

FROM THE editor

In This Issue

***Courchesne*
Considered 2**

**The Yin & Yang of
Purposivism and
Plain Meaning. . . 4**

***Courchesne* and
Contract
Interpretation. . . 8**

**The problem of
the *per curiam*
Opinion. 9**

Use It or Lose It .10

Welcome to the first issue of *Mass Appeal: A Quarterly Newsletter Addressing Appellate Issues*. It is our hope that this publication will be of interest and assistance to both practitioners who regularly appear before appellate tribunals, as well as those whose only appellate experience consists of their law school moot court competition. To that end, we have (hopefully) created in *Mass Appeal* a publication that balances analysis of relatively technical issues of appellate procedure with discussion of broader substantive questions of more general import.

This issue is centered largely, though not entirely, around the Supreme Court of Connecticut's recent decision in *State v. Courchesne*, 262 Conn. 537 (2003) (Borden, J.). This opinion (and the dissent) treat in great detail the fundamental — and often controversial — issue of statutory construction. To that end, Doug Steinmetz and Calvin Woo have analyzed the opinions of Justice Borden (for the Court) and of Justice Zarella (for the dissent) in an attempt to shed light upon a question that might appear quite simple, but which is actually very complicated: how should a court go about interpreting the provisions of an unambiguous statute? Similarly, I have examined the precedent underlying these opinions, in an attempt to unravel and

make sense of nearly two hundred years of often contradictory authority. Finally, Dan Klau has offered his insights as to the implications of the decision on the related question of contract interpretation.

I have also offered some thoughts on an unrelated topic: the problems posed by *per curiam* opinions vis-a-vis their unspoken effect on published precedent. More specifically, I assert that the dangers posed by slip opinions to the predictive value of common law precedent is a serious, and easily overlooked, problem.

Finally, Brian Wolinetz has analyzed the recent decision of the Supreme Court in *Pelletier v. Sardoni/Skanska Construction Co.*, 262 Conn. 372 (2003). That decision affirms — and clarifies — the 1988 decision of the Appellate Court in *Ray v. Schneider*, 16 Conn. App. 660 (1988). As Brian also discusses, the decision in *Pelletier* is also important because it provides a significant caution to litigators — properly preserve your claimed errors below, or they will not be considered on appeal.

We hope you find this first issue of *Mass Appeal* informative and thought provoking, and we would love to hear your thoughts, questions, and suggestions.

-- Rich Wareing

COURCHESNE CONSIDERED analysis

-- Douglas Steinmetz and Calvin Woo

In a sixty-nine page decision described by a sharp dissent as “nothing short of breathtaking,” the Supreme Court of Connecticut recently issued a significant opinion that dramatically changes the longstanding rules which govern statutory construction. Specifically, in *State of Connecticut v. Courchesne*, 262 Conn. 537 (2003) (Borden, J.), the Court abandoned the traditional “plain meaning rule” regarding statutory construction in favor of what it termed a “purposive approach.”

The fundamental premise of statutory construction is that the courts should seek out and enforce the intent of the legislature as expressed in the relevant statute(s). Prior to *Courchesne*, Connecticut courts — at least in theory — followed the plain meaning rule of statutory construction. Under the plain meaning rule, a court first considers the language of the statute itself. If the language is plain and unambiguous, the court, as a matter of law, stops its analysis and simply applies the letter of the law, unless it produces an absurd result. If the meaning of the statute is unclear on its face, however, or if its application yields an absurd result, then the court considers other sources to determine the legislature’s intent.

Under the new approach adopted in *Courchesne*, however, courts no longer need to cross this threshold of ambiguity or absurdity before looking to extrinsic sources as aids to interpretation. Rather, courts must now always consider all relevant sources for interpretation, including “the words of the statute, its legislative history and the circumstances surrounding its enactment, the legislative policy it was designed to implement, and its relationship to existing legislation and to common-law principles governing the same subject matter.”

Courchesne was a capital felony case, in which the state was seeking the death penalty. The trial court found Courchesne guilty of murdering a pregnant

woman and subsequently her baby. The fetus survived the mother’s death and was delivered by caesarean section, but died forty-two days later of her prenatal injuries. The trial court found the manner in which Courchesne murdered the mother and baby to be “heinous and cruel.”

The issue before the State Supreme Court involved interpreting two related Connecticut statutes, Sections 53a-54b and 53a-46a, which govern the imposition of the death penalty. The former lists offenses which are eligible for the death penalty and the latter lists circumstances which mandate imposition of the death penalty.

The list of capital offenses set forth in Section 53a-54b includes the “murder of two or more persons at the same time or in the course of a single transaction.” There was no dispute before the Supreme Court that Courchesne’s crime met this

threshold requirement, thus making himself eligible for the death penalty.

