

TOP 25 of 2003

LEADING DECISIONS OF THE CONNECTICUT SUPREME COURT

BY

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Welcome to the first annual Top 25 of 2003 – Leading Decisions of the Connecticut Supreme Court. We have culled the more than 200 decisions that the Court issued in 2003 and identified 25 that we think every practitioner should read. Our selection criteria? We considered whether the decision impacted the law beyond the particular controversy; whether the decision resolved an issue of first impression in Connecticut; whether it overturned longstanding precedent; and whether it involved issues which, though not of tremendous legal import, were nonetheless of great public interest.

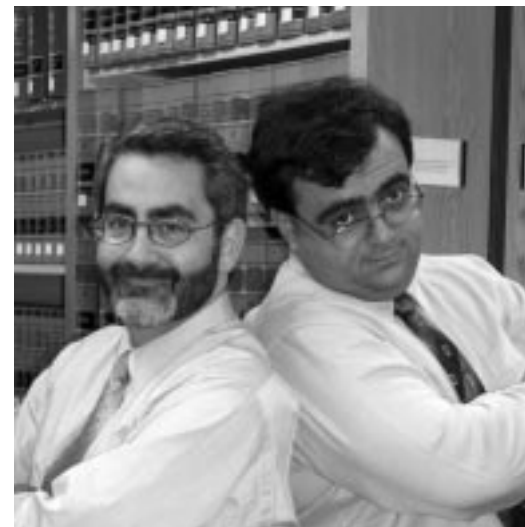
Obviously, there is inherent subjectivity in any ranking, but by any reasonable standard, one case dominated the docket of the Connecticut Supreme Court in 2003 – *State v. Courchesne*, 262 Conn. 537 (2003). Not only did that decision generate a stinging dissent from Justice Zarella, it also produced at least 30 separate concurring or dissenting opinions in subsequent cases – opinions that make clear that the Court is now, and is likely for some time to remain, sharply divided on the question of statutory construction.

Indeed, so controversial was the decision in *Courchesne* that an outraged legislature enacted (nearly unanimously) Public Act 03-154, which provides “[t]he meaning of a statute shall, in the first instance, be ascertained from the text of the statute itself and its relationship to other statutes.” The enactment of P.A. 03-154, of course, is likely only to result in further controversy in 2004, as the Supreme Court will probably be confronted with the even more explosive question of whether P.A. 03-154 violates the separation of powers.

Courchesne, however, was not the only point of controversy during 2003. The Supreme Court vacated a capital conviction in part because of what it termed “egregious” improper statements to the jury by a top prosecutor. Undeterred, the prosecutor has vowed to maintain his aggressive style. Nor was *Courchesne* the only decision of legal import during the past 12 months. The Supreme Court issued a number of other significant decisions, especially in the areas of tort and criminal law. Finally, *Courchesne* was not the only decision that generated considerable public interest. Indeed, in 2003 the Supreme Court decided several cases that involved very public controversies, ranging from the fallout from the Silvester bribery scandal, to the powers of local government.

After reading our Top 25, you may have your own ideas, and we encourage you to share your thoughts with us. Please email us and let us know what you think.

Now, without further ado, here are the Top 25



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COURT REJECTS PLAIN MEANING RULE, OVERRULING 100 YEARS OF PRECEDENT

State v. Courchesne
262 Conn. 537
(Borden, J.)

In what was clearly the most important decision of the Supreme Court in 2003, a divided court overruled literally more than one hundred years of precedent, holding that, “we do not follow the plain meaning rule in whatever formulation it may appear.”

Instead of the “plain meaning rule,” the Court adopted what Justice Borden (writing for the Court) termed a “purposive approach” to statutory construction, under which “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.” As such, when considering a statute, the Court held that, even in the absence of textual ambiguity, one must always consider “the words of the statute itself, [its] legislative history and circumstances surrounding its enactment, [] the legislative policy it was designed to implement, and [] its relationship to existing legislation and common law principles governing the same general subject matter.”

Courchesne arose from 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 issue before the Supreme Court involved the interpretation of two related statutes, Conn. Gen. Stat. §§ 53a-54b and 53a-46a. 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. Rather, the dispute before the Court involved the interpretation of Section 53a-46a, which mandates that a court must sentence a defendant to death if it finds that “one or more . . . aggravating factors exist and no mitigating factor exists.” One of the aggravating factors which can justify the imposition of capital punishment is a finding that “the defendant committed the offense in an especially heinous, cruel or depraved manner,” which the trial court concluded had been the case with respect to the murder of the mother. The precise issue before the Court was thus whether Section 53a-46a required the State to prove that Courchesne murdered *both* victims in an especially heinous, cruel or depraved manner.

Both the State and Courchesne relied on what each claimed to be the plain language of the statutes. The State argued that Section 53a-46a requires that only one of the aggravating factors need exist to mandate the death penalty. Therefore, the murder of one victim in a heinous and cruel manner satisfied the

plain language of the statute. Courchesne, on the other hand, argued that, because the aggravating factor under Section 53a-46a is defined as committing “the offense in an especially heinous, cruel or depraved manner” and because Section 53a-54b 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” the State was required to prove that the aggravating factor existed with respect to both murders.

Court Adopts Purposive Approach to Statutory Constitution

In a decision that a dissenting Justice Zarella described as “nothing short of breathtaking,” the Court concluded that, if one were to apply the statute’s language literally, Courchesne’s interpretation would be more persuasive, but that the underlying legislative purpose was to the contrary, and that purpose, rather than the literal words of the statute, controlled and compelled the affirmance of the judgment below.

In great detail, the Court elucidated its reasons for rejecting the plain meaning rule in favor of the broader purposive approach. 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 – 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.” (emphasis original)

As the Court discussed, its holding has its origins in the decision in *Frillici v. Westport*, 231 Conn. 418 (1994), also by Justice Borden, and the Court in *Courchesne* quoted liberally from that decision to buttress its claim that what matters most is the legislature’s true intent, not the words it chooses to express that intent in support of the purposive approach. The Court also relied upon its 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 [municipal] 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.

“We do not follow the plain meaning rule in whatever formulation it may appear.”

Court Concludes “Plain Meaning Rule” Inadvertently Self-Contradictory

Of course, the Court was forced to deal with a competing line of authority which holds precisely the opposite. This the Court did by unceremoniously acknowledging “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.”

The Court, however, rejected this authority and held that the plain meaning rule was “inherently self-contradictory” because its premise – there is no need for interpretation if the statutory language is plain and unambiguous – necessarily requires interpretation. Moreover, the Court further concluded that the exception to the plain meaning rule – extra-textual sources may be consulted when the text compels an absurd or unworkable result – is implicitly based upon reaching beyond the text itself and considering the legislature’s underlying intent.

The Court also criticized the plain meaning rule’s requirement of a threshold determination of ambiguity before extra-textual sources could be considered. 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.”

Justice Zarella and The Chief Justice Dissent

In a lengthy and hard-hitting dissent, Justice Zarella (joined by the Chief Justice) attacked the Court’s ruling in detail. Chiding the Court for failing to provide any specific evidence that the plain meaning rule had actually hindered the interpretative process, the dissent noted that the rule is a “bedrock principle” of statutory interpretation that has been (and continues to be) properly applied by courts throughout the country. Noting that the plain meaning rule has been applied in Connecticut for more than a century (citing *Lee Bros. Furniture Co. v. Cram*, 63 Conn. 433 (1893)), the dissent also pointed out that authorities as considerable as Holmes (Oliver Wendell Holmes *The Theory of Legal Interpretation*, 12 Harv. L. Rev. 417, 419 (1899)) and Blackstone (1 W. Blackstone, *Commentaries on the Common Laws of England* (1765), pp. 59-62) likewise make clear that legislative intent is best effectuated by rigorous application of – and adherence to – the text of statutes, not some presumed, unexpressed, legislative intent.

