

TOP 25 of 2004

LEADING DECISIONS OF THE CONNECTICUT SUPREME COURT

BY

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Welcome to the Top 25 of 2004—Leading Decisions of the Connecticut Supreme Court. With the help of our associate, David Case, we have reviewed the more than 200 decisions that the Court issued last year and identified 25 that we believe every practitioner in Connecticut should read. As we did last year, our selection process considered whether the decision raised a question of first impression in Connecticut; whether it overturned longstanding precedent; whether its impact on the law extended beyond the particular controversy before the Court; and whether the case involved issues which, while perhaps not having a great impact on the law, were nonetheless of great public interest.

Last year, a single case—*State v. Courchesne*—was clearly the most significant. In 2004, however, two cases vied for the top spot: *Kelo v. New London* and *Office of the Governor v. Select Committee of Inquiry*. Indeed, in any other year, either case would likely have been a runaway winner.

Although the Rowland impeachment scandal was a seminal event in the political history of Connecticut, and notwithstanding that the Supreme Court’s decision in the Rowland case raises important constitutional issues, we have selected *Kelo* as the leading decision of 2004. We did so in no small part because the United States Supreme Court has taken the case and appears likely to undertake its first major analysis of takings law in a quarter century. We believe that, going forward, *Kelo* is likely to have great impact not only in Connecticut, but throughout the rest of the nation.

While these two cases were at the forefront of the Court’s docket this year, there were other significant decisions addressing a broad spectrum of substantive and procedural issues. Moreover, as it did last year, the Supreme Court decided several high profile cases, including three involving some of Connecticut’s most infamous criminal defendants. Finally, 2004 saw the Court retrench on the issue of prosecutorial misconduct and likewise saw a spirited counter-attack by the *Courchesne* dissenters. Buoyed by Public Act 03-154 (which legislatively overruled *Courchesne*’s rejection of the “plain meaning rule”), the dissenters issued several strong opinions seemingly aimed at banishing, once and for all, the contextual approach to statutory construction that the Court endorsed in Justice Borden’s opinion in *Courchesne*.

As you read our Top 25, we have no doubt that you will have your own ideas about the cases we selected, or failed to select, and we encourage you to share your thoughts with us. Please drop us a note at our appellate blog—www.top25ct.com.

Without further ado, we present our Top 25 of 2004



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COURT O.K.'s TAKING FOR PRIVATE REDEVELOPMENT — U.S. SUPREME COURT GRANTS CERT.

Kelo v. New London
268 Conn. 1
(Norcott, J.)

The government's power to condemn private property and transfer ownership, not to itself, but to another private entity, has long been a controversial constitutional issue. In *Kelo v. City of New London*, the Connecticut Supreme Court answered that question in the affirmative, with certain caveats. With the United States Supreme Court's recent decision to hear the plaintiff's appeal, the case's significance has now taken on national importance.

The case arises from a redevelopment project in the City of New London. In November 2000, the New London Development Corporation—a private company to whom the City of New London had delegated its eminent domain powers—initiated condemnation proceedings to acquire property in the city's Fort Trumbull area as part of an urban redevelopment project. The corporation's stated goal was to create a development that would complement an adjacent facility that pharmaceutical giant Pfizer, Inc. intended to build; create jobs; increase tax and other revenues; encourage public access to and use of the city's waterfront; and eventually "build momentum" for the revitalization of the rest of the city, including its downtown area.

The plaintiffs, who owned property on two of the parcels to be condemned, sought to enjoin the takings. The trial court granted the plaintiffs' request for injunctive relief with respect to one of the two parcels, concluding that the defendants had not established that taking that particular parcel was reasonably necessary to accomplish the development plan. An appeal and cross-appeal followed.

The Connecticut Supreme Court concluded that the condemnations passed constitutional muster with respect to all of the parcels of land at issue. Writing for the Court in a 4-3 decision, Justice Norcott first reviewed the Court's own constitutional precedents, observing that the Court had long taken "a flexible approach to the construction of the Connecticut public use clause." He noted that, as early as 1866, in *Olmstead v. Camp*, 33 Conn. 532, the Court had recognized that a "public use" could mean anything of "public usefulness, utility or advantage, or what is productive of general benefit. . . ." He then noted that federal precedents supported "broad treatment to the federal public use clause," further noting that the broad approach to the clause "reached its zenith in 1984" in *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229, 239-40 (1984). In that case the United States Supreme Court considered the constitutionality of legislation addressing economic problems created by highly over-concentrated land ownership in Hawaii, a vestige of the feudal land tenure system of the original Polynesian settlers. The legislation provided for the condemnation of residential tracts of land, which would then be sold to the tenants residing there, or to other prospective purchasers. The United States Supreme Court

concluded, with "no trouble," that the legislation was a constitutional exercise of Hawaii's police powers and that the "public use" requirement for takings was "coterminous with the scope of a sovereign's police powers." The Supreme Court elaborated further that "[w]here the exercise of the eminent domain power is rationally related to a conceivable public purpose, [this] Court has never held a compensated taking to be proscribed by the Public Use Clause."

Given this broad definition of "public use," the Connecticut Supreme Court concluded that, in general, "an economic development plan that the appropriate legislative authority rationally has determined will promote significant municipal economic development constitutes a valid public use for the exercise of the eminent domain power under both the federal and Connecticut constitutions."

In so concluding, the Court addressed a line of cases from other states, most notably *Southwestern Illinois Development Authority v. National City Environmental, LLC*, 768 N.E.2d 1 (Ill. 2002), which, the plaintiffs argued, held that economic development projects do not, by themselves, constitute a public use. The Court "disagree[d] with the plaintiff's contention that the *Southwestern Illinois Development Authority* stands for the proposition that economic development is *never* a constitutionally valid public use." (emphasis supplied). Rather, the Court concluded that the case simply represented an instance in which the particular development project at issue did not constitute a public use.

The Court turned next to the plaintiffs' argument that, even if private economic development could constitute a valid public use in general, "the condemnations at issue in the present case do not serve that purpose because . . . the effects of those condemnations primarily will benefit private entities," and that any public benefit would be "incidental and insignificant." Making a credible "slippery slope" argument, the plaintiffs asserted that if the "generation of greater tax revenues alone becomes a sufficient basis for condemnations in Connecticut, then Connecticut homeowners will lack any constitutional protection against eminent domain. Any home will be up for grabs to any private business that wants the property."

To resolve this issue, the Court articulated the following legal standard: "We conclude that an exercise of the eminent domain power would be an unreasonable violation of the public use clause if the facts and circumstances of the particular case reveal that the taking was primarily intended to benefit a private party, rather than primarily to benefit the public." The Court then concluded that the evidence supported the trial court's findings that the takings were not primarily intended to benefit Pfizer. The Court emphasized that its decision "was

"An exercise of the eminent domain power would be an unreasonable violation of the public use clause [only] if . . . the taking was primarily intended to benefit a private party"

COURT UPHOLDS SUBPOENA — ROWLAND RESIGNS

not a license for the unchecked use of the eminent domain power as a tax revenue raising measure; rather, our holding is that rationally considered municipal economic development projects such as the development plan in the present case pass constitutional muster.”

Finally, the Court addressed the plaintiffs’ argument that the taking of their properties was unconstitutional because it was not supported by “reasonable assurances of future public use.” Applying a clearly erroneous standard of review, the majority held that the evidence supported the trial court’s conclusion that “sufficient statutory and contractual constraints [were] in place to assure that private sector participants [would] adhere to the provisions of the development plan.”

By contrast, the dissenting justices argued that a proper analysis of the issue “must focus not only on the possible statutory, contractual and planning constraints that would ensure a public use, but also on the *temporal* question of whether there is any reasonable prospect that the expected development will, *in fact*, occur.” (emphasis in original). They further argued that the standard of proof applicable to this question was a clear and convincing evidence standard. Reviewing the record in light of this heightened standard, the dissent concluded that the evidence did not support a finding that the takings would actually lead to implementation of the private development plan.

As noted, the U.S. Supreme Court granted the plaintiff’s petition for a writ of certiorari, certifying the following question for appeal: “What protections does the Fifth Amendment’s public use requirement provide for individuals whose property is being condemned, not to eliminate slums or blight, but for the sole purpose of ‘economic development’ that will perhaps increase tax revenues and improve the local economy?”

