SUPREME COURT PENDING CASES

The following appeals are fully briefed and eligible for assignment by the Supreme Court in the near future.

DISH NETWORK, LLC F/K/A ECHOSTAR SATELLITE, LLC *v.* KEVIN B. SULLIVAN, COMMISSIONER OF REVENUE SERVICES, SC 19800/19801/19802
Judicial District of New Britain

Taxation; Whether Tax Refund Claim Barred Where Taxpayer did not Challenge Audit of Underlying Tax Return; Whether All of Satellite Television Provider's Earnings Subject to § 12-256 Satellite Transmission Business Tax; Whether Plaintiff Entitled to Statutory Interest on Tax Refund. The plaintiff provides television to subscribers in Connecticut by satellite transmission. General Statutes § 12-256 (b) (2) provides that a satellite television provider "shall pay a quarterly tax upon the gross earnings from . . . the transmission to subscribers in this state of video programming by satellite." The plaintiff filed tax returns under § 12-256 (b) (2) for several quarters. It later amended those returns and sought refunds, claiming that the only earnings that were subject to the tax were those attributable to customers' payments for programming and pay-per-view packages. The defendant rejected the plaintiff's refund claims, finding that *all* amounts paid to the plaintiff by subscribers were subject to the tax, including money paid by subscribers for the purchase, rental and installation of satellite equipment, for the plaintiff's digital video recorder (DVR) service, and for subscribers' late payment and other "penalty" fees. The plaintiff appealed the defendant's decision to the trial court. The trial court rejected the defendant's claim that the plaintiff was barred from seeking refunds for some of the tax periods because the plaintiff had not challenged the audits of its tax returns for those periods, and it ruled that the plaintiff was entitled to a refund for taxes it paid on earnings from the sale of equipment, from the installation and maintenance of the equipment, and from customers' subscriptions to its monthly magazine. The court reasoned that those earnings were not "from" the transmission of video programming by satellite as contemplated by § 12-256 (b) (2). The trial court concluded, however, that the plaintiff was not entitled to a refund for taxes it had paid on earnings attributable to subscribers' late payment fees and from its DVR service, finding that those amounts were sufficiently related to transmission and therefore subject to the tax. The defendant appeals, claiming that the trial court wrongly exercised jurisdiction over the plaintiff's claims for refunds for some of the

tax periods where the plaintiff did not contest the defendant's audit determinations for those tax periods. The defendant also claims that the court erred in ruling that the plaintiff was entitled to a refund for earnings attributable to equipment, installation and the monthly magazine, arguing that it is well-established that a gross earnings tax on a business applies to the entirety of the business' earnings and receipts from its operations. The plaintiff cross appeals, claiming that the trial court erred in ruling that its earnings from late payment fees and from its DVR service were taxable under § 12-256 (b) (2). The plaintiff also claims that the trial court erred in denying its claim for General Statutes § 12-268c interest on the $886,845 tax refund ordered by the court.

STATE *v.* CASEY SINCLAIR, SC 19932
Judicial District of Waterbury

Criminal; Whether Appellate Court Properly Determined that any Violation of Defendant's Confrontation Clause Rights was Harmless; Whether Appellate Court Properly Determined that Prosecutorial Impropriety did not Deprive Defendant of a Fair Trial. The defendant was convicted of possession of narcotics with intent to sell by a person who is not drug-dependent after Waterbury police, acting on a tip that a drug deal was going to take place that night in Waterbury, pulled over a Jeep in which the defendant was a passenger and found approximately 10,000 bags of heroin and $12,248 in cash. While the defendant claimed that a friend owned the vehicle, and while the vehicle was not registered in the defendant's name, a police officer testified at trial that drug dealers often use a vehicle they own during a drug transaction, but that they register the vehicle in someone else's name. The police officer then testified, over the defendant's objection, that the Jeep had been inspected at Manny's Auto Repair, a business located next to the defendant's place of business in New York. The defendant appealed his conviction, claiming that the trial court violated his right to confrontation when it admitted into evidence the police officer's testimony that the Jeep was inspected at Manny's Auto Repair. The defendant argued that evidence of the inspection information was inadmissible testimonial hearsay and that the error in admitting the evidence was not harmless because the inspection location was critical evidence linking him to the Jeep. The Appellate Court (173 Conn. App. 1) disagreed and affirmed the defendant's conviction, finding that any error by the trial court in admitting the testimony was harmless beyond a reasonable doubt because the