The dispute before the Supreme Court regarded the interpretation of Section 53a-46a, which mandates that a court shall sentence a defendant to death if it finds that “one or more . . . aggravating factors exist and no mitigating factor exists.” The statute further provides a list of such “aggravating factors,” which includes a determination that “the defendant committed the offense in an especially heinous, cruel or depraved manner.” The issue analyzed by the Court in *Courchesne* was whether the statutes required the State to prove that Courchesne murdered both victims in an especially heinous, cruel or depraved manner, or whether proving it as to only one was sufficient to impose a sentence of death.

The State argued that §53a-46a requires that only “one . . . of the aggravating factors” need exist to mandate

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the death penalty. Therefore, the murder of one victim in a heinous and cruel manner satisfied the plain language of the statute.

Courchesne, however, argued that, under the language of §53a-46, the “aggravating factor” required to mandate the death penalty is defined as committing “the offense in an especially heinous, cruel or depraved manner.” Courchesne then turned back to §53a-54b and argued that this statute defines the “offense” required for death penalty eligibility as “the murder of two or more persons at the same time or in the course of a single transaction.” Therefore, Courchesne argued, the “essential gravamen” of the capital offense that needed to be “especially heinous, cruel or depraved” was the “murder of two or more persons.”

The Supreme Court concluded that, if one were to apply the statute’s language literally, Courchesne’s interpretation would be more persuasive. Nevertheless, and without making an initial finding that the statute was either ambiguous, or that giving effect to its plain terms would lead to an absurd result, the Court determined that the state’s interpretation was to be preferred.

First, the Court determined that the plain meaning rule “is fundamentally inconsistent with the purposive and contextual nature of legislative language.” In other words, the Court concluded that the meaning of legislative language cannot be accurately construed in a vacuum – *i.e.* the language should not be separated from the purposes being addressed when it was adopted or its context. As such, the Court reasoned that “it *does* matter, in determining that meaning, what purpose or purposes the legislature had in employing the language” and “it *does* matter what meaning the legislature intended the language to have.” Therefore, in statutory interpretation, a court should not stop at just the reading of its language.

Second, the Court determined that the plain meaning rule was “inherently self-contradictory,” as its premise was a misnomer. The Court asserted that the rule’s premise is that there is no need for interpretation if the statutory language is plain and unambiguous; however, the mere application of statutory language to the facts of any case was itself an interpretation of the language. The Court also stated that the caveat to the plain meaning rule that it not be applied when it leads to absurd or unworkable results is implicitly based upon reaching beyond the text itself and considering the legislature’s intent. The Court concluded,

therefore, that courts should not follow a rule that prohibits what its enforcement necessarily requires.

Finally, the Court criticized the concept of requiring a threshold determination of ambiguity as a prerequisite to considering additional sources. The Court stated that this concept has led the court to prior declarations that are “intellectually and linguistically dubious” and run the risk of “leaving the court open to the criticism of being result-oriented in interpreting statutes.” As an example, the Court cited its prior ruling that statutory language does not become ambiguous “merely because the parties contend for different meanings.” Rather, the Court reasoned that the very fact that parties are contending for different meanings essentially qualifies as “ambiguity.”

In response, the dissent (Justice Zarella, joined by the Chief Justice) criticized in detail the Court’s abandonment of the plain meaning rule. The dissent first observed that the overwhelming majority of federal and state courts, including the United States Supreme Court, adhere to the plain meaning rule. Noting that courts have relied upon this “bedrock principle” of statutory interpretation for years, the dissent chided the Court for failing to provide any evidence that the rule actually impeded the Court’s interpretative process. The few examples provided by the Court, the dissent argued, were only “misguided deviations” from the plain meaning rule and were not reason enough to reject it.

Second, the dissent involved the seminal principle that the separation of powers compelled application of the plain meaning rule, because it is “premised on the fact that only the text of a statute formally has been approved by the legislature and signed into law by the executive.” As a result, the plain meaning rule promotes judicial restraint in the interpretation of statutes. The dissent reasoned that, by abandoning the plain meaning rule, the court would assume the role of lawmaker and may substitute its “judicially ascribed notions of the statute’s purpose for the plain meaning of the text that the legislature has chosen.” Accordingly, the dissent argued that, absent ambiguity, only the objective meaning of the text – not some subjective intent of the legislature not reflected in the chosen text – should govern.

Courchesne, in summary, is a landmark case. It will impact the interpretation and outcome of countless cases already briefed and on appeal, as well as how practitioners frame and argue statutory issues in all of our State’s courts in the future.

