

Connecticut LawTribune

SEPTEMBER 14, 2009
VOL. 35, NO. 37 • \$10.00

An incisivemedia publication



CTLAWTRIBUNE.COM

DECISIONS WITH A LONG SHELF LIFE

Some state high court rulings will be oft-cited in Conn. and beyond

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Looking to the future, it's likely that some of the decisions of the Connecticut Supreme Court's 2008-09 term will stage repeat appearances in tomorrow's legal arguments, court decisions and developments in other states.

Last year's most historic landmark, *Kerrigan v. Commissioner*, has already made a mark with academic commentators and courts in sister states, due to the detailed and thoughtful equal protection analysis penned by Justice Richard N. Palmer.

Attorney Sheila Huddleston, the incoming co-chair of the Connecticut Bar Association's appellate advocacy section, called the *Kerrigan* majority's approach "extremely thorough and thoughtful," and anticipated that it "will certainly be used by other state courts that grapple with similar questions interpreting their own constitutions."

Wesley W. Horton described Palmer's treatment as "gloriously eloquent" on the history of discrimination in this area. Almost before the ink was dry, the Iowa Supreme Court, for one, used *Kerrigan* as it worked through its own analysis legalizing same-sex marriage.

Indeed, *Kerrigan* could well enter the national debate on whether homosexuality should be considered a "quasi-suspect class" under the federal equal protection clause, with gays and lesbians receiving the same protection from discrimination as, say, women.

The decision's "persuasive social analysis" could make it part of the discussion, said Huddleston, even though there are differences in Connecticut's Constitution, which has an equal rights amendment, and the federal Constitution.



Law Tribune File Photo

Appellate Attorney Jeffrey Babbin said a decision in a case about the Millstone nuclear power plant is the 'new Bible' for what constitutes a substantive environmental claim.

This issue of the *Law Tribune* contains our annual review of the work of the state Supreme Court. Inside, seven authors have cited and analyzed key decisions for attorneys who practice criminal, business, labor and tort law, among other fields.

Other decisions defy easy categorization, but will nevertheless play a large role in the future workings of the court, the tactics of attorneys appearing before it and the deciding of cases.

On a strictly Connecticut level, in *State v. DeJesus*, the entire court exerted a herculean effort to grapple with its own internal rule-making authority, to no great end. In this case, a plurality decision mainly authored by Chief Justice Chase T. Rogers, the issue was the judicial reviewability of the rules of evidence. The court ended up effectively neutering the Judicial Branch's decade-old evidence advisory commission which had labored to create a uniform code binding on

all courts.

Justice Peter T. Zarella, invoking the ultimate interpretive authority of the high court, took the view that it always has the right to interpret statutes and rules. It could not make an exception for evidence rules voted on by the Superior Court judges as a body.

Justice Joette Katz, in frustration, quit the evidence panel after 10 years at its helm. Now the prospect for creating an evidence code that is binding on courts of all levels awaits some new and major drafting effort – either by the legislature or the Supreme Court itself. Neither body seems to be casting about for additional extracurricular activities.

Environmental Tome

Nuclear-fueled environmental activist Nancy Burton, a former Redding lawyer whose zeal helped get her disbarred, was at the center of two decisions about the impact of the heated water discharged by the state's nuclear power plants.

Burton claimed that the state Department of Environmental Protection had done shoddy work in issuing permits to the two Millstone plants without considering evidence that the water discharge might be harmful to the Long Island Sound eco-system. The state had challenged Burton's standing to bring a complaint, but the court sided with her and said her complaints should be considered.

Attorney Jeffrey Babbin, the second incoming co-chair of the CBA's appellate advocacy section, said the exhaustive treatment in *Nancy Burton v. Commissioner of Environmental Protection*, is "for anyone who practices environmental law, at least for now, the new Bible to consult as to what claims" will amount to a substantive environmental claim. "Justice Palmer, in a kind of academic way, tried to reconcile the entire line of cases under the Connecticut Environmental Protection Act in the Burton case."

Another environmental decision, *Finley v. Inland Wetlands Commission*, authored by Justice William J. Sullivan, sheds further light on this topic. "In some cases now," said Babbin, "complaints about the [DEP] can be seen as substantive complaints about the ef-

fect on the environment. That was not seen to be the case before, so it's interesting to see it's evolving," he said.

Babbin, an appellate lawyer at Wiggin and Dana in New Haven, wasn't personally involved in either decision. "I follow this area. It's really important for businesses, zoning boards and local developers."

Coming Up

The ever-controversial clergy abuse case of *Rosado v. Bridgeport Diocese* promises to be back in the news by the end of September. The case, pressed by *The New York Times* and other large newspapers, seeks access to some 1,200 documents in court files left over from litigation initiated by alleged abuse victims in Waterbury.

The state Supreme Court ruled in June that virtually all the documents were court records subject to public access. Katz, in a pivotal case on public access to court documents, expressed the court's view that even background court documents, like motions *in limine* to suppress certain arguments, are part of the decision-making process to which the public deserves access

The church has not stopped trying to block release of the files. It took its case to the U.S. Supreme Court. After Justice Ruth Bader Ginsberg approved the release, the church petitioned Justice Antonin Scalia, who delayed action pending full court review Sept. 29.

According to Pepe & Hazard media lawyer Daniel Klau, "*Rosado* will have long-term, and in my opinion, national impact in terms of setting a progressive standard for access to court files." He said in *Rosado*, the court ties its role as custodian of the documents to the ultimate purpose of showing the public clearly how the decisions were made.

Class Actions Harder

A decision authored by Justice Zarella, *Palmer v. Friendly Ice Cream Co.*, was a setback for plaintiffs' lawyers who hoped to immediately appeal a trial court denial of class certification. The unanimous Supreme Court majority held that the litigants should continue uncertified, and wait until the end

of the case to appeal the lack of class certification. For businesses that feel beset by costly class action litigation, the decision is a considerable victory.

A March tax decision, also authored by Zarella, *St. Joseph's Living Center v. Windham*, explores and clarifies issues of when an institution qualifies for property tax exemption as a charitable institution, and is expected to be of lasting value to the tax bar.

A defense lawyer's bid to gain access to grand jury application papers launched the highly unusual matter of *In Re Judicial Inquiry N. 2005-02*, released last month. The front-burner issue – whether a defendant can see the very first papers that launched a criminal investigation – was answered in the negative through statutory construction.

But the Zarella decision also explored exactly when a matter is appealable to the Appellate Court and when it can be appealed to the Supreme Court. Lawyers in appellate practice are keenly interested in this question, but Zarella's decision hasn't exactly settled the dust, said Huddleston.

The state statute that discusses appeals to the Appellate Court says that they can be made after the "final judgment of the trial court." In contrast, the statute that authorizes petitions for certification to the Supreme Court says they must be filed after the "final determination of the Appellate Court."

"What the difference in what that language means is something the courts have to figure out," Huddleston said. From the standpoint of appellate lawyers, she said, "it made things a little more complicated, and you have to think a little harder."

Babbin, her co-chair, made a similar point. The opinions of the Connecticut Supreme Court are not often split into confusing pluralities, like the U.S. Supreme Court, but they can still require a fine-toothed comb to figure out exactly what the law is.

"The legislature gives us some broad and opaque standards," Babbin said. "Sometimes the court has to take several stabs over several years to figure out what it all means. And we lawyers are right behind them on the same roller coaster." ■