Indeed, in a point specific to the case at bar, the dissent argued that application of the purposive approach turned the interpretative process on its head.

Specifically, the dissent argued that, under the rule of lenity, any dispute in the meaning of a criminal statute is resolved against the state. But, application of the purposive approach in this case resolved the dispute against the defendant.

Second, the dissent asserted 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 own “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.

Just months later, of course, the legislature cast its lot with the dissent, enacting P.A. 03-154.

Thus, just as *Courchesne* dominated 2003, its fallout is likely to dominate 2004. *Courchesne* is a seminal case in that it unambiguously resolves (at least for the time being) a longstanding dispute between the plain meaning rule and the purposive approach to statutory interpretation. It is also important because it highlights a true – and probably enduring – split on the Court. Indeed, since its publication, there have been over thirty concurring and dissenting opinions taking issue with the decision. Moreover, the legislature’s enactment of P.A. 03-154 puts at issue the contours of the separation of powers, and more particularly the relationship between popular will and the judicial power.

The dissent reasoned that, by abandoning the plain meaning rule, the Court would assume the role of lawmaker and may substitute its own “judicially ascribed notions of the statute’s purpose for the plain meaning of the text that the legislature has chosen.”

COURT HOLDS DRAM SHOP ACT NOT EXCLUSIVE REMEDY - LEGISLATURE OVERRULES COURT

Craig v. Driscoll
262 Conn. 312
(Katz, J.)

Overturning more than 100 years of precedent, the Court abolished the common law prohibition on negligence actions arising out of the sale of intoxicating beverages and held that, while the Dram Shop Act (Conn. Gen. Stat. § 30-102) was enacted to provide a remedy given that the common law previously afforded none, the act was not intended to be the exclusive remedy. Thus, “as guardian[] of the common law,” the Supreme Court retained the authority to abrogate the old common law prohibition.

Craig v. Driscoll arose out of a traffic accident in which a pedestrian (Sarah Craig) was struck by a drunk driver (Steven Driscoll). Craig died two days later from her injuries. Craig’s mother and brother, who had arrived at the scene shortly after the accident, saw her before the ambulance arrived, as she lay on the ground, badly injured. Craig’s family ultimately sued Driscoll, the pub at which he had been drinking, and David Davis, the pub’s permittee, with her mother and brother bringing claims against the pub and the permittee for negligent and reckless infliction of emotional distress, as well as for loss of consortium. Relying on the decision in *Quinnett v. Newman*, 213 Conn. 343 (1990), the trial court struck these claims, relying on the longstanding rule that Driscoll’s “voluntary and imprudent consumption of alcoholic beverage(s)” was an intervening cause that precluded a claim of negligence against the pub and its permittee.

Craig’s mother and brother took final judgment on that portion of the case and appealed. The Appellate Court reversed, and the pub and permittee sought certification by the Supreme Court. The Supreme Court affirmed that reversal. In a 3-2 decision, the Court noted that the prohibition relied upon by the trial court had its origin in the common law, and was thus subject to either judicial or legislative modification. Reviewing common law precedent and the Dram Shop Act itself, the Court concluded that the Act did not “occupy the field” and, thus, did not preclude further judicial action.

Reviewing both the history and purpose of both the prohibition and the Dram Shop Act, the Court concluded that emerging case law in Connecticut “epitomizes the judicial recognition of the substantial causal relationship between the negligent service of alcoholic beverages and the injuries that can occur as a result of drunkenness.” As a result, the Court “expressly reject[ed]” the defendants’ assertion that the negligent provision of alcoholic beverages “cannot, as a matter of law, be the proximate cause of subsequent injuries caused by the intoxicated patron.” Rather, reviewing its related decisions, the

Court noted that it more and more was recognizing “the substantial causal relationship between the negligent service of alcoholic beverages and the injuries that occur as the result of drunkenness.”

Finally, assessing “the relevant policy considerations” the Court determined that the common law prohibition should be removed in light of the “staggering statistics concerning alcohol-related fatalities.” Concluding, the Court quoted Justice Bogdanski’s eloquent dissent in *Slicer v. Quigley*, 180 Conn. 252 (1980): “[w]hen most people walked and few had horses or carriages, or even in the days when the horse and buggy was a customary mode of travel, it may have been that the common law rule of non-liability . . . was satisfactory. But the situation then and the problem in today’s society of the imbiber going upon the public highways and operating a machine that requires quick response of mind and muscle and capable of producing mass death and destruction are vastly different.”

Dissenting, the Chief Justice, joined by Justice Zarella, pointedly asserted that “the radical change wrought by the majority usurps the legislative function of the legislature and is unwarranted on the merits.” Relying upon what it considered to be the comprehensive statutory scheme created by the Dram Shop Act, and noting that the liquor industry is heavily regulated by statute, the dissent concluded that this pervasive regulation “strongly suggests that the legislature . . . did not intend to leave for the courts the question of whether, and under what circumstances, liability beyond the statutory limits may be imposed”

The dissent also argued that the Court had ignored its own decision in *Quinnett v. Newman*, in which it had expressly held “[i]f the damage limitation . . . is inadequate then the proper remedy is to increase the statutory limitation by legislative enactment rather than by overturning established judicial principles and precedents.” Moreover, in light of this decision, and the precedent upon which it relied, the dissent concluded that *stare decisis* militated against any change in the common law, especially where the legislature had enacted the Dram Shop Act against a well-established backdrop of non-liability.

The effect of *Craig v. Driscoll* was not long felt, however, because the legislature shortly thereafter passed Public Act 03-91, which states that an “injured person shall have no cause of action against such seller for negligence....”

Although overruled by statute, the decision in *Craig v. Driscoll* is still significant because it illustrates the sharp philosophical split within the Court. It also demonstrates the willingness of the Court to continue to drive the evolution of the common law, even in the face of increasingly complex statutory regimes.

RETROACTIVE APPLICATION OF NEW APPORTIONMENT STATUTE OK'D

Attorney William O'Sullivan of Wethersfield certainly gave it his all for his client, Sun Company, the owner of a Sunoco gas station in Norwalk. In *Bhinder v. Sun Company, Inc.*, 246 Conn. 223 (1998) (*Bhinder I*), the plaintiff executor had sued Sun for damages arising out of the death of the executor's decedent (an employee of the gas station) during a robbery, and O'Sullivan had filed an apportionment complaint against the assailant. The trial court granted a motion to strike on the ground that Section 52-572h did not allow apportionment between a negligent and intentional tortfeasor. O'Sullivan appealed and convinced the Supreme Court that Section 52-572h did not abrogate the common law rule permitting apportionment with an intentional tortfeasor. The Court remanded the case for further proceedings. The Legislature then promptly passed P. A. 99-69, which precludes apportionment with an intentional tortfeasor, and made the law retroactive to the date the Supreme Court released its decision in *Bhinder I*. On remand, based upon the new law, the trial court struck Sun's apportionment complaint a second time.

O'Sullivan appealed again, arguing the retroactive application of P.A. 99-69 violated the doctrine of separation of powers and the due process clause under both the federal and state constitutions. In response, the plaintiff argued that the new law was constitutionally permissible "clarifying" legislation. The Court agreed with the plaintiff.