Although the Connecticut Supreme Court’s decision in *Kelo v. City of New London* cleared the way for a major redevelopment project in one of Connecticut’s most economically distressed cities, the United States Supreme Court’s decision to hear the case puts the project in doubt, at least with respect to the plaintiffs’ property. However, regardless of the particular outcome the United States Supreme Court may reach in *Kelo*, its decision is certain to have national ramifications for takings under the Fifth Amendment. ■

Without overstating its significance, the Supreme Court’s decision holding that former Governor John G. Rowland was obligated to comply with a subpoena issued by the Select Committee of Inquiry set in motion a chain of events that led first to his resignation and finally to his recent guilty plea in federal court. It can also fairly be said that the opinion represents the Court’s most significant statement on the separation of powers doctrine under the Connecticut Constitution.

On May 18, 2004, the Select Committee—which the General Assembly convened to investigate possible impeachable offenses by Rowland—issued a subpoena ordering him to appear and testify. On May 27, 2004, the Office of the Governor applied to the Superior Court for an order quashing the subpoena and for declaratory and injunctive relief, arguing that the Governor enjoyed categorical immunity from legislative subpoena, or, alternatively, that the subpoena in question violated the separation of powers for a panoply of procedural and substantive reasons. On June 7, 2004, however, the Superior Court (Langenbach, J.) denied the application, holding that “[t]he legislature is not categorically barred under the separation of powers doctrine from compelling the Chief Executive to testify” and that the Supreme Court had “no jurisdiction to address the special committee’s adjudicatory devices such as the order of witnesses called and pre-testimonial disclosure to subpoenaed witnesses.”

The Office of the Governor thereafter sought direct (and expedited) appellate review and the Chief Justice granted the Governor’s application on June 10, 2004. The appeal was heard eight days later by an *en banc* Court. That same day, the Court affirmed, with the Chief Justice and Justice Zarella dissenting. At that time, the Court and the dissenters issued truncated opinions, indicating that a full exposition would follow.

Faced with the Hobbesian choices of testifying, refusing to do so and risking the political fall-out, or invoking his Fifth Amendment privilege against self-incrimination, Rowland resigned three days later, on June 11, 2004.

Four months later, the Court and the dissenters issued their full opinions. In a lengthy decision co-authored by the five-member majority, the Court reviewed federal and state law regarding the separation of powers, the text of the Connecticut Constitution, and its prior decision in *Kinsella v. Jaekle*, 192 Conn. 704 (1984) (which involved impeachment proceedings commenced against the elected Probate Judge for the City of Hartford), and concluded that the Governor did not enjoy categorical immunity from subpoena and that, with respect to the subpoena in dispute, the Select Committee had not violated the separation of power.

*Office of the Governor v.
Select Committee of Inquiry*
271 Conn. 540
(per curiam)

“The majority today
eviscerates the political
question doctrine”
(Zarella, J., dissenting)

SUBPOENA CONTINUED

The Court began by considering whether the matter had been mooted by the Select Committee's representation that, if the Governor refused to comply with its subpoena, it would not attempt to enforce it via judicial process. Noting that the Select Committee had reserved the right to make the Governor's non-compliance a basis for impeachment, the Court concluded that "the appeal is not moot because of the collateral consequence of the potential for an article of impeachment on [this] basis. . . ."

The Court next considered—and rejected—the Select Committee's four-pronged argument that the controversy was non-justiciable. First rejecting the Select Committee's argument that the decision in *Kinsella* precluded judicial review, the Court concluded that, because the Governor is unique in that his authority is suspended by Article Fourth, § 18 of the Connecticut Constitution once the House of Representatives presents articles of impeachment to the Senate, the Governor must be afforded a reasonable opportunity to raise a meaningful constitutional challenge prior to the House presenting articles of impeachment.

The Court next concluded that, while the Select Committee's investigation was within the scope of the Speech and Debate Clause of Article Third, § 15 of the Connecticut Constitution, the Governor was still entitled to challenge whether its conduct violated the separation of powers.

The Court then concluded that, although the Select Committee had represented that it would not seek judicial enforcement of its subpoena, it had reserved the right to predicate an article of impeachment upon the Governor's refusal to comply such that the matter was ripe for adjudication because "to require the [Governor] to wait until the [Select Committee] imposed a sanction by means of an article of impeachment would render the [Governor's] challenge a non-justiciable political question."

Finally, the Court rejected the Select Committee's claim that the dispute was a purely political question, holding that review of the conduct of impeachment proceedings was within the judicial power (and thus not wholly delegated to the General Assembly) and that there existed well-established standards for judging the constitutionality of the Select Committee's conduct.

Turning to the Governor's appeal, the Court first rejected the claim of categorical immunity, relying upon "the nature of the [Select Committee's] task, on the text of our constitution regarding an impeachment of a governor, on analogous federal case law, on the historical record regarding legislative powers in impeachment proceedings at the federal level, and on constitutional policy." In so holding, the Court concluded that "[i]t would be constitutionally peculiar if the legislature, engaged in the impeachment process in order to vindicate

the separation of powers provision, were categorically barred by that very provision from securing the testimony of the person who, not only is the target of the impeachment process, but who undoubtedly is the best source of information regarding the alleged conduct that gave rise to the impeachment process."

The Court then considered the Governor's contention that the subpoena in question violated the separation of powers because it was not "an investigative tool of last resort" and because the Select Committee had failed to provide the Governor with notice of the scope of its inquiry, the standard for impeachment, or the burden of proof against which it would measure the evidence. Relying on the same principles that supported its rejection of the Governor's claim of categorical immunity, the Court quickly dismissed the Governor's first point, holding that "we perceive no legitimate reason why the separation of powers provision mandates that the [Select Committee] be required to put off any attempt to obtain the governor's testimony until it can demonstrate that it has exhausted all other possible avenues of investigation." The Court then rejected the Governor's second claim, holding that the Governor's estimate of the burden imposed by the legislature was "unrealistic" and that, in any event, the Select Committee was exercising a core legislative function which justified any burden its subpoena might impose.

In a sharp dissent, Justice Zarella, joined by the Chief Justice, asserted that "the majority today eviscerates the political question doctrine, which has, in the past, effectively protected both the executive and legislative branches from unwarranted interference by the judiciary." Taking issue with the majority's analysis of the Court's decision in *Kinsella*, its analysis of the separation of powers doctrine, and its assessment of sound constitutional policy, the dissent argued that impeachment was a matter committed wholly to legislative discretion. As such, and because the only sanction that might be imposed on the Governor for non-compliance with the Select Committee's subpoena was impeachment, the dissent concluded that there was no justiciable controversy. Writing separately, the Chief Justice emphasized that the only issue properly before the Court was the validity of a legislative subpoena enforceable only by the threat of impeachment and concluded that, "[i]n my view, however, the [Office of the Governor's] constitutional challenge is not 'rendered viable' by the existence of a potential consequence that this court's opinion cannot affect one way or the other." ■

COURT AFFIRMS DEATH PENALTY FOR MICHAEL ROSS

In its history, Connecticut has executed 73 people. The last, Joseph “Mad Dog” Taborsky, was executed in 1960. By the time this publication is distributed, one more person may have been added to that list—serial killer, rapist and kidnapper Michael B. Ross, who is scheduled to die by lethal injection on January 26, 2005. Ross has stated that he wants to die and has forbid his lawyers to take any further appeals to forestall the execution. Governor M. Jodi Rell has stated that she will not grant a reprieve and will veto any attempt by the General Assembly to repeal the death penalty.

Ross was originally charged with eight counts of capital felony, based on a string of murders in the early-to-mid 1980’s committed in the course of kidnappings and sexual assaults of young women. Two counts were dismissed at the outset of the case for lack of territorial jurisdiction. Following a jury trial, Ross was convicted of four counts of capital felony. After a separate penalty phase, he was sentenced to death. He then appealed to the Supreme Court, which affirmed the conviction but reversed the death penalty judgments because of errors in the trial court’s evidentiary rulings, which impaired Ross’s ability to establish a mitigating factor. The case was remanded for a second penalty phase hearing, after which a jury again imposed a death sentence on each count.

In what appears to have been his last appeal, Ross raised numerous challenges to his death sentences. His claims fell into ten general categories involving: (1) rulings pertaining to the jury selection phase of the penalty hearing; (2) the denial of his motion to sever the cases; (3) the denial of his motion to order a competency examination; (4) evidentiary rulings; (5) the state’s alleged nondisclosure of exculpatory materials in violation of *Brady v. Maryland*, 373 U.S. 83 (1963); (6) rulings relating to the sufficiency of the evidence in support of the mitigating and aggravating factors; (7) instructions given to the jury; (8) the constitutionality of the death penalty statute; (9) the reliability of the death sentences in light of the alleged cumulative errors; and (10) the proportionality of the death sentences.

