# 2023 CONNECTICUT APPELLATE REVIEW

By Kenneth J. Bartschi and Karen L. Dowd*

## I. Supreme Court

Some years, the Supreme Court's decisions reveal a theme we explore in this review, but 2023 was not one of those years. The court released no real blockbusters, and the number of published opinions (70) was down somewhat from the average of 100 or so annually as the drought of trials (and therefore decisions to appeal) in 2020 and 2021 due to the COVID-19 pandemic works its way through the appellate system.

There was a bit of drama, however, concerning the court's membership. On March 9, 2023, former Justice Maria Araújo Kahn resigned to take a seat on the Second Circuit Court of Appeals.[1] Governor Ned Lamont nominated U.S. Attorney Sandra Slack Glover to fill the vacancy. Glover clerked for Justice Sandra Day O'Connor during the same term that now-Justice Amy Coney Barrett clerked for Justice Antonin Scalia. Glover joined her fellow clerks from that term in a letter supporting Barrett's nomination to the Seventh Circuit Court of Appeals. This letter of support came back to haunt Glover in her Connecticut confirmation hearings. Justice Barrett, of course, succeeded Justice Ruth Bader Ginsberg on the U.S. Supreme Court and ultimately provided the fifth vote in *Dobbs v. Jackson Women's Health Organization*[2] to overrule *Roe v. Wade*.[3] The lingering rancor over *Dobbs* got Glover into trouble with the more liberal members of the Connecticut legislature because of her prior support of Justice Barrett. Glover responded by criticizing *Dobbs* and affirming her support for abortion rights, which alienated the more conservative members of the legislature and ultimately doomed her nomination.

---

* Of the Hartford Bar

1 https://portal.ct.gov/-/media/Office-of-the-Governor/News/2023/20230309-Justice-Kahn.pdf

2 597 U.S. 215 (2022).

3 410 U.S. 113 (1973).

Governor Lamont then turned to his former legal counsel, Attorney Nora Dannehy, as his nominee, and she was confirmed in September 2023. Justice Dannehy's background includes public service and private practice. In addition to serving as Governor Lamont's legal counsel, she served as a U.S. Attorney and as Deputy Attorney General for the State of Connecticut. She has also worked as corporate counsel and in a private law firm.

Notably, Justice Dannehy is now the third sitting justice who did not first serve as a trial judge.[4] We have no qualms about Justice Dannehy's qualifications given her impressive career and sterling reputation. Nor do we believe that experience as a trial judge is a prerequisite to service on the Supreme Court. But the fact remains that the court regularly issues decisions that affect how trial judges do their work and an understanding of what occurs in the trenches is important in assessing such issues. The authors hope that the governor will consider a jurist who has served as a trial judge the next time a vacancy opens to ensure that sufficient practical experience at the trial level informs the Supreme Court's jurisprudence.

Turning to the cases heard, it was a relatively uneventful year for the development of constitutional law. *State v. Avoletta*[5] held that a special act extending the time to sue for alleged injuries to children due to poor air quality at certain public schools was an unconstitutional public emolument in violation of Article First, § 1 of the state constitution where the state did not cause the defendants to miss the statute of limitations.

Two cases concerned the Dormant Commerce Clause of the federal constitution. In *Direct Energy Services, LLC v. Public Utilities Regulatory Authority*,[6] the court concluded

---

[4] Justices McDonald and D'Auria are the other two sitting justices who came directly to the Supreme Court. Prior justices without experience as trial judges include former Chief Justice Ellen Ash Peters and Justice Richard Palmer.

[5] 347 Conn. 629, 298 A.3d 1211 (2023).

[6] 347 Conn. 101, 135, 143, 296 A.3d 795 (2023). The Dormant Commerce Clause is a negative implication from the grant of power to Congress to regulate interstate commerce in the Commerce Clause, U.S. Const., art. I, § 8, cl. 3. It prohibits states from burdening interstate commerce, with certain exceptions. *Id.*, 117-19.

that marketing restrictions and regulations pertaining to renewable energy credits outside a specific geographic region did not violate the Dormant Commerce Clause. Similarly, in *Alico, LLC v. Somers*,[7] the Court held that the Dormant Commerce Clause was not violated by the "double" taxation of motor vehicles registered in Massachusetts (and subject to an excise tax there) but garaged in Connecticut and therefore also subject to Connecticut property taxes.

Relying on precedent from the United States Supreme Court, our Supreme Court held in *State v. Langston*[8] that the trial court did not violate the defendant's Sixth Amendment right to a jury by considering conduct for which the defendant had been acquitted when the court imposed a sentence within the statutory limits. The court also concluded after a thorough analysis that the state constitution did not provide greater protection than the federal constitution in this case.[9] Otherwise litigants largely gave the state constitution short shrift[10] or ignored it entirely.[11]

A case that could be described as constitutionally adjacent was *Cerame v. Lamont*.[12] It came to the court on certification from the U.S. District Court in Connecticut where the plaintiff claimed that General Statutes § 53-37 violates the First Amendment.[13] The question concerned the scope of

---

[7] 348 Conn. 350, 304 A.3d 851 (2023).

[8] 346 Conn. 605, 623, 294 A.3d 1002 (2023), *cert. denied*, 144 S. Ct. 698 (2024).

[9] *Id.* at 636.

[10] State v. Samuel U., 348 Conn. 304, 311 n.4, 303 A.3d 1175 (2023) (declining to reach state constitutional claim that was merely mentioned but not analyzed). *Samuel U.* held that the federal constitution did not require the state to provide pretrial notice of uncharged misconduct it intends to offer. *Id.* at 317.

[11] State v. Curet, 346 Conn. 306, 289 A.3d 176 (2023) (warrantless search was reasonable under the emergency aid exception to the Fourth Amendment where facts suggested that someone injured in an altercation could have retreated to the defendant's apartment); State v. Juan A. G.-P., 346 Conn. 132, 158, 174, 287 A.3d 1060 (2023) (trial court violated defendant's rights under confrontation clause of the federal constitution by refusing to turn over victim's psychiatric records and preventing examination regarding witnesses' applications for visas intended to help trafficking victims); State v. Velasquez-Mattos, 347 Conn. 817, 841-42, 300 A.3d 583 (2023) (precluding defendant from cross examining witness regarding pending criminal charges did not violate confrontation clause).

[12] 346 Conn. 422, 291 A.3d 601 (2023).

[13] *Id.* at 424.

§ 53-37, which criminalizes speech by any person "who by his advertisement" holds anyone out for ridicule because of membership in various protected classes.[14] The plaintiff argued that this statute applied to his banter with friends and social media posts, but the court held that it only applies to commercial speech.[15] So apparently that relative who drinks a little too much at holiday dinners and channels their inner Archie Bunker is safe from prosecution under this statute.

Finally, constitutional cases that "might have been" were *Mills v. Hartford HealthCare Corp*.[16] and a companion case, *Manginelli v. Regency House of Wallingford, Inc*.[17] Both concerned the application of an executive order issued at the beginning of the COVID-19 pandemic providing immunity from suit for healthcare workers from malpractice claims for actions taken in support of the state's response to the pandemic.[18] The court sought supplemental briefing and invited amicus briefs on the unpreserved question whether the governor had the authority to suspend the common law.[19] Reaching this issue could have required the court to confront *Gentile v. Altermatt*,[20] which is understood to hold that the legislature (and therefore, presumably, the governor) cannot eliminate a common-law cause of action in existence in 1818 without providing a suitable alternative.[21] The court, however, concluded the limitations of supplemental briefing and the inadequate opportunity to develop the factual record in the trial court counseled against deciding the question in these cases.[22]

On the other hand, the final judgment rule got a bit of a workout in 2023. First is a footnote in *Strazza Building &*

---

[14] *Id*. at 424-25.

[15] *Id*. at 426, 431.

[16] 347 Conn. 524, 298 A.3d 605 (2023). The authors represented Hartford HealthCare Corporation and other defendants in *Mills*.

[17] 347 Conn. 581, 298 A.3d 263 (2023).

[18] *Mills*, 347 Conn. at 532; *Manginelli*, 347 Conn. at 584-85.

[19] *Mills*, 347 Conn. at 564 & n.26.

[20] 169 Conn. 267, 363 A.2d 1 (1975).

[21] *See, e.g.*, In re Annessa J., 343 Conn. 642, 658, 284 A.3d 562 (2022) (Article First, § 10 of the Connecticut Constitution preserves "a litigant's common-law rights to obtain redress 'for an injury done to him in his person, property or reputation'") (citing *Gentile*, 169 Conn. at 286) (other citations omitted).

[22] *Mills*, 347 Conn. at 565.

