SUPREME COURT PENDING CASES

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

STATE *v.* ANGEL ARES, SC 20367
Judicial District of Hartford

Criminal; Whether Evidence Insufficient for Conviction under Act Prong of Risk of Injury to a Child in Violation of General Statutes § 53-21 (a) (1); Whether Risk of Injury Statute Unconstitutionally Vague as Applied; Whether Defendant Improperly Convicted under Situation Prong of Risk of Injury Statute For Which He Was Not Charged. The defendant was charged with four counts of risk of injury to a child in violation of General Statutes § 53-21 (a) (1) for intentionally setting fire to a mattress that was on the front porch of a three-story house in which he resided with family members. The defendant set fire to the mattress upon exiting the house after an argument with his stepfather who resided on the first floor. The fire traveled up from the porch to the upper floors of the house, causing extensive damage. Twelve residents, including four children, were inside the house at the time of the fire. The children were on the second floor of the house when the fire started and made it out safely. The defendant was convicted of the aforementioned charges and appeals to the Supreme Court pursuant to General Statutes § 51-199 (b) (3). He claims that there was insufficient evidence to support his conviction under the "act prong" of the risk of injury statute as charged by the state. The risk of injury statute criminalizes two distinct classes of conduct. The "situation prong" of the statute criminalizes conduct that "wilfully or unlawfully causes or permits any child under the age of sixteen years to be placed in such a situation that the life or limb of such child is likely to be impaired," while the "act prong" criminalizes the doing of "an act likely to impair the health or morals of such child." The defendant argues that, in order to prove that he committed risk of injury to a child under the act prong of the statute, the state had to demonstrate that he perpetrated an act directly on the person of the child and that his conviction cannot stand because the record is devoid of any evidence that he did so. The defendant also argues that his conviction violated his right to due process because the risk of injury statute is unconstitutionally vague as applied to his case. Specifically, he claims that he had inadequate notice that his particular conduct was prohibited because no prior authority has applied the act prong to conduct not perpetrated directly on the person of a child. The defendant additionally argues that his

right to due process was violated because the trial court convicted him of an offense with which he was not charged. The defendant notes that the trial court, in delivering the guilty verdict, stated that it had found proven beyond a reasonable doubt that he "had a reckless disregard for the consequences to the children" and that he had "unlawfully placed each child in a situat[ion] adverse to the child's physical, including psychological welfare, which situation was likely to injure the child's physical health." The defendant argues that the trial court's findings track the elements of the situation prong and show that the trial court convicted him under that prong, rather than under the act prong as charged by the state.

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

STATE *v.* JAMES GRAHAM, SC 20447
Judicial District of New Haven

Criminal; Whether Codefendant's Hearsay Statements Properly Admitted under Exception for Statements Against Penal Interest; Whether State Engaged in Prosecutorial Impropriety by Vouching for Witnesses' Credibility and Presenting Generic Tailoring Argument in Violation of State Constitutional Rights. The defendant was charged with felony murder, conspiracy to commit robbery in the first degree and carrying a pistol without a permit as a result of an incident in which he and two associates, Robert Moye and Brennan Coleman, robbed and gunned down a rival gang member on a Hamden bike path. Surveillance video admitted at trial showed the three men together near the scene of the crime. Additionally, the trial court allowed a witness to testify as to a conversation that he had with his friend, Moye, at Moye's home approximately one week after the shooting. The witness claimed that Moye asked him to swear that he would not tell anyone what he was about to say and that Moye then detailed the events of the shooting. The witness claimed that Moye admitted that he, Coleman and the defendant saw the victim on the bike path, asked him whether he was a member of a certain rival gang and decided to rob him. The witness claimed that Moye further stated that the victim punched Coleman, that Coleman attempted to shoot the victim but his gun jammed and that the defendant then shot the victim. The witness also testified that Moye did not say whether he was carrying a gun or whether they stole anything from the victim. The defendant was convicted of the aforementioned charges, and he

