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VINCENT D'ERAMO *v.* JAMES R. SMITH, CLAIMS COMMISSIONER
(SC 17112)

Sullivan, C. J., and Norcott, Katz, Zarella and Corradino, Js.

Argued October 22, 2004—officially released May 17, 2005

Joseph A. Kubic, with whom, on the brief, were *James R. Winkel* and *Stephen P. Wright*, for the appellant (plaintiff).

Thomas P. Clifford III, assistant attorney general, with whom, on the brief, were *Richard Blumenthal*, attorney general, and *William J. McCullough*, assistant attorney general, for the appellee (defendant).

Opinion

SULLIVAN, C. J. The plaintiff, Vincent D'Eramo, appeals from the judgment of the trial court dismissing his application for a writ of mandamus ordering the defendant, James R. Smith, claims commissioner (claims commissioner), to authorize his medical malpractice action against the state pursuant to General Statutes § 4-160 (b).[1] The claims commissioner filed a motion to dismiss, claiming that the trial court lacked jurisdiction over the matter. The trial court dismissed the action, not on jurisdictional grounds, but because § 4-160 (b) did not apply retroactively to the plaintiff's medical malpractice claim and, therefore, the plaintiff had no clear legal right to the relief requested in his application. We conclude that the form of judgment is improper because the trial court had subject matter jurisdiction over the plaintiff's application and, therefore, the matter should not have been dismissed. We agree with the trial court, however, that the plaintiff is not entitled to the relief sought. Accordingly, we conclude that judgment should enter for the claims commissioner.

The record reveals the following facts and procedural history. The plaintiff injured his wrist on or about February 3, 1998. Thereafter, he made arrangements for surgery to repair the injury. Prior to the scheduled surgery, the plaintiff was committed to the custody of the department of correction (department). While in the custody of the department, the plaintiff underwent surgery on July 27, 1998. On January 6, 1999, the plaintiff filed with the claims commissioner a notice of claim alleging that the delay by the department in providing adequate medical care to the plaintiff, even though it had been notified of his condition, had resulted in permanent damage to his wrist.

Meanwhile, in 1998, the legislature enacted No. 98-76 of the 1998 Public Acts (P.A. 98-76), now codified in relevant part at § 4-160 (b), which provided that if a

claimant alleges malpractice against the state and files a certificate of good faith in accordance with General Statutes § 52-190a,[2] the claims commissioner "shall authorize suit against the state . . . ." Public Act 98-76 took effect on October 1, 1998. In December, 2001, the plaintiff filed with the claims commissioner a certificate of good faith in accordance with § 52-190a. On March 8, 2002, the plaintiff filed with the claims commissioner a motion for authorization to bring an action against the state. A hearing on the claim[3] was scheduled for September 16, 2002. Before the scheduled hearing date, the plaintiff commenced the present action seeking a writ of mandamus ordering the claims commissioner to authorize suit against the state and an injunction against the claims commissioner to prevent him from conducting a hearing on the plaintiff's claim until a writ of mandamus had been issued.

The claims commissioner filed a motion to dismiss, claiming, inter alia, that the trial court lacked subject matter jurisdiction over the action under the doctrine of sovereign immunity. Specifically, the claims commissioner argued that he is absolutely immune to suits arising from the exercise of his adjudicative powers. He also argued that he was not required to authorize the plaintiff's medical malpractice action against the state under § 4-160 (b) because the statute does not apply retroactively to the plaintiff's claim. The trial court granted the claims commissioner's motion to dismiss on the ground that § 4-160 (b) is not retroactive and, therefore, that the plaintiff had no clear legal right to the relief requested in his application. See *Stratford* v. *State Board of Mediation & Arbitration*, 239 Conn. 32, 44, 681 A.2d 281 (1996).[4] Thereafter, the plaintiff appealed from the judgment to the Appellate Court, and we transferred the appeal to this court pursuant to General Statutes § 51-199 (c) and Practice Book § 65-1.

