

## SUPREME COURT PENDING CASE

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

STATE OF CONNECTICUT *v.* RICHARD G. DABATE, SC 20749  
*Judicial District of Tolland*

**Criminal; Prosecutorial Impropriety; Motion to Suppress; Evidence; Whether Prosecutor’s Alleged Failure to Make Required Disclosures, Objectionable Cross Examination Questions, and Inflammatory Closing Argument Warrant Reversal of Conviction; Whether Police Interview of Defendant at Hospital Amounted to Custodial Interrogation; Whether Evidence of Victim’s Movements Recorded by Fitbit Was Sufficiently Reliable and Accurate to Be Admitted.** Responding to a disturbance at a home in 2015, the police discovered the defendant suffering from superficial wounds and found his wife shot to death in the basement. In a statement given to police while he was in the hospital, the defendant claimed that he was attacked by an intruder just as the victim was arriving home from the gym. According to the defendant, when he yelled for her to flee, the victim ran to the basement, and the intruder followed her and shot her in the head with the defendant’s gun. The defendant claimed that the intruder then restrained him, slashed his legs with a utility knife, and attempted to start a fire with a blowtorch. The defendant, however, was allegedly able to direct the blowtorch into the intruder’s face, thereby causing the intruder to flee. Subsequently, investigators obtained evidence calling into question the defendant’s timeline of events, including data retrieved from a Fitbit—an electronic activity tracker—worn by the victim at the time of her death. The defendant was subsequently charged with murder, tampering with physical evidence, and providing a false statement. Prior to trial, the defendant moved to suppress his statement to police on the ground that it was the result of an un-*Mirandized* custodial interrogation. The court found that the defendant had not been in custody and that he had given the statement voluntarily, but it suppressed a small portion of the statement given after his discharge. The defendant also sought to preclude admission of the Fitbit evidence. During a hearing to determine the evidence’s reliability, a researcher who had conducted several studies involving the same model of Fitbit testified to its accuracy, although he lacked knowledge about the underlying algorithm that processes data into step counts. The court ultimately ruled the Fitbit evidence to be admissible. After a jury trial, the defendant was found guilty of all charges. Following sentencing, the defendant directly

appealed to our Supreme Court under General Statutes § 51-199 (b) (3). On appeal, he claims that the prosecutor engaged in a pattern of impropriety that denied him a fair trial. Specifically, he claims that the prosecutor committed misconduct by failing to disclose evidence in advance of trial, repeatedly violating prior evidentiary rulings, asking the defendant to comment on the testimony of other witnesses, seeking to elicit evidence of prior uncharged misconduct, commenting on the defendant's right to remain silent, and making improper emotional appeals to the jury. Alternatively, he claims that the prosecutor's behavior warrants reversal of his conviction pursuant to the court's supervisory authority. The defendant also claims that the trial court made several clearly erroneous factual findings in declining to suppress the entirety of his police statement. Finally, he claims that admission of the Fitbit evidence constitutes harmful error because the state failed to establish the reliability and accuracy of the evidence and the evidence was integral to the state's strategy of establishing inconsistencies in the defendant's timeline of events.

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STATE OF CONNECTICUT *v.* LATROY JOHNSON, SC 20778  
*Judicial District of Hartford*

**Criminal; Whether Evidence Was Insufficient to Disprove Self-Defense Claim; Whether Evidence of Victim's Criminal Conviction Was Improperly Excluded.** In 2017, the defendant shot three individuals on Albany Avenue in Hartford. A surveillance video showed the defendant stand up, take a few steps towards Joshua Taylor and shoot him in the head. He then walked towards Kiwan Smith, exchanged a few words with Smith, and shot him. The defendant and Jovan Wooten thereafter exchanged gunfire, and, during the exchange, Wooten was shot in the eye. As a result of the shooting, Taylor and Wooten were killed, and Smith was seriously injured. The defendant was charged with, *inter alia*, two counts of murder and one count of assault in the first degree. At trial, the defendant raised claims of self-defense and defense of others, claiming that he shot the victims because they posed an imminent threat to himself and others. During its case-in-chief, the state introduced the surveillance video into evidence. The state also offered the testimony of Smith, who stated that, although he did get into an argument with the defendant's friend, Karee Iverson, he never threatened to shoot Iverson, nor did he threaten to have Taylor or Wooten shoot Iverson. The defendant, however, testified that Smith had made threats and stated that he had "something in [the] trunk [of his car] that'll light the whole block up." The defendant