In a 179-page opinion, the Chief Justice, joined by Justices Vertefeuille, Zarella, Lavery, Foti and Dranginis (the last three of whom are Appellate Court judges sitting by designation), rejected each of Ross’s claims, several of which the Court said had not been properly preserved for appeal. Justice Norcott dissented based on his long-standing objection to the death penalty.

In the context of this publication, it is not possible to discuss each of Ross’s claims and the Supreme Court’s reasons for rejecting them. Without intending to minimize the import of any particular claim, we briefly address two of Ross’s claims.

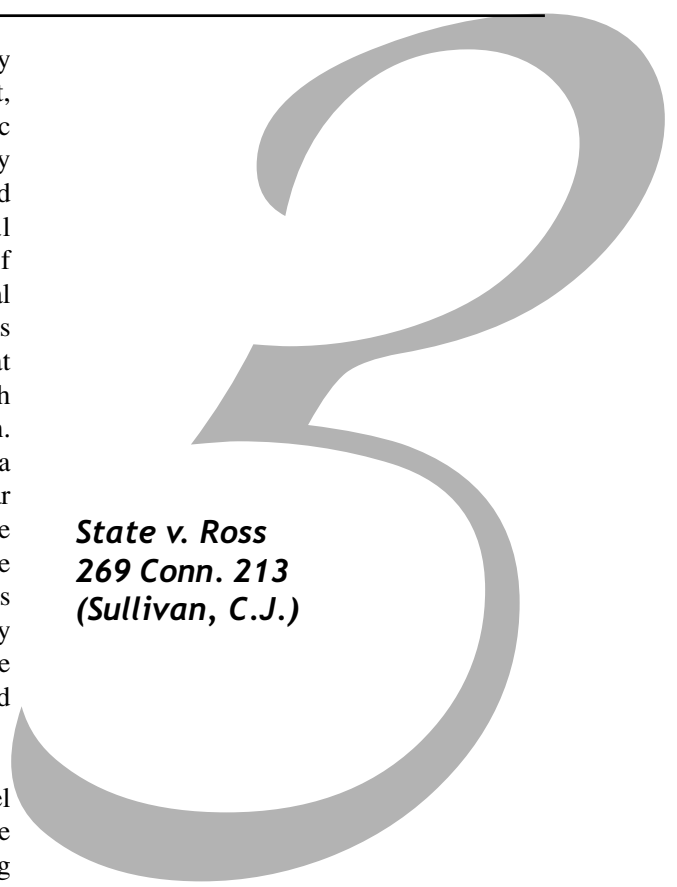
First, Ross claimed that the trial court improperly excluded the proffered testimony of Daniel Hart, the Bishop of the Norwich Roman Catholic Diocese, concerning the concept of extending mercy to those who have committed heinous crimes and the Catholic church’s position on capital punishment. Ross argued that the exclusion of Bishop Hart’s testimony violated the constitutional rule that “states cannot limit the sentencer’s consideration of any relevant circumstance that could cause it to decline to impose the death penalty.” The Supreme Court rejected that claim. It stated that, to be relevant, evidence that a defendant seeks to introduce as mitigating must bear on his “character, background and history, or the nature and circumstances of the crime.” The Supreme Court held that general ethical or religious teachings on the subject of mercy or the morality of the death penalty were not relevant under the foregoing standard and, moreover, would impermissibly encourage jury nullification.

Second, Ross argued that the death penalty was cruel and unusual punishment as applied to him because he suffered from a mental disability. In resolving this argument, the Court observed that it had already rejected Ross’s argument that the evidence established, as a matter of law, the existence of a mitigating factor based on impaired mental capacity and an impaired ability to conform his conduct to the requirements of the law. Thus, the Court understood Ross’s “cruel and unusual punishment” claim to be that it would be unconstitutional to impose the death penalty on a person with *any* mental disability, even if that disability did not rise to the level of a mitigating factor.

The Court rejected this argument, observing that, if accepted, it would be tantamount to declaring that the death penalty could never be imposed constitutionally on one who commits a capital offense because, by definition, a finding of an “especially heinous, cruel or depraved” aggravating factor necessarily establishes that the defendant’s mental status did not conform to socially accepted norms.

* * *

As previously noted, these brief descriptions of two of the claims resolved in the case barely scratch the surface of the opinion in this important case. This entire publication easily could be devoted to the *State v. Ross* decision. For readers interested in reading the decision in full, it is available on the authors’ blog, www.top25ct.com. ■



State v. Ross
269 Conn. 213
(Sullivan, C.J.)

So, You Think You Have A FINAL JUDGMENT?

Esposito v. Specyalski
268 Conn. 336
(Katz, J.)

In a case with potentially far-reaching ramifications, the Court held that an order granting summary judgment with respect to a counterclaim and third-party complaint was not immediately appealable, notwithstanding that the express language of Practice Book § 61-2 provides, “[w]hen judgment has been rendered on an entire complaint, counterclaim, or cross complaint . . . by summary judgment . . . such judgment shall constitute a final judgment.”

At issue was liability for the traffic accident that killed well-known Connecticut businessman Neil Esposito. Esposito’s estate sued Heather Specyalski, Esposito’s girlfriend at the time of his death, claiming that she was driving the decedent’s automobile in a negligent fashion (*i.e.*, intoxicated) when it went off the highway, killing Esposito and seriously injuring Specyalski. Esposito’s estate also sued Mercedes-Benz Credit, the owner of the vehicle.

Mercedes-Benz Credit thereafter brought a third-party complaint against the lessee of the vehicle, relying on an indemnification provision in the parties’ lease. Mercedes-Benz Credit also brought a counterclaim against Esposito’s estate, alleging Esposito had personally guaranteed all amounts due and owing from the lessee to Mercedes-Benz Credit. Mercedes-Benz Credit thereafter moved for summary judgment against both.

Esposito’s estate and the lessee opposed the motions on a number of contract and public policy grounds. The trial court, however, granted the motions, notwithstanding that there existed a very real factual dispute as to whether Esposito or Specyalski was driving when the automobile crashed. The trial court so ruled because it concluded that Mercedes-Benz was entitled to judgment regardless of who was driving the car because either Esposito was driving, such that his own negligence barred his claim, or because Mercedes-Benz was entitled to indemnification—*i.e.*, the dispute as to who was driving was immaterial.

Esposito’s estate and the lessee thereafter sought certification to appeal directly to the Supreme Court pursuant to Conn. Gen. Stat. § 52-265a, which was denied. They then appealed to the Appellate Court and later moved to transfer the case to the docket of the Supreme Court. At the same time, the appellants requested from the trial court a determination pursuant to Practice Book § 61-4 that, even if the trial court’s order was not final, the Appellate Court should nonetheless grant appellants permission to prosecute an interlocutory appeal because the issues resolved by the order entering summary judgment were of such significance to the determination of the outcome of the case as to justify an immediate appeal.

The Appellate Court, however, thereafter *sua sponte* ordered that the trial court take no action with respect to the appellants’ § 61-4 motion and also that the parties file supplemental briefs on the question of whether the appeal should be dismissed for lack of a final judgment. Before the Appellate Court could consider whether there existed a final judgment, however, the Supreme Court granted appellants’ motion to transfer.

In a truly remarkable opinion, the Court began its analysis by stating that “because the trial court completely disposed of a counterclaim and a third party action, at first blush, the case appears to be an appealable final judgment under § 61-2. Our resolution of this appeal, however, rests with the question of whether the decision of the trial court is ripe for adjudication.” Quoting at length its decision in *Milford Power Co. LLC v. ALSTOM Power, Inc.*, 263 Conn. 616 (2003), the Court concluded that the existence of an actual dispute between the parties was contingent upon events that had not yet occurred, and which might never occur.

Specifically, the Court noted that, if Esposito had been driving the automobile when it crashed (or had negligently allowed Specyalski to drive while intoxicated), then there would be no need for the Court to consider whether the indemnification provisions in the lease and Esposito’s guaranty were enforceable, because Esposito’s own negligence would bar his claim. Accordingly, the Court held that the trial court’s decision was not truly “final” and, thus, not appealable.

