon substitution, refile that original offer of judgment, or file a new offer of judgment, at that substituted plaintiff's discretion."

In *Costantino*, the parties agreed to settle before trial for the full amount of the physician's

insurance. On appeal, the Supreme Court upheld the refusal of the trial court to issue a declaratory judgment concerning whether the policy's limit could bar the award of offer of compromise interest because the necessary predicate to such an award under C.G.S. § 52-192a is a judgment in favor of the plaintiff *after trial*. Despite the parties' stipulation that the settlement agreement was to be considered a verdict and judgment in favor of the plaintiff, since there had been no trial in this case, the trial court was correct to refuse to assess offer of compromise interest. The Supreme Court noted that however well-intentioned the parties may have been, it is not proper for parties to stipulate to facts that are false in order to bring their conduct within the ambit of a statute and, in turn, obtain a declaratory judgment that rests upon those facts.

Economic Loss Error

Finally, in *Earlington v. Anastasi*, the plaintiffs were a mother and her infant son who was born with a permanent brachial plexus injury caused by physician malpractice. The plaintiffs called a rehabilitation specialist and an economist to testify regarding the child's future medical needs and loss of earning capacity. Plaintiffs' economist stated that the total discounted, after-tax economic loss was \$1,045,874. His report was not offered into evidence, however. The jury awarded the plaintiffs \$1,588,000 in economic loss. Upon a motion for remittitur, the trial court reviewed the evidence and ordered a remittitur of \$542,126, finding that the jury's higher award was not supported by the evidence.

The Supreme Court affirmed, stating that although both of the plaintiffs' experts testified about their methodology, analysis and calculations, neither expert's testimony supported an award in excess of the amount articulated by the

plaintiffs' economist. In arriving at its conclusion, the Court rejected the plaintiffs' argument that the expert's calculations were made on the basis of midpoints. Reading between the lines, the language of the Court's opinion suggests that, had the economist's report been admitted, the outcome of the appeal may have been different.

Also in *Earlington*, the Court held that it was harmless error, i.e., it likely did not affect the outcome of the trial, for the trial court to have

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submitted to the jury three interrogatories setting forth specification of negligence that the parties agreed should not have

gone to the jury. Regarding the first improperly submitted interrogatory, the jury found that the defendant was not negligent in that regard. As for the second one, the jury found no causation, and in the third, the interrogatory's "and/or" phrasing permitted the jury to find the defendant liable solely on the basis of the one claim the parties agreed was properly before the jury. The Supreme Court reviewed the principle of internal consistency of interrogatory responses and reiterated the rule that the jury's failure to make a finding on an interrogatory cannot be construed as an express finding that the defendant was *not* negligent in that manner.

One brief postscript: Although this past year may have been relatively calm in the area of medical malpractice, next year the Court is poised to decide the often angst-inducing question of who is a similar health-care provider for the purposes of the pre-suit physician's opinion letter. See *Bennett v. New Milford Hospital Inc.*, 117 Conn. App. 535, cert. granted, 294 Conn. 916 (2009). ■

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RULING MANDATES JURY POLLING IN CIVIL CASES

Other key case establishes burden of proof for statutory theft

By JOYCE H. YOUNG

The state Supreme Court cast its net over a wide array of civil practice issues, including jury polling, proof of statutory theft, pre-judgment remedy practice, arbitrability, offers of judgment, interpleaders, and pleading amendments.

In an issue of first impression, the Court in *Wiseman v. Armstrong* held that Practice Book 6-32 requires a trial court upon request to poll a civil jury after verdict. The *Wiseman* jury considered claims that an offender died as a result of indifference to his medical and mental health needs and excessive force while he was housed in a state correctional facility. The trial lasted 21 days, during which 25 witnesses testified and 80 exhibits were admitted.

The jury returned a verdict for the multiple defendants after three hours of unremarkable deliberation. The plaintiff immediately asked that the jury be polled, but the trial court denied the request. The Court's majority concluded that the

Practice Book rule requiring polling is mandatory, but that the trial court's lapse was harmless error.

Chief Justice Chase Rogers, joined by Justice Joette Katz, dissented from the majority's finding that the error was harmless. As Rogers wrote, "there is no way to meaningfully assess the results of a poll that was not taken." Allowing the trial court to ignore a mandatory rule of practice is unfair when the burden is on the requesting party to prove that the verdict was tainted. Additionally, the benefits of polling far outweigh the minimal burden of taking a few minutes to undertake the poll.

Stuart v. Stuart settled the issue of the burden of proof for statutory theft claims under Connecticut General Statutes 52-564. The Appellate Court and the weight of trial court authority had previously required clear and convincing proof. *Stuart* overturned that precedent, holding that a preponderance of the evidence is sufficient.

Writing for the Court, Justice Peter Zarella found it telling that both the statutory theft statute and its legislative history are silent on the

burden of proof. Had the legislature intended to impose a more stringent standard of proof than the customary preponderance of the evidence, it knew how to do so. The Court also rejected defendants' public policy arguments that statutory theft should require a heightened standard of proof because it is a penal statute, with treble damages, which carries the potential stigma of a finding equivalent to the crime of larceny.