*Construction, Inc. v. Harris*[23] observing that while Connecticut law regards the denial of motions to dismiss based on res judicata or collateral estoppel as final judgments for purposes of appeal, this is not the federal rule.[24] Although the court questioned whether it should revisit the Connecticut rule, it did not do so as the parties did not raise the question in the certified appeal.[25]

Another finality question spawned six opinions in three cases, four of which were unnecessary. The issue concerned whether the denial of a special motion to dismiss a SLAPP[26] suit pursuant to General Statutes § 52-196a was final for purposes of appeal. (Spoiler alert: it is.) The procedural route to resolving the question was a bit convoluted. The question first arose in *Pryor v. Brignole*,[27] a certified appeal from an Appellate Court order dismissing the appeal for lack of a final judgment. A five-justice panel heard argument on February 24, 2022, with Justices Kahn and Alexander apparently recused.[28] A few months after oral argument in *Pryor*, the court transferred two appeals to itself, *Smith v. Supple*[29] and *Robinson v. V.D.*,[30] raising the same issue.[31] *Smith* and *Robinson* were argued in October 2022 as motions with Justice Alexander on the panel for both. *Pryor* was reargued the same day without Justice Alexander. *Smith* and *Robinson* apparently resulted in evenly divided panels as Appellate

---

[23] 346 Conn. 205, 210 n.2, 288 A.3d 1017 (2023).

[24] *Id.* at 211 n.2.

[25] *Id.* Finality is jurisdictional, so it is curious that the court did not raise the issue sua sponte, especially since the appellee had raised the issue in the Appellate Court. Apparently the court did not view it as necessary where it had jurisdiction under existing precedent.

[26] SLAPP stands for "strategic lawsuit against public participation." Lafferty v. Jones, 336 Conn. 332, 337 n.4, 246 A.3d 429 (2020), *cert. denied*, 141 S. Ct. 2467 (2021).

[27] 346 Conn. 534, 292 A.3d 701 (2023).

[28] *Id.*

[29] 346 Conn. 928, 293 A.3d 851 (2023).

[30] 346 Conn. 1002, 293 A.3d 345 (2023).

[31] In *Robinson*, a motion to dismiss the appeal was pending at the time of transfer. 346 Conn. at 1003. It did not appear that a similar motion was pending in *Smith* as the court ordered briefing on the question. *Smith*, 346 Conn. at 928. However, the *Smith* opinion appears at the back of the 346 Connecticut Reports where orders concerning motions normally live, so we assume the court treated it as a motion to dismiss.

Judge Eliot Prescott was added to become the deciding vote in those cases and was added to *Pryor* as well.

The main decision appears in *Smith*. Chief Justice Richard Robinson, writing for himself, Justices McDonald and Mullins, and Judge Prescott, held that while § 52-196a does not expressly provide a right to appeal from the denial of a special motion to dismiss, the extraordinary remedy it provides would be lost without an immediate appeal, so the order was final under the second prong of the *Curcio* test.[32] Justice D'Auria, joined by Justices Ecker and Alexander, dissented, taking the view that the right to appeal is "strictly construed,"[33] and concluded that the statute did not afford an immediate appeal. It is not clear why the court transferred *Smith* and *Robinson* after oral argument in *Pryor*, which became a 4-2 decision with the addition of Judge Prescott. *Pryor* would originally have been a 3-2 decision comprised of the regular members of the court who were not disqualified. The court could have decided the issue in *Pryor* without involving an Appellate Court judge who ended up being the deciding vote on the case used to decide the issue.

Another published opinion based on a motion with an evenly divided court was *State v. Malone*.[34] There, the defendant filed a motion for permission to file a late appeal. The court divided 3-3 and because the rules did not provide for adding another jurist on such a motion when the court was evenly divided, the motion failed.[35]

While we're on the subject of adding jurists after argument, the court added Justice McDonald and Judge Cradle from the Appellate Court after argument to reach a majority decision in *Commissioner of Mental Health & Addiction Services v. Freedom of Information Commission*,[36] concerning whether a police report for a state hospital was subject to

---

[32] State v. Curcio, 191 Conn. 27, 463 A.2d 566 (1983).

[33] *Smith*, at 966, 989 (citing E. Prescott, Connecticut Appelate Procedure & Practice § 2-1:1.2 at 44 (5th Ed. 2016)). Take that, Judge Prescott!

[34] 346 Conn. 1012, 293 A.3d 893 (2023).

[35] *Id.* Curiously, the court seems to have been evenly divided in both Smith and Robinson since the court added Judge Prescott to break the tie on the motions.

[36] 347 Conn. 675, 299 A.3d 197 (2023).

disclosure under the Freedom of Information act. The panel at oral argument originally consisted of the Chief Justice, and Justices D'Auria, Mullins, Ecker, and Christine Keller.[37] Justice McDonald and Judge Cradle joined Justice Ecker in his majority opinion, which was also joined by Justice Mullins in holding that the police report was not protected by psychiatrist-patient privilege as it did not fall within the definition of "communications and records" for purposes of General Statutes § 52-146e.[38] The Chief Justice would have held that the communications were covered by the privilege but that the police reports should redact patient diagnoses and the documents as redacted should be disclosed.[39] Justice Keller, joined by Justice D'Auria, dissented, contending that the information in the reports was the type the legislature intended to protect.[40]

Judge Prescott again served as tiebreaker in *Ahmed v. Oak Management Corp*.[41] Writing for the majority, Justice D'Auria rejected the plaintiff's claim that the arbitrator improperly relied on the fugitive disentitlement doctrine to limit his participation in the arbitration proceeding.[42] Justice Alexander, joined by the Chief Justice and Justice Ecker, dissented, arguing that an absconder does not lose contractual rights and that the arbitration rules do not permit application of the fugitive disentitlement doctrine.[43]

Adding jurists to a panel after oral argument is something of a pet peeve for us. While the additional jurists listen to the oral arguments and read the transcripts, this is not the same as being present for the argument. Indeed, when the additional jurist is the tiebreaker, that judge is ultimately the decision maker who decides the parties' fates without being able to interact with them as happens during oral argument.

---

[37] *Id*.

[38] *Id*. at 717-18. The court did, however, order the redaction of personally identifying information for two patients as the FOIA request did not seek that information. *Id*. at 717.

[39] *Id*. at 718-19 (Robinson, C.J., concurring and dissenting).

[40] *Id*. at 729-30 (Keller, J., dissenting).

[41] 348 Conn. 152, 302 A.3d 850 (2023). Judge Prescott was added to the panel after oral argument. *Id*.

[42] *Id*. at 194.

[43] *Id*. at 216-17 (Alexander, J., dissenting).

Commendably, we note that beginning in the fall of 2023, Appellate Court judges and occasionally Superior Court judges have been added to otherwise even-numbered panels for oral argument in the Supreme Court. In March 2024, the Supreme Court published a notice on the Judicial Branch website explaining the procedure when justices are disqualified. If one justice is disqualified a regular Appellate Court judge (i.e., no senior judges or referees) will be designated on a rotating basis for direct appeals and appeals transferred from the Appellate Court. For certified appeals, a judge will be designated from the chief or deputy court administrator, or the chief administrative judges for the criminal, civil, family, and juvenile divisions. If two justices are disqualified, the court sits in a panel of five. If more than two justices are disqualified, judges are designated to make a panel of five using the same protocol for selection. This is a sensible way to avoid evenly divided panels that require adding a judge to break the tie.

Back to the cases and continuing with procedural decisions, the trial court in *Schoenhorn v. Moss*[44] properly dismissed a writ of mandamus that sought sealed transcripts in another case as it was an impermissible collateral attack on the sealing orders and therefore nonjusticiable. In *Dobie v. City of New Haven*,[45] the defendant's concession that the court properly denied a pretrial motion to dismiss did not apply to a post-trial motion to dismiss, as the former was based on the pleadings and the latter on the evidence at trial.

Turning to substantive law, General Statutes § 52-190a requires plaintiffs in medical malpractice actions to attach a good-faith certificate and an opinion letter from a similar health care professional to the complaint. The court previously had held in *Morgan v. Hartford Hospital*[46] that the failure to do so implicated personal jurisdiction, which has resulted in numerous potentially meritorious cases being dismissed due to defects in the opinion letter. The court put an end to this state of affairs by overruling *Morgan* in *Car-*

---

[44] 347 Conn. 501, 298 A.3d 236 (2023).
[45] 346 Conn. 487, 291 A.3d 1014 (2023).
[46] 301 Conn. 388, 21 A.3d 451 (2011).

*penter v. Daar*,[47] holding that § 52-190a does not implicate personal jurisdiction but is a unique statutory procedural device which permits correction of defects in the opinion letter under certain circumstances.

