

SUPREME COURT PENDING CASES

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

STATE *v.* LEROYA M., SC 20351
Judicial District of New Haven

Criminal; Whether Trial Court Improperly Rejected Defendant’s Affirmative Defense That She Was Not Guilty of Murder by Reason of Mental Disease or Defect. The defendant caused the deaths of her two minor children by giving them sleeping pills and thereafter attempted to commit suicide. A few days later, the police discovered the children’s bodies in the defendant’s home. The defendant was charged with two counts of murder and elected to be tried by a three-judge panel. At trial, the defendant did not contest the fact that she had killed the children. Instead, she asserted the affirmative defense of mental disease or defect pursuant to General Statutes § 53a-13 (a), which provides for an affirmative defense if the defendant “lacked substantial capacity, as a result of mental disease or defect, either to appreciate the wrongfulness of [her] conduct or to control [her] conduct within the requirements of the law” at the time she committed the subject offense. Dr. Paul Amble, a forensic psychiatrist, testified at trial in support of the defendant’s affirmative defense that the defendant had developed a “religious delusion” that killing her children and herself was “God’s plan.” He opined that the defendant “was psychotic at the time she did these acts and [she] was not able to appreciate what she was doing was wrong nor was she able to control her conduct in accordance with the law.” Dr. Catherine Lewis, a forensic psychiatrist, testified for the state and opined that, while the defendant suffers from a “personality disorder with antisocial and borderline features,” she did not see evidence of either “a serious mental disease or defect” or “a psychotic disorder” at the time of the alleged offense. She also disagreed with Dr. Amble’s conclusion that the defendant was acting under the influence of a “religious delusion” when she killed the victims. The trial court concluded that the defendant failed to satisfy her lack of capacity affirmative defense by a preponderance of the evidence, even assuming *arguendo* that she suffered from a mental disease or defect at the time she killed her children. It found in support thereof that Dr. Amble’s opinion “was undermined by his failure to investigate, or adequately explain, evidence that is at variance with that opinion.” The trial court ultimately found the defendant guilty of the charged offenses. The defendant appeals directly from the judgment of conviction to the Supreme Court under General Statutes § 51-199 (b) (3). She claims that the trial court erred in rejecting

her mental disease or defect affirmative defense under § 53a-13 and argues that she presented substantial evidence and expert testimony in support of her affirmative defense, that no rational fact finder could reasonably conclude that she failed to establish her affirmative defense by a preponderance of the evidence, and that the trial court's rejection of Dr. Amble's testimony is not supported by the record.

JOSEPH HALLADAY *v.* COMMISSIONER
OF CORRECTION, SC 20369
Judicial District of New Haven

Habeas; Appellate Jurisdiction; Whether Appellate Court Properly Dismissed Petitioner's Appeal Challenging Discovery Order Compelling Disclosure of His Criminal Defense File for Lack of Final Judgment; Whether Habeas Court Properly Rejected Petitioner's Claim of Privilege in His Criminal Defense File. In 2011, the petitioner pleaded guilty to murder, and the trial court sentenced him to forty years incarceration. In 2013, he brought a habeas action, claiming that his trial attorneys rendered ineffective assistance in myriad ways. The respondent, the Commissioner of Correction, filed a motion for production of the petitioner's criminal defense and investigative files (defense files) on the ground that the petitioner had waived the attorney-client privilege as to the defense files by raising an ineffective assistance of counsel claim in the petition. The habeas court, *Newsom, J.*, denied the motion, concluding that the respondent's request was overbroad and noting that, although the petitioner may raise claims that would require the disclosure of certain portions of the defense files, production of the complete files would expose privileged materials that are unnecessary for the respondent to respond to the petitioner's ineffective assistance claim. After the case was assigned to a new judge for trial, the respondent filed a second motion for production seeking any materials contained in the defense files that relate to the ineffective assistance of counsel claim. The habeas court, *Blue, J.*, granted the motion and ordered the petitioner to produce copies of any related materials from the defense files and to produce a privilege log identifying any undisclosed materials that he contends are unrelated to his claim. The petitioner filed a petition for certification to appeal from the discovery order, which the habeas court denied. The petitioner appealed to the Appellate Court, and the respondent moved to dismiss the appeal for lack of a final judgment, claiming that the discovery order is an interlocutory order that is not immediately appealable under *State v. Curcio*, 191 Conn. 27, 31 (1983). Under *Curcio*, an interlocutory order is appealable in two circum-