Significantly, Zarella suggested that the Court might be open to revisiting the clear and



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convincing standard of proof for common law fraud claims. As he wrote, "a review of our case law on the development of the standard of proof in fraud actions compels us to question the soundness of those prior decisions, although we need not decide in the present case whether they should be overruled."

State of Connecticut v. Sunrise Herbal Remedies Inc. may provide guidance to practitioners who have wrestled with the requirement of Conn. Gen. Stat. § 52-278e(a) that applications for prejudgment remedies be supported by an affidavit from a "competent affiant." The state sought attachments of two real estate parcels to secure civil penalties and restitution for 260 alleged Connecticut Unfair Trade Practices Act violations in the sale of herbal products. The applications were supported by the affidavit of an assistant attorney general who had met once with a principal of the corporate defendants and her attorney, read the defendants' responses to



CONNECTICUT SUPREME COURT 2010

LIMITS SET ON CHILD SUPPORT FOR HIGH WAGE EARNERS

Court rejects lower court ruling that exceeded established guidelines

By **LIVIA DEFILIPPIS BARNOLLAR**
and **NORMAN A. ROBERTS II**

In a heavily debated plurality decision, the Supreme Court interpreted the law governing child support awards in higher income cases in a markedly different way it had done before. The court then followed *Maturo v. Maturo*, 296 Conn. 80 (2010), with a similar interpretation in *Misthopoulos v. Misthopoulos*, 297 Conn. 358 (2010).

In both cases, the Court reversed and remanded only the child support orders, a radical departure from the mosaic at work in dissolution appeals since the Appellate Court's 1984 decision in *Ehrenkranz*.

The Maturos were married for 18 years and had 13-year-old twins at the time of their divorce trial. The wife had been a stay-at-home mother since the birth of the children. The husband, a Yale and Wharton graduate, had been employed at the Manhattan office of Merrill Lynch since 1999.

Mr. Maturo earned a yearly base salary of approximately \$200,000 and incentive compensation consisting of annual cash and stock bonuses. The trial court valued the defendant's net cash bonus for his performance in 2005, 2004 and 2003 as \$489,449, \$597,137 and \$500,000, respectively. Mr. Maturo claimed that his annual bonus historically had been much higher, reaching as much as \$3.8 million in earlier years.

The trial court awarded child support of \$636 per week, the highest child support obligation for two children listed in the child support and arrearage guidelines (the "Guidelines") schedule, plus 20 percent of the defendant's annual net cash bonus and 20 percent of any future tax refund the defendant might receive. The percentage of net household income dedicated to child support for two children at the top of the Guidelines schedule is 15.89 percent.

The trial court also ordered the defendant to pay 100 percent of the children's private school tuition, summer day camp and extracurricular activities and all work-related day care, to pay for all medical and dental insurance for the benefit of the children and to pay all of their unreimbursed medical, dental, optical and psychological expenses. The court reserved jurisdiction to enter a post-secondary school education order.

The trial court awarded Mrs. Maturo \$10.65 million of the parties' almost \$18 million of assets. Her share included the parties' mortgage-free home and \$8.1 million of cash and investment accounts, the "bulk of the family's liquid

assets." The trial court also awarded her as alimony \$1,215 per week, as well as 20 percent of Mr. Maturo's annual net cash bonus and of any future tax refund he might receive.

The trial court stated that it had considered all of the statutory criteria set forth in Connecticut General Statutes § 46b-84 and the Guidelines. The court "acknowledged...that the child support award departed from the schedule contained in the guidelines, which does not address circumstances in which the combined net

weekly income of the parties exceeds \$4,000, because of 'the [defendant's] substantial assets, the [defendant's] superior earning capacity, the extraordinary disparity in parental income and the significant and essential needs of the [plaintiff] including, but not limited to, the need to provide a home for the children.'

Income Range Exceeded

Mr. Maturo appealed and claimed as error the trial court's orders requiring him to pay a fixed percentage of his annual net cash bonus and of his annual tax refund as child support. Mrs. Maturo contended that the child support award was consistent with General Statutes § 46b-84(d) and that the trial court was not obligated to consider the Guidelines when a couple's income exceeds the maximum income range set forth in the Guidelines.

Justice Peter Zarella wrote for the plurality in an en banc decision that featured two concurrences (by Justice Barry Schaller and Justice Ian McLachlan) and a dissent (by Justices Christine Vertefeuille, Joette Katz and Richard Palmer). Justice Zarella stated that an open-ended, variable child support award that constituted an increase over that established for families at the upper limit of the Guidelines schedule constituted an abuse of discretion by the trial court requiring reversal of the child support award.

The Supreme Court held that the trial court had failed to follow the principles expressed in the Guidelines, had misapplied the deviation criteria and had failed to expressly consider the factors set forth in Section 46b-84(d), "thus providing no acceptable rationale for its decision." The Court affirmed the alimony and property

distribution orders.

Both the plurality and the dissent discussed the "income shares model" in which the Guidelines are rooted, but disagreed on the philosophy of the model. The studies which underlie the income shares model reflect that as household income rises, the percentage of income spent on children declines. The plurality concluded that "unrestrained child support awards in high income cases" without relationship to the children's "characteristics and needs," could result in the transfer of wealth to the payee spouse or the children, which is not a proper objective or effect of child support awards.

