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Highlights from Recent Superior Court Decisions

Arbitration

Brubaker v. Ranciato, 65 CLR 400 (Wilson, Robin L., J.), holds that fraudulent inducement to enter into an agreement does not preclude the enforcement of an arbitration clause contained within the fraudulently induced agreement. That is, an arbitration clause remains enforceable even if it is a sub-agreement contained within a fraudulently induced primary agreement, unless the fraudulent conduct was specifically directed at the arbitration "sub-agreement." The opinion also holds that the provision of the Arbitration Act that limits judicial enforcement of arbitration agreements to "*written*" agreements, Conn. Gen. Stat. § 52-409, does not require that an arbitration agreement be signed; rather, it is only necessary that the parties' agreement to arbitrate be established by written evidence.

A clause of a home construction contract requiring that "any dispute, conflict or claim arising from this agreement, *except with respect to any collection action,*" shall be settled by arbitration, requires arbitration of all claims if even one non-collection dispute is submitted. The opinion applies the "positive assurance test" to conclude that all claims, even collection claims, must be joined in any arbitration based on even one non-collection matter. *A.P. Savino, LLC v. Csak,* 64 CLR 877 (Povodator, Kenneth B., J.).

Contracts

V&M Construction, Inc. v. Coelho, 65 CLR 227 (Nazzaro, John J., J.), holds that a homeowner's knowledge at signing that a home improvement contract was unenforceable by the contractor because of noncompliance with the Home Improvement Act, and therefore that the contract could be unilaterally repudiated at any time, constitutes sufficient bad faith by the homeowner to allow the contractor to recover on equitable grounds for services provided in reliance on the contract. The opinion denies a motion to strike a contractor's complaint in which such conduct by the defendant/homeowner was alleged. The defendant unsuccessfully argued that knowledge of unenforceability alone is insufficient to bar a homeowner from relying on the Act to defeat a contractor's claim.

A mechanic's lien applies only to amounts payable pursuant to an agreement and therefore not to a contractor's claim for extra work not covered by an original or supplemental agreement. *Wegrzyniak v. Hanley Construction, LLC,* 65 CLR 293 (Moukawsher, Thomas G., J.).

The prior pending action doctrine does not apply to two actions brought by a subcontractor against a general contractor's performance bond, one action asserting a direct claim against the general contractor and the other asserting a claim as assignee of a sub-subcontractor, even though both actions involve the same set of facts. *M. Brett Painting Co. v. Allied World Specialty Insurance Co.,* 65 CLR 304 (Noble, Cesar A., J.). The opinion does, however, order that the two actions be consolidated.

Criminal Law and Procedure

State v. Malone, 65 CLR 232 (Jongbloed, Barbara Bailey, J.), discusses whether, in light of the decriminalization of small amounts of marijuana, a police officer's detection of an odor of marijuana during a routine traffic stop can justify a warrantless search of the vehicle for criminal amounts of contraband. The opinion concludes that the warrantless search in this case was justified based on other, more significant evidence of illegal activity.

A criminal defendant is entitled to disclosure of the criminal history records of all prosecution witnesses. *State v. Wilson,* 65 CLR 239 (Dewey, Julia DiCocco, J.). The opinion rejects the prosecution's argument that such disclosure would violate the confidentiality provisions of the National Crime Prevention and Privacy Compact, on the grounds that it only regulates the release of criminal records for noncriminal purposes and has no application to the use of such information in criminal proceedings.

The opinion in *Fuller v. State,* 65 CLR 237 (Bellis, Barbara N., J.), discusses the rule that a tort claim cannot be prosecuted if a judgment in favor of the plaintiff would demonstrate the invalidity of an outstanding criminal prosecution against the plaintiff; such a claim is not ripe for adjudication unless and until the conviction is lifted pursuant to an appeal or a habeas corpus proceeding. The opinion holds that the rule does *not* apply to an action brought by a convicted criminal for an alleged assault inflicted by police officers to prevent the defendant from revealing police misconduct concerning the prosecution, because a judgment for damages in the assault case would not necessarily be inconsistent with the criminal conviction.

