ORIGINAL

OFFICIAL TRANSCRIPT

PROCEEDINGS BEFORE

THE SUPREME COURT

OF THE

UNITED STATES

CAPTION: CONNECTICUT AND JOHN F. DIGIOVANNI,

Petitioners V. BRIAN K. DOEHR

CASE NO: 90-143

PLACE: Washington, D.C.

DATE: January 7, 1991

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IN THE SUPREME COURT OF THE UNITED STATES

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CONNECTICUT AND JOHN F. DIGIOVANNI, :

Petitioners :

v. : No. 90-143

BRIAN K. DOEHR :

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Washington, D.C.

Monday, January 7, 1991

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:01 a.m.

APPEARANCES:

HENRY S. COHN, ESQ., Assistant Attorney General of Connecticut, Hartford, Connecticut; on behalf of the Petitioners.

JOANNE S. FAULKNER, ESQ., New Haven, Connecticut; on behalf of the Respondent.

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PROCEEDINGS

(10:01 a.m.)

CHIEF JUSTICE REHNQUIST: We'll hear argument first this morning in No. 90-143, Connecticut and John F. DiGiovanni v. Brian K. Doehr.

Mr. Cohn.

ORAL ARGUMENT OF HENRY S. COHN

ON BEHALF OF THE PETITIONERS

MR. COHN: Mr. Chief Justice, and may it please the Court:

The issue before the Court in this case is whether Connecticut's ex parte attachment of real estate statute which provides for an immediate post-seizure hearing and a pre-attachment probable cause determination by a State court judge on a factual affidavit and an immediate appeal subsequent to the post-seizure clearing satisfies the due process clause of the Fourteenth Amendment.

Your Honors, this is a facial challenge to the statute, and I say this because it was noted in the opening paragraph of Judge Pratt's opinion for the Second Circuit and was so noted in all the papers and opinions below. It arose on summary judgment --

QUESTION: I'm not sure I --

QUESTION: Mr. Cohn, what does that mean in the context of a case like this to say that it's a facial

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challenge? I mean, we're not dealing with a First Amendment situation here.

MR. COHN: Yes, Your Honor, the evidence before the court was limited, and therefore matters such as the effect on the debtor and the length of time it takes to obtain a hearing, the post -- the immediate post-seizure hearing, things of that nature, were not developed in the district court. And therefore we're dealing with the statutes -- there is a statutory scheme or system which leads to the ex parte real estate attachment, and there are cases which have interpreted that in the Connecticut Supreme Court. And that is what is before you today.

QUESTION: No evidence was taken in the trial court?

MR. COHN: No, there were two facts presented in the trial court on summary judgment. Under the local rule in order to have summary judgment you have to have a, what they call a list of material facts, and there were two facts presented. One was that a lawsuit had commenced in a court in Connecticut, a superior court, concerning an assault and battery. And the other was that in fact this attachment scheme or system had in fact been used. So there were those two facts, and those two facts alone, and they were the basis of the ruling.

QUESTION: Well, it was applied in this case, was

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it not? I mean, we're dealing with a situation where the Connecticut procedures were actually invoked.

MR. COHN: Yes. Oh, yes, indeed, Your Honor, that was the case.

QUESTION: For these litigants. So one couldn't really say it's a facial challenge. I don't understand that at all.

MR. COHN: Well --

QUESTION: This is -- it has been applied in this case to these parties.

MR. COHN: It was applied to these parties, but the case that came before the district court was not based upon the factual --

QUESTION: Well, summary judgment was granted.

MR. COHN: That's right. And in that sense they had to rely on the fact that something had happened in the superior court below, yes, that certain steps had been taken.

QUESTION: As long as you're -- interrupted me, I asked you one thing about the statute. Is notice given immediately to the landowner when the lien is placed on the property?

MR. COHN: Yes, it is, Your Honor. In fact in an amendment to the statute, maybe 3 or 4 years ago, it did more than just require a service, which you would normally

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have with a lawsuit. They also took -- the legislature of the State of Connecticut added to the statute a requirement that in bold print every debtor or landowner that was affected by these attachments would receive a list of rights that they had that they could exercise.

QUESTION: Well, is the notice given at the time the complaint is served to start the lawsuit, or is there some other notice given?

MR. COHN: It's at the time a complaint is served.

QUESTION: So that could be a 90-day period?

MR. COHN: The 90-day --

QUESTION: Meaning technically someone could go in and get the lien, and then have it in existence and serve the complaint 90 days later?

MR. COHN: Technically speaking that is true. We would contest, however, that that is ever done. And we would also concede that, if such a procedure were shown to exist, there might be some due process problems.

QUESTION: Do we know in this case whether a notice was received right away?

MR. COHN: Oh, yes, absolutely. Yes.

The normal procedure is that the creditor or the attaching party would immediately get the paper served upon the debtor, and then that notice would be included with the packet of papers. Now, there would be no harm in addition

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to the debtor if there was no notice by him of this 90-day period. But again, we're talking about very much theoretical goings on that does not happen under this scheme as it's set up.

QUESTION: You say in this particular case notice was served immediately upon the debtor?

MR. COHN: Yes, Your Honor. There was a action started within 2 or 3 days after the creditor or the attaching party obtained permission from the district -- from the superior court, and they immediately took steps to both accomplish the attachment and to serve the papers on the homeowner.

QUESTION: Does Connecticut have a lis pendens scheme --

MR. COHN: Oh, yes, indeed.

QUESTION: -- in addition to this?

MR. COHN: Yes, we do.

MR. COHN: And how does that differ from this?

MR. COHN: Lis pendens differs actually because it gives somewhat less rights than this statute does in that in order to obtain the lis pendens there is no need to go to the superior court judge and to demonstrate the affidavit, in factual affidavit that we have in this case. One merely starts the suits, puts the lis pendens on the land records, then gives notice to the debtor, and the

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debtor then has the opportunity to go to the superior court to state that that was an improper service.