Writing for the Court, Justice Norcott observed that the "legislative history of P.A. 99-69, § 1(o), clearly reveals the legislature's intention to clarify the meaning of the statute as a reaction to our decision in *Bhinder I*." He added that, "[e]ven though the legislative clarification was prompted by a judicial decision that the legislature deemed mistaken, such a clarification does not constitute an invasion of judicial authority. Like legislators, judges are fallible. The legislature has the power to make evident to us that it never intended to provide a litigant with the rights that we had previously interpreted a statute to confer." Thus, the Court held that the new law did not violate the doctrine of separation of powers. The Court also rejected Sun's argument that the new law was invalid because it affected one of its own decisions in a pending case. The Court explained that, while the legislature may not enact a law that interferes with a *final* judgment, that prohibition did not apply to the present controversy because it had not yet come to a final judgment.

Sun next argued that the Court's decision in *Bhinder I* gave it a "vested property right" that the legislature could not abrogate without violating due process. The Court acknowledged that, if the case had gone to final judgment without appeal before the legislature had enacted P.A. 99-69, "considerations of good sense and justice would have dictated the conclusion that his rights in that judgment could not thereafter be legislatively abrogated." The Court added, however, that in its view "the proper question is not whether the judgment was final for other purposes, but whether, in this case, it has so far concluded the rights of the parties that it was unjust to have the case adjudicated, upon a retrial, in accordance with the amended procedures that the legislature had enacted." Applying this standard, the Court stated that Sun's case "was not so far concluded that it would be unjust to have the case adjudicated in accordance with the legislature."

The Court did not end its analysis there. In an intellectual sleight of hand, the Court agreed that, although a cause of action itself could be considered a vested property interest, Sun could not have attained a vested right in the *Bhinder I* decision because, "when clarifying legislation is enacted, it establishes what the law was, and what the legislature's intent was at the time the statute was promulgated. In this case, the defendant never attained a vested right to common-law apportionment because, as the legislature later clarified, a common-law right to apportionment between a negligent and intentional tortfeasor always was precluded by § 2-572h. Common sense would, therefore, dictate that the defendant cannot have a vested right in a cause of action that never existed."

Bhinder v. Sun Company, Inc.
263 Conn. 358 (*Bhinder II*)
(Norcott, J.)

"Like legislators, judges are fallible. The legislature has the power to make evident to us that it never intended to provide a litigant with the rights that we had previously interpreted a statute to confer."

COURT ALLOWS CUTPA CLAIM IN PRODUCT LIABILITY ACTION

Gerrity v. R.J. Reynolds Tobacco Co.
263 Conn. 120
(Norcott, J.)

On a certified question from the United States District Court for the District of Connecticut, the Supreme Court held that a party seeking relief under the Connecticut Products Liability Act, Conn. Gen. Stat. § 52-572m, *et seq.*, may also seek relief under the Connecticut Unfair Trade Practices Act (CUTPA), Conn. Gen. Stat. § 42-110b, *et seq.*

Gerrity was a tobacco case in which the plaintiff, the executor of his mother's estate, commenced suit in the Superior Court against R.J. Reynolds Tobacco Company and Lorillard Tobacco Company for damages suffered as a result of his mother's death from lung cancer. The defendants thereafter removed the case to federal court.

In his complaint, the plaintiff asserted a claim under the Connecticut Product Liability Act, alleging that the defendants' cigarettes were defective and unreasonably dangerous because they caused lung cancer, and because the defendants designed and manufactured their cigarettes so as to make them more addictive. The plaintiff also asserted a claim under CUTPA, alleging that the defendants engaged in a long campaign of misinformation, obfuscation, and outright misrepresentation about the inherent danger of smoking.

Before the Supreme Court on a certified question, the defendants argued that the exclusivity provision in the Connecticut Product Liability Act barred the plaintiff's claim under CUTPA. Applying the purposive approach to statutory construction, the Court concluded that the Act's exclusivity provision did not.

After quoting at length its decision in *State v. Courchesne*, 262 Conn. 537 (2003), the Court looked to the text of Section 52-572n(a): "[a] product liability claim . . . may be asserted and shall be in lieu of all other claims against product sellers, including actions of negligence, strict liability and warranty, for harm caused by a product." The Court then noted its prior decisions, in which it held that the text of the statute compelled the conclusion that the Product Liability Act was intended to be the exclusive remedy "for harm caused by a product." Finally, the Court also considered related provisions of Section 52-572m(b) and Section 52-572m(d) which deal with the definition of a product liability claim, what harms are "caused by a defective product," and the definition of harm, as used in Section 52-572n(a).

Considering these provisions, and considering at length the Act's legislative history, the Court concluded that the Act "was not designed to eliminate claims that previously were understood to be outside the traditional scope of a claim for liability based on

a defective product." As such, the Court held that the only claims within the scope of the Act, and thus within the scope of its exclusivity provision, were claims that "seek[] to recover damages for personal injuries, including wrongful death, or for property damage, including damage to the property itself, caused by the defective product."

Turning to the question of whether a CUTPA claim was within the ambit of the exclusivity provision, the Court held that, at least based on the allegations set forth in the plaintiff's complaint, it was. Reviewing the plaintiff's complaint, the Court noted that he sought relief under CUTPA not for property damage or personal injury, but rather to redress "a *financial injury* suffered by the decedent, of a kind that has never been regarded as part of the traditional tort remedy for harm caused by a defective product" (emphasis original). This was so because the plaintiff had alleged that, but for defendants' obfuscation and misrepresentations about the health risks of their product, and but for their artificial manipulation of the amount of nicotine in their product (which increased its addictiveness), they could not have charged as much for their cigarettes, because consumers, including the decedent, would have been less willing to consume them.

Concurring in the result, Justice Zarella, joined by the Chief Justice, reaffirmed his "continuing belief in the plain meaning rule as expressed in my dissenting opinion in *State v. Courchesne* . . ." As such, Justice Zarella concluded that, because the plain language of the Act makes clear that a claim under CUTPA is not within the Act's exclusivity provision, it was not necessary to consider the Act's legislative history; *i.e.* where the language of a statute is plain and unambiguous, the court ought to give effect to its terms and ought not consider extra-textual sources to construe its provisions.

Although *Gerrity* further illustrates the fundamental split between the *Courchesne* majority and the dissent, its real significance is that it provides consumers with another powerful avenue of recovery for injuries sustained as a result of defective products.

Gerrity . . . provides consumers with another powerful avenue of recovery. . . .

COURT REAFFIRMS SOVEREIGN IMMUNITY IN DAMAGES ACTIONS

As a general rule, the doctrine of sovereign immunity bars actions against the State, including actions against state officials acting in their official capacities. The doctrine has some well recognized exceptions, including one that permits suits for declaratory and injunctive relief against state officials allegedly acting in excess of their statutory authority. In *Miller v. Egan* and in *Prigge v. Ragaglia* – companion cases released on the same day – the plaintiffs argued, with the support of two Connecticut Supreme Court decisions, that the exception also extended to suits seeking monetary damages against state officials who acted in excess of their statutory authority. Rejecting its prior precedent, the Court expressly overruled the two cases – *Shay v. Rossi*, 253 Conn. 134 (2000) and *Antinerella v. Rioux*, 229 Conn. 479 (1994) – and held that sovereign immunity operated as a bar to such suits.

The *Miller* and *Prigge* decisions arose out of very different factual contexts. *Miller v. Egan* involved an employment dispute between the plaintiff, a former employee of the New London county sheriff's office, and his former employer, the former high sheriff of New London county. By contrast, the plaintiffs in *Prigge v. Ragaglia* sued the Commissioner of Children and Families and other state officials, alleging that they had unlawfully discriminated against them in a child custody proceeding.