Employment Law

Stevens v. Vito's by the Water, LLC, 65 CLR 430 (Noble, Cesar A., J.), holds that the "good faith belief" exception to an employer's liability for double damages for a failure to comply with state minimum wage requirements is satisfied only by proof of an "honest intention" to ascertain and satisfy the requirements of the act; mere ignorance of the law is insufficient to qualify for relief from double damages. The opinion holds that a restaurant owner's claimed ignorance of the fact that the allowance against the minimum wage for wait staff employees is available only with respect to time spent

by an employee in serving tables, and not to time spent performing general functions not directly related to table service, does not constitute "good faith belief" and therefore the employer remains liable for double damages.

The provision of the Workers' Compensation Act that establishes that an employer that lends an employee to another employer is deemed to be the lent employee's sole employer for purposes of the Act, Conn. Gen. Stat. § 31-292, applies to statutory claims for wrongful termination in retaliation for exercising rights under the Act, Con. Gen. Stat. § 31-290a. This opinion holds that an employee provided by a manpower company to a customer cannot sue the customer under § 31-290a. *Tryon v. EBM-Papst, Inc.,* 65 CLR 434 (Morgan, Lisa K., J.).

Kwiatkiowski v. Beatty, 64 LCR 719 (Brazzel-Massaro, Barbara, J.), holds that an employer does not owe a special duty to protect minor employees from harm. The plaintiff unsuccessfully argued that the "loco parentis" doctrine, which imposes a heightened duty on third parties who assume temporary custody over minors, should be extended to the employer/employee relationship.

A claim for wrongful termination in violation of public policy may be based on a termination for a refusal to work with an intoxicated co-employee. *Algarin v. LB&O, LLC,* 64 CLR 938 (Kamp, Michael P., J.).

Family Law

Membrino v. Membrino, 65 CLR 308 (Taylor, Mark H., J.), holds that an appeal from the appointment of a conservator for the estate of an elderly family member, brought by another family member who claims that the appointment was obtained through fraud, is not rendered moot by the death of the conserved person, because an unchallenged appointment might provide the challenged conservator with the cloak of quasi-judicial immunity as a defense to any claims of wrongdoing.

Although the statute authorizing the voluntary appointment of a conservator of the person or estate is worded in a manner that suggests the probate court should "[explain] to the respondent that granting the petition will subject the respondent… to the authority of the conservator," Conn. Gen. Stat. § 45a-646, it is not necessary that an express explanation, or warning, be given. Rather, a voluntary appointment may be upheld on appeal if it is apparent from the record that the probate court asked sufficient questions to gauge whether the respondent understood the consequences of a conservatorship. *Heinemann v. Heinemann,* 65 CLR 266 (Domnarski, Edward S., J.).

A provision of a premarital agreement requiring that in the event of dissolution "each party shall be responsible for his or her attorney fees" does not bar an award of pendente lite attorney fees. *Clarke v. Clarke,* 65 CLR 327 (Colin, Thomas D., J.). However, each party remains ultimately responsible for its own fees so that any pendente lite payments must be offset against the recipient's final distribution of assets.

In a wrongful death action brought by the decedent's spouse individually and as executor of the decedent's estate, the surviving spouse cannot assert a claim for any liability imposed on the spouse individually for the decedent's antemortem medical expenses as authorized by the Spousal Support Act, Conn. Gen. Stat. § 46b-37, both because the Wrongful Death Act provides the sole remedy for *all* damages related to a death, and because the Spousal Support Act does not provide for the transfer of a spouse's support obligation to a third party, even a third-party tortfeasor. Antemortem damages may be recovered by the estate as an element of damages on the wrongful death claim, but not by the spouse on a direct claim under the Spousal Support Act. *Vaccaro v. Loscalzo,* 65 CLR 177 (Wilson, Robin L., J.).

The Wrongful Death Statute, Conn. Gen. Stat. § 52-555, authorizes tort actions on behalf of a fetus beginning with the point of development at which the fetus has "quickened" within the mother's womb. E*lderkin v. Mahoney,* 65 CLR 300 (Blue, Jon C., J.). The opinion rejects the defendants' claim that wrongful death actions on behalf of deceased fetuses should be allowed only if the fetus had become "viable."

Landlord and Tenant

Sen v. Tsiongas, 65 CLR 296 (Swienton, Cynthia K., J.), holds that in a premises liability action against a landlord for injuries inflicted by a tenant's dog knowledge of viciousness cannot be imputed based solely on the breed. The opinion holds that mere knowledge that a tenant's dog was a pit bull, and even knowledge that the dog was classified as a "bait" pit bull, does not provide sufficient evidence to impute knowledge to a landlord that the dog had a vicious propensity.