The decision in *Esposito v. Specyalski* thus leaves even the wary potentially exposed to a Hobson’s choice and may well require the filing of two appeals—one at the entry of an interlocutory order that may be final judgment and one at the conclusion of the case. Specifically, failure to appeal within twenty days of notice of entry of an appealable judgment or order typically waives whatever right to appellate relief a party might otherwise enjoy. At the same time (and unlike under the Federal Rules of Appellate Procedure, where a premature appeal automatically ripens), a premature appeal must be dismissed as unripe. As such, a party faced with uncertainty as to whether an interlocutory order is immediately appealable may need to file two appeals—one immediately and one at the end of the case—in order to ensure that he/she has reserved his/her right of appeal. ■

“At first blush, the case appears to be an appealable final judgment. . . .”

LIMITATIONS PERIOD TOLLED UNTIL TORTFEASOR IDENTIFIED

Does the statute of limitations on a negligence action begin to run before the claimant discovers the identity of the tortfeasor? In *Tarnowsky v. Socci*, the Court adopted the rule of a majority of sibling jurisdictions and concluded that the limitations period does not begin to run until the claimant knows, or reasonably should have known, the identity of the tortfeasor.

The case arose out of injuries that Tarnowsky suffered when he slipped and fell on an icy stretch of sidewalk. Within two years of the accident, he filed a negligence action against a number of parties, including the owner and tenant of the property on which he fell. Following formal discovery, Tarnowsky learned that Socci, who was not named in the suit, was responsible for removing ice and snow from the property. Only days shy of three years after his fall, Tarnowsky then sued Socci. Socci moved for summary judgment, which the trial court granted on the basis that the claim was barred by the two-year statute of limitations. The Appellate Court reversed, holding that, because the identity of the tortfeasor is an essential element of a claimant's action, the actionable harm was not discovered—and, therefore the statute of limitations did not begin to run—until the time that Tarnowsky reasonably should have discovered Socci's identity. The Supreme Court granted certification and considered this issue of first impression.

Connecticut General Statutes § 52-584 provides a two-year statute of limitations for negligence actions running from the date the injury is sustained or discovered; and a three-year statute of repose, running from the date of the act or omission complained of. The Court had previously held that the term "injury" in this context, is synonymous with "legal injury" or "actionable harm." Such actionable harm occurs only when the claimant, in the exercise of reasonable care, should have discovered the essential elements of the cause of action. Although the Court had previously concluded that these essential elements include the breach of duty, the resulting harm, and the causal connection between the breach and the harm, it had never considered whether the identity of the tortfeasor is an essential element.

The Court noted a split of authority on this issue among other states, and ultimately agreed with the majority of those jurisdictions. "We agree with the Appellate Court and the majority of our sibling jurisdictions that there is no principled reason to distinguish between, on the one hand, the discovery of a breach of duty or the discovery of a causal connection between the breach of duty and the injury and, on the other hand, the discovery of the identity of the tortfeasor, for purposes of the actionable harm doctrine. . . . [T]he very phrase 'actionable harm' suggests that knowledge of the identity of the tortfeasor is one of its elements. . . . [T]he blameless failure to discover the existence of

the unknown tortfeasors is tantamount to a blameless failure to discover the causal connection between the tortfeasor's breach of duty and the injury, a failure that clearly tolls the statute of limitations." The Court also favored this rule because it is consistent with the public policy of allowing meritorious claims to be vindicated in the courts.

Socci argued that such a rule would necessarily inject an additional issue of fact into every negligence case that involves a statute-of-limitations defense, since the issue of the reasonableness of the claimant's effort in identifying the tortfeasor is properly for the fact finder. The Court was not persuaded by this slippery-slope argument. It concluded that, because this principle applies only when the plaintiff did not know, and reasonably could not have known, the identity of the tortfeasor, its application is limited, writing: "We trust that such cases are the exception, not the general rule."

The Court emphasized that, although the two-year limitations period does not begin to run until the claimant reasonably should have known the identity of the tortfeasor, the three-year repose period is unaffected. ■

Tarnowsky v. Socci
271 Conn. 284
(Sullivan, C.J.)

"The very phrase 'actionable harm' suggests that knowledge of the identity of the tortfeasor is one of its elements."

COURT UPHOLDS WARRANTLESS PATDOWN SEARCH IN APARTMENT

State v. Mann
271 Conn. 300
(Palmer, J)

In *Terry v. Ohio*, 392 U.S. 1 (1968), the United States Supreme Court held that a police officer could conduct a limited “patdown” search of a suspect on a public street if the officer had a reasonable belief, based on specific and articulable facts, that the suspect was armed and dangerous. In so holding, the Court departed from long-standing precedent that the Fourth Amendment required both probable cause and a warrant before the police could conduct a search or seizure.

In *State v. Mann*, the Connecticut Supreme Court extended *Terry*, holding that a police officer could cross over the threshold of an apartment for the purpose of conducting a limited patdown search of a suspect for weapons if the officer had a reasonable and articulable suspicion that the suspect was armed and dangerous. Relying upon that holding, the Court affirmed the defendant’s conviction on several drug charges, which flowed from a warrantless patdown search that disclosed drugs in the defendant’s pocket.

Like *Terry*, the decision in *State v. Mann* was driven by a set of facts that called out for a pragmatic response, which recognized the legitimate needs of law enforcement officers to ensure their safety when conducting an investigation. At approximately 4:25 a.m. on October 3, 2000, three uniformed New Haven police officers responded to a call concerning a dispute. They proceeded to the location of the dispute, where they met with a woman who volunteered information about drug activity in the area. In particular, she told the officers that a shipment of drugs had just been delivered to an apartment in a building at 130 Sylvan Avenue, that an African-American male was dealing drugs out of the apartment and that she did not know if there were any weapons in the apartment.

The police then went to the apartment building and, at approximately 5:00 a.m., knocked on the door of the defendant’s apartment. The officers did not announce themselves as police. The defendant opened the door one and one-half feet to two feet wide. When he saw the officers, he tried to close the door using his left hand and left side of his body while simultaneously thrusting his right hand into his pocket. Upon seeing the defendant quickly place his right hand in his pocket, one of the officers drew his gun, entered the apartment, placed the defendant against the wall and conducted a patdown search for weapons. Although the officer did not find any weapons on the defendant, he determined that the defendant had “plastic baggies with little rock-like things in them” in his right pocket. The officer then reached into that pocket and withdrew fifty small bags containing crack cocaine and four small bags of marijuana. The officers arrested and charged the defendant with various drug-related offenses.

At trial, the defendant moved to suppress the drugs seized during the patdown search. The trial court

denied the motion, concluding that the defendant’s conduct had created an exigency justifying the officers’ warrantless entry into the apartment for the limited purpose of conducting a patdown search for weapons. On appeal from his conviction, the Appellate Court reversed, holding that, “in the absence of a warrant or probable cause and exigent circumstances, the fourth amendment barred the officers from crossing the threshold of the apartment to conduct a patdown search of the defendant.”

After granting the state’s petition for certification, the Supreme Court reversed, adopting the state’s argument that the patdown search was constitutionally permissible because the police were confronted with an emergency situation when the defendant, upon opening the door to his apartment, engaged in conduct that reasonably caused the police to suspect that he was armed and posed a danger.

Conducting an extensive review of *Terry* and its progeny, the Court acknowledged that it is “indisputable that the home is afforded heightened protection under the fourth amendment,” but then observed that the “firm line drawn at the entrance to the home does not preclude every warrantless search of a residence undertaken on less than probable cause. . . . The rationale for excepting protective searches . . . from the warrant and probable cause requirements of the fourth amendment is dependent not so much on the location of the search as on the need for swift action by police officers who, while conducting lawful investigations, find themselves in a position of imminent peril.”

Applying this rationale, the Court held that it is “constitutionally permissible for the police to conduct a limited patdown search of the occupant, even though the occupant is located inside the doorway, if the search is supported by a reasonable and articulable suspicion that the occupant is armed and dangerous.” The Court further held that search of the defendant was supported by a reasonable and articulable suspicion that the defendant was armed and dangerous.

The decision in *State v. Mann* constitutes a further departure from the Fourth Amendment’s probable cause and warrant requirements in favor of a “reasonableness” test, which weighs law enforcement’s interest in protecting the safety of police officers against an individual’s interest in privacy. ■

“We cannot blind ourselves to the need for law enforcement officers to protect themselves”

CONVICTION AFFIRMED, LIFE SENTENCE VACATED, DEATH PENALTY STILL POSSIBLE

In a case arising out of the grisly gangland executions of eight-year-old Leroy Brown, Jr. and his mother, Karren Clarke, a divided Supreme Court, sitting *en banc*, affirmed the conviction of Russell Peeler, an infamous Bridgeport drug dealer.

