SUPREME COURT PENDING CASES

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

R.T. VANDERBILT CO., INC. *v.* HARTFORD ACCIDENT & INDEMNITY CO., et al.,
SC 20000/20001/20003
Judicial District of Waterbury, Complex Litigation Docket

Insurance; Asbestos; Whether Appellate Court Properly Applied Continuous Trigger Theory of Coverage for Asbestos-Related Disease Claims; Whether Appellate Court Properly Applied Unavailability of Insurance Exception to Time on the Risk Rule; Whether Appellate Court Properly Interpreted Pollution and Occupational Disease Exclusions in Policies. The plaintiff manufactured and sold industrial talc beginning in 1948 and ending in 2008. Over the past several decades, thousands of personal injury lawsuits have been brought against the plaintiff across the country that allege that the plaintiff's talc contained asbestos and that exposure to the plaintiff's product caused diseases such as mesothelioma and asbestosis. The plaintiff brought this action seeking a declaratory judgment as to its rights and obligations, and those of thirty insurance companies, as to the costs of defending and indemnifying the plaintiff in the underlying lawsuits. Among the defendants were secondary insurers Mt. McKinley Insurance Company, St. Paul Fire and Marine Insurance Company, and Travelers Casualty and Surety Company. The trial court bifurcated the trial into four phases, and the first two phases were tried to the court and addressed the plaintiff's declaratory judgment claims and related counterclaims and cross claims. After the trial court ruled as to the first two phases, the plaintiff and some of the defendants sought and received permission to appeal the interlocutory judgment pursuant to Practice Book § 61-4, and those parties filed thirteen appeals. The Appellate Court (171 Conn. App. 61) affirmed the trial court's judgment in part and reversed it in part. The Supreme Court granted the plaintiff, Mt. McKinley, St. Paul, and Travelers certification to appeal the Appellate Court's judgment, and the Supreme Court will be considering the following issues in the certified appeals: (1) Did the Appellate Court properly affirm the trial court's adoption of a "continuous trigger" theory of coverage for asbestos-related disease claims and properly affirm the trial court's preclusion of expert testimony on current medical science regarding the actual timing of bodily injury resulting from asbestos-related disease? (2) Did the Appellate Court properly affirm the trial court's adoption of an "unavailability

of insurance" exception to the "time on the risk" rule of contract law, which allows for pro rata allocation of defense costs and indemnity for asbestos-related disease claims? (3) Did the Appellate Court properly interpret the pollution exclusion clauses in some of the policies as applicable only to claims arising from "traditional" environmental pollution and not to those claims arising from asbestos exposure occurring in indoor working environments? (4) Did the Appellate Court properly interpret the occupational disease exclusion clauses in some of the policies as precluding coverage for claims of occupational disease, regardless of whether the claimant was employed by the policyholder or by a third party user of the allegedly harmful product?

ANTHONY GILCHRIST *v.* COMMISSIONER OF CORRECTION, SC 20141
Judicial District of Tolland

Habeas Corpus; Summary Disposition; Whether Habeas Court Properly Dismissed Petition on its own Motion Pursuant to Practice Book § 23-29 Without Affording Petitioner Notice and an Opportunity to be Heard and Without Ruling on Petitioner's Request for Appointment of Counsel. The petitioner was convicted on a plea of guilty of the crime of robbery in the third degree. While representing himself, the petitioner filed a petition for a writ of habeas corpus, claiming that, because his plea bargain had not been followed, the habeas court should allow him to withdraw his guilty plea and order that the criminal charge be vacated or dismissed. The habeas court, sua sponte and without holding a hearing, dismissed the petition for lack of subject matter jurisdiction pursuant to Practice Book § 23-29 (1), explaining that, at the time the petition was filed, the petitioner was no longer in custody for the conviction that he challenged. Section 23-29 (1) provides that "the judicial authority may, at any time, upon its own motion or upon motion of the respondent, dismiss the petition . . . if it determines that . . . the court lacks jurisdiction." The petitioner appealed, claiming that the habeas court's sua sponte dismissal denied him his rights to due process, to assigned counsel, and to notice of—and an opportunity to be heard on—the issue of whether the habeas court had jurisdiction over the petition. The Appellate Court (180 Conn. App. 56) affirmed the habeas court's judgment, finding that the habeas court properly dismissed the petition for lack of jurisdiction where the petitioner did not allege sufficient facts to establish that he was in custody on the challenged conviction at the time he filed the petition. The Appellate Court rejected

the petitioner's claim that the habeas court erred by not conducting a hearing before deciding that it lacked subject matter jurisdiction, ruling that, under the circumstances here, Practice Book § 23-29 did not require the habeas court to grant a hearing prior to dismissing the petition. The Supreme Court granted the petitioner certification to appeal, and it will consider whether the Appellate Court properly affirmed the habeas court's judgment of dismissal where the habeas court took no action on the petitioner's request for counsel and where it did not give the petitioner notice and an opportunity to be heard before dismissing the petition on its own motion and pursuant to Practice Book § 23-29.

KIMBERLY GRAHAM et al. *v.* JANIE R. FRIEDLANDER et al., SC 20243
Judicial District of Stamford-Norwalk at Stamford

Education; Exhaustion of Administrative Remedies; Whether Trial Court Properly Dismissed Negligence Action Brought by Autistic Minor Children for Failure to Exhaust Remedies under Individuals with Disabilities Education Act. The plaintiffs, four minor children diagnosed with autism and their parents, brought this negligence action against the city of Norwalk, the Norwalk board of education, and three of the board's employees. The plaintiffs alleged that the defendants were negligent in failing to investigate the credentials of an unqualified individual who was hired to provide services to autistic children in the Norwalk public school system. The plaintiffs further claimed that the defendants' failure to provide the minor plaintiffs with proper services during a critical time in their intellectual development resulted in the minor plaintiffs suffering irreparable developmental and neurological harm. The defendants moved that the action be dismissed for lack of jurisdiction, alleging that the plaintiffs had failed to exhaust their administrative remedies. The trial court granted the motions and dismissed this action, finding that the plaintiffs had failed to exhaust their administrative remedies under the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. § 1400 et seq., a federal law that protects the right of a child with disabilities to a free appropriate public education (FAPE) and that outlines the administrative procedures to be followed when there is a claim of failure to provide FAPE under the IDEA. The trial court rejected the plaintiffs' argument that they were not required to exhaust their administrative remedies under *Fry* v. *Napoleon Community Schools*, 137 S. Ct. 743 (2017), which held that the IDEA exhaustion requirement does not apply where the crux, or gravamen, of the complaint is something

other than the denial of FAPE. The trial court determined that the plaintiffs' negligence claims were "inexorably linked" to educational services and that the gravamen of the plaintiffs' complaint was that the defendants had denied the minor plaintiffs appropriate educational services. The plaintiffs appeal from the judgment dismissing their action. The Supreme Court will decide whether the trial court properly dismissed the action for failure to exhaust administrative remedies where the plaintiffs argue that the gravamen of their complaint is not the denial of FAPE, and accordingly that their claims were not capable of redress under the IDEA. The plaintiffs also argue that the trial court failed to consider whether it was improbable that the plaintiffs could obtain adequate relief for their harm by pursuing administrative remedies.

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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