

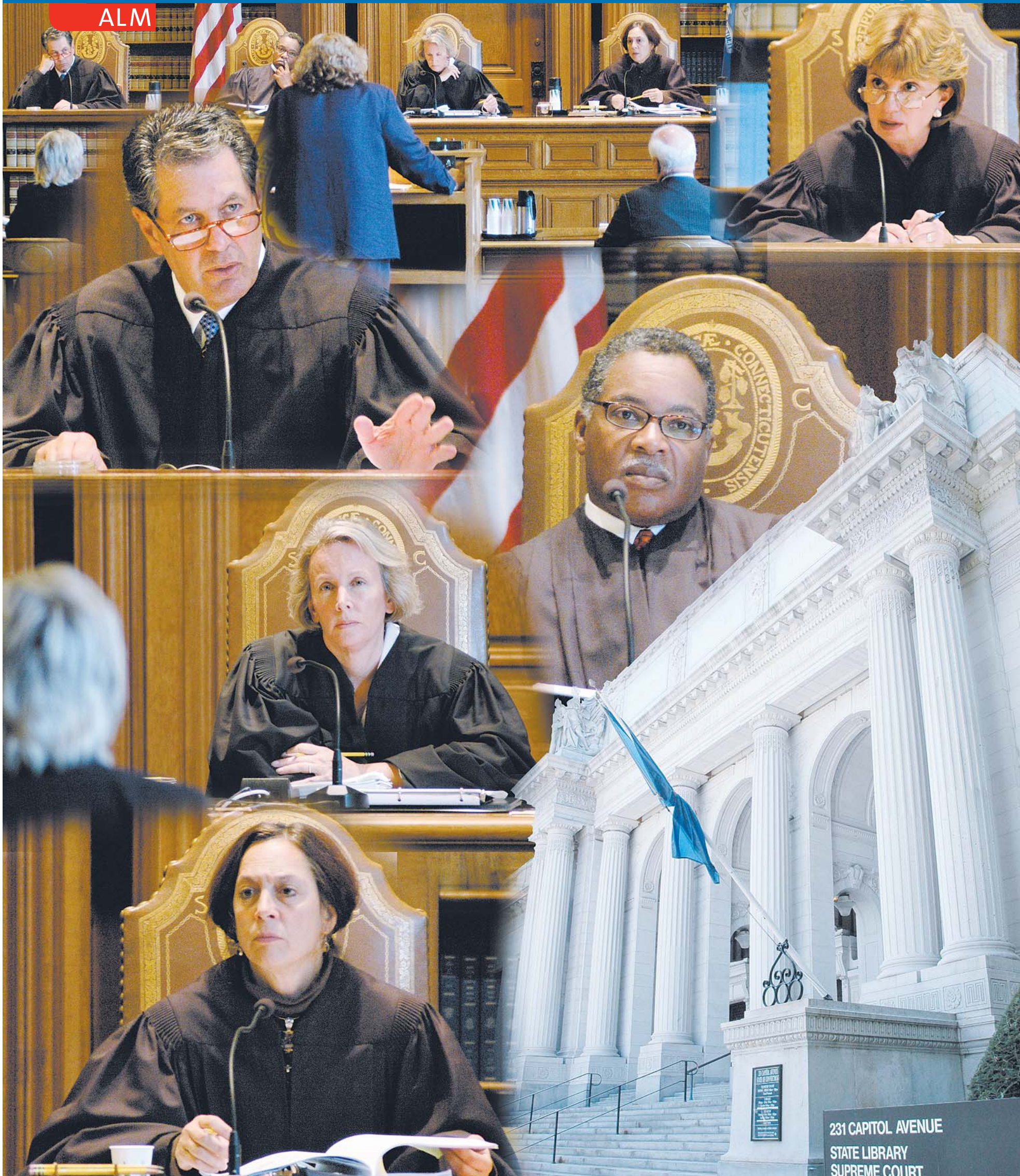
Connecticut

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New Limits To The Corporate Veil?

‘Responsible corporate officer’ doctrine, ‘direct participation’ principle both expanded

By JONATHAN M. FREIMAN

The corporate veil covers much, but it does not cover everything. That could have been the opening line of each of two important business law decisions handed down by the Connecticut Supreme Court a week apart this past summer: *Celentano v. Rocque*, 282 Conn. 645 (2007), and *Weber v. U.S. Sterling Securities Inc.*, 282 Conn. 722 (2007).

Ordinarily, the corporate or LLC form shields officers, directors and owners from liability for a company’s debts or liabilities. Recently, though, the Supreme Court has articulated new exceptions to that rule for officers and directors, separate from the longstanding doctrine of piercing the corporate veil.

Protecting The Public

In *Celentano*, the court expanded the “responsible corporate officer” doctrine, first adopted in *BEC Corp. v. DEP*, 256 Conn. 602 (2001), from the Minnesota Court of Appeals. Under the usual rule, of course, officers are not held responsible for their company’s misdeeds. The responsible corporate officer doctrine deviates from that rule, making an individual officer personally liable for the company’s action whenever the officer is in “a position of responsibility and influence from which he could have prevented the corporation from engaging in the [prohibited] conduct.” *Ventres v. Goodspeed*, 275 Conn. 105, 144 (2005).

In *Ventres*—discussed here last year—the court had noted *in dicta* that the responsible corporate officer doctrine applied to all “strict liability public welfare offenses committed by the corporation.” *Celentano* transformed that *dicta* into the explicit law of the land. Because “public welfare offenses” is not a self-evident category, Justice David M. Borden, writing for the court, explained that such offenses share three things: “First, they protect the public health, safety or welfare. Second, they protect the public from harms from which the public cannot protect themselves. Third, public welfare statutes have either a reduced *mens rea* requirement or require none at all.”

Both *Celentano* and *Ventres* involved environmental statutes, and the applicability of the doctrine to other statutes will likely be a hotly contested issue in subsequent appellate cases.

The *Celentano* case involved a dam. Vincent Celentano controlled a company that owned property containing a dam, and the Department of Environmental Protection, determining that the dam had become unsafe, held Celentano personally responsible for its repair. Because his own personal acts or omissions had not led to the dam’s hazardous condition, Celentano argued that application of the responsible corporate officer doctrine to him would effectively raze the corporate veil, threatening businesses throughout the state.

Jonathan M. Freiman is a partner in the Appellate and Litigation Practice Groups at New Haven-based Wiggin and Dana, and a Senior Schell Fellow at Yale Law School.