Peeler had orchestrated the assassinations because Brown had witnessed Peeler's attempted murder of one of Peeler's confederates, Rudolph Snead, Jr. Snead survived, however, and reported the incident to the police. Enraged that Snead had gone to the police, Peeler later shot and killed him. Remembering that Brown had been a witness to his first attempt to murder Snead, Peeler concluded that—with Snead dead—the State would likely use Brown as a witness with respect to the charge of attempted murder and link Peeler to the murder of Snead.

Russell Peeler then undertook to silence Brown, conspiring with his brother Adrian to shoot and kill the young boy. Peeler procured for the murder a .357 magnum revolver, because (and unlike a semi-automatic pistol) a revolver does not discharge spent shell casings, thereby making it harder for the police to trace the murder weapon.

Securing the assistance of one of Brown's neighbors with a handful of crack cocaine, Adrian Peeler waited for Brown and his mother to return home on January 7, 1999. After Brown and Clarke arrived home from the grocery store, Adrian Peeler forced his way into their home and murdered both, first shooting Clarke and then Brown, as he screamed "Mommy! Mommy! Mommy!"

Peeler was charged with two counts of capital felony and one count of conspiracy to commit murder. Although the jury convicted Peeler on all three counts, it deadlocked during the penalty phase, informing the court that, with respect to the murder of Brown, it could not reach unanimity as to whether the aggravating factor it had found outweighed the mitigating factor it had also found and that, with respect to the double murder of Brown and Clarke, it could not reach unanimity as to whether the State had proven beyond a reasonable doubt the presence of an aggravating factor.

After further instruction and deliberations, the jury returned with a finding that they could not reach unanimity, and the trial court sentenced Peeler to life, without the possibility of parole. Both Peeler and the State appealed.

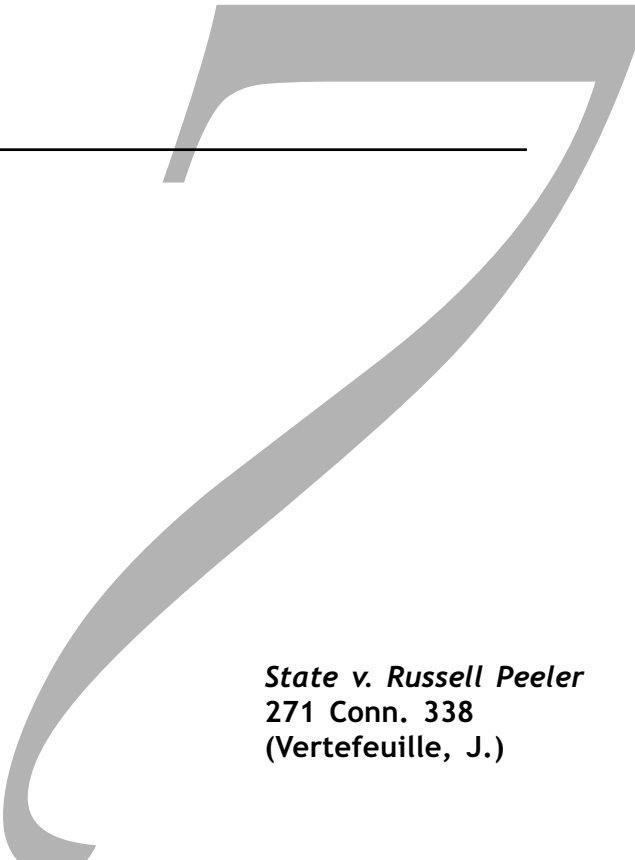
On appeal, Peeler raised a number of claims concerning the applicability of the Pinkerton doctrine, all of which the Supreme Court rejected on their merits. The Court, however, did hold that

that the error was harmless because the State had offered considerable other evidence on the subject of the witness' testimony and because the defendant had been able to thoroughly test the witness' credibility using a considerable amount of other evidence. The Court also rejected the defendant's claim that the trial court had erred in failing to disclose to his counsel certain potentially exculpatory evidence that had been presented to the Court for *in camera* review, holding that the defendant suffered no prejudice because the evidence was ultimately provided to him and introduced at trial.

With respect to the State's appeal, the Court held that the trial court had improperly denied the State's motion for a mistrial when the jury indicated it was deadlocked and that the trial court had improperly suggested to the jury that the ultimate responsibility for determining the defendant's fate did not lie with the jury. Vacating the life sentence imposed by the trial court, the Supreme Court remanded for a new penalty phase hearing.

The Chief Justice, along with Justices Katz and Norcott, dissented. Although concurring with the Court's disposition of Peeler's appeal, the Chief Justice dissented from the Court's decision with respect to the State's appeal, arguing that "[a]lthough I agree with the majority's conclusion that the court's statements to the jury were not a proper statement of the law, I do not agree that those statements tainted the jury so as to render the court's denial of the state's motion for mistrial an abuse of discretion."

Justice Katz, joined by Justice Norcott, renewed her longstanding objection to the death penalty, arguing that the imposition of the death penalty has a disparate impact upon minorities and involves inherently subjective evaluations that defy "the rationality and consistency required by the constitution." Justice Katz also renewed her objection to the death penalty as a cruel and unusual punishment, again asserting that, despite the defendant's "hideous atrocities . . . [t]he 'justice' we impose is no less shocking than the crime itself, and far from treating the defendant's offense, instead sullies us." ■



State v. Russell Peeler
271 Conn. 338
(Vertefeuille, J.)

"The 'justice' we impose is
no less shocking than the
crime itself"
(Katz, J., dissenting)

CHRO CAN HEAR SCHOOL DISCRIMINATION CLAIMS

Comm'n on Human Rights & Opportunities v. Bd. of Educ. of Cheshire
270 Conn. 665
(Borden, J.)

Two significant holdings stand out in *Comm'n on Human Rights & Opportunities v. Bd. of Educ.* First, the Court overruled two prior decisions and held that the trial court's remand to the commission is a final judgment for purposes of appeal. Second, on the principal substantive issue of the appeal, the Court held that the state Board of Education does not have exclusive jurisdiction to adjudicate a claim of racial discrimination brought by a student in a public school against the school principal. The Commission on Human Rights and Opportunities has concurrent subject-matter jurisdiction to adjudicate such claims.

The case arose when an African-American student at Cheshire High School alleged racial discrimination against his principal and local board of education. He asserted that a white student had called him a racial epithet and that, after a fight with that student, the principal only suspended him, in violation of the school handbook provision requiring the suspension of all students involved in fights. The student also alleged that, after returning from his suspension, the racial harassment from other students continued, despite his complaints to his principal, which forced him eventually to withdraw from that school.

The student filed a complaint with the Commission on Human Rights and Opportunities. The defendants successfully moved to dismiss that complaint on the ground that exclusive jurisdiction over complaints based on racial discrimination in the public schools is vested in the state Board of Education. That administrative dismissal was appealed to the trial court, which remanded the case back to the Commission for further proceedings.

The Supreme Court first decided whether the trial court's remand was a final judgment for purposes of the appeal. In answering that question affirmatively, the Court explicitly overruled its decisions in *Lisee v. Commission on Human Rights & Opportunities*, 258 Conn. 529 (2001), and *Morel v. Commissioner of Public Health*, 262 Conn. 222 (2002). In those cases, the Court held that remands by the trial court in administrative appeals pursuant to the Uniform Administrative Procedure Act were not final judgments for purposes of appeal, unless they passed the test established in *Schieffelin & Co. v. Dept. of Liquor Control*, 202 Conn. 405 (1987), which distinguished between two different types of remands. In overruling its precedent, the Court wrote:

If we were to apply *Lisee* and *Morel* to the trial court's remand in the present case, it is doubtful that it would constitute a final judgment for purposes of appeal. We conclude, however, that [in this regard] those cases were wrongly decided, and we now disavow the dictum to that effect in *Lisee* and we overrule the holding to that effect in *Morel*.

Recognizing the implications of its decision, the Court candidly conceded that "this was one of those exceptional cases where, having become aware of the clear error of [its] ways, it is wiser to correct [its] errors now, rather than wait for the legislature to do so."

