Final Judgment, Preservation of the Record, and Standards of Review on Appeal

June 10, 2019

9:00 a.m. – 11:00 a.m.

Connecticut Convention Center

Hartford, CT

CT Bar Institute Inc.

CT: 2.0 CLE Credits (General)
NY: 2.0 CLE Credits (Skills)

Seminar Materials Sponsored by

Lawyers' Principles of Professionalism

As a lawyer I must strive to make our system of justice work fairly and efficiently. In order to carry out that responsibility, not only will I comply with the letter and spirit of the disciplinary standards applicable to all lawyers, but I will also conduct myself in accordance with the following Principles of Professionalism when dealing with my client, opposing parties, their counsel, the courts and the general public.

Civility and courtesy are the hallmarks of professionalism and should not be equated with weakness;

I will endeavor to be courteous and civil, both in oral and in written communications;

I will not knowingly make statements of fact or of law that are untrue;

I will agree to reasonable requests for extensions of time or for waiver of procedural formalities when the legitimate interests of my client will not be adversely affected;

I will refrain from causing unreasonable delays;

I will endeavor to consult with opposing counsel before scheduling depositions and meetings and before rescheduling hearings, and I will cooperate with opposing counsel when scheduling changes are requested;

When scheduled hearings or depositions have to be canceled, I will notify opposing counsel, and if appropriate, the court (or other tribunal) as early as possible;

Before dates for hearings or trials are set, or if that is not feasible, immediately after such dates have been set, I will attempt to verify the availability of key participants and witnesses so that I can promptly notify the court (or other tribunal) and opposing counsel of any likely problem in that regard;

I will refrain from utilizing litigation or any other course of conduct to harass the opposing party;

I will refrain from engaging in excessive and abusive discovery, and I will comply with all reasonable discovery requests;

In depositions and other proceedings, and in negotiations, I will conduct myself with dignity, avoid making groundless objections and refrain from engaging I acts of rudeness or disrespect;

I will not serve motions and pleadings on the other party or counsel at such time or in such manner as will unfairly limit the other party's opportunity to respond;

In business transactions I will not quarrel over matters of form or style, but will concentrate on matters of substance and content;

I will be a vigorous and zealous advocate on behalf of my client, while recognizing, as an officer of the court, that excessive zeal may be detrimental to my client's interests as well as to the proper functioning of our system of justice;

While I must consider my client's decision concerning the objectives of the representation, I nevertheless will counsel my client that a willingness to initiate or engage in settlement discussions is consistent with zealous and effective representation;

Where consistent with my client's interests, I will communicate with opposing counsel in an effort to avoid litigation and to resolve litigation that has actually commenced;

I will withdraw voluntarily claims or defense when it becomes apparent that they do not have merit or are superfluous;

I will not file frivolous motions;

I will make every effort to agree with other counsel, as early as possible, on a voluntary exchange of information and on a plan for discovery;

I will attempt to resolve, by agreement, my objections to matters contained in my opponent's pleadings and discovery requests;

In civil matters, I will stipulate to facts as to which there is no genuine dispute;

I will endeavor to be punctual in attending court hearings, conferences, meetings and depositions;

I will at all times be candid with the court and its personnel;

I will remember that, in addition to commitment to my client's cause, my responsibilities as a lawyer include a devotion to the public good;

I will endeavor to keep myself current in the areas in which I practice and when necessary, will associate with, or refer my client to, counsel knowledgeable in another field of practice;

I will be mindful of the fact that, as a member of a self-regulating profession, it is incumbent on me to report violations by fellow lawyers as required by the Rules of Professional Conduct;

I will be mindful of the need to protect the image of the legal profession in the eyes of the public and will be so guided when considering methods and content of advertising;

I will be mindful that the law is a learned profession and that among its desirable goals are devotion to public service, improvement of administration of justice, and the contribution of uncompensated time and civic influence on behalf of those persons who cannot afford adequate legal assistance;

I will endeavor to ensure that all persons, regardless of race, age, gender, disability, national origin, religion, sexual orientation, color, or creed receive fair and equal treatment under the law, and will always conduct myself in such a way as to promote equality and justice for all.

It is understood that nothing in these Principles shall be deemed to supersede, supplement or in any way amend the Rules of Professional Conduct, alter existing standards of conduct against which lawyer conduct might be judged or become a basis for the imposition of civil liability of any kind.

--Adopted by the Connecticut Bar Association House of Delegates on June 6, 1994

Faculty Biographies

Chief Justice of the Connecticut Supreme Court **Chase Rogers** (Ret.), chair of Day Pitney's Appellate Practice group, brings her vast knowledge and experience as a litigator, trial judge and Chief Justice to assist litigation clients in multiple areas of law. Clients benefit from her 20 years of experience presiding over hundreds of bench and jury trials, including years hearing, mediating and ruling on complex commercial disputes. She has also been a panel member on thousands of appellate cases and the author of hundreds of decisions for the Connecticut Supreme Court.

Chief Justice Rogers' career in the judiciary has spanned over two decades, starting when she was sworn in as a Connecticut Superior Court judge in January 1998. Her assignments included serving as a judge on the Complex Litigation Docket for four years in Stamford. In March 2006, Chief Justice Rogers was sworn in as an Appellate Court judge and a little over a year later, she was sworn in as Chief Justice of the Connecticut Supreme Court. Among her many accomplishments, she is credited with restructuring the civil justice system to reduce costs and embedding a culture of openness and transparency in the judicial branch.

Chief Justice Rogers serves on the State Justice Institute's (SJI) Board of Directors, which she was appointed to by President Barack Obama in December 2010. She is also the chairperson of the national Civil Justice Implementation Steering Committee. She also currently serves on the board of the Center for Human Trafficking Court Solutions (CHTCS), as well as provides consulting services to the Institute for the Advancement of the American Legal System (IAALS). In addition, she is an adjunct professor, teaching Connecticut civil procedure, at the University of Connecticut School of Law.

