SUPREME COURT PENDING CASES

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

STATE *v.* LAZALE ASHBY, SC 18190
Judicial District of Hartford

Murder; Sexual Assault; Whether Trial Court Properly Denied Request for Third-Party Culpability Instruction; Whether Trial Court Properly Excluded Evidence That Police Conducted an Inadequate Investigation; Whether Testimony from Jailhouse Informant Violated Defendant's Right to Counsel. The defendant was convicted of charges of capital felony, murder, felony murder, sexual assault in the first degree, kidnapping in the first degree, and burglary. He appeals, claiming that the trial court wrongly denied his request that the jury be instructed on third-party culpability where he claimed at trial that he had consensual sex with the victim on the night of the murder and where another man's DNA was found on the victim's body. The defendant also contends that the trial court wrongly excluded evidence that the defendant offered in support of his claim that the police had not adequately investigated other suspects in the crimes. Among the defendant's other claims on appeal are that (1) a jailhouse informant was wrongly allowed to testify at trial, (2) a handwriting expert's testimony that corroborated the jailhouse informant's testimony violated his right to confrontation, (3) the state failed to disclose exculpatory evidence in violation of *Brady* v. *Maryland*, 372 U.S. 83 (1963), and (4) his convictions on charges of kidnapping, capital felony and felony murder should be reversed because the jury was not instructed, pursuant to *State* v. *Salamon*, 287 Conn. 509 (2008), that, to convict him of kidnapping in conjunction with other crimes, it had to find that the defendant restrained the victim to a greater degree than was necessary to carry out the other crimes.

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

ANGEL MELETRICH *v.* COMMISSIONER OF CORRECTION, SC 20075
Judicial District of Middlesex

Habeas; Ineffective Assistance of Counsel; Whether Appellate Court Properly Concluded that Trial Counsel's Failure to

Present Testimony from Additional Alibi Witness was Reasonable Trial Strategy; Whether Appellate Court Properly Concluded that Petitioner was not Prejudiced by Trial Counsel's Performance. In 2010, the petitioner was convicted of robbery, larceny and conspiracy to commit robbery and larceny in connection with the robbery of a fast-food restaurant. The petitioner brought this habeas action, claiming that his trial counsel rendered ineffective assistance by failing to present the testimony of Guillermina Meletrich, the petitioner's aunt, as an additional alibi witness at the petitioner's criminal trial. The habeas court denied the petition, finding that the petitioner failed to prove that his attorney's performance was deficient or that the petitioner was prejudiced as a result. The petitioner appealed, and the Appellate Court (178 Conn. App. 266) dismissed the appeal, finding that the habeas court did not abuse its discretion in denying the petitioner certification to appeal and that the habeas court did not err in concluding that the petitioner's trial counsel had not rendered ineffective assistance in failing to call the aunt to testify. The Appellate Court noted that, while the aunt testified at the habeas trial that the petitioner was home at the time of the robbery and at the time when he was alleged to have met with his coconspirators to discuss plans to rob the restaurant, it was clear that she was not with the petitioner during every moment of that time frame. The court also noted that the aunt's testimony would have been cumulative of the alibi testimony provided by the petitioner's girlfriend, who testified at the criminal trial that she was with the petitioner during every moment of the relevant time period. Finally, the Appellate Court held that the petitioner failed to demonstrate that he was prejudiced as a result of his attorney's decision, reasoning that the aunt's testimony would not have affected the jury's verdict. The court noted that the aunt was not a neutral, disinterested witness and that her testimony did not provide the petitioner with a complete alibi for the formation of the conspiracy, as the jury could have inferred that the plan had been devised at an earlier time. The petitioner appeals, and the Supreme Court will decide whether the Appellate Court properly concluded that the petitioner's trial counsel's failure to call the aunt as an alibi witness constituted a reasonable trial strategy and properly concluded that trial counsel's failure to do so did not result in prejudice the petitioner.

TATAYANA OSBORN et al. *v.* CITY OF WATERBURY et al., SC 20129
Judicial District of Stamford

Negligence; Whether Appellate Court Properly Determined that Expert Testimony Necessary to Establish the Standard of Care; Whether Plaintiffs Received Adequate Notice that Expert Testimony as to the Standard of Care Required. The plaintiff mother, on her own behalf and on behalf of her minor child, brought this personal injury action against the defendants, the city of Waterbury (city) and the Waterbury Board of Education (board), after the child was assaulted by other students during a lunchtime recess at her elementary school. Following a court trial, the trial court rendered judgment in favor of the plaintiffs and against the city and the board, finding that the defendants were responsible for the supervision of students enrolled at the elementary school and that the plaintiffs' injuries and losses were the result of the defendants' failure to provide adequate staff to supervise and control the students during recess. The defendants appealed, claiming that the trial court erred by finding, in the absence of expert testimony, that one student intern and three or four staff members were insufficient to control as many as 400 students during recess. The Appellate Court (181 Conn. App. 239) reversed and remanded the case with direction to render judgment for the defendants. The court concluded that the standard of care regarding the number of staff members needed to ensure the safety of elementary school students who are playing on a playground is not a matter of common knowledge, reasoning that the policies and procedures regarding the safety of students in the state's public school system are highly regulated by governing bodies and accreditation organizations, and that teachers and administrators are required to be accredited pursuant to educational standards that are set by professionals. The court held that the plaintiffs were required to present expert testimony as to the relevant standard of care and to prove that the number of staff on the playground supervising the children at the time the child was assaulted constituted a breach of that standard of care. The plaintiffs appeal, and the Supreme Court will decide whether the Appellate Court properly determined that expert testimony was required to establish the standard of care. The Supreme Court will also address whether the plaintiffs received adequate notice that they needed to present expert testimony and, if not, whether the Appellate Court properly remanded the case to the trial court with direction to render judgment for the defendants.