On appeal, the plaintiff argues that the trial court improperly concluded that P.A. 98-76 is not retroactive because it constituted a substantive rather than a procedural change to the statutory scheme and the legislature did not clearly and unequivocally express an intent that it apply retroactively. We note that the trial court's determination that § 4-160 (b) is not retroactive and, therefore, that the plaintiff had no clear right to the relief sought, concerns the merits of the plaintiff's mandamus action, rather than the trial court's subject matter jurisdiction. Accordingly, we treat the portion of the claims commissioner's motion to dismiss addressing the merits of the action as a motion for summary judgment and treat the trial court's dismissal as the rendering of judgment in favor of the claims commissioner. See *Sullivan* v. *State*, 189 Conn. 550, 552 n.4, 457 A.2d 304 (1983);[5] cf. *Cadle Co.* v. *D'Addario*, 268 Conn. 441, 445 n.5, 844 A.2d 836 (2004).[6]

The claims commissioner argues that the trial court's

judgment may be affirmed on the alternate ground that the plaintiff's application should be dismissed because he has not exhausted his remedies before the claims commissioner and because the power to waive the state's immunity to suit is committed solely to the legislature and, through the legislature, to the claims commissioner.[7]

"Ordinarily, we would consider the defendant's alternate grounds for affirmance only after finding merit in [the claim] raised on appeal. [O]nce the question of lack of jurisdiction of a court is raised, [however, it] must be disposed of no matter in what form it is presented . . . and the court must fully resolve it before proceeding further with the case." (Internal quotation marks omitted.) *Dow & Condon, Inc.* v. *Brookfield Development Corp.*, 266 Conn. 572, 578–79, 833 A.2d 908 (2003). We therefore consider as a threshold issue the claims commissioner's claimed alternate ground for affirmance.

"Under our exhaustion of administrative remedies doctrine, a trial court lacks subject matter jurisdiction over an action that seeks a remedy that could be provided through an administrative proceeding, unless and until that remedy has been sought in the administrative forum. . . . In the absence of exhaustion of that remedy, the action must be dismissed." (Citation omitted.) *Drumm* v. *Brown*, 245 Conn. 657, 676, 716 A.2d 50 (1998). "We have recognized that a party aggrieved by a decision of an administrative agency may be excused from exhaustion of administrative remedies if: recourse to the administrative remedy would be futile or inadequate . . . or injunctive relief from an agency decision is necessary to prevent immediate and irreparable harm." (Citations omitted.) *Polymer Resources, Ltd.* v. *Keeney*, 227 Conn. 545, 561, 630 A.2d 1304 (1993).

In the present case, the claims commissioner argues that the plaintiff's claim is barred by the exhaustion doctrine because he failed to proceed with the scheduled September 16, 2002 hearing before the claims commissioner. This argument has two prongs. First, he argues that, if this court determines that § 4-160 (b) applies to the plaintiff's claim, then the plaintiff must exhaust his administrative remedy by proceeding with the hearing before the claims commissioner to determine whether the plaintiff has complied with the statutory procedural requirements. The issue before this court, however, is not whether the plaintiff has complied with the procedural requirements of § 4-160 (b); it is whether § 4-160 (b) applies at all to the plaintiff's medical malpractice claim. The claims commissioner's argument, properly understood, is not grounded in exhaustion principles because it is premised on a preliminary determination by this court that § 4-160 (b) applies retroactively to the plaintiff's claim. In other words, the claims commissioner's argument is not that

this court lacks jurisdiction to determine whether § 4-160 (b) applies retroactively; it is that, if this court determines that § 4-160 (b) does apply retroactively, we should not direct a judgment for the plaintiff, but should remand the matter to the claims commissioner for a hearing. Because we conclude that § 4-160 (b) does not apply retroactively, we need not determine whether the plaintiff was required to follow the procedures set forth in § 4-160 (b).

Second, the claims commissioner argues that the plaintiff must exhaust his administrative remedies because the claims commissioner's current position that § 4-160 (b) is not retroactive could be revisited at a hearing on the plaintiff's motion for authorization to bring an action against the state. Although, as we have indicated, we need not decide in this case what, if any, proceedings before the claims commissioner are contemplated by § 4-160 (b), the legislative history of the statute makes clear that the legislature's primary purpose in enacting the statute was to eliminate, for medical malpractice claimants, the delay and inconvenience engendered by the generally applicable procedures for claims against the state pursuant to chapter 53 of the General Statutes. The plaintiff should not have to go through these more onerous procedures in order to determine whether the less onerous procedures are available. To subject the plaintiff unnecessarily to those procedures would be to subject him, immediately and irreparably, to the very harm that the legislature intended to avoid. We conclude, therefore, that the plaintiff's mandamus action is not barred by the exhaustion doctrine.