The Court concluded that, "when a family's combined net weekly income exceeds \$4,000, the court should treat the percentage set forth in the schedule at the highest income level as the presumptive ceiling on the child support obligation, subject to rebuttal by application of the deviation criteria enumerated in the guidelines, as well as the statutory factors described in § 46b-84(d). Additionally, when there is a proven, routine consistency in annual bonus income, as when a bonus is based on an established percentage of a party's steady income, an additional award of child support that represents a percentage of the net cash bonus also may be appropriate if justified by the needs of the child. When there is a history of wildly fluctuating bonuses, however, or a reasonable expectation that future bonuses will vary substantially, as in the present case, an award based on a fixed percentage of the net cash bonus is impermissible unless it can be linked to the child's characteristics and demonstrated needs."

In a notable break with long-standing precedent, the Court reversed only the child support orders, stating that the child support award was "not in any way interdependent with other orders" and that the financial components of a dissolution judgment are not necessarily interwoven. It is difficult to imagine a case after *Maturo* where the mosaic will be implicated.

Justice Schaller concurred but, like the dissent, quarreled with what he framed as the plurality's reliance on the "presumed authority" of the Guidelines. Justice Schaller stated that General Statutes § 46b-84(d) requires that a child support award be related to a child's needs and that, even when a child's station merited a more expansive view of his needs, an unlimited award at such high amounts did not reflect the application of the statute's terms.

A philosophical debate is highlighted in Justice Schaller's concurrence and Justice Zarella's response. Justice Schaller stated that, in cases in which household income exceeds the Guidelines schedule, the trial court's discretion should be governed by General Statutes § 46b-84(d) and 46b-56(c). Justice Schaller expressed concern that the plurality's approach, by recognizing the regulations of a legislative commission as controlling, infringed upon trial courts' discretionary authority. Justice Zarella's retort

was that "in establishing a commission to promulgate and regularly update guidelines, subject to legislative approval, the legislature intended to limit the court's traditionally broad judicial discretion in child support matters."

'Step Backward'

The dissent characterized the plurality's decision as a "step backward," focusing on the physical needs of the children. The dissent reasoned that the adoption of the income shares model as opposed to

a needs-based model requires that all income should be taken into account in making child support awards and that "the parents should bear any additional expenses resulting from the maintenance of two separate households instead of one, since it is not the child's decision that the parents divorce, separate, or otherwise live separately." The dissent, quoting extra-judicial authorities, opined that, nationwide, there is an increasing recognition that a child is entitled to share in the good fortune and wealth of his/her parents.

In his concurrence, Justice McLachlan advocated for the elimination of the rule that child support awards must be based upon net income as opposed to gross income. He demonstrated how calculations of net income often become circular and noted that three adjoining jurisdictions use gross income to calculate child support awards. Adoption of a gross income methodology would complete the trend started by the Appellate Court cases of *Kelman* and *Hughes*.

In *Weiss v. Weiss*, 297 Conn. 446 (2010), Mrs. Weiss was precluded by the principles of *res judicata*, from litigating the definition of a term in her separation agreement which had been incorporated into the dissolution judgment, when she had not made out a colorable fraud claim. In *Crews v. Crews*, 295 Conn. 153 (2010), the Court affirmed enforcement of an unambiguous prenuptial agreement.

The *Maturo* and *Misthopoulos* cases reflect the groundbreaking work of the Supreme Court this past term. *Weiss* and *Crews* reflect traditional adherence to time-honored principles of contract law and the finality of judgments. ■



LIVIA BARNOLLAR



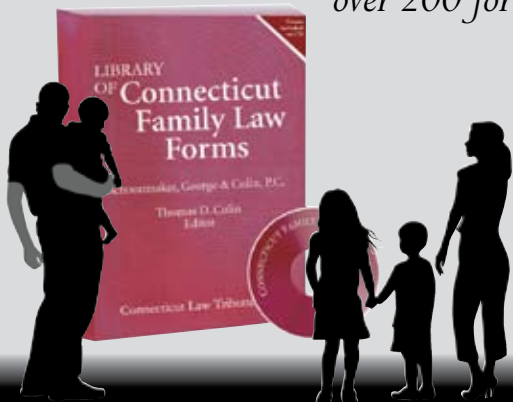
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JUSTICES RULE ON POST-CONVICTION DNA TESTING

Fourth Amendment, Miranda cases also receive scrutiny

By PROLOY K. DAS

The Supreme Court issued more than 50 decisions in criminal law over the past 12 months. Here are some of the highlights.

Four years ago, I authored the first of my annual Supreme Court criminal law reviews for this publication by leading with 2006's decision of the year — *State v. Skakel*, 276 Conn. 633 (2006). So, for sentimental value, I will lead the 2010 edition with *Skakel v. State*, 295 Conn. 447, Kennedy cousin Michael Skakel's appeal from the trial court's denial of his petition for a new trial. General Statutes § 52-270 allows a convicted defendant to petition the trial court for a new trial based on newly discovered evidence. Skakel filed a petition claiming that Gitano Bryant (cousin of basketball star Kobe Bryant), could provide testimony implicating two other men for the 1975 murder of Martha Moxley in Greenwich. The Court, with Justice Richard Palmer dissenting, determined that Bryant's statements were not so clearly credible as to require the granting of a new trial.