FRANCIS T. SCHWERIN, JR., et al. *v.* ELIZABETH HUBBELL SCHWERIN et al., SC 20208/20209

Judicial District of Hartford

Trusts; Whether Trial Court Properly Interpreted Trust Language Requiring That, Upon Expiration of Trust, Principal be Distributed to "Grantor's Issue Then Living, Per Stirpes." This case stems from a family dispute over the proper method for distributing the corpus, or principal, of two family trusts. The trusts were created in 1957 by Harvey Hubbell III (Hubbell) and by Hubbell's mother. The trust language dictates that the trusts expire upon the death of certain family members, or measuring lives, including Hubbell's three children and two of his six grandchildren, and that, upon expiration of the trusts, the trust principals will be distributed to the "grantor's issue then living, per stirpes." The plaintiffs, two of Hubbell's grandchildren, brought this action seeking a declaratory judgment as to the proper distribution of the trust principals. The defendants are other potential beneficiaries of the trusts, and the trial court appointed a guardian ad litem to represent the interests of any minor or unascertained potential trust beneficiaries. The plaintiffs urged the trial court to declare that Hubbell's six grandchildren were the "stirpital roots." Some of the defendants urged instead that the court declare that the stirpital roots were Hubbell's three children. The trial court ruled that, upon termination of the trusts, the trust principals should be distributed in equal shares to each of Hubbell's three children, with living descendants of each of the three children succeeding to the shares of their deceased ancestors. The trial court reasoned that the language "to the issue of the grantor then living, per stirpes" plainly required distribution of the trust principals to the descendants of the grantors who are alive at the time the trusts expire, per stirpes, with the stirpital roots at the generation directly below the grantor. The plaintiffs appeal, claiming that the trial court erred in failing to interpret the trust instruments as whole and that, when considered in their entirety, the trusts clearly evidence the grantors' intent that Hubbell's children be prohibited from taking trust principal. The plaintiffs also claim that the trial court wrongly relied on the Restatement of Property and the Uniform Probate Code in support of its judgment. Defendant Tadhg Campion also appeals from the trial court's judgment. Campion argues that the stirpital roots should not be determined until the trusts terminate and that the principals should be distributed to the highest generation of Hubbell descendants with a surviving member at the time of the passing of the last of the measuring lives.

JONATHAN SOBEL *v.* RICHARD D. NICHOLSON, COMMISSIONER OF REVENUE SERVICES, SC 20215

Judicial District of New Britain

Taxation; Whether Trial Court Properly Concluded that Plaintiff Entitled to General Statutes § 12-704 Credit for Tax Paid to New York on Capital Gain Income Received by Plaintiff as Partnership Profits Stemming From Operation of Hedge Funds; Whether Trial Court Properly Found that Plaintiff Domiciled in New York in 1998. In 1997 and 1998, the plaintiff lived in Connecticut and operated an investment management business in New York City as a member of a limited liability company (company) that served as general partner of two limited partnerships (partnerships) that operated hedge funds. The plaintiff managed the partnerships' assets, which were held in brokerage accounts owned by the partnerships, but he was not a limited partner of either partnership and he did not own the assets. The company conducted all trading on behalf of the partnerships, and the partnerships allocated approximately 30 percent of the net partnership profits to the company, which in turn allocated to the plaintiff his distributive share of that income. The plaintiff filed a Connecticut resident tax return for 1997 and a part-year resident tax return for 1998, claiming a credit under General Statutes § 12-704 (a) (1) for income tax he paid to New York for those years. In his 1998 return, he indicated that he moved to New York during that year. The defendant department of revenue services (department) disallowed the credits the plaintiff claimed for tax paid to New York for 1997 and 1998, issued deficiency assessments against the plaintiff, and denied the plaintiff's claim that he was a resident of New York for part of 1998. The plaintiff appealed, and the trial court rendered judgment in his favor, concluding that the defendant improperly denied the plaintiff the personal income tax credit he sought for tax he had paid to New York. The trial court also concluded that the plaintiff established that he was domiciled in New York for the second half of 1998. The department appeals, claiming that the trial court wrongly determined that the plaintiff was entitled to a credit for tax he paid to New York on the capital gain income that flowed to him from the partnerships because, the department claims, Connecticut does not tax a nonresident on similar capital gain income. The defendant asserts that Connecticut law treats partnerships as pass-through entities and accordingly that, for tax purposes, a partner's income distribution will be treated as if the partner had generated the income himself and in the same manner that the partnership generated the income. Finally,

the department argues that the trial court wrongly determined that the plaintiff established, by clear and convincing evidence, that he changed his domicile from Connecticut to New York on July 1, 1998.

