

SUPREME COURT PENDING CASES

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

RICHARD N. DINO et al. v. SAFECO INSURANCE
COMPANY OF AMERICA et al., SC 20197
Judicial District of Tolland

Insurance; Crumbling Foundations; Proper Method for Determining Date of Loss. The plaintiffs are among a group of homeowners in northeastern Connecticut who have experienced cracking in their basement walls due to the presence of the mineral pyrrhotite in the concrete that was used in the construction of their homes. The defendants, who provided homeowners' insurance to the plaintiffs over various periods of time, all denied coverage for the plaintiffs' losses. As a result, the plaintiffs brought this action alleging breach of contract and unfair insurance practice. The defendants moved for summary judgment, claiming that potential coverage under their policies was never triggered because the loss did not occur during the effective dates of their policies and that, regardless, their policies do not cover this type of loss. The trial court found that the proper method for determining the date of loss is the manifestation theory, pursuant to which potential coverage under a policy is triggered when the loss becomes known or reasonably discoverable. The trial court found that there was no evidence suggesting that the plaintiffs knew, or should have known, of the loss prior to their discovery of the cracks in the concrete in 2015 and that, as a result, there was no breach of contract by the defendants whose policies were not in effect at that time. The trial court additionally found that because there was no coverage under the policies, the unfair insurance practice claims must also fail. The plaintiffs appeal, claiming that the proper method for determining the date of loss is the continuous injury theory, pursuant to which potential coverage under a policy is triggered over the entire period of time between the first exposure to the harm and the manifestation of the loss. The plaintiffs also claim that the trial court improperly precluded their expert witness from testifying concerning his opinion that substantial impairment to the structural integrity of the plaintiffs' basement walls would have been visible ten years prior to his inspection in 2015 on the ground that his opinion was based only on his experience and the conditions that he observed, and not on any reliable scientific methodology. The plaintiffs additionally claim that the trial court improperly shifted the burden of proof on summary judgment to them and that, in light of the trial court's alleged error

in finding that potential coverage under the policies was not triggered, the judgment in favor of the defendants on the unfair insurance practice claim must be reversed. The defendants claim that the trial court's judgment may affirmed on the alternative grounds that, regardless of the trigger of coverage theory applied, the plaintiffs' loss was not a covered "collapse" under the provisions of the policies and that the action is time-barred.

STATE *v.* JOESENIER RUIZ-PACHECO, SC 20206
Judicial District of Danbury

Criminal; Whether Defendant's Convictions of Assault as Both Principal and Accessory, For a Joint Assault of the Same Victim, Violates Double Jeopardy Clause. The defendant and his brother, Eliezer, became embroiled in a fight with the victims, Kenneth Tucker and Luis Rodriguez, in a parking lot. During the fight, the defendant and Eliezer stabbed Tucker multiple times, and the defendant stabbed Rodriguez two or three times. The defendant and Eliezer then ran after Rodriguez, and Eliezer stabbed him in the back. The defendant then approached Rodriguez, who was in the street at this point, and stabbed him again. The defendant was subsequently convicted of one count each of assault in the first degree as a principal and an accessory with respect to the stabbing injuries suffered by Rodriguez, and one count each of assault in the first degree as a principal and an accessory with respect to the stabbing injuries sustained by Rodriguez. On appeal, he claimed that his convictions of two counts each of first degree assault as a principal and as an accessory violated the federal constitution's double jeopardy clause, and therefore that his two assault convictions as an accessory should be vacated. The Appellate Court (185 Conn. App. 1) rejected the defendant's claim and affirmed his convictions, concluding that, while the four assault convictions arose from one criminal event, the double jeopardy clause was not violated because the jury reasonably could have found that each charged offense was the result of a distinct act of independent legal significance. Specifically, with respect to the convictions arising out of the stabbing injuries to Rodriguez, the court determined that the jury reasonably could have found that the defendant committed assault as a principal either when he stabbed Rodriguez during the initial brawl or when he pursued Rodriguez into the street and stabbed him again. The court added that, even assuming that the relatively simultaneous stabbings of Rodriguez by the defendant and Eliezer during the initial brawl was a single act for purposes of double

jeopardy, there was no doubt that the defendant's stabbing of Rodriguez after he left the initial brawl was a criminal act that was distinct and separate from the stabbings that the defendant and Eliezer initially inflicted on Rodriguez. In addition, the court determined that the jury's finding that the defendant engaged in an assault as an accessory could have been predicated on his having aided Eliezer when he stabbed Rodriguez in the back. With respect to the convictions arising out of the stabbing injuries to Tucker, the court ruled that the jury was free to resolve conflicting evidence by concluding that both the defendant and Eliezer stabbed Tucker, and thus, could have reasonably found the defendant liable for (1) assault as a principal on the basis of his stabbing of Tucker, and (2) assault as an accessory for Eliezer's stabbing of Tucker, which was a contemporaneous yet separate assault with independent legal significance because the defendant had engaged in conduct with the intent to aid Eliezer's assault. Moreover, the court noted that the state never suggested to the jury that the assault charges were alternative theories of liability and that the state argued that the evidence supported a finding that the defendant acted as an accessory by being there with a knife. The Supreme Court will decide whether the Appellate Court properly concluded that the defendant's convictions of assault in the first degree as both a principal and as an accessory, for a joint assault of the same victim, do not violate the double jeopardy clause of the federal constitution.

