

## SUPREME COURT PENDING CASES

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

JACQUELINE RODRIGUEZ *v.* KAIAFFA, LLC d/b/a  
CHIP'S FAMILY RESTAURANTS, et al., SC 20274  
*Judicial District of Hartford, Complex Litigation Docket*

**Employment; Connecticut Minimum Wage Act; Tip Credit; Class Actions; Whether Trial Court Properly Certified Class of Plaintiff Food Servers Claiming that Defendants Failed to Pay Full Minimum Wage for Non-Service Duties.** The plaintiff brought this action by a “class action complaint” alleging that she worked as a server at a Chip’s Family Restaurant allegedly owned and operated by the defendants, a limited liability company and its sole member. She alleges that the defendants violated the Connecticut Minimum Wage Act by failing to pay her the full minimum wage for the time she performed “side work” that included cleaning and restocking supplies away from the service area. Under the act and regulations promulgated pursuant thereto, employers in the restaurant industry are allowed to pay “service” employees that regularly receive gratuities a reduced minimum wage, commonly referred to as the “tip credit.” The regulations define a service employee as one whose duties relate solely to serving food and performing duties incidental to such service. Employers are not allowed to apply the tip credit to employees who perform “non-service” duties. The regulations further provide that, if an employee performs both service and non-service duties, the employer must record the time spent on each so that the tip credit is applied only to the time spent on service duties. If the employer fails to record the time separately, the tip credit cannot be applied. The plaintiff alleges that the side work that the defendants routinely assigned to her and to other servers constituted non-service duties and that the defendants improperly applied the tip credit by failing to record the time that servers spend on each type of work. The plaintiff moved for certification of a class of all individuals employed as servers at any Connecticut Chip’s Family Restaurant. She argued that the defendants’ general policy is to assign side work to all servers during every shift and that, under Practice Book § 9-8 (3), common questions of law and fact predominate over any questions affecting individual members of the class. The defendants opposed class certification, claiming that the amount and type of side work performed varies among individual servers and from restaurant to restaurant. The trial court found that common questions of law and fact predominated because the plaintiff

alleged that all servers during their shifts performed side work properly classified as non-service duties and that the defendants did not record the servers' non-service time separately. The trial court granted the motion for class certification and, following that decision, the Chief Justice granted the defendants certification to appeal pursuant to General Statutes § 52-265a. The defendants appeal, claiming that the trial court erred by failing to correctly determine and apply the substantive law regarding the tip credit and erred in concluding that the commonality and predominance requirements of Practice Book § 9-8 (3) were satisfied.

MARTIN J. PRAISNER *v.* STATE OF CONNECTICUT, SC 20315  
*Judicial District of Hartford*

**Indemnification; Sovereign Immunity; Whether Appellate Court Properly Held that Member of State University's Special Police Force not a Member of a "Local Police Department" Entitled to Indemnification Under General Statutes § 53-39a.** The plaintiff, a former member of a special police force maintained by the state of Connecticut for Eastern Connecticut State University (university), was prosecuted by the federal government for criminal offenses that he allegedly committed during the course of his duties. After the federal charges were dismissed, the plaintiff brought this action against the state under General Statutes (Rev. 2013) § 53-39a, seeking reimbursement for the economic losses he incurred in his criminal defense. That statute authorizes certain law enforcement unit members to bring an action against their employer seeking indemnification for economic loss sustained as a result of a prosecution for a crime allegedly committed in the course of the employee's duties, where the charge is dismissed or the employee is found not guilty. The state moved to dismiss the action, claiming that it was barred by sovereign immunity because a member of the university's special police force is not included in the class of employees entitled to indemnification under § 53-39a. The trial court denied the motion, concluding that a member of the university's special police force is a member of a "local police department" under the statute. The trial court subsequently rendered judgment for the plaintiff and awarded him damages, including lost wages and attorney's fees. The state appealed, claiming that the trial court improperly determined that the plaintiff was entitled to indemnification under § 53-39a. The Appellate Court (189 Conn. App. 540) reversed the judgment, concluding that the plain language of the statute and its relationship to other statutes indicates that the university's special police force is not a "local police department" as contemplated by

§ 53-39a. The court reasoned that, while § 53-39a identifies certain officers entitled to indemnification with exacting precision, it does not include members of the university's special police force in the class of employees entitled to indemnification. The court found it significant that General Statutes (Rev. 2013) § 10a-142, which provides for the establishment of special police forces for the state's public universities, expressly identifies certain sections of the General Statutes as being either applicable or inapplicable to members of such special police forces, but it does not reference § 53-39a in any manner. The court also emphasized that § 10a-142 contains an indemnification provision that applies specifically to members of the university's special police force without reference to § 53-39a. The plaintiff appeals, claiming that the Appellate Court misconstrued § 53-39a and its relationship to other statutes. He contends that the Appellate Court erred in concluding that the legislature intended that § 10a-142 govern indemnification of members of the university's special police force, because that statute applies only to indemnification for civil liability, as opposed to criminal prosecutions under § 53-39a. The plaintiff argues that the legislature clearly intended that members of the university's special police force to be entitled to indemnification where, as here, the criminal charges were ultimately dismissed.