In both cases the plaintiffs sought money damages and alleged that state officials had acted in excess of their statutory authority. In both cases the defendants moved to dismiss the complaints for lack of subject matter jurisdiction, arguing that sovereign immunity barred the claims. And in both cases the trial court denied the motion, holding that the claims fell within an exception for suits challenging actions by state officers in excess of their statutory authority. The defendants in both cases appealed. (Although the denial of a motion to dismiss is usually an interlocutory judgment, and thus non-appealable, the denial of a motion to dismiss based upon sovereign immunity is immediately appealable.)

The Court's argument in support of its rejection of *Shay v. Rossi* and *Antinerella v. Rioux* is set forth in *Miller v. Egan* and merely incorporated by reference in *Prigge v. Ragaglia*. Writing for the Court in *Miller v. Egan*, Justice Borden began by first describing the historical and contemporary underpinnings of the doctrine of sovereign immunity. He then set out the requirements for circumventing the doctrine: 1) the legislature, expressly or implicitly, must have waived sovereign immunity; or 2) in an action for declaratory or injunctive relief, but not one for money damages, the state officer against whom relief is sought acted in excess of statutory authority, or pursuant to an unconstitutional statute. He explained the rationale for excluding suits for money damages from the exception to sovereign immunity:

We have excepted declaratory and injunctive relief from the sovereign immunity doctrine on the ground that a court may fashion these remedies in such a manner as to minimize disruption of government and to afford an opportunity for voluntary compliance with the judgment. . . . A money judgment, however, is directly enforceable, without further court intervention, against any property of the judgment debtor that is not statutorily exempt. . . .

Justice Borden then addressed the plaintiff's claim that two of the Court's own decisions recognized the very exception that the Court now held did not exist. In both *Shay* and *Antinerella*, the Court had allowed claims for money damages against state officials sued in their official capacities when the official exceeded his statutory authority. Indeed, the Court in *Antinerella* said "[i]n such instances, the need to protect the government simply does not arise and the government cannot justifiably claim interference with its functions."

How did the Court respond to these precedents? It stated, through Justice Borden, that in neither case had the defendants raised the argument that the exception to sovereign immunity for actions in excess of statutory authority did not extend to claims for money damages. Since the issue was not raised, the Court did not consider it. Justice Borden candidly (and humbly) acknowledged that, "because the doctrine of sovereign immunity implicates subject matter jurisdiction, [the Court] could and should have raised the issue *sua sponte*." The Court's failure to do so, however, was the product of "inadvertence rather than intention."

The Court also rejected the plaintiff's argument that these cases could be reconciled with another line of cases following the Court's decision in *Doe v. Heintz*, 204 Conn. 17 (1987), which limited the sovereign immunity exception to cases involving claims for declaratory or injunctive relief. Faced with two irreconcilable lines of authority, the Court expressly overruled *Shay* and *Antinerella* "to the extent that each of those cases holds that sovereign immunity does not bar monetary damages actions against state officials acting in excess of their statutory authority."

Overruling these cases, however, did not resolve the appeal because the plaintiffs also argued that the Legislature had expressly or implicitly waived statutory immunity through General Statutes section 6-30a, which required sheriffs to carry personal liability insurance for damages caused by reason of his tortious actions. Justice Borden rejected that argument: "[W]e fail to see how a requirement that sheriffs and deputy sheriffs purchase *personal* liability insurance necessarily implies that the legislature intended to waive the state's sovereign immunity, either from suits or liability. In fact, the opposite inference makes more sense"

***Miller v. Egan*
265 Conn. 301
(Borden, J.)**

&

***Prigge v. Ragaglia*
265 Conn. 338
(Borden, J.)**

SUPERSEDING CAUSE SUPERSEDED

Barry v. Quality Steel Products, Inc.
263 Conn. 424
(Norcott, J.)

“[W]e conclude that the doctrine of superseding cause no longer serves a useful purpose in our jurisprudence when a defendant claims that a subsequent act by a third party cuts off its own liability for the plaintiff’s injuries.” So wrote the Supreme Court, banishing from Connecticut law the venerable doctrine under which a tortfeasor could be entirely relieved of liability if another event so entirely superseded the tortfeasor’s negligence that it alone would have produced the injury.

At issue were the injuries suffered by two carpenters when scaffolding they were working on collapsed. The scaffolding had been attached to the roof of a building by metal brackets produced by Quality Steel Products. The brackets, however, had been attached to the roof by plaintiffs’ employer using eightpenny nails, rather than the sixteenpenny nails called for by the instruction label on the brackets.

At trial, plaintiffs asserted a claim under the Connecticut Product Liability Act, Conn. Gen. Stat. § 52-572m, *et seq.* against Quality Steel Products and the vendor from whom the brackets had been purchased. Quality Steel Products and the vendor countered by arguing that the negligence of the plaintiffs’ employer in installing the brackets with eightpenny nails was a superseding cause which absolved them from any liability arising out of the alleged defect in the brackets.

Over plaintiffs’ objections, the trial court instructed the jury on the doctrine of superseding cause and the jury returned a verdict for Quality Steel Products and the vendor. The plaintiffs appealed and the case was transferred to the Supreme Court.

Noting that there is some question as to the exact definition of a superseding cause, the Court determined that the better answer is that it describes a subset of cases where there is a dispute as to whether a tortfeasor’s negligence was the proximate cause of the plaintiff’s harm because there were multiple negligent acts that were causes in fact of the injury. Thus, the Court noted that the doctrine of superseding cause involves an assessment of foreseeability, as well as an assessment of whether sound public policy requires that liability be imposed in a particular case. The Court concluded that the doctrine served only to confuse and confound what would otherwise be a relatively straightforward proximate cause analysis; *i.e.* was the harm foreseeable, in fact and, if so, is it of a sort for which sound public policy requires compensation?

Considering the history of the doctrine, the Court concluded that it developed in response to the “harshness of contributory negligence and joint and several liability.” Given that Connecticut adopted by statute (Conn. Gen. Stat. § 52-572o) the doctrine of comparative negligence, the Court reasoned that the doctrine of superseding cause no longer had a place in Connecticut law. In so doing, the Court relied heavily upon the decisions of the New Mexico Supreme Court in *Torres v. El Paso Electric Co.*, 987 P.2d 386 (N.M.1999) and of the Indiana Supreme Court in *Control Techniques, Inc. v. Johnson*, 762 N.E.2d 104 (Ind. 2002), in which both courts similarly rejected the doctrine, noting that it was inconsistent with a comparative fault regime.

Reviewing the facts of the case, the Court concluded that the trial court erred in instructing the jury on superseding cause, and remanding with instructions that “[u]pon retrial, therefore, the fact finder must determine if the defendants’ manufacture and sale of a defective product was a cause in fact and proximate cause of the plaintiff’s injuries, without reference to the doctrine of superseding cause.”

Curiously, although the plaintiffs’ claims were brought under the Product Liability Act, neither plaintiffs nor Quality Steel Products and the vendor argued at trial or on appeal the applicability of Conn. Gen. Stat. §§ 52-572o and 52-572p, which make clear that principles of apportionment apply in actions under the Act. The Court noted this fact and further noted that “[o]ur conclusion . . . is premised solely on a common-law analysis of the law of proximate and superseding causes.”

Despite this oddity, *Barry* is obviously still significant because it clarifies Connecticut negligence law, and makes clear that, because Connecticut is a statutory comparative fault regime, liability may be shifted to third parties only in accordance with Conn. Gen. Stat. § 52-572o.

“We conclude that the doctrine of superseding cause no longer serves a useful purpose in our jurisprudence. . . .”