further claimed that he saw Taylor move quickly towards the trunk of the car and shot Taylor “before [Taylor] hit [him].” In addition, the defendant moved to admit evidence of Taylor’s arson conviction in New Jersey, arguing that such evidence was admissible to show Taylor’s proclivity for violence. The trial court denied the request, noting that the defendant had failed to provide a certified copy of the arson conviction, as required by Connecticut Code of Evidence § 6-7 (b) (2). After a trial, the jury found the defendant guilty of all charges. The defendant appeals from his conviction directly to the Supreme Court under General Statutes § 51-199 (b) (3). On appeal, the defendant claims that the evidence was insufficient to disprove his claims of self-defense and defense of others with respect to Wooten. He argues that the evidence showed that, at the time he shot Wooten, Wooten was an active shooter who was shooting at members of the community. In addition, the defendant claims that the trial court erred when it precluded him from presenting evidence of Taylor’s arson conviction. In support of this claim, the defendant argues that, contrary to the trial court’s determination, Connecticut Code of Evidence § 4-4, rather than § 6-7, applied to his request to admit evidence of Taylor’s arson conviction. He maintains that Taylor was not a witness and that § 6-7 is therefore not applicable because that section only applies when evidence of a conviction is offered to impeach a witness. Rather, he asserts that § 4-4 (a) (2) is applicable to the present situation, namely, where a defendant in a criminal case seeks to admit a victim’s “conviction of a crime of violence” to show the victim’s “violent character.” Noting that § 4-4 (b) does not require a certified copy of a victim’s criminal conviction, the defendant contends the evidence of Taylor’s arson conviction should have been admitted under § 4-4. In the alternative, the defendant claims that, if the trial court was correct that a certified copy was required under § 6-7, the trial court, nonetheless, abused its discretion in failing to permit a non-traditional method of proof for Taylor’s arson conviction, namely, the uncertified copy of Taylor’s criminal history that was provided to the defendant during discovery.

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STATE OF CONNECTICUT *v.* VERNON HAYNES, SC 20794  
*Judicial District of Waterbury*

**Criminal; Whether State Constitution Prohibits Use of Statement Taken as Result of *Miranda* Violation to Impeach Defendant; Whether Police Photographs Taken of Defendant after Invocation of Right to Counsel Were Inadmissible under**

**Federal or State Constitutions.** In 2018, the defendant stabbed his girlfriend to death. Before being arrested, the defendant had admitted to his girlfriend's sister-in-law that he had stabbed her. Prior to being questioned by the police, Detective Kyle Howles informed the defendant of his *Miranda* rights, at which point he invoked his right to counsel. Shortly thereafter, the defendant waived his right to counsel and gave a statement to Howles confessing to the stabbing. The defendant was subsequently charged with, inter alia, murder. Prior to trial, the court granted the defendant's motion to suppress the statement, finding that the police had violated the defendant's *Miranda* rights when they failed to honor his invocation of his right to counsel. The court, therefore, suppressed the statement from use in the state's case-in-chief. Thereafter, during the defendant's case-in-chief, he testified that he was under extreme emotional disturbance when he stabbed the victim because she had pulled out his dreadlocks, which violated a central tenant of his religion, Rastafarianism. On cross-examination, the state sought to impeach the defendant's testimony with the suppressed statement and photographs that Howles had taken of the defendant shortly after his arrest. The defendant objected and moved to preclude the state from using the statement and photographs. As to the photographs, he argued they were "fruit of the poisonous tree" because Howles had photographed areas of the defendant's body that he had referenced in his suppressed statement. In response, the state elicited testimony from Howles that he would have taken the photographs pursuant to standard police protocol regardless of the defendant's statement. In declining to preclude the statement for impeachment purposes, the court relied on *State v. Reid* (193 Conn. 646), in which our Supreme Court adopted, as a matter of state constitutional law, the United States Supreme Court's holding in *Harris v. New York* (401 U.S. 222), that a voluntarily given statement that failed to comply with *Miranda* may be used to impeach a testifying defendant. The court also declined to suppress the photographs, finding that *Miranda*'s exclusionary rule does not extend to physical evidence. After a trial, the jury found the defendant guilty of murder. The defendant appeals from his conviction directly to the Supreme Court under General Statutes § 51-199 (b) (3). On appeal, the defendant claims that article first, § 8, of the Connecticut constitution prohibits the state from impeaching a criminal defendant with a statement obtained in violation of *Miranda* and that *Reid* should therefore be overruled. He further claims that the trial court erred in admitting the police photographs because the holding established in *United States v. Patane* (542 U.S. 630) that *Miranda*'s exclusionary rule does not extend to physical evidence is

limited to failure to warn *Miranda* violations and does not apply to right-to-counsel *Miranda* violations and, even if it did, the photographs were inadmissible under the state constitution. Finally, the defendant claims that the trial court deprived him of a fair trial by permitting the state to present the testimony of the victim's sister-in-law despite having not disclosed her as a witness until three days before the start of evidence.

