

SUPREME COURT PENDING CASES

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

GERALYNN BOONE, EXECUTRIX OF THE ESTATE
OF MARY BOONE *v.* BOEHRINGER INGELHEIM
PHARMACEUTICALS, INC., et al., SC 20200

Judicial District of Hartford, Complex Litigation Docket

Product Liability; Whether Trial Court Properly Precluded Plaintiff From Commenting on Defendant’s Spoliation of Evidence; Whether Trial Court Properly Precluded Plaintiff From Presenting Rebuttal Evidence; Whether Trial Court Properly Granted Summary Judgment for Defendant on Claim that Defendant Failed Timely to Develop Reversal Agent for Pradaxa.

The decedent, Mary Boone, took Pradaxa, a prescription blood thinner manufactured by defendant Boehringer Ingelheim Pharmaceuticals, Inc., to lower her risk of stroke caused by atrial fibrillation. She died after experiencing uncontrollable intestinal bleeding. The plaintiff, the executrix of her estate, brought this product liability action against the defendant, alleging that the decedent’s death was caused in part by her use of Pradaxa and that the defendant failed to instruct and warn her physicians of the risks in prescribing the drug. The plaintiff also alleged that the defendant failed timely to pursue the development and approval of Praxbind, a reversal agent for Pradaxa that was released after the decedent’s death. The case was tried to a jury, and the trial court instructed the jury that the defendant had engaged in spoliation of evidence in destroying or failing to preserve the desktop computer, laptop computer, Blackberry phone, and paper files of Dr. Thorsten Lehr, a scientist and employee of the defendant who did research concerning Pradaxa until he left the company in 2012. The trial court instructed the jury that the defendant had intentionally failed to preserve that evidence when it had a legal duty to do so and that it was up to the jury to decide whether to draw an adverse inference that the destroyed evidence would have been unfavorable to the defendant. The jury returned a verdict for the defendants, finding that, while the defendants had been negligent in failing to provide adequate warnings and instructions concerning Pradaxa, the plaintiff failed to prove that, absent the defendants’ wrongful conduct, the decedent would not have suffered injury and death. The plaintiff appeals from the judgment rendered on the verdict, claiming that the trial court improperly precluded the plaintiff from making any comment in its opening or closing arguments or during the trial con-

cerning the defendant's destruction of Dr. Lehr's Pradaxa files. The plaintiff also claims that the trial court improperly precluded the plaintiff from seeking to rebut the testimony of the defendant's expert witnesses that the decedent's bleeding did not cause her death by introducing an excerpt from a deposition of one of the defendant's senior officers. The plaintiff next contends that the trial court erred in rendering summary judgment for the defendant on the plaintiff's design defect claim insofar as the plaintiff alleged that the defendant unnecessarily delayed the development and approval of Praxbind. The trial court concluded that Praxbind was a different product and therefore not an element of Pradaxa's design and that the claim was preempted under the "impossibility" doctrine, which provides for implied federal preemption when it is impossible for a party to comply with both state and federal law. Finally, the plaintiff argues that the trial court properly excluded evidence proffered by the plaintiff that the FDA had advised the defendant that there was a test that the defendant could perform to determine the safety and efficacy of Pradaxa.

MARK BANKS *v.* COMMISSIONER OF CORRECTION, SC 20222
Judicial District of Tolland

Habeas; Whether, in Collateral Proceeding, Harm from Trial Court's Failure to Give *Salamon* Kidnapping Instruction is Measured under Harmless Error Standard or "Substantial and Injurious Effect" on Verdict Standard. The defendant was convicted 1997 of kidnapping in the first degree, robbery in the first degree, and criminal possession of a firearm in connection with two incidents. In both incidents, the defendant entered a furniture store, pointed a gun at employees, told them to open the cash register and give him money, forced the employees into a store bathroom, and exited the premises. He brought this habeas action in 2014 to challenge his kidnapping conviction, claiming that the trial court failed to properly instruct the jury on the elements of kidnapping in accordance with *State v. Salamon*, 287 Conn. 509 (2008), which has been held to apply retroactively in collateral proceedings. In *Salamon*, the Supreme Court held that "to commit a kidnapping in conjunction with another crime, a defendant must intend to prevent the victim's liberation for a longer period of time or to a greater degree than that which is necessary to commit the other crime." The habeas court denied the habeas petition, and the petitioner appealed to the Appellate Court (184 Conn. App. 101), which reversed the habeas court's judgment. The Appellate Court observed that, under present state law, the standard by which a habeas

court is to measure harm from a trial court's failure to give a *Salamon* instruction is harmless error, in accordance with *Neder v. United States*, 527 U.S. 1 (1999). The United States Supreme Court held in *Neder* that, on direct appeal, a claim that a jury instruction omitted an essential element of a charged crime is subject to harmless error analysis, that is, "whether it appears beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." The Appellate Court agreed with the petitioner that the habeas court improperly held that there was harmless error. The Appellate Court considered the brief duration of the incidents, where they occurred, the sequence of events, the defendant's use of a firearm throughout, and whether the restraint of the employees was inherent in the nature of the robberies. Given these factors, it determined that the absence of a *Salamon* instruction could have contributed to the verdict in that, if the jury had been instructed under *Salamon*, it could have found that the defendant did not confine or move the employees in a way that had independent criminal significance from his other crimes, such that he was not guilty of kidnapping. The respondent was granted certification to appeal from the Appellate Court's decision. The Supreme Court will decide whether, when a habeas petitioner claims that the trial court erred by omitting jury instructions on the intent element of kidnapping pursuant to *Salamon*, harm is measured in accordance with *Neder* or in accordance with *Brecht v. Abrahamson*, 507 U.S. 619 (1993), which held that a federal habeas court must find that a constitutional error had a "substantial and injurious effect" on the verdict before granting habeas relief. The Supreme Court will also decide whether the Appellate Court properly concluded that the omission of a *Salamon* instruction at the petitioner's criminal trial did not constitute harmless error.

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.

John DeMeo
Chief Staff Attorney