We also reject the claims commissioner's claim that the trial court lacked jurisdiction over the plaintiff's application because the determination of whether to waive immunity to suit is committed solely to the legislature and, through the legislature, to the claims commissioner. Article eleventh, § 4, of the constitution of Connecticut provides: ''Claims against the state shall be resolved in such manner as may be provided by law.'' This court has held that ''[t]he question whether the principles of governmental immunity from suit and liability are waived is a matter for legislative, not judicial, determination.'' (Internal quotation marks omitted.) *Struckman* v. *Burns*, 205 Conn. 542, 558, 534 A.2d 888 (1987). We also have held that the trial court does not have jurisdiction over an administrative *appeal* from the claims commissioner's discretionary denial of authorization to bring an action against the state because ''[t]he commissioner of claims performs a legislative function directly reviewable only by the General Assembly.'' *Circle Lanes of Fairfield, Inc.* v. *Fay*, 195 Conn. 534, 541, 489 A.2d 363 (1985).

The claims commissioner argues that these authorities establish that the trial court did not have jurisdic-

tion over the plaintiff's application because the claims commissioner, through the legislature, is vested with the power to determine whether to waive immunity to suit. The flaw in the claims commissioner's argument is that the plaintiff in the present case, unlike in *Circle Lanes of Fairfield, Inc.*, is not attempting to appeal from a decision by the claims commissioner and is not asking the court to substitute its views for the claims commissioner's discretionary legislative determination as to whether sovereign immunity should be waived. Rather, the plaintiff is asking the court to determine whether the legislature, in enacting § 4-160 (b), intended to waive immunity to claims like his that accrued before the effective date of the statute. Statutory interpretation is a quintessentially judicial function and this court has never hesitated to construe a statute to determine whether it constitutes a waiver of sovereign immunity. Indeed, we have construed § 4-160 (b) for that purpose. See *Bloom* v. *Gershon*, 271 Conn. 96, 98, 856 A.2d 335 (2004) (§ 4-160 [b] does not constitute waiver of immunity to apportionment complaint relating to medical malpractice claim). Accordingly, we conclude that the trial court had jurisdiction over the plaintiff's application.

We now turn to the substance of the plaintiff's claim on appeal. As a preliminary matter, we set forth the standard of review. ''[T]he standard of review of a trial court's decision to grant a motion for summary judgment is well established. Practice Book [§ 17-49] provides that summary judgment shall be rendered forthwith if the pleadings, affidavits and any other proof submitted show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.'' (Internal quotation marks omitted.) *Craig* v. *Stafford Construction, Inc.*, 271 Conn. 78, 83, 856 A.2d 372 (2004).

The plaintiff in the present case does not claim that any material facts are in dispute. The sole issue in dispute is whether, as a matter of law, the plaintiff has a clear right under § 4-160 (b) to obtain from the claims commissioner authorization for his action against the state. This question turns on whether the statute is retroactive. ''Whether to apply a statute retroactively or prospectively depends upon the intent of the legislature in enacting the statute. . . . In order to determine the legislative intent, we utilize well established rules of statutory construction. Our point of departure is General Statutes § 55-3, which states: No provision of the general statutes, not previously contained in the statutes of the state, which imposes any new obligation on any person or corporation, shall be construed to have retrospective effect. The obligations referred to in the statute are those of substantive law. . . . Thus, we have uniformly interpreted § 55-3 as a rule of presumed legislative intent that statutes affecting substantive rights shall apply prospectively only.''[8] (Citation omit-