Other tort cases covered a variety of situations. *Escobar-Santana v. State*[48] held that a medical malpractice action is broad enough to encompass claims of emotional distress caused by physical injuries to the plaintiff's child during delivery. *Khan v. Yale University*,[49] on certification from the Second Circuit, held that proceedings before a campus committee on sexual misconduct were not quasi-judicial for purposes of absolute immunity in a defamation suit because of the lack of procedural safeguards.[50] Although the court held that Connecticut public policy affords qualified immunity for participants in certain sexual misconduct proceedings, the court could not determine whether that immunity applied as a matter of law in light of the plaintiff's allegations of malice.[51] *Adesokan v. Town of Bloomfield*[52] held that discretionary act immunity does not apply to the manner in which emergency vehicles are operated.

Two cases explored the preclusive effect (or lack thereof) of probate court decrees. In *Solon v. Slater*,[53] the probate court's admission of a will did not constitute collateral estoppel or res judicata for purposes of the plaintiff's claim that the defendants tortiously interfered with an amendment to a premarital agreement between the plaintiff and her late husband. There was no collateral estoppel because, in allowing the will, the probate court did not address conduct pertaining to the prenuptial agreement.[54] There was no res judicata because the probate court had no jurisdiction over

---

[47] 346 Conn. 80, 287 A.3d 1027 (2023).
[48] 347 Conn. 601, 298 A.3d 1222 (2023).
[49] 347 Conn. 1, 295 A.3d 855 (2023).
[50] *Id.* at 39.
[51] *Id.* at 48-49.
[52] 347 Conn. 416, 297 A.3d 983 (2023).
[53] 345 Conn. 794, 798-99, 287 A.3d 574 (2023).
[54] *Id.* at 814-15. The plaintiff was collaterally estopped, however, from litigating her right of inheritance claim as the Probate Court found no undue influence on the defendants' part. *Id.* at 822.

the prenuptial agreement.[55]

In *Barash v. Lembo*,[56] where the plaintiffs claimed breach of fiduciary duty by a trustee, the court held that while a probate decree usually has the preclusive effect of a final judgment pending an appeal, that rule does not apply where the appeal is a trial de novo in the Superior Court. The court further held that the trustee of a testamentary trust has a duty to compel the estate's representative to transfer property under the will to the trust and must pursue reasonable claims against the representative on behalf of the trust.[57]

Other developments in trusts and estates include *Derblom v. Archdiocese of Hartford*,[58] holding that the putative beneficiaries of a testamentary bequest did not have standing under the special-interest exception to the rule that only the attorney general has authority to enforce charitable gifts where the gift in question was unrestricted. In *Salce v. Cardello*,[59] a majority of the court held that enforcement of an *in terrorem* clause would violate public policy where a beneficiary made a good-faith challenge to the fiduciary. Justice D'Auria, dissented, drawing on the arbitration standard for overriding parties' choices to conclude that the policy the majority identified was not "strong, important, clearly articulated, and dominant."[60]

Turning to contract and property law, COVID-19 appeared in two insurance coverage cases in 2023. In *Connecticut Dermatology Group, PC v. Twin City Fire Ins. Co.*,[61] the court held that "direct physical loss of or physical damage" to covered property did not include business interruption losses due to the pandemic shut down. *Hartford Fire Ins. Co. v. Moda*[62] held that the same language did not include unsold and unsaleable inventory.

---

55 *Id*. at 828.
56 348 Conn. 264, 284, 303 A.3d 577 (2023).
57 *Id*. at 287.
58 346 Conn. 333, 289 A.3d 1187 (2023).
59 348 Conn. 90, 301 A.3d 1031 (2023).
60 *Id*. at 115-16 (D'Auria, J., dissenting).
61 346 Conn. 33, 288 A.3d 187 (2023).
62 346 Conn. 64, 288 A.3d 206 (2023).

As for foreclosure matters, *Strazza Building & Construction*[63] held that the presumption that subcontractors are in privity with general contractors for purposes of collateral estoppel when the general contractors are parties to prior litigation does not apply in the converse. *Key Bank, N.A. v. Yazar*[64] held that the notice requirements for the Emergency Mortgage Assistance Program (EMAP) are mandatory. Further, because the notice must be given prior to commencing the action, a failure to comply cannot be cured and the lender must start over with a new action.[65] The requirement, however, is not jurisdictional, as a foreclosure action is a common-law cause of action and the legislature has not made clear that the statutory notice requirements are jurisdictional.[66] *JPMorgan Chase Bank, National Association. v. Malick*[67] held that an objection to an affidavit of debt must set forth specific reasons but does not need to be supported by legal argument and admissible evidence as the burden shifts to the plaintiff to prove the amount of debt.

An interesting statutory construction question arose in *Clark v. Town of Waterford, Cohanzie Fire Dept.*,[68] concerning heart and hypertension benefits for a part-time firefighter. When a statute is ambiguous for purposes of General Statutes § 1-2z, that is, capable of two plausible meanings, but the legislative history is unilluminating, the construction "must yield to the implications of the statutory language."[69] In other words, a merely plausible alternate interpretation (which is enough to make the statute ambiguous for purposes of § 1-2z) must yield to the better construction of the statutory language. In *Clark*, that meant depending on the definition of "member" as set forth in a related statute to limit application of the benefits at issue to part-time firefighters who regularly worked at least twenty hours per week.[70]

---

63 *Strazza*, 346 Conn. at 207.
64 347 Conn. 381, 386, 297 A.3d 968 (2023).
65 *Id.* at 394 n.9.
66 *Id.* at 396.
67 347 Conn. 155, 296 A.3d 157 (2023).
68 346 Conn. 711, 295 A.3d 889 (2023).
69 *Id.* at 728.
70 *Id.* at 737.

Another statutory construction case in the employment context is *Dunn v. Northeast Helicopters Flight Services, LLC*.[71] The issue was whether the public policy set forth in General Statutes § 31-73(b), which prohibits employers from demanding or requesting money from an employee to remain employed, was implicated in a wrongful discharge case where the plaintiff refused to share fees he expected to receive as a certified pilot examiner for the Federal Aviation Administration.[72] The court concluded that the statute was broad enough to include such fees.[73]

Another employment case, *Hartford Police Department v. Commission on Human Rights & Opportunities*,[74] explored the "cat's paw"[75] or transferred intent theory to conclude that the complainant had established an inference of race discrimination when he was fired.[76] The complainant was a probationary police officer of Vietnamese origin whose supervisor, who had been disciplined previously for making racial remarks, gave him bad evaluations and complained to colleagues, who in turn wrote critical memos that ultimately led the complaint's firing.[77] Because the bias of the complainant's supervisor tainted the process, he established a causal connection of the conduct to his termination.[78]

A final employment case is *Town of Middlebury v. Frater-*

---

[71] 346 Conn. 360, 290 A.3d 780 (2023).

[72] *Id*. at 364.

[73] *Id*. at 375.

[74] 347 Conn. 241, 297 A.3d 167 (2023).

[75] As the United States Supreme Court has explained:

> The term "cat's paw" derives from a fable conceived by Aesop, put into verse by La Fontaine in 1679, and injected into United States employment discrimination law by Judge Posner in 1990. In the fable, a monkey induces a cat by flattery to extract roasting chestnuts from the fire. After the cat has done so, burning its paws in the process, the monkey makes off with the chestnuts and leaves the cat with nothing.

*Staub v. Proctor Hosp.*, 562 U.S. 411, 416 n.1 (2011) (citation and internal quotation marks omitted). In the employment context, the decision maker who fires the complainant is the cat's paw doing the biased non-decision maker's dirty work. (Both of us have had cats, and we question the ability of a monkey to persuade a cat to do anything it doesn't want to do. But we digress.)

[76] *Hartford Police Dep't*, 347 Conn. at 262.

[77] *Id*. at 248-54.

[78] *Id*. at 274.

*nal Order of Police, Middlebury Lodge No. 34*.[79] The town unilaterally changed its formula for calculating pensions in violation of the Municipal Employee Relations Act as the union had not waived its right to bargain with respect to that issue.[80] The state labor board properly continued to apply the clear and unmistakable waiver standard under Connecticut law even though the National Labor Relations Board had abandoned that standard in favor of the contract coverage standard.[81] Although Connecticut courts frequently rely on federal precedent in this context, it is not binding and the labor board did not act unreasonably in declining to adopt the new federal standard.[82]

The court issued two family law decisions in 2023. In *Tilsen v. Benson*,[83] the court held that the trial court properly declined to enforce a ketubah (a contract that governs marriage according to Jewish law) because doing so would entangle the court in religious matters in violation of the First Amendment.[84]

*Gershon v. Back*[85] required a trek into the Serbonian bog of conflicts of law concerning a challenge to a New York separation agreement that had been incorporated but not merged into the divorce decree. Under New York law, modification of such agreements requires a plenary action on the contract rather than a motion to open the divorce decree as the agreement survives the latter.[86] The plaintiff, who had domesticated the judgment in Connecticut, moved to open the judgment claiming fraud but the court held that because the New York plenary action rule affected the parties' contractual rights, it was a rule of substance and New York law, i.e., the plenary action rule, rather than Connecticut procedural rules, applied.[87]

---

[79] 348 Conn. 251, 303 A.3d 1 (2023).
[80] *Id*. at 255-56.
[81] *Id*. at 258.
[82] *Id*.
[83] 347 Conn. 758, 299 A.3d 1096 (2023).
[84] *Id*. at 786.
[85] 346 Conn. 181, 288 A.3d 602 (2023). The authors represented the defendants, who were the co-executors of the late defendant-husband.
[86] *Id*. at 183.
[87] *Id*. at 186, 188, 193.

