2021 CONNECTICUT APPELLATE REVIEW

By Wesley W. Horton and Kenneth J. Bartschi*

I. Supreme Court

Justice Richard Palmer turned seventy in May 2020, but we knew better than to take the opportunity in last year's Review to appraise his service on the Supreme Court. Not only did he have one of the longest tenures in the Court's history at twenty-seven years and two months,[1] but he also had the reputation as one of the slowest authors in its history. And so it was that Justice Palmer remained a de facto justice well into 2021, authoring some of his most interesting opinions over a year after he was no longer a constitutional justice.

Justice Palmer was a direct appointment by Governor Lowell Weicker to the Supreme Court from his job at Chief State's Attorney. Previously, Justice Palmer had been Deputy United States Attorney, and then United States Attorney for Connecticut. He had no judicial experience, which made him a highly unusual choice at the time. Only Chief Justice Ellen Peters, previously a Yale Professor, also lacked prior judicial experience among all justices appointed since 1950. Even today it is relatively unusual; only two, Justice Andrew McDonald and Justice Gregory D'Auria, lack prior judicial experience. In our view, a wide variety of job backgrounds, not just judicial ones, is preferable in a state's highest court.

Justice Palmer took some time to make a judicial name for himself. In the 1990s, he often followed the lead of Justice David Borden, who had extensive judicial experience and whom Justice Palmer, with good reason, highly respected. The most noteworthy example is Palmer's joining his dissent in the 4-3 school desegregation decision, *Sheff v. O'Neill*.[2]

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* Of the Hartford Bar

[1] Barely exceeded only by Joel Hinman, at twenty-seven years and nine months (1842–1870), and Elisha Carpenter, at twenty-seven years and eleven months (1866–1894).

[2] 238 Conn. 1, 678 A.2d 1267 (1996) (Borden, J., dissenting).

Justice Palmer came out from Justice Borden's shadow in this century. Ironically, Justice Palmer's most important decision, both jurisprudentially and socially, *Kerrigan v. Commissioner of Public Health*,[3] holding same sex couples had a right to marry under the Connecticut Constitution, was also a 4-3 decision in which Justice Borden wrote the dissent. *Kerrigan*'s importance socially is obvious. Its importance jurisprudentially is that it made Connecticut the second state, after Massachusetts, to recognize marriage between same sex couples as a constitutional right,[4] and it presaged the later adoption of marriage for same sex couples as a federal constitutional right.

Kerrigan is also important jurisprudentially because it emphasized the importance to the people of Connecticut of their separate constitutional rights. This would continue to be Justice Palmer's theme throughout the rest of his career. In *State v. Santiago*,[5] also a 4-3 decision, he held that the legislature's prospective abolition of the death penalty, made all capital punishment cruel and unusual under the state constitution.

We can talk about other decisions of his that in our opinion generated more heat than light,[6] but we have done so in previous Reviews and would rather focus on the two state constitutional decisions he wrote in 2021 that are a worthy cap to what we think is his principal judicial legacy: strengthening rights under the Connecticut Constitution.

The first is *State v. Bemer*.[7] After disposing of a difficult statutory construction issue adversely to the defendant by a vote of 5-2, Justice Palmer for the majority held that Article

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[3] 289 Conn. 135, 957 A.2d 407 (2008).

[4] Although the California Supreme Court ruled in favor of marriage equality prior to *Kerrigan*, Proposition 8 reversed the decision a few months later. In Connecticut, by contrast, the legislature codified the decision in *Kerrigan* in the next legislative session. P.A. 09-13 (Reg. Sess.).

[5] 318 Conn. 1, 122 A.3d 1 (2015).

[6] LaPointe v. Commissioner of Correction, 316 Conn. 225, 112 A.3d 1 (2015); Skakel v. Commissioner of Correction, 329 Conn. 1, 188 A.3d 1 (2018), *cert. denied*, 139 S. Ct. 788 (2019).

[7] 339 Conn. 528, 262 A.3d 1 (2021). Mr. Horton and his firm represent the defendant.

First, § 7, of the state constitution requires an interpretive gloss on the statute that authorizes a court to order an examination of someone charged with certain sexual offenses for a sexually transmitted disease. The court ruled that § 7 limited the power to order such an examination to those situations where it would provide useful information to a victim who could not reasonably find that information in another manner.

The extensive constitutional analysis in *Bemer* is fascinating because, unlike other state constitutional decisions, there was no tally of the cases on point on each side from other states. There simply was no case directly on point, but there were many cases to be distinguished. Justice Palmer also gives a lengthy policy analysis. All in all, it shows him being a leader, not a follower, of other decisions in state constitutional adjudication.