In 2012, Chief Justice Rogers was appointed to the Federal-State Jurisdiction Committee of the Judicial Conference of the United States by U.S. Supreme Court Chief Justice John Roberts, where she served until January 2018. She also served as a member of the Board of Directors for the Conference of Chief Justices until January 2018.

Judge **Alexandra Davis DiPentima** was born in Sharon, Connecticut and raised in Kent, Connecticut. She graduated from Princeton University, receiving an A.B. in intellectual history in 1975. From 1976 to 1979, she attended the University of Connecticut School of Law and graduated in 1979.

From 1979 to 1981, she worked as a staff attorney for Connecticut Legal Services, Inc. in Willimantic, Connecticut, representing low income persons in domestic disputes (especially spousal abuse and custody issues) and housing disputes. In 1981, she joined the Hartford law firm of Moller, Horton & Fineberg, P.C., and in 1985, she became a principal in the firm. While associated with the firm from 1981 through 1993, she litigated products liability and other personal injury actions at the trial court level and enjoyed an active appellate advocacy practice. In November of 1993, Governor Lowell Weicker appointed her to the trial bench as a Superior Court judge. On May 13, 2003, Judge DiPentima was sworn in as a judge of the Appellate Court. On March 29, 2010, Judge DiPentima was sworn in as Chief Judge of the Appellate Court by Chief Justice Chase Rogers.

During her years of practice, Judge DiPentima was an active member of the Connecticut Bar Association, serving as president of the Young Lawyers Section from 1989 to 1990, and as a member of the Hartford County Bar Association, where she served as treasurer from 1993 to 1994 and as a director from 1990 to 1993. Each year since the late 1980s, she has written one or two chapters of annotations for the Connecticut Superior Court

Civil Rules Annotated (Thomson Reuters).

Since her appointment to the bench, Judge DiPentima's assignments have included presiding judge of the Hartford and New Britain Housing Divisions, presiding judge in Meriden and, from 1998 to 2003, Administrative Judge of the Judicial District of Litchfield. She has served on the Rules Committee of the Superior Court and the Judicial Education Committee, and is currently co-chair of the Advisory Committee on Appellate Rules. From 2001 to 2002, she served as president of the Connecticut Judges Association. In 2010, Judge DiPentima received the Connecticut Bar Association's Henry J. Naruk Judiciary Award. In 2011, she received the Distinguished Service Award from the University of Connecticut School of Law Alumni Association. In January of 2012, Judge DiPentima became an Adjunct Professor at the University of Connecticut School of Law.

In June of 2007, Chief Justice Rogers appointed her to serve as chair of the newly-formed Public Service and Trust Commission, which created a five-year strategic plan for the Judicial Branch. She continues to oversee the implementation of the Judicial Branch's strategic plan. From 2012 to 2016, Judge DiPentima served on the Executive Committee for the national organization Council of Chief Judges of the State Courts of Appeal, and continues to be active in that organization.

Judge **Eliot D. Prescott** was born in New Bedford, Massachusetts. He attended St. George's School in Newport, Rhode Island, and received his Bachelor of Arts degree from the University of Massachusetts at Amherst in 1988. He graduated with high honors from the University of Connecticut School of Law in 1992.

Following law school, Judge Prescott served as the law clerk to the Honorable David M. Borden on the Connecticut Supreme Court. He also worked as an associate in the Washington, D.C. office of the law firm Fulbright & Jaworski, LLP.

In 1994, Judge Prescott returned to Connecticut where he served as an Assistant Attorney General in the Office of the Attorney General. In 2001, he became the Department Head of the Special Litigation Department within the Office of the Attorney General, where he supervised lawyers, accountants, paralegals and other support staff. During his tenure as an Assistant Attorney General, he represented the State of Connecticut in complex litigation matters in state and federal court, and argued more than 25 appeals in the Connecticut Supreme Court, Appellate Court and the United States Court of Appeals for the Second Circuit. In 2002, he received the "New Leaders of the Law" award from the Connecticut Law Tribune for outstanding government service.

Judge Prescott was appointed to the Superior Court by Governor John G. Rowland in 2004. During his time as a trial judge, Judge Prescott presided over Part A and Part B criminal trials and civil matters in various locations around the State. He also served as the Presiding Judge of the Administrative Appeals and Tax Session of the Superior Court. He served as a member of the Rules Committee of the Superior Court and the Advisory Committee on the Appellate Rules. On numerous occasions, he has served on the faculty of the annual Connecticut Judges' Institute.

From 1998 to 2015, Judge Prescott was an Adjunct Professor of Law at the University of Connecticut School of Law, where he taught administrative law. He is the author of two legal treatises: Connecticut Appellate Practice and Procedure (ALM), and Tait's Handbook of Connecticut Evidence (Wolters Kluwer).

Judge Prescott was appointed to the Appellate Court in 2014 by Governor Dannel P. Malloy.

John Cerreta, a litigator and member of Day Pitney's Appellate Practice, represents clients in complex tort and product liability cases, insurance coverage disputes and class actions. Clients rely on John to handle their most complex appeals and critical motions. He has briefed and argued numerous appeals in the Second Circuit, and appellate courts in Connecticut and throughout the U.S.

Before joining Day Pitney, John served as a law clerk to Justice Samuel A. Alito, Jr. of the United States Supreme Court. Prior to that, he was an associate in the New York office of an international law firm. John also clerked for then-Judge Alito and Judge Michael A. Chagares of the U.S. Court of Appeals for the Third Circuit from 2005 to 2007.

Thomas Donlon's practice focuses on appellate and complex trial matters. He is a member of Robinson and Cole's Appellate Team within the Business Litigation Group.