I would point out to the Court that the lis pendens statute of Connecticut was approved by the Connecticut Supreme Court in Williams v. Bartlett, and it was appealed to this Court, and this Court summarily affirmed the lis pendens statute. And the question presented to the Court, this Court, was whether or not this violated due process. And again, it was summarily affirmed.

QUESTION: One difference, in many States, and I believe this was true where I practiced in Arizona, is that a lis pendens can be sought only where you are bringing an action that somehow affects the land on which you want the lis pendens, whereas an attachment, you can seek that on property that has nothing to do with the underlying cause of action. Is that true in Connecticut too?

MR. COHN: I believe it is true. Yes, that is the case.

QUESTION: Mr. Cohn, before you go on let me just be sure I understood one of your answers. In this case is it not correct that the attachment was obtained before there was any notice to the owner of the real estate?

MR. COHN: The attachment was obtained without notice --

QUESTION: Okay.

MR. COHN: -- however, then the party started the lawsuit, and notice and attachment were given at the same time as --

QUESTION: But that means that the party had the right to come in and seek to have the attachment set aside.

MR. COHN: That's right.

QUESTION: But the attachment was already in place before there was any notice?

MR. COHN: Within a day or so.

QUESTION: Yeah, but at least it preceded the notice.

MR. COHN: Oh, yes.

QUESTION: Okay.

MR. COHN: Because that's why it is an ex parte procedure.

QUESTION: Right. I just wondered.

MR. COHN: Yes.

Our point is that this statutory scheme, as it is established and as the legislature has passed it, is beyond question, as one district court said, beyond question facially constitutional. Respondent in this Court has sought to go beyond even the Second Circuit, which made some factual assumptions based upon some of the two points that were in the court on summary judgment in the district court. The Second Circuit has made a few additional assumptions as

to the effect of a real estate attachment.

But now, in the Supreme Court of the United States, respondent has gone beyond this and, to our view, if this attachment, the Connecticut attachment, is vitiated, not only would the attachment statutes fall, but our mechanics lien statutes would be threatened, lis pendens statutes would be threatened throughout the country, and even attachments after hearing, because there are references in respondent's brief to the type of attachments which occur after hearing as being violative of due process and difficult for the homeowner to sustain and causing a variety of economic and emotional harm.

Just to briefly summarize the facts, in this case, in order for the attachment to take place, the petitioner, who is DiGiovanni, had to present to the district, to the superior court for the State of Connecticut three items: an application for pre-judgment remedy, which we call PJR's in Connecticut, a factual sworn affidavit setting forth the grounds of the liability and the nature of the damages, and the proposed unsigned summons and complaint that was intended to be served on the respondent door.

The superior court judge reviewed the above papers and made a finding of probable cause. He actually had to read through these papers. It was not just a matter of --

QUESTION: Does that mean that there is, he find

that there is a likelihood of success on the merits?

MR. COHN: That is right.

QUESTION: That it's more probable than not --

MR. COHN: That's right.

QUESTION: -- that the plaintiff will prevail?

MR. COHN: That is correct, Your Honor.

QUESTION: And I take it that's the same standard that the plaintiff has to meet again if a hearing is sought after the attachment?

MR. COHN: That is right. And indeed the burden is still on the attaching creditor if the hearing is sought. The --

QUESTION: Excuse me --

MR. COHN: Yes.

QUESTION: Are you sure that it is clear from Connecticut law that it means it is more likely than not that the plaintiff is going to win? It just doesn't mean that it's a valid lawsuit and not a frivolous lawsuit?

MR. COHN: We would say that the probable cause standard means that there is a likelihood of success for the --

QUESTION: Gee, it doesn't, it certainly doesn't mean that in the context in which we are most familiar with that phrase, that is whether there is probable cause to conduct a search. It certainly doesn't mean that you are

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more likely than not to find what you are looking for. You just have to have a reasonable suspicion that it's there. But here you say that it means it is more likely than not that the plaintiff is going to win?

MR. COHN: It certainly is not suspicion, Your Honor. It is not -- I would concede it is not the degree that a high level of success, but it is the --

QUESTION: Well, if it's more likely than not, then that's sufficient for the plaintiff to prevail in an ordinary civil action, I take it.

MR. COHN: That's right.

QUESTION: What is your authority for that? Could you give us a citation that shows that it's a more likely than not --

MR. COHN: Well, I would rely on the Connecticut Fermont case, Fermont v. Smith, which is cited in our brief.

QUESTION: And that holds that?

MR. COHN: That describes the nature. And also there is this case which is mentioned in our reply brief, Glans v. Testa. This is the reply brief to our petition for certiorari, which discusses the nature of the proof --

QUESTION: Well then if the plaintiff does not prevail, the defendant is automatically entitled to double damages? Because then the suit had been commenced without probable cause.

MR. COHN: Well, the remedy is there in any event, and they'd have to --

QUESTION: Well, the remedy is that you -- if the suit is commenced without probable cause you get double damages. Isn't that correct?

MR. COHN: That is right.

QUESTION: So under your theory, anytime the defendant prevails, the defendant is entitled to double damages?

MR. COHN: I would have to say yes, Your Honor.

QUESTION: But no bond or security is required under Connecticut scheme.

MR. COHN: No.

QUESTION: Do most States that have a pre-attachment proceeding like this require a bond or security to be furnished?

MR. COHN: Yes. Most States have that, but we have precedent which we cite in our brief to the effect that it is not just a bond which is necessary. There must be some protection for the attached party, for the homeowner. There is no question about that. However, that does not always, in our view, have to be accomplished by a bond.

QUESTION: Well, the only protection is the finding of probable cause.