ANTONIO VITTI *v.* CITY OF MILFORD *et al.*, SC 20350  
*Compensation Review Board*

**Workers' Compensation; Whether Plaintiff Entitled to Permanent Partial Disability Award for 100 Percent Loss of His Heart Following Heart Transplant.** The plaintiff was employed by the city of Milford's police department from 1993 to 2014. In 2010, he was diagnosed with giant cell myocarditis, a heart disease, and he underwent a heart transplant. The plaintiff subsequently sought, among other things, a permanent partial disability workers' compensation award under General Statutes § 31-308 (b) for a 100 percent loss of function of his native heart. Section 31-308 (b) lists the heart among the "members or organs" of the body for which a permanent partial disability award may be sought and provides in relevant part: "If the injury consists of the loss of a substantial part of a member resulting in a permanent partial loss of the use of a member, or if the injury results in a permanent partial loss of function, the commissioner may . . . award to the injured employee the proportion of the sum provided in this subsection for the total loss of, or the loss of the use of, the member or for incapacity or both that represents the proportion of the total loss or loss of use found to exist." Precedent also establishes that a claimant is entitled to a permanent partial disability award

once he or she reaches maximum medical improvement. During the proceedings before the trial commissioner, a cardiologist opined that the plaintiff had reached maximum medical improvement after his heart transplant and that he should be given a 23 percent impairment rating for his transplanted heart. The trial commissioner agreed and issued a permanent partial disability award to the plaintiff for a 23 percent loss of function of his transplanted heart, rejecting his claim that his native heart and not his transplanted heart was the organ that should be considered for purposes of determining the award. The Compensation Review Board affirmed the trial commissioner's award, rejecting the plaintiff's argument that the loss of his native heart was comparable to the amputation of a limb, which would warrant a permanent partial disability award for a 100 percent loss of function. The plaintiff appeals from the board's decision. The Supreme Court will decide whether the board properly affirmed the trial commissioner's decision that the plaintiff was entitled to a permanent partial disability award under General Statutes § 31-308 (b) for a 23 percent loss of function of his transplanted heart and not for a 100 percent loss of function of his native heart.

NASH STREET, LLC *v.* MAIN STREET AMERICA  
ASSURANCE COMPANY et al., SC 20389  
*Judicial District of Ansonia-Milford at Milford*

**Insurance; Whether Trial Court Correctly Determined that Insurer had no Duty to Defend or Indemnify its Insured; Whether Trial Court Properly Concluded that Plaintiff's Property Damage Excluded from Coverage Under "Business Risk Exclusions" in Commercial Risk Insurance Policy.** In 2013, the plaintiff hired a contractor to renovate its storm-damaged beach house. Because the house needed to be elevated in order to comply with certain regulations, the contractor hired a subcontractor to perform work on the foundation. While the subcontractor was lifting the house and placing it on cribbing for support, the house shifted off of the cribbing and collapsed. At the time of the collapse, the contractor was insured under a commercial general liability policy issued by the defendant, Main Street America Assurance Company. When the plaintiff brought an action against the contractor to recover for the property damage, the defendant refused to defend or indemnify the contractor. The plaintiff obtained a default judgment against the contractor in the amount of \$558,007.16. After the contractor failed to satisfy that judgment, the plaintiff brought the present action against the defendant pursuant to General Statutes § 38a-321, which authorizes a judgment creditor to bring an action against the judgment debtor's liability

insurer and exercise the insured's rights under the policy. The defendant asserted, as a special defense, that the claimed loss was excluded from coverage under two exclusions in the policy, which are commonly referred to as "business risk" exclusions. Those exclusions state that the insurance does not apply to property damage to "[t]hat particular part of real property on which you or any contractor or subcontractor working directly or indirectly on your behalf is performing operations," nor does it apply to "[t]hat particular part of any property that must be restored, repaired or replaced because 'your work' was incorrectly performed on it." The trial court granted summary judgment in favor of the defendant, ruling that both exclusions applied and precluded coverage for the loss. It concluded that the entire house was "that particular part" of the property on which the contractor was working because the entire house was being renovated and the damage to the house arose out of that renovation. Accordingly, the trial court rejected the plaintiff's contention that the renovation work involving the foundation was separate and distinct from the renovations performed on the house prior to the collapse. The plaintiff appeals, claiming that the trial court failed to apply the proper standard for determining whether an insurer breached a duty to defend its insured, a duty the plaintiff asserts is triggered whenever a complaint alleges facts that potentially are within the scope of coverage. The plaintiff contends that, because the allegations in the complaint against the contractor alleged facts that could bring the claimed loss within the scope of coverage, the defendant breached its duty to defend its insured such that it is liable for the resulting judgment. The plaintiff also contends that the trial court erred in concluding that the phrase "that particular part" referred to the entire house as opposed to only the foundation.