Another post-conviction petition is one for DNA testing, which is authorized by General Statutes § 54-102kk. In *State v. Dupigny*, 295 Conn. 50, and *State v. Marra*, 295 Conn. 74, two decisions released on the same day, the Court addressed the standards to be applied for these petitions. The Court concluded that the petitioner must demonstrate that there is a "reasonable probability" that the testing will produce DNA results that would have altered the verdict. It defined "reasonable probability," by looking to *Brady v. Maryland*, 373 U.S. 83 (1963), as a "probability sufficient to undermine confidence in the outcome."

Neither Dupigny nor Marra could satisfy this standard in attempting to get human remains and a ski cap, respectively, subjected to DNA testing.

In terms of statutory interpretation, the most interesting case was *State v. Courchesne*, 296 Conn. 622, where the Court applied the common-law "born alive rule" to conclude that an infant, who was born alive and subsequently died of injuries that had been sustained in utero, was a person for purposes of the murder statute.

Courchesne stands out as the year's most interesting read as the majority opinion and separate concurring and dissenting opinions scholarly explore the "born alive rule." In another statutory interpretation case, the Court held in *State v. Grant*, 294 Conn. 161, that a BB gun is a firearm for purposes of the sentence enhancer. *State v. Rodriguez-Roman*, 297 Conn. 66, features a racketeering prosecution, where the Court held that a defendant's uncharted association with a co-conspirator constituted an "enterprise."

State v. Fernando A., 294 Conn. 1, addressed previously undefined domestic violence proceedings. In 2006, the Appellate Court in an unpublished decision in *State v. Duell*, A.C. 26926, granted the state's motion to dismiss an appeal from the denial of an

evidentiary hearing to dissolve a family violence protective order. The state argued that because the issuance of a protective order as a result of a pending criminal case is not a final judgment, defendants in these cases could not obtain appellate review regarding the protective order as long as the criminal case was not resolved (even where, as in *Duell*, the victim spouse wanted the order dissolved). This led to some instances where the underlying criminal case would not be resolved by the state, in an effort to keep the protective order in place.

The legislature responded by creating a statutory right to a hearing, but failed to define the hearing. *Fernando A.* brought a public interest appeal to obtain appellate review of the denial of an evidentiary hearing. The Court held that the defendant is, in fact, entitled to hearing on the continued need for a protective order. However, he is not entitled to a hearing before the initial protective order is issued. Significantly, the Court also explained that a criminal defendant cannot force the victim to testify, though he may question the victim if the victim voluntarily testifies.

Hangin' Object

There were a number of Fourth Amendment decisions this year, with the Court's 4-3 decision in *State v. Cyrus*, 297 Conn. 829 leading the pack. *Cyrus* affirmed the trial court's dismissal of a DUI conviction, where the initial stop was made based on General Statutes § 14-199f(c), the distracted

driver statute. A divided Court concluded that the mere hanging of an object from the rearview mirror did not give rise to a reasonable and articulable suspicion that the driver was, in fact, distracted by the object.

State v. Clark, 297 Conn. 1, concluded that information about a crime from a confidential informant, in the absence of any basis for the informant's knowledge, still provides officers with a reasonable suspicion to stop a vehicle. *State v. Boyd*, 295 Conn. 707 recognized that a person has a privacy right to the contents of his cell phone, including his subscriber number. *State v. Fausel*, 295 Conn. 785, explained that there need not be an actual emergency for the emergency exception to the warrant requirement to apply. So long as the police objectively believe an emergency situation exists, they may enter a residence without a warrant. The record was inadequate to review the defendant's claim in *State v. Gardner*, 297 Conn. 58, that delivery of his personal effects by Hartford Hospital personnel to police constituted a warrantless search because there was no evidence in the record as to whether the hospital personnel were acting as agents of the police at the time.

There were a few Fifth Amendment cases, including two which applied *Miranda v. Arizona*, 384 U.S. 436 (1966). In *State v. Mitchell*, 296 Conn. 449, the Court did not disturb the Appellate Court's conclusion that police officer who asked a suspect, "What is going on?" and "Why were you stopped?" was not merely trying to assess the situation but was attempting to confirm that he had the right suspects and, therefore, triggered the need for *Miranda* warnings. The Court affirmed the assault conviction on harmless error grounds.

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In *State v. Canady*, 297 Conn. 322, an officer's general question, "Are you OK?," did not amount to interrogation implicating *Miranda*. In *Canady*, the Court also concluded that protections offered under General Statutes § 46b-137(a) which renders certain statements made by a child to police inadmissible in a delinquency hearing do not apply when a juvenile is tried as an adult in criminal court.

State v. Moore, 293 Conn. 781, presented an interesting situation where a prosecution witness invoked the Fifth Amendment near the end of re-direct, thereby precluding an opportunity for re-cross. The Court, over a dissent, concluded that the defendant's confrontation rights were not violated because the defendant had been afforded an opportunity to cross-examine the witness prior to redirect.

Scope Of Defenses

The Court also addressed the scope of several important defenses. In *State v. Terwilliger*, 294 Conn. 399, the Appellate Court's reversal of a manslaughter conviction was affirmed where the Court concluded that the jury should have been instructed that the state bore the burden of disproving the defendant's defense of premises theory beyond a reasonable doubt.