The most exciting thing about the *Bemer* decision is that the constitutional discussion—finally—starts with a statement that we have been advocating for years. We could hardly believe our eyes when we first read it:

> We first address the defendant's claim under the state constitution because there is no clear and binding precedent on the issue of whether a statute authorizing mandatory examinations for sexually transmitted diseases and mandatory testing for HIV of individuals charged with certain sexual offenses is reasonable under the fourth amendment in the absence of a showing of probable cause to believe that testing is necessary to advance the health interests of the victim or the public.[8]

The final decision he authored as a justice is *State v. Correa*,[9] issued in September, a novel state constitutional decision under § 7 holding that the privacy interests implicated by a canine sniff of the exterior door of a motel room raises similar § 7 issues to those of a canine sniff of the outside of an apartment or condominium, even though a motel room

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[8] *Id*. at 552 n.21.

[9] 340 Conn. 619, 264 A.3d 894 (2021). Day v. Seblatnigg, 341 Conn. 815, 268 A.3d 595 (2022), decided on January 21, 2022, is the last decision in which he participated.

usually is not considered a home, and was not in fact in this case.

Unlike in *Bemer*, Justice Palmer's constitutional analysis in *Correa* is not extensive but it is still fitting that he chose to end his Supreme Court career with a unanimous decision expanding rights under the state constitution. His leadership on the Supreme Court will be missed.

Since we are on the subject of the state constitution, we may as well turn to other decisions on the subject in 2021, the most important being the two COVID-19 cases. The first is *Fay v. Merrill*,[10] holding that absentee voting for everyone in a pandemic was permissible under Article Sixth, § 7, which permits an absentee ballot for anyone who "because of sickness" is unable to appear at a polling place on election day. Chief Justice Richard Robinson, writing for a unanimous court, gives an extensive historical analysis of absentee voting in Connecticut, including his explanation that the absence of such a provision during the Civil War prevented soldiers at war from voting.

The other COVID-19 case is *Casey v. Lamont*,[11] challenging the extensive executive orders issued by Governor Ned Lamont. After concluding that the pandemic constitutes a "serious disaster" for the purpose of a statute delegating emergency powers to the governor, Justice Andrew McDonald turned to whether the governor's sweeping powers violated Article Second (addressing the separation of powers) by giving too much legislative power to the executive. Justice McDonald, a former legislator, made a detailed exposition of how the statute guided how the executive's powers were to be exercised and limited them to six months unless renewed legislatively. Justice McDonald also noted the existence of legislative oversight. One comes away reading *Casey* with the confidence that the separation of powers doctrine is alive and well in Connecticut.

In *Anthony A. v. Commissioner of Correction*,[12] the peti-

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[10] 338 Conn. 1, 256 A.3d 622 (2021).
[11] 338 Conn. 479, 258 A.3d 647 (2021) (unanimous).
[12] 339 Conn. 290, 260 A.3d 1199 (2021).

tioner challenged his prison status as a sex offender based on non-conviction information. Justice Christine Keller, speaking for the whole court, held that the petitioner was deprived of procedural rights at the prison hearing to which he was by law entitled, and this violated Article First, § 9. Unfortunately, *Anthony A.* relies on prior precedent holding that § 9 provides nothing more than federal constitutional law provides. It is one thing for the court to say that it agrees with a decision of the U.S. Supreme Court; it is quite another, and it seems to us an abdication of power, in effect to delegate to the U.S. Supreme Court the final interpretation of the Connecticut Constitution.

In fact, *Anthony A.*'s statement about federal authority is directly contrary to what the court said about Article First, § 8, a few weeks later in *State v. Culbreath*.[13] *Culbreath* followed up on a recent decision, *State v. Purcell*,[14] holding that an ambiguous request for a lawyer after a *Miranda* warning required police questioning to cease. However, under federal constitutional law, only a clear request for a lawyer required questioning to cease.

We hope that in due course the Supreme Court will give a decent interment to the statements in various cases, including those interpreting § 9, suggesting that its hands are tied by another court in deciding the meaning of any provision of the Connecticut Constitution.

We turn now to procedural cases, one of which highlights the significance of one's reputation as preserved by Article First, § 10. In part because of that provision, the Supreme Court, in *State v. Gomes*,[15] ruled that a criminal appeal is not moot because the defendant has been deported. Unlike federal law, Connecticut law considers reputational damage from a conviction to be a judicially-recognized collateral consequence of a conviction.

In *State v. Armadore*,[16] the Supreme Court closed the gap

[13] 340 Conn. 167, 263 A.3d 350 (2021).
[14] 331 Conn. 318, 203 A.3d 542 (2019).
[15] 337 Conn. 826, 256 A.3d 131 (2021).
[16] 338 Conn. 407, 258 A.3d 601 (2021).

in its *Golding* jurisprudence by holding that it applies to *all* constitutional claims that were not timely or properly raised. The specific issue in *Armadore* concerned a new decision announced while the appeal was underway. The case has a useful discussion of supplemental briefs and the fact that they should almost always be allowed.

