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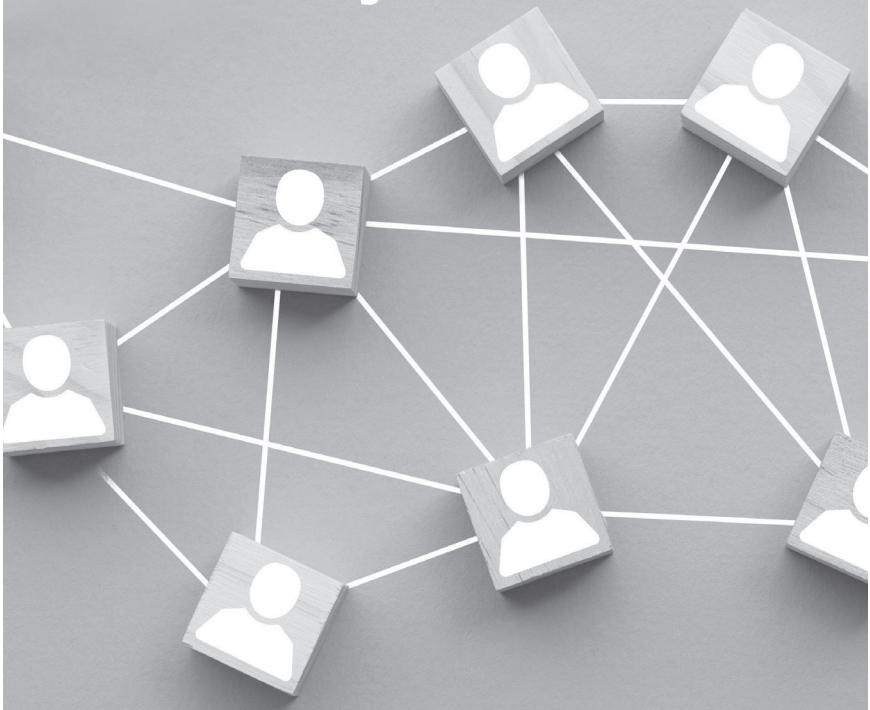

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Letters to the Editor, Inquiries about manuscripts, editorial matter, reprints, etc.: James H. Lee, Editor-in-Chief,
61 Unquowa Rd, Fairfield, CT 06824, (203)259-4665,
jlee06430@sbcglobal.net

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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.

BUSINESS LITIGATION: 2021 IN REVIEW

By William J. O'Sullivan[1]

In 2021, Connecticut's appellate courts decided numerous cases of interest to business litigators. Following is a summary of the year's most noteworthy decisions.

I. Creditors' Rights

A. *Foreclosing bank can seek damages for breach of mortgage provisions, without need for obtaining deficiency judgment*

The Appellate Court's decision in *LLP Mortgage Ltd. v. Underwood Towers Ltd. Partnership,*[2] a commercial foreclosure case involving a large apartment complex, illustrates the difference between a lender enforcing its rights under the mortgage and enforcing its rights under the note secured by the mortgage.

In *Underwood Towers*, the substitute plaintiff was the assignee of the loan obligation and mortgage, but the promissory note had been lost before the assignment.[3] Accordingly, although the substitute plaintiff retained the right to enforce the mortgage,[4] it was barred from pursuing a deficiency judgment or otherwise enforcing the note.[5]

Aside from seeking foreclosure of its mortgage, the substitute plaintiff sought, in separate counts of its complaint, money damages for the breach of certain mortgage covenants, including an assignment of rents and income. Because the substitute plaintiff lacked the power to seek a deficiency judgment, and because the underlying note had been a nonrecourse obligation,[6] the defendant argued that the substitute plaintiff lacked the right to seek this additional relief.

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[1] Of the Hartford Bar.

[2] 205 Conn. App. 763, 260 A.3d 521 (2021).

[3] *Id.* at 769.

[4] New England Savings Bank v. Bedford Realty Corp., 238 Conn. 745, 680 A.2d 301 (1996).

[5] Seven Oaks Enterprises, L.P. v. DeVito, 185 Conn. App.534, 198 A.3d 88, *cert. denied* 330 Conn. 953, 197 A.3d 803 (2018); Conn.Gen.Stat. § 42a-3-309.

[6] 205 Conn. App. at 786.

The trial court rejected this argument, and the Appellate Court agreed. Separate from its rights under the note, "a mortgagee may sue a mortgagor for damages for violation of a covenant or provision in the mortgage."[7] More particularly, "a mortgagee may proceed with an action for money damages based on a debtor's failure to pay rents, despite the existence of a nonrecourse clause in the loan documents."[8] The court rejected the proposition that the substitute plaintiff was, in effect, seeking to convert a nonrecourse loan into a recourse loan. The substitute plaintiff "is not relying on the mere fact that the defendants owe principal plus interest as provided in the note, as it would in a deficiency proceeding. Rather, the plaintiff relies on a separate provision in a separate document – the covenants in the second mortgage concerning rental income – and must assume the higher burden of proving the contract and tort causes of action it has pleaded."[9]

B. *Noteholder that did not take assignment of mortgage has standing to foreclose*

In *Goshen Mortgage, LLC v. Androulidakis*,[10] a foreclosure action, the Appellate Court reaffirmed the principle that the holder of the note has standing to foreclose, even if another party holds the mortgage. The original plaintiff, Goshen Mortgage, LLC, had assigned the mortgage to itself, as trustee for a mortgage pool, denominated Goshen Mortgage, LLC, as Separate Trustee for GDBT I Trust 2011-1 (Goshen Trustee), four days before commencing the foreclosure action. The plaintiff then moved to substitute Goshen Trustee as plaintiff. The defendant objected, claiming the original plaintiff had lacked standing to commence suit at the time the case began.

The Appellate Court noted, "whether or not the plaintiff had standing to initiate the action depends on whether it had

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7 *Id*. at 825.
8 *Id*. at 826.
9 *Id*. at 826, 827.
10 205 Conn. App. 15, 257 A.3d 360 (2021).

physical possession of the note" on the date the action was commenced. The court observed that the mortgage assignment predated the suit, but "the note itself never changed hands. Because the plaintiff transferred the note to itself as trustee, the physical possession of the note never changed."[11] Because it is "well established that the holder of a note has standing to enforce a mortgage even if the mortgage is not assigned to that party,"[12] the original plaintiff had had standing to commence suit, and the trial court had acted properly in allowing Goshen Trustee to be substituted as plaintiff and the case to proceed to a judgment of foreclosure.

C. *Trial court in foreclosure case erred in rendering judgment for defendant based on unconscionability*

In *Rockstone Capital, LLC v. Caldwell*,[13] a residential foreclosure case, the Appellate Court ruled that the trial court erred when it found that one of the defendants had proven her special defense of unconscionability.

The plaintiff sued the defendant Morgan J. Caldwell, Jr., and his business, Wesconn Automotive Center, LLC, on an unpaid line of credit. To resolve the case, the plaintiff entered into a settlement agreement with Caldwell, Wesconn, and Caldwell's life partner, Vicki A. Ditri, with whom Caldwell co-owned their residence in Norwalk (property). Ditri had no obligation under the line of credit, but mortgaged her interest in the property as part of the settlement. Following default under the settlement agreement, the plaintiff brought a second action, this time to foreclose the mortgage.

Ditri filed a special defense, claiming that, as to her, the settlement agreement was unconscionable and unenforceable. Following a bench trial, the trial court agreed, based on its findings that Ditri "lacked business acumen; the closing was rushed because the defendant was on her lunch break; the defendant was unrepresented at the closing; neither Caldwell nor Caldwell's attorneys explained the settlement

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[11] *Id*. at 26.
[12] *Id*. at 27.
[13] 206 Conn. App. 801, 261 A.3d 1171 (2021).

agreement or the mortgage to the defendant; and the documents for the defendant to sign were folded back so that only the signature page was exposed."[14]

Applying plenary review to the legal conclusion of unconscionability, the Appellate Court reversed. The court noted that, for purposes of analyzing a claim of procedural unconscionability, the relevant factors include

> the contracting party's business acumen, the party's awareness of material preconditions to the contract, whether the party was represented by counsel during the transaction period … the existence of a language barrier between the contracting parties … the contracting party's level of education, the party's ability to read and understand the agreement at issue … the reasonableness of the party's expectation to fulfill the contractual obligations … [and] the conduct of the parties during the contract's formation, focusing on the process by which the allegedly unconscionable terms found their way into the agreement.[15]

Applying these factors to the trial record, the Appellate Court found that Ditri had failed to prove her defense. The court found her level of education and business sophistication to be "largely immaterial" under the circumstances, given that "her alleged surprise regarding the contractual terms derives from her failure to read the agreement. Where a party does not attempt to understand its contractual obligations before signing, considerations such as education level, business acumen, and complexity of the contractual language becomes less relevant to our analysis."[16]

Furthermore, even if there had been some procedural impropriety, that could not be imputed to the plaintiff, which "was not even present at the time the defendant signed the settlement agreement."[17] Rather, "the alleged rushed nature of the signing, folded pages, and failure to explain the settle-

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[14] *Id*. at 811.
[15] *Id*. at 810, 811.
[16] *Id*. at 812.
[17] *Id*. at 814.

ment agreement and mortgage each stem from Caldwell, his attorneys, or the defendant's own constraints."[18] There was no showing that Caldwell had somehow acted as an agent for the plaintiff, and "[w]here the claim of unconscionability is directed at the actions and representations of third parties, rather than the plaintiff, we have required that an agency relationship exist between the plaintiff and the third party."[19]

Finally, the Appellate Court found that Ditri had failed to prove not only procedural unconscionability, but substantive unconscionability as well. She argued that she had received "no direct consideration" for mortgaging her interest in the property in connection with the loan workout – a loan for which she was not already an obligor. But under settled law, "the intangible benefit of assisting one's family is sufficient to constitute valuable consideration."[20] Furthermore, "our courts have upheld contractual agreements as enforceable where one party incurs personal liability for a third person's debts in exchange for the other party's offer to forgo pursuing legal action on those debts."[21]

D. *Foreclosure court retained equitable jurisdiction to open judgment after running of law days*

In *U.S. Bank National Association v. Rothermel*,[22] the Connecticut Supreme Court revisited the issue of when, notwithstanding the language of General Statutes Section 49-15, our courts have jurisdiction to open a judgment of strict foreclosure after the law days have passed. The statute provides, in relevant part, "no such judgment shall be opened after the title has become absolute in any encumbrancer…"

In previous caselaw, the state Supreme Court and Appellate Court, noting the equitable nature of mortgage foreclosure, have "recognized that trial courts possess inherent powers that support certain limited forms of continuing eq-

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[18] *Id*.
[19] *Id*. at 813.
[20] *Id*. at 815.
[21] *Id*. at 816.
[22] 339 Conn. 366, 260 A.3d 1187 (2021).

uitable authority [which] can be exercised in a manner consistent with § 49-15 after the passage of the law days."[23] For example, in *Wells Fargo Bank, N.A. v. Melahn*,[24] the plaintiff "had falsely certified that it had complied with the terms of a court order requiring it to provide notice to all nonappearing defendants."[25] The Appellate Court ruled that under those circumstances, "[d]espite the constraints imposed by § 49-15 … the trial court possessed an inherent, continuing, and equitable authority to enforce its previous order," including opening the judgment after title had passed to the foreclosing plaintiff. This authority may be exercised in "rare and exceptional cases."[26]

The defendant in *Rothermel* filed a motion to open a judgment of strict foreclosure one day after the law days had run. She claimed she had relied on certain "misrepresentations" by the plaintiff's loan servicer, which "caused her failure to file a motion to open before the passage of the law day."[27] The trial court denied her motion, finding that the court lacked "jurisdiction or authority" to grant her the relief she requested, but then went on to rule, on the merits, that "the equities of the case did not warrant granting relief" inconsistent with General Statutes Section 49-15.[28]

The Supreme Court disagreed with the trial court's finding that it lacked jurisdiction to open the judgment. "[T]he defendant's motion raised a colorable claim falling within a class generally recognized in equity and sought relief through the court's inherent, continuing jurisdiction as previously established in *Melahn*."[29] But the court nevertheless ruled that the trial court had properly denied the defendant's motion. Applying the "abuse of discretion" standard of review to the trial court's decision on the merits, the Supreme Court found sufficient basis for the trial court's ruling.