KENT LITERARY CLUB et al. *v.* WESLEYAN UNIVERSITY et al., SC 20226
Judicial District of Middlesex

Universities; Fraternities; Coeducation; Whether Trial Court Erred in Issuing Mandatory Injunction Requiring University to Contract to Allow Fraternity to House Students; Whether University Liable for Misrepresentation. For many years, Wesleyan University listed Kent Literary Club's (KLC) property, known as "DKE House," as a "program house." This designation permitted KLC to house members of an all-male fraternity in DKE House. In order for DKE House to be afforded program house status for the 2014-15 academic year, KLC and the fraternity entered into a "Greek Organization Standards Agreement" (standards agreement) with Wesleyan. The standards greement, while contemplating annual renewal, also provides for termination by either party upon thirty days written notice. In September, 2014, Wesleyan announced that all residential fraternities would be required to become coeducational within three years. Subsequently, Wesleyan informed KLC and the fraternity that, while coeducation of the fraternity itself would not be necessary, coeducation in DKE House would be required. The fraternity and KLC submitted plans for coeducation of DKE House, but Wesleyan found the plans unacceptable and terminated the agreement. The fraternity and KLC brought this action against Wesleyan, claiming that it falsely promised that the plaintiffs would have three years to fully coeducate DKE House and, furthermore, that the coeducation policy was merely a pretext for Wesleyan's acquisition of DKE House. Following a trial, a jury rendered a verdict in favor of the plaintiffs on their claims of promissory estoppel, negligent misrepresentation, violation of CUTPA and tortious interference with KLC's business expectancies and awarded KLC $386,000 in damages. The jury found that the fraternity was entitled to $0 in damages. Subsequently, the trial court ordered the parties to enter into a new standards agreement and that Wesleyan include DKE House as an option in its program housing offering for the fall 2018 semester. The court noted that its order was in the nature of a mandatory injunction and that the purpose of the order was to place the parties in the same position they would have been in had Wesleyan accepted the plaintiffs' plan for coeducation in 2015. Wes-

leyan appeals, claiming that the mandatory injunction orders should be reversed because a court cannot force parties to enter into a contract and because the injunction violates the public policy of allowing private universities to make decisions related to their educational mission and policies. Wesleyan also contends that the judgment in favor of the plaintiffs should be reversed because (1) the plaintiffs' claims are effectively barred by the standards agreement, which governs the parties' entire relationship, (2) Wesleyan's allegedly false promise that the plaintiffs would have three years to fully coeducate DKE House did not modify Wesleyan's right to terminate the standards agreement, and (3) the evidence was insufficient to prove that Wesleyan created the coeducation program as a pretext for acquiring DKE House.

JONATHAN S. METCALF *v.* MICHAEL FITZGERALD et al., SC 20227
Judicial District of Waterbury

Bankruptcy; Federal Preemption; Whether Federal Law Preempts Vexatious Litigation Claim Arising out of Alleged Misconduct Occurring During Bankruptcy Proceedings. The plaintiff brought this vexatious litigation action under both state statute and common law against the defendants, Ion Bank and its employee, Michael Fitzgerald, and against the bank's lawyer and his law firm. The plaintiff alleged that the defendants maliciously and without cause brought an adversary proceeding in his bankruptcy case in which they objected to the general discharge of his debt on the ground that he transferred or concealed property in order to defraud creditors. The trial court dismissed the action for lack of subject matter jurisdiction, finding that the vexatious litigation claim was preempted by federal law in accordance with *Lewis* v. *Chelsea G.C.A. Realty Partnership, L.P.*, 86 Conn. App. 596 (2004), cert. denied, 273 Conn. 909 (2005), because it arose solely from alleged misconduct that took place during bankruptcy proceedings. In *Lewis*, the Appellate Court held that federal law preempts claims of vexatious litigation premised on allegations of the bad faith filing of an adversary proceeding in Bankruptcy Court. The plaintiff appeals from the judgment of dismissal, arguing that *Lewis* was wrongly decided and should be overruled. Specifically, the plaintiff argues that the *Lewis* court improperly limited its analysis to one type of federal preemption, that is, implied field preemption, and failed to address express preemption and conflict preemption. The plaintiff further argues that the *Lewis* court improperly failed to consider that rule 9011 of the Federal Rules of Bankruptcy Procedure, which allows for sanctions in bankruptcy cases, is modeled after rule

11 of the Federal Rules of Civil Procedure and that the official commentary to rule 11 provides that the rule does not preclude a party from initiating an independent action for malicious prosecution or abuse of process. Finally, the plaintiff notes that there is a split among other jurisdictions as to whether claims of malicious prosecution or vexatious litigation stemming out of alleged misconduct occurring during bankruptcy proceedings are preempted by federal law.

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