The Supreme Court disagreed. Because Celentano “failed to influence” his company’s corporate policy, and because the company’s obligation to keep the dam in good repair was based on a strict liability statute, Celentano was liable. In the end, the court feared the real flood waters more than the metaphorical ones: any burden the responsible corporate officer doctrine imposed on businesses, it held, was outweighed by the good it did in ensuring the public welfare. Corporate officers beware: failure to use your influence to prevent your company from committing a “public welfare offense” can lead to personal liability.

Direct Participation

In *Weber v. U.S. Sterling Securities Inc.*, the Supreme Court turned to another source of liability for corporate officers and directors: the “direct participation” principle. Under that doctrine, officers or directors can be held individually liable for the tortious acts that they commit, ratify or approve—even if the tort is committed in their official, not individual, capacities. Unlike the responsible corporate officer doctrine, the direct participation principle seemingly applies to all torts, not just the narrower category of “public welfare offenses.”

Weber involved a class action brought against a Delaware LLC for violation of the federal law prohibiting unsolicited fax advertisements—the ancestor of spam. The trial court granted summary judgment on the ground that the individual defendants’ membership in an LLC precluded their personal liability, but the Supreme Court disagreed. It noted that, while the directors and officers of corporations are shielded from automatic responsibility for the entity’s debts and liabilities, that protection does not extend to their own direct participation in wrongdoing.

While the Supreme Court had reiterated

Connecticut’s common law “direct participation” principle in *Ventres*, *Weber* goes a step further, holding that Delaware law, like Connecticut law, exposes officers and directors to personal liability for directly participating in—i.e., committing, ratifying or approving—a tortious act, even if the participation occurs solely in the officer or director’s official capacity.

Because Delaware has remained a favorite site for the incorporation of businesses owned by Connecticut residents, the decision could have significant practical effects. The Delaware Supreme Court has never squarely addressed this issue, and until it does, *Weber* is the final authority on the liability of Delaware companies sued in Connecticut.

The two corporate doctrines reinforced by the Supreme Court this summer overlap to some degree, but they are distinct. The responsible corporate officer doctrine makes executives responsible

even for their omissions, but applies only to public welfare offenses. The direct participation doctrine makes executives responsible for their

individual actions, and applies to the full range of torts. Together, the decisions make clear that the corporate veil stretches only so far in Connecticut.

Boardrooms Take Note?

That’s worth remembering. Though the Connecticut Supreme Court handed down decisions over the past year addressing an unusually large number of issues of interest to the business community—including decisions making it easier to sue retailers for negligence, finding liability releases invalid as against public policy, and holding that the state constitution, like the federal constitution, requires little scrutiny of economic regulation—the decisions on the limits of the corporate veil may attract the widest attention in the state’s corporate suites and boardrooms. ■

New Precedents, Wide Impact

Whether it’s the creation of a new cause of action for spoliation of evidence or giving trial courts in divorce cases the go-ahead to award attorney fees to discourage repeated discovery abuse, the Connecticut Supreme Court advanced the law on several fronts during its 2006-2007 term that just ended, significantly impacting litigants and their lawyers.

Those advances, in key practice areas, are summarized in the pages that follow by practitioners in those areas who make it a point of staying current with Supreme Court caselaw. Each author, given a prescribed word limit, was responsible both

for selecting which cases to include in their summaries and for determining what weight to give those cases.

The practice areas represented were selected by the *Law Tribune* and are as followed:

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Notice Lapse Wasn't A Fatal Defect

Though plaintiffs indisputably failed to notify interested parties, their position was adequately argued

By **JOYCE H. YOUNG**

Is the failure to give notice to interested parties in a declaratory judgment action a fatal defect? That was one of the key civil procedure questions to come before the Connecticut Supreme Court this past year.

CIVIL PROCEDURE

Overruling its own precedent, the high court in *Batte-Holmgren v. Commissioner of Public Health* held that such a deficiency does not deprive a court of subject matter jurisdiction.

The plaintiffs in *Batte-Holmgren*, officially released on Feb. 13, were café owners challenging the constitutionality of a statute prohibiting smoking in restaurants, cafes and other public facilities, but not in casinos and most private clubs. The state and the American Cancer Society, as *amicus curiae*, aligned in support of the statute. The plaintiffs had indisputably failed to notify interested parties as required by Connecticut General Statutes §17-56(d).

The Supreme Court noted that, while not a jurisdictional defect, the failure to notify interested parties may implicate due process concerns compelling a court to require notice or joinder before continuing. It concluded, however, that the interests of non-parties in the purely legal constitutionality issue presented in *Batte-Holmgren* had been adequately represented by the existing parties, which had thoroughly briefed and argued the issue.

Another case, *C. R. Klewin Northeast LLC v. City of Bridgeport*, presented a jurisdictional turf issue in a construction arbitration. On the 20th day of arbitration hearings and almost two and a half years after the indictment of its former mayor, the city of Bridgeport sought to amend its answer to allege that the public works contract at issue had been illegally procured.

The arbitration panel denied the amendment as untimely, but later afforded the city the opportunity to present evidence on the illegality defense. The city did not do so and participated in the arbitration to its conclusion. After 37 days of hearings, the panel rendered a substantial award against the municipality.

Citing federal precedents, the Supreme Court held that challenges to the legality of an entire agreement fall within an arbitration panel's jurisdiction, while attacks specific to an arbitration provision are committed to the court. Since the city sought generally to attack the agreement, not just

its arbitration clause, the defense fell squarely within the panel's jurisdiction. The panel's error in not considering the defense was harmless, however, because the city waived the defense by raising it too late and by not presenting evidence when given the chance, the high court concluded in a decision issued in April.

Res Judicata

The court's ruling the following month in *Powell v. Infinity Insurance* teaches that a judgment finding coverage is not a condition precedent to bringing a bad faith claim against an insurer, even when some of the alleged bad faith conduct occurs during an initial coverage action.

In *Powell*, the insureds prevailed in an initial action for uninsured motorist coverage. About a year later, the insureds brought a second action alleging bad faith, breach of contract and violation of the Connecticut Unfair Trade Practices Act. These claims were alleged to have arisen from the insurer's denial of coverage, refusal to settle within the policy limits before and after the offer of judgment in the first action, delay in resolving the claims, and harassment to force the insureds to settle for an unfair amount.

Applying *res judicata* principles, the Supreme Court affirmed the trial court's dismissal of the second action, finding that the claims in both actions grew out of the same transaction, and that the bad faith and unfair trade practices claims were extinguished because they *could* have been asserted in the first action.

The high court was not persuaded by the insureds' contention that the second action was predicated in part on events that occurred only after the insurer refused their offer of judgment during the first action. Because the first action went to trial only 13 months after the return date, the complaint could have been amended. The court also was not swayed by the insureds' concern that the attorneys in the first action might need to be witnesses, since this difficulty would arise in any event.