Having settled the question of its own subject-matter jurisdiction, the Court next decided the principal substantive issue on appeal, *viz.*, whether the Commission on Human Rights and Opportunities has jurisdiction to hear the type of racial-discrimination claims made by the student, or whether that jurisdiction is vested exclusively in the state Board of Education. The Court examined the relevant statutes and concluded that the commission had authority to "vindicate public school students' rights in the case of the type of racial discrimination alleged in the present case. . . ." It further opined:

[i]ndeed, given the history of the civil rights movement in this nation, it would be anomalous to construe our state's fundamental civil rights statute to have had an implied exception for the type of racial discrimination involved in the present case, particularly where neither the language, the purpose nor the history of the statute suggests any such implied exception.

Writing for the dissent, Chief Justice Sullivan warned that this broad reading of the statute would invite a deluge of claims to the Commission based on individual violations of rights protected by the decision in *Sheff v. O'Neill*, 238 Conn. 1 (1996). In response, the Court in its decision emphasized that the holding was limited to claims of "a discrete course of allegedly discriminatory conduct by an identified school official against the complainant, in violation of specific state statutes," not to "systemic racial isolation," such as that held unconstitutional in *Sheff*. ■

"It is wiser to correct our errors now, rather than wait for the legislature to do so."

EMPLOYEE MUST EXHAUST HANDBOOK GRIEVANCE REMEDIES

**Neiman v. Yale
University**
270 Conn. 244
(Sullivan, C.J.)

Does the exhaustion-of-remedies doctrine require an employee to exhaust internal grievance procedures established in an employee handbook before seeking redress in court? In *Neiman v. Yale University*, the Court answered that question in the affirmative.

Neiman was an untenured, associate professor of philosophy at Yale. She requested that Yale consider her for a tenured position. After a review of Neiman and other candidates, the advisory committee by a narrow margin voted not to extend to her an offer of tenure. Before seeking any internal redress, Neiman filed a three-count complaint alleging breach of contract, breach of implied covenant of good faith and fair dealing, and negligent misrepresentation. The trial court dismissed the complaint for lack of subject-matter jurisdiction because Neiman had failed to exhaust the remedies available to her at Yale, as provided in the faculty handbook. Neiman appealed and the Supreme Court affirmed.

The Court stated: “[Neiman] claims that the exhaustion of remedies doctrine generally does not apply when employee handbooks provide for an internal grievance procedure. We disagree.” The Court noted that it had previously held that the exhaustion-of-remedies doctrine applies in a number of contexts, including when an exclusive grievance or arbitration procedure is contained in a collective bargaining agreement or when an administrative appeal is taken. But, never before had the Court even considered if the doctrine applied to procedures set forth in employee manuals.

The Court was guided by the decisions from other jurisdictions which “have held almost uniformly that the exhaustion-of-remedies doctrine applies when faculty handbooks provide internal grievance procedures.” The Court reasoned that the employee’s rights are contractual, and the internal grievance policy is part of the contractual bargain. Further, an exhaustion of internal grievance procedures does not preclude access to the courts, it just ensures that the parties have an opportunity to resolve the dispute before seeking redress from the courts.

The Court was comforted in its decision by the factual context of the case. It concluded that academic institutions themselves are best suited to be the original forum for grievances. The university officials and professor’s peers are most familiar with tenure requirements; the parties bring the most sophisticated skills to the table; and the courts should be reluctant to become entangled in substantive academic disputes over tenure decisions, because those decisions are an integral part of academic freedom, rooted in the First Amendment. ■

PAROCHIAL SCHOOL ORDER IMMEDIATELY APPEALABLE

Resolving an emotional and well-publicized dispute, a divided Court held that a *pendente lite* order directing that a minor child attend a parochial school during the pendency of the parties’ divorce was a final judgment for the purposes of appeal.

Before the trial court, the child’s father had opposed his wife’s motion to have the child, who was about to enter kindergarten, enrolled in Catholic school, arguing, among other things, that he objected to the child’s enrollment on religious grounds. Over the father’s objection, the trial court ordered that the child be enrolled.

The child’s father thereafter appealed, but the Appellate Court dismissed for lack of subject-matter jurisdiction. Acknowledging that the case was one of first impression, the Appellate Court reviewed and then distinguished well-established precedent allowing immediate appeals from *pendente lite* custody orders, holding that the trial court’s ruling was interlocutory in nature; *i.e.*, there was no final judgment.

The Supreme Court, however, reversed. Applying the two-pronged test set out in *State v. Curcio*, 191 Conn. 27 (1983), the Court concluded that the order was one that finally determined the parties’ respective parental rights. Relying on its prior decisions involving *pendente lite* orders of temporary custody, the Supreme Court held that the Appellate Court had erred in its analysis of this precedent because “[t]he consequences of the enrollment of a minor child in an educational institution that a joint legal custodian believes to be academically inadequate and religiously objectionable are irreparable.”

The Court also held that the father’s appeal was still justiciable, notwithstanding that it was moot given that the trial court had entered a judgment of dissolution in the underlying divorce action. Analyzing the record, the Supreme Court determined that the dispute fell into the category of matters capable of repetition, yet evading appellate review, because it was a question of public importance that was likely to arise again and because the complained-of order was of limited duration such that it was likely that a substantial majority of cases involving the same issue would be resolved prior to disposition on appeal.

In a dissent, Justice Zarella, joined by the Chief Justice, argued that it was inconsistent for the Court to have concluded that the period of time between the entry of a *pendente lite* order and the entry of a final dissolution order was so short that a substantial number of cases are likely to be rendered moot before they can be resolved on appeal, yet simultaneously also have concluded that that same period of time is so long as to justify an immediate appeal in order to avoid substantial injury to parental rights of the appellant. ■

**Sweeney
v. Sweeney**
271 Conn. 193
(Norcott, J.)

THE NEXT 15 LEADING DECISIONS

11 *State v. Colon* 272 Conn. 106 (Zarella, J.)

A jury convicted Ivo Colon of murder and capital felony and sentenced him to death in connection with the death of two-year-old Keriana Tellado, whose head he repeatedly smashed against a shower wall. On direct appeal to the Supreme Court, Colon raised multiple challenges to both the guilt and penalty aspects of his conviction. The Supreme Court affirmed his conviction, but reversed the judgment imposing the death penalty and remanded the case for a new penalty phase hearing.

Although space limitations preclude a full review of the decision, two issues in particular are noteworthy. First, based on its 2003 decision in *State v. Rizzo*, 266 Conn. 171—which was decided after Colon’s trial—the Court held that the trial court erred in instructing the jury on how to balance mitigating factors against aggravating factors. In particular, the trial court failed to instruct the jurors that, in order to sentence Colon to death, they had to find that any aggravating factors did not merely outweigh any mitigating factors, but outweighed them *beyond a reasonable doubt*.

In addition, the Court rejected Colon’s claim that the trial court improperly denied his right of allocution, that is, his right to make an unsworn personal statement to the trial court and to present information in mitigation of his sentence. The Court held that neither the Practice Book, common law, nor the federal or state constitutions guaranteed a defendant a right of allocution within the structured setting of a capital sentencing hearing. ■

12 *State v. Christian* 267 Conn. 710 (Katz, J.)

Deciding a case of first impression in Connecticut, the Court joined every other jurisdiction in the country and expressly recognized the privilege for confidential marital communications. The privilege permits an individual to refuse to testify, and to prevent a spouse or former spouse from testifying, about any confidential communication made by the individual to the spouse during the marriage. In a case involving drunk-driving and second-degree-manslaughter charges, the defendant unsuccessfully sought to prevent his estranged wife from testifying that he had confessed to her that he was the guilty driver. In the appeal that followed his conviction, the Court “expressly accept[ed] [the marital communications] privilege as a fixture of our common law.” However, Connecticut remains unique in this regard: all sister states have adopted the privilege by statute or rule of evidence.

The basis of the privilege is the protection of marital confidences, which the Court regarded as so essential to the relationship as to outweigh the privilege’s hindrances to the administration of justice. The Court applied the privilege in *Christian* even though the defendant and his wife were at odds at the time of the communication: “Although the defendant’s marriage may have been acrimonious at the time that he made the communications to his wife, the marital communications privilege nonetheless was valid.”

Unfortunately for the defendant, the Court concluded that the improper admission of the privileged testimony was harmless error. ■

13 *Daniels v. Alander* 268 Conn. 320 (Katz, J.)