Tom has successfully prepared briefs and presented arguments in various federal Courts of Appeals as well as state appellate courts in both Connecticut and New York. These appeals have involved multimillion-dollar cases covering diverse topics, including health care fraud, securities, anti-trust, bankruptcy, employment, insurance, contract and construction disputes, condemnation, land use, and environmental regulation. Tom appears regularly before the Second Circuit, where he won a precedent-setting case limiting state immunity in bankruptcy cases. He also has handled cases before the Third, Ninth and Federal Circuits.

Tom is also involved in all aspects of complex litigation in trial courts, with a concentration on motion practice, particularly complex dispositive motions requiring the briefing of challenging legal issues. Working with other members of the firm's litigation group, his cases have run the gamut of civil litigation, including the representation of one of America's largest corporations in an international contract dispute, the defense of insurance companies against bad faith claims, the enforcement of arbitration agreements against class action attack, defense of Native American corporations, disputes over major government construction contracts, and enforcement of penalties and attorney's fees in bankruptcy.

Tom was an attorney on active duty with the U.S. Coast Guard for over 20 years before coming to the firm. He served as the senior government appellate counsel, responsible for all Coast Guard appeals nationwide, and represented the Coast Guard in the first military case directly appealed to the U.S. Supreme Court. He also served an assignment with the U.S. Department of Justice, Civil Division, litigating Coast Guard cases in federal district courts and Courts of Appeal. In his last Coast Guard assignment, Tom served as a legal advisor to the U.S. Ambassador to the United Nations.

Final Judgment, Preservation of the Record, and Standards of Review on Appeal (CLC2019-A08)

Agenda

9:00 a.m. – 9:10 a.m.	Introduction
9:10 a.m. – 9:30 a.m.	Presentation of Oral Argument Strategy Speakers: **Thomas Donlon**, Robinson + Cole **John Cerreta**, Day Pitney LLP
9:30 a.m. – 10:10 a.m.	Oral Argument Speakers: **Thomas Donlon**, Robinson + Cole **John Cerreta**, Day Pitney LLP
10:10 a.m. – 11:00 a.m.	Discussion and Q&A Speakers: **Hon. Chase Rogers (Ret.),** Day Pitney LLP **Hon. Alexandra DiPentima**, Connecticut Appellate Court **Hon. Eliot Prescott**, Connecticut Appellate Court

2019 CONNECTICUT LEGAL CONFERENCE
APPELLATE ADVOCACY SECTION CLE
FINAL JUDGMENT, PRESERVATION OF THE RECORD, AND STANDARDS OF REVIEW ON APPEAL

MOCK ORAL ARGUMENT FACT PATTERN

After graduating from high school and spending a year backpacking across the United States, appellant Desiree Armfell got a job as a clerk at a growing Connecticut digital company, Widgets.com. As the company had no formal dress code, Desiree continued to wear jeans and cross-training shoes to work. After a year, Desiree applied for an opening as a junior customer fulfillment representative. She lost out to another young woman. When she asked a supervisor why, the supervisor said that the other woman always looked nicer and added, "You know, dressed up to get ahead."

Over the next six months, Desiree noticed that a junior manager, Fred Eggman, was spending a lot of time around her cubicle. More than once, he made comments like, "You're not bad looking, if you would just dress better." At the Christmas party, fueled by alcohol and spotting some mistletoe, Fred came up and kissed her, saying, "I've wanted to do that for a while." Desiree leaned in and replied, "Well I haven't," and then walked away. The next time Fred came by her cubicle, Desire asked him to stop hanging around. Fred replied, "If you really want to get ahead around here, you should really be nicer to the bosses." The following month, Desiree was turned down for another promotion. She soon found a better job through an online ad and left Widgets.com.

Two years later, as the #MeToo movement swept the country, Desiree saw a business news report that Fred Eggman was receiving an award for best new digital leader under 40. Desiree contacted a local plaintiff's attorney who had been in the news, Lorie Partred. Partred filed a suit (within the statute of limitations) against Widgets.com and Fred in Connecticut

Superior Court alleging *quid pro quo* sexual harassment.

Discovery in the case was very contentious. Partred regularly refused to produce material, claiming "victim's privilege." The defense filed four separate motions to compel. At Desiree's deposition, Partred repeatedly interrupted with objections that suggested answers, for which the defense sought sanctions. The court denied the sanctions request and said, "Let's see what happens with the jury."

At trial, Partred relied primarily on Desiree's testimony. Fred denied making any comments about promotion but admitted counseling Desiree to dress less informally because clients came by the office. Confronted with a picture from the Christmas party, Fred admitted kissing Desiree on the cheek but testified she said Merry Christmas, leaning in to kiss him back. Other defense witnesses testified Desiree never filed any complaint against Fred, nor did they observe any improper conduct. HR director Carl-Magnus Horseman testified that promotions went to other women with the same or more experience who received glowing endorsements by their supervisors.

After the defense rested, Partred told the judge in a sidebar she was considering calling Ivy McGone, *Time* Person of the Year and a leader of the #MeToo movement, to testify. Ivy had been widely quoted as saying #MeToo had liberated women (like Desiree) to come forward, even years later, to reveal how they had been sexually harassed. The judge commented that he did not see how such testimony would help, and Partred ultimately did not call the witness. In closing argument, defense counsel F. Lee Bailout argued extensively that Desiree should not be believed because she never complained at the time or for years afterward. The jury returned a verdict for both Widgets.com and Fred.

In a posttrial motion to set aside the verdict, Partred argued that the trial judge erred as a

matter of law in refusing to allow testimony by #MeToo leader Ivy McGone. Meanwhile, Bailout renewed the defense's motion for sanctions, seeking attorney's fees and to strike all of Desiree's testimony concerning her "alleged" conversations with Fred. The judge expressed concern about Partred's conduct before and during trial and took Bailout's motion under advisement.

