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LAW REPORTER

EMPLOYMENT LAW – The Supreme Court reaffirms that the qualified privilege for defamation is lost upon a showing of either actual malice or malice in fact:

The plaintiff sought to recover damages from her former employer, a skilled nursing facility based upon a claim of defamation arising out of the defendant's termination of the plaintiff's employment. Following the death of a resident of the facility, the resident's niece told the plaintiff that she was not interested in the resident's personal property and that the plaintiff could do what she wanted with those items. The plaintiff removed some of the personal property. After the employer later discovered that property had been taken, the employer informed the plaintiff that there was corporate policy against accepting gifts from residents and their families. The plaintiff returned the items. The employer verified that the plaintiff had in fact been given permission from the niece but nonetheless terminated the plaintiff on the grounds of theft, claiming that pursuant to the corporate policy the items belonged to the facility and that the plaintiff had committed theft when she removed them. Following a trial to the court, \$424,481.00 in general, special and punitive damages was awarded to the plaintiff. On appeal, the defendant claimed that the qualified privilege for intra corporate communications barred liability. The Supreme Court clarified that the qualified privilege is lost under Connecticut law upon proof of either actual malice (the publication of a false statement with knowledge of its falsity or reckless disregard for its truth) or malice in fact (the publication of a false statement with bad faith or improper motive). Next, the Court held that the trial court was not clearly erroneous in finding that the defendant acted with actual malice in publishing the claim that the plaintiff committed theft. In reaching this conclusion, the Court noted that whatever belief the employer had with regard to the policy prohibiting gifts to employees, "that belief did not alter the ownership of the property and

cannot alter the meaning of theft, a criminal act defined by law." "The fact that the defendants had instituted a policy prohibiting employees from accepting gifts from residents or their families as a condition of their employment was relevant only to the plaintiff's employment obligations, not to the ownership of the property." *Gambardella v. Apple Health Care, Inc.*, 291 Conn. 620 (2009)

TRIAL PRACTICE – The Appellate Court affirms a directed verdict for the defendant in a rear-end collision case:

In an underinsured motorist case, the plaintiff sought benefits in connection with an automobile accident in which the plaintiff's vehicle was struck from behind by a vehicle operated by the tortfeasor. The only evidence presented by the plaintiff addressing the issue of liability was her testimony regarding the incident and photographs

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of the damage to her vehicle. The plaintiff testified that she had been driving in the left of two lanes when she slowed and brought her car to a stop behind a line of traffic that was waiting for a car ahead to make a left turn. The plaintiff considered switching to the right lane but decided against it because of the heavy traffic conditions. After being stopped for a total of 4 to 5 seconds, the plaintiff's car was struck in the rear. She described the impact as a hard jolt and admitted that she did not observe the car that struck her before the accident. At trial, the jury was deadlocked and the trial court granted the defendant's motion for directed verdict. On appeal, the Appellate Court affirms, holding that the plaintiff failed to present sufficient evidence to remove the issues of negligence and proximate cause from the realm of conjecture. The Court notes that "a plaintiff cannot merely prove that a collision occurred and then call upon the defendant operator to come forward with evidence that the collision was not a proximate consequence of negligence on his part." "No one testified as to the actual circumstances that caused [the alleged tortfeasor's] vehicle to strike the plaintiff's vehicle, and the plaintiff testified that she did not see [the] vehicle strike her vehicle. There remains a number of factual possibilities that could explain how the accident occurred." *Schweiger v. Amica Mutual Ins. Co.*, 110 Conn. App. 736 (2008)