In a child protection matter, *In re Gabriel S.*,[88] the trial court did not violate the respondent's right to due process concerning notice for the basis for the court's adjudication of the petitioner's termination of parental rights. The petitioner had filed a motion to amend the petition after the close of evidence and included a summary of the facts.[89] The trial court granted the motion and ordered a continuance to allow the respondent to evaluate his position, but the petitioner never filed the amended petition.[90] Since the respondent had actual notice of the basis for the petition and the decision, his due process rights were not violated.[91]

In criminal cases that did not raise constitutional issues, *State v. James K.*[92] clarified that to establish reversible error based on voir dire, the defendant must show an abuse of discretion and harmful error. In *State v. King*,[93] the court concluded that the term "actual physical control" in a Florida DUI statute was sufficiently similar to the term "operating" in the Connecticut DUI statute for purposes of sentence enhancement after a third conviction. Overruling *State v. Wilson*,[94] the court held in *State v. Butler*[95] that the four-month rule for opening judgments set out in General Statutes § 52-212a and Practice Book § 17-4 does not apply to criminal convictions.

As for habeas matters, in *Banks v. Commissioner of Correction*[96] and a companion case, *Bosque v. Commissioner of Correction*,[97] the majority held that the requirement for certification to appeal habeas decisions does not preclude plain error review of claims arising in the habeas court but not included in the petition. The Chief Justice, joined by Justice Mullins, dissented, contending that the legislative history of

---

88 347 Conn. 223, 228, 296 A.3d 829 (2023).
89 *Id.* at 229-30.
90 *Id.*
91 *Id.* at 236.
92 347 Conn. 648, 660, 299 A.3d 243 (2023).
93 346 Conn. 238, 288 A.3d 995 (2023).
94 199 Conn. 417, 513 A.2d 620 (1986).
95 348 Conn. 51, 70, 300 A.3d 1145 (2023).
96 347 Conn. 335, 297 A.3d 541 (2023).
97 347 Conn. 377, 297 A.3d 981 (2023).

General Statutes § 52-470(g) indicates that the certification requirement precludes review of unpreserved claims in uncertified appeals.[98] In *Maia v. Commissioner of Correction*,[99] habeas counsel was not deficient in not advising the petitioner to accept a plea deal where counsel advised the client of the strength of the state's case and the weakness of the defense. In *Rose v. Commissioner of Correction*,[100] ineffective assistance is an external factor that may overcome the presumption in General Statutes § 52-470(c) that a petition filed more than five years after the conviction is deemed final lacks good cause.

Finally, in *Cohen v. Rossi*,[101] the court affirmed, albeit by different routes as to one issue, the trial court's judgment that purported flaws in an election process did not seriously undermine the result, which would have required a new election. The disagreement concerned the collection of absentee ballots. General Statutes § 9-140b(c)(2) provides that "the municipal clerk shall retrieve [the ballots] from the secure drop box"[102] and the question became whether that meant the clerk herself or a designee. Justice McDonald, writing for himself and Justices Alexander and Keller, first noted that the requirements of § 9-140b are mandatory.[103] He then concluded that while the plain language of § 9-140b in isolation would seem to require the clerk personally to retrieve the absentee ballots, when read in conjunction with related statutes, it becomes clear that a designee may perform the task.[104] Justice D'Auria, joined by the Chief Justice, concurred, but disagreed that designee of the clerk could retrieve the ballots under the plain language of the statute unless that person was an appointed and sworn assistant clerk.[105] Justice Ecker, also concurred, finding both Justice McDonald's and Jus-

---

98 *Banks*, 347 Conn. at 377 (Robinson, C.J., dissenting).
99 347 Conn 449, 298 A.3d 588 (2023).
100 348 Conn. 333, 304 A.3d 431 (2023).
101 346 Conn. 642, 295 A.3d 75 (2023).
102 *Id*. at 658.
103 *Id*. at 661.
104 *Id*. at 663.
105 *Id*. at 690 (D'Auria, concurring). He was not convinced, however, that this error affected the outcome of the election. *Id*. at 695-96.

tice D'Auria's constructions reasonable, which rendered the statute ambiguous for purposes of General Statutes § 1-2z.[106] He ultimately agreed with Justice McDonald's construction after analyzing the legislative history, which included testimony by the secretary of the state.[107] We find Justice Ecker's analysis to be the most persuasive in light of the competing "plain language" constructions proffered by Justices McDonald and D'Auria.

A few statistics: the overall reversal rate in the Supreme Court for 2023 was about 31% (20 out of 64).[108] For certified appeals from the Appellate Court the rate was slightly higher at 34% (12 out of 35). For direct appeals to the Supreme Court,[109] the reversal rate was somewhat lower 28% (8 out of 29). The reversal rates were not significantly different for civil and family matters (33% or 14 out of 42) and criminal and habeas matters (30% or 6 out of 20).[110]

The overall grant rate for petitions for certification was 14% (29 out of 208). However, the grant rate for petitions from civil and family matters where the parties were represented by counsel was 23% (18 out of 80, and the rate for criminal appeals (excluding habeas matters) was 36% (9 out of 25). The court granted two civil petitions for certification filed by self-represented parties out of the 48 such petitions filed.

## II. Appellate Court

The Appellate Court issued 230 published decisions in 2023, counting two decisions released on January 2, 2024, but included in the Judicial Branch's 2023 Archive. This number is down again from last year and down from the usual 400-500 decisions that the Appellate Court published

---

[106] *Id*. at 696 (Ecker, J., concurring).

[107] *Id*. at 697, 707.

[108] For purposes of determining the reversal rate, the authors do not count certified appeals from other courts such as the Connecticut District Court or the Second Circuit, or decisions on motions. There were six such opinions in 2023.

[109] Direct appeals in this context means appeals statutorily entitled to go directly to the Supreme Court and appeals transferred from the Appellate Court to the Supreme Court docket pursuant to Practice Book §§ 65-1 or 65-2.

[110] The court affirmed the lower courts in both child protection cases it decided in 2023.

prior to the COVID-19 pandemic. As matters were not being tried during the pandemic, except for very specific matters that seldom generate appeals, and the lead time from appeal to decision can be a couple of years, this is not unexpected. So far in 2024, the Appellate Court is assigning up to 50 cases per term, so the number of published cases will be returning to normal soon.

The reversal rate in 2023 was over 22%. The fifty-two reversed cases run the gamut from family to habeas corpus to an always-exciting easement case, and beyond.

The dismissal rate was 9%. A review of the dismissals leads to a discussion of appellate procedure, a most tantalizing subject for some (well, at least us). Roughly a quarter of those cases were dismissed because they were moot as the appeal only attacked one of two independent bases for the underlying judgment.[111] There is nothing more annoying than having a terrific basis for appeal on one basis for a judgment but having no basis to appeal the other. In these cases, there was no attempt to appeal both aspects of the judgment, and so dismissal was obvious.

Another quarter of the cases were dismissed as they were traditionally moot: there was no longer any available remedy.[112] Of interest, in *Fitzgerald v. City of Bridgeport*,[113] the appeal was mooted through no fault of the appellants/defendants, but the court dismissed the appeal and vacated the underlying judgment. Where the appeal of pendente lite orders addressed access to the marital home, the trial court's final judgment in the dissolution case mooted the appeal in

---

[111] *See* In re A'Vion A., 217 Conn. App. 330, 288 A.3d 231 (2023); Doe v. Quinnipiac Univ., 218 Conn. App. 170, 291 A.3d 153 (2023); In re Autumn O., 218 Conn. App. 424, 292 A.3d 66, *cert. denied*, 346 Conn. 1025, 294 A.3d 1026 (2023) (dismissed in part); Worth v. Picard, 218 Conn. App. 549, 292 A.3d 754 (2023) (also noting that raising an issue for the first time in a reply brief is inadequate); and In re Kharm A., 218 Conn. App. 750, 292 A.3d 1286 (2023).