Liability Releases

In *Reardon v. Windswept Farm LLC*, officially released Oct. 3, 2006, the Supreme Court extended its recent case law invali-

dating releases of liability on public policy grounds in a negligence claim on behalf of a girl who was bucked off a horse during a riding lesson.

Cautioning against a formulaic approach, the court called for the public policy determination to be made by weighing all the circumstances "against the backdrop of current societal expectations." The *Reardon* defendants, pursuant to a "classic" adhesion contract, provided facilities, instructors and equipment for this popular recreational activity to the general public, regardless of ability level. The plaintiff lacked the knowledge, experience and authority to see that the stables were maintained in reasonably safe condition; only the defendants could do so. Under those circumstances, the court found it "illogical" to relieve the defendants from liability, and invalidated the release.

The high court's May 29, 2007, ruling in *ACMAT Corp. v. Greater New York Mutual Insurance Co.* settled a split in the lower Connecticut courts as to whether attorneys'

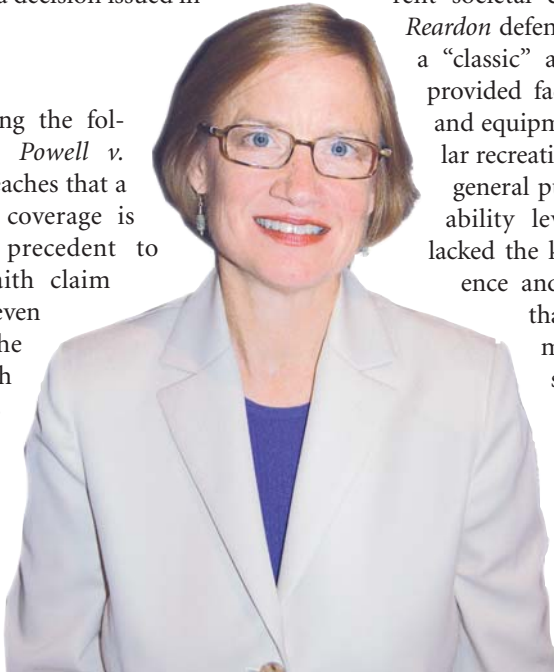
fees may be awarded to prevailing insurance policyholders in coverage actions.

Certain Connecticut lower courts, joining a plurality of states, had carved out an exception to the American rule permitting attorneys' fee awards to successful policyholders, even absent bad faith by the insurer. The Supreme Court declined to adopt this exception, underscoring its deference to the legislature to choose those limited instances under which attorneys' fees may be awarded.

In another ruling regarding attorneys' fees, the court in *Traystman, Coric and Kermaids P.C. v. Daigle* held that prevailing parties seeking attorneys' fees in actions based on a consumer contract or lease brought under C.G.S. §42-150bb must make a motion pursuant to Practice Book § 11-21 within 30 days of judgment.

C.G.S. § 42-150bb provides for the award of attorneys' fees, but is silent on the procedure for obtaining them. In *Daigle*, the prevailing party had submitted a bill of costs that included attorneys' fees. Ruling in May, the high court affirmed the trial court's rejection of the fee application.


As the Supreme Court noted, clerks automatically assess bills of costs. In contrast, attorneys' fees, which are typically far more substantial, are discretionary. Accordingly, motions for statutory attorneys' fees must be made by motion within 30 days of judgment, when memories of the nature and conduct of the case are fresh. ■



THE SUPREME Court noted that, while not a jurisdictional defect, the failure to notify interested parties may implicate due process concerns compelling a court to require notice or joinder before continuing.

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Grappling With Novel Prosecutions

High court: mother's poor housekeeping wasn't criminal, but father's refusal to disclose son's location was

By PROLOY DAS

The past 12 months has been full of novel prosecutions. For the Connecticut Supreme Court's criminal law jurisprudence, the past year's term is replete with explanations of what constitutes—and doesn't constitute—a crime.

The year's most national media-grabbing case was *State v. Scruggs*, 279 Conn. 698 (2006), an appeal from a mother's conviction for causing her 12-year old son to commit suicide by maintaining a cluttered and unclean home.

The son hung himself in a bedroom closet. During the ensuing investigation, police observed that the mother's apartment was "extremely cluttered" and had an "unpleasant odor." A jury convicted her of risk of injury to a minor in that she placed her son in a situation likely to injure his mental health. But the Supreme Court reversed. It held the statute was unconstitutionally vague as applied to the defendant's conduct, as she could not have foreseen her poor housekeeping would give rise to criminal liability.

However, in *State v. Gewily*, 280 Conn. 660 (2006), the court affirmed a risk of injury conviction without a showing of actual harm to the child. The victim's mother had custody over the couple's 3-year-old son. During an unsupervised visit, the defendant-father secretly took the victim with him to Ethiopia. A year later, he returned to the U.S. and was arrested when he arrived at the airport, but refused to disclose the location of the boy. He was convicted of risk of injury for depriving his son of the "love and affection" of his mother and custodial parent.

Other interesting prosecutions made their way up to the high court. In *State v. Aloi*, 280 Conn. 824 (2007), it held that a person's mere refusal to provide identification when requested by a police officer, even without physical force, constitutes the crime of interfering with an officer. Meanwhile the defendant in *State v. Haight*, 279 Conn. 546 (2006), saw his conviction for operating a motor vehicle under the influence of intoxicating liquor upheld even though he was asleep in a parked vehicle. Although the engine was not running, the court determined the presence of the key in the ignition was sufficient to prove operation.

In *State v. Knybel*, 281 Conn. 707 (2007), the Supreme Court held that an all-terrain vehicle (ATV) is a motor vehicle for purposes of the operating while suspended

statute. Finally, in *State v. McKenzie-Adams*, 281 Conn. 486 (2007), the court determined that a statute prohibiting a teacher from engaging in sexual relations with a student at the school was not unconstitutional and did not infringe upon privacy rights.

Right To Counsel Expanded

On the subject of constitutional law, the court issued two right-to-counsel decisions of import. In *State v. Casiano*, 282 Conn. 614 (2007), it ruled that an indigent defendant is entitled to the assistance of counsel in "any criminal action," including a motion to correct an illegal sentence and the subsequent appeal from a denial of that motion, unless bringing the motion would be frivolous. In *State v. Stenner*, 281 Conn. 742 (2007), the court held that, just as

defendant had a prior opportunity to cross-examine. In *Davis v. Washington*, 126 S. Ct. 2266 (2006), the court explained that statements made to police dispatchers in the context of 911 calls are testimonial and, therefore, inadmissible under *Crawford*, when the circumstances objectively indicate that there is no ongoing emergency and the primary purpose of the call is to establish a record for later criminal prosecution.

