

## SUPREME COURT PENDING CASES

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

STATE *v.* ROBERT R., SC 20355  
*Judicial District of Fairfield*

**Criminal; Whether Evidence was Sufficient to Prove that Defendant Committed Sexual Assault in the First Degree; Whether Trial Court Properly Admitted Testimony from Expert Witness Regarding Child Sexual Abuse; Whether Preventing Defense Counsel from Arguing that Victim Planted Evidence Deprived Defendant of Sixth Amendment Right to Present Complete Defense.** The victim alleged that, beginning when she was thirteen years old, the defendant sexually assaulted her on multiple occasions. She alleged that in 2016, when she was eighteen years old, the defendant forced his way into her family's house while she was alone and forced himself on her. On the basis of those allegations, the state charged the defendant with one count of sexual assault in the first degree, one count of sexual assault in the second degree, and three counts of risk of injury to a child. During his testimony at trial, the defendant denied the victim's allegations but claimed that he had consensual sex with the victim on two separate occasions in 2016. The jury found the defendant guilty of sexual assault in the first degree but acquitted him of the remaining charges, and the trial court sentenced him to twenty years of incarceration. The defendant appeals. On appeal, the defendant claims that the state failed to prove that he committed sexual assault in the first degree because no reasonable jury could have credited the victim's testimony about his alleged use of force. He argues that the victim's testimony was internally inconsistent and contradicted by the lack of any physical evidence. The defendant also claims that the trial court abused its discretion in allowing a pediatric nurse practitioner to testify as an expert witness regarding child sexual abuse when the victim was eighteen years old at the time of the alleged 2016 assault. Finally, he claims that the trial court deprived him of his sixth amendment right to present a complete defense by precluding defense counsel from arguing to the jury that the victim had planted physical evidence in an effort to substantiate her false allegations against the defendant.

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

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STATE *v.* DAMARQUIS GRAY, SC 20368*Judicial District of New Haven*

**Felony Murder; General Statutes §§ 54-82j and 54-82k; Whether Defendant's Right to Due Process Was Violated When Witnesses Were Incarcerated Pursuant to Material Witness Warrants; Whether Trial Court Erred in Admitting Grand Jury Transcripts Into Evidence as Prior Inconsistent Statements Under *Whelan*.** Daryl Johnson was upset because his sister, Alexis, was involved in a relationship with the victim, Durrell Law. Johnson wanted to fight Law, and, on January 20, 2014, Johnson directed Alexis to call Law and arrange for him to meet her at a certain housing project where there was an absence of security cameras. Alexis and her friend Chyna Wright met Law at a bus stop. Those three individuals then met the defendant, who had been at his house with Delano Lawrence and Anton Hall, before proceeding to the housing project. The defendant took a shortcut, and, at some point, he was given a handgun. When Alexis, Wright and Law arrived, Johnson and his associate, Erika Gomez, were already waiting at the housing project. As the three got closer to Johnson, the defendant and several of his associates arrived behind them and began to follow the group. The defendant pointed a gun at Law and demanded that he empty his pockets. Law struck the defendant, turned, and ran away when he was then shot from behind. He was later pronounced dead at the hospital. The witnesses to the shooting were generally uncooperative, and the prosecutor applied for material witness warrants under General Statutes § 54-82j, which authorizes the trial court to issue a warrant for a material witness who the prosecutor believes is likely to avoid testifying. The prosecutor applied for material witness warrants with respect to Gomez, Hall and Wright, who were arrested and incarcerated overnight pursuant to General Statutes § 54-82k. None of those witnesses had a prior criminal record, one witness was five months pregnant at the time, and another witness was kept from her minor child overnight. Following their testimony, each of the witnesses was released, and the jury ultimately found the defendant guilty of, inter alia, felony murder. The defendant appeals to the Supreme Court under General Statutes § 51-199 (b) (3), claiming that the trial court violated his federal due process rights by incarcerating material witnesses in a way that risked coercing them into testifying favorably for the state. He specifically argues that the trial court implied that the witnesses were being held because they claimed not to remember the shooting and, as a result, the witnesses could have understood the court's remarks as pressuring them into testifying favorably for the state. In addition to claiming reversible