ted; internal quotation marks omitted.) *Andersen Consulting, LLP* v. *Gavin*, 255 Conn. 498, 517, 767 A.2d 692 (2001); see also *Reid* v. *Zoning Board of Appeals*, 235 Conn. 850, 859 n.6, 670 A.2d 1271 (1996) (" '[i]t is a rule of construction that legislation is to be applied prospectively unless the legislature clearly expresses an intention to the contrary' "). "The rule is rooted in the notion that it would be unfair to impose a substantive amendment that changes the grounds upon which an action may be maintained on parties who have already transacted or who are already committed to litigation. . . . In civil cases, however, unless considerations of good sense and justice dictate otherwise, it is presumed that procedural statutes will be applied retrospectively. . . . Procedural statutes have been traditionally viewed as affecting remedies, not substantive rights, and therefore leave the preexisting scheme intact." (Citations omitted.) *Moore* v. *McNamara*, 201 Conn. 16, 22, 513 A.2d 660 (1986). "[A]lthough we have presumed that procedural or remedial statutes are intended to apply retroactively absent a clear expression of legislative intent to the contrary . . . a statute which, in form, provides but a change in remedy but actually brings about changes in substantive rights is not subject to retroactive application." (Citation omitted; internal quotation marks omitted.) *Miano* v. *Thorne*, 218 Conn. 170, 175, 588 A.2d 189 (1991). "While there is no precise definition of either [substantive or procedural law], it is generally agreed that a substantive law creates, defines and regulates rights while a procedural law prescribes the methods of enforcing such rights or obtaining redress." (Internal quotation marks omitted.) *Davis* v. *Forman School*, 54 Conn. App. 841, 854–55, 738 A.2d 697 (1999).

We begin our analysis with the language of the statute. Section 4-160 (b) provides in relevant part that an "attorney or party filing [a malpractice] claim may submit a certificate of good faith to the Claims Commissioner in accordance with section 52-190a. If such a certificate is submitted, the Claims Commissioner shall authorize suit against the state on such claim." Before § 4-160 (b) was enacted, medical malpractice claims were treated like other claims against the state under chapter 53 of the General Statutes. With respect to such claims, the claims commissioner had the authority to hold trial-like hearings; see General Statutes § 4-151; to make findings of fact and issue appropriate orders; see General Statutes § 4-154; to approve immediate payment of just claims not exceeding $7500; see General Statutes § 4-158; and to recommend that the General Assembly pay claims exceeding $7500. See General Statutes § 4-159. In addition, "[w]hen the Claims Commissioner deems it just and equitable, he may authorize suit against the state on any claim which, in his opinion, presents an issue of law or fact under which the state, were it a private person, could be liable." General Stat-

utes § 4-160 (a). Thus, the effect of § 4-160 (b) was to deprive the claims commissioner of his broad *discretionary* decision-making power to authorize suit against the state in cases where a claimant has brought a medical malpractice claim and filed a certificate of good faith. Instead, § 4-160 (b) *requires* the claims commissioner to authorize suit in all such cases.[9] In other words, the effect of the statute was to convert a limited waiver of sovereign immunity to medical malpractice claims, subject to the discretion of the claims commissioner, to a more expansive waiver subject only to the claimant's compliance with certain procedural requirements.

With this background in mind, we conclude that the enactment of P.A. 98-76, now codified at § 4-160 (b), constituted a substantive change to the statutory scheme. This court previously has recognized that "[w]here a statute gives a right of action which did not exist at common law . . . and fixes the time within which the right must be enforced, the time fixed is a limitation or condition attached to the right—it is a limitation of the liability itself as created, and not of the remedy alone. . . . The courts of Connecticut have repeatedly held that, under such circumstances, the time limitation is a substantive and jurisdictional prerequisite . . . ." (Citation omitted; internal quotation marks omitted.) *Lostritto* v. *Community Action Agency of New Haven, Inc.*, 269 Conn. 10, 23, 848 A.2d 418 (2004). Similarly, where a statute creates a right to bring an action against the state that did not exist at common law, and places limitations on the right, any such limitations are substantive and not merely remedial or procedural. It follows, therefore, that the amendment of a statutory limitation on a right to sue the state constitutes a substantive change to the statute. Accordingly, § 4-160 (b) constitutes a substantive change to the statutory scheme and, in the absence of any clear expression of legislative intent to the contrary, is presumptively prospective.