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STATE OF CONNECTICUT *v.* WILLIE MCFARLAND, SC 20802  
*Judicial District of New Haven*

**Criminal; Whether Due Process Rights Violated by Thirty-Two Year Delay Between Crimes and Arrest; Whether Request for Competency Evaluation Properly Denied; Whether Deceased Witness' Statements Inculcating Third Party in Crimes Fell Within Hearsay Doctrine's Residual Exception.** In August 1987, Fred Harris and Gregory Harris were stabbed to death in their apartment in Hamden. The police interviewed the defendant a month later, and he proclaimed his innocence. Between 1987 and 1993, Veronica Saars-Doyle and Donald Bruce Hankins gave several statements to the police implicating a third party in the crimes. In 1996, the defendant confessed to the murders. His confession contained information that was mostly consistent with the details of the crime and included information that only the perpetrator would know, but it also included some contradictions and uncorroborated information. DNA testing was performed on items from the scene in 2006 and 2009, but the results did not link the defendant to the crimes. The defendant was linked to the crimes, however, through a work glove found at the scene that was resubmitted for DNA testing in 2018 following advancements in the process. In November 2019, the defendant was charged with the Harris murders. The defendant moved to dismiss on the ground that his due process rights were violated by the delay in procuring his arrest, which he claimed was unjustifiable and prejudiced his ability to defend himself because Saars-Doyle and Hankins are now deceased. The trial court denied the motion, finding that the defendant could not establish a federal constitutional due process violation because he conceded that the prearrest delay was not due to bad faith or improper prosecutorial motive. The trial court found that our state constitution affords greater due process protection with respect to prearrest delays but concluded that the defendant could not prevail under the applicable balancing test because any prejudice that he suffered was substantially outweighed by the state's justification for

the delay. The trial court found that any prejudice due to the defendant's inability to call Saars-Doyle and Hankins as witnesses was undermined by significant problems with their credibility and by inconsistencies and inaccuracies in their statements. The trial court further found that there were reasonable grounds for the state to delay prosecution until after receiving the DNA test linking the defendant to the crimes, given the inconsistencies in the defendant's confession and the statements by Saars-Doyle and Hankins implicating a third party in the crimes. The defendant was convicted as charged and filed this appeal directly to the Supreme Court pursuant to General Statutes § 51-199 (b) (3). On appeal, the defendant challenges the trial court's denial of his motion to dismiss. The defendant also claims that the trial court abused its discretion when it denied his multiple requests for an in-hospital competency evaluation to determine whether he was able to participate and assist in his defense, given his long-standing mental health issues and his refusal to communicate with his counsel and attend his trial. The defendant finally claims that the trial court violated his rights to due process and to present a defense by finding that Saars-Doyle's statements implicating a third party in the crimes were not sufficiently trustworthy and reliable to be admitted under the residual exception to the hearsay doctrine.

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STATE OF CONNECTICUT *v.* BRANDON JONES, SC 20840  
*Judicial District of Hartford*

**Criminal; Gang Evidence; Whether Trial Court Improperly Admitted Gang Affiliation Testimony; Whether Admission of Gang Affiliation Testimony Violated Defendant's Federal and State Constitutional Rights to Fair Trial; Whether Trial Court Improperly Admitted Consciousness of Guilt Testimony.** The victim, Dante Davis, was killed when several gunshots were fired during a party outside of her apartment building at 131 Martin Street in Hartford on June 21, 2005. Multiple witnesses provided that they had seen the shadows of three men at the shooting. The investigation grew cold, however, until a witness at the scene, Vernon Lloyd, contacted the Office of the Chief State's Attorney in 2014 and 2022 and identified the defendant as one of the shooters. The defendant was subsequently charged with murder. Lloyd testified at the defendant's trial and further stated that he had met with the defendant and Shane Henriques, one of the other shooters, later on the night of the shooting, at which point Henriques told Lloyd that they had gone to the Martin Street area because that was "where they were beefing." A retired Hartford police

officer, William Rivera, also testified at the defendant's trial, as a state's witness over the defendant's objection. Rivera testified that, at the time of Davis' murder, he worked in the Hartford police department's intelligence division; that the division tracked gang activity as part of its work; and that the defendant, Henriques, and Maurice Snowden, the third shooter, were known by police to be members of a gang known as The Ave, which had an ongoing feud with a gang known as West Hell in the vicinity of the incident area. Another Hartford police officer, Christopher Reeder, testified at the defendant's trial and likewise noted the affiliation of the defendant, Henriques, and Snowden with The Ave and the feud between The Ave and West Hell. The state additionally presented the testimony of law enforcement officers Zachary Sherry and Michael Sheldon, who were involved in the issuance and service of the murder warrant against the defendant and averred that, during apprehension efforts, the defendant's cell phone stopped working and he began to use a new one. The jury ultimately found the defendant guilty of murder, and he was convicted and sentenced to forty-five years of incarceration. The defendant appeals from his conviction to the Supreme Court pursuant to General Statutes § 51-199 (b) (3). The defendant claims that the trial court improperly admitted evidence of his alleged gang affiliation and argues that such evidence was more prejudicial than probative and harmful where the state's case was otherwise weak because there was no evidence other than the testimony of Lloyd, who had an extensive criminal history, to directly connect the defendant to the murder. The defendant also claims that the admission of the gang affiliation evidence violated his rights to a fair trial under the federal and state constitutions. Finally, the defendant claims that the trial court improperly admitted the evidence of his cell phone activity during his apprehension and argues that his actions were too ambiguous and remote in time to constitute consciousness of guilt in relation to the charged murder.