These holdings were applied in a case with dramatic facts, *State v. Kirby*, 280 Conn. 361 (2006), where the defendant appealed from his kidnapping conviction for the abduction of a 59-year-old second-grade teacher. While the victim was in the car with her assailant, she managed to get herself untied, escape from the defendant, drive-off leaving him on a highway, and return home. Once home, she reported the incident to a 911 dispatcher. However, two days after the incident, she mysteriously died as a result of a fall down a flight of stairs at her home, rendering her unavail-

talismanic phraseology that is required for a valid reasonable doubt instruction, and commended the trial judge for attempting to improve upon the standard charge that had been routinely issued in criminal cases. (Disclaimer: the author was counsel in this matter.) The instruction, based on the Federal Judicial Center's model instruction, uses the phrase "firmly convinced" to explain the concept of reasonable doubt to the jury.

In *State v. Edman*, 281 Conn. 444 (2007), the court found that a trial judge was not "neutral and detached" when he had a personal relationship with the defendant who was threatening to sue him in an unrelated matter and, therefore, should not have signed the search warrant. However, in *State v. Canales*, 281 Conn. 572 (2007), the court determined that no due process violation existed when a trial judge who signed a warrant in a case later presided at the defendant's probable cause hearing.

The Supreme Court reversed sexual assault convictions in two cases based on its interpretation of the rape-shield law. In *State v. Ritrovato*, 280 Conn. 36 (2006), it held the defendant was improperly denied the opportunity to introduce evidence, under the credibility prong of the rape-shield

IN STATE V. FAUCI, the state Supreme Court replaced the term 'prosecutorial misconduct' with 'prosecutorial impropriety' as a more accurate characterization of a claim of error premised upon a prosecutor's conduct during the course of a trial.



able at trial.

under the federal constitution, a defendant's right to counsel under the state constitution attaches when he is charged at arraignment and not during the defendant's post-arrest but pre-arraignment statement to police (which is independently safeguarded by *Miranda* warnings).

In another case calling for an interpretation of our state constitution, *State v. Davis*, 283 Conn. 280 (2007), the court rejected the opportunity to apply the rule of automatic standing and held that a defendant may challenge the legality of a search only if he has a reasonable expectation of privacy in the subject of the search. In *Davis*, the apartment owner gave the police permission to search a duffel bag that was in the apartment where the defendant was also staying. The duffel bag turned out to contain evidence of the defendant's involvement in a murder. The trial court denied the defendant's motion to suppress on the ground that the defendant did not have standing to object to the consented-to search.

Doctrines Adopted

The court also incorporated recent U. S. Supreme Court doctrines into its jurisprudence.

In *Crawford v. Washington*, 541 U. S. 36 (2004), SCOTUS held that "testimonial" hearsay statements may be admitted only if the declarant is unavailable and the defen-

able at trial. Applying *Davis v. Washington* to these facts, the state Supreme Court held the 911 call should have been excluded at the defendant's kidnapping trial because it was made after the emergency. The primary purpose of the call, the court reasoned, was to apprehend a suspect from a prior crime rather than to solve an ongoing emergency or crime in progress at the time of the call.

In *Apprendi v. United States*, 530 U. S. 466 (2000) and *Blakely v. Washington*, 542 U.S. 296 (2004), SCOTUS held that a defendant who is subject to an enhanced penalty has a right to a jury finding as to facts that enhance a sentence, other than the issue of whether he has a previous conviction. In *State v. Fagan*, 280 Conn. 69 (2006), the state Supreme Court held that, just like a prior conviction, the question of whether a defendant was lawfully on release at the time he committed an offence is a question of law that does not require a jury determination. However, in *State v. Bell*, 283 Conn. 748 (2007), the court held that a statute that calls for a sentence enhancement based on a determination of whether extended incarceration will serve the "public interest" requires that factual finding to be made by a jury rather than a trial court.

New Guidance For Trial Courts

In *State v. Jackson*, 283 Conn. 111 (2007), the court noted that there is no mandatory

statute, to contradict the victim's testimony that she was a virgin at the time of the first sexual assault. In *State v. Smith*, 280 Conn. 285 (2006), the court determined the defendant had been improperly denied the opportunity to introduce evidence that a third-party's semen was found on the victim under the source of semen exception to the rape-shield law. (Disclaimer: The author was counsel in this matter.)

In *State v. George J.*, 280 Conn. 551 (2006), the court held the statute of limitations period for sexual offences against minors, which is two years from the date of majority or five years from the date the victim notifies a law enforcement, begins only when the actual victim notifies the authorities. In *George J.*, a counselor reported suspected abuse to police on June 6, 1996, while the actual victim was not interviewed by police until four days later. The warrant was issued on June 7, 2001.

Finally, of note, is *State v. Fauci*, 282 Conn. 23 (2007), where the court replaced the term "prosecutorial misconduct" with "prosecutorial impropriety" as a more accurate characterization of a claim of error premised upon a prosecutor's conduct during the course of a trial.

Indeed, the 2006-07 year in criminal justice was a memorable one—both for its interesting prosecutions and its advancement of constitutional principles. ■

Proloy K. Das is an attorney at Hartford-based Rome McGuigan, P.C., where his practice areas are appeals, white-collar criminal defense and corporate litigation. He previously served as a prosecutor in the Appellate Bureau of the Office of the Chief State's Attorney from 2002 through June of this year.

A Victory For Independent Contractors

Withholding substantial deferred compensation has same impact as non-compete clause, Supreme Court rules

By **DEBORAH L. MCKENNA**

This past term, the Connecticut Supreme Court considered three cases dealing with employment-related issues. In the first case discussed below, it considered the question of whether a provision in an independent insurance agent's contract requiring forfeiture of deferred compensation was in essence a covenant not to compete. The court also examined whether it is a violation of Connecticut public policy to require an employee to sign an exculpatory clause prospectively waiving claims for injuries which he may suffer during the course of his employment. In the third and final case, the court addressed whether an individual who was precluded from seeking unemployment benefits because of a mental or physical disability could challenge the constitutionality of certain agency regulations pertaining to unemployment compensation, and if so, in what manner.

In *Deming v. Nationwide Mutual Insurance Co.*, 279 Conn. 745, 905 A. 2d 623 (2006), the Supreme Court considered the claims of three individuals who worked as insurance agents selling Nationwide insurance products. Their independent contractor agreements contained certain restrictions on their ability to work for competitors should their relationship with Nationwide cease, including the forfeiture of any deferred compensation.

Nationwide did not renew their contracts and the three agents began to sell other insurance products. Nationwide determined, due to their actions, the agents forfeited their right to certain deferred compensation, which ranged from \$158,000 for one of the agents to upward of \$800,000 for another agent.