THE YIN AND YANG OF PURPOSIVISM AND PLAIN MEANING IN STATUTORY CONSTRUCTION

analysis

-- Rich Wareing

If you didn't read Linda Morkan's column in the *Connecticut Law Tribune* for the week of December 16, 2002 (*Gender Bender In The Courts*) it's worth your time to go dig it out and take a look. In that column, Ms. Morkan makes reference to her attendance at a seminar at which Justice Borden offered some thoughts on statutory construction, using his decision for the Supreme Court in *Bender v. Bender*, 228 Conn. 733 (2001) as the touchstone. In that decision (and over the dissent of Justice Zarella) the court held:

[t]he process of statutory interpretation involves a reasoned search for the intention of the legislature. In other words, we seek to determine, in a reasoned manner, the meaning of the statutory language as applied to the facts of this case, including the question of whether the language actually does apply. In seeking to determine the meaning, we look to the words of the statute itself, to the legislative history and circumstances surrounding its enactment, to the legislative policy it was designed to implement, and to its relationship to existing legislation and common law principles governing the same general subject matter.

Ms. Morkan then goes on to point out that this holding represents a radical departure from the plain meaning rule and concludes that the Supreme Court has moved in a completely different direction with respect to the question of statutory interpretation.

Her comments, in many ways, thus presaged the recently released opinion of the Supreme Court in *State v. Courchesne*, 262 Conn. 537 (2003). In that decision, a divided court reaffirmed the above-quoted language, which it termed the "purposive" approach to statutory construction and expressly rejected the plain meaning rule.

Although the text of the opinion of the court and Justice Zarella's dissent in *Courchesne* are both worthy of very close study, also worthy of close attention is the underlying — and tangled — history of statutory construction in Connecticut. Indeed, in his opinion for the Court in *Courchesne*, Justice Borden quotes his prior opinion in *Frillici v. Westport*, 231 Conn. 418 (1994)

for the proposition that:

[i]t is true that, in construing statutes, we have often relied upon the canon of statutory construction that we need not, and indeed ought not, look beyond the statutory language to other interpretive aids unless the statute's language is not absolutely clear and unambiguous...It is also true, however, that we have often eschewed such an analytical threshold, and have stated that, in interpreting statutes, we look at all the available evidence, such as the statutory language, the legislative history, the circumstances surrounding its enactment, the purpose and policy of the statute, and its relationship to existing legislation and common law principles.

In fact, a close review of the authority relied upon by the Court and by Justice Zarella in *Courchesne* establishes that a dichotomy of authority has existed in our law with respect to the question of statutory constitution for nearly two centuries. For example, the court's opinion in *Courchesne* cites its prior decision in *Bridgeman v. Derby*, 104 Conn. 1 (1926) for the proposition that:

[a]s we seek to interpret this provision of [the] defendant's charter, it will be well to keep before us some of the fundamental principles of statutory construction. The intent of the lawmakers is the soul of the statute, and the search for this intent we have held to be the guiding star of the court. It must prevail over the literal sense and the precise letter of the language of the statute.

In *Bridgeman*, the Supreme Court construed both Special Act 331 of 1921 (which put into effect the charter of the City of Derby), as well as Chapter 185 of the Public Acts of 1919, and concluded that, because Derby's charter stated that the City Attorney (like twelve of his counterparts in other municipalities whose charter contained an identical provision) enjoyed "the same authority" and was to "perform the same duties as now provided by law for State's Attorneys in the several counties" the City Attorney had the right to specially retain detectives to undertake undercover

investigations because Chapter 185 of the Public Acts of 1919 conferred such authority on the State’s Attorneys.

The rub, however, was that Chapter 185 of the Public Acts of 1919 also required that a State’s Attorney who wished to specially retain detectives to conduct undercover investigations was obligated to first obtain the approval of “the judges of the Superior Court, or any judge thereof.” The court, however, concluded that, for a variety of reasons, this was completely impractical in the context of a City Attorney seeking to employ a special undercover detective, and held that the legislature could not have intended to so condition the City Attorney’s authority:

[i]t is inconceivable that the legislature intended that the employment of detectives should be subject to the authorization of “the judges of the Superior Court, or any judge thereof.” To such a course there are practical considerations which weigh most strongly against this construction...

...a close review of the authority relied upon by the Court and by Justice Zarella in Courchesne establishes that a dichotomy of authority has existed in our law with respect to the question of statutory constitution for nearly two centuries.

Moreover, practical considerations aside, the Supreme Court also concluded that there existed powerful public policy arguments to support its holding:

[t]he public mischief to be avoided, if this provision of the charter is construed in such a way as to support the right of the City Attorney to employ detectives in ferreting out crime, should be universally recognized. It is, in these days, upon occasion, a power indispensable to the effective administration of the criminal law.

* * * * *

A construction of the charter provision upholding the power of the City Attorney to employ private detectives for the same purposes for which the State’s Attorney may employ them, is in the interest of good order and peace of the defendant community, and at the same time secures for the twelve other communities of the State similar protection and benefit. The construction we accord to this charter provision carries out, we believe, the legislative will and serves the cause of order and peace in the State.