error, the defendant urges the Supreme Court to direct trial courts to balance the state's interest in the testimony against the rights of defendants and witnesses such that a material witness is only incarcerated if a less restrictive method of ensuring his or her presence at trial is not available. Furthermore, the defendant claims that the trial court abused its discretion by allowing the state to read lengthy grand jury transcripts into evidence as prior inconsistent statements under *State v. Whelan* (200 Conn. 743). The state counters that the defendant's claims are not reviewable on appeal and, moreover, that they fail on the merits.

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STATE *v.* JUAN J., SC 20406  
*Judicial District of New Britain*

**Criminal; Whether Trial Court Erred in Admitting Evidence of Defendant's Uncharged Misconduct; Whether Trial Court Committed Plain Error in Admitting Videotaped Forensic Interviews of Victim Into Evidence; Whether Trial Court Committed Plain Error in Admitting Constancy of Accusation Testimony.** The defendant was charged with sexual assault and risk of injury to a minor in connection with allegations that he had engaged in sexual conduct with the minor victim on two occasions. At trial, the defendant moved to preclude the state from introducing evidence of his uncharged misconduct, specifically the victim's testimony that the defendant sexually assaulted her on other occasions, pursuant to Connecticut Code of Evidence § 4-5 (a), which prohibits the introduction of uncharged misconduct evidence to prove "bad character, propensity, or criminal tendencies." Subsection (c) of § 4-5 sets forth exceptions to the general prohibition on the admission of uncharged misconduct evidence in § 4-5 (a) and provides that such evidence is admissible to prove, inter alia, "intent" or "absence of mistake or accident." The trial court denied the defendant's motion, ruling that the uncharged sexual misconduct evidence was admissible under § 4-5 (c) to prove the defendant's "intent" to commit the charged crimes and/or to show an "absence of mistake or accident" and that, under the circumstances, its probative value was not outweighed by its prejudicial effect. The defendant also moved to exclude the admission of two videotaped forensic interviews of the victim conducted by Lisa Murphy-Cipolla, a clinical services coordinator at a family advocacy center, on the ground that they contained inadmissible hearsay. In those interviews, the victim disclosed additional incidents of sexual assaults by the defendant. In response, the state made an offer of proof in which Murphy-Cipolla testified that

part of the purpose of the interviews was so she could “make necessary recommendations for a medical exam and/or therapy depending on what was disclosed in the interview.” The defendant thereafter withdrew his objection to the admission of the interviews. Nevertheless, the court found that the interviews were admissible under the medical treatment exception to the hearsay rule set forth in Connecticut Code of Evidence § 8-3 (5). The defendant was convicted, and he appeals directly to the Supreme Court under General Statutes § 51-199 (b) (3). He claims that the trial court abused its discretion in admitting the uncharged sexual misconduct evidence. He argues in support thereof that § 4-5 (c) did not apply because the evidence was not relevant to prove “intent” or “absence of mistake or accident” where his defense was that the sexual assaults never occurred and where the charged offenses were general intent crimes. In addition, the defendant claims that the trial court committed plain error in admitting the victim’s videotaped forensic interviews into evidence under the medical treatment exception to the hearsay rule because the interviews were conducted solely for investigative and not medical purposes. Finally, he claims that the trial court committed plain error in allowing the victim’s cousin and a school social worker to testify as constancy of accusation witnesses and argues that neither witness’s testimony sufficiently connected the alleged disclosure to either of the two pending charges.