MR. COHN: That and the right to sue if the -- if

there has been a wrongful attachment.

QUESTION: Well, that doesn't do any good if the person who makes the attachment is judgment proof, in effect.

MR. COHN: That is true, but --

QUESTION: It wouldn't take much to require some kind of security to be furnished, would it?

MR. COHN: No, it wouldn't, Your Honor. And I can only say that the due process clause would seem to allow the State to decide under what circumstances it would grant security, and it has not gone as far as that.

QUESTION: Is the attachment in the sum certain? $100,000?

MR. COHN: Yes.

QUESTION: And if the damages recovered are $50,000, then what?

MR. COHN: Then the -- that is just a contingency. In other words, if the --

QUESTION: Well, has the, has the defendant -- can the defendant show damages and recover if the attachment was for $100,000 but the amount of the judgment was only 50?

MR. COHN: Certainly. There would be a -- that same cause of action for wrongful attachment.

QUESTION: But there would be the same cause of action, but if the plaintiff in the original case was in

good faith and believing the damages would be over $100,000, there'd be no recovery, would there?

MR. COHN: Probably not.

QUESTION: Yeah.

QUESTION: I think you may have given inconsistent answers. Is it a question of whether the plaintiff is simply in good faith in filing the lawsuit and asserting a claim for $100,000, or is it a question of whether he actually recovers that amount?

MR. COHN: The question is whether or not he is in good faith, because he has to make a judgment at the time when he commences his lawsuit as to what the possible outcome will be and what security he needs. There is one other factor.

QUESTION: Okay, well, now, wait a minute. I am the plaintiff. I file -- I file a lawsuit for $100,000. I file an attachment on the piece of property for $100,000. I recover only $50,000 in the lawsuit. The superior court judge finds nonetheless I was in good faith in seeking $100,000. Is there any recovery against me as the attacher?

MR. COHN: I would say no.

QUESTION: Well, isn't that inconsistent with your earlier answer? Earlier you said that you are entitled to double damages if you lose the suit. Why couldn't you say the same thing with respect to losing the entire suit?

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Well, I did lose, but in fact I was in good faith. And it turned out that I lost, but at the time, beforehand, it looked more likely than not that I wouldn't lose. Do you want to change your earlier answer?

MR. COHN: No, I don't. I'd say that --

QUESTION: Well, I don't see how it --

MR. COHN: There's a separate suit which is brought after the initial lawsuit is over in the superior court, and when that separate suit comes up all these factors become important in deciding whether there is a recovery or not.

QUESTION: Well, I am sure they are all important. But as I understand what you say the law is in Connecticut, if you are wrong because you have asked for too many damages, you're only liable if it wasn't in good faith. But if you're wrong because you thought you had a valid lawsuit, but in fact it's worthless, good faith doesn't count for that. You can get socked for double damages simply because you lost the suit. Is that --

MR. COHN: No, I don't believe so. I would not say that. I would say that --

QUESTION: But you have said it already.

MR. COHN: I apologize to Your Honor. I would say that what happens is that the remedy is there to protect the party that goes beyond what is required in the lawsuit and

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seeks more than is necessary, or takes action which is just plain not justified by the action in question.

QUESTION: So you can defend against the double-damage lawsuit so long as your initial submission was in good faith. Is that --

MR. COHN: Yes.

QUESTION: Okay.

MR. COHN: And in addition, Your Honor, I think I should point out that there is the judge in here. There is also the factor of the judge, because as the Connecticut procedure works, all these papers go before the judge. And the superior court judge -- and again, this is a facial challenge and we haven't shown any reason why the superior court would not do this. The superior court would screen, and does in fact screen these attachments to make sure that the amount of the damages fits the amount of the -- or the nature of the liability.

QUESTION: Mr. Cohn, I want to go back to another aspect of that probable cause standard. On page 2 of the respondent's brief there is a quotation from the -- I guess it was an affidavit submitted in this particular case. Are you familiar with that? Do you have that handy? Page 2, the first full paragraph.

MR. COHN: Yes, Your Honor.

QUESTION: Was anything presented to the judge in

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this case beyond this particular affidavit?

MR. COHN: Actually, I think Your Honor should look at the full affidavit, which is on page 24A of the joint appendix. That will show you the entire -- there have been some things clipped out of the respondent's brief.

QUESTION: What has been clipped out? Can you summarize that for me briefly?

MR. COHN: Well, just a bit more about what the damages were.

QUESTION: Well, let's go to the issue for a moment of the likelihood of there being a right to recovery at all. Is the affidavit in that respect as set out here representative of what would be sufficient under Connecticut law?

MR. COHN: I would say that it is the bare bones, Your Honor. I have seen a lot more detailed than this, however --

QUESTION: This is enough to pass muster?

MR. COHN: This is -- this was enough for this judge to pass.

QUESTION: Well, was the judge right or wrong?

MR. COHN: I would agree that the judge was right.

QUESTION: All right. What this provides -- what this contains with respect to the right to recover, leaving aside the amount of damages, is simply an allegation that

I was willfully, wantonly, maliciously assaulted, a statement that the assault caused, in this case, a broken wrist and a bruised eye, and that money was expended for treatment. And it ends up with a statement, in my opinion the foregoing facts are sufficient to show there is probable cause for judgment. What does that tell you anything more than the fact that this plaintiff is in fact making a claim, and professes to make a claim in good faith, that he has a right to recover?

MR. COHN: He does say that he was willfully, wantonly, and maliciously assaulted.

QUESTION: Yeah, but that is purely conclusory. That is not a factual affidavit. That is a statement of conclusion. And I don't see how -- I guess what I'm getting at is, I don't see how any magistrate passing on this can make any judgment whatsoever about the likelihood of success or even the likelihood of there being a factual basis for the claim, except insofar as he says, well, I assume this fellow in front of me or signing the affidavit is doing it in good faith. I don't see how he can get -- at most I don't see how he can get beyond a judgment that the action is at least being brought professedly in good faith.