state presented a significant amount of evidence that supported the charge that the defendant knowingly possessed the narcotics in the vehicle, including the money and the heroin that were recovered from the Jeep, a gas station videotape showing the defendant interacting with a known heroin dealer in the hours before his arrest, and testimony from the defendant's girlfriend concerning a drug transaction that he engaged in that day. The Appellate Court also noted that the defendant's own contradictory testimony was damaging to his case, that his actions during the incident at issue comported with certain common practices used by drug dealers and that, in light of the strength of the state's case, the inspection information would not have tended to influence the jury's judgment. The Appellate Court also rejected the defendant's claim that he was deprived of a fair trial due to prosecutorial misconduct, finding that, while certain remarks by the prosecutor during closing argument were improper, there was no reasonable likelihood that the jury would have returned a different verdict absent the improprieties and because the remarks were not so blatantly egregious as to warrant reversal of the defendant's conviction. The Supreme Court granted the defendant certification to appeal, and it will consider whether the Appellate Court properly determined that (1) any presumed violation of the defendant's confrontation clause rights was harmless beyond a reasonable doubt, and (2) the prosecutor's multiple acts of prosecutorial impropriety did not deprive the defendant of a fair trial.

ERIC THOMAS KELSEY *v.* COMMISSIONER OF CORRECTION, SC 19945

Judicial District of Tolland at Rockville

Habeas; Whether Pleadings in Habeas Action Must Be Closed Before Habeas Court can Entertain Motion that Subsequent Habeas Petition be Summarily Dismissed on Ground that it was not Timely Filed. In 2004, the petitioner was convicted of felony murder and conspiracy to commit robbery. He brought a habeas action challenging his conviction in 2007. The habeas court denied the petitioner's habeas petition, and the petitioner appealed. The Appellate Court dismissed the appeal, and the Supreme Court denied the petitioner certification to appeal the Appellate Court's judgment in July, 2012. The petitioner brought this second habeas action challenging his conviction in March, 2017. The respondent moved that the habeas court order the petitioner to show cause why he should be permitted to proceed despite his delay in filing the subsequent habeas petition.

The respondent pointed to General Statutes § 52-470 (d) (1), which provides that there is a rebuttable presumption that a habeas petitioner does not have good cause excusing his delay in filing a subsequent habeas petition that challenges the same conviction challenged with a prior habeas petition where the petitioner files the subsequent petition more than two years after conclusion of appellate review of the judgment on the prior habeas petition. The respondent argued that this subsequent habeas action was presumptively untimely under § 52-470 (d) (1) because the petitioner filed it more than two years after the Supreme Court denied him certification to appeal the Appellate Court judgment dismissing his appeal from the judgment on his prior habeas petition. The habeas court ruled that the respondent's request was premature because the pleadings were not yet closed. The habeas court ruled that General Statutes § 52-470 (b) (1) clearly and unambiguously requires that the pleadings in a habeas corpus proceeding must be closed before the habeas court can entertain any request for a determination as to whether there is good cause to allow the habeas action to proceed any further. Upon certification by the Chief Justice pursuant to General Statutes § 52-265a that a matter of substantial public interest is at issue, the respondent appeals, arguing that §§ 52-470 (d) and (e) do not require that the pleadings be closed before the habeas court can dismiss a habeas petition on the ground that it was not timely filed.

PATRICK TANNONE *v.* AMICA MUTUAL INSURANCE COMPANY, SC 20020

SANDRA TANNONE *v.* AMICA MUTUAL INSURANCE COMPANY, SC 20021

Judicial District of Danbury

Insurance; Underinsured Motorists; Whether Trial Court Properly Upheld Policy Provision Excluding Underinsured Motorist Coverage for Vehicles Owned by Self-Insurers. The plaintiffs, Patrick and Sandra Tannone, were struck and injured by a rental car owned by Enterprise Rent-A-Car, a self-insured entity. After exhausting the insurance coverage of the car's renter and driver, the plaintiffs brought these actions against their automobile liability insurer, defendant Amica Mutual Insurance Company, seeking underinsured motorist benefits. The actions were consolidated, and the defendant moved for summary judgment on the ground that the plaintiffs were not entitled to underinsured motorist benefits because their policies contained a provision excluding vehicles owned by "self-insurers" from