The individuals sued, claiming, in part, that the provision was akin to a covenant not to compete and, as such, required that the court review the contract pursuant to the well-established, five-part test used to determine the reasonableness of such covenants.

The trial court rejected the agents' arguments and granted summary judgment on that count. On review, the Supreme Court determined that, although the forfeiture provision in the agents' contracts did not have a direct restraint on trade, it was similar to a covenant not to compete. It based its decision on the fact that the provision, if enforced, required that the agents give up significant sums of money and would likely have as much of an impact on trade as a traditional covenant not to compete. The Supreme Court remanded the case for further proceedings.

In *Brown et al. v. Soh et al.*, 280 Conn. 494, 909 A. 2d 43 (2006), the Supreme Court considered whether it is a violation of Connecticut public policy for an employer to require an employee to sign a release, prospectively waiving any rights to any claims an employee may have, should he or she be injured during the course of his employment.

The plaintiff, Robert Brown, was an employee of the Skip Barber Racing School. While assigned to a position on the track, Brown was hit by one of the school's students and suffered injuries. Brown then sued his employer for negligence.

The trial court granted the employer's motion for summary judgment, holding that an exculpatory agreement that the employer required Brown to sign barred any potential negligence claims. On review, the Supreme Court concluded that such an exculpatory agreement in the employment context violates Connecticut public policy.

In reaching this conclusion, the high court cited three main factors: (1) workplace safety and injuries are subject to public regulation; (2) an employer has greater bargaining power than an employee who may be requested to sign such an agreement; and (3) the party seeking the protection—in this case the employer—is also the party who is most likely to have placed the employee in harm's way in the first place and also had control over the employee's working conditions.

Lastly, in *Fullerton v. Administrator, Unemployment Compensation Act et al.*, 280 Conn. 745, 911 A.2d 736 (2006), the Supreme Court considered whether regulations of the state Department of Labor requiring applicants for unemployment benefits be available for full-time work violate Connecticut General Statutes § 46a-76. The statute prohibits state agencies from considering physical or mental disabilities when determining if an individual is qualified for state funds.

The regulation in question is codified at C.G.S. § 31-235(a) and states, in relevant part, "an unemployed individual shall be eligible to receive benefits with respect to any week only if it has been found that ... he is physically and mentally able to work and is available to work and has been and is making reasonable efforts to obtain work."

That regulation was challenged by two individuals, Claudia Fullerton and Carmen Cocchiola. Fullerton suffered from bipolar disorder and a back injury. However, at the time she applied for unemployment benefits, she had most recently worked part-time for a period of 15 months. Although

she looked for work, as required by the statute, she limited her search to part-time positions. Cocchiola suffered from severe vascular disease in his leg and had a medical restriction that limited his availability to work to six hours per day, five days per week. Cocchiola was employed for a number of years within his restrictions. However, in 2001, he lost his job. When seeking subsequent employment, he indicated his desire to work six-hour days.

Both individuals were denied unemployment benefits and challenged the validity of the Department of Labor regulation, claiming that it violated C.G.S. §§ 46a-71(a) and 46a-76(a), the Americans with Disabilities Act, and the Equal Protection Clauses of the Connecticut and U.S. Constitutions.

The Supreme Court determined that neither the Board of Review nor the trial court had the statutory authority to hear the claimant's appeal. In reaching this conclusion, the court held that the laws governing unemployment benefits, and specifically, the responsibilities and jurisdiction of the Board of Review and the unemployment claims referees, did not allow for them to consider the validity of the governing statutes or regulations. The court also concluded that the trial court did not have the authority to consider an appeal that challenged the validity of these regulations.

In the alternative, the Supreme Court held the proper venue for such a challenge would be the Connecticut Commission on Human Rights and Opportunities. ■

ALTHOUGH the forfeiture provision in the agents' contracts did not have a direct restraint on trade, it was similar to a covenant not to compete, the Supreme Court determined.

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Attorneys Gain New Protections

Supreme Court throws wet blanket on most litigants' vexatious litigation claims

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

The Connecticut Supreme Court issued five cases involving attorney ethics this past year, the most important one being *Falls Church Group Ltd. v. Tyler, Cooper & Alcorn LLP*, written by Justice Joette Katz, the court's ethics guru.

Published Jan. 23, *Falls Church* concerns the standards for bringing a vexatious litigation case against a lawyer and holds that the test is essentially the same as that against a client: facts strong enough to justify a reasonable belief in grounds for prosecuting the action.

While 100 out of 100 attorneys would not have to have that belief, *Falls Church* provides ample protection for lawyers testing the limits. Quoting from a California case, the Supreme Court said probable cause may exist "even if it is extremely unlikely that they will win."

This is a good decision that clarifies an important area of the law and properly throws a wet blanket over most litigants who bring vexatious litigation claims. Attorneys should note, how-

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LAWYERS AND LEGAL ETHICS

ever, that the court does not address, except tangentially, in footnote 10, the doctrine of abuse of process.

Another notable ruling is the one written by Justice David M. Borden in *Rioux v. Barry*, released in July. In a case with no apparent relevance to ethics law, the Supreme Court attacked *Field v. Kearns*, 43 Conn. App. 265, cert denied, 239 Conn. 942 (1996), in a mere footnote.



Fields held an attorney who is wrongfully grieved has no recourse through an abuse of process or vexatious litigation action. Did the court mean to overrule *Fields* when it declared: "The holding of *Fields* is inconsistent with the holding of this opinion?" If so, it may put a damper on grievance complaints where the oath requirement on

the complaint form did not.

However, our advice to lawyers is this: if they have won a dismissal of a grievance complaint against them, be happy and go on with life. Don't keep the wound festering by bringing a vexatious litigation claim.

Disbarred Attorneys

The third most important decision is buried deep in *Friezo v. Friezo*, a landmark decision issued in February on the validity

of prenuptial agreements. At the very end of Justice Peter T. Zarella's 6-1 decision is a discussion of Rule 1.8(i) of the Rules of Professional Conduct. One of the reasons the trial court had invalidated the agreement was that the defendant fiancé had suggested the plaintiff fiancée seek advice, before signing the agreement, with a lawyer in his sister-in-law's firm.

The plaintiff, in fact, saw another lawyer in that firm. Zarella pointed out that it was ethically proper for two reasons: (1) Rule 1.8(i) does not apply to in-laws; and (2) the rule is personal and did not disqualify other lawyers in the sister-in-law's firm.

The fourth most important decision was written by Justice Flemming L. Norcott Jr. in *Daniel M. Somers & Associates P.C. v. Busch*,

published Aug. 7. It held that a disbarred attorney with an express contract with his client to provide legal services has, by his disbarment, breached that contract and cannot claim *quantum meruit*. All he can claim is unjust enrichment.