MR. COHN: There is one other point, Your Honor, and that is that he also has the complaint in front of him as well.

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QUESTION: But a complaint is just an allegation, isn't it? Or is it more than that in Connecticut?

MR. COHN: No, it supplements -- the way the practice works is that it supplements the affidavit so that the judges look both at the affidavit and the complaint.

QUESTION: Is the complaint the one found on 28A of the joint appendix?

MR. COHN: No. If Your Honor pleases, it's on page 30A.

QUESTION: What is the complaint on 28A?

MR. COHN: Oh, excuse me. No, 28A. I'm sorry. It is 28A.

QUESTION: And what does that add to the affidavit?

MR. COHN: It does say that he assaulted the plaintiff and beat him with his fists.

QUESTION: So beating with the fists is what's added?

MR. COHN: Yes, Your Honor.

QUESTION: That's all?

QUESTION: But also the amount in demant -- I think that may be a misprint over at the top of 29A -- the ad damnum clause, the complaint contains an ad damnum clause of $15,000, which the affidavit did not.

MR. COHN: Yes, Your Honor.

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QUESTION: But I guess I come back to the question what does the -- what does the affidavit really do beyond repeat or summarize in a conclusory way a series of allegations?

MR. COHN: In this case I would admit that it is a very skeletal affidavit. However --

QUESTION: But if this is enough to pass muster, then a judge really can authorize an attachment on the Connecticut law without being in a position to make any judgment whatsoever about the probability of success. Isn't that true?

MR. COHN: No, I would disagree. I would say that, while it's a skeletal affidavit, it does set forth enough here in that the fists allegation is there, and also that there is some indication of the nature of the damages, and that that would be enough for a judge to decide in an assault and battery case that a attachment would be warranted.

QUESTION: Mr. Cohn, I'd like to come back to your statement at the outset that the judge makes a determination that it is more likely than not that the plaintiff will win. The judge doesn't evaluate the truth of what the plaintiff asserts, does he?

MR. COHN: No.

QUESTION: I mean, he takes all these -- so, don't

you have to modify that statement? Isn't all the judge determines at most that it is more likely than not that if what the plaintiff says is true, the plaintiff will win?

MR. COHN: He looks through the papers to decide whether or not there is sufficient evidence there --

QUESTION: Assuming that everything the plaintiff says is true.

MR. COHN: Yes.

QUESTION: But he makes no evaluation as to whether that -- this plaintiff could be a thorough liar. Correct?

MR. COHN: Yes.

QUESTION: And he makes no inquiry into that at all.

MR. COHN: No, he does not.

QUESTION: So it's not really an inquiry as to whether it's more likely than not that he'll win, but rather it's more likely than not that if he isn't a liar he'll win. It's a big difference.

MR. COHN: Well, not so much. I would say that he gets a flavor of the case enough to allow a real estate attachment.

QUESTION: Well, all he does is really say that the complaint is sufficient.

QUESTION: Yeah.

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MR. COHN: To allow this attachment to go on a debtor's property.

QUESTION: Really, the complaint survives a motion to dismiss. Isn't that about what it boils down to?

MR. COHN: Yes.

Your Honor, may I reserve the balance of my time?

QUESTION: Can I ask one quick question?

MR. COHN: Yes.

QUESTION: How do they get the $75,000 on a $15,000 ad damnum?

MR. COHN: The ad damnum, in Connecticut the way it works is you list the minimum, and it could be anything higher than that. It has to do with how much money you paid the court.

QUESTION: What is the factual basis for the $75,000? Is there anything, or is that just a --

MR. COHN: Not in this affidavit. No.

QUESTION: Just picked out of the air?

MR. COHN: Normally in an affidavit that was -- that would meet constitutional -- that would be a little bit better than what we have got here today, they would actually put down money -- monetary figures and show exactly how they arrived at that figure. They didn't do it here.

QUESTION: Mr. Cohn, may I take you all the way back to the bond, the absence of a bond?

MR. COHN: Yes.

QUESTION: Even though you lost below, am I not correct that two of the judges felt that this was of no consequence?

MR. COHN: Yes, Your Honor, they relied on the fact that you had the right to sue for a wrongful --

QUESTION: So that one of the judges in the majority nevertheless felt the bond was not an unconstitutional absence, so to speak?

MR. COHN: Two felt that the bond was -- lack of bond was okay, and one felt that it was not.

Thank you, Your Honor.

QUESTION: Very well, Mr. Cohn.

Mrs. Faulkner, we'll hear now from you.

ORAL ARGUMENT OF JOANNE S. FAULKNER

ON BEHALF OF THE RESPONDENT

MRS. FAULKNER: Mr. Chief Justice, and may it please the Court:

Connecticut has a unique prejudgment attachment statute which allows anybody with a colorable claim to attach a defendant's real estate before bringing the lawsuit without giving notice to that defendant until after the attachment has been placed, without any bond to protect the defendant against a wrongful attachment, and without reciting any particular reasons for the attachment. This

process is quite routine in Connecticut, or at least it was until the second --

QUESTION: Mrs. Faulkner, when you say reasons for the attachment, you mean something like the defendant is liable to leave the jurisdiction, or something like that?

MRS. FAULKNER: That is correct, Your Honor, or the defendant is transferring his property in fraud of creditors or some other emergency circumstances, or the defendant is a deadbeat and doesn't pay his debts, whatever. This procedure is so routine in Connecticut that before the Second Circuit decision below it was routinely -- there were 300 to 400 real estate attachments per week before lawsuits were even brought. And this figure I get from the attorney general's estimate in his -- in her petition for a rehearing below.