It was a big year in criminal law as we have already seen. Some of the other interesting criminal cases are *State v. Komisarjevsky*,[17] with a lengthy discussion of pretrial publicity in the case of the notorious 2007 Cheshire home invasion and multiple murders; *State v. Gonzalez*,[18] a thorough discussion by Justice Maria Kahn for the court of the possible abuse by prosecutors (but not in that case) of final argument by saving too much content for rebuttal; *State v. Jodi D.*,[19] a 3-2 decision with the justices debating the significance of an over-inclusive statute where the conduct in question is within the statute's core; Justice McDonald's opinion for the court in *State v. Bradley*,[20] holding over Justice Steven Ecker's dissent that a white man cannot pursue a claim that the statute discriminates against non-whites; and Justice Raheem Mullins's opinion for the court in *State v. Griffin*,[21] holding, also over Justice Ecker's dissent, that police lying in interrogation did not make the defendant's confession involuntary.

A leading tort case, *Raspberry Junction Holding, LLC v. Southeastern Connecticut Water Authority*,[22] is not leading because of its specific holding—namely, that a water company is not liable for economic losses to its customers for a loss of water due to an explosion at the water company allegedly caused by its negligence—but because of its thorough discussion of the policies used to determine whether the judiciary will create or extend a common law cause of action.

Two cases concern the rights and duties of lawyers. *Scholz*

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[17] 338 Conn. 526, 258 A.3d 1166, *cert. denied*, ___ U.S. ___, 142 S. Ct. 617 (2021).
[18] 338 Conn. 108, 257 A.3d 283 (2021).
[19] 340 Conn. 463, 264 A.3d 509 (2021).
[20] 341 Conn. 72, 266 A.3d 823 (2021).
[21] 339 Conn. 631, 262 A.3d 44 (2021).
[22] 340 Conn. 200, 263 A.3d 796 (2021).

v. Epstein[23] is a scholarly discussion by Justice Gregory D'Auria of the ins and outs of the litigation privilege. *Cohen v. Statewide Grievance Committee*[24] concerns the relationship between the Rules of Professional Conduct and the Official Commentary, both of which are adopted by the judges. The good news is that *Cohen* leaves open the opportunity for the court not to be bound by General Statutes § 1-2z in interpreting the Rules.[25] That statute circumscribes the court's core duty to state what the law is, so the court should take every opportunity to circumscribe the statute.

A leading case in the area of workers' compensation law, and one of Justice Palmer's last decisions, is *Clements v. Aramark Corp.*,[26] an encyclopedic discussion of compensation decisions dating back to 1920. The precise holding—that an idiopathic fall on a level surface at a workplace resulting in a head injury is not compensable unless workplace conditions increase the risk of the fall—is narrow, but the general discussion is a primer on workers' compensation.

An exhaustive treatise on minimum contacts law is found in *North Sales Group, LLC v. Boards & More GmbH*,[27] authored by Justice D'Auria and holding that there were not minimum contacts. An even more exhaustive treatise reaching the opposite conclusion can be found in Justice Ecker's eighty-five-page dissent.[28]

The leading family case of 2021 is *Oudheusden v. Oudheusden*.[29] The court discusses its concerns with orders for permanent non-modifiable alimony and has a useful discussion of what does and does not constitute double counting when valuing and distributing marital property.

A major discussion of Indian tribes is *Great Plains Lending, LLC v. Dept. of Banking*.[30] The court held that the plain-

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[23] 341 Conn. 1, 266 A.3d 127 (2021).
[24] 339 Conn. 503, 261 A.3d 722 (2021).
[25] *Id.* at 515 n12.
[26] 339 Conn. 402, 261 A.3d 665 (2021). Mr. Horton represented the defendant.
[27] 340 Conn. 266, 264 A.3d 1 (2021).
[28] *Id.* at 322–407 (Ecker, J., dissenting).
[29] 338 Conn. 761, 259 A.3d 598 (2021). Mr. Bartschi and his firm represented the plaintiff.
[30] 339 Conn. 112, 259 A.3d 1128 (2021).

tiffs had the burden of proving that they were entitled to tribal sovereign immunity. The court then went into great detail in explaining what had to be proven and concluded that two of the three companies indeed were entitled to immunity.

Finally, we take a fancy to a discussion by Justice D'Auria of a municipal tax statute, General Statutes § 12-65(b), and specifically the phrase "required by law." We are not so interested in the result. What interests us is that the earliest version of the statute was adopted in 1849. So, voila! Noah Webster happens to have published An American Dictionary of the English Language in 1848, and Justice D'Auria dutifully quotes what Webster wrote about "required" and "law." We are not sure that these words have changed meaning in the last 173 years, but we completely agree with the court's search. Lots of Connecticut statutes date back to 1848 or earlier. It makes eminent sense for lawyers and judges to see what the leading American lexicographer, and a Connecticut citizen at that, personally thought on the subject. We will make a point of adding the 1848 Webster's to our bookshelf along with Swift's Digest.