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

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WILLIE A. SAUNDERS *v.* COMMISSIONER OF  
CORRECTION, SC 20430  
*Judicial District of Tolland*

**Habeas; Procedural Default; Competency; Whether Doctrine of Procedural Default Applies to Competency Claims; Whether Petitioner’s Pleadings Failed to Allege Sufficient Cause and Prejudice to Overcome Procedural Default.** The petitioner was convicted of sexual assault in the first degree and risk of injury to a child. He filed a two count habeas petition alleging due process violations under the federal and state constitutions in that he had been incompetent to be prosecuted and stand trial and that no competency evaluation had been requested during his criminal trial in violation of General Statutes § 54-56d. The petitioner alleged that he suffers from severe intellectual disabilities in count one and that he has a history of significant physiological and mental health afflictions in count two.

The respondent filed a return denying the allegations and raising a special defense of procedural default on the ground that the petitioner had not raised his competency claims during his criminal trial or on direct appeal. The respondent also argued that the petitioner could not allege sufficient cause and prejudice to overcome the procedural default. The petitioner filed a reply arguing that his claims were not subject to procedural default, that he could not have raised them earlier due to his developmentally disabled status, and that he nonetheless could allege sufficient cause and prejudice. The respondent thereafter filed a motion to dismiss the petition on procedural default grounds, which the habeas court granted. The petitioner appealed to the Appellate Court (194 Conn. App. 473), which affirmed the habeas court's judgment. The Appellate Court acknowledged federal precedent providing that it is contradictory that a defendant who may be incompetent may waive his right to a competency determination. The court also noted, however, the distinction between waiver and procedural default and determined the application of the procedural default doctrine to competency claims promotes the doctrine's objectives of finality of judgments and judicial economy "by forcing the defendant to litigate all of his claims together, as quickly after trial as the docket will allow, and while the attention of the appellate court is focused on his case." The court further posited that the promotion of these objectives outweighed the minimal risk of convicting and sentencing a truly incompetent person without making a competency determination or otherwise allowing competency based challenges during his or her criminal trial. After concluding that procedural default applied to the petitioner's competency claims, the court held that the petitioner had failed to establish sufficient cause and prejudice to overcome the procedural default. It determined that the petitioner's reply, with its cursory references to the petition, was deficient and that his alleged incompetency was an internal rather than external impediment to his defense that could not serve as cause to overcome the procedural default. The petitioner has been granted certification to appeal, and the Supreme Court will decide whether the Appellate Court correctly concluded that the doctrine of procedural default applies to competency claims and that the petitioner's pleadings failed to allege sufficient cause and prejudice to overcome a procedural default.

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

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STATE *v.* GERJUAN RAINER TYUS, SC 20462  
*Judicial District of New London*

**Criminal; Whether Murder Cases Properly Joined for Trial; Whether Right to Confrontation Violated by Testimony of Substitute Firearms Examiner Where Primary Examiner Unavailable; Whether Limiting Instruction on Substitute Examiner's Testimony Was Required; Whether Fourth Amendment Rights Violated When Police Obtained Cell Site Location Information without Warrant.** The defendant and Darius Armadore were convicted of murder in connection with the shooting death of Todd Thomas outside of Ernie's Café in New London. The defendant appealed, and the Appellate Court (184 Conn. App. 669) affirmed the conviction. The Appellate Court rejected the defendant's claim that his case was improperly joined for trial with Armadore's case. The Appellate Court found that, because both cases arose from the same incident, virtually all of the state's evidence against the two defendants would have been admissible against either of them if they had been tried separately. The Appellate Court also noted that their defenses were not antagonistic and that each was the other's principal alibi witness. The Appellate Court, moreover, disagreed with the defendant that, if they had been tried separately, a statement made by Armadore to his girlfriend that he shot someone on the day of Thomas' killing would not have been admissible against the defendant under the coconspirator exception to the hearsay rule in the absence of a conspiracy charge. The Appellate Court also rejected the defendant's claim that the trial court violated his right to confrontation by permitting the state's firearms examiner, James Stephenson, to testify regarding the firearms evidence in the case because his opinions were based on the findings and conclusions of the prior firearms examiner, Gerald Petillo, who died before trial. The Appellate Court found that, although Stephenson reviewed Petillo's report, the report was not admitted into evidence and that Stephenson conducted his own physical examination of the evidence and came to his own conclusions. The Appellate Court additionally rejected the defendant's claim that the trial court erred in denying his request for a limiting instruction to the jury regarding Stephenson's testimony. Rather, the Appellate Court found that, although the instruction given to the jury did not specifically highlight Stephenson's testimony as requested by the defendant, there was no substantive difference between the instruction given to the jury and the instruction requested by the defendant. The Appellate Court also found that the instruction given to the jury properly advised it as to its exclusive role in assessing the credibility of expert witnesses and determining the weight to be given