In *State v. Erickson*, 297 Conn. 164, the defendant's self-defense and defense of premises defenses to the charge of assault of an elderly person had no merit. The defendant had pushed a marshal, who was serving a subpoena on him, in the back after the marshal was voluntarily leaving the premises. The Court also held that denial of the defendant's request that the personnel file of the marshal be produced or reviewed in camera did not violate the right to confrontation. In *State v. Nathan J.*, 294 Conn. 243, the defense of parental justification was applied to the charge of risk of injury to a child.

This past year, the Court provided significant guidance to the criminal bar on the standards for proceedings on petitions for new trials and petitions for DNA testing, and the scope of evidentiary hearings for protective orders in domestic violence cases. These proceedings will likely continue to be refined to incorporate constitutional and statutory rights as they grow in frequency and are subject to further appellate review. ■

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the state's civil investigative demand, reviewed the customer complaint files, and reviewed relevant governmental and real estate records.

The trial court ruled that review of the consumer complaint files did not make the state's attorney a "competent affiant" under Conn. Gen. Stat. § 52-278e(a) since he did not have personal knowledge of the underlying facts. The Court reversed, seemingly easing the requirement of a competent affiant. While the affiant was not familiar with the facts underlying

the consumer complaints, the Court found it sufficient that he was competent to represent the nature and extent of those complaints. Presumably, another witness could testify at the probable cause hearing as to the underlying facts.

Bacon Construction v. Department of Public Works illustrates the perils of allowing an arbitrator to decide the issue of arbitrability without fully preserving a record protecting against

waiver of judicial review. A defendant challenging arbitrability has three choices: seeking an injunction against the continued arbitration, preserving its objection to arbitrability while continuing with the arbitration, or consenting to the arbitrator's binding determination. In *Bacon*, the state waived *de novo* judicial review submitting the arbitrability to the arbitrator and stating that the issue "may be heard and fully and finally determined by this arbitration." This distinguished the case from earlier decisions where vehement objections were lodged from beginning to end.

Offers of judgment also found a place on the Court's docket. In *DiLieto v. County Obstetrics and Gynecology Group*, a plaintiff mistakenly commenced a medical malpractice action and filed an offer of judgment. Later it was determined that the action should have been brought by a trustee in bankruptcy, who was then substituted as the proper plaintiff. The defendants argued that offer of judgment interest should not run since the

offer of judgment was not "valid" when filed, as required under Conn. Gen. Stat. 52-192a.

Citing the remedial principles of the statute, which provides that substitution relates back to and corrects retroactively defects prior pleadings as to the identity of the real party in interest, the Court concluded that the substitution of the bankruptcy trustee validated the previously filed offer of judgment, but limited accrual of interest to run from the date of substitution.

Interpleader Action

In another issue of first impression, the Court held that an interpleader action is mooted only when an agreement between some of the parties "fully and conclusively resolves the triangular dispute." In *Vincent Metro v. Yah Realty*, a plaintiff acting as listing agent escrowed a real estate purchase deposit. After the transaction failed, the plaintiff brought an interpleader action requesting direction as to whom to return the funds. The defendants eventually entered into a voluntary stipulation providing for the return of the deposit to the seller. The plaintiff was not a party to that stipulation, which was not signed or otherwise affirmed by any of the defendants. The purchaser did not expressly relinquish his rights. The defendants had

filed pleadings faulting plaintiff for not returning the funds. Under these facts, the Court held the stipulation was not conclusive and the trial court should have adjudicated plaintiff's obligations.

Each year the Court refines the law concerning pleading amendments, and this term was no exception. In *Ruggiero v. Pellicci*, plaintiff brought a foreclosure action arising out of defendants' default on a promissory note in connection with their purchase of plaintiff's business. The defendants filed numerous counterclaims and special defenses. The case was tried before an attorney trial referee over a four-month period. At the close of trial, the defendants sought to amend their counterclaims and special defenses to assert a claim of unjust enrichment and additional relief including a prejudgment remedy and rescission. The Court upheld the attorney trial referee's refusal to allow the amendment. The trial referee had concluded that amendment would severely prejudice plaintiff, since the trial, and possibly discovery, would have to be reopened, resulting in significant delay. ■

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CRIMINAL LAW

CIVIL PRACTICE



CONNECTICUT SUPREME COURT 2010

IMMUNITY EXPANDED IN SUITS AGAINST MUNICIPALITIES

Justices rule against plaintiffs hurt at school, transfer station, soccer field

By **BRENDEN P. LEYDON**

The Supreme Court decided many interesting cases regarding tort and insurance issues this year. Three cases dealing with municipal immunity from liability illustrate how challenging it can be to prevail in such a case.

In *Cotto v. Board of Education*, 294 Conn. 265 (2009), the plaintiff was a youth director of an organization that ran a summer youth program at a public school in New Haven. One day during the program, he went into one of the bathrooms in the school where he slipped and fell on water and urine that were on the floor, sustaining significant injuries. The plaintiff brought a personal injury claim against the board of education and prevailed at trial. The defendants appealed, claiming governmental immunity precluded any recovery by the injured plaintiff. The Court held in favor of the defendants on appeal, reversing the judgment for the plaintiff and directing judgment for the defendants.