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STATE OF CONNECTICUT *v.* ORANE C., SC 20843  
*Judicial District of Bridgeport*

**Criminal; Aggravated Sexual Assault; General Statutes (Rev. to 2019) § 54-193; Whether Trial Court Improperly Denied Motion to Dismiss Because Substitute Information Substantially Broadened Charge in Prior Information.** Beginning in 2002, the defendant forced the victim, his stepdaughter, to have sexual intercourse with him through physical abuse and by threatening to kill her mother. In June, 2017, when the victim was twenty years old, she

disclosed the ongoing sexual abuse to her mother, who reported it to the police in July, 2017. The defendant was arrested in February, 2018, pursuant to an arrest warrant application that detailed recurring instances of sexual abuse from when the victim was age six until twenty, specifically describing three incidents that occurred, approximately, in 2014, 2016, and 2017. In March, 2018, the state filed a long form information charging the defendant with, inter alia, one count of aggravated sexual assault in the first degree for conduct alleged to have occurred on July 22, 2017. On February 7, 2020, the state filed a substitute information charging the defendant with, inter alia, two counts of aggravated sexual assault in the first degree and one count of sexual assault in the first degree for conduct occurring on, among other dates, January 1, 2014. Following the close of the state's evidence, the defendant moved to dismiss the count of the February, 2020 substitute information pertaining to conduct that occurred in 2014 on the ground that it was time barred by General Statutes (Rev. to 2019) § 54-193, which precludes the prosecution of certain offenses "except within five years" after the underlying conduct. Although the statute of limitations is tolled by the signing of the arrest warrant application, the defendant argued that any tolling ended when the February, 2020 substitute information broadened the charges. The trial court denied the motion to dismiss after rejecting that claim and determining that the record was "replete with notice" that the defendant would face charges pertaining to conduct that occurred in 2014 "from the very beginning when [the arrest] warrant was served." The defendant was convicted and sentenced to sixty years of incarceration, execution suspended after thirty years, and he appealed to the Appellate Court (218 Conn. App. 683). That court rejected the defendant's claim that the trial court improperly denied his motion to dismiss because the February 7, 2020 substitute information substantially broadened the charges. In considering the factors set forth in *State v. Golodner* (305 Conn. 330), the Appellate Court found that the original and substitute informations both charged the defendant with the same crime, aggravated sexual assault, and both informations relied on the same evidence, namely, the "detailed allegations" in the arrest warrant application concerning the 2014 assault. The Appellate Court, emphasizing that "notice is the touchstone of the analysis," affirmed the judgment of conviction, and the defendant filed this appeal after the Supreme Court granted his petition for certification, limited to whether the Appellate Court correctly concluded that the February, 2020 substitute information did not substantially broaden the charges in the March, 2018 information.



STATE OF CONNECTICUT *v.* ADAM PALMER, SC 20849  
*Judicial District of Bridgeport*