In a decision that could have deep implications for the practice of law in Connecticut, the Supreme Court affirmed a reprimand issued by the Superior Court to an associate attorney who did not correct a misrepresentation of fact made by his employer in an *ex parte* proceeding. The Court rejected the associate’s argument that Rule 3.3(a) of the Rules of Professional Conduct only prohibits affirmative misrepresentations holding that “[i]t is apparent that the drafters of rule 3.3 . . . did not intend to limit its application to the party making affirmative misrepresentations. Depending on the circumstances, the rule can pertain to an attorney who fails to correct a misstatement to the court that was made in his presence by another attorney.” Noting that the associate had direct, first-hand knowledge of the matter to which the misrepresentation pertained, the Court concluded that he was under an affirmative obligation to correct the misstatement, especially given that Rule 3.7 requires full disclosure even of adverse facts in the context of an *ex parte* proceeding.

The Court also rejected the associate’s argument that he should not have been required to correct a misstatement by his employer. Brushing aside this claim, the Court quickly concluded that “[t]he plaintiff has not presented, nor can we identify, any sound reason to graft an exception onto the rule when an attorney whose conduct is at issue is an associate joined by his employer.” ■

14 *Bloom v. Gershon* 271 Conn. 96 (Borden, J.)

Does the claims commissioner have jurisdiction, pursuant to General Statutes § 4-160, to waive the state’s sovereign immunity and grant a claimant permission to file an apportionment complaint against the state in Superior Court? The Supreme Court answered that question in the negative, relying heavily on its recent decision in *Lostritto v. Community Action Agency of New Haven, Inc.*, 269 Conn. 10 (2004), which held that apportionment claims are not claims for monetary damages and, therefore, do not require a certificate of good faith in medical malpractice actions, as § 52-102b generally requires.

The plaintiffs brought this malpractice action against two radiologists, who subsequently filed an apportionment complaint against two physicians who had also provided medical treatment to the named plaintiff. One of the apportionment defendants moved to dismiss the apportionment claim on the ground that he was a state employee and that sovereign immunity thus barred the lawsuit against him. The trial court concluded that the filing of an apportionment complaint against the state employee was permissible under the circumstances of the case.

The Supreme Court reversed. The Court interpreted § 4-160 as limiting the claims commissioner’s jurisdiction to authorizing suits against the state only if they involve claims for monetary damages. Having just held in *Lostritto* that apportionment claims are not claims for monetary damages, the Court concluded that the commissioner lacked jurisdiction under § 4-160 to authorize apportionment claims against the state. ■

15

Nussbaum v. Kimberly Timbers
271 Conn. 65 (Zarella, J.)

In this appeal, the Court considered whether a claim that a contract is unenforceable because it is contrary to public policy falls within the scope of an arbitration clause in the contract. The Court held that such a claim was arbitrable.

The appeal arose from a dispute over the construction of a new home. Pursuant to an arbitration provision in the parties' contract, the defendant demanded arbitration. The plaintiffs responded by filing an application in Superior Court to stay the arbitration on the grounds that the contract did not comply with the New Home Construction Contractors Act, Conn. Gen. Stat. § 20-417d. The plaintiffs further claimed that the contract, including the arbitration provision, was thus void and unenforceable. The trial court denied the application and directed the parties to arbitrate their dispute.

On appeal, the Connecticut Supreme Court rejected the plaintiffs' claim that, just because they alleged that the underlying contract was illegal, the Court, rather than the arbitrator, had sole jurisdiction to determine whether a valid and enforceable agreement to arbitrate existed. The Court held that, because arbitration agreements are considered separate and distinct from the underlying contract and because the plaintiffs challenged the legality of the contract in general, rather than the arbitration provision specifically, the plaintiffs' claim fell within the scope of the arbitration clause, which provided for arbitration of all claims "arising out of or relating to" the contract. ■

16

Cweklinsky v. Mobil Chemical Co.
267 Conn. 210 (Vertefeuille, J.)

An essential element of a defamation claim is the defendant's publication of the defamatory statements to a third party. In this case of first impression in Connecticut (which came to the Court by way of a certified question from the Second Circuit), the Court considered whether Connecticut recognizes a claim for defamation based upon a former employee's compelled self-publication (to a prospective employer) of the former employer's defamatory statements, which were made only to the employee in the context of terminating the employee. The Court declined to recognize such a claim.

The Court began by noting that several courts in other states had recognized an exception, in the employment context, to the rule in defamation cases that the defendant must publish the defamatory statements to a third party. These cases held that, if an employer terminates an employee and gives the employee false and defamatory reasons for the termination (such as incompetence or criminal conduct), it is foreseeable that the former employee might be compelled to repeat those reasons to a prospective employer in the context of a job interview and that such compelled self-publication satisfies the publication requirement of the defamation tort.

Expressing concern that "acceptance of the [self-publication] doctrine would have a chilling effect on communication in the workplace," the Supreme Court declined to follow those precedents, concluding instead that the public policy considerations favored the rejection of the doctrine of compelled self-publication defamation. ■

17

Cheryl Terry Enterprises, Ltd. v. City of Hartford
270 Conn. 619 (Katz, J.)

Central to the dispute in *Cheryl Terry Enterprises* was the question of whether a municipality can be held liable for anticompetitive behavior in the letting of public contracts. Plaintiff, the low bidder for a contract for school bus transportation services, claimed that the City of Hartford had engaged in prohibited anticompetitive activity by conspiring with a labor union to steer a contract to a company whose drivers were unionized.

At trial, the jury found for the plaintiff, awarding \$500,000 in damages, but the trial court set the verdict aside, holding that the plaintiff could not prosecute an antitrust claim against the City for conduct arising out of the bidding and letting of public contracts. The trial court also concluded that the plaintiff had failed to establish its lost profits with enough certainty because it offered no evidence beyond the testimony of its president as to the company's usual profit margin.

After transferring the case from the docket of the Appellate Court, the Supreme Court reversed, holding that a municipality is a "person" within the meaning of the Connecticut Antitrust Act, Conn. Gen. Stat. § 35-31, *et seq.*, and that the City was thus subject to liability thereunder for anticompetitive behavior. Examining in detail the evidence before the trial court and reviewing its prior decisions on lost profits, the Court also held that the testimony of the plaintiff's president was sufficient to support the jury's award of damages. ■

18

Craig v. Stafford Construction
271 Conn. 78 (Borden, J.)

Extending the doctrine of absolute immunity to statements made in an internal police investigation, the Supreme Court held that the investigation qualified as a quasi-judicial proceeding, thus cloaking with absolute immunity any statements made in connection therewith.

At issue were certain allegedly defamatory statements made by an individual about a Hartford police officer in connection with an internal investigation of a complaint that the officer had made racially derogatory statements while working at a police detail at a construction site. The party who complained that the officer had made the derogatory statements eventually withdrew his complaint and the officer was ultimately found not guilty of the charge of conduct unbecoming a police officer. The officer then sued the complainant and his employer, alleging that the allegations constituted slander, causing him emotional distress, damaging his professional reputation, and costing him several promotions. The defendants moved for summary judgment, arguing that the statements were cloaked with absolute immunity because they were made in the context of a quasi-judicial proceeding. The Superior Court granted the motion and the Appellate Court affirmed.

Considering both the facts of the case, as well as case law from other jurisdictions, the Supreme Court held that the internal investigation qualified as a quasi-judicial proceeding under the multi-factor test set forth in *Kelley v. Bonney*, 221 Conn. 549 (1992) because the investigation was a fact-finding process in which witnesses may testify under oath and in which the adjudicator ultimately makes binding determinations that can affect the employment status of the accused. ■

19

State v. Swinton
268 Conn. 781 (Katz, J.)

Faced with an issue of first impression in Connecticut, the Supreme Court considered whether computer-enhanced photographs of bite marks on the victim of a rape and murder were admissible against the defendant.

The Court began by noting that “the appearance of computer generated evidence in our courts is becoming more common.” Borrowing from the federal rules, the Court held that when determining the admissibility of computer-enhanced and computer-generated evidence the trial court should consider whether: (1) the computer equipment is accepted in the field as standard and competent and was in good working order; (2) qualified computer operators were employed; (3) proper procedures were followed in connection with the input and output of information; (4) a reliable software program was utilized; (5) the equipment was programmed and operated correctly; and (6) the exhibit is properly identified as the output in question.