The Court explained that there are three exceptions for municipal immunity for the performance of discretionary acts. First, where the circumstances make it apparent to the public officer that his or her failure to act would be likely to subject an identifiable person to imminent harm; second, where a statute specifically provides for a cause of action against a municipality or municipal official for failure to enforce certain laws; and third, where the alleged acts involve malice, wantonness or intent to injure, rather than negligence.

TORT & INSURANCE LAW

The plaintiff was pursuing the first exception, commonly called the identifiable person-imminent harm exception. In the case of *Burns v. Board of Education*, 228 Conn. 640, 645 (1994), the Court had allowed a fall down claim by a child who fell on ice during school hours, holding that an identifiable class of people can qualify under this exception. However, this holding was limited in the *Cotto* decision, which held it did not apply because the youth director was a not a school student required to be there, and thus the harm was not imminent enough given that anyone who may have used that bathroom could have fallen at any time.

Pyrrhic Victory

In *Grady v. Somers*, 294 Conn. 324 (2009), the plaintiff was a town resident injured as a result of a slip and fall at the town transfer station. The plaintiff, relying on *Burns v. Board of Education*, sought to qualify under the identifiable class of persons argument, as a paid permit holder for the transfer station. The trial court granted summary judgment,

holding that the identifiable person-imminent harm exception did not apply to an action brought directly against a municipality.

On appeal, the Supreme Court reversed that aspect of the decision, holding that the identifiable person-imminent harm exception does apply to a direct claim against a municipality, overruling language to the contrary in a prior case.

However, that turned out to be a Pyrrhic



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victory for the plaintiff as the Court rejected the application of the identifiable person-imminent harm exception to his claim, again limiting the *Burns* decision to its facts and suggesting that identifiable classes of persons outside of public school

children would be unlikely to be recognized. Thus, the granting of summary judgment was affirmed.

In *Picco v. Voluntown*, 295 Conn. 141 (2010), the plaintiff was seriously injured when a tree limb fell on her at a soccer game. The tree in question allegedly has a history of failure, and contained numerous structural defects, including bark inclusions, trunk cracks and major decay. The plaintiff sought to pursue the town under a nuisance theory, seeking to prevail under language in the case of *Keeney v. Old Saybrook*, 237 Conn. 135, 166 (1996), which allowed a nuisance claim under certain environmental statutes against a town "for a public nuisance that it intentionally creates through its prolonged and deliberate failure to act to abate that nuisance." The Court held that that doctrine did not apply in a claim for personal injuries, which required an affirmative, positive action on the part of the municipality for liability to attach, thus affirm-

ing judgment for the defendant.

The doctrine of discretionary act immunity for municipal employees is premised upon a rationale that "a more expansive exposure to liability would cramp the exercise of official discretion beyond the limits desirable in our society." *Grady*, supra at 338. As more fully explained in that ruling, "discretionary act immunity reflects a value judgment that-despite injury to a member of the public-the broader interest in having government officers and employees free to exercise judgment and discretion in their official functions, unhampered by fear of second-guessing and retaliatory lawsuits, outweighs the benefits to be had from imposing liability for that injury."

It has never been clear to me why this rationale is rational. All private individuals are charged with the duty of using reasonable care not to cause foreseeable death or injury to others through unreasonable actions or omissions, which seems to be a fairly sound rule to have everyone live by. I am not particularly comforted by the knowledge that municipal employees are "unhampered" by that rule, and thus given the discretion to unreasonably cause death and injury so long as they don't step over certain narrowly construed exceptions. Having said that, the trend in the case law seems to be to expand the scope of immunity and narrow the scope of the exceptions. Thus, practitioners bringing any such case should be prepared to show clearly that they fall under a well established exception. ■

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COURT CLARIFIES DEFINITION OF WAGES, 'DISCRETIONARY BONUSES'

Separate ruling focuses on GPS monitoring of workers

By **ROBERT G. BRODY**
and **ALLISON E. KAZI**

Overall, it has been a quiet year with regard to major judicial changes to Connecticut's employment laws. Throughout the Connecticut Supreme Court's term, which runs from September until May, the court dealt with only five major employment law issues and none of them produced any monumental changes. As a result, there is no need to revise an employer's practices based on this term's decisions.

EMPLOYMENT LAW

Discretionary Bonuses

In *Ziotas v. The Reardon Law Firm P.C.*, the Court dealt with the question of whether a discretionary bonus is considered wages under the Connecticut wage statutes. The plaintiff, an attorney, had an employment contract which included a provision that he would receive a bonus each year, and that the amount of the bonus would be based on the success of the business, as well as the

plaintiff's seniority and quality of work.

Each year, the plaintiff's bonus was determined by the head of the firm. However, the year the plaintiff left the firm, he did not receive a bonus. As a result, he brought an action for unpaid wages. The Supreme Court found that a discretionary bonus which is not calculated based on a set formula does not constitute wages. An employer cannot be penalized

for "failure to pay wages" if it chooses not to give a discretionary bonus.

While most of the focus from this case is the definition of wages, the definition of a discretionary bonus is another key issue. The law firm won this aspect of the case because the bonus was not based on a formula. There was no way to calculate the amount of the bonus. If the firm had been more specific in equating the specific criteria for the bonus to an amount of money earned, the opposite outcome would have been seen.