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[23] *Id*. at 376, 377.
[24] 148 Conn. App. 1, 85 A.3d 1 (2014).
[25] 339 Conn. at 378.
[26] *Id*. at 379.
[27] *Id*. at 371.
[28] *Id*.
[29] *Id*. at 380.

E. *Supreme Court reverses Appellate Court decision requiring defendant in pending foreclosure to pay property taxes and insurance premiums*

In *JPMorgan Chase Bank v. Essaghof*,[30] a foreclosure case, the Connecticut Supreme Court reversed a decision of the Appellate Court affirming the trial court's order that the defendant homeowners reimburse the plaintiff bank for its advances of property taxes and insurance premiums during the pendency of the appeal.

The court noted the essentially *in rem* nature of mortgage foreclosure, and characterized the interim reimbursement order as a remedy *in personam*, because it did not directly relate to title to the mortgaged premises. "To the contrary, it operated on the defendants personally with respect to *other* property owned by them, by requiring them to pay over money under threat of contempt."[31]

But it was improper for the court to order relief *in personam* in this manner. Under Connecticut foreclosure law, "a deficiency judgment is the only procedure by which a court may order a mortgagor to pay money to a mortgagee in the context of a strict foreclosure."[32] The court noted that the state's eviction statutes provide for use and occupancy payments by a defendant while an eviction case is pending or on appeal, but that no counterpart exists in the foreclosure statutes. "Where the legislature has taken action in an area, [this court] generally interpret[s] the legislature's failure to take similar action in a closely related area as indicative of a decision not to do so."[33]

F. *Municipal rent receiver has limited powers*

In *Boardwalk Realty Associates, LLC v. Gateway Associates, LLC*,[34] the Connecticut Supreme Court narrowly cir-

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[30] 336 Conn. 633, 249 A.3d 327 (2021).
[31] *Id.* at 645. (Emphasis supplied by the court.)
[32] *Id.* at 643.
[33] *Id.* at 644, quoting Bell Atlantic NYNEX Mobile, Inc. v. Commissioner of Revenue Services, 273 Conn. 240, 255, 869 A.2d 611 (2005).
[34] 340 Conn. 115, 263 A.3d 87 (2021).

cumscribed the powers of a municipal rent receiver, which had been appointed, pursuant to General Statutes Section 12-163a (receivership statute), to collect rent payments and apply them to unpaid property taxes. That statute provides, in relevant part, that a receiver appointed thereunder is empowered to "collect all rents or payments for use and occupancy forthcoming from the occupants of the building in question in place of the owner, agent, lessor or manager," and from those proceeds, pay the property taxes owing to the town. The court held that, upon the peculiar facts of this case, in which the landlord had abandoned the property and its tenant remained on the property subject to no lease, the rent receiver was effectively powerless.

The subject property was a commercial parcel in Canton leased to the defendant Gateway Associates, LLC (Gateway) and occupied by Gateway's subtenant, Mitchell Volkswagen, LLC (Mitchell), a car dealership. The owner of the property, Cadle Properties of Connecticut, Inc. (Cadle), effectively abandoned the property shortly after the Superior Court issued an order, on December 4, 2000, requiring Cadle to comply with a pollution abatement order.[35] At about that time, effective October 31, 2001, Cadle's lease of the property to Gateway expired. Since then, neither Cadle nor Gateway has rendered real property taxes to the town, and Mitchell has remained on the property.

In 2011, the town successfully petitioned to have the plaintiff appointed as rent receiver for the property. The plaintiff then served Gateway with a notice to quit, which sparked litigation that led to an Appellate Court decision holding that under the receivership statute, the receiver lacked authority to evict a tenant or lease the property to a new tenant.[36] The plaintiff then brought a new action against Gateway and Mitchell for use and occupancy payments.

The trial court granted the defendants' motion for summary judgment, noting that, in light of Cadle's abandonment

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[35] *Id*. at 119.

[36] *Id*. at 121, summarizing the holding in Canton v. Cadle Properties of Connecticut, Inc., 188 Conn. App. 36, 204 A.3d 62 (2019).

of the property and the termination of the lease, "there is no 'rent' for the receiver to collect."[37] The trial court observed that the plaintiff was bound by "the consequences of Cadle's abandonment of the property in 2001," and noted that the lease lacked "holdover provisions, which, after the lease expired, would (1) have defined the defendants' status on the property, and (2) have set forth the tenants' payment obligations while in this status."[38]

The Supreme Court affirmed. The court observed that the receivership statute "authorizes the collection of 'all' rents or use and occupancy payments 'in place of the owner, agent, lessor or manager' but is silent as to whether the receiver may establish those use and occupancy payments in the first instance, or whether such payments are limited to those that are the product of an existing landlord-tenant relationship."[39] The court then focused on the statute's reference to payments that are "forthcoming," and determined that that language "suggests an existing obligation as between the property owner and the tenants."[40] Given that interpretation, the receiver was "not statutorily authorized to impose and collect rent or use and occupancy payments under the circumstances of this case, when the property has been abandoned by the owner prior to the appointment of the receiver and there is no existing obligation for the receiver to enforce."[41]

The court noted that the town's ultimate recourse "lies with the legislature."[42]

G. *Appellate Court finds substantial compliance with note provision concerning method of transmitting default notice*

In *Onthank v. Onthank*,[43] the Appellate Court discussed the principle of "substantial compliance" with a contract requirement, as applied to the method of transmitting a de-

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[37] *Id.* at 123.
[38] *Id.*
[39] *Id.* at 127.
[40] *Id.* at 127, 128.
[41] *Id.* at 118.
[42] *Id.* at 136.
[43] 206 Conn.App. 54, 260 A.3d 575 (2021).

fault notice.

The case involved a promissory note, which required notices of default to be transmitted "by certified mail, postage prepaid or personal delivery." It was undisputed that the plaintiff, the holder of the note, sent a default notice by regular mail, not by certified mail, which was actually received by the defendants. In rendering judgment for the plaintiff, the trial court found that the plaintiff had strictly complied, or, alternatively, had substantially complied, with the notice requirement.

The Appellate Court affirmed, finding substantial compliance while declining to address the alternative conclusion of actual compliance. The court noted that "substantial compliance" is "closely intertwined with the doctrine of substantial performance," by which "a technical breach of the terms of a contract is excused, not because compliance with the terms is objectively impossible, but because actual performance is so similar to the required performance that any breach that may have been committed is immaterial."[44] The principle applies "only where performance of a *nonessential* condition is lacking, so that the benefits received by a party are far greater than the injury done to him by the breach of the other party."[45]

The Appellate Court found that the trial court had properly applied this doctrine to the situation at hand, given the circumstances that "there is no contractual requirement of proof of actual delivery, actual delivery is not contested, and any noncompliance with the requisite method of delivery did not result in any prejudice to the defendants."[46]

II. Business Torts

A. *Terminated fraternity's tort claims against Wesleyan University stymied by terminable-at-will provision in contract*

Kent Literary Club of Wesleyan University at Middletown

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[44] *Id*. at 63.
[45] *Id*.
[46] *Id*. at 65.

v. Wesleyan University[47] was a business tort case arising from Wesleyan University's decision, announced on September 22, 2014, to require all residential fraternities on campus to coeducate.

Following the announcement of that policy, the university negotiated with the all-male fraternities on campus, including Delta Kappa Epsilon (DKE), over the terms of their coeducation plans. The DKE chapter resided in a fraternity house owned by an affiliated entity, Kent Literary Club of Wesleyan University at Middletown (Kent). When negotiations with DKE broke down, on February 7, 2015, the university notified the fraternity that it was terminating their Greek Organization Standard Agreement (agreement), the contract that governed their relationship, effective at the end of that academic year. As a result, Wesleyan students would no longer be allowed to reside in or use the DKE fraternity house. DKE, Kent, and a student member of DKE responded by bringing suit.

The plaintiffs claimed that the university failed to negotiate in good faith. They alleged the university had falsely reassured them that, under the new policy, they would be deemed in compliance if they allowed female students to live in fraternity housing even without full membership in the fraternity. They framed this as a promise that "they relied [on] to their detriment, such as by taking steps necessary to prepare a residential coeducation plan."[48] They also claimed the university reneged on a promise to give them three years to coeducate, so long as they fulfilled certain criteria, and broke a promise to prospective and incoming students that the DKE house would be a housing option for them.[49]

The agreement between the university and DKE contained a provision that allowed either party to terminate the relationship, for any reason, upon thirty days' notice.[50] The plaintiffs sought to sidestep that barrier by refraining from

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47 338 Conn. 189, 257 A.3d 874 (2021).
48 *Id.* at 199.
49 *Id.*
50 *Id.* at 196.

alleging breach of contract. Instead, they claimed promissory estoppel, negligent misrepresentation, tortious interference with business expectancies, and violations of the Connecticut Unfair Trade Practices Act, General Statutes Section 42-110a set seq. (CUTPA).

Following a jury trial, the court entered judgment for the plaintiffs in the amount of $386,000, plus attorneys' fees and costs under CUTPA, and injunctive relief. But the Supreme Court reversed.

The court observed, "if the plaintiffs have any enforceable rights, those rights are grounded, first and foremost, in the parties' contracts," under which the fraternity's "ability to lease its property to Wesleyan students under the auspices of the university's official program housing system could be curtailed at Wesleyan's sole discretion."[51] Given that reality, the plaintiff assumed the burden of establishing that "Wesleyan's allegedly deceptive and misleading conduct was *independently tortious*," and "gave rise to a separate, supra-contractual, but enforceable, obligation for Wesleyan to continue to conduct business with Kent and to assign students to live in the DKE House."[52]

The court acknowledged, "it is possible, under certain limited circumstances, to commit a tort or an unfair trade practice in the context of exercising one's legitimate contractual rights."[53] For example, this may arise "if one party negotiates in bad faith so as to cause the other party reasonably to rely on a false belief that an annual contract will be renewed or extended."[54] Thus, "[t]o this limited degree, the plaintiffs' claims are cognizable."[55] But this is subject to the limiting principle that "a party generally cannot recover more in tort than it would have been entitled to recover under the contract."[56]

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[51] *Id*. at 202.
[52] *Id*. at 203 (emphasis in original).
[53] *Id*.
[54] *Id*.
[55] *Id*.
[56] *Id*.