filed this appeal in the Supreme Court pursuant to General Statutes § 51-199 (b) (3). On appeal, the defendant claims (1) that the trial court improperly found that Moye's statements were admissible under the exception to the hearsay rule provided by section 8-6 (4) of the Connecticut Code of Evidence for statements against penal interest that are sufficiently trustworthy and (2) that the admission of Moye's statements violated his rights under the confrontation clause of the sixth amendment to the federal constitution. The defendant also claims on appeal that the state engaged in prosecutorial impropriety by vouching for the credibility of two witnesses when it elicited testimony from the witnesses on direct examination concerning provisions of their cooperation agreements in which they promised to provide truthful testimony and when it presented closing argument relating to those provisions. The defendant also claims that the state engaged in prosecutorial impropriety by presenting a generic tailoring argument, which occurs when a prosecutor impugns the credibility of a testifying defendant by urging the jury to infer that the defendant had the opportunity to fabricate or tailor his testimony based on the fact that he was present during the trial. The defendant acknowledges that generic tailoring arguments are permitted under the federal constitution but claims that they are improper under the heightened protections provided by our state constitution.

STATE *v.* ANASTASIA SCHIMANSKI, SC 20550
Judicial District of New Haven at G.A. 23

Criminal; Whether Appellate Court Properly Upheld Trial Court's Denial of Defendant's Motion to Dismiss Charge of Operating Motor Vehicle with Suspended License under General Statutes § 14-215 (c) (1). On September 18, 2017, the defendant was arrested and charged with operating a motor vehicle under the influence in violation of General Statutes § 14-227a. Her driver's license was suspended under General Statutes § 14-227b for forty-five days, beginning on October 18, 2017, and ending on December 2, 2017. On December 4, 2017, the defendant operated a motor vehicle without an ignition interlock device and struck another motor vehicle. She was charged with operating a motor vehicle with a suspended license in violation of General Statutes § 14-215. The defendant filed a motion to dismiss the charge on the ground that she could not have violated § 14-215 on December 4, 2017, because her forty-five day license suspension had ended on December 2, 2017. The trial court denied the motion to dismiss, holding that the installation of an ignition interlock device is a mandatory statutory requirement to restore a license that

has been suspended under §§ 14-227a and 14-227b and that the defendant's suspended license was not restored until January 2, 2018, by which time she had installed an ignition interlock device on her motor vehicle. The defendant entered a plea of nolo contendere to appeal the trial court's denial of her motion to dismiss. On appeal, she claimed that the trial court erred in denying her motion to dismiss and argued that, as a matter of statutory interpretation, her failure to install an ignition interlock device did not extend the forty-five day suspension of her license under § 14-227b, such that she could not have violated § 14-215. The Appellate Court (201 Conn App. 164) disagreed and affirmed the judgment of conviction. It noted that § 14-215 applies to an individual whose license has been suspended pursuant to § 14-227b. It then observed that § 14-227b (i) provides for a forty-five day license suspension under certain circumstances and states in relevant part that, "[a]s a condition for the restoration of such operator's license . . . such person shall be required to install an ignition interlock device on each motor vehicle owned or operated by such person and, upon such restoration, be prohibited from operating a motor vehicle unless such motor vehicle is equipped with a functioning, approved ignition interlock device" for a defined period of time. The court concluded that § 14-227b contemplates two periods of time – a license suspension period and a post-license restoration period, without an interim period during which an individual with a suspended license may lawfully operate a motor vehicle without installing an ignition interlock device. It interpreted the statute to accordingly provide that the installation of an ignition interlock device is required to move from suspension to restoration. The court further distinguished the cases on which the defendant relied, noting that they were decided prior to the amendment of the relevant statutes, and rejected her arguments relying on the rule of lenity and the equal protection clause of the federal constitution. In this certified appeal by the defendant, the Supreme Court will decide whether the Appellate Court properly upheld the trial court's denial of the defendant's motion to dismiss the charge of operating a motor vehicle with a suspended license in violation of § 14-215 (c) (1).