Another practical note is that while there is no obligation to create a written policy defin-

ing your bonus structure, such a policy could be very helpful. Without such a written policy, the terms of the bonus are left for the court to determine. So the take home from this case is to word all offers of discretionary bonuses in such a manner that their calculation is impossible and to put that wording in writing. Otherwise, the employer may lose the right to deny such a bonus and wages could be owed!

No Workers' Comp

In a decision important to the federal government, the Supreme Court decided the U.S. Postal Service is not an employer within the Connecticut Workers' Compensation laws. The court reasoned in *Lopa v. Brinker International, Inc.*, that because the federal government was not a corporation organized or created under the laws of Connecticut, it could not be considered a public corporation within the state, and does not fall under the workers' compensation laws.

The Court, in *Gerardi v. City of Bridgeport*, ruled



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there is no private cause of action for an employee (whether working in the private or public sector) to seek relief under Connecticut's electronic monitoring statute. This statute requires employers to notify their employees of all types of electronic monitoring used in the workplace.

Based on prior litigation, we know that using GPS devices is considered electronic monitoring

ANTITRUST ACT RULING LIMITS ATTORNEY GENERAL'S AUTHORITY

Two key arbitration decisions set 'traps for the unwary'

BY JEFFREY J. WHITE

The lifeblood of any corporation is its proprietary documents, which often reflect the creativity, skill, and inventiveness of employees. As a result, the unwanted disclosure of such documents can be devastating, and thus, justify an extended legal battle.

In *Brown & Brown Inc. v. Blumenthal*, 297 Conn. 710 (2010), the Connecticut Supreme Court decided one such battle when it interpreted the Connecticut Antitrust Act to impose limits on the attorney general's authority to disclose a corporation's trade secrets and other valuable information during the course of an investigation. The impact of the *Brown* decision — both legally and politically — renders it the most significant business law decision issued by the Supreme Court in 2009-10.

In addition to *Brown*, the Supreme Court issued two important arbitration decisions, which set "traps for the unwary" for those handling arbitrations. As corporations continue to insert arbitration clauses in their commercial contracts, it is essential to understand that the contours of arbitration law differ from typical civil litigation.

Antitrust Act

Connecticut General Statutes § 35-42 authorizes the Office of the Attorney General to demand discovery before an action is even commenced, based merely on a suspicion that a corporation is engaging in antitrust activity. The legislature attempted to cushion this broad investigative power by preventing the public from gaining access to confidential information disclosed during these types of investigations.

In *Brown*, the Supreme Court decided the question of whether the attorney general could disclose *Brown & Brown Inc.*'s confidential information to other parties (such as actual and potential competitors) during the course of the antitrust investigation. Clearly, the stakes were high for the business community and the attorney general.

In an opinion written by Chief Justice Chase T. Rogers, the Supreme Court ruled in favor of the plaintiff on three distinct issues. First, as to the disclosure of confidential information to third parties during an investigation, the Court held that C.G.S. § 35-42's prohibition from disclosing such information to the "public" bars the attorney general from disclosing subpoenaed information and documents to third parties during interviews or depositions that are conducted to advance the antitrust investigation. Specifically, the Court noted that although the legislature "granted broad investigatory powers to [the attorney general] to pursue antitrust violators, [it] also intended to afford counterbalancing protections to investigatory targets in recognition of the potential sensitivity of internal business information and the fact that the [attorney general's] investigation need not be founded on any specified level of suspicion and, ultimately, might result in no allegations of wrongdoing."

Indeed, the Court soundly rejected the attorney general's argument that there would be little prejudice to disclosing documents to one's competitors (particularly, if they are involved in the conspiracy), by emphasizing that those parties targeted by the attorney general have not and may never be charged and therefore "it is wholly inappropriate to presume their guilt to justify fur-

ther expansion of the [attorney general's] already considerable statutorily granted investigatory powers."

Second, with respect to the disclosure of confidential information to other governmental entities, the Court interpreted C.G.S. § 35-42 as requiring the attorney general to obtain an agreement from those officials that they will keep the information confidential before any documents or information are shared. In doing so, the Court rejected the attorney general's argument that it would be unduly burdensome to place restrictions on disclosure to other governmental officials as that argument "is belied by the fact that many other states have similar prerequisites for interjurisdictional sharing of documents and information acquired in pre-litigation antitrust investigations."

Finally, the Court held that if confidential documents are filed with the Superior Court as part of some future legal action, they must be filed under seal with the court until a determination is made as to whether the documents should be disclosed.

Ultimately, the *Brown* decision reaffirms that the Office of the General Attorney continues to enjoy

broad authority to investigate antitrust violations. However, as *Brown* indicates, this authority is not limitless, which provides some degree of comfort to the business community.

Arbitration

In the past several years, the Supreme Court has issued several important arbitration decisions. This court year was no exception. For instance, in *Bacon Construction Co. Inc. v. Department of Public Works*, 294 Conn. 694 (2010), the Court found that the department had waived its right to seek judicial review of whether a dispute was subject to arbitration or barred by sovereign immunity.

In a nutshell, the department agreed to allow an arbitrator to decide the sovereign immunity issue, but later, when it lost, the department sought *de novo* judicial review. The Supreme Court determined that the department's submission of that issue to the arbitrator prevented the Court from exercising *de novo* review over the issue even though it is traditionally within the bailiwick of the judicial system. The Court repeatedly emphasized the department's willingness to allow the arbitrator to decide the sovereign immunity issue, and for that reason, the department was not entitled to get a second bite at the proverbial apple. Ultimately, while *Bacon* is fact-dependent, it again emphasizes that arbitration is not a prelude to expansive judicial review.