Here, "Kent and DKE's right to house Wesleyan students was grounded entirely in, and limited by, the terms of the Greek Organization Standards Agreement, to which they repeatedly had assented."[57] As a result, any liability on the part of Wesleyan "extends only so far as they made misrepresentations regarding the renewal or extension of the contract or otherwise bargained in bad faith between September 22, 2014, and February 13, 2015 (the negotiation period)."[58] It follows that Kent's damages are "limited to any documented costs it accrued during that negotiation period in reliance on Wesleyan's alleged misrepresentations."[59]

The court turned to the plaintiffs' claim of promissory estoppel. The court agreed that the defendants had properly sought a jury instruction that "[a] party cannot prevail on a claim for promissory estoppel based on alleged promises that contradict the terms of a written contract."[60] But the defendants went too far when they sought a further instruction that "promissory estoppel applies only when there is no enforceable contract between the parties."[61] The court noted, "[t]hat is not strictly the law. The existence of a contract does not create an absolute bar to a promissory estoppel claim when that claim addresses aspects of the parties' relationship that are collateral to the subject matter, and does not directly vary or contradict the terms, of the written agreement."[62]

As applied here, the plaintiffs' claim of promissory estoppel was cognizable, but to a limited extent: "only insofar as they allege that Wesleyan made promises and commitments that did not alter or contradict the terms of the Greek Organization Standards Agreement."[63] Given Wesleyan's termination rights under the agreement, the plaintiffs had "no legal grounds for contesting Wesleyan's unilateral decision

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[57] *Id.* at 204.
[58] *Id.*
[59] *Id.*
[60] *Id.* at 210, 211.
[61] *Id.* at 211.
[62] *Id.*
[63] *Id.* at 211, 212.

not to readmit DKE into program housing for the 2015–2016 academic year."[64]

The Supreme Court found the trial court's jury instructions on these principles had been inadequate. Along similar lines, the court faulted the trial court's instructions with respect to the plaintiff's claims of unfair trade practice and tortious interference, noting "the trial court should have instructed the jury that the Greek Organization Standards Agreement limited the defendants' potential exposure to only those losses—if any—that Kent incurred prior to the expiration of that contract on June 18, 2015."[65]

The court also took issue with the jury instructions concerning the plaintiffs' claim of negligent misrepresentation. The court noted, "[a]s a general matter, the damages available to a plaintiff in connection with a claim for negligent misrepresentation are measured by the plaintiff's costs incurred in reliance on the defendant's misstatements and false promises, rather than by the profits that the plaintiffs hoped to accrue therefrom."[66]

Here, the plaintiffs had provided evidence of detrimental reliance, such as "hiring an architect and otherwise preparing for coeducation of the DKE House,"[67] but the jury's damages clearly extended beyond reliance damages into "benefit of the bargain losses."[68] The Supreme Court found the trial court's jury instructions had provided insufficient guidance as to the proper measure of damages.

In its remand instructions, the court noted that in previous decisions, the Connecticut Supreme Court has questioned the continuing vitality of the "cigarette rule" as the framework for deciding CUTPA cases. Under the cigarette rule, which arose from the U.S. Supreme Court's decision in *Federal Trade Commission v. Sperry & Hutchinson Co.*,[69]

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64 *Id*. at 214.
65 *Id*. at 220.
66 *Id*. at 223.
67 *Id*. at 224.
68 *Id*.
69 405 U.S. 233, 244-45 n. 5 (1972).

the FTC's standard for identifying an unfair trade practice is "(1) [w]hether the practice, without necessarily having been previously considered unlawful, offends public policy as it has been established by statutes, the common law, or otherwise—in other words, it is within at least the penumbra of some common law, statutory, or other established concept of unfairness; (2) whether it is immoral, unethical, oppressive, or unscrupulous; [or] (3) whether it causes substantial injury to consumers, [competitors or other businesspersons]."[70] Connecticut's courts have long applied that analysis to CUTPA cases.

The court in *Wesleyan University* noted that the FTC and federal courts no longer apply the cigarette rule in unfair trade practice cases, having abandoned it in favor of the "unjustified injury test."[71] Accordingly, in several decisions of the Connecticut Supreme Court, the court has weighed the possibility of following suit, and nudged the state legislature to consider clarifying legislation. But, in *Wesleyan University*, the court resolved the issue, finding that the legislature has clearly acquiesced in the application of the cigarette rule. Accordingly, our Supreme Court expressly confirmed that that remains the proper standard.

B. *Appellate Court unravels liability issues in defective construction case*

In *Onofrio v. Mineri*,[72] the Appellate Court addressed significant liability issues concerning the sale of a defective new house. Defendant Joseph Mineri (Mineri) was a fifty percent owner of defendant Timberwood Homes, LLC (Timberwood), a house builder, and he also owned fifty percent of G & M Properties, LLC (G & M), a buyer and seller of real property. The plaintiffs bought from G & M a new house, which had been built by Timberwood on an old foundation.

Mineri knew, but did not disclose to the plaintiffs, that the property was vulnerable to flooding. After repeated in-

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[70] 338 Conn. at 232.
[71] *Id.* at 231.
[72] 207 Conn.App. 630, ___ A.3d ___ (2021).

stances of flooding in the house's basement, the plaintiffs sued Mineri, Timberwood and G & M under a variety of theories. Following a courtside trial, the trial court determined, among other things, that all three defendants were liable to the plaintiffs under the Connecticut Unfair Trade Practices Act, General Statutes Section 42-110a et seq. (CUTPA), and that Timberwood, a non-party to the sale transaction, was also liable under the New Home Warranties Act, General Statutes Section 47-116 et seq. Mineri and Timberwood, but not G & M, appealed.

Mineri claimed the trial court erred when it extended G & M's liability under CUTPA to him personally. The Appellate Court disagreed, finding sufficient evidence in the record to support this conclusion. The court noted that under existing law, such personal liability may be imposed based on proof of "(1) the entity's violation of CUTPA; (2) the individual's participation in the acts or practices, or the authority to control them; and (3) the individual's knowledge of the wrongdoing at issue."[73]

But the Appellate Court agreed with Timberwood that the trial court erred when it also imputed G & M's liability under CUTPA to Timberwood, upon the court's finding that G & M, Mineri and Timberwood had "jointly coordinated" the activities that constituted an unfair trade practice. The Appellate Court noted that the Connecticut Supreme Court had previously imposed CUTPA liability upon "an individual who engages in unfair or unscrupulous conduct on behalf of a business entity," but has never gone so far as to extend such liability to "another entity that has a controlling shareholder or officer in common with the entity found to have engaged in unfair or unscrupulous conduct."[74] The Appellate Court was unwilling to take that further step.

The Appellate Court also considered whether Timberwood, which built the house but was not the direct seller to the plaintiffs, could be held liable under the New Home

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[73] *Id*. at 643.
[74] *Id*. at 644.

Warranties Act. The court framed the issue, one of first impression, as "whether the implied warranties created by § 47-118 '[i]n every sale of an improvement by a vendor to a purchaser'; General Statutes § 47-118 (a); are owed by the builder/vendor of such improvement to the original purchaser notwithstanding the fact that the home was sold by an intermediary vendor."[75] The court answered that question in the affirmative.

C. *Alleged fraudulent nondisclosure in public filings did not support private fraud claim*

In *Asnat Realty, LLC v. United Illuminating Company*,[76] the plaintiffs, the purchasers of environmentally contaminated property previously owned by the principal defendant, United Illuminating Company (UI), alleged that that company had fraudulently failed to disclose its knowledge, based on a confidential environmental report, about the condition of the property. The plaintiffs brought suit against UI and various affiliated entities and persons.

The plaintiffs and the defendants did not deal with each other directly; UI conveyed the parcel to a third party in 2000, which in turn conveyed the property to the plaintiffs in 2006. The defendants' alleged fraudulent nondisclosures arose in the context of testimony at a public hearing before the Connecticut Department of Public Utility Control, and Form 10-K statements that UI filed with the Securities and Exchange Commission.[77]

The defendants moved to strike the plaintiffs' claims, asserting that these alleged nondisclosures in public forums could not support a fraud claim. The trial court agreed with the defendants, granting the motion to strike and entering judgment on the stricken counts.

The Appellate Court affirmed. The court "agree[d] with the trial court that the complaint failed to allege, with the

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[75] *Id*. at 648.
[76] 204 Conn. App. 313, 253 A.3d 56 (2021).
[77] *Id*. at 316, 317.

requisite specificity, that the defendants' alleged fraud was done to induce the plaintiffs to act.... [T]he plaintiffs' broad claims alleging the existence of an indeterminate future market of potential purchasers of the property are insufficient to properly allege the intent 'to induce action' that is necessary to plead claims of fraud."[78] The plaintiffs failed to allege fraudulent misconduct on the part of the defendants that was "done with the intention or purpose to induce *these* plaintiffs to act to their detriment."[79] The court noted that the plaintiffs had been parties to neither the DPUC proceedings nor to UI's initial sale of the property.[80]

As for UI's SEC filing, the Appellate Court agreed with the trial court's conclusion that UI owed the plaintiffs no legal duty of disclosure. "[T]he class of persons intended to be protected by [the Securities Exchange Act of 1934] consists of investors in the securities market…Accordingly, the plaintiffs as purchasers of the site, do not come within the class of persons that the [act] is intended to protect. … [A]lthough the defendants' duty to disclose truthfully likely was owed to securities investors, it was not owed to the plaintiffs here."[81]

D. *Mutual withdrawal of claims did not provide predicate for later claim for vexatious litigation*

In *Carolina Casualty Insurance Company v. Connecticut Solid Surface, LLC*,[82] the Appellate Court affirmed the trial court's grant of summary judgment for the defendant in a claim for vexatious litigation. The underlying case, which included a counterclaim, had been resolved by way of cross motions to dismiss, which had been simultaneously granted by agreement of the parties. The trial court ruled, and the Appellate Court agreed, that upon that record, a party alleging vexatious litigation could not prove an essential element: that the underlying case had terminated in its favor.

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78 *Id*. at 324.
79 *Id*. at 324, 325.
80 *Id*. at 325.
81 *Id*. at 327.
82 207 Conn. App. 525, 262 A.3d 885 (2021).

For purposes of a vexatious litigation claim, it is true that "final determination on the merits is not necessary to satisfy the favorable termination requirement … [P]roof of a dismissal or abandonment of a prior action is sufficient so long as the proceeding has terminated without consideration."[83] But here, the parties' stipulation to mutual dismissals "constituted a contractual agreement supported by consideration akin to a negotiated settlement of the action."[84] This outcome "was not, as a matter of law, a termination of the action in favor of" the party claiming vexatious litigation.[85]

E. *Paralegal fired for refusing to witness false affidavit stated claim for wrongful termination*

The plaintiff in *Sieranski v. TJC Esq., A Professional Services Corporation*,[86] a paralegal at a law firm, brought suit for wrongful termination, claiming among other things that she had been terminated for refusing to notarize an affidavit that she knew to be false. As alleged in her complaint, the defendant law firm had missed a deadline to appeal from an arbitrator's decision, and the plaintiff's supervising attorney instructed her to prepare and notarize an affidavit falsely asserting that the firm had never received the arbitrator's decision. When she refused, she was fired.

In the first count of the plaintiff's complaint, she alleged common-law wrongful discharge in violation of public policy. She relied upon the public policies embodied in General Statutes Section 3-94h, which provides in relevant part "A notary public shall not (1) perform any official action with intent to deceive or defraud…," and General Statutes Section 53a-157b, the provision from the penal code that defines the crime of making a false statement.

But the trial court did not perceive a violation of public policy, taking a narrow view of the plaintiff's duties as a notary public. The court observed, "a notary has the authority

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[83] *Id.* at 531; internal punctuation and citation omitted.
[84] *Id.* at 536.
[85] *Id.*
[86] 203 Conn.App. 75, 247 A.3d 201 (2021).

to administer oaths, take an acknowledgement, and provide a jurat, but does not have the power to themselves affirm the truth of the contents of the document signed by another."[87] The court granted the defendant's motion to strike this count of the complaint.