Thus, for at least 75 years there has existed in our law authority for the proposition that what matters is not what the legislative literally said, but rather what reasoned judicial analysis concludes the legislature actually meant.

In *Bridgeman*, however, the eminent Justice Maltbie — joined by Justice Jennings — dissented. Dismissing the majority’s determination of the public interest, Justice Maltbie instead focused on the text of the charter itself:

a grant of power to City Attorneys is very probably salutary. But [this] consideration [is] of less consequence than [is] the need of a logical interpretation of the statutes in question and a close adherence to the legislative intent expressed in them. The majority opinion reaches its conclusion by divorcing the power to employ detectives given the State’s Attorneys by statute, from the requirement in the same statute that the power be exercised only upon the authorization of the judges or a judge of the Superior Court.

While it is the decision in *Bridgeman* — and not the dissent — that reflects the present thinking of the Court, eighteen years after their dissent in *Bridgeman v. Derby*, it would be the logic of Justices Jennings and Maltbie that would prevail. In *Marshall v. Marshall*, 130 Conn. 655 (1944), the Supreme Court vacated the judgment entered by the Superior Court (Baldwin, J.), and held that the Superior Court lacked subject matter jurisdiction over an action seeking a marital dissolution because the plaintiff had not resided in Connecticut during the three years prior to the commencement of the action.

At the time, Conn. Gen. Stat. § 5181 provided “[i]f the plaintiff shall not have continuously resided in this state three years next before the date of the complaint, it shall be dismissed” The plaintiff in *Marshall* was a Navy dentist who had been stationed in New London from 1935 to 1938. In 1938, he had been transferred to Boston, but the record evidence established that he still considered New London his legal domicile (*i.e.* the place to which he ultimately intended to return). In 1942, he brought an action in the Superior Court of New London County, seeking

the dissolution of his marriage. After trial, the court entered a judgment dissolving the marriage and the defendant wife appealed.

In a unanimous opinion authored by Justice Jennings (and joined by then-Chief Justice Maltbie), the Court concluded that, because the plain language of Section 5181 required continuous residence for three years prior to the commencement of the action, the Superior Court was without jurisdiction to hear the dispute, notwithstanding that the record evidence allowed for a finding that the plaintiff had been continuously domiciled in New London since 1935. Analyzing the text of the statute, and reviewing its decision in *Morgan v. Morgan*, 103 Conn. 189 (1925), the court concluded that, while “it is not necessary that the residence should be literally uninterrupted” the legislature’s use of the word “continuously” in Section 5181, required consistent physical presence within the state, and not merely a declaration that the plaintiff considered Connecticut his domicile.

... the oldest decision I could find on this point -- applies a purposive approach to statutory construction -- *The Warden, Burgesses and Freemen of the Borough of Bridgeport v. Hubbell*, 5 Conn. 237 (1824).

Concluding, the Court rejected the plaintiff’s argument that “if this is the law, few service men can satisfy the Connecticut residence requirements because of their service in the armed forces of the country.” Without any consideration of the public policy considerations implicated by this argument (especially in light of the ongoing World War), and without any examination of the underlying legislative history to determine whether the General Assembly actually intended to effectively penalize members of the armed forces, the Court flatly rejected the argument, holding “[b]e that as it may, it is within the power of the legislature to grant relief. The courts can only construe the statutes in accordance with the expressed legislative intent.”

Indeed, the plain meaning rule has even deeper roots in Connecticut jurisdiction. In his dissent in *Courchesne*, Justice Zarella relies upon the decision of the Court in *Lee Bros. Furniture Co. v. Cram*, 63 Conn. 433 (1893) for the proposition that the unambiguous statutory language must be given its plain meaning.

In that case, the vendor of certain personal property had failed to record with the Town Clerk of the municipality where the vendee resided its security interest in the property conveyed. Thereafter, the

vendee failed to make payment for the property, and instead sold it to a third party, who took without any knowledge of the vendor’s security interest. The vendor ultimately sought a writ of replevin to recover the property from the *bona fide* purchaser. The Court of Common Pleas made its findings of fact and reserved decision, pending the advice of the Supreme Court of Errors (as it was then called). The Court analyzed the relevant statute (Chapter 147 of the Public Acts of 1893) and concluded that its plain language compelled the conclusion that the vendor was entitled to the writ.