The plaintiff argues that the following legislative history contains such a clear and unequivocal expression of legislative intent to the contrary. See *Taylor* v. *Kirschner*, 243 Conn. 250, 252–53, 702 A.2d 138 (1997) (considering legislative history in determining whether substantive statute is retroactive). During debate before the judiciary committee on the bill that ultimately was enacted as P.A. 98-76, Representative Michael Lawlor asked Robert Reardon, an attorney and president of the Connecticut Trial Lawyers Association at the time: "[S]hould this bill become law, what would be the practical effect in a case such as this if these new rules were adopted?" Conn. Joint Standing Committee Hearings, Judiciary, Pt. 1, 1998 Sess., p. 140. Reardon responded: "I would think that I would file a [c]ertificate of [g]ood [f]aith promptly and the case would move on." Id. Thereafter, Reardon commented: "We only seek to get to the

jury and get an opportunity to have our day in court in these medical negligence cases against the [s]tate and not have to wait . . . .'' Id., p. 141. Later, Representative Lawlor stated: ''I think it's our obligation in light of the reality of the sovereign immunity of the [s]tate and tribes and federal government, etc., that we have to make it as simple as possible to accomplish justice even when the sovereign is involved.

''So, I'm relatively optimistic this bill will be successful this year and hopefully that you won't and people like yourself in the *future* won't have to deal with this kind of thing.'' (Emphasis added.) Id., p. 147. During the debate on the bill in the House of Representatives, Representative Richard D. Tulisano summarized the changes made by P.A. 98-76 and explained that the bill ''reduces [the need for] having another hearing and then bringing it to court for a hearing.'' 41 H.R. Proc., Pt. 8, 1998 Sess., p. 2697. The plaintiff argues that this history establishes that ''the intent of the legislation was to allow the persons who had pending claims at the time of the public hearing to [proceed] to Superior Court upon the filing [of] a certificate of good faith.''

We are not persuaded that these general remarks clearly and unequivocally express a legislative intent for the bill to apply retroactively. If anything, Representative Lawlor's statement that *future* claimants would not have to deal with the delays caused by the claims commissioner's investigation expresses the legislature's intent that the legislation would apply prospectively. Accordingly, we conclude that § 4-160 (b) only applies prospectively.

Having concluded that § 4-160 (b) does not apply retroactively, it remains for us to determine whether application of the statute to the plaintiff's claim would be retroactive. The trial court determined that § 4-160 (b) should apply only to injuries that occurred after the effective date of the statute, October 1, 1998, in a manner similar to the ''date of injury rule'' that is applied in the workers' compensation context. ''The date of injury rule is a rule of statutory construction that establishes a presumption that new workers' compensation legislation affecting rights and obligations as between the parties . . . applie[s] only to those persons who received injuries after the legislation became effective, and not to those injured previously.'' (Internal quotation marks omitted.) *Hasselt* v. *Lufthansa German Airlines,* 262 Conn. 416, 424, 815 A.2d 94 (2003). The plaintiff argues that the date of injury rule is inapplicable because that rule relies, in part, on § 55-3; see *Badolato* v. *New Britain*, 250 Conn. 753, 756–57, 738 A.2d 618 (1999); and § 55-3 does not apply to the state. We have already rejected this argument. See footnote 8 of this opinion. Accordingly, we conclude that the trial court properly found that the date of injury is the operative date for purposes of retroactivity analysis.

The plaintiff's original injury occurred on or about February 3, 1998, and he received surgery for the injury on July 27, 1998. Accordingly, any injury caused by the department's delay in providing surgery occurred between those dates. Because the plaintiff's injury occurred before the statute's effective date of October 1, 1998, § 4-160 (b) does not apply to his medical malpractice claim. Accordingly, we conclude that the plaintiff had no clear legal right to the relief sought in his application for writ of mandamus and that judgment should enter for the claims commissioner.

The form of the judgment is improper, the judgment is reversed and the case is remanded with direction to render judgment for the defendant on the merits of the plaintiff's application for a writ of mandamus.

In this opinion NORCOTT, KATZ and CORRADINO, Js., concurred.

[1] General Statutes § 4-160 (b) provides: "In any claim alleging malpractice against the state, a state hospital or a sanitorium or against a physician, surgeon, dentist, podiatrist, chiropractor or other licensed health care provider employed by the state, the attorney or party filing the claim may submit a certificate of good faith to the Claims Commissioner in accordance with section 52-190a. If such a certificate is submitted, the Claims Commissioner shall authorize suit against the state on such claim."