II. Appellate Court

The Appellate Court published approximately 440 decisions in 2021, including two decisions on motions. The overall reversal rate was on the low side at 16%. Of the twenty-nine appeals submitted only on briefs, four resulted in reversals for a reversal rate of 14%, which is on the high side. Usually, the reversal rate for appeals submitted on briefs is considerably lower. Nevertheless, you are better off not to waive argument as a general rule.

Turning to the decisions and starting with appellate procedure, two cases concerning finality deserve mention. With apologies to Captain Obvious, whether an order is final in child protection cases is not always clear. The latest example is *In re Marcquan C.*[31] in which the court held that an order

[31] 202 Conn. App. 520, 246 A.3d 41, *cert. denied*, 336 Conn. 924, 246 A.3d 492 (2021).

for the respondent parent to undergo a psychiatric evaluation was not final where the child had been found to be neglected and further proceedings would decide the permanency plan.[32] In *Mase v. Riverview Realty Associates, LLC*,[33] the trial court orally entered a judgment of strict foreclosure but failed to find the debt, rendering the judgment nonfinal. The trial court subsequently issued a backdated order finding the debt, but the defendants failed to amend their appeal, which was dismissed for lack of a final judgment. The Appellate Court noted that the dismissal did not prevent the defendants from filing a motion for permission to file a late appeal for cause if they believed they were misled by the trial court's actions.

Statutory appeals have their own rules and can be tricky for those not paying close attention. In ruling on a motion for review, the court in *Atlantic St. Heritage Associates v. Bologna*[34] concluded that the ruling on a motion to open a summary process judgment created a new five-day statutory appeal period. The matter was before the court on a motion for review because the plaintiff had filed a motion to terminate the stay and the trial court had concluded erroneously that no stay existed because the appeal was late.

The appellants did not fare so well in *Brookstone Homes, LLC v. Merco Holdings, LLC*,[35] which involved an appeal from the discharge of a lis pendens. Practice Book § 61-11 does not apply to appeals from the discharge of a lis pendens. Instead, the statutory scheme provides for an automatic stay during the seven-day appeal period, which will be extended automatically if the appellant moves for a stay during the appeal period. If the stay is denied, there is no further stay,

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[32] Note that an adjudication of neglect is a final judgment when it results in temporary custody orders. In re Stephen M., 109 Conn. App. 644, 662–63, 953 A.2d 668, 680–81 (2008). In *Marcquan C.*, the child had already been the subject of temporary custody orders when the order for a psychiatric evaluation had been made. Nevertheless, it is better to appeal an arguably final order and have it be dismissed as premature than to file a late appeal and risk res judicata. *See* In re Shamika F., 256 Conn. 383, 773 A.2d 347 (2001).

[33] 208 Conn. App. 719, 265 A.3d 944 (2021).

[34] 204 Conn. App. 163, 252 A.3d 881 (2021).

[35] 208 Conn. App. 789, 266 A.3d 921 (2021).

even while a motion for review is pending, unless the appellant seeks a temporary stay from the Appellate Court. The appellants in *Brookstone Homes* failed to seek such a stay, and the court dismissed their appeal on mootness grounds as the appellee had recorded the discharge of the lien.

Articulations are the bane of the appellate lawyer's existence. Failing to seek an articulation can result in the court reading the record to support the judgment. But filing a motion for articulation gives the trial judge the opportunity to buttress the decision on appeal. Sometimes, though, judges use an articulation to add to or modify their reasoning, which is not the purpose of an articulation. The latest example is *Kemon v. Boudreau*,[36] which concerned a probate appeal and civil action in a dispute over a trust. The trial court found for the defendant on the complaint, concluding (erroneously it turns out) that the plaintiff had abandoned several counts. In an articulation, the court reiterated that the plaintiff abandoned the counts and added that there was no evidence to support them in any event. Because the original decision made clear that the only basis for the ruling was the purported abandonment of counts, the Appellate Court disregarded the articulation, which might have otherwise rescued the decision from reversal.

Two appeals dismissed on mootness grounds warrant discussion. *In re Naomi W.*[37] held that an appeal from an order allowing a minor to have back surgery against her mother's wishes was moot because the surgery took place and nonemergency medical disputes are likely to be reviewed. The court dismissed an appeal from a finding of neglect in *In re Yassell B.*[38] that the respondent was not the child's father because the resolution of the underlying proceeding rendered the appeal moot. The court nevertheless vacated the judgment because the respondent was not responsible for moot-

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[36] 205 Conn. App. 448, 258 A.3d 755 (2021).

[37] 206 Conn. App. 138, 259 A.3d 1263, *cert. denied*, 338 Conn. 906, 258 A.3d 676 (2021).

[38] 208 Conn. App. 816, 267 A.3d 316 (2021), *cert. denied*, 340 Conn. 922, 268 A.3d 77 (2021).

ing the appeal and could suffer collateral consequences due to the finding he had challenged.