Desiree filed a timely appeal, which was transferred to the Connecticut Supreme Court. Partred argued that the judge's refusal to admit testimony explaining why Desiree failed to complain for such a long time crippled her case.

Bailout moved to dismiss, claiming there was no final judgment because the fees and sanctions motion remained undecided. On the merits, Bailout argued that the plaintiff had failed to preserve the evidentiary argument regarding Ivy McGone and, in any case, exclusion of such evidence was not an abuse of discretion.

2019 CONNECTICUT LEGAL CONFERENCE
APPELLATE ADVOCACY SECTION CLE
FINAL JUDGMENT, PRESERVATION OF THE RECORD, AND STANDARDS OF REVIEW ON APPEAL

OUTLINE – OVERVIEW OF CLE TOPICS

I. Final Judgment

A. Subject matter jurisdictional per General Statutes § 52-263: "Upon the trial of all matters of fact in any cause or action in the Superior Court . . . if either party is aggrieved by the decision of the court or judge upon any question or questions of law arising in the trial . . . he may appeal to the court having jurisdiction *from the final judgment* of the court or of such judge . . . ." (Emphasis added.)

1. Inherent in the final judgment rule is "the policy against piecemeal litigation." See, e.g., *Waterbury Teachers Assn.* v. *Freedom of Information Commission*, 230 Conn. 441, 450 (1994).

2. Writs of error are also subject to the final judgment rule. See Practice Book § 72-1 (a); *Perry* v. *Perry*, 312 Conn. 600, 618–21 (2014).

3. Relevant Practice Book rules

a. § 61-2: A judgment disposing of an entire complaint, counterclaim, or cross complaint is final.

b. § 61-3: A judgment disposing of part of a complaint, counterclaim, or cross complaint is final *if* it disposes of all counts by or against a party.

c. § 61-4: A partial judgment that does not fall under § 61-3 is nonetheless final for purposes of appeal if the trial court "makes a written determination that the issues resolved by the judgment are of such significance to the determination of the outcome of the case that the delay incident to the appeal would be justified, and the chief justice or chief judge of the court having appellate jurisdiction concurs."

d. § 61-6 addresses appealable final judgments in criminal matters.

4. General Statutes § 52-265a allows a party to file an application to the Supreme Court seeking to appeal an order, regardless of whether it is final, that "involves a matter of substantial public interest and in which delay may work a substantial injustice." The application is reviewed by the Chief Justice, and if granted, the applicant may file the appeal, which may be treated in expedited fashion.

B. Examples of Non-Final Judgments

1. Denial of motion to dismiss, motion to strike, or motion for summary judgment.

a. Examples of exceptions include:

i. Denial of summary judgment on res judicata grounds; *Lighthouse Landings, Inc.* v. *Connecticut Light & Power Co.*, 300 Conn. 325, 328 n.3 (2011); or collateral estoppel grounds; *LaFayette* v. *General Dynamics, Inc.*, 255 Conn. 762, 763–64 n.1 (2001).

ii. Denial of summary judgment on absolute immunity grounds. *Chadha* v. *Charlotte Hungerford Hospital*, 272 Conn. 776, 784–87 (2005).

iii. Denial of motion to dismiss on sovereign immunity grounds. *Shay* v. *Rossi*, 253 Conn. 134, 167 (2000).

iv. …*but* the denial of summary judgment on governmental immunity grounds is *not* a final judgment. *Vesjeli* v. *Pasha*, 282 Conn. 561, 563 (2007).

2. Order granting motion to strike where judgment has not been entered on stricken complaint. See, e.g., *Grier* v. *West Haven Police Dept.*, 8 Conn. App. 142 (1986).

3. Order granting summary judgment as to liability only without a finding of damages. See, e.g., *Balf Co.* v. *Spera Construction Co.*, 222 Conn. 211, 212 (1992).

a. *Balf* also stands for the proposition that there is no final judgment when a trial court has issued a decision on the merits of an action but has reserved its decision on a claim for prejudgment interest for future resolution.

b. Similarly, a judgment of foreclosure is not a final judgment where the trial court has not yet determined the method of foreclosure or amount of the debt. See *Essex Savings Bank* v. *Frimberger*, 26 Conn. App. 80 (1991).

4. Before a decision is made as to collateral source payments under General Statutes § 52-225a. See *Rosa* v. *Lawrence & Memorial Hospital*, 145 Conn. App. 275, 282 n.9 (2014).

5. Generally, the final judgment in a criminal matter is the imposition of sentence.

a. However, while interlocutory, the denial of a motion to dismiss on double jeopardy grounds has been deemed to be an appealable final judgment. See, e.g., *State* v. *Thomas*, 106 Conn. App. 160, 167–68, cert. denied, 287 Conn. 910 (2008).

b. Under General Statutes § 54-94a, a defendant may enter into a conditional nolo contendere plea to appeal the denial of a motion to suppress or dismiss before trial, which is otherwise an interlocutory order.

6. The granting of a motion to intervene is not a final judgment. The denial of a motion to intervene, however, constitutes a final judgment *if* the proposed intervenor "can make a colorable claim to intervention as a matter of right." *BNY Western Trust* v. *Roman*, 295 Conn. 194, 203–206 (2010).

7. Remand orders in administrative appeals

a. If under the UAPA – General Statutes § 4-183 (j): "[A] remand is a final judgment."

b. If not under the UAPA – apply the final judgment test of *Schieffelin & Co.* v. *Dept. of Liquor Control*, 202 Conn. 405, 410 (1987).

8. Workers' compensation decisions – General Statutes § 31-301b:

"Any party aggrieved by the decision of the Compensation Review Board upon any question or questions of law arising in the proceedings may appeal the decision of the Compensation Review Board to the Appellate Court, *whether or not the decision is a final decision within the meaning of section 4-183 or a final judgment within the meaning of section 52-263.*" (Emphasis added.)