stances: (1) where the order terminates a separate and distinct proceeding or (2) where the order so concludes the rights of the parties that further proceedings cannot affect them. The Appellate Court dismissed the appeal for lack of a final judgment, and the Supreme Court granted the petitioner certification to appeal. The Supreme Court will decide whether the Appellate Court properly dismissed the petitioner's appeal for lack of a final judgment, and if not, whether the habeas court properly rejected the petitioner's claim of privilege in his attorney's case file. The petitioner claims that the habeas court's order satisfies both prongs of the *Curcio* test, in that the order terminated a separate and distinct proceeding concerning his property rights in the defense files and so concluded his right to maintain the privilege in the files. The respondent argues in turn that the discovery order fails to satisfy either prong of the *Curcio* test because it is intertwined with the underlying ineffective assistance claim and because further proceedings could affect the parties' rights where the habeas court ordered the petitioner to create a privilege log identifying those portions of the file that he claims are privileged.

CECILIA PFISTER et al. v. MADISON BEACH
HOTEL, LLC, SC 20478
Judicial District of New Haven

Zoning; Permanent Injunction; Whether Defendants' Use of Neighboring Municipal Park Was Expansion of Preexisting Nonconforming Use of Defendants' Property. The defendants own and operate a hotel on property in a residential zone in the town of Madison (town). Because the hotel predates the enactment of the town zoning regulations, the hotel and its restaurant are permitted as preexisting nonconforming uses. Immediately next to the hotel property is a grassy strip of land that is part of West Wharf Beach Park (Grassy Strip), which the town has owned and used as a park since 1896. Like the hotel property, the park is permitted in the residential zone as a preexisting nonconforming use. As a park, the Grassy Strip may be used for "active or passive recreational purposes" under the zoning regulations. In 2012, the hotel, in accordance with town rules, began using the Grassy Strip to sponsor a free annual summer concert series that runs one night each week for about ten weeks. The hotel hires the bands, runs the concerts using its own electricity, pays the town for the extra police detail, and advertises the event. Although the concerts take place on the Grassy Strip, the hotel allows attendees to watch the event from its property and to purchase food and drinks there. As a result, approximately 200 attendees traverse both properties

during the concerts. The plaintiffs, neighboring property owners aggrieved by the noise and traffic on concert nights, commenced this action for a permanent injunction prohibiting the concerts. The plaintiffs claim that the defendants are in violation of the town's zoning regulations because the concerts amount to an expansion of the defendants' preexisting nonconforming use of the hotel property. The defendants contend that any restrictions that apply to their use of the hotel property do not apply to the Grassy Strip and that concerts are a permissible use of the Grassy Strip under the zoning regulations. The trial court agreed with the plaintiffs and enjoined the defendants from holding the summer concert series. It found that the concerts are fundamentally commercial in nature and "functionally inseparable" from the hotel's business operations. As a result, the court concluded that the concerts were a prohibited expansion of the hotel's preexisting nonconforming use of the hotel property. The defendants appealed to the Appellate Court (197 Conn. App. 326), which reversed the judgment. That court reasoned that neither the restrictions on the hotel property nor the commercial benefits that the hotel derived from the concerts were relevant to the defendants' use of the Grassy Strip. It was unpersuaded by the plaintiffs' argument that, because the park had not been used to host concerts prior to the enactment of the town's zoning regulations, the summer concerts were not a preexisting nonconforming use. The court determined that the preexisting nonconforming use of the Grassy Strip was as a park and that, under the current zoning regulations regarding parks, the summer concerts were permissible as an "active or passive recreational" activity. The plaintiffs, on the granting of certification, appealed to the Supreme Court. They claim that the Appellate Court improperly applied plenary review to the trial court's findings that the concerts span both parcels and are commercial in nature, improperly rejected their claim that the actual use of the park prior to the enactment of the zoning regulations determines its nonconforming use, and improperly concluded that the concerts were a permissible use of a park under the regulations.

CENTERPLAN CONSTRUCTION COMPANY, LLC, et al. v.
CITY OF HARTFORD, SC 20526
Judicial District of Hartford

Contracts; Whether Trial Court Properly Concluded That Builder and Developer Plaintiffs Were Responsible for Architect's Acts and Omissions; Whether Trial Court Erred in Treating Plaintiffs as Single Entity; Whether Trial Court Erred in Failing to Instruct Jury to Consider Whether Defendant City's Actions

Resulted in “Concurrent Delay”; Whether Trial Court Properly Instructed Jury on City’s Counterclaim for Liquidated Damages.