In this case there was no need for the attachment. There was no need to get in rem jurisdiction over respondent. There was no showing that he could not or would not pay any eventual judgment. There were no emergency circumstances as --

QUESTION: Are you suggesting that the due process clause of the Federal Constitution requires that sort of a showing of necessity for an attachment?

MRS. FAULKNER: I am not suggesting that in this case, Your Honor. Your -- this Court has looked at several

factors, and among the factors in deciding whether something was constitutional was in Mitchell, I believe, where the Court emphasized that the plaintiff had to file an affidavit that the property in which he had a security interest was at risk. All we're doing in this case is absence of advance notice and the lack of a bond.

Again, the litigation was unrelated to the property. And another peculiarity of Connecticut law is that we have no homestead exemption whatsoever, so that once a person's home is attached, there is no cushion left to the homeowner.

Exactly how it works is illustrated by this case, and that is that Mr. DiGiovanni presented a one-sided affidavit to a judge on the papers 2 days after the assault occurred. And the affidavit is, as this Court has already noticed, a bare minimum.

"On March 13 I was willfully, wantonly, and maliciously assaulted. The assault broke my left wrist and further caused an ecchymosis to my right eye, as well as other injuries. My left arm is in a cast and I am restricted in my usual duties. And I have further expended sums of money for medical care and treatment, and I will be obliged to spend sums in the future. In my opinion the foregoing facts are sufficient to show that there is probable cause."

Now the questioning to the attorney general was on the standard for probable cause in Connecticut, and the cases are quite clear that the standard for probable cause is a -- that you can assert a colorable position that you have a claim against the defendant. That subjective belief, probable cause, does not have to be more true than false. As long as you can bring forth some statement of facts that you have a colorable claim, you can get an attachment.

QUESTION: So you disagree with him that the standard is that it's more likely than not that the plaintiff will prevail?

MRS. FAULKNER: I vigorously disagree, Your Honor. There is --

QUESTION: What case do you rely on that we might look at from Connecticut to --

MRS. FAULKNER: There are several cases cited in my brief, Your Honor, for the proposition that probable cause means merely that he has to have a belief in his cause of action and that belief does not need to be more true than false.

QUESTION: I have been reading the Fermont case, and I don't see any reference to that one way or the other.

MRS. FAULKNER: I don't think you will, Your Honor.

In addition, one of the problems with the

affidavit that we have in Connecticut, even though the Connecticut Supreme Court has said it must be factually specific, the Connecticut Supreme Court in two cases and the Connecticut appellate court in four cases have all said it doesn't matter whether your affidavit is adequate, because you can always cure the deficiency if the defendant asks for a hearing. And at that hearing you can cure the deficiency and you can then keep your affidavit, keep your prejudgment attachment.

QUESTION: Well, the court -- the court below didn't deal with the sufficiency of this particular affidavit, did it?

MRS. FAULKNER: No, Your Honor, it didn't.

QUESTION: Did they invalidate it on other ground?

MRS. FAULKNER: That is correct, Your Honor, but the --

QUESTION: And are you defending the judgment below on the grounds they used?

MRS. FAULKNER: No, Your Honor. I am responding to an argument that the State used here that the supreme court says the affidavit must be sufficient, and I am just responding to the argument that he made in his reply brief that that is all that is needed, that the Connecticut Supreme Court said it must be sufficient.

QUESTION: But you are defending the reasons that

the court below gave?

MRS. FAULKNER: Yes, Your Honor. I can defend -- I believe I can defend the court below on alternate grounds other than what the court below ruled on.

QUESTION: Do you in fact defend it on the grounds that it did rule on?

MRS. FAULKNER: Yes, indeed. My primary position here is that there is no advance notice to a defendant before his home is attached by the plaintiff.

QUESTION: And no hearing.

MRS. FAULKNER: And no hearing. No notice, no opportunity to be heard, and no bond --

QUESTION: You wouldn't say it would be enough to give him notice if he wasn't entitled to a hearing before the attachment went on?

MRS. FAULKNER: No, I would not, Your Honor.

QUESTION: And if a bond or security were furnished, would that overcome any constitutional deficiency?

MRS. FAULKNER: That would certainly be of assistance, Your Honor. I don't know whether this Court will decide that a bond alone --

QUESTION: Well, what is your position?

MRS. FAULKNER: My position is that, unless there are very unusual circumstances, the defendant should have

an opportunity to tell his side of the case to the judge before his property is attached.

QUESTION: Under the holding of the court which we're reviewing, I suppose no State's lis pendens law would survive.

MRS. FAULKNER: I think a lis pendens law is entirely different, Your Honor, and that is because a lis pendens affects a particular piece of property that is an issue.

QUESTION: But there is no notice, there's no advance hearing. I assume that under the language of the opinion which we are reviewing that all these laws across the country would fail.

MRS. FAULKNER: I disagree, Your Honor, because in mechanics liens statutes, in lis pendens statutes, we have a particular piece of property that everybody knows the defendant and the plaintiff have adverse claims to, so that in effect the defendant knows somebody is going to -- if a mechanics lien, for instance, is put on the property, work has been done on that property and the defendant really knows that somebody has another interest in that property. And in this case it would be an emergency circumstances situation because a particular piece of property is unique. You don't want to give the defendant a chance to transfer it out from under somebody else who has a claim to that

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particular piece of property.

QUESTION: Well, in your view, Ms. Faulkner, one could have had the most elaborate affidavit in the world here, sworn to by 20 bishops, in effect, and still, without a prior notice and a prior hearing, it still would be unconstitutional.

MRS. FAULKNER: Yes, Your Honor, that is my position.

QUESTION: Mrs. Faulkner, in the -- in the lis pendens situation there is another distinction too, isn't there, and that is that the lien at least allegedly already exists.