Next, we turn to cases concerning civil procedure. The first two involve state constitutional challenges to procedures and rule suspensions in light of the COVID-19 pandemic. *In re Annessa J.*[39] held that holding hearings via Microsoft Teams did not violate Article First, § 1, or Article Fifth, § 1, rejecting a claim that the respondent would not be able to assess demeanor.[40] In *In re Jacob M.*,[41] the court held that the governor's executive order suspending the 120-day rule did not violate the separation of powers.

The trial court abused its discretion in denying the defendants' motion to amend their special defenses in *Ocwen Loan Servicing, LLC v. Mordecai*[42] where it was reasonable to do so after the plaintiff complied with discovery, the length of time on the docket was not the defendants' fault, and the plaintiff had not replied to the defendants' original special defenses. The trial court in *Gutierrez v. Mosor*[43] abused its discretion in granting a motion for default where a self-represented party failed to appear at a deposition when the court did not find bad faith or contumacious behavior, a pattern of misconduct, or prejudice to the plaintiff, and other sanctions were available. However, in *Disturco v. Gates in New Canaan, LLC*,[44] the court did not abuse its discretion in refusing to open a default judgment based on a failure to appear, where the defendant claimed he sent the complaint to his insurance broker and assumed the insurance company knew about the suit.

Two administrative appeals round out the discussion of procedural cases. In *Meyers v. Middlefield*,[45] the court held

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[39] 206 Conn. App. 572, 260 A.3d 1253, *cert. granted*, 338 Conn. 904-06, 258 A.3d 674 , and *cert. granted*, 338 Conn. 905, 258 A.3d 675, and *cert. granted*, 338 Conn. 906, 258 A.3d 90 (2021) (multiple petitions filed).

[40] The court noted that such a rule would preclude visually impaired judges or jurors.

[41] 204 Conn. App. 763, 255 A.3d 918, *cert. denied*, 337 Conn. 909, 253 A.3d 43, and *cert. denied* 337 Conn. 909, 253 A.3d 44 (2021) (multiple petitions filed).

[42] 209 Conn. App. 483, 268 A.3d 704 (2021).

[43] 206 Conn. App. 818, 261 A.3d 850, *cert. denied*, 340 Conn. 913, 265 A.3d 926 (2021).

[44] 204 Conn. App. 526, 253 A.3d 1033 (2021).

[45] 202 Conn. App. 264, 245 A.3d 851 (2021).

that the standard of appellate review of decisions by the town select board pursuant to General Statutes § 29-260 (authorizing the appointment of building officials) was the substantial evidence standard that applies to municipal boards outside the zoning context. In *Meyers*, there was substantial evidence to support the dismissal of the building official who refused to issue a certificate of occupancy for the Powder Ridge Resort. In *Danner v. Commission on Human Rights & Opportunities*,[46] the trial court properly sustained an appeal of a decision by a hearing officer who erroneously granted summary judgment without considering an affidavit of discrimination, which raised genuine issues of material fact. The court did not determine in the first instance whether summary judgment was procedurally proper in an administrative appeal.

Turning to substantive law, more specifically torts, the court held in *Elder v. 21st Century Media Newspaper, LLC*[47] that the fair report privilege, which protects journalists from defamation claims if they report accurately on official actions, did not deprive the plaintiff of his rights under Article First, § 10, of the Connecticut Constitution to access open courts. The trial court held that the plaintiff failed to brief the claim adequately because, inter alia, he failed to discuss the *Geisler* factors.[48] The Appellate Court held that the *Geisler* factors are relevant when the claim is that the state constitution affords greater rights than the federal constitution, but where the right claimed has no federal analog, a *Geisler* analysis is not required, although it may be useful. Notwithstanding the plaintiff's inadequate constitutional analysis, the court decided the issue on the merits, holding that the privilege did not conflict with the constitution.

Next, we discuss a trio of premises liability cases. In *Garcia v. Cohen*,[49] the plaintiff was entitled to a charge on the

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[46] 208 Conn. App. 234, 264 A.3d 586 (2021).

[47] 204 Conn. App. 414, 254 A.3d 344 (2021).

[48] State v. Geisler, 222 Conn. 672, 610 A.2d 1225 (1992), *abrogated on other grounds by* State v. Brocuglio, 264 Conn. 778, 826 A.2d 145 (2003).

[49] 204 Conn. App. 25, 253 A.3d 46, *cert. granted*, 336 Conn. 944, 249 A.3d 737 (2021).

nondelegable duty of landowners to maintain their property where the landlord testified that he had workers help him with the snow. The jury inquired what they should do if no one was negligent, suggesting they were thinking only of the landlord and not the workers. Judge Douglas Lavine dissented because he saw no evidence that the landlord had contracted out his snow removal and further saw no harm in the purported error.