The defendant city of Hartford (City) entered into an agreement (Architect Agreement) with an architect firm, Pendulum Studio II, LLC, to design Dunkin’ Donuts Park, the home stadium for the Hartford Yard Goats minor league baseball team. The City thereafter entered into a “Developer Agreement” with plaintiff DoNo Hartford, LLC, a developer, to construct the stadium. DoNo in turn entered into a “Builder Agreement” with a builder, plaintiff Centerplan Construction Company, LLC. Subsequently, the plaintiffs filed a “Notice of Claim” claiming, inter alia, that the City’s failure to timely assign the Architect Agreement had likely delayed the construction of the stadium. In order to resolve the dispute, the City and DoNo entered into a new agreement, entitled the “Term Sheet,” which, inter alia, established a new substantial completion deadline for the stadium of May 17, 2016. The City then issued a “change order” increasing the maximum guaranteed price for the construction of the stadium by \$7,573,079. After the plaintiffs failed to complete the construction of the stadium by the new deadline, the City terminated the plaintiffs from the project. The plaintiffs brought this action, alleging breach of contract and breach of the implied covenant of good faith and fair dealing, and the City filed a counterclaim. After trial, the jury returned a verdict in favor of the City, finding that the plaintiffs were responsible for the stadium not being completed by the May 17, 2016 deadline, and the jury awarded the City \$335,000 in liquidated damages. The plaintiffs appeal and claim that the trial court erred in deciding as a matter of law that, under the parties’ agreements, they – and not the City – “controlled” the architect firm and were therefore responsible for its mistakes in and changes to the design of the stadium. The plaintiffs also claim that the trial court improperly concluded that, under the terms of the Term Sheet, the City was not required to (1) give them notice, (2) provide them with an opportunity to cure any default, and (3) participate in mediation with them. Alternatively, noting that Centerplan was not a party to the Term Sheet, the plaintiffs claim that the court improperly treated DoNo and Centerplan as one entity when it determined that the City had no obligation to give Centerplan notice and an opportunity to cure. In addition, the plaintiffs claim that the court erred in refusing to instruct the jury that, if it found that there was concurrent delay by virtue of the City’s acts or omissions, Centerplan would be entitled to an extension of time and DoNo could not be in default. Finally, the plaintiffs claim that the trial court erred in refusing to give their requested jury charge that would have allowed the jury to determine the value of the benefits conferred by the plaintiffs to the City and offset that amount against the City’s liquidated damages award.

JOANN RICCIO, EXECUTRIX (ESTATE OF THERESA RICCIO) *v.*
BRISTOL HOSPITAL INC., SC 20529
Judicial District of New Britain

Accidental Failure of Suit Statute; General Statutes § 52-592; Whether Plaintiff Could Bring Second Medical Malpractice Action under Accidental Failure of Suit Statute After First Action Was Dismissed for Failure to Attach Sufficient Written Opinion From Similar Health Care Provider. Theresa Riccio died while receiving care at the defendant hospital, and her estate brought a wrongful death action against the defendant. The plaintiff attached to the complaint two written opinions of similar health care providers stating that there appeared to be evidence of medical negligence, as required by General Statutes § 52-190a. The defendant moved to dismiss the action on the ground that the written opinions were legally insufficient because neither opinion disclosed the author's credentials and qualifications. The trial court granted the motion to dismiss and cited *Bell v. Hospital of Saint Raphael*, 133 Conn. App. 548 (2012), and *Lucisano v. Bisson*, 132 Conn. App. 549 (2011), in which the Appellate Court held that § 52-190a mandates that the written opinion include the author's credentials and qualifications. The plaintiff then brought a second action against the defendant pursuant to the accidental failure of suit statute, General Statutes § 52-592. *Per Plante v. Charlotte Hungerford Hospital*, 300 Conn. 33 (2011), if a medical malpractice action is dismissed for failure to file a sufficient written opinion under § 52-190a, a plaintiff may commence an otherwise time barred new action under the "matter of form" provision of § 52-592 when the failure in the first action resulted from mistake, inadvertence or excusable neglect and not egregious conduct or gross negligence by the plaintiff or his attorney. The plaintiff alleged in her complaint that the first action had been dismissed as a matter of form due to mistake, inadvertence or excusable neglect in that she failed to set forth the authors' credentials in their written opinions. The defendant moved to dismiss the action as time barred, claiming that the plaintiff's action cannot be saved under § 52-592 because the failure in the first action was the result of her attorney's gross negligence. After conducting an evidentiary hearing, the trial court found that the failure in the first action was not due to "mistake, inadvertence, or excusable neglect" but rather was due to gross negligence on the part of the plaintiff's attorney in failing to read and comply with the relevant Appellate Court authority. Accordingly, the court held that the plaintiff could not avail herself of § 52-592 and dismissed the action. The plaintiff filed this appeal in the Appellate Court, and it was subsequently transferred to the Supreme Court. The Supreme Court will decide whether the trial court