The last case, last only because it is likely to affect even fewer readers of this article than *Somers*, is *Statewide Grievance Committee v. Burton*, which was issued in April. Also authored by Justice Zarella,

Burton concerns whether an already disbarred lawyer could be presented before the grievance committee for another claim occurring before disbarment. Zarella said yes, because a new ethical violation, if proven, might affect the defendant's chances of being readmitted to the bar.

By far the most important Appellate Court decision this year concerning legal ethics is *McCullough v. Wentworth Associates*, which like *Somers* refuses to apply the doctrine of *quantum meruit*, but for the opposite reason. The client thought his attorney, McCullough, had done a poor job preparing the case for trial and brought in other counsel to assist him. But McCullough was never discharged by the client. Therefore, when the case settled before trial he was entitled to his contingency fee.

The Appellate Court opinion shows that, if the client is dissatisfied and wants to pay only *quantum meruit*, the lawyer must be discharged. We question this decision, however, because discharging a lawyer shortly before trial is often not a practical alternative.

Trial lawyers must take note of *Brunswick v. Statewide Grievance Committee*, in which the lawyer twice runs afoul of Rule 3.1. The Appellate Court held the lawyer could not offer evidence that he admittedly knew was inaccurate; and could not pursue a frivolous allegation absent any evidentiary basis. The court made clear that the rule applies as much to bringing an action as to pursuing allegations and claims within the action. ■



Land Matters Make Up Big Chunk Of Appeals

Among dozens of other rulings, planned developed districts deemed to be legitimate zoning choice

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

The Connecticut Supreme Court over the past 12 months grappled with eminent domain, zoning and other real property law issues. **REALPROPERTY** This article

sets out to highlight those decisions. In-depth analysis or discussion, however, is not consistent with the space constraints of this column. The significant decisions are as follows:

Eminent Domain

In *Albahary v. City of Bristol*, the Supreme Court upheld the Appellate Court's conclusion that a property's pre-taking environmental injury had been appropriately included in the valuation of the taking. In *Commission of Transportation v. Rocky Mountain LLC*, the high court upheld the trial court's valuation of an easement for

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commercial billboards.

The Supreme Court heard one case involving economic development agencies, *Maritime Ventures v. Norwalk*, in which it ruled that a redevelopment agency has no duty to integrate a non-standard property into its redevelopment plan when the plan already does not permit the uses exercised by that property. Further, it held that an amended redevelopment plan does not need a new finding of blight.

Zoning

In *Jalowiec Realty Associates v. Planning & Zoning Commission*, the Supreme Court found *mandamus* an appropriate remedy for a zoning commission's failure to act within the mandatory statutory time frames in Section 8-7d.

In *City of Bridgeport v. Planning & Zoning Commission*, it ruled that the notice requirement under Section 8-3(b) for zone change

applications is both jurisdictional and requires strict compliance. On the other hand, in *Roncari Industries Inc. v. Planning and Zoning Commission*, the court also held that no additional notice is required when a public hearing, after being properly noticed, is postponed. Any interested person attending the commission's proceedings would have learned of the rescheduled date.

In *Pansy Road LLC v. Town Planning and Zoning Commission*, the Supreme Court ruled that a planning commission, because it was acting in an administrative capacity, was legally bound to approve an application that complied with all applicable subdivision regulations, and could not deny the application based on off-site traffic concerns.

The Supreme Court addressed statutory and classical aggrievement in *Moutinho v. Planning & Zoning Commission*, and rejected the idea that a real estate contract, even though violative of the Statute of

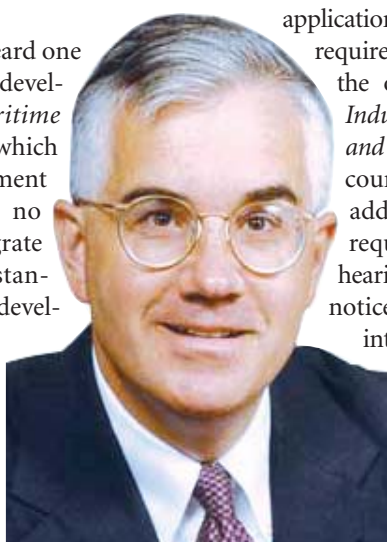
Frauds, could not serve to establish aggrievement as a matter of law.

In *Campion v. Board of Alderman*, the Supreme Court expressly found that planned developed districts, like floating zones, are among the legitimate zoning choices the city of

New Haven may exercise pursuant to its 1925 Special Act. In *Graff v. Zoning Board of Appeals*, the Supreme Court

addressed the theory of implicit accessory uses, in holding that pets may be regulated as an accessory use on residential property.

Historic District Commission of the Town of Fairfield v. Hall was a case of first impression. The court ruled that a sculpture placed on the front lawn of the defendant's property was a "structure" within the meaning of Connecticut General Statutes § 7-147a(a), and, as such, required the property owners to submit an application for a certificate of appropriateness to the historical commission.



Supremes Advance Law For Plaintiffs

Court creates exception to actual notice requirement, new cause of action for destroyed evidence

By **BRENDEN LEYDON**

This past year saw a number of interesting developments in tort and insurance law. Rather than briefly mention a number of state Supreme Court cases, I have chosen to explain two of the most notable cases in more detail.

The first is *Kelly v. Stop and Shop Inc.*, an *en banc* ruling officially released April 3. *Kelly* dealt with the issue of a notice requirement in a fall down case when the negligence in question arises from the mode of operation of a business establishment.

Specifically, the plaintiff Maureen Kelly slipped and fell on a piece of lettuce that had fallen to the floor from the self-service salad bar of the defendant's supermarket in Fairfield. After a bench trial, the trial court found that the plaintiff had failed to meet her burden of establishing that the defendant had actual or constructive notice of the particular piece of lettuce and, on that basis, rendered judgment for the defendant.

The Supreme Court was called upon to adopt the "mode of operation" rule, which relieves the plaintiff of the burden of proving notice of the particular defect in cases where the cause of the injury springs from the foreseeable actions of the defendant's employees or visitors in the context of the defendant's business operation and the defendant fails to take reasonable precautions to avoid harm of the general nature of that which caused the plaintiff's injury.

The prior general rule required injured victims to prove that the defendant either had actual notice of the presence of the specific unsafe condition which caused the injury or constructive notice of it. "The notice, whether actual or constructive, must be notice of the very defect which occasioned the injury and not merely of conditions naturally productive of that defect even though subsequently in fact producing it," (Id. at 794). The "notice of the very defect which occasioned the injury" rule has been the death knell for many otherwise

meritorious claims, including Maureen Kelly's case at the trial level.