TRIAL PRACTICE – The Appellate Court holds that a new trial is warranted where a jury awards the plaintiff compensation for past and future medical bills, but fails to make any award for non-economic damages: In a claim arising out of an automobile accident, the jury returned a verdict in favor of the plaintiff in the amount of \$8,872.14 for past medical expenses and \$50,000.00 for future medical expenses for a surgery involving a 2 level spinal fusion. The jury did not award any non-economic damages. At trial, the defendant's expert witness admitted that the plaintiff had been asymptomatic prior to the accident and that the accident contributed to the plaintiff's back injury and caused approximately 25% of the plaintiff's pain and that the plaintiff's pain would get worse with time. The expert also conceded that surgeons recommend surgery to treat similar injuries and that, without surgery, the plaintiff would experience pain for the remainder of his life. The expert testified that he personally would not recommend surgery because he believed that it was unlikely that the surgery would improve the plaintiff's condition. Holding that the case at bar was similar to many prior cases in which

the Appellate Court held that a jury's failure to award non-economic damages was inconsistent with its verdict, the Appellate Court affirms the granting of the plaintiff's motion for a new trial. "It is not reasonable for a jury to find a defendant liable for the expense of a spinal fusion surgery but not liable for the pain and permanent disability necessarily attendant to such intrusive surgery. The jury was free to find the defendant insurer liable for some, all or none of the plaintiff's economic damages. After finding the defendant insurer liable for at least a portion of the plaintiff's spinal fusion surgery, however, the jury reasonably could not have found that the defendant insurer was free from liability for all of the pain or disability attendant to such surgery." *Benedetto v. Zaku*, 112 Conn. App. 467 (2009)

TORT LAW – A homeowner and a construction contractor do not owe a duty to a firefighter injured in the course of responding to a fire: A firefighter sought to recover damages from a condominium unit owner and a contractor hired by the owner to perform remodeling work. The firefighter was injured while jumping from the fire truck due to the advanced state of the fire at the time of the firefighter's arrival. The trial court granted motions to strike the plaintiff's negligence and recklessness claims. The Appellate Court affirms pursuant to *Lodge v. Arett Sales Corp.*, 246 Conn. 563 (1998), a Supreme Court case in which Jackson O'Keefe represented the defendants and the Supreme Court affirmed the dismissal of analogous claims. The Appellate Court notes that the firefighter alleged that the defendants negligently hired unqualified individuals to perform plumbing work which resulted in the fire and negligently failed to promptly report the fire once it began. The Appellate Court holds that neither the contractor nor the homeowner lit the fire; instead, the fire was ignited by a subcontractor. "That fact alone significantly attenuates [the defendants'] conduct from the harm suffered." Additionally, "the fact that the plaintiff sustained injuries after he jumped from the fire engine in an unorthodox and an allegedly unsafe manner could not have been anticipated as a foreseeable consequence of [the defendants'] conduct." Furthermore, the Court noted that "with respect to [the] delay in reporting the fire, we have found no authority stating that a homeowner owes a duty of care to emergency personnel to report promptly a fire or any other emergency. As a matter of public policy, we additionally note that a finding of liability in response to a delay in reporting an

PEOPLE IN THE NEWS



Attorney
Peter K. O'Keefe

PEOPLE IN THE NEWS – Attorney Peter K. O'Keefe obtains a defendant's verdict: Attorney O'Keefe recently obtained a defendant's verdict in a premises liability lawsuit. The plaintiff claimed a laceration above the left eye with bruising, a right leg fracture, a left leg fracture, a right wrist injury, as well as emotional distress. Medical special damages totaled \$39,000.00 and a lost wage claim of in excess of \$16,000.00 was asserted. The plaintiff claimed an 8% impairment of the left leg and a 3% impairment of the right leg. The plaintiff was a customer at a grinder shop and alleged that as she was entering the premises, another patron was exiting. She claimed that as she stepped aside to allow the patron to exit, she fell off of the sidewalk ramp, landing on her knees. The plaintiff alleged that her fall was caused by the narrow width of the sidewalk in front of the premises. The plaintiff's expert testified that the ramp in question was not in compliance with the Building Code. However, the plaintiff's expert acknowledged that the Code did not apply to the building as the ramp was constructed prior to the enactment of the Connecticut State Building Code. The defendant asserted that the property was not defective and that the fall was caused by the plaintiff's own negligence. The defendant's expert testified that the Code cited by the plaintiff was inapplicable to the building in question.

emergency could deter an individual from reporting the emergency at all if that person thought that too much time had passed." *Hollister v. Thomas*, 110 Conn. App. 692 (2008)