9. A trial court decision that disposes of one count but not another count advancing a legally consistent alternative theory of relief. See *Meribear Productions, Inc.* v. *Frank*, 328 Conn. 709, 717–26 (2018) ("[W]hen the trial court disposes of one count in the plaintiff's favor, such a determination implicitly disposes of legally inconsistent, but not legally consistent, alternative theories. When a legally consistent theory of recovery has been litigated and has not been ruled on, there is no final judgment.")

C. When interlocutory orders are nonetheless final for purposes of appeal – *State* v. *Curcio*, 191 Conn. 27 (1983): "An otherwise interlocutory order is appealable in two circumstances: (1) where the order or action terminates a separate and distinct proceeding, or (2) where the order or action so concludes the rights of the parties that further proceedings cannot affect them."

1. Discovery order: Generally not an appealable final judgment; there must first

be a finding of contempt for failure to comply with the order. See, e.g., *Niro* v. *Niro*, 314 Conn. 62, 67–73 (2014); *Incardona* v. *Roer*, 309 Conn. 754, 759–67 (2013). But see *Woodbury Knoll, LLC* v. *Shipman & Goodwin, LLP*, 305 Conn. 750, 755–74 (2012) (discovery order against nonparty law firm in legal malpractice action was final judgment under first prong of *Curcio*); *Abreu* v. *Leone*, 291 Conn. 332, 341–50 (2009) (DCF's appeal from discovery order requiring foster parent to respond to deposition questions in connection with separate action brought by foster child against DCF was brought from final judgment under first prong of *Curcio*).

a. A sanctions order arising from a failure to comply with a discovery order is also not an appealable final judgment, per *Green Rock Ridge, Inc.* v. *Kobernat*, 250 Conn. 488 (1999), and its progeny, e.g., *Rosa Brothers, Inc.* v. *Mansi*, 61 Conn. App. 412 (2001).

2. Award of attorney's fees: "[A] judgment on the merits is final for purposes of appeal even though the recoverability or amount of attorney's fees for the litigation remains to be determined." *Paranteau* v. *DeVita*, 208 Conn. 515, 523 (1988). See also *Ledyard* v. *WMS Gaming, Inc.*, 330 Conn. 75 (2018) (trial court's decision on summary judgment that, under statute, plaintiff was entitled to attorney's fees incurred in related federal action was final judgment, notwithstanding that amount of fees had not yet been determined); *Hylton* v. *Gunter*, 313 Conn. 472 (2014) (common-law punitive damages); *United Amusements & Vending Co.* v. *Sabia*, 179 Conn. App. 555, 559–61 (2018); *Doyle Group* v. *Alaskans for Cuddy*, 164 Conn. App. 209, 217–22 (contractual attorney's fees), cert. denied, 321 Conn. 924 (2016).

a. But see *Paranteau* v. *DeVita*, supra, 208 Conn. 524 n.11: "*A supplemental postjudgment award of attorney's fees* becomes final and appealable, however, not when there is a finding of liability for such fees, but when the amount of fees are conclusively determined." (Emphasis added.)

b. As a judgment is final on the merits despite an outstanding question regarding attorney's fees, a judgment is also final on the merits despite an outstanding question regarding offer of compromise interest under General Statutes § 52-192a. See *Blakeslee Arpaia Chapman, Inc.* v. *EI Constructors, Inc.*, 239 Conn. 708, 752 (1997).

3. *Blakely* v. *Danbury Hospital*, 323 Conn. 741 (2016): " [A] decision concluding that the savings statute permits a statutory cause of action subject to a jurisdictional time limitation to proceed cannot be the subject of an interlocutory appeal authorized under [*Curcio*]."

4. *Khan* v. *Hillyer*, 306 Conn. 205, 213 (2012): "This court has a long history of concluding that, within the context of family matters, orders that would otherwise

be considered interlocutory constitute appealable final judgments." The court thereafter provides a string citation of cases containing examples of such orders.

5. See *Sharon Motor Lodge, Inc.* v. *Tai*, 82 Conn. App. 148, 158–59 (2004) for a detailed discussion of criteria regarding the second prong of *Curcio*.

II. Preservation of the Record

A. In general: "Our appellate courts, as a general practice, will not review claims made for the first time on appeal. We repeatedly have held that [a] party cannot present a case to the trial court on one theory and then seek appellate relief on a different one . . . . [A]n appellate court is under no obligation to consider a claim that is not distinctly raised at the trial level. . . . [B]ecause our review is limited to matters in the record, we [also] will not address issues not decided by the trial court. . . . The requirement that [a] claim be raised distinctly means that it must be so stated as to bring to the attention of the court the precise matter on which its decision is being asked.'' (Citations omitted; emphasis omitted; footnote omitted; internal quotation marks omitted.) *White* v. *Mazda Motor of America, Inc.*, 313 Conn. 610, 619–20 (2014). See also Practice Book §§ 5-2, 60-5.

1. BUT claims that a court lacks subject matter jurisdiction, even if unpreserved, may be raised at any time. See, e.g., *Perez-Dickson* v. *Bridgeport*, 304 Conn. 483, 506 (2012).

2. Preservation requirement also applies to alternative grounds for affirmance. See, e.g., *Mangiafico* v. *Farmington*, 331 Conn. 404, 429–36 (2019).

3. Raising a claim for the first time in a motion to reargue in the trial court will not preserve it for appellate review. See, e.g., *Doyle* v. *Alaskans for Cuddy*, supra, 164 Conn. App. 227.