the definition of "underinsured motor vehicle" for coverage purposes. The trial court agreed and rendered summary judgment in favor of the defendant, ruling that the policy exclusion was valid under Connecticut law and that it barred the plaintiffs' recovery of underinsured motorist benefits. The trial court noted that, in *Orkney* v. *Hanover Ins. Co.*, 248 Conn. 195 (1999), the Supreme Court upheld a policy provision excluding coverage for motor vehicles owned by self-insurers on finding that the provision was authorized by the insurance regulations and that it did not offend the public policy underlying the underinsured motorist statutes of ensuring that an insured be fully compensated because an individual who is injured by virtue of the operation of a self-insured rental car can seek compensation from the car's owner. The trial court rejected the plaintiffs' claim that a 2005 federal law known as the Graves Amendment changed the legal landscape such that the rationale supporting the *Orkney* decision no longer applies. The Graves Amendment provides that a car rental company that rents or leases a vehicle to a person shall not be liable under any state law for harm to persons or property resulting from a renter's or lessee's use of the vehicle. These are the plaintiffs' appeals from the trial court's judgments in favor of the defendant. The plaintiffs claim that the trial court wrongly upheld the policy provision excluding underinsured motorist coverage for vehicles owned for self-insurers where, in light of the Graves Amendment, the plaintiffs are now prohibited from seeking recovery from Enterprise Rent-A-Car for the negligence of its customer.

GREGORY DEMOND et al. *v.* PROJECT SERVICE, LLC, et al.,
SC 20025/20026/20027/20028
Judicial District of Waterbury

Negligence; Whether Operators of Highway Service Plaza had Duty to Protect Motorists Traveling on Highway from Driver who Drank Alcohol at Service Plaza. The plaintiffs brought this action sounding in negligence and public nuisance against the defendants, the operators of a highway service plaza in Montville that is owned by the state of Connecticut. They alleged that they suffered injuries when a drunk driver, Willis Goodale, entered Interstate 395 from the service plaza and caused a series of car crashes. They claimed that the defendants were negligent in allowing Goodale to loiter and drink alcohol at the service plaza in contravention of a contract that the named defendant had with the state, which required the defendants to prevent the consumption of alcohol and loitering at the service

plaza. The defendants argued that they did not owe a legal duty of care to the plaintiffs. The trial court disagreed, finding that the defendants owed a duty to the plaintiffs pursuant to § 324A of the Restatement (Second) of Torts, which provides that a defendant who undertakes to render services to another is liable for the harm suffered by a third person if (a) the defendant's failure to exercise reasonable care increases the risk of such harm, (b) the defendant has undertaken to perform a duty that is owed to the third person, or (c) the harm is suffered because of reliance of the other or the third person upon the undertaking. The court reasoned that the contract with the state required the defendants to prohibit alcohol consumption and loitering at the service plaza in order to prevent harm to motorists traveling on the adjacent highway. The defendants now appeal from a $4,277,600 judgment in favor of the plaintiffs. They argue that the contract with the state did not impose a legal duty on them to protect motorists traveling on Interstate 395 from drivers who drank alcohol and loitered at the service plaza and that the facts of this case do not fit within any of the three scenarios set forth in § 324A. The defendants also claim that it would violate public policy to impose liability upon service plaza operators for damages caused by a drunk driver who consumed his own alcohol at the service plaza while sitting in his parked car. The plaintiffs have also appealed, arguing that the trial court wrongly reduced their award of damages by the percentage of negligence attributed to a defendant that had settled with the plaintiffs. They maintain that the court should have instead applied the nondelegable duty doctrine to find that the named defendant, as the primary contractor with the state, could not delegate its duty and was liable for the full amount of the plaintiffs' damages notwithstanding any settlement agreement. The plaintiffs also contend that the trial court improperly rendered summary judgment in favor of the defendants on their claim that the defendants created a public nuisance in allowing Goodale to drink alcohol and loiter at the service plaza.