The Court emphasized that these factors are intended as guideposts and need not be held in equipoise: “[W]e stress that these factors represent an approach to the admissibility of computer generated evidence, and not a mechanical, clearly defined test with a finite list of factors to consider.”

Viewing the evidence “through the lens of the previously enunciated factors,” the Court concluded that the State sufficiently established the reliability of the evidence and the processes that produced it. ■

20

Cahaly v. Benistar Property Exchange Trust Company, Inc.
268 Conn. 264 (Norcott, J.)

Connecticut attorneys have long relied upon the State’s prejudgment remedy statute, Conn. Gen. Stat. § 52-278a *et seq.*, to attach property to secure a future judgment in a Connecticut action. Some attorneys, however, have employed the PJR statute to obtain an attachment in Connecticut to secure a potential judgment in an action pending in another state. In *Cahaly*, the Supreme Court held that such use of the PJR statute was impermissible.

The plaintiff had commenced an action in Massachusetts against the defendant, which maintained offices in Connecticut. The plaintiff then filed a PJR application in the Superior Court seeking to attach the defendant’s property in Connecticut. The trial court denied the defendant’s motion to dismiss and granted the attachment. The Appellate Court affirmed.

The issue before the Supreme Court was “whether the [PJR] statutes are satisfied by attaching to the [PJR] application an unsigned writ of summons and complaint that constitutes a prospective action in Connecticut that will be brought to enforce a foreign judgment prior to the foreign judgment’s having been obtained.” The Court answered that question in the negative, holding that the “action” referred to in § 52-278c(a)(1) must be an action in which a Connecticut court will render judgment. It does not include a future judgment on an action that the plaintiff has filed or proposed to file in another state. ■

21

State v. DeJesus
270 Conn. 826 (Borden, J.)

In this appeal, the Court considered whether evidence of an alleged rape victim’s prior history of prostitution could be admitted at trial, despite the State’s rape shield statute, Conn. Gen. Stat. § 54-86f, so as not to deprive the defendant of his Sixth Amendment rights to confront witnesses and to present a defense. Section 54-86f generally excludes evidence of an alleged victim’s prior sexual conduct unless the evidence is “so relevant and material to a critical issue in the case that excluding it would violate the defendant’s constitutional rights.”

Both the defendant and the victim agreed that they had sexual intercourse and the defendant gave the victim \$30. However, the defendant said that the victim had demanded \$50 and falsely accused him of rape when he refused to pay the balance. The victim said that she was raped and then took the \$30 that the defendant volunteered to hasten her departure from his apartment. The trial court excluded evidence of the victim’s prostitution on prior occasions and the defendant was convicted.

The Supreme Court reversed the conviction and remanded the case for a new trial. It concluded that the excluded evidence was sufficiently material to the credibility contest between the victim and the defendant. “Had the jury known of the victim’s prior history of prostitution and the defendant’s knowledge of that history, a reasonable probability exists that its verdict would have been affected.” ■

22

Manifold v. Ragaglia
272 Conn. 410 (Norcott, J.)

At issue was whether the qualified immunity that General Statutes § 17a-101e(b) extends to mandatory reporters of suspected child abuse extended to a physician (and his hospital-employer) who examined two children at the request of state officials who were themselves mandatory reporters and who already suspected abuse. The plaintiffs were the children and their parents, who temporarily lost custody after a physician asked by employees of the Department of Children and Families (DCF) to examine the two children concurred with the State’s assessment that one had been abused. Ultimately, the parents regained custody after it was established that there had been no abuse and sued the physician and hospital for negligent infliction of emotional distress and medical malpractice.

The physician and hospital moved for summary judgment, arguing that the qualified immunity extended by § 17a-101e(b) shielded them from liability. The trial court granted their motion and the plaintiffs appealed.

Transferring the case to its own docket, the Supreme Court affirmed the judgment of the trial court. In so deciding, the Court considered both the text and remedial purpose of the statute and concluded that qualified immunity for secondary reporters would only further the public’s interest in rooting out and preventing child abuse. The Court also noted that such immunity was unlikely to be abused because intentional misconduct in reporting was a criminal offense and because the immunity would not shield acts of medical malpractice; *i.e.*, while a secondary reporter is without liability for an incorrect (but good faith) report, the secondary reporter would still be subject to liability for any injuries caused by independent acts of medical malpractice.

Although the plaintiffs had also alleged a claim for medical malpractice, the Court nevertheless concluded that the thrust of that claim was that the physician was not acting in the capacity of a mandatory reporter when he failed to order certain tests that would have established that one of the children’s injuries were the product of a blood disorder and not abuse. As such, the Court concluded that, because the physician was a reporter for the purposes of the statute, and because the alleged act of malpractice was undertaken as part of the investigatory process and not for the purposes of treating any injury, it was within the scope of the immunity conferred by § 17a-101e(b). ■

23

PSE Consulting, Inc. v. Frank Mercede & Sons, Inc.
267 Conn. 279 (Katz, J.)

In an important case for the construction and surety industries in Connecticut, the Supreme Court resolved a number of open questions concerning a surety's rights and obligations when faced with payment bond claims. First, the Court held that, as in all other jurisdictions that recognize the implied covenant of good faith and fair dealing, a surety who pays claims is entitled to indemnification under a broad "right to settle" clause only if the payment is in good faith.

Noting a lack of consensus as to what constitutes a good faith payment, the Court held that, to support a finding of bad faith, there must be evidence of an "improper motive" or "dishonest purpose." Explaining, the Court held that, while actual fraud need not be proven, there must be evidence of more than simply bad judgment or unreasonable conduct.

But, because a surety has "an obligation to conduct a proper investigation" when faced with a bond claim, the Court also held that, although evidence of unreasonable conduct is, of itself, insufficient to support a finding of bad faith, it can be used to buttress such a finding when the indemnitor offers independent evidence tending to prove a dishonest purpose or improper motive.

Finally, considering whether a surety's decision to settle a claim out of pure economic self-interest can constitute bad faith, the Court similarly held that such economic self-interest, coupled with other evidence of improper purpose, can constitute bad faith. ■

24

Barrett v. Montesano
269 Conn. 787 (Katz, J.)

This appeal considered the interplay between two statutes: General Statutes § 52-184 and § 52-190. Section 52-584 requires any medical malpractice action to be brought within two years of the date when the injury is discovered or in the exercise of reasonable care should have been discovered. It further establishes an outside date of three years from the date of the negligent act or omission within which a claim must be brought. By contrast, § 52-190b authorizes a ninety-day extension of the "statute of limitations" to permit a plaintiff to determine whether a good faith basis exists for believing there was negligence in her care or treatment.

The issue on appeal was whether the ninety-day extension available under § 52-190b applied solely to the two-year limitations period in § 52-184 or whether it also applied to the three-year period. The Supreme Court held that the extension applied to both periods.

The Court's decision turned on whether the three-year period in § 52-184 was a statute of repose, rather than a statute of limitations. The defendant adopted the former position and argued that, because § 52-190b referred only to an extension of the "statute of limitations," that extension did not apply to the repose component of § 52-184. The Supreme Court rejected that argument, observing that its own precedents and the legislature repeatedly used the phrase "statute of limitations" to include statutes of repose. ■

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State v. Adrian Peeler
267 Conn. 611 (Palmer, J.)

If 2003 saw the Court crack down on what it concluded was prosecutorial misconduct, 2004 saw the Court retrench. In the most publicized of these misconduct cases, the Supreme Court held that an improper statement by a prosecutor in closing argument was nonetheless harmless error, and it affirmed the conviction of Adrian Peeler for conspiracy to commit murder in the death of Leroy Brown, Jr. and Karren Clarke.

After rejecting the defendant's other arguments—including two other claims of prosecutorial misconduct—the Court concluded that the prosecutor's suggestion in summation that Peeler would have also killed the State's star witness had he not run out of ammunition was impermissible because there was no evidence that Peeler had attempted or even intended to kill the witness. Nevertheless, despite this "highly improper" statement to the jury, the Court concluded that the defendant had not been denied a fair trial.

Reviewing the whole record—and specifically noting the failure of Peeler's trial counsel to object to the statement—the Court concluded that the remark was harmless because the trial court had specifically instructed the jury that the arguments of counsel are not evidence and because "[a]lthough, in other circumstances, the argument might be so prejudicial as to require a new trial, in the present case, there was ample evidence properly before the jury regarding the willingness of the defendant and his coconspirators to resort to murder to silence prospective witnesses." ■

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