In an opinion written by Justice Richard N. Palmer, the Supreme Court adopted the mode of operation rule, which "allows a customer injured due to a condition inherent in the way a store is operated to recover without establishing that the proprietor had actual or constructive knowledge of the dangerous condition" (Id. at 795). The court gave numerous reasons for the soundness of the rule, among them that the possessor of property has a vastly greater ability to gather and preserve information at the accident scene than the injured victim "who may be dazed, helpless and friendless, unable to interview bystanders or to observe the scene carefully." Therefore, the court held that a defendant who fails to take reasonable precautions to avoid dangers "should bear the burden of demonstrating that its failure to take such precautions was not a proximate cause of any injuries resulting from those foreseeable dangers."

Justice Peter T. Zarella wrote a concurring opinion to emphasize the mode of operation rule does not presume that all self-service operations are inherently dangerous, thus the plaintiff still must establish that the business in question gave rise to a foreseeable risk of injury to its customers.

This case represents a significant shift from the prior "time on the floor" proof requirement that was often impossible to meet as a factual matter and rested on questionable logic. It will be interesting to see how this case is construed outside of the self-service retail store context as its reasoning seems equally applicable to a wide variety of premises liability situations where a difficult proof barrier as to notice has existed.

Ladder Destroyed

The second notable case is *Rizzuto v. Davidson Ladders Inc.*, officially released Oct. 3, 2006. The *Rizzuto* case dealt with the issue of whether Connecticut should recog-

nize an independent cause of action for spoliation of evidence.

The plaintiff, Leandro Rizzuto, climbed a ladder manufactured by the named defendant while shopping at a Home Depot store in Norwalk in December of 1996. The ladder collapsed suddenly and the plaintiff fell to the floor, incurring serious physical injuries.

In August of 1997, Rizzuto brought an action against the named defendant and Home Depot. Thereafter, the plaintiff asked the defendants repeatedly to preserve the ladder and to afford him an opportunity to examine the ladder. In 1998, the defendants' expert examined the ladder and surprisingly concluded that it was not defective in any manner.

The defendants thereafter destroyed the ladder without ever allowing the plaintiff an opportunity to inspect it, despite the fact of the pending litigation, repeated requests to examine it and instructions to preserve the ladder.

The plaintiff sought to add a specific count sounding in spoliation of evidence as an independent cause of action. However, the trial court struck that count, finding that no such cause of action existed. The issue was ultimately appealed and transferred to the Supreme Court. Writing for the majority, Justice David M. Borden found that such a cause of action was "necessary to compensate the victims of spoliation and to deter future spoliation."

The Supreme Court determined that existing remedies, such as a potential adverse inference charge under *Beers v. Bayliner Corp.*, 236 Conn. 769 (1996), were insufficient. Specifically, *Beers* had concluded that the adverse inference would not be sufficient to bridge the evidentiary gap when the plaintiff did not have "some independent concrete evidence of a product defect," Borden wrote.

Therefore, the court established a new cause of action for spoliation, consisting of the following essential elements: (1) the defendant's knowledge of a pending or impending civil action involving the plaintiff; (2) the defendant's destruction of evi-

dence; (3) in bad faith, that is, with intent to deprive the plaintiff of his cause of action; (4) the plaintiff's inability to establish a *prima facie* case without the spoliated evidence; and (5) damages.

Justice Palmer wrote a concurring opinion noting that *Beers* should be extended to allow the adverse inference to satisfy the plaintiff's burden of production upon proof that the defendant destroyed the evidence in bad faith. Former Chief Justice William J. Sullivan wrote a dissenting opinion, noting firstly that he would conclude that the plaintiff had established a sufficient *prima facie* case to obtain an adverse inference charge under *Beers*, and thus would avoid deciding the need for an independent cause of action. Furthermore, Sullivan stated that such a cause of action should not be adopted, as proof of the claim would be inherently speculative in no small part due to the very evidence that was lost.

Egregious Conduct

It seems the driving force behind the result in *Rizzuto* was the defendant's calculated decision to destroy evidence critical to the case against it, despite pending litigation and repeated requests not to. The defendant's well established record in the litigation arena itself provided clear support for the proposition that existing remedies were apparently not perceived as sufficient to convince potential defendants that the risk of destroying evidence were outweighed by the risk of preserving it. By placing the consequences of such behavior on the destroyer of evidence, one would expect it to think a little harder before engaging in such egregious conduct.

A fundamental policy purpose of substantive tort law is to place the risk of loss on the party best able to avoid or protect against it. These two cases illustrate that this same policy purpose needs to be given priority in devising procedural tort law. While some might prefer the rigid formal logical mechanisms holding to the principle that the plaintiff always carries the burden of proof, as Oliver Wendell Holmes explained, "the life of the law has not been logic: it has been experience."

By placing procedural as well as substantive burdens on the party best able to manage them, the Supreme Court ultimately advances the ends of justice for all. ■

Conveyances And Partitions

In *Socha v. Bordeau*, the Supreme Court's ruling distinguished between concepts of title and possession as affecting available legal and equitable remedies for trespass. It overruled the Commissioner of Revenue Services in *Old Farms Associates v. The Commissioner of Revenue Services*, and held that conveyance tax could only be imposed on the transaction for the unimproved lot, and not upon the value of the lot as improved with a house, based on the novel contract structure utilized.

In *Alexson v. Foss*, the court discussed the favored nature of alternate dispute resolution in considering a technical defect that was raised by the losing party in an arbitration.

Inland Wetlands/Environmental

In *AvalonBay Communities Inc. v. Zoning*

Board of Appeals of the Town of Stratford, the majority held that a municipality could intervene under Section 22a-19 to oppose the appeal to Superior Court by a developer from the town wetlands agency's denial of its application to conduct a regulated activity.

In *Celentano v. Rocque*, the Supreme Court upheld Department of Environmental Protection orders that were challenged under the hearing process in C.G.S. § 22a-408, directing the property owners to remedy deficiencies in a dam and associated detention basin.

Common Interest Communities

In *Weldy v. Northbrook Condominium Association*, the Supreme Court backed a trial judge's finding that the articulation of a leash length requirement (which was not

set forth in the condo declaration) was consistent with the board of directors' rule-making authority under Section 47-244(1) of the Common Interest Ownership Act and the terms of the condominium declaration, and did not constitute amendment of the declaration itself.

In another case involving the Common Interest Ownership Act, *Alvord Investment LLC v. Zoning Board of Appeals*, it found the act allowed a common interest community to be composed of airspace units, and that the developer did not have to get subdivision approval because no land was divided, even though the air above it was.