STATE *v.* CODY M., SC 20213

Judicial District of New Haven at G.A. 23

Criminal; Harassment; Whether Defendant Subject to Double Jeopardy on Conviction of Two Counts of Violating Protective Order; Whether Jury Properly Instructed that “Harass” Means to “Trouble, Worry or Torment.” The defendant was subject to a standing criminal protective order that prohibited him from having contact with the victim, the mother of his children, except for the purpose of visitation as directed by the trial court. The order also prohibited the defendant from, among other things, threatening or harassing the victim. During a juvenile court hearing regarding their children, the defendant told the victim that he loved her and asked her why she had blocked his telephone number, but she ignored him. The defendant then told the victim, using obscenities, that “you’re going to have problems when I get home,” and, when she looked at him, he mouthed that he was going to kill her. The victim contacted the police thereafter, and the defendant was charged with two counts

of violation of a standing criminal protective order under General Statutes § 53a-223a. The first count alleged that the defendant had engaged in contact with the victim in violation of the protective order, while the second count alleged that the defendant had violated the order by threatening or harassing the victim. The defendant was convicted after a jury found him guilty of both counts. He appealed, and the Appellate Court (185 Conn. App. 287) affirmed the conviction. The Appellate Court rejected the defendant's claim that his conviction violated his right against double jeopardy because the two counts amounted to an improper double punishment for one act, that is, his interaction with the victim. The Appellate Court determined that each count was based on distinct act; the act of engaging in contact with the victim for a purpose unrelated to visitation was a violation of one part of the protective order while the act of telling the victim that he was going to kill her was an additional violation of an additional part of the order. The Appellate Court thus concluded that each act was a separately chargeable violation. The Appellate Court also rejected the defendant's claim that the trial court erroneously instructed the jury on the second violation of a protective order count that the definition of "harassing" was "to trouble, worry, or torment." The defendant argued that the trial court's definition imposed a lower standard than a definition for "harassing" that was previously recognized by the Appellate Court, that is, "to annoy persistently." The Appellate Court disagreed, acknowledging the distinction but concluding that the distinction was "not so great as to implicate the fairness of the defendant's trial." The defendant was granted certification to appeal from the Appellate Court's decision. The Supreme Court will decide whether the Appellate Court properly concluded that the defendant's right against double jeopardy was not violated when he was convicted of two counts of violation of a protective order based on different words spoken to the same person during a single, brief, and uninterrupted statement. The Supreme Court will also decide whether the Appellate Court properly concluded that to "harass" means to "trouble, worry, or torment" for purposes of an enhanced penalty for violating a standing criminal protective order.

The Practice Book Section 70-9 (a) presumption in favor of coverage by cameras and electronic media does not apply to the case above.

RAUL DIAZ *v.* COMMISSIONER OF CORRECTION, SC 20233
Judicial District of Tolland

Habeas; Appellate Review; Whether Appellate Court Properly Affirmed Habeas Court Judgment on Ground Not Raised or Decided by Habeas Court and Not Raised or Briefed by Parties on Appeal. The petitioner was charged with home invasion, burglary, larceny, assault, and interfering with an officer in connection with an incident in which he broke into the victim's residence while it was unoccupied, assaulted the victim when the victim returned, took the victim's car keys and wallet, and fled in the victim's car. Before his criminal trial, the petitioner entered an *Alford* guilty plea on the home invasion charge and was sentenced to 25 years of incarceration. The petitioner subsequently filed this habeas action, alleging, among other things, ineffective assistance of counsel based on his trial counsel's failure to file a motion to dismiss the home invasion charge on the ground that the charge did not apply to the facts of the petitioner's case. The habeas court denied the habeas petition on the merits, and the petitioner appealed, claiming that the habeas court erred in denying his claim that his trial counsel rendered ineffective assistance by failing to file a motion to dismiss the home invasion charge. The Appellate Court (185 Conn. App. 686) affirmed the habeas court's judgment. Instead of considering the habeas court's decision on the merits of the petitioner's ineffective assistance claim, however, the Appellate Court held that the petitioner's guilty plea, which he made knowingly, intelligently, and voluntarily, served as a waiver of any constitutional claims unrelated to the plea. The waiver ground was not raised before either the habeas court or the Appellate Court. The petitioner has been granted certification to appeal, and the Supreme Court will decide whether the Appellate Court properly affirmed the judgment of the habeas court on a legal ground that was not raised or decided in the habeas court and never raised or briefed by the parties in the Appellate Court.