In so holding the Court noted that, while Section 2 of the statute expressly stated that “[a]ll conditional sales of personal property which shall not be [acknowledged before competent authority and recorded in the town clerk’s office in the municipality where the vendee resided] shall be held to be absolute” it also expressly excluded “the vendor and his heirs” from the penalty for non-recording. Rejecting the *bona fide* purchaser’s contention that the legislature’s underlying intent had been to protect subsequent *bona fide* purchasers, as well, and should thus be read to do so, the Court rhetorically asked and answered:

[w]here is the authority for such an interpretation? It is found in assuming that the legislature intended such a result because no other would remedy the mischiefs and evils at which the statute was evidently aimed

As powerful and venerable authority as the decision in *Lee Bros. Furniture Co.* may be, however, the oldest decision I could find on this point — applies a purposive approach to statutory construction — *The Warden, Burgesses and Freemen of the Borough of Bridgeport v. Hubbell*, 5 Conn. 237 (1824).

At that time, persons could petition the County Court for the establishment of highways within towns, and, if a court-appointed committee determined that the proposed highway was for the “common convenience and necessity” of the town, the town would be assessed the cost of construction. However, the law also provided that, where the proposed highway was only for the “special convenience” of a borough or city located within the town, the town could summon the borough or city into the proceeding and the court could

assess the city or borough (and thus only its residents) with the cost of construction.

Public Act 56 of 1820 also provided that, if the town prevailed against the city or borough, the city or borough could be taxed with the costs of the proceedings.

Ultimately, it was determined that a highway petitioned for by Hubbell (and others) was not for “common convenience and necessity” (and thus chargeable to the entire Town of Stratford), but, rather, only for the “special convenience” of the Borough of Bridgeport, located within the town. In entering judgment against the borough, the County Court also taxed the borough with the costs incurred in the prosecution of the petition, including those incurred prior to it having been summoned into the proceedings.

On appeal, the Supreme Court of Errors affirmed the County Court’s conclusion that the proposed highway was for the “special convenience” of the borough, but found that the taxing of the borough with costs incurred prior to it having been made a party was error. Writing for a unanimous court, Chief Justice Hosmer concluded that, although the statute at issue appeared to confer upon the County Court the discretion to tax the borough with costs incurred prior to it having been made a party, it was nonetheless error for the County Court to have done so.

Specifically, the Court concluded that “it is an undoubted principle, that a thing within the letter of a statute is not within the law, unless it be within the intention of the makers; and that a statute ought, sometimes, to have such equitable construction as is contrary to the letter.”

Turning to the facts, Chief Justice Hosmer then concluded that, absent clear and precise language to the contrary, the legislature (“the makers”) could not have intended such an unjust and inequitable result. As such, regardless of the plain language of the statute (“the letter of [the] statute”) the County Court did not have the statutory power to tax the borough with costs incurred prior to its having been made a party:

I have, however, read enough cases to be able to confirm Justice Borden’s observation in Frillici that there exist two parallel (and conflicting) lines of cases on the question of statutory interpretation, and to also be able to state that, over time, the Supreme Court has shifted its position on this issue at least a few times.

[n]ow, the law, literally expounded, is just, so far as it relates to the costs arising posterior to Bridgeport’s becoming a party to the suit; and it is a presumption fairly warranted, that as the terms of it are, to a certain extent, operative, and equitable in their meaning, they were only intended to be thus far imperative. Beyond this, the injustice of the case forbids the supposition that costs were prescribed.

I have not read every decision of the Supreme Court addressing the issue of statutory interpretation. I have, however, read enough cases to be able to confirm Justice Borden’s observation in *Frillici* that there exist two parallel (and conflicting) lines of cases on the question of statutory interpretation, and to also be able to state that, over time, the Supreme Court has shifted its position on this issue at least a few times.

This is not to say, however, that the Supreme Court has operated for two hundred years without a clear method of statutory interpretation. Quite the contrary, it is to assert that the Supreme Court has, at various points, applied both the plain meaning and the purposive approach, that the tension between them is older than the Court itself, and that it probably has not been conclusively resolved, the Court’s decision in *Courchesne* notwithstanding.

Indeed, that the Court in *Courchesne* could rely on Lord Coke’s Reports, while Justice Zarella could invoke in his dissent Oliver Wendell Holmes and Blackstone’s Commentaries on the Laws of England, is strong evidence that this tension is inherent in the law itself and is thus likely to vex us as long as there is a General Assembly to pass statutes, and as long as there is a Supreme Court to interpret them.

That said, precisely because the evolution of the doctrine pertaining to statutory interpretation is always tangled, frequently complicated, often contradictory, and sometimes controversial, anyone venturing into the arena ought first to study carefully the history and understand fully the perspective of the Justices who now sit.

COURCHESNE AND CONTRACT INTERPRETATION

analysis

-- Daniel Klau

While not identical endeavors, statutory interpretation and contract interpretation are nonetheless very similar. Both have as their goal ascertaining the meaning of the relevant text and, thus the intent of the author(s). Moreover, both have traditionally shared a common, or at least significantly overlapping, set of legal principles that guide judges through the interpretive process. Chief among those principles is that, if the meaning of text is plain on its face (*i.e.*, if the language is not ambiguous), then the court should not look beyond the text to other sources to determine its meaning.