The Appellate Court reversed. The court found that, given the plaintiff's actual knowledge of the falsity of the affidavit, by notarizing it she "would have performed her notarial duties in a manner that knowingly assisted the affiant in deceiving the court."[88] The statutes that she relied upon "outline a public policy" against this kind of conduct.[89] Accordingly, her complaint had "sufficiently pleaded facts that, if proven, would fall under the public policy exception to the at-will employment doctrine."[90]

III. Contracts

A. *Non-solicitation provision in partnership agreement held unenforceable*

In *DeLeo v. Equale & Cirone, LLP*,[91] the Appellate Court affirmed the judgment of the trial court voiding the non-solicitation provision[92] in an accounting firm's partnership agreement. That provision applied to former partners who provided auditing, tax or consulting services to clients of the firm during the five years after the partner separated from the firm. A partner who breached the provision would be required to pay to the firm 150% of the firm's average annual billings to the client during the two years before the partner's separation from the firm. The partner would also forfeit deferred compensation payments that would otherwise have

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[87] *Id*. at 78, 79.
[88] *Id*. at 88.
[89] *Id*. at 89.
[90] *Id*.
[91] 202 Conn.App. 650, 246 A.3d 988 (2021).
[92] The court consistently referred to the provision at issue as a "noncompete" provision. However, the provision applied only to the plaintiff's provision of services to former clients of the defendant firm, not to working in the accounting field in general. Client-specific provisions of this type are typically referred to as non-solicitation provisions.

been payable by the firm.

The court applied the familiar five-prong test for assessing the reasonableness of a noncompete. Those are: "(1) the length of time the restriction is to be in effect; (2) the geographic area covered by the restriction; (3) the degree of protection afforded to the party in whose favor the covenant is made; (4) the restrictions on the employee's ability to pursue his occupation; and (5) the extent of interference with the public's interests."[93]

The trial court found the five-year proscription period to be excessive. "The five year term is considerably longer than the one to two year terms usually considered reasonable if needed to protect an established business interest. ... [A]ny business for a former or present [partnership] client during the five year period would trigger the penalty even if that client had not been [a partnership] client during most of the restricted period, or had left [the partnership] for reasons unrelated to [the plaintiff], or had stayed with [the partnership] but used [the plaintiff] for only part of the work during the period or had only come to [the plaintiff] years after the client left [the partnership] for other reasons without any solicitation by [the plaintiff]."[94]

As for "reasonableness" prong number three, the court found the provision's restraints were greater than necessary to protect the firm's legitimate interests. For example, the provision "does not distinguish between clients brought into the firm by [the plaintiff] and those he serviced while at [the partnership] who were integrated firm clients or clients developed and/or referred to [the plaintiff] by others at the firm."[95]

This broad language was significant, given the trial court's finding that the plaintiff's clientele "identified with him and the client relationship was primarily with him, not [with the partnership]. When he left nearly 100 percent of his clients

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[93] *Id*. at 672.
[94] *Id*. at 662.
[95] *Id*. at 662, 663.

at [the partnership] followed him to his new firm. This is compelling evidence the clients did not consider themselves [partnership] clients."[96] Along similar lines, "There is no evidence that [the partnership] did anything special to generate goodwill in [the plaintiff's] client base other than to pay the ordinary overhead attributable to providing accounting services (i.e., staff, technology, fixed costs, etc.)…"[97]

The trial court further found that the plaintiff had not benefited from proprietary information of the partnership. "Any customer list would be a list of [the plaintiff's] own clients. … His familiarity with the clients and their needs would not alone suffice as specialized knowledge of [the partnership] to uphold the restrictions as that information could easily have been obtained from the clients themselves when they engaged [the plaintiff's] services."[98] The court concluded that enforcing the non-solicitation provision would result in a "'windfall' to the defendants that is 'disproportionate to the goodwill of the former [partnership's] clients who followed [the plaintiff] to his new practice.'"[99]

Turning to "reasonableness" prong number four, the trial court found the provision "interferes with the plaintiff's ability to pursue his occupation as a certified public accountant…. [T]he court found credible the plaintiff's testimony that he would be unable to continue his accounting practice if he were required to pay the fees called for under the non-compete provision….[The plaintiff's] livelihood and welfare would be jeopardized if he had no access to the client base he developed…"[100]

Finally, the trial court found that the provision would "adversely affect the public's interest in freely engaging with the certified public accountant of its choice."[101] The court noted that the relationship between accountant and client is one of

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[96] *Id*. at 663, 664.
[97] *Id*. at 664.
[98] *Id*. at 664.
[99] *Id*. at 665.
[100] *Id*. at 668, 669.
[101] *Id*. at 670.

"trust and knowledge of the clients' affairs and businesses," one that would be "difficult to recreate elsewhere."[102]

Applying "clearly erroneous" review to the trial court's findings of fact and plenary review to the legal conclusion of unreasonableness, the Appellate Court agreed that the provision was unenforceable. The court was unmoved by the firm's argument that "the parties' equal bargaining power and sophisticated knowledge of the industry are compelling reasons to uphold the enforcement of the noncompete provision."[103]

B. *Appellate Court explains law of third-party beneficiaries*

In *Anderson v. Bloomfield*,[104] the Appellate Court expounded on the law of third-party beneficiaries to contracts. The plaintiff, a homeowner in Bloomfield, needed a new roof for her house. She availed herself of a residential rehabilitation assistance program, by which the town would retain a contractor and pay for the work at no immediate cost to the homeowner. In exchange, the plaintiff granted the town a lien on her house in an amount equal to the contract price, to be settled when she sold or transferred ownership of the property.

The town retained the defendant Plourde Enterprises, LLC, to perform the work. Within months after the job was completed, water began entering the house through the ceilings and walls. An inspection led to the determination that the defendant had installed a defective roof. The plaintiff sued the contractor, claiming to be a third-party beneficiary of the contract between the town and the contractor.

The defendant moved to dismiss, claiming that the plaintiff lacked standing to pursue a contract claim. The trial court agreed, and granted the motion. The court noted that, although the plaintiff was a foreseeable beneficiary of the contract between the defendant and the town, that was in-

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[102] *Id.*
[103] *Id.* at 673.
[104] 203 Conn.App. 182, 247 A.3d 642 (2021).

sufficient to confer third-party beneficiary status upon the plaintiff. The trial court reasoned, "although the plaintiff's home is specifically referenced in the contract, and although the purpose of the contract includes, inter alia, performing work on the plaintiff's home, there is no expressed intent to create an obligation on the part of [the defendant] directly to the plaintiff. Instead, all of the contract terms were negotiated with the town ... [I]t is incumbent on the plaintiff to identify specific language in the contract evidencing [the defendant's] intent to create a direct obligation to her."[105]

The plaintiff appealed, claiming that, because she was the intended beneficiary of the work, and because the property address was identified in the contract, she had third-party beneficiary status. At the very least, she contended, the contract was ambiguous on this point, and the issue should have been submitted to the finder of fact.

The Appellate Court agreed with the latter argument, and reversed. The court noted that a person cannot claim third-party beneficiary status based only on the fact that that person was a foreseeable beneficiary of the contract. "[A] third party seeking to enforce a contract must allege and prove that the contracting parties intended that the promisor should assume a direct obligation to the third party."[106] To have standing, that person must prove status as an intended beneficiary, as defined by Section 302 of the Restatement (Second) of Contracts: "(1) Unless otherwise agreed between promisor and promisee, a beneficiary of a promise is an intended beneficiary if recognition of a right to performance in the beneficiary is appropriate to effectuate the intention of the parties and either (a) the performance of the promise will satisfy an obligation of the promisee to pay money to the beneficiary; or (b) the circumstances indicate that the promisee intends to give the beneficiary the benefit of the promised performance."[107]

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[105] *Id*. at 186, 187.
[106] *Id*. at 190, quoting Stowe v. Smith, 184 Conn. 194, 196, 441 A.2d 81 (1981).
[107] *Id*. at 190.

In this context, "intent is to be determined from the terms of the contract read in the light of the circumstances attending its making, including the motives and purposes of the parties ... [I]t is not in all instances necessary that there be express language in the contract creating a direct obligation to the claimed [third-party] beneficiary."[108] The trial court therefore erred "when it determined that the plaintiff failed to establish standing simply because there was no 'specific language in the contract evidencing [the defendant's] intent to create a direct obligation to her.'"[109]

The Appellate Court noted that, on the issue of intent to benefit the plaintiff, the language of the contract in question cuts both ways. "The identification of the plaintiff's home as the location where the work is to be done can be read as evidencing an intent that she is a third-party beneficiary of the contract. At the same time, the fact that the contract provides rights to review the work performed by the defendant and remedies for breach of the defendant's obligations solely to the town can be read as evidencing the parties' intent that the plaintiff is not a third-party beneficiary."[110]

The court reversed and remanded the case to the trial court, holding that "an evidentiary hearing is required to make the critical factual finding as to whether the plaintiff has standing as a third-party beneficiary."[111] The court instructed, "because resolution of this factual issue is intertwined with the merits of the case, resolution of this jurisdictional question should be resolved by the ultimate fact finder as part of the trial on the merits."[112]

C. *Doctrine of contra proferentem bars contractor's claim against homeowners*

In *C&H Shoreline, LLC v. Rubino*,[113] the Appellate Court

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[108] *Id.* at 191, quoting Dow & Condon, Inc. v. Brookfield Development Corp., 266 Conn. 572, 580, 581, 833 A.2d 908 (2003).

[109] *Id.* at 196.

[110] *Id.*

[111] *Id.* at 197.

[112] *Id.*

[113] 203 Conn.App. 351, 248 A.3d 77 (2021).

used the rule of contra proferentem, by which ambiguities in a written instrument are construed against the drafter, to bar a commercial party's claim for nonpayment under its own preprinted contract.

The plaintiff, doing business as 'Servpro,' had been hired by the defendants to clean their summer home after a flood caused by bursting pipes. The relationship was governed by a written contract provided by the plaintiff. The defendants refused to pay the plaintiff for its work, claiming a lack of proper performance, and the plaintiff sued them for nonpayment. The plaintiff brought suit more than 18 months after the dispute arose.

The defendants asserted a special defense based on paragraph seven of the contract, which provided as follows: "Any claim by Client for faulty performance, for nonperformance or breach under this Contract for damages shall be made in writing to Provider within sixty (60) days after completion of services. Failure to make such a written claim for any matter which could have been corrected by Provider shall be deemed a waiver by Client. NO ACTION, REGARDLESS OF FORM, RELATING TO THE SUBJECT MATTER OF THIS CONTRACT MAY BE BROUGHT MORE THAN ONE (1) YEAR AFTER THE CLAIMING PARTY KNEW OR SHOULD HAVE KNOWN OF THE CAUSE OF ACTION."[114]

The parties offered differing interpretations of this provision. The plaintiff argued "because the first two sentences of paragraph 7 relate solely to claims brought by the 'Client,' it necessarily follows that the term 'Claiming Party' in the third sentence refers only to the customer."[115] Thus, the one-year limitation period would have no effect on claims asserted by the plaintiff as "Provider." The defendants countered that "Claiming Party" was a "newly introduced term" that refers to "any party bringing a cause of action relating to the parties' agreement."[116]

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[114] *Id*. at 353.
[115] *Id*. at 357.
[116] *Id*. at 358.

The Appellate Court found paragraph seven to be ambiguous, and noted that the plaintiff "does not suggest that there is any countervailing extrinsic evidence to support a finding that the parties understood the third sentence to apply only to claims brought by the 'Client' or 'Customer.'"[117] Accordingly, given the undisputed fact that the parties' agreement was a contract of adhesion supplied by the plaintiff, the court applied the rule of contra proferentem to paragraph seven, "which resolves the ambiguity against the plaintiff as the undisputed drafter. … and conclude[d] that the one year limitation period contained therein applies to any contracting party asserting a cause of action."[118] The court affirmed the trial court's judgment for the defendants.

The plaintiff's complaint was in six counts, including claims for unjust enrichment, quantum meruit, and negligent misrepresentation. Without specifically pointing out that it was doing so, the Appellate Court effectively held that the contract language at issue, which barred "[any] action, regardless of form, relating to the subject matter of this contract," covered claims sounding in quasi-contract and tort.

IV. Closely Held Businesses

A. *Appellate Court affirms finding of implied partnership*

In *Villanueva v. Villanueva*,[119] the Appellate Court affirmed the trial court's finding that the plaintiff and defendant had entered into an implied partnership, a family landscaping business.