SERAMONTE ASSOCIATES, LLC *v.* TOWN OF HAMDEN, SC 20571
Judicial District of New Haven

Property Taxation; Rental Properties; Penalties; Whether Appellate Court Properly Construed Phrase "Who Fails To Submit Such Information" as Used in General Statutes § 12-63c (d) in Concluding That Plaintiff Failed To Timely Submit Certain Tax Forms To Defendant Town's Tax Assessor. The plaintiff owns

three parcels of rental property in the defendant Town of Hamden. In February 2016, the assessor for the defendant assessed the total value of the plaintiff's three rental properties at over $29 million. Pursuant to General Statutes § 12-63c (a), the owner of real property used primarily for the purpose of producing rental income may be required to "annually submit to the assessor not later than the first day of June" certain tax forms containing rental and expense information. Further, pursuant to § 12-63c (d), an owner "who fails to submit such information" shall be subject to a penalty "equal to a ten per cent increase in the assessed value of such property for such assessment year." Here, the plaintiff sent the required tax forms to the assessor by first class mail on May 31, 2016, and the assessor received them on June 2, 2016. Because the required tax forms were not received on or before June 1, 2016, as required by § 12-63c (a), the tax assessor imposed a 10 percent penalty pursuant to § 12-63c (d), amounting to $132,145.16, that was added to the assessments of the properties. Subsequently, the defendant's Board of Assessment Appeals (board) denied the plaintiff's appeal challenging the assessor's imposition of the 10 percent penalty. The plaintiff then appealed to the Superior Court, claiming that the board improperly upheld the assessor's imposition of the 10 percent penalty. The parties filed cross motions for summary judgment. The trial court granted the defendant's motion for summary judgment and denied the plaintiff's motion for summary judgment, concluding that the word "submit" as used in § 12-63c means that the assessor must receive the tax forms by June 1 of each year. The plaintiff appealed to the Appellate Court (202 Conn. App. 467), challenging the trial court's grant of summary judgment in favor of the defendant. The plaintiff claimed that the word "submit" as used in § 12-63c means "to mail" and that it had complied with the statute by mailing the tax forms to the assessor prior to June 1. Alternatively, the plaintiff claimed that § 12-63c was ambiguous as to whether submitting the tax forms by mail is sufficient to comply with the statute and, therefore, § 12-63c should be construed in its favor as the taxpayer. The Appellate Court rejected the plaintiff's claims, concluding that, when viewed in the context of other tax statutes, the word "submit" as used in § 12-63c was unambiguous and meant that the assessor must receive the tax forms by June 1. The court explained that the legislature frequently includes the phrase "or postmarked" in tax statutes when it intends for the date of mailing to be considered the date of filing or submission and that the legislature's decision not to include the phrase "or postmarked" in § 12-63c (a) necessarily meant that the tax forms must be delivered to the assessor's office by June 1 in order to comply with

the statute. Accordingly, the Appellate Court affirmed the trial court's grant of summary judgment in favor of the defendant. The plaintiff was granted certification to appeal, and the Supreme Court will decide whether the Appellate Court properly construed the phrase "who fails to submit such information" as it is used in § 12-63c (d).

J. XAVIER PRYOR *v.* TIMOTHY BRIGNOLE et al., SC 20581/20583
Judicial District of Hartford

Appellate Jurisdiction; Whether Appellate Court Properly Dismissed Defendants' Appeals for Lack of Final Judgment After Trial Court Denied Their Special Motions to Dismiss Filed Pursuant to Connecticut's Anti-SLAPP Statute, General Statutes § 52-196a. The plaintiff, J. Xavier Pryor, brought this action against the defendants, Attorney Timothy Brignole and his law firm, Brignole, Bush & Lewis, LLC, alleging that they breached a contractual nondisparagement clause when defendant Brignole anonymously sent letters to various news outlets accusing the plaintiff of assaulting the plaintiff's wife in front of a child. The defendants filed separate "special" motions to dismiss pursuant to Connecticut's anti-strategic lawsuit against public participation ("anti-SLAPP") statute, General Statutes § 52-196a, claiming that the letters constituted an exercise of defendant Brignole's right of free speech on a matter of public concern and, thus, were protected under § 52-196a (e) (3). The trial court denied the special motions to dismiss. The defendants filed separate appeals from the trial court's denial of their special motions to dismiss. The plaintiff moved to dismiss both appeals on the ground that the denial of a motion to dismiss does not constitute an appealable final judgment. The Appellate Court issued orders granting the motions to dismiss. The defendants were granted certification to appeal, and the Supreme Court will decide whether the Appellate Court properly dismissed the defendants' appeals for lack of a final judgment after the trial court denied their special motions to dismiss filed pursuant to § 52-196a. The defendants argue that they have a statutory right to appeal from the denial of their special motions to dismiss under the plain language of § 52-196a (d), which states in relevant part that "[t]he court shall stay all discovery upon the filing of a special motion to dismiss" and that such stay "shall remain in effect until the court grants or denies the special motion to dismiss and any interlocutory appeal thereof." Alternatively, if the language of § 52-196a (d) is found to be ambiguous, the defendants argue that the legislative history and purpose of § 52-196a, namely, to protect individuals from meritless lawsuits designed