OFFICE OF CHIEF DISCIPLINARY COUNSEL *v.*  
JOSEPHINE SMALLS MILLER, SC 20390  
*Judicial District of Danbury*

**Attorney Discipline; Whether Trial Court Violated Defendant's Due Process Rights by Denying Her Motion for Articulation; Whether Trial Court Erred in Determining that Defendant's Affirmative Defenses Were Not Properly Before It; Whether Trial Court Erred in Finding that Defendant Engaged in Misconduct Warranting Suspension from Practice of Law.** The plaintiff brought this presentment action against the defendant attorney in four counts. The first count alleged that the defendant commingled personal funds with client funds in her IOLTA account. The second count alleged that the defendant repeatedly failed to appear for trial court proceedings and that she failed to use the proper procedure to request continu-

ances in multiple cases. The third count alleged that the defendant engaged in the unauthorized practice of law by representing a client in the Appellate Court while she was suspended from practice before that court, and the fourth count alleged that the defendant failed to inform that client of the suspension. The defendant raised two affirmative defenses in response, alleging that the actions of the plaintiff were based on racially discriminatory and retaliatory reasons in violation of her federal and state constitutional rights. After a hearing, the trial court issued a memorandum of decision finding that the plaintiff had established by clear and convincing evidence that the defendant had engaged in misconduct in violation of the Rules of Professional Conduct as alleged in all four counts of the presentment and ordered, among other things, that the defendant be suspended from the practice of law for one year. The court determined that the defendant's affirmative defenses were not properly before it because they were independent causes of action through which she could seek specific damages or other relief and that, even if they were properly before it, the defendant had failed to meet her burden of proof. The defendant filed this appeal from the trial court's judgment to the Appellate Court. While the appeal was pending before that court, the defendant filed a motion for articulation of the trial court's judgment. The trial court denied the motion, and the defendant filed a motion for review of that denial with the Appellate Court, which denied the relief requested therein. This appeal was transferred thereafter to the Supreme Court. The Supreme Court will decide whether the trial court's denial of the defendant's motion for articulation violated her due process rights. The Supreme Court will also decide whether the trial court erred in determining that the defendant's affirmative defenses were not properly before it. Finally, the Supreme Court will decide whether the trial court properly found that the defendant engaged in misconduct that warranted her suspension from the practice of law.

STATE *v.* JOSEPH LOUIS IMPERIALE, SC 20391  
*Judicial District of Litchfield*

**Criminal; Violation of Probation; Whether Defendant's Placement at Residential Sex-Offender Treatment Facility as a Condition of Probation Violated His Constitutional Rights.** In 2013, the defendant pleaded guilty to illegal possession of child pornography in the second degree, and he was sentenced to a term of incarceration. Shortly after the defendant was released on parole in 2015, his parole was revoked and he was again ordered incarcerated. The defendant was released on probation in 2017, and the conditions of

his probation required that he participate in and complete sex offender treatment. The defendant was placed at the January Center, a residential sex-offender treatment facility located on the grounds of the Corri-gan Correctional Institution in Montville. The defendant did not successfully complete his treatment at the January Center, and he was discharged after he committed several disciplinary violations. The defendant was subsequently arrested, charged with violation of probation, and again returned to the custody of the Commissioner of Correction. The defendant filed a motion to dismiss the violation of probation charge, claiming that his constitutional due process rights were violated in that the condition of probation requiring him to undergo sex offender treatment at the January Center was “unreasonable” and in that, given the restrictive nature of confinement at the January Center, that confinement amounted to another form of imprisonment. The trial court denied the motion to dismiss, found that the defendant had violated his probation, and sentenced him to six years incarceration, execution suspended after two years, and the balance of his original term of probation. The defendant appeals, claiming the trial court erred in denying his motion to dismiss because his confinement at the January Center was tantamount to imprisonment and because his confinement there did not constitute a “reasonable” condition of probation. The defendant also claims that the trial court’s finding that he violated his probation was in violation of his equal protection rights insofar as one factor considered when confining him to the January Center was his homelessness. Finally, the defendant claims that the imposition of confinement in the January Center as a condition of his probation violated his federal constitutional right against cruel and unusual punishment because it was grossly disproportionate to his offense.

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*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*

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