FRUIT OF THE POISONOUS TREE NOT ALWAYS POISONOUS


Under both the Article First, section 7 of the Connecticut constitution and the Fourth Amendment of the U.S. constitution, the “exclusionary rule” precludes the state, in criminal proceedings, from using evidence that was obtained as the result of an unlawful search or seizure. In *State v. Brocuglio*, the Court considered a case of first impression in Connecticut: whether to recognize the “new crime” exception to the exclusionary rule. Under this exception, “the commission of a new crime dissipates the taint from evidence of that crime obtained as the result of an illegal entry into one’s home.” Thus, evidence which would otherwise have been excluded at a criminal trial as the “fruit of the poisonous tree” is admissible if it falls within the new crime exception. The Court recognized and adopted the exception, joining a host of jurisdictions, both federal and state, that had already done so.

The case arose from an incident in which the defendant challenged several East Hartford police officers who, at the direction of the mayor’s office, had come to his house to ticket abandoned and unregistered vehicles on his property. The police officers did not have a search warrant, and a verbal altercation ensued when they went into the defendant’s backyard. The police arrested and charged him with assaulting a police officer. The defendant moved to suppress the evidence of events in the backyard on the ground that the evidence had been obtained as a result of an illegal, warrantless search. Although the trial court agreed that the search of the defendant’s property was unlawful, it denied the motion, holding that the defendant’s statements and actions had “broken the chain of causation and dissipated the taint of any alleged prior illegality.” The defendant was subsequently convicted. He appealed to the Appellate Court, which held that motion to suppress should have been granted and remanded the case for a new trial. A certified appeal to the Supreme Court followed.

After surveying the law in the jurisdictions that recognized the “new crime” exception, the Supreme Court observed that several different policy rationales had been advanced to support its recognition. The Court found one particular rationale persuasive: “[T]he limited objective of the exclusionary rule is to deter unlawful police conduct – not to provide citizens with a shield so as to afford an unfettered right to threaten or harm police officers in response to the illegality.”

Notwithstanding this persuasive rationale, the Court faced a significant obstacle to adopting the exception; its own decision in *State v. Gallagher*, 191 Conn. 433 (1983), in which it had recognized a limited common law right reasonably to resist an illegal and warrantless search of a home, so long as the resistance did not rise to the level of an assault. The legislature, in Section 53a-23, had previously abrogated the common law right to resist an unlawful *arrest*, but left untouched the common law right to resist an unlawful *entry*. The Court acknowledged that “adoption of the new crime exception to the exclusionary rule conflicts with the common-law privilege” that *Gallagher* recognized. The state expressly asked the Court to overrule that precedent. The Court “decline[d] the state’s invitation and conclude[d] that the better course is to overrule *Gallagher* only to extent that it conflicts with the new crime exception. In other words, the right to challenge an illegal entry remains a privilege, provided no new crime is committed.” The Court concluded that the rule originally set forth in *Gallagher* “no longer provides the most appropriate accommodation between the competing interests involved in cases of this sort. This court is charged with the ongoing responsibility to revisit our common-law doctrines when the need arises.”

Having limited the scope of the common law privilege recognized in *Gallagher*, the Court then observed that defendant’s conduct “would fall outside the common-law privilege. Accordingly, under the new crime exception . . . the evidence relating to the defendant’s statement and actions with regard to the crime of interfering with an officer would be admissible.” The Court, however, did not affirm the defendant’s conviction. Instead, the Court invoked the principle that the judicial alteration of a common law doctrine of criminal law violates the due process requirement of “fair warning” if the alteration is unexpected. The Court stated that its departure from *Gallagher* and its progeny was “marked and unpredictable.” Therefore, the Court concluded that retroactive application of the new crime exception to the defendant in the present case would violate the principles of fair warning. Accordingly, the Court affirmed the judgment of the Appellate Court.



State v. Brocuglio
264 Conn. 778
(Katz, J.)

“The right to challenge an illegal entry remains a privilege, provided no new crime is committed.”

FILING FLUKE FREES FELON

State v. McCahill
265 Conn. 437
(Katz, J.)

In *State v. McCahill*, the Court considered the scope of the “good cause” exception to the statute governing speedy trials in criminal cases. It held that a filing error in the clerk’s office did not justify the state’s failure to bring the defendant to trial in a timely manner.

The defendant, who was being held pursuant to an information that charged him with sexual assault, had filed a motion for a speedy trial. Pursuant to General Statutes § 54-82m and Practice Book § 43-41, the state was required to commence his trial within 30 days of the filing of the motion. When the state failed to do so because it had misfiled the motion, the defendant filed a motion to dismiss the information. The trial court denied the motion. The defendant was eventually tried to a jury, convicted, and sentenced to a term of imprisonment and parole.

On appeal, the defendant argued that the trial court erred in denying his motion to dismiss the information. The Supreme Court resolved the appeal largely upon a set of stipulated facts. In particular, the state had stipulated that the defendant had properly filed the speedy trial motion with the clerk’s office and had properly served a copy of the motion on the state’s attorney office. Both the state’s attorney and the clerk, however, misfiled the motion. The clerk’s mistake was the result of “ignorance or incompetence or apathy” which led to an “utter and complete breakdown” in the clerk’s office. The state also conceded that the state’s attorney’s office “shared the blame in this as well.”

Notwithstanding these stipulations, the state argued that the negligence of the clerk’s and state’s attorney’s offices constituted good cause to excuse the delay in commencing the defendant’s trial. As Justice Katz wrote for the Court, “the state contends that we should accept administrative incompetence as a good cause exception to the statutory requirement of a speedy trial.” The Court rejected the state’s argument, holding that “[a]dministrative incompetence, whether founded in negligence, recklessness or serious dereliction of duty, does not constitute ‘good cause’ or ‘exceptional circumstances’ under the pertinent statutory and Practice Book provisions.” The Court reversed the judgment and remanded the case with instruction to dismiss the information.

In support of this holding, the Court reviewed the case law interpreting the speedy trial statute. The Court concluded that the case law “reflects that the good cause exception recognizes the fact that, on rare occasions, there will arise a need to accommodate extreme or unusual circumstances *out of necessity*.” (emphasis original) According to the Court, “[w]hat the state loses sight of in this case is that the ‘good cause’ exception is meant to be just that: an *exception* to the otherwise strict statutory and Practice Book requirements that if ‘a trial is not commenced within thirty days of a motion for a speedy trial made by the defendant . . . the information . . . shall be dismissed . . .’” (emphasis original) The Court added that “[i]f the state is correct in its assertion that institutional incompetence may fall within the exceptional circumstances exception under good cause, then a defendant seeking to avail himself of these mandatory provisions would have to demonstrate recklessness or actual malice by the state in order to enforce his statutory speedy trial rights. Such a result would be untenable and contrary to the legislative intent. The speedy trial rule . . . was intended to ensure institutional compliance, not to excuse institutional incompetence.”

Looking beyond the text of the speedy trial statute to its legislative history, the Court found further support for its holding. It observed that when the legislature amended the speedy trial statute to require defendants to “affirmatively trigger the dismissal provision of the statute by moving for a speedy trial,” it did so “with the intent that the defendant’s motion would alert both the court and the state that the clock was running and that, to avoid dismissal of the charges, the defendant would have to be afforded a trial within thirty days.” In the words of then-state representative (now congressman) Shays, the motion for a speedy trial is supposed to be the state’s “wake up call.”

Justice Vertefeuille dissented. She agreed that “administrative negligence generally does not constitute ‘good cause’ for the failure to commence a speedy trial.” But, she reasoned that, because the particular court personnel charged with management of criminal cases did not have actual notice of the defendant’s motion for a speedy trial, such lack of notice constituted good cause for the failure to bring the defendant to trial promptly.