In the contract context, this principle is reflected in the rule that the interpretation of an unambiguous contract is a question of law for the court, as well as the parol evidence rule, which forbids the use of extrinsic evidence of the parties' intent to vary, alter, or contradict the unambiguous terms of an integrated written contract. In the statutory context, the principle is reflected in what is generally known as the "plain meaning rule." Pursuant to that rule, if the meaning of a statute is plain and unambiguous on its face, a court should not look to "extra-textual sources," such as legislative history, to inform its interpretation of the statute.

In short, Courchesne may represent the opening of the proverbial Pandora's Box. If the meaning of all language is inherently contextual, then the parol evidence rule may come under considerable pressure, at least in Connecticut.

Given the strong similarities between statutory and contract interpretation, the Connecticut Supreme Court's recent decision in *State v. Courchesne*, 256 Conn. 537 (2003) bears close reading. Specifically, what implications, if any, does *Courchesne* have for contract interpretation? Does *Courchesne*, or at least the underlying rationale of the decision, portend fundamental changes in the traditional approach to contract interpretation, particularly the parol evidence rule?

Courchesne is not directly controlling authority on the issue of contract interpretation. However, the Supreme Court did state in its opinion that "the meaning of

legislative language (*indeed, of any particular use of our language*), is best understood by viewing not only the language at issue, but by its context and by the purpose or purposes behind its use." (emphasis supplied). As such, the Supreme Court's "purposive approach" could easily be applied in interpreting language in general – including contract terms – and not just statutory language.

Further, in *Courchesne*, the Supreme Court concluded that one of the flaws with the "plain meaning" rule is that it requires a court to "engage in a threshold determination of whether the [statutory] language is ambiguous." That

requirement, the Court said, had led it "into a number of declarations" that it viewed as "intellectually and linguistically dubious" and that "risked leaving the court open to the criticism of being result-oriented in interpreting statutes." These very same

concerns about the plain meaning rule could be applied to contract cases, where, as noted above, well-established precedent also requires courts to make a threshold determination that the contract is ambiguous before admitting extrinsic evidence to vary or contradict the meaning of the contract.

In short, *Courchesne* may represent the opening of the proverbial Pandora's Box. If the meaning of all language is inherently contextual, then the parol evidence rule may come under considerable pressure, at least in Connecticut.

Notwithstanding, it is too early to mourn the demise of the parol evidence rule in Connecticut. Despite the similarities between statutory and contractual interpretation, there are also differences that counsel against extending *Courchesne* to the contract context, some of which are noted above. Hopefully, raising the issue will serve as a catalyst for discussion.

THE PROBLEM OF THE PER CURIAM OPINION

or, the Troubling Case of Morganti National, Inc. v. United States

commentary

-- Rich Wareing

But the easing of the load by way of sifting and nondiscussion comes at a price in care and in responsibility — a price which reminds us of the reason for both the older practice and those statutes which demand full opinions. The candor which in a full opinion forbids ignoring uncomfortable authority must scorn equally its disregard in silence by way of a Per Curiam.

Karl Llewellyn, *The Common Law Tradition*, pp. 312-13 (1960)

As Karl Llewellyn so eloquently argued, while management of the appellate docket by increased use of the *per curiam* decision may perform a useful ‘sifting’ function, it also calls into question the intellectual integrity of the common law tradition. While I agree with Llewellyn’s reasoning, insofar as it goes, I think there is an additional reason why *per curiam* decisions can have an extremely corrosive effect on the body of the common law. In his seminal lecture, *The Path of The Law*, Oliver Wendell Holmes Jr. stated “[t]he prophecies of what the courts will do in fact, and nothing more pretentious, are what I mean by the law.” But, in a system where dispositions need not be explained, the predictive value of the law is diminished, precisely because there is a diminished body of precedent to which an attorney may resort for guidance.

Admittedly, this diminution may not be material where the principles at stake are so clear, and so well established, as to not require repetition. However, at least some (and perhaps a considerable) proportion of what is litigated at the appellate level is not necessarily obvious, and the disposition of such cases often involves complicated decisions about the applicability and actual application of various (and often competing) legal principles. In such cases, a *per curiam* decision can be a potentially dangerous abscess in the body of the law.

Take, for example, the case of *Morganti National, Inc. v. United States*, 49 Fed. Cl. 110 (2001). In that case, a contractor challenged the United States’ decision to terminate for default the parties’ contract for the construction of a correctional facility. After trial, the United States Court of Federal Claims concluded that the termination was proper. In so doing, however, the court also found that the government’s contracting officer (who had made the decision to terminate the contractor) had wrongly assumed that the contractor was not entitled to any additional time to perform its work because of alleged government-caused delays.