[112] *See* State v. Santiago, 219 Conn. App. 44, 293 Conn. 977, *cert. denied*, 346 Conn. 1028, 295 A.3d 944 (2023) (sentence modification rendered appeal moot); and State v. Decosta, 219 Conn. App. 137, 293 A.3d 991 (2023) (voluntary payment of fine mooted appeal).

[113] 218 Conn. App. 771, 292 A.3d 1256 (2023).

*Netter v. Netter*.[114] Also in *Rek v. Petit*,[115] the appeal of an order granting visitation to grandparents was rendered moot when the trial court granted a motion to terminate that visitation. This is an important reminder that parallel trial proceedings should be utilized where appropriate as they may provide an alternate path to the remedy sought on appeal.

One case was dismissed for inadequate briefing of the issues.[116] Generally, however, inadequate briefing will be the basis to refuse to review individual issues within the appeal.[117] In habeas cases, the petitioner must raise the substantive issues in the petition for certification in order for those issues to be reviewable on appeal.[118]

There were also dismissals for a lack of a final judgment.[119]

Three dismissals are worthy of a quick mention. In *C.M. v. R.M.*,[120] the appellant was not aggrieved by a decision which allowed him to move to New York with the children where the trial court ordered it as a relocation pursuant to General Statutes § 46b-56d. The appellant wanted the order on a different basis, but it is hard to get the court to consider your appeal when you won the case below.

In *J.G. v. Curtis-Shanley*,[121] the appellant asked to argue

---

[114] 220 Conn. App. 491, 298 A.3d 653 (2023).

[115] 222 Conn. App. 132, 303 A.3d 926 (2023), *cert. denied*, 348 Conn. 948, 308 A.3d 36 (2024).

[116] Stanley v. Comm'r of Corr., 217 Conn. App. 805, 290 A.3d 437, *cert. denied*, 346 Conn. 919, 291 A.3d 607 (2023).

[117] *See e.g.*, Booth v. Park Terrace II Mut. Hous. L.P., 217 Conn. App. 398, 289 A.3d 252 (2023); Long Manor Owners' Ass'n v. Alungbe, 218 Conn. App. 415, 292 A.3d 85, *cert. denied*, 348 Conn. 909, 303 A.3d 10 (2023); Stanley v. Scott, 222 Conn. App. 301, 304 A.3d 892 (2023), *cert. denied*, 348 Conn. 945, 308 A.3d 34 (2024) (self-represented appellant); and Stanley v. Quiros, 222 Conn. App. 390, 305 A.3d 335 (2023), *cert. denied*, 348 Conn. 945, 308 A.3d 33 (2024).

[118] *See* Reese v. Comm'r of Corr., 219 Conn. App. 545, 295 A.3d 513, *cert. denied*, 348 Conn. 906, 301 A.3d 1056 (2023); *but see Banks*, 347 Conn. at 335 (plain error review not precluded where issue not raised in petition for certification to appeal).

[119] Ahern v. Bd. of Educ,, 219 Conn. App. 404, 295 A.3d 496 (2023) (appeal dismissed in part); Speer v. Danjon Capital, Inc., 222 Conn. App. 624, 306 A.3d 1162 (2023) (appeal dismissed in part); Connecticut Light & Power Co. v. Pub. Utils. Regul. Auth., 223 Conn. App. 136, 307 A.3d 967 (2023).

[120] 219 Conn. App. 57, 293 A.3d 968 (2023).

[121] 223 Conn. App. 149, 307 A.3d 960 (2023), *cert. denied*, 348 Conn. 954, 309 A.3d 1222 (2024).

remotely and then appeared only by audio despite an explicit order to be on video. When told to correct the lack of video, the appellant hung up and did not call back or respond to attempts to contact him. The Appellate Court concluded that dismissal of the appeal was a proper sanction for the disrespect to the court.

In *United States Bank, National Association v. Rose*,[122] the beneficiary of an estate took an appeal on behalf of the estate as a self-represented person. The appeal was dismissed as beneficiaries cannot represent estates.

Turning to other appellate practice issues, the court published two rare decisions on motions to dismiss an appeal. First, in *Centrix Management Co. v. Fosberg*,[123] the court held that the twenty-day appeal period applied to an appeal from a post-judgment award of attorney's fees in a summary process action, not the five-day period set forth in General Statutes § 47a-35. In *Lafferty v. Jones*,[124] the court dismissed in part a writ of error from the trial court's six-month suspension of the defendant's attorney for violating the Rules of Professional Conduct. The Appellate Court granted the motion to dismiss filed by Superior Court Judge Barbara Bellis, who had issued the suspension order, because the writ was not timely served on her, but allowed the writ of error to continue against Disciplinary Counsel as they were a properly joined party. The authors appreciate when the court publishes substantive decisions on motions to dismiss.

Failure to raise a claim in the trial court will likely preclude appellate review. The court declined to review a claim involving leases as it was not raised in the trial court in *Cody Real Estate, LLC v. G&H Catering, Inc*.[125] The court noted it was "particularly unwilling" to address the issue since it required resolution of a significant factual question.[126] In

---

[122] 222 Conn. App. 464, 305 A.3d 337 (2023).
[123] 218 Conn. App. 206, 291 A.3d 185 (2023).
[124] 220 Conn. App. 724, 299 A.3d 1161 (2023).
[125] 219 Conn. App. 773, 296 A.3d 214, *cert. denied*, 348 Conn. 910, 303 A.3d 11 (2023).
[126] *Id*. at 791.

*Lowthert v. Freedom of Information Commission*,[127] the court declined to review an issue that was not raised to the trial court.[128] In *Bradley v. Yovino*,[129] the court declined to review a discovery dispute because the plaintiff failed to include the disputed discovery requests in the record.

The Court also held that the plaintiff in *Bradley* had failed to prove harm.[130] *Bradley* illustrates two key appellate practice points: 1) make sure you have preserved the issue on the record,[131] and 2) prove that the claimed error caused harm. This must be done at trial: it is generally too late if you try to fix it on appeal. If you have to demonstrate harm on your appeal, do not wait until your reply brief to do so.[132]

However, in a decision that clouds the rules on appellate preservation, the court reviewed issues raised by the plaintiff in *Curley v. Phoenix Ins. Co.*[133] for the first time in a motion to reargue. The Court first noted the difference between a claim and an argument, then noted that generally claims raised for the first time in a motion to reargue are not reviewed.[134] The court then ignored that rule and simply held that "the circumstances of the case" warranted deviation from the general rule, citing to *Blumberg Associates Worldwide v. Brown & Brown of Connecticut, Inc.*[135] The court not-

---

[127] 220 Conn. App. 48, 297 A.3d 218 (2023).

[128] Self-represented parties are not excused from the requirement of presenting their claims to the trial court in order to preserve issues on appeal. In Anderson-Harris v. Harris, 221 Conn. App. 222, 301 A.3d 1090 (2023), the Court held it would be manifestly unjust to allow the self-represented plaintiff to raise a due process claim for the first time on appeal.

[129] 218 Conn. App. 1, 291 A.3d 133 (2023).

[130] *Id.* at 21.

[131] *See also* Fraser Lane Assocs., LLC v. Chip Fund 7, LLC, 221 Conn. App. 451, 301 A.3d 1075 (2023) (failure to present claim to trial court precluded review of claims regarding arbitration award); Graham v. Graham, 222 Conn. App. 560, 306 A.3d 499 (2023) (failure to raise res judicata or collateral estoppel at trial precluded claim on appeal); Gainty v. Infantino, 222 Conn. App. 785, 306 A.3d 1171 (2023), *cert. denied*, 348 Conn. 948, 308 A.3d 36 (2024) (failure to raise res judicata, collateral estoppel, or question of trial court's authority at trial precluded claim on appeal).

[132] State v. Torell, 223 Conn. App. 21, 307 A.3d 280, *cert. denied*, 348 Conn. 960, 312 A.3d 36 (2023).

[133] 220 Conn. App. 732, 299 A.3d 1133, *cert. denied*, 348 Conn. 914, 303 A.3d 260 (2023).

[134] *Id.* at 744-45.

[135] 311 Conn. 123, 156, 84 A.3d 840 (2014).

ed that the general issue (regarding insurance coverage) was before the trial court, even if the specific statutory provision raised in the motion to reargue was not, and the defendant had responded to the motion to reargue on the merits. The court also noted that the issue on appeal, the plaintiff's entitlement to underinsured benefits, was subject to de novo review, and the defendant made no claim that the failure to raise the claim before the motion to reargue was a strategic decision by the plaintiff.