to expert testimony. The defendant filed a petition for certification to appeal, which the Supreme Court granted as to the questions of whether the Appellate Court properly concluded that the defendant and Armadore's cases were properly joined for trial, that the defendant's right to confrontation was not violated by Stephenson's testimony, and that the trial court properly refused to give a limiting instruction concerning Stephenson's testimony. The Supreme Court also granted certification to appeal on the question of whether, pursuant to *Carpenter v. United States*, 138 S. Ct. 2206 (2018), the defendant's fourth amendment rights were violated when the police obtained his cell phone records, including his cell site location information, without a warrant.

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STATE *v.* A.B., SC 20471  
*Judicial District of Ansonia-Milford*

**Criminal; Whether Trial Court Properly Dismissed Charge Against Out-of-State Resident Defendant on Ground That State Failed to Execute Arrest Warrant Without Unreasonable Delay.**

In 2009, the police seized two computers from the defendant's residence during the execution of a search warrant. The defendant thereafter voluntarily signed a sworn statement admitting to possessing child pornography. He moved to California in 2011. In 2013, after the state forensic lab confirmed that the computers contained child pornography, the defendant was charged with possession of child pornography, and an arrest warrant was issued on May 22, 2013. The defendant was not arrested in California, however, until March 15, 2018. He filed a motion to dismiss, claiming that the prosecution was barred by the five-year statute of limitations set forth in General Statutes (Rev. to 2009) § 54-193 (b). Specifically, he argued that, although the arrest warrant was issued within the limitations period of § 54-193 (b), the limitations period was not tolled under *State v. Crawford*, 202 Conn. 443 (1987), because the warrant was not executed "without unreasonable delay." In response, the state argued the limitations period had been tolled under § 54-193 (c) because the defendant had "fled" from Connecticut, citing *State v. Ward*, 306 Conn. 698 (2012). In *Ward*, the Supreme Court held that § 54-193 (c) "may toll the statute of limitations when a defendant absents himself from the jurisdiction with reason to believe that an investigation may ensue as the result of his actions." The trial court disagreed and concluded in accordance with *Roger B. v. Commissioner of Correction*, 190 Conn. App. 817, cert. denied, 333 Conn. 929 (2019), that § 54-193 (c) was irrelevant because the arrest warrant was issued within the limitations period and that the dispositive question therefore was whether the warrant was executed without

unreasonable delay under *Crawford*. The court answered that question in the affirmative, noting that the state provided no explanation for its failure to execute the warrant for five years despite knowing the defendant's California address during that time. The court ruled in the alternative that, even if § 54-193 (c) applied, the state could not prevail on its tolling argument because the defendant knew an investigation was ongoing when he moved to California and therefore had not "fled" within the meaning of the statute. The state appealed to the Appellate Court, and the Supreme Court granted the state's motion to transfer the case to itself. The state claims on appeal that the trial court erred in concluding that the statute of limitations was not tolled when the defendant fled from and resided out of state. It argues that, notwithstanding *Roger B., Ward* and not *Crawford* applies when a suspect flees the state for purposes of determining whether § 54-193 (c) indefinitely tolls the limitations period of § 54-193 (b). The state also argues that, under *Ward*, a suspect flees the state within the meaning of § 54-193 (c) not only when he believes that an investigation might ensue but also when, as here, he knows that an investigation has begun. The state accordingly takes the position that the trial court erroneously dismissed the action where the limitations period of § 54-193 (b) was tolled indefinitely under § 54-193 (c) because the defendant had "fled" to California under the statute.