**Criminal; Due Process; Constancy of Accusation; Evidence; Whether Instruction Prohibiting Jury from Considering Delay in Reporting Sexual Assault Violated Defendant’s Due Process Rights or Was Plain Error; Whether Defendant’s Statement to Victim Regarding His Abuse of Another, Admitted as Evidence of Grooming Behavior, Was Unduly Prejudicial.** Shortly after beginning a romantic relationship with Q in 2005, the defendant moved into the Connecticut apartment that Q shared with her daughters, the victims D and T. Due to Q’s work schedule, the victims were left in the defendant’s care for significant periods of time, except during the summer and for a ten-month period in 2010, when the victims lived with Q’s mother. The defendant continued to live with them until he and Q broke up in 2013, whereupon he moved to North Carolina. When Q moved out of the state in 2014, she sent the victims to live with relatives and did not see them again until she and the victims resumed living together in 2016. In 2017, shortly after Q suggested that she might invite the defendant to move back in with them, the victims disclosed to Q that the defendant had sexually abused them. After the abuse was officially reported in 2018, the defendant was arrested and returned to Connecticut, where he was charged with seven counts of sexual assault in the first degree and eight counts of risk of injury to a minor. At trial, the victims testified that the defendant had sexually abused them for years and had framed the abuse as a game. Over the defendant’s objection, D also testified that, when at one point she told the defendant that she felt uncomfortable, he replied that he had played the same game with his daughter, that she had enjoyed it, and that D was the only one who did not. The court ruled that D’s testimony about the defendant’s prior statement was admissible as a statement of a party opponent relevant to show grooming behavior. During his case-in-chief, the defendant sought to show that the victims had long been deprived of their mother’s affection and had fabricated their accusations to prevent the defendant from disrupting their relationship with her. Because defense counsel did not seek to impeach the victims regarding their delayed disclosure of the abuse, the court instructed the jury not to consider the delay in evaluating the victims’ credibility, as required by *State v. Daniel W.E.*, 322 Conn. 593 (2016). In *Daniel W.E.*, our Supreme Court modified the constancy of accusation doctrine to permit the victim to testify on direct examination regarding the identity of any person to whom the incident was reported but barred the state from calling constancy of accusation witnesses unless

the victim's credibility is challenged; if the victim's credibility is not challenged, the jury must be instructed not to consider any delay in the victim officially reporting the incident. The defendant ultimately was convicted on all counts except for two of the sexual assault charges. Following sentencing, the defendant directly appealed to our Supreme Court pursuant to General Statutes § 51-199 (b) (3). He first claims that the *Daniel W.E.* instruction violated his due process rights because it unconstitutionally shifted the state's burden of proof onto him and denied him the ability to establish his defense of recent fabrication. Alternatively, he claims that the trial court's instruction was plain error. The defendant also claims that the trial court abused its discretion by admitting D's testimony about his claimed abuse of his daughter because such testimony was unduly prejudicial.

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LOUIS MARTINOLI *v.* CITY OF STAMFORD POLICE DEPARTMENT  
et al., SC 20932

*Compensation Review Board*

**Workers' Compensation; Whether Claimant Is Entitled to Temporary Total Disability Benefits under General Statutes § 31-307 (a) Where His Status Commenced When He Was Retired and Had No Intention of Returning to Workforce.** The claimant began his employment with the respondent police department in 1975. In January 1999, the claimant established a compensable claim for coronary artery disease, hypertension, and congestive heart failure pursuant to General Statutes § 7-433c. In October 1999, the claimant retired at the age of sixty-four with no intention of returning to the workforce. On July 15, 2015, when the claimant was eighty years old, he developed atrial fibrillation and sustained a stroke, which the Workers' Compensation Commissioner concluded was compensable as it flowed from the underlying accepted claim. The claimant thereafter applied for temporary total disability benefits under General Statutes § 31-307 (a). The statute provides that an employee "shall be paid" temporary total disability benefits if the employee sustains a compensable "injury . . . that results in total incapacity to work." The commissioner approved the claim and determined that the respondent shall provide the claimant with temporary total disability benefits under § 31-207 (a), commencing retroactively to July 15, 2015. The respondent appealed to the Compensation Review Board, claiming that the commissioner erred in determining that the claimant was entitled to § 31-307 (a) benefits where his temporary total disability status commenced after he retired with no intention to reenter the

workforce. The board disagreed with the respondent and affirmed the commissioner's decision, finding that a reasonable interpretation of the precedent governing eligibility for § 31-307 (a) benefits is that once a claimant proves that he is medically incapable of performing work, his willingness to obtain employment is irrelevant. The respondent appealed from the board's decision to the Appellate Court (220 Conn. App. 874). The Appellate Court noted that, in *Cochran v. Dept. of Transportation*, 220 Conn. App. 855 (2023), which was released the same day, it held that, under the plain and unambiguous language of § 31-307 (a), a claimant who retires without any intention of returning to the workforce and does not return to the workforce is not entitled to temporary total disability benefits because it cannot be said that the claimant's injury resulted in a total incapacity to work as required by the statute. The Appellate Court then held in the present case that, for the reasons set forth in *Cochran*, the claimant was not entitled to temporary total disability benefits under § 31-307 (a) and, accordingly, reversed the board's decision. The claimant filed a petition for certification to appeal, which the Supreme Court granted as to the question of whether the Appellate Court correctly determined that the claimant was not eligible for temporary total disability benefits pursuant to General Statutes § 31-307 (a).