properly found that the failure to include the health care providers' credentials in their written opinions constituted gross negligence or egregious conduct where the plaintiff argues that the trial court improperly based its decision on the maxim that ignorance of the law is not an excuse.

STATE *v.* GREGORY JOHN POMPEI, SC 20530
Judicial District of Hartford at G.A. 14

Criminal; Search and Seizure; Whether Trial Court Properly Denied Defendant's Motion to Suppress Statements to and Observations Made by Police on Ground that Parking of Police Vehicle Behind Defendant's Vehicle was an Illegal Seizure. On October 5, 2017, Manchester police officer John Loud received a report of a potentially unconscious man in a white Ford Focus parked in the lot of a convenience store. Loud arrived at the convenience store, parked his police vehicle behind the Focus, and approached the Focus, where he saw the defendant either asleep or unconscious in the driver's seat. He knocked on the driver's side window, and the defendant awoke. As they spoke, Loud observed the keys in the ignition, the smell of alcohol, and the defendant's disoriented behavior. The defendant exited the vehicle to get his identification from the trunk, at which time other officers arrived on the scene. After the defendant repeatedly attempted to walk away from the officers, he was put in handcuffs and taken to the Manchester police station. He was later arrested and charged with operating a motor vehicle under the influence and interfering with a police officer. The defendant filed a motion to suppress all of his statements and all of the police officers' observations of him made before he was read his *Miranda* rights at the police station. The defendant argued that Loud's parking of the police vehicle behind his vehicle in the convenience store lot constituted a seizure in violation of his fourth amendment rights because Loud did not have a reasonable and articulable suspicion that he was engaged in illegal conduct at the time. The trial court denied the motion to suppress and held that the defendant was not seized when Loud parked his police vehicle behind the defendant's vehicle because Loud was performing a well-being check, not conducting an investigatory stop. The trial court noted that Loud was acting pursuant to the report of an unconscious man in a parked car, that he parked behind the defendant for security reasons, and that he did not use his police lights or make a display of force towards the defendant when he approached the defendant's vehicle. The trial court further concluded that the encounter became a seizure when the defendant woke up and began to interact with Loud but

that, given the surrounding circumstances, Loud had a reasonable and articulable suspicion that the defendant had been operating his vehicle under the influence. The case was tried to a jury, which found the defendant not guilty of operating under the influence but guilty of interfering with an officer. The defendant filed this appeal from his conviction in the Appellate Court, and it was subsequently transferred to the Supreme Court. The Supreme Court will decide whether the trial court properly denied the defendant's motion to suppress. The defendant argues that he was seized when Loud parked behind his vehicle under *State v. Edmonds*, 323 Conn. 34 (2016), where the Supreme Court determined that the defendant there was seized for fourth amendment purposes when multiple police officers converged on him in a parking lot and told him to stop when he attempted to walk away.

JAMES G. GALLAGHER *v.* TOWN OF FAIRFIELD et al., SC 20533
Judicial District of Fairfield

Contracts; Whether Defendant Town Is Required to Reimburse Plaintiff Retiree for Medicare Premiums and Whether Plaintiff Is Entitled to Same Health Insurance as Defendant's Active Employees under Collective Bargaining Agreement in Effect When He Retired. The plaintiff was previously employed as a police officer by the defendant town of Fairfield. On October 9, 1986, his disability retirement request was approved. The plaintiff was covered at the time by a police union collective bargaining agreement providing in relevant part that "employees who retire under the disability provisions of the retirement plan and their enrolled dependents shall also be entitled to town paid health insurance coverage." The defendant town accordingly paid the premiums of the plaintiff and his wife for the health insurance coverages that were in effect at the time of his retirement. The defendant town entered into a new collective bargaining agreement with its police union in 2010, which contained a new provision stating that "employees eligible for Social Security Medicare Benefits shall be required to participate in Medicare Part A and B Plans upon attaining eligibility." The plaintiff became eligible for Medicare when he turned sixty-five years old in 2016, and he was subsequently moved to a Medicare Supplement Plan with premiums that he was required to pay. The defendant town continued to pay for health insurance coverage but did not reimburse the plaintiff for his Medicare premiums. The plaintiff brought this contract action against the defendants—the town, its personnel department, and its Police and Retirement Board—seeking in relevant part monetary damages