TORT LAW – The Appellate Court affirms the principle that a defendant has no duty to warn of an open and obvious condition of which the plaintiff is aware:

The plaintiff was injured while delivering a truckload of bricks at a construction site. An employee of the general contractor pointed to an area where the plaintiff should deliver the bricks, and the plaintiff moved his truck to that area. Shortly thereafter the defendant, another subcontractor, arrived on the site. Observing that there were power lines nearby, the defendant suggested that the plaintiff move his truck because it was too close to the power lines. Despite knowing that there was a sign posted on his truck that stated "look up keep boom 15 feet from power line," the plaintiff responded that he could make the delivery from that location. Using a boom attached to the truck, the plaintiff began to move the pallets of bricks, but,

during the process, the boom came into contact with the power lines, injuring the plaintiff. After settling with the general contractor, the plaintiff proceeded to trial against the remaining subcontractor defendant, alleging negligence in failing to warn and negligence in allegedly directing the plaintiff to operate his truck in an area that did not provide adequate clearance or protection. At trial, the court charged the jury on both of these specifications of negligence but after a plaintiff's verdict concluded that there had in fact been no evidence to justify a charge on the alleged failure to warn. Nonetheless, the trial court declined to grant the defendant a new trial. On appeal the Appellate Court reverses, agreeing that there was in fact no evidence upon which to predicate any claim of negligent failure to warn, noting that the duty to warn does not arise if an invitee has actual knowledge of the dangerous condition. Since the trial court had a duty not to submit the failure to warn specification of negligence to the jury, the defendant was entitled to a new trial. *Sequenzia v. Guerrieri Masonry, Inc.*, 113 Conn. App. 448 (2009)

PEOPLE IN THE NEWS



Attorney
Philip R. Dunn, Jr.

Attorney Philip R. Dunn obtains a defendant's verdict in a premises liability case:

On May 1, 2009, after a three week trial, Attorney Dunn prevailed in the defense of a condominium association, its management company and a unit owner. The plaintiff was a maintenance person employed by an independent contractor and fell from a ladder he leaned against a wooden deck rail when it collapsed. The plaintiff violated his own company policy relative to the use of a spotter and should have accessed the deck from inside the unit. The plaintiff was also the person charged to repair and replace defective deck rails, but did not inspect the rail in question before leaning his ladder against the rail. The plaintiff fractured his heel bone and developed RSD that has kept him out of work since August, 2006. He is collecting SSD and there is no prospect of his return to work based on his education and medication regimen. Attorney Dunn retained the services of a professor of physics to create a model and experiments to demonstrate that the plaintiff placed more weight on the rail than it was required to hold under the Building Code. The plaintiff's theories of liability were numerous and involved alleged code violations and sound construction and inspection practices as described by the plaintiff's experts. The plaintiff's last demand was \$475,000.00, and there was no offer to settle. No appeal has been filed.

MEDICAL MALPRACTICE – The Appellate Court holds that a Motion to Dismiss is the appropriate procedural vehicle to challenge the lack of a good faith certificate required by General Statutes § 52-190a:

The plaintiff sought to recover damages from physicians and a medical practice, alleging claims for negligent infliction of emotional distress, breach of contract and misrepresentation in connection with the defendants' care of the plaintiff during her pregnancy and the premature birth of her son, who died 51 days later. The Appellate Court affirms dismissal of the complaint on the grounds that the plaintiff failed to include any good faith certificate and written opinion of a similar healthcare provider as required by General Statutes § 52-190a in medical malpractice cases. The Appellate Court rejects the plaintiff's claim that the trial court improperly characterized her complaint as sounding in medical malpractice rather than an ordinary tort and breach of contract. While recognizing that the complaint involved allegations of emotional distress and broken promises,