In *Pollard v. Bridgeport*,[50] the abutting property owner was not responsible for a city sidewalk made uneven by the growth of a root from a tree on the owner's property. The growth of the root was not an affirmative act subjecting the owner to liability. And in *Belevich v. Renaissance I, LLC*,[51] the court explained the burden shifting for the ongoing-storm doctrine. If the defendant provides evidence of an ongoing storm at the time of the fall, the burden shifts to the plaintiff to raise an issue of fact as to whether the slippery condition preceded the storm.

The defective highway statute[52] is a legislative waiver of sovereign immunity, which requires compliance with notice requirements for the court to have subject matter jurisdiction. In *Dobie v. New Haven*,[53] the plaintiff was injured when a snowplow displaced an access cover pushing it onto the road. His failure to comply with the notice requirement was fatal to his claim, even though the snowplow driver knew that he had created the defect.

The statutory requirement that medical malpractice complaints include an opinion letter from a similar health care worker is frequently litigated. Two cases on this topic merit discussion. The first, *Kissel v. Center for Women's Health*,[54] held that the failure to attach an opinion letter to a complaint

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[50] 204 Conn. App. 187, 252 A.3d 869, *cert. denied*, 336 Conn. 953, 251 A.3d 992 (2021).

[51] 207 Conn. App. 119, 261 A.3d 1 (2021).

[52] Conn. Gen. Stat. § 13a-149 (2021).

[53] 204 Conn. App. 583, 254 A.3d 321, *cert. granted*, 338 Conn. 901, 258 A.3d 90 (2021).

[54] 205 Conn. App. 394, 258 A.3d 677, *cert. denied*, 339 Conn. 917, 262 A.3d 137, *cert. granted*, 339 Conn. 916, 262 A.3d 139, and *cert. granted*, 339 Conn. 917,

could not be cured by amending the complaint after the statute of limitations had run, even though the plaintiff claimed the letter existed prior to filing the original complaint and was inadvertently omitted. *Barnes v. Greenwich Hospital*[55] reached the same conclusion but there, the opinion letter did not exist prior to filing the complaint.

The court held in *Cooke v. Williams*[56] that although a legal malpractice action in a criminal matter is not usually ripe until the conviction is overturned, allegations of fraud pertaining to a fee dispute were ripe to the extent that they did not relate to the quality of the representation.

Two cases implicating the misuse of the legal system drew our attention. *Rousseau v. Weinstein*[57] concluded that the fact that an action might be subject to dismissal under the prior pending action doctrine does not mean that the action is prima facie vexatious. On the other hand, the court held in *Idlibi v. Ollennu*[58] that the litigation privilege does not preclude an abuse of process claim where the plaintiff alleged that the defendant improperly used interrogatories to mislead the court.

Finally, as to the tort-adjacent Connecticut Unfair Trade Practices Act (CUTPA),[59] the trial court in *Dressler v. Riccio*[60] properly struck a CUTPA count where the plaintiff claimed he hired the defendant based on the defendant's misrepre-

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262 A.3d 138 (2021) (multiple petitions filed). Although certification was granted, those appeals were later withdrawn. SC 20644, SC 20645. The authors represented defendant Reed Wang.

[55] 207 Conn. App. 512, 262 A.3d 1008, *cert. denied*, 340 Conn. 904, 263 A.3d 100 (2021). The Supreme Court does not give reasons for its decisions on petitions for certification. As to why to the court granted certification in *Kissel* but not in *Barnes*, two distinguishing facts may offer an explanation. In *Kissel*, the plaintiff claimed the letter existed prior to filing the complaint, while in *Barnes* it appears that the letter was created after the statute of limitations ran. Further, in *Kissel*, the trial court denied the defendants' motions to dismiss, and the jury found for the plaintiff, while in *Barnes*, the trial court granted the motion to dismiss, so there was no trial or verdict.

[56] 206 Conn. App. 151, 259 A.3d 1211, *cert. denied*, 339 Conn. 919, 262 A.3d 136 (2021).

[57] 204 Conn. App. 833, 254 A.3d 984 (2021).

[58] 205 Conn. App. 660, 258 A.3d 121 (2021).

[59] Conn. Gen. Stat. § 42-110a *et seq.* (2021).

[60] 205 Conn. App. 533, 259 A.3d 14 (2021).

sentations of his skill. Representations of competence or expertise are not entrepreneurial for purposes of CUTPA.

On to two workers' compensation cases. In *DeJesus v. R.P.M. Enterprises, Inc.*,[61] the court held that the workers' compensation commissioner does not have the authority to pierce the corporate veil. Instead, the second-injury fund can bring a civil suit once the workers' compensation case is over. In a case with a sad set of facts, the court in *Orzech v. Giacco Oil Co*.[62] affirmed a finding that the suicide of the plaintiff's decedent had a causal link to a workplace injury. The decedent injured his leg while delivering oil and needed surgery that he could not afford as he lost his health insurance, leading to depression and eventually suicide.