Despite *Curley*, counsel should raise all claims in the trial court before decision. Appellate review based on issues raised for the first time in a motion to reargue is usually not granted and should not be assumed. It is worth noting that the court reversed the grant of summary judgment as a matter of law once the preservation issue was decided.

Anyone handling foreclosure matters with appeals, and commensurate appellate stays, should read *Finance of America Reverse, LLC v. Henry*,[136] regarding the application of Practice Book § 61-11 (h).

Finally, this is a reminder that if you appeal from the denial of a motion to open, and not the underlying judgment, the only issue on appeal is whether the denial of the motion to open was proper.[137] Similarly, if you wish to appeal a Probate Court order, an application for reconsideration does not toll the time to appeal.[138]

Turning to substantive law and beginning with torts, in *Murphy v. Town of Clinton*,[139] the court held that photographs of the claimed defective area were adequate to put the town on notice in a slip and fall case.

The court rejected adoption of § 379A of the Restate-

---

[136] 222 Conn. App. 810, 307 A.3d 300 (2023).

[137] *See* Francis v. CIT Bank, N.A., 219 Conn. App. 139, 293 A.3d 984 (2023).

[138] *See* Haydusky's Appeal from Probate, 220 Conn. App. 267, 297 A.3d 1072 (2023). There, the self-represented plaintiff waited to file her appeal in Superior Court until after a ruling on the denial of the application of reconsideration. The trial court properly dismissed the appeal from the original order as untimely, and then dismissed the appeal of the application for reconsideration as her appeal did not contain a basis to attack that decision.

[139] 217 Conn. App. 182, 287 A.3d 1150 (2022).

ment Second of Torts in holding that a landlord was not liable for a dog bite which occurred off-premises in *Aviles v. Barnhill*.[140] In *Houghtaling v. Benevides*,[141] the plaintiff was injured while watching the defendant's dog, which wrapped the leash around her legs causing her to fall. The court affirmed the trial court's grant of summary judgment as the plaintiff was in possession of the dog and was precluded from recovery under General Statutes § 22-357.

In *Lastrina v. Bettauer*,[142] the plaintiff lied to obtain a medical marijuana certificate and then enjoyed his access to the marijuana so much he stopped taking his bipolar medications, had a manic episode requiring hospitalization, and then had to go to rehab for marijuana dependence. The court affirmed the trial court's grant of summary judgment in a medical malpractice case against the marijuana-prescribing doctor as the plaintiff's injuries were the direct result of his admitted illegal conduct in obtaining the medical marijuana certificate, applying *Greenwald v. Van Handel*.[143] In a decision you should not read while eating lunch, the court reversed a medical malpractice case stemming from nose surgery. In *Perdikis v. Klarsfeld*,[144] the trial court improperly charged on sole proximate cause where the defendant had no medical expert to link plaintiff's post-surgery conduct to the claimed injuries.

In *King v. Hubbard*,[145] the court held that the plaintiffs had an absolute right to withdraw their lawsuit pursuant to General Statutes § 52-80 after the filing of a special motion to dismiss pursuant to the anti-SLAPP statute[146] but before a hearing had commenced. Merely filing the special motion to dismiss did not vest the defendant with any right to attorney's fees.

---

[140] 217 Conn. App. 435, 289 A.3d 224 (2023).

[141] 217 Conn. App. 754, 290 A.3d 429, *cert. denied*, 346 Conn. 924, 295 A.3d 418 (2023).

[142] 217 Conn. App. 592, 289 A.3d 1222 (2023).

[143] 311 Conn. 370, 88 A.3d 467 (2014).

[144] 219 Conn. App. 343, 295 A.3d 1017, *cert. denied*, 348 Conn. 903, 301 A.3d 528 (2023).

[145] 217 Conn. App. 191, 288 A.3d 218 (2023).

[146] Conn. Gen. Stat. § 52-196a.

In a vexatious litigation case, the trial court applied the wrong standard in assessing the defendant's defense of good faith reliance on advice of counsel because it failed to determine whether there was full and fair disclosure to counsel.[147]

The court held that, pursuant to the litigation privilege, the trial court should have dismissed a parent's claim of religious discrimination against DCF based upon a court order placing the children in temporary custody, the filing of neglect petitions, the placement of the children, and the termination of the parent's termination of parental rights in *Ammar I. v. Department of Children & Families*.[148]

In *Cornelius v. Markle Investigations, Inc.*,[149] the plaintiff stole defendant school's letterhead, intending to use it to send a publication from a recognized hate group to the school's alumni. Shortly thereafter his home, located across from the school's campus was raided by the FBI who seized weapons, bomb-making materials, and anti-Semitic and racist materials. The plaintiff filed suit against the school and a private investigation firm following his release from prison, claiming invasion of privacy. The court upheld the trial court's grant of summary judgment to the defendants finding that the claimed conduct did not intrude upon the plaintiff's solitude or seclusion or private affairs, nor would it be considered highly offensive to a reasonable person. Judge Cradle concurred in the decision, agreeing with the majority that that plaintiff had not met the second or third element of the invasion of privacy claim.[150] Judge Cradle disagreed with the majority's consideration of the plaintiff's prior conduct as a basis for determining if the surveillance was highly offensive to him.[151]

And now a reminder that the law regarding General Statutes §§ 52-184c and 52-190a changed fairly dramatically

---

[147] Christian v. Iyer, 221 Conn. App. 869, 303 A.3d 604 (2023).

[148] 220 Conn. App. 77, 297 A.3d 269 (2023), *cert. granted*, 348 Conn. 906, 301 A.3d 1057 (2023) (parent's petition), and *cert. denied*, 348 Conn. 907, 302 A.3d 295 (2023) (intervenor's petition).

[149] 220 Conn. App. 135, 297 A.3d 248 (2023).

[150] *Id.* at 170 (Cradle, J., concurring).

[151] *Id.* at 170-71.

since *Carpenter v. Daar*.[152] In *Gervais v. JACC Healthcare Center of Danielson, LLC*,[153] the Court reversed the trial court's dismissal of the medical malpractice action where a motion to amend the opinion letter was filed beyond the statute of limitations, which is now permitted.

In family law, the court held that the offer of compromise statute[154] does not apply to a dissolution of marriage action.[155] The court explained that a dissolution proceeding is not a contract action or an action for money damages.[156]

The court held in *Renstrup v. Renstrup*[157] that the trial court erred in increasing the father's child support obligations based on the mother's earning capacity as the presumptive amount of child support must be based on the parties' respective incomes. The court also held that the trial court erred in deviating from the child support guidelines without a finding that it was justified by one of the regulatory criteria. Finally, the court held that additional child support of a set percentage of the father's undetermined future bonuses was in error as there were no explicit findings that the additional child support was based upon the needs of the children. Because of an error in determining the defendant's income, the court reversed all of the financial orders including the property distribution as the financial orders were intertwined.

In *Marcus v. Cassara*,[158] the trial court found the plaintiff had no obligation to pay for the children's extracurricular activities because the original trial court did not explain why its order to pay such was a proper deviation from the child support guidelines. The court reversed, holding that the trial court exceeded its authority in modifying on the basis of grounds not in the motion for modification. The court also held that the order to pay for the children's extracurricular

---

[152] 346 Conn. 80, 287 A.3d 1027 (2023).
[153] 221 Conn. App. 148, 150, 300 A.3d 1244 (2023).
[154] Conn. Gen. Stat. § 52-192.
[155] Graham v. Graham, 222 Conn. App. 560, 306 A.3d 499 (2023).
[156] *Id*. at 583-84.
[157] 217 Conn. App. 252, 287 A.3d 1095, *cert. denied*, 346 Conn. 915, 290 A.3d 374 (2023). Attorney Bartschi represented the plaintiff wife.
[158] 223 Conn. App. 69, 308 A.3d 39 (2023).

activities was a separate order from child support, and so the order was not an improper deviation from the guidelines. Judge Robert Clark concurred in part because, in his view, the order to pay for extracurricular expenses was an order for child support, and the guidelines applied, requiring a specific finding for the order.[159]

The trial court improperly considered temporary COVID-19 benefits in crafting alimony orders in *Onyilogwu v. Onyilogwu*.[160] In *D.S. v. D.S.*,[161] the court affirmed the trial court's finding that the defendant's interest in retirement benefits was too speculative to be considered for property distribution and held that an alimony order that permitted her to determine when to retire was not an improper delegation of the court's authority.

The court held that the respondent had affirmatively waived her due process claim because her counsel did not object, and went along with, the trial court's request to call a certain witness in *In re Kylie P.*[162]

The court covered a lot of ground in *R.H. v. M.H.*[163] First, the court upheld an ex parte order of custody based on a violation of a custody order regarding the parties' blood alcohol level. The court held that the trial court reasonably could infer that the defendant had been over the prescribed BAC level the night before, when she had custody of the children, based upon the BAC level shortly before 7 a.m. The court refused to interpret General Statutes § 46b-56f to require the filing of the emergency ex parte application on the same day as the conduct at issue. The court also held that it was not improper to render the order even though the children would not be in the defendant's custody for the next few days, though it did so without much explanation. The court, however, found that the trial court had improperly delegated its authority to

---

[159] *Id*. at 97 (Clark, J., concurring).