CITY OF HARTFORD *v.* CBV PARKING HARTFORD, LLC, et al., SC 20044
Judicial District of Hartford

Eminent Domain; Whether Trial Court Improperly Applied Doctrine of Assemblage in Valuing Properties; Whether Trial Court Properly Awarded § 37-3c Interest on Judgment of Compensation at Rate of 7.22 Percent. The city of Hartford brought this condemnation action to acquire parcels of land owned by the

defendants on which the defendants operated parking lots. The city sought the land as part of a redevelopment plan that called for the construction of a ballpark, and one of the parcels was surrounded by two lots that the city previously had taken by eminent domain. The city assessed damages in the amount of $1,980,000, and the defendants applied to the trial court for review of the assessment. The trial court ruled that, under the doctrine of assemblage, the fair market value of the properties as of the date of the taking was $4.8 million. The court explained that, in light of the planned ballpark, it was reasonably probable that the defendants' lots would be combined with the two other properties owned by the city into one integrated use, resulting in a higher fair market value. The trial court subsequently awarded the defendants General Statutes § 37-3c interest on its judgment of compensation at a rate of 7.22 percent. The city appeals, arguing that the trial court improperly calculated the fair market value of the defendants' properties as assembled with the two city properties because it omitted from its decision a key element of the assemblage doctrine; that is, that the taken property probably would have been combined with the neighboring property in the absence of the condemnation. The city contends that assemblage does not apply here because the defendants never made any attempt to combine their properties with the adjoining properties. The city also argues that the trial court erred in awarding interest on the judgment of compensation at a rate of 7.22 percent and that, because the trial court did not mention interest or set an interest rate in its judgment of compensation, the court was bound to award interest at the default interest rate provided for in § 37-3c.

SUN VAL, LLC *v.* STATE OF CONNECTICUT, COMMISSIONER OF DEPARTMENT OF TRANSPORTATION

Judicial District of Litchfield

Environment; Whether Trial Court Miscalculated Plaintiff's Damages by Applying Wrong Environmental Regulations in Determining Whether Materials Improperly Dumped on Plaintiff's Property were Contaminated. The plaintiff brought this action against the Department of Transportation (department), claiming that the department negligently authorized its contractor, Hallberg Contracting Corporation (Hallberg), to dump materials from a highway construction project onto the plaintiff's New Milford property. The trial court found that the department was negligent and that the plaintiff was entitled to $29,855.26 in damages—far less than the $1,279,704.03

in damages that the plaintiff had sought. With regard to damages for remediation costs, the court found that 70 percent of the materials that were dumped onto the plaintiff's property could be legally disposed of at a lower level remediation facility, while only 20 percent of the materials would have to be disposed of at a more costly high level remediation facility. The court also rejected the plaintiff's claim that, as a result of the department's negligence, a deal to sell the property for over $2 million fell through. The court reasoned that there were many reasons why the deal failed apart from Hallberg's improper dumping of materials onto the property. The court also found that the plaintiff failed to mitigate its damages when it rejected Hallberg's offer to remove thirty truckloads of the materials from the property. The court determined that the plaintiff could have eliminated virtually all of its damages if it had accepted Hallberg's offer. The plaintiff appeals, claiming that the trial court applied the wrong set of environmental regulations in determining whether the materials dumped on its property were contaminated, which resulted in the trial court's significant miscalculation of the cost of disposing of the materials. The plaintiff also claims that it did not fail to mitigate its damages because it had the right to reject Hallberg's offer. It reasons that it was unfair for the court to expect it to allow Hallberg to reenter its property after it had illegally dumped polluted materials and that Hallberg's proposal contravened the town's zoning regulations. Finally, the plaintiff claims that the trial court improperly rejected its contention that the department's negligence directly led to the cancellation of its contract to sell the property to a bona fide purchaser for over $2 million, which resulted in lost profits in the amount of $1,146,500.