The court noted that an implied contract may be "inferred from the conduct of the parties though not expressed in words."[120] Here, the trial court found "strong evidence the parties were *de facto* partners."[121] Although the defendant had initially been hired by the plaintiff as an employee, the

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[117] *Id*. at 359.
[118] *Id*.
[119] 206 Conn.App. 36, 260 A.3d 568 (2021).
[120] *Id*. at 41.
[121] *Id*.

court observed that "in later years, they regarded each other as partners compensated by withdrawals from the business accounts for personal expenses, which may be characterized as draws and distributions; not salary. … [T]hey acted as mutual agents and jointly managed the business and shared its profits. … Their joint purchase of real estate using corporate [sic] funds epitomized the informal understanding between the brothers. The informal nature of distributions and draws, and the absence of contrary credible proof, suggests they were equal partners. The totality of evidence satisfied the test for formation of a partnership ...."[122]

The defendant argued that a finding of implied partnership "cannot survive the plaintiff's own denial that any such agreement existed," but the trial court had found that "by his conduct, the plaintiff manifested an intent to operate the business alongside the defendant" as a partner.[123] In the trial court's memorandum of decision,[124] the court had cited the Connecticut Supreme Court's decision in *Connecticut Light and Power Co. v. Proctor*[125] for the proposition that "conduct of one party, from which the other may reasonably draw the inference of a promise, is effective in law as a promise. …As long as the conduct of [the] party is volitional and that party knows or reasonably ought to know that the other party might reasonably infer from the conduct an assent to contract, such conduct will amount to a manifestation of assent."

The Appellate Court concluded that the trial court's factual finding of an implied partnership was not clearly erroneous, and affirmed the judgment below.

B. *Fiduciary duty between partners required full disclosure of terms of partner loan to partnership*

In *ASPIC, LLC v. Poitier*,[126] real estate partner A loaned funds to the venture and took back promissory notes from

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[122] *Id*. at 41, 42.
[123] *Id*. at 42.
[124] 2019 WL 6327396 (Conn.Super. October 30, 2019).
[125] 324 Conn. 245, 259-260, 152 A.3d 470 (2016).
[126] 208 Conn.App. 731, ___ A.3d ___ (2021)

the partnership, but he failed to fully apprise partner B of the transactions. The Appellate Court ruled that under the circumstances, partner B could not be held personally liable for the partnership debts.

The case involved notes that were obligations of four limited partnerships, collectively known as the Court Hill Partnerships (Court Hill). Court Hill owned low-income rental properties in the New Haven area. Each partnership had the same three general partners, and each had a partnership agreement imposing unlimited personal liability on all the general partners for partnership debts.

Unbeknownst to one of the partners, Poitier, another partner, Harp, signed two notes totaling almost $3 million on behalf of Court Hill, one to Harp personally and one to a company owned by Harp, called Renaissance Management Company, Inc. (Renaissance Management).[127] In so doing, Harp purported to obligate the other partners, including Poitier, personally. The plaintiff, an assignee of the notes, brought suit against Poitier.

Poitier raised various defenses, including the contention that Harp's execution of the notes had been in breach of his fiduciary duty to Poitier.[128] The trial court agreed: following a bench trial, the court rendered judgment for the defendant, based on that special defense.

On appeal, the plaintiff disputed the trial court's finding that the defendant had lacked notice of the promissory notes. The plaintiff cited various communications in which Harp had informed Poitier about Court Hill's financial straits, asked Poitier to inject needed funds, proposed buying out his interest and that of the third partner, and warned Poitier that absent a buyout, "I will simply borrow the additional funds available to me and assign my collateral debts from Court Hill to [the plaintiff]."[129] The plaintiff also pointed to

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[127] *Id*. at 736.

[128] The plaintiff acquired the notes after they were in default and therefore did not have the status of a holder in due course under General Statutes § 42a-3-302(a). Accordingly, the plaintiff took the notes subject to all defenses. *Id*. at 742.

[129] *Id*. at 744.

Court Hill's audited financial statements, which showed the payables owing to Harp and Renaissance Management.

But the Appellate Court agreed with the trial court that the plaintiff did not adequately prove notice to Poitier of the specific obligations at issue. "[N]either the letters nor the audited financial statements constitute evidence of Harp notifying the defendant of his intent to issue promissory notes totaling more than $3 million on behalf of Court Hill to himself and to Renaissance Management… Owning accounts receivable, even if confirmed by Court Hill's audited financial statements, is materially different from being the holder of a promissory note that provides a clear and explicit obligation to pay the amount set forth in the note pursuant to specific terms…In addition, the [notes] gave Harp and Renaissance Management remedies not available to them without the notes."[130]

C. *Distinction between earnings and dividends proves crucial in divorce decree*

In *Boyd-Mullineaux v. Mullineaux*,[131] a divorce case, the Appellate Court drew a dividing line between the defendant's income for services rendered to a small business, which was subject to apportionment with the plaintiff as alimony and child support, and distributions that the defendant received as a member of a limited liability partnership, which were not.

In 2013, the parties entered into a marital separation agreement, which was incorporated into the court's divorce decree. That agreement required the defendant to pay alimony and child support based on percentages of his "Gross Annual Income Earned from Employment," defined as "any and all earnings of any nature whatsoever actually received by the [defendant] in the form of cash or cash equivalents, or which the [defendant] is entitled to receive, from any and all sources relating to the services rendered by the [defendant] by way of his past, current or future employment ...."[132] At

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[130] *Id*. at 747, 748.
[131] 203 Conn.App. 664, 249 A.3d 759 (2021).
[132] *Id*. at 668.

the time, the defendant was employed as a managing director of an investment company called Liquidity Finance, LLC.

A year later, the defendant acquired a membership interest in an affiliated entity, Liquidity Finance, LLP. In that capacity, he received member distributions, while continuing to earn commission income as an employee of the LLC. He did not include his member distributions when calculating his support obligations. The plaintiff challenged this approach, claiming "the distributions were related to the defendant's employment, and, therefore, were included in the definition of earned income from employment contained in the parties' separation agreement."[133]

The Appellate Court ruled that the trial court properly rejected this argument. The court noted that the defendant's two income streams were governed by two separate written agreements, a service agreement with the LLC and a members' agreement with the LLP.[134] Under the latter agreement, members were required to make capital contributions, and received profits based on their "relevant proportion."[135] The agreement did not require employment by the LLC as a condition of membership.[136] The separation agreement's definition of earned income from employment specifically excluded "[c]apital [g]ains, interest and dividends, and all other income earned by the [defendant] due to his investment of assets distributed to him in connection with this dissolution proceeding…"[137]

The court also addressed an issue that often arises in the law of small businesses: conflating termination of the employment relationship with termination of the ownership relationship. The plaintiff argued that under the LLP membership agreement, "if the defendant leaves his employment with the LLC, his capital account would be paid back to him and he would no longer qualify for further profit distributions

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[133] *Id.* at 666.
[134] *Id.* at 669.
[135] *Id.*
[136] *Id.* at 671.
[137] *Id.*

as a member of the LLP."[138] But the court rejected that argument as a "misreading of the members' agreement," which actually provided, "a *member who leaves the LLP* shall have his capital returned to him."[139]

V. Remedies and Defenses

A. *Supreme Court finds lack of minimum contacts to support jurisdiction over Austrian company in breach of contract case*

The Connecticut Supreme Court's decision in *North Sails Group, LLC v. Boards & More GmbH*,[140] a breach of contract case, featured an exhaustive "minimum contacts" analysis in connection with a jurisdictional challenge raised by the defendant, Boards & More GmbH (B&M), a company based in Austria. A divided Supreme Court affirmed the trial court's judgment dismissing the action.

The plaintiff, a Connecticut company, brought suit in Connecticut against the defendant, a surfing products company, for breach of an agreement under which the plaintiff had licensed the "North Surf" tradename and trademark to the defendant. The initial licensing agreement had spanned ten years, 1990 to 2000, followed by a new agreement in 2000 that had a one-year term but provided for yearly renewal.[141] The plaintiff alleged that the defendant breached the parties' contract by launching its own trademark and replacing the plaintiff's North Surf trademark on its products with its own.

The defendant moved to dismiss on the grounds of lack of personal jurisdiction. The trial court granted the motion, concluding that "because the actions that allegedly constituted a breach of contract had occurred in Europe, not in Connecticut, the defendants lacked sufficient minimum contacts with Connecticut, and the exercise of personal jurisdic-

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[138] *Id*. at 671.
[139] *Id*. at 671; emphasis supplied by the court.
[140] 340 Conn. 266, ___ A.3d ___ (2021).
[141] *Id*. at 271, 272.

tion over them would offend principles of due process."[142] The plaintiff appealed, and the Supreme Court transferred the appeal from the Appellate Court to itself.

The Connecticut Supreme Court analyzed the case under the framework of the United States Supreme Court's decision in *Burger King v. Rudzewicz*.[143] In *Burger King*, the court noted that under the Due Process Clause, an individual has a "liberty interest in not being subject to the binding judgments of a forum with which he has established no meaningful 'contacts, ties, or relations.'"[144] It follows that individuals are constitutionally entitled to "fair warning that a particular activity may subject [them] to the jurisdiction of a foreign sovereign."[145] The constitutional touchstone is "whether the defendant purposefully established 'minimum contacts' in the forum."[146]

The Connecticut Supreme Court noted, "[t]o determine whether a single contract suffices to establish the minimum contacts necessary for the exercise of specific jurisdiction over a nonresident defendant, courts review the totality of the circumstances surrounding that relationship to determine whether the defendant, by its actions, purposefully has availed itself of the benefits of the forum state."[147]

The court's task is to "determine whether the contract and its surrounding circumstances demonstrate that the nonresident defendant 'reach[ed] out beyond one state and create[d] continuing relationships and obligations with citizens of another state ....'"[148] When that is the case, "the nonresident defendant is understood to have purposefully availed itself of the benefit of its activities in the forum state," making it fair to subject the defendant to suit there for claims arising from those activities.[149]

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[142] *Id*. at 273.

[143] 471 U.S. 462 (1985).

[144] 471 U.S. at 471, 472, quoting International Shoe Co. v. Washington, 326 U.S. 310, 319 (1945).

[145] *Id*. at 472, quoting Shaffner v. Heitner, 433 U.S. 186, 218 (1977) (Stevens, J., concurring).

[146] *Id*. at 474.

[147] 340 Conn. at 277.

[148] *Id*. at 278, quoting *Burger King*, 471 U.S. at 473.

[149] *Id*. at 278.

Courts must take a "'highly realistic approach that recognizes that a contract is ordinarily but an intermediate step serving to tie up prior business negotiations with future consequences which themselves are the real object of the business transaction. ... It is these factors—*prior negotiations and contemplated future consequences, along with the terms of the contract and the parties' actual course of dealing*—that must be evaluated in determining whether the defendant purposefully established minimum contacts with the forum.'"[150]

Through this lens, the court evaluated the contacts between the defendant and Connecticut, and found them insufficient to constitute "minimum contacts" that would constitutionally support jurisdiction.