[2] General Statutes § 52-190a provides in relevant part: "(a) No civil action shall be filed to recover damages resulting from personal injury . . . whether in tort or in contract, in which it is alleged that such injury . . . resulted from the negligence of a health care provider, unless the attorney or party filing the action has made a reasonable inquiry as permitted by the circumstances to determine that there are grounds for a good faith belief that there has been negligence in the care or treatment of the claimant. The complaint or initial pleading shall contain a certificate of the attorney or party filing the action that such reasonable inquiry gave rise to a good faith belief that grounds exist for an action against each named defendant. . . ."

[3] See General Statutes § 4-141 (" '[c]laim' means a petition for the payment or refund of money by the state or for permission to sue the state").

[4] "It is well established that mandamus will issue only if the plaintiff can establish: (1) that the plaintiff has a clear legal right to the performance of a duty by the defendant; (2) that the defendant has no discretion with respect to the performance of that duty; and (3) that the plaintiff has no adequate remedy at law." (Internal quotation marks omitted.) *Stratford* v. *State Board of Mediation & Arbitration*, supra, 239 Conn. 44.

[5] "No objection has been raised to the procedure of using a motion to dismiss rather than a motion for summary judgment to obtain a pretrial adjudication of the merits of the special defense of immunity from liability . . . raised by the defendant. . . . We have decided to consider the issues as the parties have presented them to us on their merits." *Sullivan* v. *State*, supra, 189 Conn. 552 n.4.

[6] "In response to the defendants' motion for summary judgment, the plaintiff filed its own motion for summary judgment alleging that it had standing and was aggrieved. The proper procedural vehicle for disputing a party's standing is a motion to dismiss. *St. George* v. *Gordon*, 264 Conn. 538, 544–45, 825 A.2d 90 (2003). Therefore, we treat the parties' cross motions for summary judgment as a motion to dismiss and an objection to the motion to dismiss. We consider the trial court's action as the denial of a motion to dismiss." *Cadle Co.* v. *D'Addario*, supra, 268 Conn. 445 n.5.

[7] The claims commissioner has not renewed in this court his argument to the trial court that he is absolutely immune to suit. Cf. *Bloom* v. *Gershon*, 271 Conn. 96, 856 A.2d 335 (2004) (considering merits of mandamus action seeking order directing claims commissioner to authorize apportionment suit against state pursuant to § 4-160 [b]); *Miller* v. *Egan*, 265 Conn. 301, 314, 828 A.2d 549 (2003) (sovereign immunity is not defense in action against state officer for declaratory or injunctive relief when plaintiff claims officer acted in excess of statutory authority); *Connecticut Pharmaceutical Assn., Inc.* v. *Milano*, 191 Conn. 555, 559, 468 A.2d 1230 (1983) ("[a] trial court

that has the competency to adjudicate what duties can be compelled by mandamus has subject matter jurisdiction'').

[8] The plaintiff argues that § 55-3 does not apply to the claims commissioner because neither the claims commissioner nor the state is included in the statutory definition of ''person.'' See General Statutes § 1-1 (k) (''[t]he words 'person' and 'another' may extend and be applied to communities, companies, corporations, public or private, limited liability companies, societies and associations''). Even if we assume that § 55-3 does not apply to the state and its agents and subdivisions, however, the presumption against retroactivity is rooted in common-law notions of fairness that have general application. As we stated in *State* v. *Faraday*, 268 Conn. 174, 196, 842 A.2d 567 (2004), the ''presumption against retroactive legislation is deeply rooted in our jurisprudence, and embodies a legal doctrine centuries older than our Republic. Elementary considerations of fairness dictate that individuals should have an opportunity to know what the law is and to conform their conduct accordingly; settled expectations should not be lightly disrupted. For that reason, the principle that the legal effect of conduct should ordinarily be assessed under the law that existed when the conduct took place has timeless and universal human appeal.'' (Internal quotation marks omitted.) We can perceive no reason that the state should be exempt from these principles. Moreover, even if these principles do not apply to the state, they apply to claimants against the state, such as the plaintiff. If § 4-160 (b) is a substantive statute, it affects the substantive rights of both the state and claimants against it. Accordingly, we reject this claim.

[9] As we have indicated, we express no opinion in this case concerning whether the claims commissioner is authorized under § 4-160 (b) to conduct a hearing to determine whether a claimant has met the statutory requirements.