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STEPHEN T. COCHRAN *v.* DEPARTMENT OF TRANSPORTATION,  
SC 20940

*Compensation Review Board*

**Workers' Compensation; Whether Claimant Is Entitled to Temporary Total Disability Benefits under General Statutes § 31-307 (a) Where His Status Commenced When He Was Retired and Had No Intention of Returning to Workforce.** The claimant sustained a compensable back injury in the course of his employment with the respondent in 1994. In 2003, the claimant, who was then fifty-four years old and had worked for the respondent for thirty-six years, accepted an incentivized early retirement benefits package and had no intention of returning to the workforce. The claimant's condition deteriorated over time after his retirement, and he applied for temporary total disability benefits pursuant to General Statutes § 31-307 (a). The statute provides that an employee "shall be paid" temporary total disability benefits if the employee sustains a compensable "injury . . . that results in total incapacity to work." The Workers' Compensation Commissioner determined that the claimant was entitled to § 31-307 (a) benefits (1) for the three month period following an April 2013

surgery, because he demonstrated through medical testimony that he was totally disabled during that time and that the surgery was related to his 1994 injury and (2) commencing retroactively to December 30, 2017, because he had established through nonphysician vocational rehabilitation expert testimony that he had become unemployable as of that date. The respondent appealed to the Compensation Review Board, which affirmed the commissioner's decision. The respondent then appealed to the Appellate Court (220 Conn. App. 855), which reversed the board's decision. The Appellate Court held that (1) the plain and unambiguous language of § 31-307 (a) did not entitle the claimant to temporary total disability benefits when he elected early retirement and did not intend to reenter the workforce because it could not be said that his injury resulted in his total incapacity to work or that he had any wage loss or experienced any loss of earning power; (2) the claimant's argument that § 31-307 (a) provides for an injured worker to be paid a weekly compensation regardless of the reason for leaving the workforce and without having demonstrated any intention to return was unreasonable, as that construction of the statute disregards the prefatory language that requires that an injury result in total incapacity to work in order to be eligible; and (3) awarding temporary total disability benefits under § 31-307 (a) to the claimant who elected to retire with no intention of returning to the workforce would not effectuate the statutory purpose of compensating a claimant for wage loss or loss of earning power. The claimant filed a petition for certification to appeal, which the Supreme Court granted as to the question of whether the Appellate Court correctly determined that the claimant was not eligible for temporary total disability benefits pursuant to General Statutes § 31-307 (a).

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JOHN WISNIEWSKI et al. v. ANTHONY J. PALERMINO et al., SC 21001  
*Judicial District of Hartford*

**Wills; Legal Malpractice; Breach of Contract; Whether Intended Beneficiaries of Decedent's Will Have Standing to Bring Claims for Breach of Contract and Professional Negligence Against Attorneys Who Drafted Will.** The plaintiffs brought this action against the defendants, Attorney Anthony J. Palermino and his law firm, alleging claims of professional negligence and breach of contract in connection with their preparation of the will of the decedent, Edward Wisniewski. According to the amended complaint, the decedent retained the defendants to prepare his will, and he informed Palermino that he wished to bequeath his interest in a TD Ameritrade

account (account) in equal shares to five individuals, including his daughter, Joanna Cooper, and the three plaintiffs. Upon the decedent's death, however, all the funds in the account were distributed to Cooper pursuant to a beneficiary designation on file with TD Ameritrade. As to the negligence claim, the plaintiffs alleged that Palermino breached his duty of care to the decedent by negligently failing to ensure that the account listed the estate as the beneficiary and, accordingly, prevented the plaintiffs from realizing the intended inheritance. As to the breach of contract claim, the plaintiffs alleged that Palermino breached his contractual duties to the decedent and to the plaintiffs as intended third-party beneficiaries by failing to prepare the will in accordance with the decedent's express wishes. The defendants filed a motion to dismiss for lack of standing, citing *Stowe v. Smith*, 184 Conn. 194 (1981), and *Krawczyk v. Stingle*, 208 Conn. 239 (1988). Under those cases, an attorney who fails to draft a will in conformity with a testator's wishes may be held liable to the intended third-party beneficiary of the will under both tort and contract theories of liability, as long as the attorney and the testator intended that the attorney would assume a direct obligation to the intended beneficiary. The trial court dismissed the negligence count on the ground that the plaintiffs had failed to adequately assert standing as third-party beneficiaries, explaining that there was no allegation in that count that both Palermino and the decedent intended that the plaintiffs would have the right to enforce the duties Palermino assumed in his representation of the decedent. In addition, citing *Leavenworth v. Mathes*, 38 Conn. App. 476 (1995), the court ruled that the negligence claim was not viable because the alleged error committed by Palermino was not related to the drafting of the will. The court, however, ruled that the breach of contract claim as alleged in the amended complaint was cognizable under *Stowe* and *Leavenworth*. Subsequently, the plaintiffs filed a substitute amended complaint in which the breach of contract claim was premised on essentially the same factual allegations as the dismissed negligence claim. Upon the defendants' motion, the trial court dismissed the breach of contract claim on the same grounds that it had dismissed the negligence claim. The plaintiffs appealed to the Appellate Court, and the Supreme Court transferred the appeal to itself pursuant to General Statutes § 51-199 (c). On appeal, the plaintiffs claim that, as intended third-party beneficiaries of the will, they have standing to pursue their negligence claim under *Stowe* because (1) the will failed to enact the decedent's wishes, even though the drafting error is not apparent in the will instrument itself, and (2) the duty of care that the defendants owed to their client extended to them. In addition, the

plaintiffs claim that, contrary to the trial court's determination, their substitute amended complaint alleged a valid breach of contract claim under *Stowe*.