In its effort to establish minimum contacts, the plaintiff "relie[d] heavily on the long-term relationship between the parties."[151] But although the initial license deal between the parties had a ten-year term, the agreement in effect at the time of the alleged breach was a one-year deal that provided for yearly renewal. Thus, unlike the franchise agreement in *Burger King*, the parties "did not anticipate a relationship for a specific amount of time."[152] Also, the court observed that the subject contract "did not envision an interactive, highly regulated relationship."[153] "[I]t is not the length of the relationship, but the quality of the relationship—i.e., the extent the defendant has purposefully reached into the forum—that matters most for determining forum contacts."[154]

The court observed that one relevant factor is "whether the defendant reached into the forum, including whether the defendant initiated contact."[155] Here, the plaintiff offered no evidence that the defendant had "purposefully 'reached out' to the forum state by initiating contact with the plaintiff."[156] Nor did the defendant "reach into" the Connecticut forum

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[150] *Id*. at 279, quoting *Burger King*, 471 U.S. at 479. (Emphasis in original.)
[151] *Id*. at 286.
[152] *Id*. at 287.
[153] *Id*.
[154] *Id*.
[155] *Id*. at 289.
[156] *Id*. at 291.

through a physical presence here. "Physical presence may include maintaining offices, employees, real or personal property, or an agent for service of process in the forum state, none of which B&M maintains in the present case."[157]

Physical presence "also may include traveling to the forum to negotiate, execute, or perform the contract,"[158] but the plaintiff could point to only "a single visit to the forum [by a representative of the defendant] after the contract was executed."[159] "[A] single visit to the forum is of minimal weight when considered under the totality of the circumstances, especially when, as here, the defendant did not initiate contact, and the contract does not require performance by the defendant in the forum."[160]

The court also considered the jurisdiction in which the contract was to be performed. The plaintiff pointed out that it would "perform its obligations from and suffer any consequences in Connecticut,"[161] but "it is the defendant's contacts with the forum state, not those of the plaintiff, that are relevant."[162] Thus, "[n]one of the plaintiff's forum contacts—its performance in the forum, its use of the royalty funds in the forum, its sales and marketing in the forum, any harm it suffers in the forum—is relevant to determining whether the defendant has minimum contacts with the forum."[163]

As for the defendant, it "never conducted any business in Connecticut," and did "not perform its contractual obligations in Connecticut, [nor did] the contract … require it to do so."[164] The contract did not require the defendant to render payments to the plaintiff at its office in Connecticut; instead, B&M sent its quarterly license fees to a bank designated by the plaintiff, which was located in Milwaukee, Wisconsin.[165]

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157 *Id*. at 292.
158 *Id*. at 293.
159 *Id*. at 291.
160 *Id*. at 293.
161 *Id*. at 296.
162 *Id*. at 276.
163 *Id*. at 297.
164 *Id*. at 299.
165 *Id*. at 271.

The absence of contract performance in Connecticut "weighs heavily against finding minimum contacts."[166]

The plaintiff also pointed out its numerous communications with the defendant, directed to and from its office in Connecticut, concerning the contractual relationship. The parties indeed "communicated regularly and consistently regarding the contract, including communications regarding [the defendant's] payment of royalties. …. The parties also communicated via e-mail regarding the alleged breach of contract at issue."[167] But such communications "do not weigh in favor of jurisdiction because they were ancillary to the performance of the contract rather than demonstrative of continuous collaboration between the parties."[168]

The court went on to compare the contractual relationship at issue in the *Burger King* case with the one before the court. From its corporate headquarters in Florida, Burger King "imposed many requirements on franchisees and, thus, controlled the defendant's daily operations. Among other things, Burger King regulated the defendant's accounting and insurance practices, hours of operation, building layout, service and cleanliness standards, as well as the range, quality, appearance, size, taste, and processing of menu items. … [Burger King's] control over the [defendant's] business required him to consistently and continuously reach out to Florida to obtain authorization for the operation of his business, thereby establishing purposeful availment and providing him with notice that he could be sued in Florida."[169]

The court found these factors to be largely absent from the relationship between North Sails and B&M. The contract at issue

> [did] not require B&M to conduct its business in any particular fashion or require it to comply with any decisions the plaintiff makes regarding its business operations be-

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166 *Id*.
167 *Id*. at 301, 302.
168 *Id*. at 302.
169 *Id*. at 311, 312.

> yond those relating to the use of the trademarks and trade name. Although the agreement permits the plaintiff to inspect B&M's premises and the licensed products, as well as to audit B&M, these oversight measures do not highly regulate B&M's business—and certainly not in the same way Burger King possessed almost complete control and authority over the defendant's restaurant in Burger King. Rather, the agreement's oversight provisions regulate only B&M's use of the plaintiff's trademarks and trade name.[170]

The court went on to observe:

> [a]lthough the licensing agreement requires B&M to obtain approval from the plaintiff as to the design of certain licensed products, the plaintiff is not authorized to regulate the daily operations of B&M's business. Unlike in *Burger King*, in which the defendant consistently and continuously had to reach out to Florida to obtain authorization for the operation of his business, B&M was not required to reach out to Connecticut to run its business. Rather, the limited supervisory contractual provisions, such as the right to inspect and the right to receive royalty reports, are ancillary and incidental to the licensing agreement.[171]

On this basis, the court agreed with the trial court that there had been an absence of "minimum contacts" sufficient to support jurisdiction, and affirmed the judgment below.

Justice Ecker, joined by Justice Kahn, penned a vigorous 85-page dissent. In their view, "[t]he simple fact of the matter is that B&M made a voluntary, informed choice to enter into a long-term contractual relationship with North Sails, and it did so knowing full well that North Sails would perform its principal obligations under the contract—including filing, processing, maintaining, and protecting the parties' rights to and the value of the North Marks trade name—from its headquarters in Milford."[172] The dissenters faulted the majority for "fail[ing] to give any weight at all to the fact

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[170] *Id.* at 312.
[171] *Id.*
[172] *Id.* at 326.

that the parties were engaged in a decades long business partnership rather than a single product sale or some one-off contractual arrangement."[173]

The dissenters also took issue with the majority's analysis of the U.S. Supreme Court's decision in the *Burger King* case. In their view, that case "holds, in broad, clear, and unequivocal terms, that creating continuing contractual obligations with a forum resident subjects a foreign defendant to jurisdiction in the forum."[174]

In the view of the dissenters, the lesson of *Burger King* is "[w]hen a commercial entity knowingly and voluntarily *chooses* to become business partners with a resident of a state, and follows through by engaging in a long-term relationship, it necessarily accepts a connection with the state itself—its laws, economy, transportation and communication infrastructure, and other residents—in all sorts of ways, both predictable and unexpected, such that it should reasonably anticipate the possibility that a contract related dispute may be adjudicated by that state's courts."[175]

B. *Supreme Court clarifies standard for awarding attorneys' fees under CUTPA*

In *Stone v. East Coast Swappers, LLC*,[176] the Connecticut Supreme Court clarified the standards that apply to awards of attorney's fees to prevailing plaintiffs in cases under the Connecticut Unfair Trade Practices Act, General Statutes Section 42-110a et seq. ("CUTPA").

Following a courtside trial, the plaintiff obtained a judgment against the defendant, an automobile repair business, in the amount of $8,300. In the memorandum of decision, the trial court held that the plaintiff had "proven a violation of CUTPA [but had] not proven the evil motive or malice necessary to award punitive damages," and on the same basis,

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[173] *Id*. at 336.
[174] *Id*. at 340.
[175] *Id*. at 344.
[176] 337 Conn. 589, 255 A.3d 851 (2021). The author argued the appeal for the plaintiff.

pre-emptively denied any award of attorney's fees.[177] On appeal, the plaintiff contended that the trial court abused its discretion in refusing to award attorney's fees. The Appellate Court affirmed the judgment below.[178]

Following a grant of the plaintiff's petition for certification to appeal, the Supreme Court agreed with the plaintiff that the trial court erred when it "relied on the same factors to deny attorneys' fees as it did to deny punitive damages."[179] In so doing, the court "failed to recognize the different purposes that attorney's fees and punitive damages serve under CUTPA."[180] The purpose of the former is "to foster the use of private attorneys in vindicating the public goal of ferreting out unfair trade practices in consumer transactions by commercial actors generally," while the latter is "focused on deterrence and punishment of particular commercial actors."[181] "[I]n exercising its discretion, a trial court must consider the purpose of CUTPA attorney's fees when deciding whether a prevailing plaintiff should be awarded such fees."[182]

The Supreme Court found that it was an abuse of discretion for the trial court to apply "the more demanding test for awarding punitive damages – intentional, wanton, malicious, or evil conduct- as its rationale for not awarding attorney's fees."[183] The court reversed the judgment below with respect to the denial of attorneys' fees, and remanded the case for further proceedings.

C. *Multiple actions arising from the same construction project raise claim preclusion and issue preclusion issues*

The Appellate Court's decision in *Strazza Building & Construction, Inc. v. Harris*[184] addressed important issues about claim preclusion and issue preclusion in the context of

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[177] *Id*. at 596-598.

[178] The Appellate Court decision is reported at 191 Conn. App. 63, 213 A.3d 499 (2019).

[179] *Id*. at 611.

[180] *Id*. at 610.

[181] *Id*. at 603.

[182] *Id*. at 609.

[183] *Id*. at 610, 611.

[184] 207 Conn. App. 649, 262 A.3d 996 (2021).

a construction case. The plaintiff, the general contractor for a house renovation project, sought to foreclose a mechanic's lien for sums allegedly due from the property owner. One of the plaintiff's subcontractors, which had performed plumbing work, had filed its own mechanic's lien.

In a separate, earlier proceeding (subcontractor case), the property owner applied to discharge the plumbing subcontractor's lien. Following a trial in the subcontractor case, as to which the general contractor was not a party, the court discharged the lien.

The court in the subcontractor case noted that under established law, "a subcontractor only can enforce a mechanic's lien to the extent that there is unpaid contract debt owed to the general contractor by the owner."[185] Thus, to determine the viability of the plumbing subcontractor's lien, the court had to decide if there was a "lienable fund" measured by what, if anything, was owing to the general contractor. This required findings about work performed by the general contractor and other subcontractors, who were nonparties to the subcontractor case. The court in that case determined that there was no lienable fund.

When the general contractor sought to foreclose its own mechanic's lien, the property owner moved for summary judgment. Citing the decision in the subcontractor case, the owner asserted that the general contractor was in privity with its subcontractor, and therefore was bound by that earlier decision on the grounds of res judicata and collateral estoppel. The owner relied on the Connecticut Supreme Court's decision in *Girolametti v. Michael Horton Associates, Inc.*,[186] in which the court held "when a property owner and a general contractor enter into binding, unrestricted arbitration to resolve disputes arising from a construction project, subcontractors are presumptively in privity with the general contractor with respect to the preclusive effects of the arbitration on subsequent litigation arising from the project."

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[185] *Id.* at 654.
[186] 332 Conn. 67, 87, 208 A.3d 1223 (2019).

The trial court denied the owner's motion, and the Appellate Court affirmed, agreeing that the decision in favor of the property owner in the subcontractor case did not dispose of the subsequent claim by the general contractor.[187] The court distinguished *Girolametti* on the basis that, in that case, "the presumption of privity arises from the 'flow down' obligation that a general contractor owes to a subcontractor… [G]eneral contractors are vicariously or derivatively liable for the work of their subcontractors."[188] But, "the opposite is not necessarily true, meaning that there is no corresponding 'flow up' obligation that extends from a subcontractor to a general contractor."[189]

More particularly, in *Girolametti*, "[t]he first action involved the general contractor who presumably had involvement in all aspects of the job," and accordingly "the owner, who was a party to the first proceeding brought by the general contractor, was bound by the rulings in that case when subsequent cases were brought by the subcontractors …"[190] The owner "had every opportunity to assert any claim that he might have against a [subcontractor] in the case against the general contractor."[191]

But, in the present case, "the opposite was true."[192] The earlier decision in the subcontractor case included findings about "many portions of the renovations and improvements to the subject property with which [the plumbing subcontractor] had virtually no involvement."[193] The plumbing subcontractor "would not have firsthand knowledge [of] or significant involvement [in] many aspects of the required performance of other areas of necessary performance under the general contract."[194] Accordingly, under the circumstances, "a genuine is-

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[187] The court noted, "Generally, the denial of a motion for summary judgment is not appealable, but the denial of a motion for summary judgment predicated on the doctrine of res judicata is a final judgment for purposes of appeal." 207 Conn. App. at 651, n.2.