MRS. FAULKNER: An inchoate lien or some kind -- of some kind exists.

QUESTION: Well, that's the basis of the lawsuit --

MRS. FAULKNER: That's correct.

QUESTION: -- that I have a lien, and I am just asking the court to affirm it.

MRS. FAULKNER: That's correct.

QUESTION: Whereas this action is what creates the lien.

MRS. FAULKNER: That is correct.

QUESTION: There's -- there's no even arguable claim that any lien exists.

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MRS. FAULKNER: That is correct, Your Honor.

In addition this Court asked questions about the possibility of recovery. If the $75,000 attachment in this case turns out to be excessive, but DiGiovanni wins the case, there is no recovery for a attachment that is wrongful because it is excessive. The only possible --

QUESTION: Is there some authority for that?

MRS. FAULKNER: The case law views that a wrongful attachment is only wrongful if it is completely dissolved and not if it is only partially dissolved. And Justice O'Connor asked a question about the 90-day time work -- time frame between getting the attachment and notifying the defendant. That is a distinct possibility under our statute. The plaintiff can get an attachment, put it on the land records, and sit on it for up to 90 days before he notifies --

QUESTION: What happened in this case, however?

MRS. FAULKNER: In this case, Your Honor, there was, the attachment was served on the defendant within about 3 days of the time it was issued. However, the time frame in which it was served was a month before this defendant could do anything about it. We have a practice book rule in Connecticut, Practice Book 114, which says that motions and pleadings shall commence upon the return date. In this case my client was served 1 month before the return date,

and he could not, under our rules of practice, make any motion until the return date came along.

The defendant, it is interesting --

QUESTION: What -- the return date was the date upon which your client could ask for a hearing if he so desired?

MRS. FAULKNER: He could move for a hearing on that date, he could file an answer, he could do any number of things, but he couldn't do it before the return date. He could move to substitute a bond so he could avoid --

QUESTION: So he had notice, but he was unable to take any steps to defeat the attachment before the return date?

MRS. FAULKNER: Under the Practice Book Rule 114, that is correct, Your Honor, unless he brought a separate action or an order to show cause at additional expense, in which case he would get a --

QUESTION: Now was that all in evidence before the district court or the court of appeals here?

MRS. FAULKNER: No, Your Honor, it's just on the face of our practice and procedure.

QUESTION: May I go back to one -- one further issue on that? Does the return -- is the return day in Connecticut law the day upon which, or the last day, as it were, upon which a response may be filed?

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MRS. FAULKNER: It is the first day upon which a response may be filed.

QUESTION: Oh, so the clerk of court would not receive or would not accept pleadings prior to that date?

MRS. FAULKNER: The clerk might accept pleadings, but the other party could say this is -- should be stricken from the record because it was not properly filed.

QUESTION: They would have no legal effect?

MRS. FAULKNER: That is correct.

QUESTION: If the return day is the first day, what is the last day upon which responsive pleadings can be filed?

MRS. FAULKNER: There is a time frame that could go as long as a year or two, Your Honor.

QUESTION: I see.

MRS. FAULKNER: It is not like in Federal court.

QUESTION: What is the status of this practice handbook that you refer to? I raise the question because in the reply brief opposing counsel points out that under the Connecticut statute involved there is no indication that an objecting defendant could not have a hearing immediately, even before the return date. That -- so I ask what is the status of the practice handbook?

MRS. FAULKNER: We have a separate statute which says that the pleadings are governed by rules of practice

established by the judicial department, and their practice book is the rules of practice established by the judicial department.

QUESTION: I see.

QUESTION: Do you quote the rules of practice in your brief?

MRS. FAULKNER: I do not, Your Honor. It didn't come up until defendant's reply -- petitioners' reply brief, Your Honor.

A defendant can get an attachment on a plaintiff's property after the lawsuit is begun in Connecticut if the defendant asserts a counterclaim or set-off. But when the defendant wants an attachment he has to give notice to the plaintiff and he has to give an opportunity to be heard to the plaintiff before he can get a counter-attachment.

As this -- as Justice Souter and Scalia were --

QUESTION: That seems unfair, but does that illustrate some constitutional proposition? Does that --

MRS. FAULKNER: It just shows that a hearing and notice before an attachment is eminently practicable, and ordinarily this Court has not dispensed with a prior notice and opportunity to be heard unless there were emergency circumstances, unless the attachment were random and unauthorized and an advance hearing was not practicable.

QUESTION: Well, of course the real estate

attachment is a little different than coming in and seizing someone's wages or household goods and carting them off.

MRS. FAULKNER: That is correct, Your Honor.

QUESTION: Because the homeowner is not dispossessed as of the time that the lien goes on. So perhaps that enters into the balance, or what process is due under the constitutional requirement of due process. It may well be different.

MRS. FAULKNER: That could be, Your Honor, except that I think a real estate attachment is very significant, and that is because -- for several reasons. Most people have first mortgages or second mortgages on their homes which have an insecurity clause. So that once an attachment is put on a person's property he is in technical default under an insecurity clause and he could be driven to the wall by a foreclosure on his property.

He is put in an impaired adversary position, he is kind of down one if the negotiations over settlement begin. It is immediately put on his credit record and it stays there for 7 years, interfering with his credit opportunities. And one of the important things about giving advance notice is that it gives the defendant the opportunity to avoid all of these consequences.

In the Peralta case which this Court decided a couple of years ago, the defendant hadn't gotten notice of

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the lawsuit and he wanted to reopen the judgment, but he didn't have a good defense. And one of the arguments was that, well, it would have come out the same way even if you had gotten notice. And this Court said no, because you could have negotiated, you could have made other arrangements.