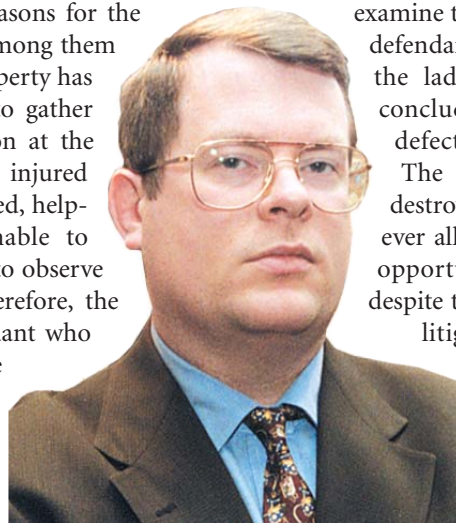
Easements And Property Liens

In *McBurney v. Cirillo*, the court discussed how an implied easement may be

created by the filing of a map on the land records. It also overturned the trial court's finding of a prescriptive easement, based on "tacking" of periods of time without evidence of privity between successive land owners. In *Stefanoni v. Duncan*, it ruled an easement providing access to water did not allow the placement of docks in the water off the burdened property.

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

TORTS AND INSURANCE LAW



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Discovery Abuse Taken Seriously

Judges in divorce cases given go-ahead to award attorney fees to discourage litigation misconduct

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

Three state Supreme Court rulings rendered over the past year will have profound consequences for the practice of family law in Connecticut.

The first is *Ramin v. Ramin*, released Feb. 20. In a 4-3 decision, the Supreme Court, citing *Ahneman v. Ahneman*, 243 Conn. 471 (1998), concluded it was error for the trial court to mark "off" and thereby refuse to consider, a *pendente lite* motion for contempt that detailed a history of failures to comply with discovery requests and court orders.

In *Ramin*, the court reminded counsel in family cases that they are responsible for diligent investigation and preparation, as well as full and fair disclosure, of all the facts that materially affect the client's rights and interests. In the absence of an agreement with the client to limit discovery or other litigation procedures, an attorney must attempt to present his or her client's case on a "[100] percent" basis, the court held. The trial court, it said, does not have the power to limit that presentation to less

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than 100 percent.

The *Ramin* majority made new law about awards of attorney fees in family matters. It held that a trial court should award attorney fees to a party who has incurred substantial fees due to the egregious litigation misconduct of the other party, even absent a finding that the award is necessary to avoid undermining its other financial orders, and irrespective of that party's ability to pay.



The dissent saw the majority's change in the law as unwarranted because Practice Book Section 13-14 provides for attorney fees in connection with motions for order of compliance and Section 46b-62 is inconsistent with an award to a party who has the ability to pay.

Ramin may be *sui generis* due to its unusual facts. Or it may stand for the proposition that it is error for a court to commence trial where a party is pursuing legitimate discovery in the face of repeated recalcitrance and refusals to comply with court orders. The ruling is consistent with *Freidlander v. Freidlander*, 191 Conn. 81 (1983), and *Jewett v. Jewett*, 265 Conn. 669 (2003), in allowing counsel fees as a sanction for litigation misconduct.

all property obtained during the marriage. The dissent relied upon *Wendt v. Wendt*, 59 Conn. App. 656, cert. denied, 255 Conn. 918 (2000), and the language of Section 46b-81 of the General Statutes, and correctly concluded that "there is no presumption of equal property distribution in Connecticut."

Improper Alimony Modification

The third ruling of notable impact is

THE MAJORITY in *Ramin v.*

Ramin held a trial court should award attorney fees to a party who has incurred substantial fees due to the other side's egregious litigation misconduct, irrespective of the harmed party's ability to pay.



Another ruling of significant importance is *Friezo v. Friezo*, published Feb. 6. In a 6-1 decision, the high court reversed a judgment that had found a prenuptial agreement to be unenforceable. The *Friezo* majority rejected a subjective approach to the financial disclosure required incident to such an agreement. "The trial court determined that the defendant's disclosure failed to comply with § 46b-36g because the plaintiff lacked sufficient financial experience to understand the information disclosed. ... To adopt such a test would place an additional burden on each party to assess the intelligence and financial experience of the other ...," the majority determined.

In demanding gender neutral application of the Premarital Agreement Act, the court stated that "[a]t least one jurisdiction has explicitly noted that the time has come for paternalistic presumptions and protections to be discarded. ... Accordingly ... [p]aternalistic presumptions and protections that arose to shelter women from the inferiorities and incapacities which they were perceived as having in earlier times have, appropriately, been discarded. ... It would be inconsistent, therefore, to perpetuate the standards governing prenuptial agreements that ... [reflect] a paternalistic approach that is now insupportable," the majority held.

The *Friezo* dissent agreed the trial court's judgment should be reversed despite determining that the prenuptial agreement was unenforceable. The dissenting justice felt a reversal was warranted because the trial court improperly presumed that the plaintiff was entitled to an equal distribution of

Simms v. Simms, published Aug. 14. In it, the Supreme Court unanimously concluded that, under the totality of the circumstances, the trial court abused its discretion in reducing the defendant's alimony obligation to \$1 per year.

The high court based that conclusion, in part, upon the trial court having improperly concluded that it could not consider the value of the parties' non-income producing assets in determining the amount by which the defendant's alimony obligation should be modified.

While the Supreme Court acknowledged that a trial court could not modify a property division and could not order the sale of assets to satisfy an alimony obligation, "[t]hat does not mean, however, that [the] court had no authority to consider the value of the parties' assets in determining

the amount of the modification or, in appropriate circumstances, to order the defendant to pay alimony if doing so may require him to invade his assets," it held.

Another factor in the Supreme Court's finding of

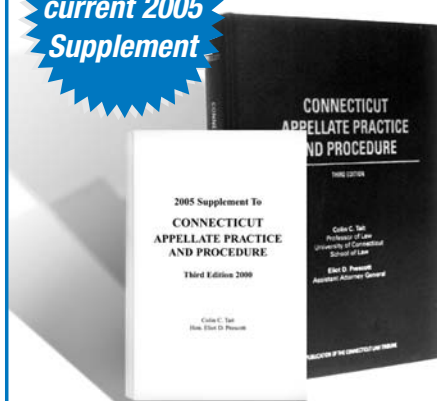
abuse of discretion was the trial court's failure "to give due consideration to the evidence concerning [the plaintiff's] health and financial circumstances" that indicated her medical expenses were significant and her expenses far exceeded her income even before the trial court reduced alimony to one dollar a year.

Practitioners who thought the abuse of discretion reversal in *Casey v. Casey*, 82 Conn.App. 378, 385, 844 A.2d 250 (2004), was an Appellate Court aberration need to rethink that analysis in light of the Supreme Court decision in *Simms*. ■

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