the court nonetheless agreed with the trial court that the complaint sounded in medical negligence and therefore came within the purview of § 52-190a. "Every count of the complaint, whether labeled intentional, reckless or negligent conduct or breach of contract, alleges that the defendants disregarded 'the recommendation of [the] high risk physicians during the plaintiff's stay at the hospital' and refused the plaintiff's requests 'for no valid medical reasons....'" Based upon these allegations, the Appellate Court concludes that all of the claims arose out of the professional-patient relationship and involved a claim of a "specialized medical nature and that to decide the issues presented a jury would require expert medical testimony." Second, the Appellate Court rejects the plaintiff's claim that a motion to strike, rather than a motion to dismiss, should have been used to challenge the complaint since the motion to strike would allow the plaintiff to attempt to remedy the alleged deficiencies by the filing of an amended complaint after the granting of the motion. Citing subsection (c) of § 52-190a, the Court notes that

the legislature has expressly provided in the statute that the failure to obtain and file a written opinion of a similar healthcare provider renders the case subject to dismissal. While not allowing for an amendment after the granting of a motion to dismiss, the Court does note that “given the fallibility existing in the legal profession once noted by Justice David N. Shea, it is possible that a written opinion of a similar healthcare provider, existing at the time of commencement of an action, might be omitted through inadvertence. In such a scenario, it certainly may be within the discretionary power of the trial judge to permit an amendment to attach the opinion, and, in doing so, deny a pending motion to dismiss. Such a discretionary action would not be at variance with the purpose of § 52-190a, to prevent groundless lawsuits against healthcare providers.” In the case at bar, the Appellate Court notes that the plaintiff made no claim to have such a written opinion and maintained that her action simply did not sound in medical malpractice. *Votre v. County Obstetrics & Gynecology Group, PC*, 113 Conn. App. 569 (2009)

MEDICAL MALPRACTICE – Affirming a verdict for the defendant physician, the Appellate Court holds that the trial court correctly precluded the plaintiff from presenting evidence as to the standard of care for recordkeeping which the plaintiff claimed would be relevant to his claim that the physician had mistakenly operated on the wrong side of his back: The plaintiff brought an action against an orthopedic surgeon for medical malpractice and battery in connection with a surgical procedure performed to correct a herniated disc. Although the herniation was located on the left side of the spine, the physician operated on the right side. At trial, the physician defended his decision to operate on the right side by claiming that he had chosen to remove material from the right side to create a space for the bulge on the left side to sink back into place. The physician’s medical records from both before and after the surgery mistakenly indicated that the plaintiff had complained of right-sided symptoms and had a right-sided herniation. Evidence of these mistaken entries was admitted at trial, but the trial court refused to allow evidence as to the standard of care for medical recordkeeping. The Appellate Court affirms, noting that there was no allegation of negligent recordkeeping and the plaintiff had been allowed to present evidence of the inaccurate records and had simply been precluded from offering evidence as to the standard of care with regard to recordkeeping. *Costanzo v. Grey*, 112 Conn. App. 614 (2009)

PEOPLE IN THE NEWS



Attorney
Joseph M. Busher, Jr.

Attorney Joseph M. Busher, organizes a successful fundraiser to benefit charity: On July 11, 2009 the East Haddam Lions Club hosted its annual town-wide auction at the Grange Hall in East Haddam. The Club raised over \$17,000 for its charitable projects. This was the third year Attorney Busher chaired the event. Kevin Hogan of WFSB served as the guest auctioneer.

To receive the Jackson O’Keefe Law Reporter via email, please email Attorney Joseph M. Busher at jmbusher@jacksonokeefe.com. Archive copies of prior issues of the Law Reporter are also available via email in PDF format.

ABOUT THE FIRM

The Law Offices of Jackson O'Keefe are located in Hartford and Southington, Connecticut. The firm specializes in litigation and appellate work while also providing expertise in general practice areas including banking, real estate, estate planning, probate, divorce, family and corporate law.



Jackson O'Keefe has been engaged in work for major insurance companies since the late 1950s. Our experience in wrongful death, motor vehicle claims, premises liability, insurance law and related coverage questions, arbitration and mediation, product liability, medical and legal malpractice, environmental matters, municipal claims, Section 1983 actions and other federal civil rights claims, as well as property and casualty losses of a diverse nature demonstrate the broad scope of our defense experience.



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