[160] 217 Conn. App. 647, 289 A.3d 1214 (2023).

[161] 217 Conn. App. 530, 289 A.3d 236, *cert. granted*, 346 Conn. 924, 295 A.3d 419 (2023). The authors represent the defendant.

[162] 218 Conn. App. 85, 291 A.3d 158, *cert. denied*, 346 Conn. 926, 295 A.3d 419 (2023).

[163] 219 Conn. App. 716, 296 A.3d 243 (2023).

decide visitation for one of the children with the defendant to the plaintiff and the child's therapist. This prompted a dissent from Appellate Court Chief Judge Bright, who felt the majority had read General Statutes § 46b-56 too narrowly in holding that the trial court had improperly delegated its authority to the sole legal and custodial parent to exercise discretion over the noncustodial parent's visitation.[164]

The court also held in *C.D. v. C.D.*,[165] that the trial court improperly delegated its authority to determine whether the father would have access to the children's therapeutic therapy records to the children's counselors, and also erred in failing to make the initial finding of the presumptive amount of child support. Remand was limited to the issues of child support and access to the children's therapy reports.

In *Strauss v. Strauss*,[166] the trial court properly found it did not have authority to vacate contempt orders from five years earlier, as the ability to vacate a finding of contempt after the four-month period was generally limited to situations when the contempt was purged, or to effectuate the judgment. Since the defendant sought to vacate the contempt orders because he claimed they should not have entered, the trial court properly found it had no authority to act.

The court declined to review the plaintiff father's claim that the trial court did not have authority to allow the child's grandmother, who had sole legal and physical custody, to take federal tax exemptions because he had failed to raise the claim of lack of authority to the trial court despite ample opportunities to do so.[167] In appeals by both the father and DCF, the court held that the trial court exceeded its authority when it granted an emergency motion ordering that re-

---

[164] The case detail on the Judicial Branch Website reveals that the Appellate Court granted a motion for reconsideration en banc and ordered supplemental briefs. While the motion was pending, the Supreme Court transferred the appeal to itself. Docket No. S.C. 20882. The court invited amicus briefs on the question concerning improper delegation and held argument on December 18, 2023. Stay tuned.

[165] 218 Conn. App. 818, 293 A.3d 86 (2023).

[166] 220 Conn. App. 193, 297 A.3d 581, *cert. denied*, 348 Conn. 914, 303 A.3d 602 (2023).

[167] Ochoa v. Behling, 221 Conn. App. 45, 299 A.3d 1275 (2023).

unification efforts cease.[168] That motion was filed by the attorney for the minor child.

The trial court erred as a matter of law in assuming that transferring guardianship of the minor child to its paternal grandmother, who was not the child's foster parent or custodian, was in the best interests of the child, thereby shifting the burden to DCF to prove that such guardianship was not in the best interests of the child.[169] The court also held that the trial court erred in failing to terminate the father's parental rights and then remanded the matter for a new hearing on the motion to transfer guardianship and for a new dispositional hearing.

The court held that the trial court improperly allowed the foster parent to intervene and file a motion to transfer guardianship, which improperly affected the court's decision on motions to revoke commitment, resulting in appeals by both the father and the minor child.[170] The court also addressed evidentiary issues given that they would likely arise again on remand. The court held that the trial court abused its discretion in precluding evidence of how another child was doing after she had been reunified with the father, how father handled the care of the other child, as well as evidence of the paternal grandparent's care of the other child.

In criminal law, having failed to ask for a taint hearing,[171] the defendant claimed that the trial court violated his state and federal due process rights by failing to hold such a hearing sua sponte in *State v. James S.*[172] The court did not agree, nor was it willing to exercise its supervisory authority to require pretrial taint hearings in child sexual abuse cases.

---

[168] In re Amani O., 221 Conn. App. 59, 301 A.3d 565 (2023).

[169] In re Christina C., 221 Conn. App. 185, 300 A.3d 1188, *cert. denied*, 348 Conn. 907, 301 A.3d 1056 (2023).

[170] In re Ryan C., 220 Conn. App. 507, 299 A.3d 308, *cert. denied*, 348 Conn. 901, 300 A.3d 1166 (2023).

[171] A taint hearing is a hearing to determine whether a child's testimony was reliable and not coerced.

[172] 221 Conn. App. 797, 303 A.3d 261 (2023), *cert. denied*, 348 Conn. 932, 306 A.3d 474 (2024).

The court held in *State v. Hurdle*[173] that the sentencing court lacked authority to consider presentence confinement credit when imposing sentence as assessing such credit is the sole responsibility of the Commissioner of Corrections.[174]

In *State v. Foster*, the court upheld the trial court's decision to continue commitment of a defendant who had been committed following an innocent-by-reasons-of-insanity judgment. The court determined that there was no violation of the right to equal protection as the defendant was not similarly situated to civilly committed patients, given the nexus between the mental disorder and the criminal behavior. The trial court found there was no basis for release without any supervision. Judge Hope Seeley concurred with the court's decision as she was not convinced that the petitioner was not similarly situated to civilly committed patients but found that the defendant had failed to satisfy rational basis review.

The court affirmed the denial of a habeas claim of ineffective assistance by his standby counsel as the petitioner had waived any such claim when he waived his Sixth Amendment right to counsel in *Ross v. Commissioner of Correction*.[175]

In *Williams v. Commissioner of Correction*,[176] the habeas court held, and the state did not contest, that a statement favorable to the defense was suppressed. The court found that the habeas court erred in finding that the statement was not material as the statement was relevant to the victim's credibility, which was critical in securing the petitioner's conviction.

A habeas matter was not moot because petitioner was no longer in custody because a successful petition could reduce the time he had to spend on special parole in *Leffingwell v. Commissioner of Correction*.[177]

---

[173] 217 Conn. App. 453, 288 A.3d 675, *cert. granted*, 346 Conn. 923, 295 A.3d 420 (2023).

[174] *Id.* at 464-65.

[175] 217 Conn. App. 286, 288 A.3d 1055, *cert. denied*, 346 Conn. 915, 290A.3d 374 (2023).

[176] 221 Conn. App. 294, 301 A.3d 1136 (2023).

[177] 218 Conn. App. 216, 291 A.3d 641 (2023). This case was also one of several that were reversed because the trial court did not give prior notice of its intention

The court held that the habeas court improperly denied the petition for certification to appeal but then held that, despite nine improper comments by the prosecutor, the petitioner was not deprived of a fair trial in *Valentine v. Commissioner of Correction*.[178] The court declined to find that the prosecutor's use of "nuts and sluts" in the rebuttal argument was improper, and further held that, while not condoned by the court, the language as used was not harmful in *State v. Sullivan*.[179] The Supreme Court granted certification on the question "Did the Appellate Court correctly determine that the prosecutor's rebuttal argument did not constitute prosecutorial impropriety that deprived the defendant of a fair trial?"[180] Watch for that case in next year's article.

The court affirmed the habeas court's finding that the petitioner's trial counsel did not properly apprise the petitioner that his plea would subject him to mandatory deportation.[181] Judge Elgo concurred to express concern about the standard for disclosure set forth in *Budziszewski v. Commissioner of Correction*.[182]

The trial court lacked subject matter jurisdiction over a motion to correct an illegal sentence which attacked the requirement to register as a sex offender as that requirement was not part of the sentence, but the regulatory consequence of the conviction.[183] On a motion to correct an illegal sentence, the trial court had subject matter jurisdiction to address the defendant's claim that he was denied the right to defend himself, but not claims regarding counsel's failure to turn over documents as they were not a challenge to the sentence.[184]

---

to dismiss the petition and an opportunity to be heard on the papers, following the Supreme Court's decisions in Brown v. Comm'r of Corr., 345 Conn. 1, 282 A.3d 959 (2022), and Boria v. Comm'r of Corr., 345 Conn. 39, 282 A.3d 433 (2022).

[178] 219 Conn. App. 276, 295 A.3d 973, *cert. denied*, 348 Conn. 913, 303 A.3d 602 (2023).

[179] 220 Conn. App. 403, 298 A.3d 1238, *cert. granted*, 348 Conn. 927, 305 A.3d 631 (2023).

[180] 348 Conn. at 927.

[181] Stephenson v. Comm'r of Corr., 222 Conn. App. 331, 305 A.3d 266 (2023), *cert. denied*, 348 Conn. 940, 307 A.3d 274 (2024).