In this case, advance notice might give an opportunity to escrow an amount instead of having his property attached, or to enter into an agreement not to sell or mortgage during the course of the lawsuit. So there is some value in having some advance notice, because it gives you an opportunity to avoid the harsh consequences of attachment.

QUESTION: Well, as a practical matter, don't settlement negotiations of some sort usually precede a lawsuit in Connecticut?

MRS. FAULKNER: As a practical matter? I don't know, Your Honor. In this case they certainly didn't. The assault and battery was 3 days before the lawsuit was begun.

QUESTION: But I mean, are there no discussions between attorneys before a lawsuit is filed?

MRS. FAULKNER: When a real estate attachment is available, they go and get it, and then they start talking, Your Honor. That -- that is -- that is the 300 or 400 cases per week in which attachments were granted before the Second

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Circuit decision below.

QUESTION: Mrs. Faulkner, is your position that there has to be a pre-attachment hearing? That a prompt post-attachment hearing is inadequate? I thought we have said that a prompt post-attachment hearing would be enough in Grant.

MRS. FAULKNER: In Grant there were also emergency circumstances. There was a preexisting interest in property which the defendant could destroy. There was a double bond to compensate the defendant for humiliation, embarrassment, attorneys' fees, and whatever. So that I think there were a number of factors in Grant which are not present in this case.

QUESTION: But you're, you're not insisting that there absolutely must be a pre-attachment hearing?

MRS. FAULKNER: No, Your Honor, there are circumstances --

QUESTION: If there are certain other things, perhaps a bond, perhaps the necessity of emergency circumstances, or so forth, you might be able to get one without a hearing, constitutionally?

MRS. FAULKNER: That is correct. Certainly, Your Honor.

QUESTION: Well, don't you think the court below held that there had to be a pre-attachment hearing?

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MRS. FAULKNER: Yes, Your Honor, in the circumstances of this case. Yes, I do, Your Honor.

QUESTION: Well, so you say that an immediate post-attachment hearing would not be sufficient?

MRS. FAULKNER: That is correct, Your Honor.

QUESTION: And that is what the holding was below?

MRS. FAULKNER: That is correct, Your Honor. But that is on the factors in this case, and there may be other cases in which a prompt post-deprivation hearing would be appropriate.

Another problem in Connecticut law is that the post-deprivation hearing is not necessarily prompt. Most States which have post-deprivation --

QUESTION: You and your opponent disagree on whether you could apply before the return date. How are we supposed to find out what the Connecticut law is?

MRS. FAULKNER: Practice Book 114 says pleadings and motion shall start on the return date.

QUESTION: Your opponent says that you can apply for an immediate hearing.

MRS. FAULKNER: Without citing any authority for that proposition, Your Honor.

QUESTION: Did either of the lower courts make any finding on that point as to whether a relatively prompt or immediate hearing was available?

MRS. FAULKNER: No, Your Honor.

Among the factors that this Court considers in whether -- how much of a pre-deprivation hearing is due are the Government interests, the private interest, and --

QUESTION: Did you take any steps in the State court?

MRS. FAULKNER: That is outside the record, Your Honor, but the answer is no.

QUESTION: The -- your opponent says, "Indeed the defendant in this case appeared 1 week before the return date, even though he chose not to request a hearing." What does that mean? Perhaps I should ask your opponent.

MRS. FAULKNER: I am not sure what it means, Your Honor. You can appear at any time after the lawsuit is filed against you, it is just that you can't file motions.

QUESTION: Well, what did you do? Was there an appearance?

MRS. FAULKNER: Yes, there was, Your Honor. I am not counsel in the State court action.

The Government interest in this case seems particularly tenuous. In fact the Government has not argued that it has any interest in maintaining this ex parte procedure. It is only myself and the amici who have posited some possible Government reasons here. But it seems to me important that the judicial system be deemed impartial by

a person who is called before the court, and that image of impartiality is certainly shattered when behind the defendant's back there is an attachment on his real property before he's had a chance to come into court.

The private interests, of course, the plaintiff has an interest in securing any eventual judgment, but studies in the State of -- one study in the State of Connecticut shows that a potential judgment for the plaintiff is a possibility in about 1.5 percent of the cases.

QUESTION: Mrs. Faulkner, how do you distinguish, if you want to distinguish, the Williams against Bartlett summary affirmance here on the lis pendens statute? On the grounds that the lis pendens is different from the attachment?

MRS. FAULKNER: Yes, Your Honor. I would accept that a lis pendens or a mechanics lien statute would be constitutional without a prior hearing because it does involve a particular piece of property and a dispute over that property, which could be conveyed with advance notice.

QUESTION: But the plaintiff who gets a lis pendens, until that -- until he get it, files it, he has no interest in the property. He has no right to interfere with any element of the ownership.

MRS. FAULKNER: Yes, he does, Your Honor. Lis

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pendens is only when there is a dispute over title. For instance a husband and wife who are divorcing will commonly, one of them will commonly file a lis pendens --

QUESTION: Well, when can you get a lis pendens? When you have already got an interest in the property?

MRS. FAULKNER: Yes, Your Honor. A person who is foreclosing on a piece of property would file a lis pendens.

QUESTION: Well, that's --

QUESTION: I don't think so.

QUESTION: Is that the only situation where you can get a lis pendens in Connecticut?

MRS. FAULKNER: You have to have a -- some kind of preexisting interest in the property.

QUESTION: So a preexisting interest in the property?

MRS. FAULKNER: Right.

QUESTION: How about a claim that the property has been transferred in fraud of creditors? Does that support a lis pendens?

MRS. FAULKNER: Yes. Thank you, Your Honor, yes.

QUESTION: But can you really say that the person has a preexisting interest in that situation? I mean, the lawsuit is designed to produce that result, but at the beginning of the lawsuit does a person -- does the person who is suing to set aside a fraudulent transfer have an

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interest in the property?