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JERMAINE WOODS *v.* COMMISSIONER OF CORRECTION, SC 20487

*Judicial District of Tolland*

**Habeas; Whether Appellate Court Correctly Concluded that Petition for Writ of Habeas Corpus Filed by Self-Represented Party Could Not Be Construed as Raising Ineffective Assistance of Counsel Claim.** The petitioner was charged with murder. His first trial resulted in a mistrial. The petitioner was retried and convicted of murder. The petitioner filed a habeas petition alleging that his trial counsel was ineffective for failing to prepare an adequate diminished capacity defense. The habeas court granted the petition and ordered a new trial. After the petitioner's third criminal trial, a three judge panel convicted him of murder and sentenced him to fifty years imprisonment. The petitioner filed a second habeas petition alleging various claims of ineffective assistance of counsel during his third criminal trial, including a claim that trial counsel failed to timely notify and adequately prepare his expert witness, psychiatrist John Felber, to testify. The habeas court denied the second habeas petition. The petitioner subsequently filed the present third habeas petition alleging that his sentence is illegal because evidence of his diminished capacity



was not presented at trial. The habeas court dismissed the claim, finding that it had been adjudicated previously at his third criminal and second habeas trials and, therefore, was barred by the doctrines of res judicata and collateral estoppel. The petitioner appealed, claiming that the habeas court improperly dismissed his claim because it failed to construe his allegations broadly as pleading a claim of ineffective assistance of his second habeas counsel. The Appellate Court (197 Conn. App. 597) affirmed, holding that even under the most generous reading of the petitioner's allegations, his third habeas petition could not be construed to allege a claim of ineffective assistance by his second habeas counsel. The Appellate Court noted that the petitioner alleged in his third habeas petition that (1) his conviction is illegal because significant evidence of his diminished capacity could have changed the outcome of his case if it had been presented to the triers of fact; (2) his first habeas corpus petition was granted because of the testimony of Dr. Felber, but the triers of fact never got to hear that testimony; and (3) three other witnesses testified previously as to his diminished capacity, but their testimony was not heard by the triers of fact. The Appellate Court determined that, because the three other witnesses testified at the petitioner's second habeas trial, the triers of fact to which he referred in the third habeas petition must refer to the three judge panel that presided over his third criminal trial. The Appellate Court concluded, therefore, that on the basis of its construction of the pleadings, there was no allegation that reasonably could be construed as a reference, either directly or indirectly, to the petitioner's second habeas counsel. The petitioner sought certification to appeal, which the Supreme Court granted as to the issue of whether the Appellate Court correctly concluded that the third petition for writ of habeas corpus, which the petitioner filed in a self-represented capacity, did not raise a claim of ineffective assistance of counsel with respect to his second habeas trial.

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U.S. BANK NATIONAL ASSOCIATION, AS TRUSTEE *v.*  
MARGIT MADISON et al., SC 20493  
*Judicial District of New Haven*

**Foreclosure; Whether Defendant Did Not Have Standing in Foreclosure Action to Raise Defense Not Identified as Bankruptcy Estate Asset in Schedule of Assets Filed in Bankruptcy Action Adjudicated While Foreclosure Action Was Pending.** The plaintiff commenced the present foreclosure action in 2017 against the defendant and Eric Demander, Jr., who is now deceased. The plaintiff alleged that Demander had executed a mortgage on the subject