[182] 322 Conn. 504, 142 A.3d 243 (2016).

[183] State v. King, 220 Conn. App. 549, 300 A.3d 626, *cert. denied*, 348 Conn. 918, 303 A.3d 1194 (2023).

[184] State v. Despres, 220 Conn. App. 612, 300 A.3d 637 (2023).

In *State v. Mieles*,[185] the trial court entered a standing criminal protective order nine years after the offense involving the protected person. The court held that the imposition of the protective order did not constitute an improper modification of the judgment, that there was no temporal limitation in General Statutes § 53a-40e, and that the defendant had not challenged the trial court's application of the statute. Judge Ingrid Moll dissented on the grounds that the trial court did not have an adequate record to impose the protective order.

We conclude with a smattering of miscellaneous cases.

The court confirmed that, in action on promissory note, the plaintiff's attorney could not sign the affidavit of debt in *Myshkina v. Gusinski*.[186]

Notice of a Planning and Zoning decision which was published in a paper to which no town resident subscribed was defective notice for purposes of starting the clock on appeal, so the motion to dismiss appeal was properly denied in *9 Pettipaug, LLC v. Planning & Zoning Commission*.[187] The plaintiff was denied his right to fundamental fairness when he was not given an opportunity to be heard on whether his application was complete at the public hearing in *Taylor v. Planning & Zoning Commission*.[188]

In *Friedheim v. McLaughlin*,[189] the court reversed the trial court's interpretation of an implied view easement which failed to consider the surrounding circumstances in determining the nature and extent of the easement. The trial court also improperly applied the statute of limitations of General Statutes § 52-575a to the action.

Where the Probate Court disallowed the administrator's

---

[185] 221 Conn. App. 164, 301 A.3d 1063, *cert. granted*, 348 Conn. 920, 303 A.3d 1195 (2023).

[186] 217 Conn. App. 376, 289 A.3d 250 (2023).

[187] 217 Conn. App. 714, 290 A.3d 853, *cert. granted*, 346 Conn. 1021, 293 A.3d 898 (2023).

[188] 218 Conn. App. 616, 293 A.3d 357, *cert. denied*, 346 Conn. 1022, 293 A.3d 897 (2023).

[189] 217 Conn. App. 767, 290 A.3d 801 (2023).

claim for attorneys' fees and no appeal was filed from that order, the trial court properly held that the Probate Court lacked subject matter jurisdiction to award those attorneys' fees on a motion for approval filed by the law firm in *Sacramone v. Harlow, Adams & Friedman, P.C.*[190] The Probate Court decree was conclusive and the attorneys' motion did not fit within the limited review permitted under General Statutes § 45a-128.

Judgment on a bill of discovery was not mooted by the subsequent filing of a civil action asserting the same claims raised in the bill of discovery in *Nowak v. Environmental Energy Services, Inc.*[191]

Res judicata and collateral estoppel popped up several times in the decisions this year. In *Pascarella v. Silver*,[192] the court held that res judicata could not be used offensively. In that case, the plaintiffs brought a declaratory judgment action based upon a prior judgment. The court then held that res judicata, when pleaded as a special defense, did not bar the defendant's counterclaim.

In two companion cases, the court affirmed summary judgment in a surety contractual indemnification action in *Barbara v. Colonial Surety Co.*,[193] but held that neither res judicata nor collateral estoppel applied to a decision on motion to enforce judgment in a New York proceeding. The court noted in a footnote, however, that its decision on the indemnification action would likely provide a basis for the application of res judicata or collateral estoppel.

Similarly, in *Colandrea v. Connecticut State Dental Commission*,[194] res judicata did not preclude an administrative disciplinary proceeding because of a prior subpoena enforcement action, as they served different purposes. Nor did that same

---

[190] 218 Conn. App. 288, 291 A.3d 1042 (2023).

[191] 218 Conn. App. 516, 292 A.3d 4 (2023).

[192] 218 Conn. App. 326, 292 A.3d 45, *cert. denied*, 347 Conn. 901, 296 A.3d 171 (2023).

[193] 221 Conn. App. 337, 301 A.3d 535, *cert. denied*, 348 Conn. 924, 304 A.3d 443 (2023). Attorney Dowd represented Colonial Surety.

[194] 221 Conn. App. 597, 302 A.3d 348 (2023), *cert. denied*, 348 Conn. 933, 306 A.3d 475 (2024).

administrative proceeding preclude the subpoena enforcement action.[195] The trial court improperly applied res judicata and collateral estoppel to dismiss plaintiff's quo warranto claim challenging the appointment of the defendant law firm as corporation counsel in *Speer v. Brown Jacobson, P.C.*[196]

A firefighter was not entitled to worker's compensation for a fall while he was leaving home carrying his gear as he did not prove he needed to bring the gear home.[197] In *Dusto v. Rogers Corp.*,[198] the court reversed the trial court's grant of summary judgment, finding there was a genuine issue of material fact as to the substantial certainty exception to worker's compensation exclusivity. Judge Prescott dissented, as he disagreed that the plaintiff had submitted evidence which created an issue of fact.

The court upheld the denial of worker's compensation benefits to the plaintiff who, while picking up garbage in the course of his employment, picked up and intentionally set light to a brown sphere in his hand which then exploded causing serious injuries.[199] The court agreed with the Commissioner that the injuries did *occur* in the course of the plaintiff's employment, but also agreed that they did not *arise* in the course of that employment.[200]

Further proof that appellate review of arbitration matters is difficult can be found in *ARVYS Protein, Inc. v. A/F Protein, Inc.*[201] In *ARVYS*, the court upheld the arbitrator's award of damages beyond the damages specified in the contract because it found the scope of the submission was unrestricted. The court also found there was no public policy precluding nonattorneys from representing corporate entities in arbitration.

In *Brownstone Exploration & Discovery Park, LLC v.*

---

[195] Comm'r of Pub. Health v. Colandrea, 221 Conn. App. 631, 302 A.3d 370 (2023), *cert. denied*, 348 Conn. 932, 306 A.3d 474 (2024).

[196] 222 Conn. App. 638, 306 A.3d 1105 (2023).

[197] White v. Waterbury Fire Dep't, 218 Conn. App. 711, 292 A.3d 1280 (2023).

[198] 222 Conn. App. 71, 304 A.3d 446 (2023), *cert. denied*, 348 Conn. 939, 307 A.3d 274 (2024).

[199] Bassett v. Town of E. Haven, 219 Conn. App. 866, 296 A.3d 331 (2023).

[200] *Id.* at 877-78.

[201] 219 Conn. App. 20, 293 A.3d 899, *cert. denied*, 347 Conn. 905, 297 A.3d 198 (2023).

*Borodkin*,[202] the court reversed the trial court's refusal to compel arbitration, holding that the trial erred in deciding the issues of arbitrability where the arbitration agreement expressly provided that the arbitrators would decide if the claim was arbitrable. The court also held that it was improper for the trial court to raise sua sponte procedural issues about the application to compel where the defendant did not raise them, and the parties were given no opportunity to brief those issues or be heard.

In *A Better Way Wholesale Autos, Inc. v. Better Business Bureau of Connecticut*,[203] the plaintiff claimed the trial court failed to consider all of the allegations of the complaint, including in counts other than the defamation count, in granting summary judgment on defamation counts. The court upheld the trial court's grant of summary judgment, holding that the BBB's letter grades were an expression of opinion, and therefore not actionable. The court further held that if the plaintiff wanted the trial court to consider statements alleged in other portions of the complaint, it should have alleged those in the defamation counts or directed the court to those statements.

The accidental-failure-of-suit statute[204] applied to an action brought improperly in plaintiff's individual capacity, instead of as a derivative suit on behalf of the corporate entity.[205]

And last, but not least, the trial court improperly admitted a settlement letter into evidence over objection in *CCI Computerworks, LLC v. Evernet Consulting, LLC*,[206] as the letter was not admissible to demonstrate a failure to mitigate damages.

Finally, regarding personnel, Judge Westbrook joined the Appellate Court in October 2023, filling the vacancy created by Judge Prescott when he took senior status.

---

[202] 220 Conn. App. 806, 299 A3d 1189 (2023). The authors represented the plaintiff.

[203] 221 Conn. App. 1, 299 A.3d 1200, *cert. denied*, 348 Conn. 919, 303 A.3d 1194 (2023).

[204] Conn. Gen. Stat. § 52-592.

[205] AAA Advantage Carting & Demo. Serv., LLC v. Capone, 221 Conn. App. 256, 301 A.3d 1111, *cert. denied*, 348 Conn. 924, 304 A.3d 442 (2023)..

[206] 221 Conn. App. 491, 302 A.3d 297 (2023).