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L.L. et al. v. NEWELL BRANDS INC., et al., SC 21005  
*On Certification from United States District Court for the  
District of Connecticut*

**Torts; Loss of Consortium; Whether Derivative Cause of Action for Loss of Filial Consortium by Parent Should Be Recognized.** The minor child plaintiff L.L. (child) was severely burned after the car seat in which she was strapped, which had been placed next to an electric range stove, caught fire. As a result, the child suffered permanent injuries, including the devitalization of tissue in her arm that eventually required amputation of several fingers. The child's parents, the plaintiffs Justin and Mary Lapointe (parents), subsequently brought an action in the United States District Court for the District of Connecticut against the sellers of the car seat, the defendants Newell Brands Inc. and Target Stores, Inc., as well as the seller of the stove, Haier US Appliance Solutions, Inc. The parents asserted product defect claims against the defendants on behalf of the child. On their own behalf, the parents alleged claims of loss of filial consortium. The defendants thereafter moved to dismiss the consortium claims as not cognizable under Connecticut law. The plaintiffs opposed the motion, relying on our Supreme Court's decision in *Campos v. Coleman*, 319 Conn. 36 (2015), in which it recognized a cause of action for loss of parental consortium by a minor child. In *Campos*, the Supreme Court determined that the relevant public policy factors favored recognition, specifically, "the unique emotional attachment between parents and children, the importance of ensuring the continuity of the critically important services that parents provide to their children, society's interest in the continued development of children as contributing members of society, and the public policies in favor of compensating innocent parties and deterring wrongdoing." *Id.*, 43. In dismissing concerns about countervailing policy considerations, the Supreme Court determined that recognizing a claim for parental consortium would not require imposing arbitrary limitations on said claim, would not impose undue societal costs without yielding significant social benefits, and would not create a significant risk of double recovery, and it noted that the weight of authority from other jurisdictions favored recognition. *Id.*, 44–57. The District Court in the present case declined to dismiss the plaintiffs' filial consortium claim. In light of the lack of

Connecticut appellate authority on the issue, however, it certified the following question of law to the Connecticut Supreme Court pursuant to General Statutes § 51-199b, and the Supreme Court accepted the following question: “Does Connecticut law recognize a parent’s claim for loss of filial consortium in his or her child, who allegedly suffered severe, but non-fatal, injuries because of the defendants’ tortious conduct?” In urging that the certified question be answered in the affirmative, the plaintiffs argue that the same factors and reasoning relied upon by the Supreme Court in recognizing a cause of action for parental consortium in *Campos* apply with equal, if not greater, force in the context of claims for filial consortium, which arise from the same parent-child relationship. The defendants disagree that the balancing of factors favors recognition of such causes of action and argue that it should be left to the legislature to decide whether to expand *Campos* to claims of loss of filial consortium.

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STATE OF CONNECTICUT *v.* MICHAEL INZITARI, SC 21008  
*Judicial District of New Britain*

**Criminal; Whether Evidence Insufficient to Prove Defendant Possessed Fifty or More Images of Child Pornography; Whether Jury Improperly Instructed on Standard for Lascivious Images; Whether Court Improperly Declined to Give Specific Unanimity Instruction; Whether Court Improperly Admitted “Artifacts” of Deleted Images from Defendant’s Phone.** Following the defendant’s arrest on an unrelated charge, the police obtained a cell phone that he intentionally left in his friend’s possession just prior to his arrest. A forensic examination revealed that the phone contained hundreds of images of suspected child pornography. The defendant was charged with one count of violating General Statutes § 53a-196d (a) (1) because he “knowingly possesse[d] . . . fifty or more visual depictions of child pornography.” Child pornography is defined under § 53a-193 (13) as “sexually explicit conduct,” which in turn is defined under § 53a-193 (14) as, inter alia, the “lascivious exhibition of the genital or pubic area of any person.” At trial, thirteen of the fifty-seven images that were recovered from the defendant’s phone and entered as evidence depicted naked boys but did not portray any sexual intercourse. The trial court admitted, as uncharged misconduct evidence, “artifacts” extracted from the phone that related to deleted images. The trial court found that such evidence was relevant to the issues of identity and knowledge, rejecting the defendant’s arguments that the evidence was cumulative, unduly prejudicial, and constituted imper-