property in favor on the plaintiff's predecessor in interest in 2007, that the defendant was the owner of record of the property in 2010, and that the mortgage and note evidencing the underlying debt were in default due to nonpayment starting in 2016. The trial court rendered a judgment of strict foreclosure. The defendant thereafter filed notice of her pending Chapter 7 bankruptcy petition, which automatically stayed the foreclosure action. She filed a schedule of assets in the bankruptcy action that listed the amount of the debt claimed by the plaintiff and the fair market value of the property but did not identify the plaintiff's claim as unsecured or as contingent, unliquidated, or disputed. The bankruptcy trustee was discharged upon his representation that the bankruptcy estate had been fully administered, and the bankruptcy action was closed. The plaintiff filed a motion to reenter the judgment of strict foreclosure after the termination of the automatic bankruptcy stay. The defendant filed an objection thereto and claimed that she was not authorized to execute the mortgage and note because Demander had not validly executed the power of attorney that appointed her as his attorney-in-fact. The trial court granted the plaintiff's motion and overruled the defendant's objection, agreeing with the plaintiff that the defendant lacked standing to pursue her claimed defense because she failed to identify it as an asset of the bankruptcy estate. It accordingly rendered a judgment of strict foreclosure, which the defendant appealed and the Appellate Court (196 Conn. App. 267) affirmed. The Appellate Court observed that, pursuant to precedent, all of a debtor's assets, including prepetition causes of action, become assets of the bankruptcy estate and must be scheduled for the benefit of creditors in order for them to pass to the debtor if they are not administered when the bankruptcy action is closed. The court rejected the defendant's argument that her claim was distinguishable because it entailed a defense to the enforcement of the lien rather than a claim for money damages, determining that the argument discounted her disclosure obligations to the bankruptcy trustee and could allow for an end run around the bankruptcy process via the recoupment of an inaccurately valued asset. The court accordingly concluded that the defendant lacked standing to pursue her defense, consistent with the principle that a failure to list a legal claim as a bankruptcy estate asset causes the claim to remain the property of the estate and vest with the trustee. The defendant has been granted certification to appeal, and the Supreme Court will decide whether the Appellate Court correctly concluded that the defendant did not have standing to raise a defense that she had failed to identify as an asset of the bankruptcy estate in the schedule of assets filed in her Chapter 7 bankruptcy case adjudicated while the foreclosure case was pending.

DEVONTE DALEY *v.* ZACHARY KASHMANIAN et al., SC 20498  
*Judicial District of Hartford*

**Torts; General Statutes § 52-557n; Whether Defendant Entitled to Governmental Immunity for Negligent Operation of Motor Vehicle in Course of Conducting Surveillance.** The defendant Zachary Kashmanian is a detective in the defendant city of Hartford's police department. On June 1, 2013, he was operating a gray sedan that was not equipped with lights, sirens, or law enforcement markings, which made it appear to be an ordinary civilian car. A confidential informant contacted police and stated that an individual riding a yellow motorcycle was in possession of a gun. At the time, the plaintiff, along with a group of other individuals, was riding a motorcycle that matched that description on Asylum Avenue in Hartford. Kashmanian was instructed to perform surveillance on the group and proceeded to follow it. At one point, he collided with another motorist but was directed by officers to continue surveilling the plaintiff. In order to catch up to the plaintiff, Kashmanian crossed the double yellow line and traveled at speeds reaching forty or fifty miles per hour in a twenty-five mile per hour zone. He found the plaintiff still riding the motorcycle, drove closer, and, without slowing or braking, struck the motorcycle's back tire causing the plaintiff to crash into a parked vehicle, thereby ejecting him from the motorcycle. The plaintiff was found approximately ninety-five feet away with significant injuries. He commenced this action against Kashmanian and sought indemnification from the city, alleging that Kashmanian's negligent or reckless conduct caused his injuries. As a special defense, the defendants argued that Kashmanian had been engaged in discretionary acts at the time and, therefore, was entitled to governmental immunity under General Statutes § 52-557n. Following the close of evidence, the trial court granted Kashmanian's motion for a directed verdict on the plaintiff's recklessness claim, and, thereafter, the jury returned a verdict in favor of the plaintiff on his negligence claim. The trial court, however, set aside that verdict after concluding that Kashmanian was entitled to governmental immunity because he had been engaged in a discretionary police activity. The plaintiff appealed to the Appellate Court (193 Conn. App. 171), which reversed the trial court's judgment on the recklessness claim, finding that it should have been submitted to the jury, and affirmed the decision to set aside the verdict on the negligence claim. The Appellate Court found that Kashmanian had discretion regarding the manner in which he conducted surveillance, and, therefore, he was entitled to immunity under § 52-557n. In doing so, that court rejected the plaintiff's claim that Kashmanian had a