and “an order that the defendants restore to the plaintiff the medical and health coverage as provided” in the collective bargaining agreement in effect when he retired. The trial court rejected the plaintiff’s claim that he was entitled to the same health insurance coverage in effect on the date of his retirement and that his benefits have been reduced by virtue of his mandated Medicare enrollment, finding that he and his wife have not experienced a decrease in benefits. The trial court agreed with the plaintiff, however, that he was entitled to reimbursement for his Medicare premiums under the collective bargaining agreement in effect when he retired and determined that the agreement provision regarding “town paid health insurance coverage” could not be construed to exclude the plaintiff’s Medicare premiums. The trial court accordingly awarded damages to the plaintiff that corresponded to his past Medicare premiums and ordered the defendant town to reimburse the plaintiff for his present and future Medicare premiums. The defendants appealed and the plaintiff cross appealed to the Appellate Court, and the Supreme Court transferred the matter to itself thereafter. The Supreme Court will decide in the defendants’ appeal whether the trial court properly found that the defendant town was required to reimburse the plaintiff for Medicare premiums under the collective bargaining agreement in effect when he retired. It will further decide in the plaintiff’s cross appeal whether the trial court properly held that he was not entitled to the same health insurance coverage as the town’s active employees under that collective bargaining agreement and that he was not entitled to damages representing amounts (1) he reimbursed to Medicare from a personal injury settlement and (2) not covered by Medicare.

TORO CREDIT CO. *v.* BETTY ANNE ZEYTOONJIAN,
AS TRUSTEE, et al., SC 20534
Judicial District of Tolland

Foreclosure; Choice of Remedies Provision in Mortgage Agreement; Whether Trial Court Erred in Ordering Foreclosure by Sale When Strict Foreclosure Would Satisfy Underlying Debt. The plaintiff is the financing arm of a parent company that sells outdoor power equipment through various independently-owned dealers, including the dealership owned by the defendants. In 2003, the defendants’ dealership restructured \$14 million in debt that it owed the plaintiff and, as part of that transaction, the defendants gave the plaintiff a mortgage on two parcels in Enfield to secure a \$1,662,500 note. The mortgage contains a choice of remedies provision that provides that the plaintiff may pursue a foreclosure by sale in the event of a default.

The parties agree that the defendants defaulted on their obligations under the note and that the plaintiff has the right to foreclose. They also agree that the fair market values of the two parcels are \$950,000 and about \$850,000. The parties dispute, however, whether the appropriate remedy is to render a judgment of strict foreclosure or foreclosure by sale. The principal amount of the unpaid debt is \$756,785.07, and the plaintiff sought, as of April 5, 2019, an additional \$67,313.22 in interest, \$9750 for an appraisal and the appraiser's testimony, and \$68,598.83 in attorney's fees, for a total debt of \$902,447.12. Both parties' appraisers testified that it would take at least one year to market and sell the parcels. In light of that testimony, the court reasoned that if it ordered a strict foreclosure of the one parcel whose value exceeds the debt, then the costs incurred by the plaintiff during the time it took to market the property would make it less likely that the plaintiff would be made whole. The court determined that, instead, it would be more equitable to order a foreclosure by sale in which the defendants could choose whether to sell both parcels together or to sell one parcel initially. If they chose to sell one parcel first and the sale was insufficient to satisfy the debt, then the second parcel would be sold to satisfy the outstanding amount due. The defendants appealed the judgment of foreclosure by sale to the Appellate Court, and the Supreme Court transferred the appeal to itself. The defendants claim on appeal that the trial court erred in ordering a foreclosure by sale when the \$950,000 fair market value of one parcel "materially exceeded" the total amount of the debt on April 5, 2019. They argue that the trial court erred by taking into account the plaintiff's postjudgment costs related to the time that it would take to market and sell the property. The defendants also claim that the trial court improperly overlooked the plaintiff's failure to file a motion for a judgment of foreclosure by sale, as required by General Statutes § 49-24, and that the choice of remedy provision in the parties' mortgage is invalid because it is inconsistent with state foreclosure 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.

*Jessie Opinion
Chief Staff Attorney*