B. Preservation of evidentiary claims: "[T]he standard for the preservation of a claim alleging an improper evidentiary ruling at trial is well settled. This court is not bound to consider claims of law not made at the trial. . . . In order to preserve an evidentiary ruling for review, trial counsel must object properly. . . . In objecting to evidence, counsel must properly articulate the basis of the objection so as to apprise the trial court of the precise nature of the objection and its real purpose, in order to form an adequate basis for a reviewable ruling. . . . Once counsel states the authority and ground of [the] objection, any appeal will be limited to the ground asserted. . . . These requirements are not simply formalities. They serve to alert the trial court to potential error while there is still time for the court to act. . . . Assigning error to a court's evidentiary rulings on the basis of objections never raised at trial unfairly subjects the court and the opposing party to trial by ambush." (Internal quotation marks omitted.) *State* v. *Jorge P.*, 308 Conn. 740, 753 (2013).

1. Evidentiary objections - see Practice Book §5-5 Objections to Evidence; Interlocutory Questions; Exceptions Not Required.

2. Motions in limine – see Practice Book §§ 15-3 (civil), 31a-7 (juvenile), 42-15 (criminal).

3. Offer of proof: "As a general matter, a trial court should *always* allow a party to make an offer of proof and mark an item as an exhibit for identification, for both

practices generally are necessary to preserving the trial record for appellate review. See *State v. Silva,* 201 Conn. 244, 253 (1986) ('the general rule has evolved that the trial court *must* mark as an exhibit for identification *anything* offered by counsel' [emphasis in original]); *State v. Zoravali,* 34 Conn.App. 428, 433 ('The appellant bears the burden of providing an adequate appellate record through the offer of proof, among other vehicles. . . . A trial court cannot prevent a defendant from doing so.' [Citation omitted.]), cert. denied, 230 Conn. 906 (1994); C. Tait & E. Prescott, Connecticut Appellate Practice and Procedure (4th Ed.2014) § 8–2:1.1, p. 437 ('[i]f necessary [to properly preserve a claim for appellate review], the appellant also must make an offer of proof or offer an exhibit for identification')." (Emphasis in original.) *Filippelli* v. *Saint Mary's Hospital*, 319 Conn. 113, 150–51 (2015).

4. Sufficiency of the evidence

a. Criminal matters – "A motion for a judgment of acquittal will preserve a sufficiency of the evidence claim." *State* v. *Allan*, 311 Conn. 1, 10 n.5 (2014). An unpreserved sufficiency of the evidence claim, however, is reviewable under *Golding*. See, e.g., *State* v. *Terry*, 161 Conn. App. 797, 804 n.4, cert. denied, 320 Conn. 916 (2016).

b. Civil matters – See *Willow Springs Condominium Assn., Inc*. v. *Seventh BRT Development Corp.*, 245 Conn. 1, 48–51 (1998) (appellant did not preserve sufficiency of evidence claim where it did not move for directed verdict, "a prerequisite to the filing of a motion to set aside the verdict," and policy underlying requirement of timely preservation would be undermined by allowing issue that arose during trial to be first raised posttrial).

C. Preservation of jury instruction claims: "'It is well settled . . . that a party may preserve for appeal a claim that an instruction . . . was . . . defective either by: (1) submitting a written request to charge covering the matter; or (2) taking an exception to the charge as given. *State v. Ramos,* 261 Conn. 156, 170 (2002); see also Practice Book § 16–20. [T]he purpose of the [preservation requirement] is to alert the court to any claims of error while there is still an opportunity for correction in order to avoid the economic waste and increased court congestion caused by unnecessary retrials. . . . *State v. Ramos,* supra, 261 Conn. 170; see also *Henderson v. Kibbe,* 431 U.S. 145 (1977) ([o]rderly procedure requires that the respective adversaries' views as to how the jury should be instructed be presented to the trial judge in time to enable him to deliver an accurate charge and to minimize the risk of committing reversible error). Thus, the essence of the preservation requirement is that *fair notice* be given to the trial court of the party's view of the governing law and of any disagreement that the party may have had with the charge actually given.' (Emphasis in original; footnote omitted; internal quotation marks omitted.) *State v. Ross,* 269 Conn. 213, 335–36 (2004)." *Ulbrich* v. *Groth*, 310 Conn. 375, 424–25 (2013).

1. See Practice Book §§ 16-20 to 16-23 re: requests to charge and taking exceptions.

D. Adequacy of the record: "It is well established that the appellant bears the burden of providing an appellate court with an adequate record for review. Practice Book § 61–10. . . . The general purpose of [the relevant] rules of practice . . . [requiring the appellant to provide a sufficient record] is to ensure that there is a trial court record that is adequate for an informed appellate review of the various claims presented by the parties. . . . One specific purpose of a motion for articulation of the factual basis of a trial court's decision is to clarify an ambiguity or incompleteness in the legal reasoning of the trial court in reaching its decision. . . . Further articulation ... is unnecessary whe[n] the [memorandum of decision] adequately states its factual basis, and whe[n] the record is adequate for informed appellate review of the [judgment]." (Citations omitted; emphasis omitted; internal quotation marks omitted.) *Ammirata* v. *Zoning Board of Appeals*, 264 Conn. 737, 744 (2003).

1. "[W]hen the facts underlying a claim on appeal are not in dispute, and that claim is subject to de novo review, the precise legal analysis undertaken by the trial court is not essential to the reviewing court's consideration of the issue on appeal." Id., 745–46.

2. If a trial court fails to state the basis for its decision or to rule on a matter, an appellant may file a motion for articulation asking that the trial court clarify its decision. See Practice Book § 66-5. An appellate court may not decline to review a claim solely on the basis of failure to seek an articulation; Practice Book § 61-10 (b); and may sua sponte order an articulation from the trial court. This rule does not otherwise limit, however, an appellate court's ability to deem a claim unreviewable for lack of an adequate record. See *Chester* v. *Maris*, 150 Conn. App. 57, 63 n.5 (2014). A trial court's decision on a motion for articulation may only be reviewed by way of an appellate motion for review. See Practice Book § 66-7; *Swanson* v. *Groton*, 116 Conn. App. 849, 865–66 (2009).