“Administrative incompetence, whether founded in negligence, recklessness or serious dereliction of duty, does not constitute ‘good cause’ or ‘exceptional circumstances’ under the pertinent statutory and Practice Book provisions.”

TOP PROSECUTOR REBUKED - DEATH SENTENCE SET ASIDE

If *State v. Courchesne* was the most important decision of 2003, *State v. Rizzo* was the most explosive. In a decision that generated five separate opinions, the Supreme Court overrode a jury and vacated a sentence of death returned against a brutal killer who had murdered his young victim in a heinous and depraved act. The Court did so in part because of what the Court concluded was the overly zealous advocacy of an overly aggressive prosecutor.

As a young Marine, Rizzo had listed as a goal “kill[ing] another man.” Rizzo achieved that twisted goal early in the evening of September 30, 1997, when he lured 13-year-old Stanley Edwards into his backyard and – even as Edwards begged Rizzo to stop – straddled Edwards and bludgeoned him to death with twelve or thirteen blows to the head using a three pound sledgehammer. Rizzo would later tell Waterbury police that he had “had an urge” and wanted to kill Edwards “for no good reason and get away with it.” But, in an incriminating letter to a friend, Rizzo confided that he had killed Edwards because “he wanted to know what it felt like to kill someone” and that his friend should “add [him] to your long list of famous killers” because he (Rizzo) had “knock[ed] off number two on my goal list.”

Rizzo ultimately pled guilty to capital murder and, after a penalty phase hearing, the jury condemned him to death. On direct appeal to the Supreme Court, Rizzo raised many points, of which the Court found two meritorious: 1) the trial court erred in instructing the jury concerning its obligation to balance mitigating and aggravating factors when determining whether to impose the death penalty; and 2) Assistant State’s Attorney John Connolly had deprived Rizzo of his Due Process right to a fair trial through “repeated and egregious” improper and inflammatory statements to the jury.

Four justices (Borden, Norcott, Palmer, and Katz) concluded that the trial court erred in not instructing the jury that before it could impose the death penalty, it had to conclude beyond a reasonable doubt that the aggravating factors they had found outweighed, by a preponderance of the evidence, the single mitigating factor they had found. In a separate concurrence, Justice Katz made clear that she would have gone farther and required that the jury find that the aggravating factor outweighed the mitigating factor, beyond a reasonable doubt, not only by a

preponderance of the evidence. Three justices (the Chief Justice, joined by Justice Vertefeuille and Justice Zarella) dissented, asserting that nothing in the death penalty statute required that the jury be certain beyond a reasonable doubt that mitigating factor was outweighed by the aggravating factor.

In addition, six justices (the Chief Justice dissented) concluded that Assistant State’s Attorney John Connolly had acted improperly at numerous points in his arguments to the jury, and that the effect of the sum of his misconduct was to deprive Rizzo of his right to a fair trial. Indeed, even the Chief Justice, who concluded that Connolly’s statements had not deprived Rizzo of his right to a fair trial, had sharp words for the prosecutor, accusing him of “engage[ing] in conduct calculated to come as close as possible to the constitutional line without crossing it” and stating that “[t]here is no question that this prosecutor’s remarks were improper, and that such behavior does a disservice to the office of the state’s attorney, to the dignity of the court and to the people of this state.”

Connolly, however, defended his statements to the jury in the press, asserting “[t]hese are very emotional and highly charged cases. For successful prosecution, one has to bring a certain level of passion to these cases, and the jury expects that.” He added that “[t]he jury did not sentence this guy to death because of my final argument. They sentenced him to death because of the facts of this case. To say the jury was swayed by my final argument does the jury a great disservice.”

Ironically, although the Supreme Court did vacate Rizzo’s sentence and remanded the case for a new penalty phase hearing, it also found that the trial court had improperly excluded Rizzo’s incriminating letter to his friend, meaning that the letter will no doubt come before the jury in the remanded proceedings to rebut Rizzo’s mitigating evidence.

Thus, while Todd Rizzo won the battle to avoid the death penalty this time, he may have already cost himself the war.

State v. Rizzo
266 Conn. 171
(Borden, J.)

“There is no question that this prosecutor’s remarks were improper...”

THE NEXT 15 LEADING DECISIONS

11 *Gould v. Mellick and Sexton* 263 Conn. 140 (Sullivan, C.J.)

The Complex Litigation Docket offers many of the advantages of being in federal court, particularly the advantage of having a single judge preside over a case from beginning to end. But, according to the Appellate Court's decision in this case in 2001, those advantages had a cost – the parties had to abandon all hope of ever obtaining summary judgment. Said the Appellate Court, “summary judgment should not be used in cases that are complex.” It added, “the simple fact that these cases were consolidated on the complex litigation docket might have given the parties some indication that the claims were not appropriate for summary judgment.”

Fortunately, the Supreme Court granted certification and breathed life back into summary judgment on the CLD. The Court acknowledged that it had issued several opinions in the past that spoke of the difficulties of issuing summary judgment in the context of complex cases. But, it said that those cases “do not stand for the proposition that summary judgment is inappropriate in complex cases where the absence of disputes regarding material facts can be established.” The Supreme Court's final words on this subject say it all: “succinctly stated, as a matter of law, no case is too complex for summary judgment.”

13 *ABC, LLC v. State Ethics Commission* 264 Conn. 812 (Sullivan, C.J.)

In a case arising out of the infamous State Treasurer ‘finder's fee’ scandals, the Supreme Court vacated a judgment entered by the Superior Court determining that certain conduct by several so-called finders did not constitute lobbying under Connecticut General Statutes § 1-91. The case arose out of a ruling by the State Ethics Commission that the complained-of conduct constituted lobbying under Section 1-91. The so-called finders appealed the decision to the Superior Court pursuant to Conn. Gen. Stat. § 4-183 and the court ultimately entered judgment in their favor. The court did so, however, on the basis of facts which the parties agreed were to be considered hypothetical.

The State Ethics Commission appealed. After transfer, the Supreme Court raised *sua sponte* the question of subject matter jurisdiction, and determined that the so-called finders could not on the one hand be aggrieved by the decision of the State Ethics Commission (a jurisdictional prerequisite of any appeal under Section 4-183) while on the other maintain that the facts alleged in the complaint were hypothetical. Vacating the judgment, the Court bluntly concluded “[t]he plaintiffs cannot seek a ruling on the applicability of relevant statutes to a limited set of self-selected facts, expressly decline to be legally bound by the ruling in the context of any real-world controversy, and then claim they are aggrieved by the ruling because the facts are ‘real’ and the ruling affects their concrete and actual interests.”

12 *State v. Ceballos* 266 Conn. 364 (Norcott, J.)

Although the Court directed most of its wrath at John Connelly (*see State v. Rizzo* above, and *State v. Reynolds*, below), Assistant State's Attorney Michael Dearington felt it as well. In *Ceballos*, an ugly sexual assault case involving a minor child, the Court held that, through repeated instances of misconduct during the questioning of witnesses and closing argument, Dearington had violated the defendant's due process right to a fair trial. The defendant identified six claims of prosecutorial misconduct, most of which the Court held were valid. In particular, the Court held that Dearington violated the rule established in *State v. Singh*, 259 Conn. 693 (2002) — that it is improper to ask a witness to comment on another witness's veracity, as such questioning invades the province of the jury.

The Court also held that Dearington made improper religiously charged statements when he referred to a witness as “Satan's daughter” and later remarked: “I would submit that the defendant is not concerned about what God is going to do to him, not now anyways. He's worried about what you people are going to do, and that's why he had to say what he said yesterday.” The Court concluded that these prosecutorial improprieties were “pervasive and directed at the critical evidentiary issue, which was the credibility” of the defendant and a principle witness.