Moreover, the court also concluded that the contracting officer’s assessment of the contractor’s rate of progress was incorrect by a rather substantial factor. Nevertheless, the court concluded that these errors were harmless because, even at the contractor’s actual rate

of progress, and even giving the contractor the extension to which it was entitled, the contractor could not have timely finished the project.

On appeal, the contractor argued that, because the Court of Claims had found that the contracting officer was in error concerning the contractor’s rate of progress, and because it had also concluded that the contracting officer had failed to recognize and account for the fact that the contractor was entitled to a significant extension of time, the contracting officer necessarily abused her discretion. More specifically, the contractor argued that, in considering whether a new contractor could more expeditiously complete the work, the contracting officer made her comparison based on an incorrect assumption about when the work was likely to be completed by the original contractor, as well as an incorrect assumption about the severity of the delay for which the original contractor would be responsible.

In support of this argument, the contractor cited 41

But, in a system where dispositions need not be explained, the predictive value of the law is diminished, precisely because there is a diminished body of precedent to which an attorney may resort for guidance.

C.F.R. § 1-18.803-5(a), which requires a contracting officer contemplating terminating a contractor for default to first consider, among other things, whether a new contractor can be retained and complete the remaining work in less time than it would take the present contractor to complete. The contractor also relied upon the decision of the United States Court of Appeals for the Federal Circuit in *Lisbon Contractors, Inc. v. United States*, 828 F.2d 759 (Fed. Cir. 1987). In *Lisbon Contractors, Inc.*, the Federal Circuit held that, where a contracting officer failed to make a thorough investigation into the question of whether a new contractor could more expeditiously complete the remaining work, the decision to terminate for default was an abuse of discretion. Extrapolating from the holding in *Lisbon Contractors, Inc.*, the contractor argued that, if a failure to make the investigation required by the Code of Federal Regulations was an abuse of discretion, then predicating a termination decision on materially incorrect information was likewise an abuse of discretion because the contracting officer's assessment of whether termination was warranted under 41 C.F.R. § 1-18.803-5(a) was necessarily flawed.

If and how the Federal Circuit evaluated this argument will never be known, because the court issued a simple *per curiam* affirmance. *Morganti National, Inc. v.*

United States, 36 Fed. Appx. 452 (Fed. Cir. 2002).

What is a prospective litigant to make of this (assuming the litigant is at all aware of this issue)? Has *Lisbon Contractors* been overruled, *sub silentio*? Has it been limited, *sub silentio*, to cases where no investigation and comparison have been made — as opposed to a comparison predicated upon an erroneous understanding of the facts? Was there some other fact in the record that the Federal Circuit concluded salvaged the contracting officer's decision? Unfortunately, we are not likely to ever know.

While the court's *per curiam* may have saved considerable resources in the short run — the Court of Federal Claims' decision ran to 38 pages and is hardly easy to unravel — it may come at a steep price. Specifically, contractor-claimants who appear before the Court of Federal Claims and the Federal Circuit may again advance the arguments advanced by the contractor in *Morganti National, Inc.*; arguments which the Federal Circuit has already found unpersuasive — ironically proliferating the sort of doomed litigation and ensuring the waste of precious judicial resources that the *per curiam* decision was intended to prevent in the first place.

USE IT OR LOSE IT

Pelletier v. Sordoni/Skanska Construction Co.

analysis

-- Brian J. Wolinetz

In *Pelletier v. Sordoni/Skanska Construction Co.*, 262 Conn. 372 (2003) the Supreme Court affirmed and clarified the rule announced by the Appellate Court in *Ray v. Schneider*, 16 Conn. App. 660 (1988): an employee of an independent contractor in the course of his employment may not assert clauses of action against parties with whom the independent contractor was in privity. In that case, an employee of a structural steel fabrication and erection subcontractor suffered serious injuries while in the process of laying metal decking when a steel beam came loose and fell on him. Barred by workers' compensation exclusivity from

directly suing his employer, the plaintiff/employee brought suit against both the general contractor (Sordoni), and the steel inspection agency (Professional Services) retained by the general contractor.

Sordoni moved for summary judgment, arguing that: (1) it could not be held liable in negligence to the employee of its independent subcontractor; (2) the plaintiff was not a third party beneficiary of Sordoni's contract with the project's owner, and (3) an orientation and procedures manual given by Sordoni to the plaintiff did not constitute a contract between them.

Professional Services likewise moved for summary judgment, maintaining, *inter alia*, that it owed no duty of care to the plaintiff. The trial court granted both motions.

On appeal by the plaintiff, the Supreme Court affirmed the decision of the trial court in its entirety.