missible propensity evidence. After the state rested, the trial court denied the defendant's motion for a judgment of acquittal, which claimed that the state failed to prove that fifty or more photographs depicted "child pornography" because several of the photographs did not depict children engaged in any sexual activity. Over the defendant's objection, the trial court instructed that the jury was permitted to consider the six factors articulated in *United States v. Dost* (636 F. Supp. 828) to determine whether any of the images depicted a "lascivious" display of the genitals or the pubic area of a child. The defendant had argued that our Supreme Court in *State v. Sawyer* (335 Conn. 29) did not approve of the use of the *Dost* factors in jury instructions but did find that the factors are generally relevant and provide guidance in evaluating whether an image is lascivious. The trial court also declined to provide a specific unanimity instruction requested by the defendant that would have instructed the jurors to unanimously agree on which fifty out of the fifty-seven photographs in evidence fit the statutory definition of child pornography. Following the defendant's conviction, he appealed to the Appellate Court, and the Supreme Court transferred the appeal to itself. On appeal, the defendant claims that (1) the evidence was insufficient to prove that he possessed fifty or more images of child pornography because thirteen images did not meet the definition of "sexually explicit conduct"; (2) the jury was improperly instructed that it could consider the *Dost* factors in deciding whether any of the images were lascivious; (3) his constitutional rights were violated when the trial court declined to instruct that all jurors must unanimously agree on which fifty or more images were found to constitute child pornography; and (4) the trial court abused its discretion in admitting into evidence artifacts of images deleted from the defendant's phone.

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MCCARTER & ENGLISH, LLP *v.* JARROW FORMULAS, INC., SC 21013

*On Certification from the United States District Court for the District of Connecticut*

**Punitive Damages; Whether Law Firm Can Recover Common-Law Punitive Damages For Client's Wilful and Malicious Breach of Agreement to Compensate Law Firm for Legal Services.** The plaintiff law firm represented the defendant dietary supplement company in a jury trial in Kentucky federal district court. The jury returned a verdict against the defendant, and the defendant thereafter terminated its relationship with the plaintiff and refused to pay the plaintiff's remaining attorney's fees and costs. The plaintiff filed an



action in the United States District Court for the District of Connecticut claiming breach of contract, account stated, and quantum meruit, and the defendant filed counterclaims. The parties stipulated before trial that the jury would determine whether a party was entitled to punitive damages and that the District Court would determine the amount of punitive damages. The parties also reserved their rights, however, to argue that the other party was not entitled to any punitive damages and that the issue should not be submitted to the jury. The District Court instructed the jury that punitive damages could be awarded if “the other party’s conduct intended to violate—or showed reckless indifference to—the rights of the first party.” The jury returned a verdict in favor of the plaintiff and awarded \$1,057,173.93 in compensatory damages. It also determined that the defendant’s conduct was wilful and malicious. The defendant moved for judgment as a matter of law during trial and renewed its motion after trial on the ground that punitive damages could not be awarded to the plaintiff because Connecticut law does not “recognize bad faith breach of contract except when there is a strong public policy involved.” The plaintiff in turn filed a series of posttrial motions, including a motion for punitive damages. The District Court issued a ruling on the parties’ posttrial motions that in relevant part denied the plaintiff’s motion for punitive damages without prejudice and provided, “because Connecticut law is unsettled on this question, resolving this question requires weighing competing public policy concerns, and other states have adopted several different rules, I will certify this question to the Connecticut Supreme Court.” The District Court explained that the Supreme Court suggested in dicta in *Triangle Sheet Metal Works, Inc. v. Silver*, 154 Conn. 116 (1966), that punitive damages might be available in a breach of contract case where “wanton and wilful injury is proved” or “malice is established” but has never directly addressed and decided the issue. The District Court then observed that the Appellate Court applied the dicta in *Triangle Sheet Metal Works, Inc.* to a claim of breach of implied contract to act as a surety in *L.F. Pace & Sons, Inc. v. Travelers Indemnity Co.*, 9 Conn. App. 30 (1986), but declined to apply it to a claim of wrongful termination in *Barry v. Posi-Seal, International, Inc.*, 40 Conn. App. 577 (1996). Given the absence of authoritative Connecticut law on the availability of punitive damages for wilful and malicious breach of contract, as well as differing approaches by courts of other jurisdictions and the significant policy implications of the issue, the District Court certified the following question of law to the Connecticut Supreme Court pursuant to General Statutes § 51-199b, and the Supreme Court accepted the following question: “Can a law

firm recover common-law punitive damages, i.e., litigation costs including attorney's fees, for its client's wilful and malicious breach of an agreement to compensate the law firm for legal services?"

*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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