14 *Gianetti v. Norwalk Hospital* 266 Conn. 544 (Zarella, J.)

For everything you ever wanted to know (and then some) about the “lost volume seller” theory of damages in a breach of contract case, read this decision in which the Court adopted a three-prong test for determining whether a provider of services qualifies as a lost volume seller. In a typical breach of contract case, a seller of services (or goods) must attempt to mitigate his damages by reselling the service or item that the breaching party refused to purchase. The usual measure of damages is the difference between the contract price and the price the plaintiff obtained by reselling the good or service. However, if the plaintiff can demonstrate that he could have entered into *both* transactions but for the breach, he can recover as damages the profits he would have earned on the first sale.

Under the three-pronged test that the Court adopted, a plaintiff claiming status as a lost volume seller must prove: 1) that the seller had the ability to perform both contracts simultaneously; 2) that the second contract would have been profitable; and 3) that the seller of services probably would have entered into the second contract even if the first contract had not been terminated. Applying this test to the facts of the case, the Court held that the plaintiff — a plastic surgeon who sued the defendant hospital for revoking his privileges in 1984 (yes, 1984!) — was entitled to a new hearing to determine whether, under the particular factual circumstances of his case, he qualified as a lost volume seller.

15

State v. Reynolds
264 Conn. 1 (Palmer, J.)

A divided Supreme Court affirmed the sentence of death returned against Richard Reynolds, a drug dealer who shot and killed Waterbury police officer Walter Williams.

Reynolds raised over fifty claims of error, including numerous claims of prosecutorial misconduct against Assistant State’s Attorney John Connolly. In a voluminous opinion, however, the Supreme Court rejected all of Reynolds claims, even though it determined that “the state’s attorney engaged in conduct that clearly was improper on several occasions” In so doing, the Court concluded “we are not persuaded that the sum total of those improprieties rendered the defendant’s penalty phase hearing fundamentally unfair. . . .”

In a stinging dissent, Justice Katz countered that “the present case involves a state’s attorney who engaged in . . . a pattern of misconduct” and that “[t]his particular state’s attorney, personally, is not new to findings of prosecutorial misconduct committed at trial Rather than reconsider his tactics, however, the state’s attorney in the present case grows emboldened, buoyed by the mere slap on the wrist he has received or the harmless error curtain he has been able to hide behind. The case at hand is a prime example.”

For his part, Connolly was undeterred, telling the press “[t]he fact is, Justice Katz is opposed to the death penalty, and I’ve been successful in five death penalty prosecutions . . . these cases, to say the least, are very emotional. They’re high stakes cases It’s frustrating when someone who is not there is looking at what you’ve said.”

16

Harp v. King
266 Conn. 747 (Palmer, J.)

Deciding a genuine issue of first impression in Connecticut, the Supreme Court concluded that it would apply the “middle of the road” test to determine whether a document inadvertently disclosed waived the attorney-client privilege with respect to communications within the document. In so doing, the Court first considered and rejected both a “strict” test, under which any disclosure waives the privilege, as well as a “lenient” test, under which there is never a waiver if the disclosing party can prove the dissemination was truly inadvertent.

Settling on the intermediate standard, the court noted that “the occasional disclosure of privileged material is inevitable in the modern era of complex, document-intensive litigation” and that the intermediate standard “strikes the fairest balance between the competing policy interests of preserving confidential attorney-client communications and encouraging the party seeking the benefit of the attorney-client privilege to take care in the handling of otherwise privileged material.” Endorsing the five-factor test adopted by the United States Court of Appeals for the Eighth Circuit in *Gray v. Bicknell*, 83 F.3d 1472 (8th Cir. 1996), the Court proceeded to consider the adequacy of the precautions employed (unsuccessfully) by the disclosing party and concluded that the trial court had properly determined the document at issue had been inadvertently disclosed.

17

Fort Trumbull Conservancy, LLC v. Alves
262 Conn. 480 (Sullivan, C.J.)

Section 22a-16 of the Connecticut Environmental Protection Act permits “any person” to file an injunction action in Superior Court to prevent “unreasonable” pollution. Similarly, § 22a-19 of the Act permits a person to intervene in an administrative agency proceeding for the purpose of challenging agency action that may adversely effect the environment.

In recent years the Supreme Court has explained that intervention in an agency proceeding via § 22a-19 is only permitted if it is within the agency’s ordinary jurisdiction to consider environmental issues. That is, § 22a-19 does not give an agency jurisdiction over environmental issues that it otherwise lacks.

In *Fort Trumbull*, the Court was faced with the question of whether that same limitation applied to an action under § 22a-16. Alves - a New London building official - argued that the regulations relevant to issuing demolition permits did not require him to consider environmental issues and, therefore, an action against him under § 22a-16 was improper. The Court agreed and held that the complaint against Alves failed to state a claim. The mere fact that the issuance of a demolition permit was a “condition antecedent” to the demolition of the buildings, and hence to the pollution the plaintiff sought to prevent, did not support a claim against Alves under § 22a-16. The Court held, however, that the environmental claims against the defendant redevelopment corporation, which sought to demolish buildings could go forward.

18

Paul Dinto Electrical Contractors, Inc. v. City of Waterbury
266 Conn. 706 (Borden, J.)

Most significant in the decision in *Paul Dinto Electrical Contractors, Inc. v. City of Waterbury* is the question the Supreme Court did *NOT* address – the effect of Public Act 03-154 upon the Supreme Court’s landmark decision in *State v. Courchesne*.

The Supreme Court began with a brief discussion of the holding in *Courchesne*, followed with an analysis of the text of the statutes at issue, and concluded by noting that the literal text of the statutory provisions at issue was consistent with their underlying legislative purpose. Except in a single footnote, however, the Supreme Court gave no consideration to the effect of Public Act 03-154, or to its constitutionality.

Instead, in that footnote, the Court stated “[t]his case does not present an appropriate occasion to consider P.A. 03-154. First this is not a case in which the applicable statutory text is plain and unambiguous. Second, the parties, whose briefs were filed long before the enactment of P.A. 03-154, and have not addressed it.”

In so concluding, however, the Court (which included both Justice Borden as well as Justice Zarella) overlooked the fact that it has, on occasion, ordered supplemental briefing to discuss issues that developed after the initial submissions. The Court likewise overlooked the fact that despite concluding that the half dozen statutory provisions at issue were not “plain and unambiguous” it was able to ascertain their meaning and effect without reference to extra-textual sources.

19

Burton v. Mottolese
267 Conn. 1 (Sullivan, C.J.)

What makes the decision in *Burton v. Mottolese* noteworthy is the Supreme Court’s holding that within a trial judge’s inherent authority to discipline an attorney for misconduct is the power – when the circumstances so warrant – to disbar. *Burton v. Mottolese* involved a writ of error taken from an order of the Superior Court (Mottolese, J.) disbaring Attorney Nancy Burton. The Superior Court had so ordered after conducting an evidentiary hearing and concluding that Attorney Burton had committed multiple violations of the Connecticut Rules of Professional Conduct in connection with her representation of a group of homeowners in an appeal from a decision of the zoning board of appeals for the Town of Monroe.

On appeal, Attorney Burton asserted that the trial court was without authority to disbar, that she had not been afforded due process, that she had been the victim of gender bias, and that there was insufficient evidence to support either the trial court’s findings of misconduct, or its conclusion that disbarment was warranted.