[188] *Id*. at 662.

[189] *Id*.

[190] *Id*. at 664.

[191] *Id*.

[192] *Id*. at 663.

[193] *Id*.

[194] *Id*. at 664.

sue of material fact existed as to the question of whether [the general contractor's] interests were sufficiently represented" in the subcontractor case.[195] It followed that the property owner could not establish, as a matter of law, that res judicata or collateral estoppel barred the general contractor's claims.

D. *Appellate Court provides guidance on statute of limitations tolling doctrines*

The Appellate Court's decision in *Medical Device Solutions, LLC v. Aferzon*[196] provides useful guidance about three tolling doctrines that relate to the running of a statute of limitations: fraudulent concealment, continuing course of conduct and continuing violation.

In 2004, the plaintiff, a medical device designer and developer, and the first named defendant, Dr. Joseph Aferzon, a neurosurgeon and inventor, entered into an agreement concerning a spinal fusion device conceived by Aferzon. Under the agreement, the plaintiff would provide detailed drawings and a prototype of the device, and would receive fifty percent of the total compensation from sales of the device or versions thereof.

The plaintiff developed a prototype that was successfully tested in a cadaver, but afterward shifted to a modified design, and provided new drawings to Aferzon. In the meantime, Aferzon became dissatisfied with the plaintiff's work, and worked on the device on his own and with his son. Aferzon and his son obtained a patent on the modified device, and he and another doctor formed a company, the defendant International Spinal Innovations, LLC (ISI), to monetize it. Meanwhile, Aferzon ignored repeated inquiries from the plaintiff about the status of the project.[197]

ISI licensed the device, and between 2010 and 2019, the company received a series of royalty payments aggregating more than three million dollars.[198] None of this money was shared with the plaintiff.

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[195] *Id*. at 663.
[196] 207 Conn.App. 707, ___ A.3d ___ (2021).
[197] *Id*. at 718.
[198] *Id*. at 719.

In 2017, the plaintiff learned by happenstance that Aferzon had successfully developed and monetized a spinal fusion device. The plaintiff brought suit in 2018, and following a courtside trial, prevailed on claims of breach of contract and violation of the Connecticut Unfair Trade Practices Act, General Statutes Section 42-110a et seq. (CUTPA). The court awarded the plaintiff fifty percent of all the royalty payments received by ISI, reaching back to the first payment received in 2010. In response to the defendants' contention that recovery of the earlier payments was barred by the applicable statutes of limitation, the trial court concluded that the running of the limitation periods had been tolled by both the fraudulent concealment doctrine and continuing course of conduct doctrine.[199]

The trial court noted, "'the first breach of the agreement that could have justified a lawsuit was in 2010,' when ISI first received a royalty payment."[200] But in finding fraudulent concealment, the court relied in substantial part on various acts and willful omissions by Aferzon that preceded that first payment. These included a letter in 2006 to the plaintiff in which Aferzon falsely claimed that the project was dormant; Aferzon's deliberate failure to reply to two inquiring emails from the plaintiff in 2008; and Aferzon's transfer of his patent rights to ISI.

The Appellate Court ruled that, for purposes of the fraudulent concealment analysis, it was error for the trial court to rely on events that occurred before the plaintiff's cause of action accrued. Under established law, "merely concealing [the] existence of wrongdoing is insufficient" to support the application of this doctrine.[201] Rather, "[t]o prove fraudulent concealment, the plaintiff must demonstrate the defendant's *actual awareness* of the facts necessary to establish the plaintiff's *cause of action* and its intentional concealment of these facts."[202] As to Aferzon's acts and omissions before

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[199] *Id*. at 723, 724.
[200] *Id*. at 747.
[201] *Id*. at 748.
[202] *Id*. at 747. (Emphasis in original.)

2010, "[t]he facts necessary to establish the cause of action did not [yet] exist … so it was impossible at those times for Aferzon either to have had actual awareness of the plaintiff's nonexistent cause of action for breach of contract or to have intentionally concealed such a cause of action from the plaintiff."[203]

The Appellate Court noted that the trial court had also relied on Aferzon's nondisclosure to the plaintiff of the royalty payments received by ISI. But absent a fiduciary duty, "mere nondisclosure paired with an ordinary contractual duty to disclose is insufficient to establish fraudulent concealment."[204] Applying the "clear, precise and unequivocal evidence" standard of proof to the issue at hand,"[205] the Appellate Court concluded that the trial court had erred in applying the fraudulent concealment doctrine to the defendants' actions.

The Appellate Court then addressed the trial court's conclusion that the limitation periods had also been tolled by the continuing course of conduct doctrine. The trial court had characterized the defendants' actions as "a series of distinct breaches" of Aferzon's duty, "[u]nder the contract, each time the device made money … to notify [the plaintiff] and pay it 50 percent of the total compensation."[206] The trial court "then engaged in a discussion of both continuing violation analysis and the continuing course of conduct doctrine, referring to them interchangeably,"[207] before concluding that the continuing course of conduct doctrine applied.[208]

The Appellate Court ruled that this too was error, because "the nature of the defendants' breaches is incompatible with the continuing course of conduct doctrine."[209] That doctrine applies when "the act or omission that commences the limitation period [is] not discrete and attributable to a

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[203] *Id*. at 748.
[204] *Id*. at 751.
[205] *Id*. at 745.
[206] *Id*. at 755.
[207] *Id*.
[208] *Id*. at 756.
[209] *Id*.

fixed point in time … under circumstances where [i]t may be impossible to pinpoint the exact date of a particular negligent act or omission that caused injury."[210] One example is a case involving "the negligent failure of a physician to warn a patient of the harmful side effects of a drug that the physician had prescribed and that the patient had continued to ingest over a period of time."[211]

But here, "the defendants repeatedly breached the agreement, and every breach is readily identifiable … [the evidence] clearly delineat[ed] the date and amount of each distinct royalty payment which the defendants received … without notifying the plaintiff."[212] This is an example of a continuing violation, as to which tolling does not apply. "[T]he damages from each discrete act … would be readily calculable without waiting for the entire series of acts to end. There would be no excuse for the delay."[213] The case at hand "involves a series of separate breaches to which the continuing course of conduct doctrine does not apply because each such breach caused separate damages that were readily calculable at the time of breach."[214] Indeed, the continuing course of conduct doctrine "is one classically applicable to causes of action in tort, rather than in contract," and it is questionable "whether the doctrine should ever be applied to breach of contract claims."[215]

E. *Probate Court decree collaterally estops later tortious interference claim*

In *Solon v. Slater*,[216] the widow of Michael Solon (decedent) sued the decedent's son and attorney for tortiously interfering with the amendment of his will and their prenuptial agreement in ways that would have benefited her. Before she commenced suit, the Probate Court issued a de-

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[210] *Id.* at 759.
[211] *Id.* at 758.
[212] *Id.* at 759.
[213] *Id.*
[214] *Id.* at 761.
[215] *Id.*
[216] 204 Conn. App. 647, 253 A.3d 503 (2021).

cree admitting the decedent's will, after a contested hearing at which the plaintiff claimed undue influence on the part of the defendants. The plaintiff did not appeal from the probate decree.

The defendants moved for summary judgment on the tortious interference claims, asserting that, because of the Probate Court decree, she was collaterally estopped from asserting them. The trial court agreed, and granted the defendants' motion.

The Appellate Court affirmed. The court identified the elements, under established Connecticut law, of claims for undue influence and tortious interference, and noted, "In support of her claims of tortious interference, the plaintiff relies on the same factual predicate that she offered in support of her undue influence claim in Probate Court."[217] Those common allegations were that "the decedent's 2014 will was executed 'under the influence and control' of the defendants" and "the antenuptial agreement was not modified … because the defendants… '…forcibly removed and essentially kidnapped [the decedent] from the marital home ... so [that the decedent] would be in their complete control and custody and under their influence and manipulation.'"[218]

The Appellate Court noted that the Probate Court "already has determined that the aforementioned factual predicate on which the plaintiff relies to support her tortious interference claims does not rise to a level of impropriety, of whatever character, by the defendants such as to affect the disposition of the decedent's estate."[219] The court concluded that the plaintiff was improperly "attempting to relitigate the propriety of the defendants' conduct with respect to the disposition of the decedent's estate."[220] Accordingly, the trial court had properly applied the doctrine of collateral estoppel to bar her tortious interference claims.

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[217] *Id*. at 663.
[218] *Id*. at 663, 664.
[219] *Id*. at 664.
[220] *Id*. at 665.

F. *Exchange of emails gives rise to summarily enforceable settlement agreement*

In *Wittman v. Intense Movers, Inc.*,[221] the Appellate Court enforced the trial court's order summarily enforcing a settlement agreement evidenced by a memorandum of understanding, followed up by a formal settlement agreement transmitted by email but never signed.

The plaintiffs, shareholders in a closely held corporation, brought an action to dissolve the company. Defendant Alexander Leute, who was another shareholder, filed a notice of intent to purchase the plaintiffs' shares in lieu of dissolution, pursuant to General Statutes Section 33-900(b).

The parties subsequently executed a memorandum of understanding, which as characterized by the court, "resolv[ed] the primary issues" while providing "the parties would enter into a more detailed settlement that would provide, among other things, the necessary terms to effectuate the plaintiffs' transfer of their shares."[222] To that end, the parties followed up with numerous emails concerning the proposed settlement agreement.

In November of 2018, Mr. Leute sent an email to counsel for the plaintiffs, concerning the most recent draft agreement, requesting a change but also saying "[e]verything else looks good. I will have this signed and sent over to you ASAP once that small change is made and I will have the check mailed out as well."[223] Counsel for the plaintiffs promptly made the requested change and tendered the revised agreement, but Mr. Leute refused to sign it, claiming the parties had understood that the agreement was contingent upon him obtaining the necessary financing.

The trial court found that the parties had entered into an enforceable settlement agreement, and that the agreement unambiguously did not include a financing contingency. The court granted the plaintiffs' motion for an order summarily

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[221] 202 Conn. App. 87, 245 A.3d 479 (2021).
[222] *Id.* at 90.
[223] *Id.* at 94.

enforcing the agreement. The Appellate Court affirmed, concluding that the defendants had "failed to establish that the court improperly enforced the settlement agreement, which consisted of the signed memorandum of understanding as supplemented by the unsigned settlement document with its attachments."[224]

G. *Constitutional limits on punitive damages held inapplicable to awards of statutory damages*

In *Your Mansion Real Estate, LLC v. RCN Capital Funding, LLC*,[225] the Appellate Court ruled that constitutional constraints on awards of punitive damages do not apply to awards of statutory damages. The plaintiff, the owner of a parcel of real estate, sued the defendant, the mortgagee of the property, for failing to timely tender a release of the mortgage after it had been paid off, in violation of General Statutes Section 49-8(c). The statute provides that, if a mortgagee fails to provide a release within sixty days of a written request for the same, the mortgagee shall thereafter be liable for the greater of actual damages or statutory damages in the amount of $200 per week, up to a cap of $5,000.

The defendant's delivery of a release was more than two years late. Because the plaintiff stipulated that it had not suffered actual harm, the trial court awarded the plaintiff statutory damages, in the maximum sum of $5,000.

The defendant argued that, given the absence of actual harm, the imposition of statutory damages violated its right to due process under the Fourteenth Amendment of the Constitution, pursuant to the principles articulated by the United States Supreme Court in *BMW of North America, Inc. v. Gore*.[226] Under that decision, one factor a court should consider when reviewing awards of punitive damages is "the disparity between the harm or potential harm suffered by [the plaintiff] and [the] punitive damages award."[227]

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[224] *Id*. at 105.
[225] 206 Conn. App. 316, 261 A.3d 110 (2021).
[226] 517 U.S. 559 (1996).
[227] 206 Conn. App. at 333, 334, quoting BMW of North America, Inc. v. Gore, 517 U.S. 559 at 575.