An insurance case that touched on workers' compensation is *Menard v. State*.[63] There, the court held that bodily injury for purposes of uninsured/underinsured motorist coverage does not include post-traumatic stress disorder. The court also concluded that the state, as a self-insured, was not required to provide notice that it would reduce coverage for workers' compensation benefits that the plaintiffs had received.

From workers' compensation, we go to employment law. The plaintiff in *Sieranski v. TJC Esq, A Professional Services Corp*.[64] stated a cause of action for wrongful discharge where she was fired for failing to draft or notarize a false affidavit. In *Commission on Human Rights & Opportunities v. Cantillon*,[65] the court held that the fact that emotional distress damages tend to fall within a range does mean that range is binding, nor is there an obligation to consider awards from other jurisdictions.

Now for a potpourri of property decisions. The court held

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[61] 204 Conn. App. 665, 255 A.3d 885 (2021).

[62] 208 Conn. App. 275, 264 A.3d 608 (2021).

[63] 208 Conn. App. 303, 264 A.3d 1034, *cert. granted*, 340 Conn. 916, 266 A.3d 886 (2021).

[64] 203 Conn. App. 75, 247 A.3d 201 (2021).

[65] 207 Conn. App. 668, 263 A.3d 887, *cert. granted*, 340 Conn. 909, 264 A.3d 94 (2021).

in *KeyBank, N.A. v. Yazar*[66] that the failure to comply with the Emergency Mortgage Assistance Program notice requirements deprives the court of subject matter jurisdiction in a foreclosure action. In *Bank of New York Mellon v. Tope*,[67] the court held, over Judge Robert Devlin's dissent, that opening a foreclosure judgment to modify the sale date does not restart the clock for purposes of the four-month rule to file a motion to open the judgment.

In *Your Mansion Real Estate, LLC v. RCN Capital Funding, LLC*,[68] the court concluded that General Statutes § 49-8(c), which provides for statutory damages in the amount of $200 per week up to a cap of $5,000 for failing to provide the release of a mortgage, was not unduly oppressive (and therefore did not violate due process) because the defendant could limit the damages by providing the release.

Reserve Realty, LLC v. Windemere Reserve, LLC[69] concerned a dispute regarding real estate listings and had returned to the Appellate Court on remand. The issue was whether the listing agreement complied with the duration requirements set forth in General Statutes § 20-325a. In this case, the brokerage contract provided that the duration would begin from the first sale, whenever that occurred. As that rendered the term indefinite, it did not comply with § 20-325a.

In a zoning case, the court held in *International Investors v. Town Plan & Zoning Commission*[70] that General Statutes § 8-2 authorizes a planning and zoning commission to limit the time to complete a project for which a special permit has

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[66] 206 Conn. App. 625, 261 A.3d 9, *cert. granted*, 340 Conn. 901, 263 A.3d 100 (2021).

[67] 202 Conn. App. 540, 246 A.3d 4, *cert. granted*, 336 Conn. 950, 251 A.3d 618, and *cert. granted*, 339 Conn. 901, 260 A.3d 483 (2021) (multiple petitions filed).

[68] 206 Conn. App. 316, 261 A.3d 110, *cert. denied*, 339 Conn. 908, 260 A.3d 1227 (2021).

[69] 205 Conn. App. 299, 258 A.3d 711, *cert. granted*, 339 Conn. 901, 260 A.3d 1224, and *cert. granted*, 339 Conn. 902, 260 A.3d 1226, and *cert. granted*, 339 Conn. 903, 260 A.3d 1223 (2021) (multiple petitions filed).

[70] 202 Conn. App. 582, 246 A.3d 493, *cert. granted*, 336 Conn. 928, 247 A.3d 577 (2021).

been issued. The court also held that the special permit runs with the land, so that a successor can use the permit but does not have an indefinite right to do so.

Finally, while the plaintiff in *Lebanon Historical Society, Inc. v. Attorney General*[71] managed to obtain restrictions on 95% of the parcels on the town green, it was thwarted in its attempt to impose its desired restrictions on the parcel containing the First Congregational Church. Specifically, because the society lacked an interest in the parcel, it lacked standing to quiet title. That it had obtained restrictions on 95% of the green was immaterial.

A tax case warranting discussion is *Seramonte Associates, LLC v. Hamden*.[72] The plaintiff mailed certain tax forms to the town assessor a day before they were due and, of course, they arrived a day after they were due. The court held that General Statutes § 12-63c required the paperwork to be received by June 1, not just postmarked by then. The court further rejected the plaintiff's claim that the ten percent increase in the assessment for the one-day late filing was an excessive fine under the state and federal constitutions.

Four family cases are noteworthy. In *Coleman v. Bembridge*,[73] the court held that a joint custody order that provided for shifting physical custody arrangements was not an improper prospective modification. In *McCormick v. Terrell*,[74] the court concluded that the trial court's failure to find that the plaintiff lacked liquid assets was not error in awarding counsel fees where the court found that not awarding fees would undermine other orders. Judge Bethany Alvord dissented because, in her view, a finding that the plaintiff had only $1,000 in the bank was clearly erroneous and infected the decision.