In a lengthy opinion, the Supreme Court rejected these arguments and affirmed. Writing for the Court, the Chief Justice concluded that “[a]lthough, without question, the sanction of debarment is the most serious penalty an attorney can endure, in these circumstances we do not believe it was unreasonable for the trial court to have disbarred the plaintiff.”

20

Deleo v. Nusbaum
263 Conn. 588 (Sullivan, C.J.)

In the medical practice context, both trial and appellate courts in Connecticut have long recognized the “continuous course of treatment” doctrine, which tolls the statute of limitations period if a physician has continuously treated the patient since the alleged negligence occurred. The analog to the doctrine in the legal malpractice context – the “continuous representation” doctrine – had been recognized by lower courts, but not by a Connecticut appellate court until last year, when the Appellate Court recognized the doctrine in *Rosenfield v. Rogin, Nassau, Caplan, Lassman & Hirtle, LLC*, 69 Conn. App. 151 (2002).

In *Deleo*, the Supreme Court put its own imprimatur on the issue, thus joining the majority of states that have adopted the doctrine. In general, the doctrine provides for tolling of the statute of limitations on professional negligence claims when: 1) an attorney has continuously represented the client with regard to the underlying matter in which the negligence occurred; and 2) the plaintiff was unaware of the alleged malpractice or the attorney could have mitigated the harm resulting from the malpractice during the period of continued representation.

21

Pelletier v. Sordoni/Skanska Construction Co.
264 Conn. 509 (Borden, J.)

Proving that motions for reconsideration are not an exercise in futility, the Supreme Court on reconsideration reversed itself in *Pelletier v. Sordoni/Skanska Construction Co.* and overruled the decision of the Appellate Court in *Ray v. Schneider*, 16 Conn. App. 660, cert. den. 209 Conn. 822 (1988). In *Ray v. Schneider*, the Appellate Court held that the employee of a construction contractor may not, under any circumstances, sue the general contractor for injuries suffered in a jobsite accident.

Reviewing seventy-five years of common law precedent, as well as the text and history of Conn. Gen. Stat. § 31-291, the Supreme Court concluded that, although the employee of a subcontractor may not, as a general matter, sue a general contractor, there are exceptions, including cases where the employee alleges that it is the direct negligence of the general contractor that caused his (or her) injury.

Not affected by reconsideration, however, was the Supreme Court’s holding that the trial court had properly entered summary judgment against the employee with respect to claims against a testing agency hired by the general contractor. Examining the testing agency’s contract, the Supreme Court concluded that the trial court had properly determined that nothing in the contract between the testing agency and the general contractor gave rise to a duty of care in favor of non-parties.

22

Hatt v. Burlington Coat Factory
263 Conn. 279 (Norcott, J.)

In a long and technical opinion, the Supreme Court resolved an open question about the Second Injury Fund, holding that Conn. Gen. Stat. § 31-349 abrogates the common law doctrine of apportionment and renders the workers’ compensation insurer at the time of the second injury solely liable. The court also held that Conn. Gen. Stat. § 31-299b permits apportionment only in cases involving repetitive trauma or occupational disease.

Quoting at length the decision in *State v. Courchesne*, the Court undertook an extensive review of the relevant statutory language, legislative history, related statutes, and informative common law precedent and concluded that, under Section 31-349, “apportionment is not an available form of relief for the second injury employer or its insurer. . . .” After performing a similar analysis on Section 31-299b, the Court also concluded “we conclude that the board properly determined that §31-299b is applicable only to single instances of occupational disease or repetitive trauma and, therefore, properly refused to invoke the apportionment provision of §31-299b.”

Concurring in the result, Justice Zarella continued his attack on the decision in *State v. Courchesne*, asserting that the text of the relevant statutes was clear and writing, “in my view, application of [*State v. Courchesne*] makes this otherwise very simple case needlessly confusing.”

23

State v. Coltherst
263 Conn. 478 (Sullivan, C.J.)

Jamal Coltherst was convicted of capital murder for the October 15, 1999 shooting death of Kyle Holden. Coltherst and another car-jacked Holden at gunpoint from the parking lot of an exotic dance club and Coltherst's companion ultimately shot and killed Holden. Although Coltherst was thus not guilty of actually killing Holden, he was nonetheless convicted under the rule of *Pinkerton v. United States*, 328 U.S. 640 (1946) – a person is liable for the crimes of a co-conspirator where such crimes are within the scope of the conspiracy; are in furtherance of the conspiracy; and are a reasonably foreseeable natural or necessary consequence of the conspiracy.

On direct appeal, the Supreme Court rejected on the merits all but one of the arguments offered by Coltherst. The Court refused to consider Coltherst's argument that, because Conn. Gen. Stat. § 53a-46a(h)(4) bars the imposition of the death penalty when a person plays only a minor role in a capital crime, even if the person possesses the requisite criminal intent, it would be manifestly unfair to allow a person to be sentenced to death who does not possess such intent, but is nonetheless guilty under *Pinkerton*. Refusing to consider Coltherst's argument, the Court reserved the question, stating “[b]ecause the State did not seek the death penalty in this case, however, we conclude that we need not decide whether a defendant convicted of a capital felony under the *Pinkerton* doctrine could invoke § 53a-46a(h)(4) or, if not, whether such a result would be anomalous or unfair.”

24

Murillo v. Seymour Ambulance Assoc.
264 Conn. 474 (Vertefeuille, J.)

While watching an emergency medical technician's repeated attempts to insert an IV needle into her sister's arm, the plaintiff began to feel faint and told the EMT that she thought she was going to faint. The EMT made no effort to aid the plaintiff as she then fainted, suffering a broken jaw, broken and chipped teeth, and facial lacerations. The plaintiff sued the EMT, who moved to strike the complaint, arguing that she did not owe a duty of care to the plaintiff. The Superior Court granted the motion and the Supreme Court affirmed.

The Court agreed that the harm the plaintiff suffered was foreseeable, but foreseeability alone “cannot itself mandate a determination that a legal duty exists.” Thus, the Court proceeded to consider the public policy ramifications of recognizing a duty of care to aid bystanders to an emergency medical procedure. As a matter of public policy, the “law should encourage medical providers . . . to devote their efforts to their patients, and not be obligated to divert their attention to the possible consequences to bystanders of medical treatment of the patient.”

The Court added that the “normal expectations” of bystanders would be that the medical providers would focus their effort to provide medical assistance to the injured person, not the bystander.

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State v. Morrisette
265 Conn. 658 (Palmer, J.)

In a decision that adds another layer of analysis to the *Courchesne* controversy, the Court held that a party may not appeal from an order setting aside a verdict pursuant to Connecticut General Statutes § 52-263. That Section allows “either party” to appeal following the “granting [of] a motion to set aside a verdict.” Quickly concluding that the statute applied in criminal cases, the Court then went on to consider the State's argument that, because a motion for new trial is the functional equivalent of a motion to set aside the verdict, the State enjoyed pursuant to Section 52-263 a right of appeal from a decision setting aside a guilty verdict.

The Court was not persuaded. Pointing to the plain language of Section 52-263, the Court stated “[w]e acknowledge the logic of the state's position. Nevertheless, we are not at liberty to rewrite § 52-263.”

On its face, the Court's analysis in *State v. Morrisette* appears to be inconsistent with the mandate of *Courchesne* – a court's analysis begins, not ends, with the plain language of a statute. Indeed, even though the relevant statutory language was clear, the Court considered the legislative history of Section 52-263 in determining that the State thereunder enjoyed an appeal in criminal cases. The Court did not, however, examine the legislative history of Section 52-263 to determine whether anything therein supported the State's argument that a motion for new trial is the functional equivalent of a motion to set aside the verdict, and thus is within the ambit of Section 52-263.

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