MRS. FAULKNER: Well, he has an interest in enforcing his judgment. He has no more interest in the property, certainly --

QUESTION: Yeah. But that's not quite the same thing as saying he has a preexisting lien, I don't --

MRS. FAULKNER: Right.

QUESTION: Well, of course even in that case, even though you can't say the plaintiff claims that he has an interest, you can claim that he is asserting that the purported owner of the property does not have an interest. If he claims it has been transferred in fraud of creditors he claims the transfer is invalid, and therefore the person who claims title really doesn't have it.

MRS. FAULKNER: That's correct.

QUESTION: So I think in all these lis pendens cases you may be correct that at least what is at issue is it is not conceded that the other person is the owner of the property, and I want to get a lien on it. Rather, it's a dispute over whether it is yours or mine.

MRS. FAULKNER: That is correct, Your Honor.

As I said before, this Court has never dispensed with some type of prior notice and opportunity to be heard unless there were emergency circumstances, or unless the defendant had substantial input into the decision-making

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process, as in Mathews v. Eldridge. The person had a substantial paper input before the deprivation occurred. That is not what happens in this case.

I think the attachment of $75,000 worth of equity in Mr. Doehr's property, which put that equity beyond reach for a loan, put his property in a position where it could not be sold, is every bit as significant as the $35 in wages that was attached in Sniadach.

QUESTION: What's the status of the assault suit?

MRS. FAULKNER: Again, that is outside the record, but it is still pending in the State court, and Mr. Doehr has filed a counterclaim against DiGiovanni. I believe the $65,000 --

QUESTION: Can you give us any indication, I am sure it varies from case to case, that, how long it takes to bring a suit like this to trial in Connecticut, assuming diligence on all sides?

MRS. FAULKNER: I would say anywhere from 4 years to non-jury to 7 years for a jury trial, and this is a jury trial.

The attachment here is every bit as significant as the $23 hobby kit which was given due process protections in Parratt. It is every bit as significant as the personal letters and mementos in Hudson, which was given due process protection. We have in Connecticut an established State

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procedure, a foreseeable deprivation, and an eminently practicable opportunity to have pre-deprivation notice and hearing.

I urge this Court to affirm the decision below. Thank you.

QUESTION: Thank you, Mrs. Faulkner.

Mr. Cohn, you have 3 minutes remaining.

REBUTTAL ARGUMENT OF HENRY S. COHN

ON BEHALF OF THE PETITIONERS

MR. COHN: Your Honors, I think I should respond immediately to the return date question which Justice White had. We do disagree, as you point out, in our reply brief as to the effect of this return date.

This return date is in all actions and has to do with when one has to appear or face default attachments to one's side. It could be any case where there is a lawsuit between a plaintiff and a defendant. The defendant is given, on the papers that he is receiving, an indication of a date, a cut-off date after which an answer must be filed or an appearance must be filed in the State court or he risks having the plaintiff come in and make a motion to default for failure to appear and then take judgment against him if that is granted.

But that does not impact on the attachment situation, where if a person is served with an attachment

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and given notice that he may immediately appear, there is no reason why, indeed there is no legal bar under the rule of court, to have that party go to the clerk's office, present the motion to release the attachment, and have the process started. It obviously would have to be put on the calendar, and that would take a week or two, but they're not going to throw his papers out or refuse to honor it, or anything like that. So the return date is a red herring, in our opinion, in this -- in this matter.

QUESTION: What -- even if you are right that you can come in and ask for a hearing, you could file a motion for a hearing right away --

MR. COHN: Yes.

QUESTION: -- when -- there is no guarantee in the statute or anyplace else that the hearing would be, would be given within a particular time? It might be a week, it might be 6 months.

MR. COHN: No, that's not true, Your Honor.

QUESTION: Well, where is the provision for an immediate hearing?

MR. COHN: The statute, which is 52.278(E)(c) says that the hearing shall be expeditious, and the Fermont case says that it should be immediate. And reading the statute on its face we say that you would get this immediate hearing, and the 6 months would be a total violation of due

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process, and we would concur. But that wouldn't happen --

QUESTION: Within 10 days?

MR. COHN: It certainly could be. In the Fermont case itself it was within a week of the defendant attached party asking for it. He received his hearing right away.

QUESTION: When did the defendant ask for it in that case?

MR. COHN: In the Fermont case?

QUESTION: Yes.

MR. COHN: In the Fermont case --

QUESTION: How soon after the attachment?

MR. COHN: Um, I believe in the Fermont case, as I understand the facts, the attachment had gone on, but the defendant hadn't asked for any sort of hearing. He just let the attachment continue. And then at some point during the course of the proceedings he asked for a hearing, and he was given a hearing immediately, 1 week later. But I am using it as an example that they do in fact give immediate hearings. There would be no reason under the world why the courts wouldn't accommodate what the statute and the Connecticut Supreme Court has said, that it should be an immediate hearing.

QUESTION: Well, it's sort of inconsistent with the requirement for an immediate hearing to say that under the rules you have to wait 20 days before you can even ask

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for it.

MR. COHN: Yes, but we would contest that that is the situation that would happen.

QUESTION: Thank you, Mr. Cohn.

Mrs. Faulkner, would you submit to the clerk of the Court by Wednesday noon the, a copy of the practice rule to which you refer?

MRS. FAULKNER: Yes, Your Honor.

CHIEF JUSTICE REHNQUIST: Thank you. The case is submitted.

(Whereupon, at 10:57 a.m., the case in the above-entitled matter was submitted.)

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NO. 90-143 - CONNECTICUT AND JOHN F. DIGIOVANNI, Petitioners V.

BRIAN K. DOEHR

and that these attached pages constitutes the original transcript of the proceedings for the records of the court.

BY Rodgerus Hunter

(REPORTER)