3. See https://www.jud.ct.gov/lawlib/Law/articulation.htm - page titled "Connecticut Law About Motion for Articulation" on the Connecticut Judicial Branch Law Libraries website.

E. Exceptions allowing for review of unpreserved claims

1. *State* v. *Golding*, 213 Conn. 233 (1989): "[A] defendant can prevail on a claim of constitutional error not preserved at trial only if *all* of the following conditions are met: (1) the record is adequate to review the alleged claim of error; (2) the claim is of constitutional magnitude alleging the violation of a fundamental right; (3) the alleged constitutional violation clearly exists and clearly deprived the defendant of a fair trial; and (4) if subject to harmless error analysis, the state has failed to demonstrate harmlessness of the alleged constitutional violation beyond a reasonable doubt. In the absence of any one of these conditions, the defendant's

claim will fail. The appellate tribunal is free, therefore, to respond to the defendant's claim by focusing on whichever condition is most relevant in the particular circumstances." (Footnote omitted.)

a. Available for claims of constitutional error in civil cases. See, e.g., *In re Yasiel R.*, 317 Conn. 773 (2015).

b. An unpreserved jury instruction claim in a criminal appeal may nonetheless be waived under *State* v. *Kitchens*, 299 Conn. 447, 482–83 (2011).

2. Plain error: "An appellate court addressing a claim of plain error first must determine if the error is indeed plain in the sense that it is patent [or] readily [discernible] on the face of a factually adequate record, [and] also . . . obvious in the sense of not debatable. . . . This determination clearly requires a review of the plain error claim presented in light of the record. Although a complete record and an obvious error are prerequisites for plain error review, they are not, of themselves, sufficient for its application. . . . [T]he plain error doctrine is reserved for truly extraordinary situations [in which] the existence of the error is so obvious that it affects the fairness and integrity of and public confidence in the judicial proceedings. . . . [I]n addition to examining the patent nature of the error, the reviewing court must examine that error for the grievousness of its consequences in order to determine whether reversal under the plain error doctrine is appropriate. A party cannot prevail under plain error unless it has demonstrated that the failure to grant relief will result in manifest injustice. . . . [Previously], we described the two-pronged nature of the plain error doctrine: [An appellant] cannot prevail under [the plain error doctrine] . . . unless he demonstrates that the claimed error is *both* so clear *and* so harmful that a failure to reverse the judgment would result in manifest injustice. . . .

"It is axiomatic that [t]he plain error doctrine . . . is not . . . a rule of reviewability. It is a rule of reversibility. That is, it is a doctrine that this court invokes in order to rectify a trial court ruling that, although either not properly preserved or never raised at all in the trial court, nonetheless requires reversal of the trial court's judgment . . . for reasons of policy. . . . Put another way, plain error review is reserved for only the most egregious errors. When an error of such a magnitude exists, it necessitates reversal." (Citations omitted; emphasis in original; internal quotation marks omitted.) *State* v. *McClain*, 324 Conn. 802, 812–14 (2017)

3. Supervisory authority: "It is well settled that [a]ppellate courts possess an inherent supervisory authority over the administration of justice. . . . Supervisory powers are exercised to direct trial courts to adopt judicial procedures that will address matters that are of utmost seriousness, not only for the integrity of a particular trial but also for the perceived fairness of the judicial system as a whole. . . . Under our supervisory authority, we have adopted rules intended to guide the lower courts in the administration of justice in all aspects of the criminal

process. . . . Under our supervisory authority, we have adopted rules intended to guide the lower courts in the administration of justice in all aspects of the criminal process. . . . The exercise of our supervisory powers is an extraordinary remedy to be invoked only when circumstances are such that the issue at hand, while not rising to the level of a constitutional violation, is nonetheless of utmost seriousness, not only for the integrity of a particular trial but also for the perceived fairness of the judicial system as a whole." (Citation omitted; internal quotation marks omitted.) *State* v. *Elson*, 311 Conn. 726, 764–65 (2014).

4. When a Reviewing Court Raises and Decides an Issue Not Raised by the Parties: *Blumberg Associates Worldwide, Inc.* v. *Brown & Brown of Connecticut*, 311 Conn. 123, 128 (2014), provides that "the reviewing court (1) must do so when that issue implicates the court's subject matter jurisdiction, and (2) has the discretion to do so if (a) exceptional circumstances exist that would justify review of such an issue if raised by a party, (b) the parties are given an opportunity to be heard on the issue, and (c) there is no unfair prejudice against whom the issue is to be decided."

a. This is a lengthy, comprehensive decision – read carefully.

b. See id., 144–166 for in-depth discussion of principles regarding an appellate court's authority to raise unpreserved issues sua sponte and circumstances under which an appellate court can consider unpreserved claims raised by a party or sua sponte.

III. Standards of Review

A. "A *question of fact* is [a]n issue that has not been predetermined and authoritatively answered by the law. . . . In contrast, a *question of law* is [a]n issue to be decided by the judge, *concerning the application or interpretation of the law.*" (Citations omitted; emphasis in original; internal quotation marks omitted.) *Ayantola* v. *Board of Trustees of Technical Colleges*, 116 Conn. App. 531, 538 (2009).

B. Plenary: "[A] question of law [is] subject to plenary review. . . . [W]here the legal conclusions of the court are challenged, we must determine whether they are legally and logically correct . . . and whether they find support in the facts that appear in the record." (Citations omitted; internal quotations marks omitted.) *Webster Bank* v. *Zak*, 259 Conn. 766, 773–74 (2002).