to chill free speech, support the conclusion that interlocutory appeals are permitted under the statute. In addition, the defendants argue that the denial of a special motion to dismiss constitutes an appealable final judgment under the second prong of the finality test set forth in *State* v. *Curcio*, 191 Conn. 27, 31 (1983), which states that "[a]n otherwise interlocutory order is appealable . . . (2) where the order or action so concludes the rights of the parties that further proceedings cannot affect them." In *Shay* v. *Rossi*, 253 Conn. 134, 165 (2000), overruled on other grounds by *Miller* v. *Egan*, 265 Conn. 301 (2003), the Supreme Court held that the denial of a motion to dismiss based on a colorable claim of sovereign immunity constitutes a final judgment under the second prong of *Curcio* because "the state's right not to be required to litigate the claim filed against it would be irretrievably lost" without an immediate appeal. The defendants assert that § 52-196a grants a right to be protected from having to litigate a claim, akin to sovereign immunity and that a defendant's right not to be required to litigate the claim filed against it would be irretrievably lost unless it is permitted to immediately appeal from the trial court's denial its special motion to dismiss.

MARIANNA PONNS COHEN *v.* BENJAMIN H. COHEN, SC 20605
Judicial District of Stamford-Norwalk at Stamford

Dissolution; Whether Financial Orders Should Be Vacated for Judicial Bias Because Trial Court Prejudged Plaintiff's Credibility; Whether Trial Court Properly Ordered Sanctions and Awarded Legal Fees Against Plaintiff for Noncompliance with Trial Management Orders to Provide Exhibits on USB Drives. The plaintiff wife commenced this dissolution action against the defendant husband in 2014. The trial court judge to whom the action was first assigned declared a mistrial in 2016, and the action was thereafter assigned to another trial court judge, who held a trial on various dates between August 2017 and March 2018. The second trial was continued multiple times at the plaintiff's request for a variety of reasons that included health issues for which she had received accommodations under the Americans with Disabilities Act. A telephone pretrial conference was held on July 17, 2017. During a recess, the trial court's digital audio recording system recorded the trial court judge saying, "I am not just going to let that stupid woman talk." The system also recorded the trial court judge stating with respect to the plaintiff during another recess that "she's not sick" and "she's going to be a mess until we get it done." The trial court expressed further frustration during trial in

response to the plaintiff's noncompliance with its orders that the trial exhibits, due to their numerosity, be electronically submitted via Universal Serial Bus (USB) drives. The electronic exhibit issue resulted in additional posttrial orders and proceedings. In its final order on the issue, the trial court stated a court-provided USB drive contained "the official record of all electronic full and id exhibits in this case," despite any objections to the contrary, and that "plaintiff has only herself to blame for the difficulties with the disorganized, voluminous, repetitive and irrelevant exhibits in her case and her failure to provide them to the defendant and the court in an appropriate and carefully reviewed fashion." The trial court issued a memorandum of decision dissolving the parties' marriage in September 2018. The judgment in relevant part (1) awarded $65,000 in legal fees to the defendant for the posttrial electronic exhibit litigation and, (2) after finding that the plaintiff had spent $3,000,000 on legal fees, ordered that a net adjustment amount of $1,056,069 was due to the defendant "not as legal fees but as part of the overall property settlement and equitable distribution." The plaintiff filed this appeal in the Appellate Court, which the Supreme Court transferred to its docket. The Supreme Court will decided whether the financial orders entered pursuant to the dissolution judgment should be vacated due to judicial bias, where the plaintiff argues that the trial court prejudged her credibility before and maintained its negative perception of her throughout trial. The Supreme Court will also decide whether the trial court's judgment should be reversed on the ground that the trial court violated the plaintiff's due process rights by sanctioning her for conduct that occurred after trial and without holding a hearing. The Supreme Court will further decide whether the trial court's judgment should be reversed where the plaintiff argues that, even though she exhausted all of the available rectification remedies, the record is inadequate to review her claims on appeal regarding the electronic exhibits. Finally, the Supreme Court will decide whether the trial court clearly erred in making findings regarding the inoperability of the USB drives and the amounts that the plaintiff spent on legal fees for purposes of the $1,056,069 equitable distribution award.