A tenant of commercial property owes a duty to warn visitors of dangerous conditions encountered in a common area when approaching the tenant's premises, even though the defects are outside of the area controlled by the tenant. *Conney-Grover v. Town Center of South Windsor, LLC,* 65 CLR 312 (Bright, William H., J.).

A commercial tenant's option to terminate a ten-year lease at the end of the fifth year, provided the tenant is "*in occupancy of the entire premises*" at that time, is defeated by the presence of a subtenancy granted over a portion of the premises. *Aircastle Advisor, LLC v. ESRT First Stamford Place SPE, LLC,* 65 CLR 258 (Jacobs, Irene P., J.). The opinion holds that a tenant's attempted termination was invalid because a portion of the leased premises had been sublet. The opinion reasons that the purpose of the clause was to assure that the landlord would have to deal only with a single tenant upon an early termination of the ten-year lease.

Law of Lawyering

Leth v. Halloran & Sage, LLP, 65 CLR 269 (Noble, Cesar A., J.), holds that while misconduct by an attorney designed to obtain a client may be relied on to establish a claim under the entrepreneurial exception to the general rule that CUTPA does not apply to claims arising out of an attorney's representation of a client, there is no authority establishing that misconduct designed to keep an existing client may be asserted to support a claim under the entrepreneurial exception.

The attorney/client privilege applies to communications between an attorney and a prospective client even if ultimately the attorney is not retained by the client. *Veli-*

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ju v. Tejeda, 65 CLR 411 (Lager, Linda K., J.). The opinion bases the existence of a privilege for communications with prospective clients on the common law, but notes that amendments have been recently proposed to the Connecticut Code of Evidence that would give additional recognition to the privilege under such circumstances.

An attorney prosecuting an action to collect a fee owed to the attorney is acting in a pro se capacity and therefore is subject to the general rule that attorney fees may not be awarded to pro se parties, including fees authorized by a contract. *Rosenthal Law Firm, LLC v. Cohen,* 65 CLR 319 (Shapiro, Robert B., J.).

Parisi v. Parisi, 64 CLR 381 (Sommer, Mary E., J.), disqualifies counsel in a post-dissolution proceeding in which a clause of a marriage separation agreement must be interpreted, because counsel's testimony as to the parties' intent at the time the agreement was executed is likely to be necessary at trial.

An attorney's maintenance of possession of a client's executed will does not create a continuing relationship that tolls the running of the statute of limitations for claims arising out of the drafting and execution of the will. *Cummings v. Reynolds,* 64 CLR 437 (Krumeich, Edward T., J.).

Pensions and Other Employee Benefit Plans

Retirement benefits are not part of a decedent's estate and therefore a dispute over an alleged intervivos agreement for a distribution of plan benefits is not subject to probate court jurisdiction. *Donato-Nash v. Nash,* 64 CLR 863 (Bates, Timothy D., J.).

Retired municipal employees suing their former employing municipality for breach of contract based on the municipality's adoption of a modified health plan that would impose a new deductible requirement, allegedly in violation of a contractual obligation to charge no more for coverage than was being charged at the time of each employee's retirement, are not entitled to a temporary injunction against the immediate adoption of the plan because there is no evidence that the retirees would suffer irreparable harm. *Torrington Retired Fire & Police Officers Association v. Torrington*, 65 CLR 174 (Schuman, Carl J., J.).

State and Local Government Law

Pedraza v. State, 65 CLR 211 (Dubay, Kevin G., J.), holds that the Accidental Failure of Suit Statute does not apply to applications to the claims commissioner for permission to sue the state. Therefore a civil action brought against the state which is dismissed on the grounds that the underlying application for permission to sue was untimely cannot be cured under the statute.

Sovereign immunity does not bar an action against a state employee for an intentional tort. *Torres v. Teague-Turner,* 64 CLR 830 (Wilson, Robin L., J.). The opinion reasons that such an action would not impose a fiscal burden on the state because the State Employee's Indemnification Act excludes claims against state employees based on "wanton, reckless, or malicious" conduct, and it not likely that the imposition of liability on a state employee for intentional wrongful conduct would impede the state's normal course of business. CL