OHAN KARAGOZIAN *v.* USV OPTICAL, INC., SC 20257
Judicial District of New Haven at Meriden

Employment; Whether Action Alleging Constructive Discharge in Violation of Public Policy Requires that Plaintiff Allege and Prove Both that Employer Intended to Create Intolerable Work Atmosphere and that Employer Intended to Force Plaintiff to Resign. The plaintiff brought this action alleging that he was constructively discharged from his employment as a licensed optician

manager of an optical department that the defendant owned and operated in a JCPenney department store. The plaintiff alleged that from the beginning of his employment to the date on which he resigned, the defendant required him as part of his duties to provide optometric assistant services to the doctor of optometry in the store and that the duties that the defendant required him to perform violated certain public policies of the state. The plaintiff further alleged that he was compelled to resign from his position because the defendant refused his request that he not be required to perform the duties. The plaintiff claims that the defendant thereby constructively discharged him in violation of the public policy of the state. The trial court granted the defendant's motion to strike the complaint on the ground that it failed to sufficiently allege a claim of constructive discharge. The plaintiff appealed from the trial court's judgment in favor of the defendant on the stricken complaint. The Appellate Court (186 Conn. App. 587) affirmed the judgment, holding that the trial court properly determined that the plaintiff failed to state a claim for constructive discharge. The Appellate Court noted that, in *Brittell v. Dept. of Correction*, 247 Conn. 148, 178 (1998), our Supreme Court stated that "constructive discharge of an employee occurs when an employer, rather than directly discharging an individual, *intentionally* creates an intolerable work atmosphere that forces an employee to quit involuntarily." (Emphasis in original). The Appellate Court found that, here, there were no allegations in the complaint that reasonably could be construed to claim that the defendant intended to create conditions so intolerable that a reasonable person would be compelled to resign. The Appellate Court rejected the plaintiff's argument that a more sensible reading of *Brittell* would conclude that it is the employer's intent to create the work atmosphere in question that matters, rather than the intent that such atmosphere should force an employee to resign. The plaintiff filed a petition for certification to appeal, which the Supreme Court granted as to the issue of whether the Appellate Court correctly construed and applied *Brittell* as holding that an action for constructive discharge in violation of public policy requires that the plaintiff allege and prove not only that the employer intended to create an intolerable work atmosphere, but also that the employer intended thereby to force the plaintiff to resign.

E. I. DU PONT DE NEMOURS AND COMPANY *v.*
CHEMTURA CORPORATION, SC 20329
Judicial District of Danbury

Breach of Contract; Whether, Under New York law, the Plaintiff was Required to Comply Strictly With Contractual Notice Provisions in Order to Exercise its Right to Indemnification Under the Contract. In December, 2007, the parties entered into an asset purchase agreement (contract) for the sale of the defendant's fluorine chemical business to the plaintiff. Under the contract, the defendant was obligated to indemnify the plaintiff for losses it incurred as a result of any breach of the defendant's representations and warranties regarding the business, provided that, within four years of the closing date, the plaintiff notified the defendant in writing, stating the amount of and the factual basis for any claim. The contract specified that all notices had to be sent to the defendant's General Counsel and its outside counsel. The closing occurred on January 31, 2008, and, shortly thereafter, the plaintiff sought indemnification for various losses that it claimed were caused by the defendant's misrepresentations. The parties' representatives attempted to resolve the claims during the ensuing years, but they failed to resolve all of the plaintiff's claims under the contract. In June, 2014, the plaintiff brought this action alleging that the defendant breached its indemnity obligations under the contract. The case was tried to the court, and the parties agreed that New York law governed the plaintiff's claims. At trial, the defendant moved for a directed verdict on the ground that the plaintiff had failed to satisfy a condition precedent to bringing the action in that it failed to comply strictly with the contract's notice provisions. It argued that, under New York law, strict compliance with contractual notice provisions is required. The plaintiff countered that strict compliance is not required in commercial contracts and that noncompliance is excused where the defendant has received actual notice and has not been prejudiced by the failure to comply strictly with the terms of the contract. The trial court deferred any decision on the motion and the defendant presented its case. After trial, the court rendered judgment for the defendant, concluding that the plaintiff failed to comply with the contract's notice provisions when it failed to send notice of its claims to the defendant's General Counsel or its outside counsel within four years after the closing. It rejected the plaintiff's claim that the defendant had received actual notice, finding that the evidence did not establish that the plaintiff had provided notice of the particular contract claims and that the plaintiff's noncompliance with the terms of the notice provisions prejudiced the defendant. The plain-

tiff appeals, claiming that the trial court erred in concluding that New York law requires strict compliance with notice provisions of commercial contracts as a condition precedent to recovery for breach of contract. The plaintiff argues that the trial court failed to recognize that the parties' communications during the years following the closing constituted actual notice of the claims even if it did not comply with the contract's formal notice procedure. The defendant contends, as an alternative ground for affirming the judgment, that the plaintiff failed to prove its breach of contract claims.

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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