ministerial duty to comply with all traffic laws, finding that his decision whether to comply with such laws while engaged in surveillance was inherently discretionary. The Supreme Court granted the plaintiff's petition for certification to appeal, limited to whether the Appellate Court correctly determined that § 52-557n confers governmental immunity for injuries caused by a police officer's negligent operation of a motor vehicle while conducting surveillance. The plaintiff argues that certain statutes governing the operation of motor vehicles imposed ministerial duties on Kashmanian while engaged in surveillance and that, even if he were entitled to governmental immunity under the circumstances, his conduct exceeded the bounds of that immunity because he was actually engaged in a pursuit.

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PHYLLIS LARMEL *v.* METRO NORTH COMMUTER  
RAILROAD CO., SC 20535  
*Judicial District of New Haven*

**Civil; Accidental Failure of Suit Statute; Whether Judgment Rendered After Mandatory Arbitration Is “Trial on the Merits” That Bars Plaintiff from Utilizing Accidental Failure of Suit Statute; Whether Plaintiff’s Failure to Request Trial De Novo Following Entry of Arbitrator’s Decision Was “Matter of Form” Under Accidental Failure of Suit Statute.** The plaintiff was injured when she slipped and fell on the floor of a train operated by the defendant, and she brought a negligence action against the defendant. The trial court ordered the parties to submit to compulsory arbitration under General Statutes § 52-549u, and the arbitrator found in favor of the defendant. The plaintiff failed to file a timely demand for a trial de novo within twenty days under General Statutes § 52-549z, and the trial court rendered judgment for the defendant in accordance with the arbitrator’s decision. The plaintiff then brought a second negligence action against the defendant pursuant to General Statutes § 52-592, the accidental failure of suit statute. That statute allows a plaintiff to commence a new action for the same cause within one year if a prior action failed to be tried on its merits due to “any matter of form.” In the second action, the plaintiff alleged that her failure to file a timely motion for a trial de novo was due to “mistake, inadvertence, and/or excusable negelect” in that her attorney was on vacation and did not receive notice of the arbitrator’s decision until after the time for filing a demand for a trial de novo had expired. The defendant moved to dismiss the second action for lack of subject matter jurisdiction based on the principles of *res judicata*, arguing that § 52-592 is inapplicable

because the trial court in the first action rendered a final judgment on the merits pursuant to § 52-549z. The trial court granted the motion to dismiss, and the plaintiff appealed, claiming that the trial court wrongly dismissed the action when § 52-592 applied because the first action was “dismissed” as a matter of form when she failed to file a timely demand for a trial de novo. The plaintiff argued that the judgment in the first action was akin to a disciplinary dismissal and that the trial court was required to determine whether her failure to file a timely demand for a trial de novo constituted mistake, inadvertence, or excusable neglect within the meaning of the statute. The Appellate Court (200 Conn. App. 660) first determined that the trial court improperly dismissed the action because res judicata does not implicate a court’s subject matter jurisdiction but rather is pleaded properly as a special defense. The court then held that the first action was resolved on the merits by an arbitrator under § 52-549u and, therefore, the second action was not saved by the accidental failure of suit statute. Accordingly, the Appellate Court reversed the judgment dismissing the action and remanded the case with direction to render judgment for the defendant. The Supreme Court granted the plaintiff’s petition for certification to appeal. It will decide whether the Appellate Court properly concluded that a judgment rendered after mandatory arbitration is a “trial on the merits” that precludes a plaintiff from bringing a second action under the accidental failure of suit statute and whether the plaintiff’s failure to file a timely demand for a trial de novo constitutes “a matter of form” under the statute.

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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.*

*Jessie Opinion  
Chief Staff Attorney*

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