The automatic stay rules can be tricky in family cases as periodic alimony and support orders are not automatically

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[71] 209 Conn. App. 337, 268 A.3d 734 (2021).

[72] 202 Conn. App. 467, 246 A.3d 513, *cert. granted*, 336 Conn. 923, 246 A.3d 492 (2021).

[73] 207 Conn. App. 28, 263 A.3d 403 (2021).

[74] 208 Conn. App. 580, 266 A.3d 182 (2021).

stayed on appeal while lump-sum payments are stayed.[75] In *Bouffard v. Lewis*,[76] the trial court found the defendant in contempt for failing to pay periodic alimony and child support and ordered him to pay an arrearage. The defendant appealed and did not pay the arrearage, prompting the plaintiff to move for contempt. During the course of the hearing, the trial court held that there was no stay of the arrearage, and the defendant filed a motion for review. The Appellate Court held that because the arrearage was for periodic payments, it was not subject to the automatic stay, nor are contempt orders subject to the automatic stay.[77]

Finally, in *Conroy v. Idlibi*,[78] the trial court properly denied a motion to open based on fraud where the defendant claimed after-acquired evidence proved that the plaintiff lied about an affair, which the trial court found to be an emotional affair, concluding the evidence would not have changed the result. Judge Joseph Flynn dissented, arguing that adultery is more serious than an emotional affair and since it could have affected the result, the defendant was entitled to an *Oneglia*[79] hearing.

A child protection case worth noting is *In re Josiah D.*[80] The trial court was not required to reiterate notice that it may draw an adverse inference from the respondent's decision not to testify when he announced he would not do so. Practice Book § 35a-7A requires such notice at the beginning of the trial, which allows counsel to develop strategy and acknowledges as a practical matter that the court does not necessarily know what evidence it will rely on.

We conclude with four cases touching on criminal law. A prosecutor makes a generic tailoring argument when they

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[75] Conn. Prac. Bk. § 61-11(c) (2021).

[76] 203 Conn. App. 116, 247 A.3d 667 (2021).

[77] The decision does not mention Bryant v. Bryant, 228 Conn. 630, 636 n.5, 637 A.2d 1111 (1994), which seems to suggest, albeit in dicta, that contempt rulings are subject to the automatic stay.

[78] 204 Conn. App. 265, 254 A.3d 300, *cert. granted*, 337 Conn. 905, 252 A.3d 366 (2021).

[79] Oneglia v. Oneglia, 14 Conn. App. 267, 540 A.2d 713 (1988).

[80] 202 Conn. App. 234, 245 A.3d 898, *cert. denied*, 336 Conn. 915, 245 A.3d 424 (2021).

ask questions of the defendant or argue that the defendant had the opportunity to fabricate or tailor their testimony based on their presence at trial. In *State v. Stephanie U.*,[81] the court held that generic tailoring did not violate Article First, § 8, of the state constitution but nonetheless exercised its supervisory powers to prohibit generic tailoring arguments prospectively.

In *State v. Butler*,[82] the court held that the trial court lacks jurisdiction to open a judgment of dismissal. Judge Thomas Bishop dissented, arguing that the Superior Court is a court of general jurisdiction and has the inherent authority to open judgments.

In *Godfrey v. Commissioner of Correction*,[83] the court assumed but did not decide that the frustration of purpose doctrine applied to plea deals but concluded that the petitioner failed to show that his guilty plea to murder made to avoid the death penalty should be vacated because the subsequent abolition of the death penalty frustrated the purposes of the plea deal. Finally, a federal habeas petition is not a prior petition within the meaning of General Statutes § 52-470(d), which creates a rebuttable presumption that a successive petition challenging the same conviction is untimely if it is more than two years after the disposition of the first petition.

The only personnel change to report for 2021 is the appointment of Judge Robert Clark to the Appellate Court. He takes the place of Judge Douglas Lavine, who reached the mandatory retirement age. Due to COVID-19, there was a period when the judge trial referees did not sit on appellate panels. They resumed sitting in the spring and continued during the rest of 2021. Of the more than a dozen referees, Judges Bishop, Devlin, Jr., Flynn, Lavine, and Joseph Pellegrino, and former Justice Dennis Eveleigh, are the most active referees in terms of hearing appellate arguments.

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[81] 206 Conn. App. 754, 261 A.3d 748 (2021), *cert. pending*, SC 210198.

[82] 209 Conn. App. 63, 267 A.3d 256 (2021), *cert. pending*, SC 210273.

[83] 202 Conn. App. 684, 246 A.3d 1032, *cert. denied*, 336 Conn. 931, 248 A.3d 2 (2021).

We also note the passing of former Chief Judge Edward Y. O'Connell, who was appointed to the Appellate Court in 1987 and served as its chief judge from 1997 until early 2000, when he reached the mandatory retirement age.