The General Contractor – Sordoni

The plaintiff first argued that it could recover against Sordoni in a claim sounding in negligence. In this regard, the plaintiff claimed that the general contractor “knew or should have known” that the job site was unsafe, and that it “failed to abate the danger of [a] defective [steel] weld.”

The Supreme Court began its analysis by reiterating the general rule that “an employer is not liable for the negligence of its independent contractors.” The Court acknowledged exceptions to this rule — for example, where the general contractor breaches its own duty of care (like the duty to exercise reasonable care in inspecting the work after it is done) — it may be liable in negligence to innocent third parties. The Court, however, found that none of those exceptions applied.

Rather, exceptions to the general rule of non-liability simply do not apply where it is the independent contractor’s employees — rather than third parties — who sue.

Rather, exceptions to the general rule of non-liability simply do not apply where it is the independent contractor’s employees — rather than third parties — who sue. In so holding, the Court identified several policy reasons for this bar:

- Workers’ compensation already provides such employees with compensation for their injuries, unlike third parties or innocent bystanders;
- Most jurisdictions do not permit claims by the employees of independent contractors under these circumstances;
- The economic relationship between the general contractor and its subcontractor is usually such that the contract price indirectly reflects the cost of workers’ compensation insurance paid by the subcontractor. As such, to impose

liability on the general contractor would be, in effect, to charge it twice for the same injury;

- To recognize the plaintiff’s claim would impose greater liability against the general contractor that if it had opted to do the work (in this case, the steel fabrication) itself — in turn, this would create a disincentive to general contractors to employ more expert subcontractors; and
- The contract documents employed by the general contractor and subcontractor made clear that the subcontractor — and not the general contractor — was primarily responsible for proper steel fabrication and inspection.

The plaintiff also raised contract-based claims against Sordoni. The plaintiff first claimed that the contract between Sordoni and the project owner created a duty

to the plaintiff as a third party beneficiary, because certain provisions thereof charged Sordoni with safety responsibilities. The Court, however, held that a common sense interpretation of those provisions made clear that the

contracting parties were not at all concerned with creating legal duties to subcontractors and their employees. Instead, the sole concern of the parties was to hold the owner harmless as to Sordoni’s undertaking of those responsibilities. Even if subcontractors and employees were *foreseeable* beneficiaries of safety measures adopted by Sordoni, that alone, held the Court, was insufficient to create third party beneficiary rights.

Similarly, the plaintiff contended that an orientation and procedures manual given by Sordoni to the plaintiff constituted a contract between them. But the Court found nothing in the manual itself, nor in the record, to suggest that it was anything other than an informational tool used to educate the plaintiff in job site protocols. The Supreme Court found that the manual was “informational rather than promissory in nature.” As with the rest of the plaintiff’s claims against Sordoni, the Court affirmed the trial court’s entry of summary judgment in this regard.

The Steel Inspection Agency – Professional Services

The Supreme Court also affirmed the trial court’s summary disposition of the plaintiff’s claims against Professional Services. The thrust of the plaintiff’s claim against Professional Services focused upon his contention that the latter negligently failed to perform its contractual duty to inspect the welds on the project.

On appeal, the plaintiff made a number of arguments premised upon the state building code, and whether it imposed additional duties upon Professional Services. Although it had not made those arguments below, it attempted to “piggyback” on oblique references to various code provisions throughout the record. The Court, however, noted that there was no mention of state building code violations within the operative complaint, nor in the trial court’s memorandum of decision on the plaintiff’s motion for reconsideration of the trial court’s entry summary judgment.

...the Judgment as to Professional Services is now final, and illustrates an important procedural point — where a party believes that such issues were implicitly or indirectly addressed below, it is of crucial importance to timely clarify that point — before an appellate court advises that it is too late to do so.

The Court then bluntly concluded that:

[n]one of these claims...was presented to the trial court on the summary judgment motion. Therefore we decline to address them.

* * * * *

[i]f the plaintiff believed that the trial court failed to address one or more of the arguments he had advanced in opposition to summary judgment, the plaintiff could have filed a motion for articulation pursuant to Practice Book §66-5, but he did not. Because the plaintiff failed to move for articulation, we must take the trial court’s decision as properly defining the scope of the plaintiff’s claims presented to the trial court. Thus, the record does not support the contention that the plaintiff had raised in the trial court any [additional] claims...

Left with the only claim properly preserved by the plaintiff, the Supreme Court held that the subcontract “simply did not create any duty in Professional Services, owed to the plaintiff, to inspect any welds on the project.”

While the Plaintiff has moved for reconsideration of the Supreme Court’s decision as to Sordoni, the Judgment as to Professional Services is now final, and illustrates an important procedural point — where a party believes that such issues were implicitly or indirectly addressed below, it is of crucial importance to timely clarify that point — before an appellate court advises that it is too late to do so.

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