GERIATRICS, INC. *v.* HELEN McGEE et al., SC 20047
Judicial District of New Britain

Fraud; Whether Transfer of Money From Mother to Son While Mother in Nursing Facility a Fraudulent Transfer; Whether Defendant Unjustly Enriched by Transfer. The plaintiff, a nursing home, brought this action against Helen McGee and her son, Stephen McGee, seeking to recover payment for services that it had provided to Helen McGee. The plaintiff alleged that Stephen McGee, while acting under the power of attorney for his mother, transferred his mother's funds to himself while she was a resident of the plaintiff's facility and that those transfers were fraudulent under the Uniform Fraudulent Transfer Act (act). Section 52-552e (a) (1) of the act provides that "[a] transfer made . . . by a debtor is fraudulent as to a

creditor, if the creditor's claim arose before the transfer was made . . . and if the debtor made the transfer . . . [w]ith actual intent to hinder, delay or defraud any creditor of the debtor." Section 52-552b (6) defines "debtor" as "a person who is liable on a claim." The trial court rejected the plaintiff's fraudulent transfer claim and rendered judgment in favor of Stephen McGee, ruling that Helen McGee was the "debtor" within the meaning of § 52-552b (6), and that the act does not apply to "third party transferors" such as Stephen McGee. In trial court also rejected the plaintiff's claim that it was entitled to recover from Stephen McGee under the theory that he had been unjustly enriched by the transfers of money. The court found noted that the evidence showed that Stephen McGee used the money he received from his mother's account to pay her bills and to reimburse himself for expenses he had incurred on his mother's behalf, and it found that the plaintiff failed to prove that Stephen McGee was unjustly enriched at the plaintiff's expense. The plaintiff appeals, claiming that the trial court erred in rendering judgment in favor of Stephen McGee on determining that the Uniform Fraudulent Transfer Act did not apply to the money transfers here and that the plaintiff was not entitled to recover from Stephen McGee under the theory that he had been unjustly enriched.

MARJORIE ASHMORE, ADMINISTRATRIX (ESTATE OF WILLIAM ASHMORE) et al. v. HARTFORD HOSPITAL, SC 20052
Judicial District of Waterbury

Damages; Remittitur; Whether Trial Court Properly Found that Jury's Award of $4.5 Million in Damages for Loss of Consortium not Excessive as a Matter of Law. The plaintiffs brought this medical malpractice action seeking damages from the defendant hospital resulting from the death of William Ashmore. The jury found that the hospital's negligence caused Ashmore's death and awarded his estate $75,321 in economic damages and $1.2 million in noneconomic damages. The jury also found in favor of plaintiff Marjorie Ashmore, William Ashmore's wife, on her loss of consortium claim and awarded her $4.5 million in damages. The hospital filed a motion for remittitur pursuant to General Statutes § 52-228c, claiming that the award of damages for the loss of consortium was excessive as a matter of law because it was nearly four times the amount of the noneconomic damages awarded to William Ashmore's estate to compensate for the loss of his life. Section 52-228c provides that in medical malpractice actions where a jury awards over $1 million in noneconomic damages,

the trial court shall order a remittitur "if the amount of noneconomic damages specified in the verdict is excessive as a matter of law in that it so shocks the sense of justice as to compel the conclusion that the jury was influenced by partiality, prejudice, mistake or corruption." The trial court denied the motion for remittitur, finding that the evidence presented provided a basis from which the jury reasonably could conclude that the loss of consortium award was fair, just and reasonable. The trial court noted that there was evidence before the jury that Marjorie and William Ashmore were high school sweethearts who had been happily married for forty-five years, that they had raised three children together, and that they were mutually dependent upon one another for support, affection and companionship. The hospital appeals, claiming the trial court erred in denying its motion for remittitur of the jury's award of loss of consortium damages. The hospital argues that, while appellate precedent holds that a ruling denying a motion to set aside a verdict should be tested under an abuse of discretion standard of review, a trial court's determination that a verdict is not excessive "as a matter of law" should instead be subject to plenary review on appeal. The hospital claims that the award of loss of consortium damages here was excessive as a matter of law because an award of loss of consortium damages in an amount almost four times greater than the noneconomic damages awarded for wrongful death shocks the sense of justice and compels the conclusion that the jury made a mistake or that it was influenced by partiality or corruption.

The summaries appearing here are not intended to represent a comprehensive statement of the facts of the case, nor an exhaustive inventory of issues raised on appeal. These summaries are prepared by the Staff Attorneys' Office for the convenience of the bar. They in no way indicate the Supreme Court's view of the factual or legal aspects of the appeal.

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