MARJORIE GLOVER et al. *v.* BAUSCH & LOMB INC., SC 20607
United States Court of Appeals for the Second Circuit

Product Liability; CUTPA; Federal Preemption; Whether State Claims Based on Injuries Caused by Medical Device Preempted by Federal Law; Whether State Product Liability Act's Exclusivity Provision Bars Deceptive Marketing CUTPA Claim.

The Medical Device Amendments to the Federal Food, Drug and Cosmetics Act, 21 U.S.C. § 301 et seq. (FDCA), established a comprehensive scheme of regulation of medical devices by the U.S. Food and Drug Administration (FDA). In 2013, the FDA granted defendant Bausch & Lomb approval for the Trulign Toric intraocular lens (Trulign Lens), which is a prescription medical device that is surgically implanted into a patient's eye to replace a lens that has become clouded by cataracts. The following year, plaintiff Marjorie Glover underwent cataract surgery during which her physician implanted a Trulign Lens into each eye. Shortly thereafter, Glover was diagnosed with Z Syndrome, which occurs when one side of the implanted lens pulls forward while the other side remains in its normal position or is pushed backward, resulting in a "Z" shape. As a result, Glover suffers from permanent visual impairment and eye pain. Glover and her husband brought this action against Bausch & Lomb in federal court alleging negligence and failure-to-warn under the Connecticut Product Liability Act, General Statutes §§ 52-572h and 52-572q (CPLA). The Glovers claim that Bausch & Lomb was aware of a substantial risk that patients would develop Z Syndrome after Trulign Lenses were implanted and failed to inform the FDA of the extent of that risk during the approval process. The Glovers also claim that Bausch & Lomb failed to comply with certain post-approval conditions set by the FDA by failing to timely perform a study concerning the risk of Z Syndrome and by failing to inform the FDA of adverse events that occurred after approval. The United States District Court for the District of Connecticut granted Bausch & Lomb's motion to dismiss the action, finding that the claims were both expressly and impliedly preempted by the FDCA. The district court also denied the Glovers request to amend their complaint to add a CUTPA claim, finding that it would be futile because the claim would also be preempted by federal law. The Glovers appealed to the United States Court of Appeals for the Second Circuit, which determined that the preemption analysis turns on whether the Glovers have pleaded state law causes of action that exist separately from the FDCA but do not impose requirements different from, or in addition to, those imposed by federal law. Finding no binding Connecticut authority on that question of state law, the Second Circuit certified the following questions, which the Supreme Court accepted pursuant to General Statutes § 51-199b: "1. Whether a cause of action exists under the negligence or failure-to-warn provisions of the Connecticut Product Liability Act, Conn. Gen. Stat. §§ 52-572h, 52-572q, or elsewhere in Connecticut law, based on a manufacturer's alleged failure to report adverse events to a regulator like the FDA following approval of the

device, or to comply with a regulator's post-approval requirements. 2. Whether the Connecticut Product Liability Act's exclusivity provision, Conn. Gen. Stat. § 52-572n, bars a claim under the Connecticut Unfair Trade Practices Act, Conn. Gen. Stat. § 42-110a, et seq., based on allegations that a manufacturer deceptively and aggressively marketed and promoted a product despite knowing that it presented a substantial risk of injury."

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