Indeed, the limited review afforded to arbitration awards was also at issue in *Comprehensive Orthopedics & Musculoskeletal Care LLC v. Axtmayer*, 293 Conn. 748 (2009). In a 4-3 decision, the majority held that an arbitrator did not exceed his authority when he declined to award attorney's fees and costs pursuant to the terms



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of an employment agreement.

The circumstances of the case are relatively straightforward. In *Axtmayer*, the underlying arbitration concerned whether a physician violated a restrictive covenant in an employment agreement. The arbitrator found that the covenant was violated, but held that the penalty for violating the agreement (i.e., the liquidated damages clause) was excessive. As a result, the arbitrator reformed the contract and slashed the penalty for a violation in half. The agreement also stated that attorney's fees and costs were to be awarded to the plaintiff if it was the "prevailing" party on its claims. The arbitrator declined to award fees and costs based upon his reformation of the agreement.

Although the arbitrator did not say so expressly, the majority found that the arbitrator had implicitly ruled that the plaintiff had not prevailed in the arbitration in light of the arbitrator's reformation of the employment agreement. The majority held that so long as the arbitrator rendered one of two awards (namely,

that: 1) the plaintiff prevailed and was entitled to fees or, 2) that it had not prevailed and was not entitled to fees) then the award conformed to the submission. In doing so, the majority relied on established case law that a court cannot correct legal errors, which in this case would be the arbitrator's interpretation of the term "prevailed." Not surprisingly, the dissent, authored by Justice Joette Katz, disagreed with this reasoning by arguing that the arbitrator exceeded his authority by ignoring the settled meaning of the term "prevailed."

Ultimately, the Court (albeit by a slight margin) issued another decision that underscores the narrow judicial review afforded to an arbitration award.

The 2009-10 Court year produced interesting decisions that will have a future effect on the business community. Time will tell whether the Court will continue to become entangled with the Office of the Attorney General or whether quieter days are ahead. ■

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as regulated by this statute. In this case, the city did not inform its employees that it had placed GPS tracking devices in city-owned cars. Based on evidence gathered from the GPS device, the plaintiffs were presumably subject to discipline for traveling to locations not required by their job assignments. The plaintiffs sued, claiming they were entitled to notice of monitoring and damages when the city failed to provide such notice. The Supreme Court rejected this claim explaining that only the commissioner of the state Department of Labor can bring such an action.

This ruling does not mean that employers should ignore the requirements of the statute. To the contrary, the commissioner can penalize an employer for violations, and an employee may use administrative remedies provided under their collective bargaining agreement. However, this does mean employees cannot personally initiate the action. Hopefully, the result is that frivolous actions are slightly less likely. However, to protect the business, employers should still post the required notices in their workplaces regarding their rights to electronically monitor employee's conduct.

Other New Haven Firefighters

While the country was concentrating on *Ricci v. DeStefano*, a case regarding discrimination in the New Haven Fire Department that received national media coverage, the Connecticut Supreme Court was considering another discrimination case involving different New Haven firefighters.

The case, *Broadnax v. City of New Haven*, was brought by several African-American firefighters who claimed the city's process of "underfilling" high-ranking positions had a discriminatory impact on African-American firefighters. Underfilling is when "the fire department promotes an individual to a particular position, and the city's budget has not allocated funds to pay the salary of that position." The solution is funds for a vacant higher ranking position are used to pay for the newly appointed lower ranking position. The plaintiffs desired to be promoted to chief. However, since so many lieutenant positions had been underfilled, there was no money left to pay for

new chiefs and the plaintiffs were therefore denied promotions. They argued that the process of underfilling disproportionately benefited non-African American firefighters, in violation of the equal protection clause of the Fourteenth Amendment.

The jury awarded the plaintiff's front pay and non-economic damages. However, the Supreme Court reversed finding no evidence that there was any discriminatory impact or intent on the part of the city and concluding no reasonable juror could find discrimination in violation of the Fourteenth Amendment.

Bargaining Agreements

In *Honulik v. Town of Greenwich* (argued in the 2008-09 term but officially released this past term), the plaintiff argued that under the collective bargaining agreement between the town of Greenwich and the Silver Shield Association, the highest scoring officer on the promotional exam was to be promoted to captain. The plaintiff scored the highest, but a lower scoring lieutenant was promoted. The town argued that the collective bargaining agreement did not cover the promotion to police chief, since the position was outside the bargaining unit.

The Court agreed with the town, stating that the promotion to police captain could not be a subject of bargaining or grievance between the union and the employer as the employee was promoted out of the bargaining unit. This is the same basic standard recognized at the federal level — if the issue is promotion out of the bargaining unit, the employee has no right to use the collective bargaining agreement to protest the promotion.

Conclusion

As the Connecticut Supreme Court begins their new term this month, employees and employers alike should remain aware of the Court's decisions. With the state's increase in wage and hour enforcement, its crackdown on worker misclassification, and an economy that remains weak, it is likely that the next Connecticut Supreme Court term will see more employment law cases. ■

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BUSINESS LAW