1. "When the trial court conducts a legal analysis or considers a mixed question of law and fact, plenary review is appropriate. . . ." (Internal quotation marks omitted.) *Jones* v. *State*, 328 Conn. 84, 102 (2018)

2. Also called "de novo" review. See *Ammirata* v. *Zoning Board of Appeals*, supra 264 Conn. 746 n.13 (2003).

C. Clearly erroneous: "[A]ppellate review of a trial court's findings of fact is governed by the clearly erroneous standard of review. The trial court's findings are binding upon this court unless they are clearly erroneous in light of the evidence and the pleadings in the record as a whole. . . . We cannot retry the facts or pass on the credibility of the witnesses. . . . A finding of fact is clearly erroneous when there is no evidence in the record to support it . . . or when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." (Internal quotations marks omitted.) *In re Kaurice B.*, 83 Conn. App. 519, 523 (2004). See also, e.g., *Brittell* v. *Dept. of Correction*, 247 Conn. 148, 164–65 (1998); *Eaddy* v. *Bridgeport*, 156 Conn. App. 597, 605, cert. denied, 317 Conn. 906 (2015).

1. An appellate court cannot find facts. See, e.g., *Gallo* v. *Gallo*, 184 Conn. 36, 38 (1981).

2. "Appellate review of a factual finding . . . is limited both as a practical matter and as a matter of the fundamental difference between the role of the trial court and an appellate court." *Pulaski* v. *Ledwith*, 5 Conn. App. 629, 631, cert. denied, 198 Conn. 803 (1985).

3. "In applying the clearly erroneous standard of review, [a]ppellate courts do not examine the record to determine whether the trier of fact could have reached a different conclusion. Instead, we examine the trial court's conclusion in order to determine whether it was legally correct and factually supported." (Internal quotation marks omitted.) *O'Connor* v. *Larocque*, 302 Conn. 562, 575 (2011).

D. Abuse of discretion: "Judicial discretion is always a legal discretion, exercised according to the recognized principles of equity. . . . The action of the trial court is not to be disturbed unless it abused its legal discretion, and [i]n determining this the unquestioned rule is that great weight is due to the action of the trial court and every reasonable presumption should be given in favor of its correctness. . . . In determining whether there has been an abuse of discretion, the ultimate issue is whether the court could have reasonably concluded as it did." (Citations omitted; internal quotations marks omitted.) *DiPalma* v. *Wiesen*, 163 Conn. 293, 298–99 (1972).

1. "[R]eversal is required when the abuse is manifest or where injustice appears to have been done." *Thomas* v. *Thomas*, 159 Conn. 477, 480 (1970).

2. Generally applies to trial court rulings (v. findings, see supra re: "clearly erroneous" standard of review), e.g.,

a. Admission or exclusion of evidence. See, e.g., *State* v. *Isabelle*, 107 Conn. App. 597, 603 (2008).

i. But see *State* v. *Saucier*, 283 Conn. 207, 219 (2007): "[T]he function performed by the trial court in issuing its ruling should dictate the scope of review." In *Saucier*, the court distinguished the standard of review to be applied in determining whether a statement qualified as hearsay (plenary) from the standard of review to be applied in determining whether said statement was properly admitted (abuse of discretion).

b. Award of attorney's fees. See, e.g., *Munro* v. *Munoz*, 146 Conn. App. 853, 858 (2013).

c. Decision on a motion to set aside a verdict. See, e.g., *Chief Information Officer* v. *Computers Plus Center, Inc.*, 310 Conn. 60, 98 (2013).

E. Specific Situations

1. Contract interpretation: "The standard of review for the interpretation of a contract is well established. Although ordinarily the question of contract interpretation, being a question of the parties' intent, is a question of fact . . . [when] there is definitive contract language, the determination of what the parties intended by their . . . commitments is a question of law [over which our review is plenary]. . . . If the language of [a] contract is susceptible to more than one reasonable interpretation, [however] the contract is ambiguous. . . . Ordinarily, such ambiguity requires the use of extrinsic evidence by a trial court to determine the intent of the parties, and, because such a determination is factual, it is subject to reversal on appeal only if it is clearly erroneous." (Citations omitted; internal quotation marks omitted.) *Bristol* v. *Ocean State Job Lot Stores of Connecticut,*

Inc., 284 Conn. 1, 7 (2007).

2. Sufficiency of the evidence: "[W]e must determine whether the facts set out in the memorandum of decision are supported by the evidence or whether, in light of the evidence and the pleadings in the whole record, those facts are clearly erroneous. . . . We also must determine whether those facts correctly found are, as a matter of law, sufficient to support the judgment." (Internal quotations marks omitted.) *Masse* v. *Perez*, 139 Conn. App. 794, 797 (2012), cert. denied, 308 Conn. 905 (2013).

3. Administrative appeals: "Judicial review of an administrative agency decision requires a court to determine whether there is substantial evidence in the administrative record to support the agency's findings of basic fact and whether the conclusions drawn from those facts are reasonable. . . . This so-called substantial evidence rule is similar to the sufficiency of the evidence standard applied in judicial review of jury verdicts, and evidence is sufficient to sustain an agency finding if it affords a substantial basis of fact from which the fact in issue can be reasonably inferred. . . . [I]t imposes an *important limitation* on the power of the courts to overturn a decision of an administrative agency . . . and [provides] a more restrictive standard of review than standards embodying review of weight of the evidence or clearly erroneous action. . . . The United States Supreme Court, in defining substantial evidence in the directed verdict formulation, has said that it is something less than the weight of the evidence, and [that] the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence." (Citations omitted; emphasis in original; internal quotation marks omitted.) *Sweetman* v. *State Elections Enforcement Commission*, 249 Conn 296, 331–32 (1999).

a. Codified in General Statutes § 4-183 (j) of the UAPA.