The Appellate Court rejected this argument, holding "*Gore* is not applicable to this case because the statutory damages available under §49-8 are not punitive damages for purposes of *Gore*."[228] The court observed that punitive damages and statutory damages are "fundamentally different…[P]unitive damages are not compensation for injury. Instead, they are private fines levied by civil juries to punish reprehensible conduct and to deter its future occurrence. Statutory damages, on the other hand, not only are subject to limits established by the legislature, but they are at least partly (if not principally) designed to provide compensation to individuals where actual damages are difficult or impossible to determine."[229]

[228] 206 Conn. App. at 334.
[229] *Id*. at 334, 335.

2020 DEVELOPMENTS IN CONNECTICUT ESTATE AND PROBATE LAW

By Jeffrey A. Cooper,* John R. Ivimey** and Katherine E. Mulry***

This Article provides a summary of recent developments affecting Connecticut estate planning and probate practice. As there were no significant legislative developments in 2020, this article will focus on 2020 case law relevant to the field.

A. *Wills and Trusts*

1. Powers of Appointment

In *Benjamin v. Corasaniti*,[1] the superior court ruled that a decedent could validly exercise a testamentary power of appointment in favor of a previously unfunded trust.

The decedent was the beneficiary of two trusts, one of which was governed by Connecticut law.[2] He held a testamentary power of appointment over the trust corpus.[3] Prior to his death, he established a charitable trust and thereafter executed a will exercising his power of appointment in favor of the charitable trust.[4] The charitable trust was not otherwise funded during the decedent's life.[5]

After the decedent's death, the defendants successfully

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* Professor of Law and Associate Dean for Research and Faculty Development, Quinnipiac University School of Law, and of the Greenwich Bar.

** Of the Hartford Bar.

*** Of the Hartford Bar. The authors wish to thank the editors of this publication for their helpful review of this article. This article contains the opinions of the authors and may not reflect the position of any organization or entity with which they are affiliated. In addition, in cases where an author considered it inappropriate to comment on a specific issue, such as where that author was involved in a matter discussed herein, another author assumed complete responsibility for drafting the relevant portion of this article. Readers should be aware that cases discussed in this article may have been appealed and the results discussed herein may have been modified or reversed.

1 No. UWYCV186045572, 2020 WL 3058149 (Conn. Super. Ct. May 1, 2020).

2 *Id.* at *1. The other trust was governed by Illinois law. *Id.* Although the court reached similar holdings with respect to both Illinois and Connecticut law, this article only discusses the court's application of Connecticut law.

3 *Id.* at *2.

4 *Id.* at *2.

5 *Id.*

petitioned the probate court to validate the exercise of the power of appointment in favor of the charitable trust notwithstanding the fact that the trust had not been funded during the decedent's life.[6] The plaintiffs appealed that decision to the superior court, which affirmed the probate court ruling.[7] As of this writing, the matter is on further appeal before the Connecticut Supreme Court.[8]

In affirming the probate court, the superior court rejected three major arguments put forth by the defendants.

First, the court held that the charitable trust was valid even though not funded prior to the decedent's death.[9] In reaching this result, the court conceded that Connecticut law specifies that a trust must have trust property in order to be valid.[10] Nevertheless, the court reasoned that "[m]odern practice has evolved," to validate unfunded trusts in many circumstances, a position endorsed by the Restatement (Third) of Trusts.[11] The court thus found the charitable trust valid.

Second, the court held that Connecticut's version of The Uniform Testamentary Additions to Trusts Act (UTATA), codified at General Statutes Section 45a-260, validates the exercise of a power of appointment in favor of an unfunded trust.[12] While the plaintiffs contended that the text of UTATA provides only that a decedent may validly "devise or bequeath" property to an unfunded trust, and does not explicitly address the exercise of a power of appointment, the court rejected this "narrow reading of the statute."[13] In reaching this result, the court seemed particularly influenced by its review of the 1960 "legislative history" from the UTATA Drafting Committee, finding that the drafters of the uniform act explicitly envisioned that it would cover exercises of powers

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6 *Id*. at *3.
7 *Id*.
8 *Benjamin v. Corasaniti*, No. SC 20491 (argued Apr. 1, 2021).
9 *Benjamin*, 2020 WL 3058149 at *6.
10 *Id*. citing Palozie v. Palozie, 283 Conn. 538, 545, 927 A.2d 903 (2007).
11 *Id*. (citing Restatement (Third) of Trusts § 19 (2003)).
12 *Id*. at *6.
13 *Id*. at *7.

of appointment.[14] Citing prior Supreme Court precedent, the court interpreted Connecticut's version of UTATA in a manner consistent with the intent of the drafters of UTATA.[15]

Third, the court held that Connecticut's recently enacted version of the Uniform Trust Code also applied to validate the exercise of the power of appointment.[16] In this regard, the court ruled that General Statutes Section 45a-499v explicitly provides that a "trust may be created by … (3) the exercise of a power of appointment…," and that General Statutes Section 45a-487t provides for this provision to operate retroactively.[17]

2. Definition of "Per Stirpes"

In *Schwerin v. Ratcliffe*,[18] the Supreme Court considered how to compute the shares of trust property payable to the grantor's "issue then living, per stirpes" under Connecticut law. The court held that the phrase required an initial division of the property into shares for each of the grantor's children, even though none of them would be alive at the time of distribution.

At issue were two trusts established over fifty years ago.[19] Both trusts will terminate upon the death of the last to survive of specified issue of the grantor, only three of whom are still alive.[20] The plaintiffs brought a declaratory judgment action in the superior court, arguing that since the grantor's three children are deceased, the phrase "issue then living, per stirpes" should be interpreted to require an initial division into shares for each of the grantors' six grandchildren. The defendants countered that the initial division should be made at the level of the children, notwithstanding the fact

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[14] *Id*. at *8 (quoting Proceedings in Committee of Whole Testamentary Additions to Trust Act, August 25, 1960) (the chair stated that the act "cover[s] the exercise of a power of appointment by will…").

[15] *Id*. at *8 (citing *Yale Univ. v. Blumenthal*, 225 Conn. 32, 38 (1993) (noting that states should interpret uniform acts in accordance with the drafters' stated intent)).

[16] *Id*. at *10.

[17] *Id*. at *10 (citing CONN. GEN. STAT. §§ 45a-499v, 45a-487t).

[18] 335 Conn. 300 (2020).

[19] *Id*. at 303-05.

[20] *Id*. at 304-06.

that all of them are deceased.[21] The trial court agreed with the defendants and granted their motion for summary judgment.[22] An appeal ensued, and the Supreme Court affirmed.[23]

In reviewing the case, the Supreme Court noted that prior case law established that when making a per stirpital division in Connecticut, "the initial division is to be made into as many shares as there are members of the first generation…."[24] The Court noted that this approach is consistent with Connecticut's intestacy laws,[25] and embraced by both the Restatement (Second) of Property[26] and the Uniform Trust Code.[27]

The Court further held that the grantor's use of the words "then living" did not affect this general rule. The court reasoned that the words "then living" merely identified who would take the trust property upon termination and not the method of computing their shares.[28] While finding no Connecticut appellate authority on point, the Court found support for this position in a Massachusetts Appeals Court case construing a similar phrase.[29]

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[21] *Id*. at 307.

[22] *Id*. at 307-08.

[23] The Supreme Court assumed jurisdiction over the appeal pursuant to General Statutes § 51-199(c), which provides in relevant part that "[t]he Supreme Court may transfer to itself a cause in the Appellate Court." *Id*. at 304, n 3.

[24] *Id*. at 313 (quoting *Warren v. First New Haven Nat'l Bank*, 150 Conn. 120, 124-25 (1962)).

[25] *Id*. at 316-17 (citing CONN. GEN. STAT. § 45a-438) (providing that property distributable to descendants "shall be distributed equally, according to its value at the time of distribution, among the children, including children born after the death of the decedent … and the legal representatives of any of them who may be dead….").

[26] *Id*. at 313 (citing 3 Restatement (Second), Property, Donative Transfers § 28.2, p. 254 (1988) ("the initial division into shares will be on the basis of the number of class members, whether alive or deceased, in the first generation below the designated person.")).

[27] *Id*. at 317-18 (quoting Unif. Probate Code § 2-709 (c) (amended 1993); 8 U.L.A. 316 (2013) ("If a governing instrument calls for property to be distributed 'per stirpes,' the property is divided into as many equal shares as there are (i) surviving children of the designated ancestor and (ii) deceased children who left surviving descendants. Each surviving child, if any, is allocated one share. The share of each deceased child with surviving descendants is divided in the same manner, with subdivision repeating at each succeeding generation until the property is fully allocated among surviving descendants.").

[28] *Id*. at 318.

[29] *Id*. at 319 (citing *Bank of New England, N.A. v. McKennan*, 19 Mass. App. 686, review denied, 395 Mass. 1102 (1985)).

3. Will Execution

In *In Re Harris*,[30] the superior court admitted a will to probate even though the witnesses had signed the self-proving affidavit rather than the will itself.

In reaching this result, the court relied extensively upon the Supreme Court's 1991 opinion in *Gardner v. Balboni*,[31] in which the Court admitted to probate a will even though the testator had signed the self-proving affidavit rather than the will itself.[32] A linchpin of the *Gardner* court's opinion had been that our probate statues require only that the testator "subscribe" their will, a term the court defined to require a signature anywhere "underneath" the will rather than at the end of its text.[33] A signature made below the intervening language of the self-proving affidavit thus meets this requirement.[34] The court in this case extended the logic of *Gardner* to the situation where the witnesses, rather than the testator, were the ones who signed the affidavit rather than the will.[35]

In reaching its decision, the court held that the witnesses' signatures complied with the formal statutory requirements for a will execution. The court thus did not consider the extent to which a curative doctrine such as harmless error might be operative to excuse a defective will execution.[36]

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[30] No. HHBCV186042174, 2020 WL 1230815 (Conn. Super. Ct. Feb. 13, 2020).

[31] 218 Conn 220 (1991).

[32] *In re Harris,* 2020 WL 1230815 at *2.

[33] *Id.* at *3 (citing *Gardner*, 218 Conn. at 228).

[34] *Id.* at *2.

[35] *Id.* at *3.

[36] The doctrine of harmless error, or substantial compliance, provides that a will executed in a manner that fails to comply with statutory formalities may nevertheless be admitted to probate if the proponent proves by clear and convincing evidence that the testator intended the document to be a will. For a discussion of the doctrine, see *Litevich v. Prob. Court, Dist. of W. Haven*, No. NNHCV126031579S, 2013 WL 2945055, at *19-20 (Conn. Super. Ct. May 17, 2013), discussed in Jeffrey A. Cooper & John R. Ivimey, *2013 Developments in Connecticut Estate and Probate Law*, 88 Conn. B.J. 51, 57-59 (2014). For an argument in favor of adopting the doctrine in Connecticut, see Jeffrey A. Dorman, *Stop Frustrating the Testator's Intent: Why the Connecticut Legislature Should Adopt the Harmless Error Rule*, 30 Quinnipiac Prob. L.J. 36 (2016). For an example of the doctrine applied to facts similar to those in the current case, see *Matter of Will of Ranney*, 124 N.J. 1 (1991) (holding that witness' signatures on a self-proving affidavit did not comply with statutory requirements but could be excused as harmless error).

4. Malpractice

In *Wisniewski v. Palermino*,[37] the superior court considered whether the intended beneficiaries of a decedent's estate had standing to bring a professional negligence and contract claim against the decedent's estate planning attorney.

The decedent's attorney prepared a Will that left an investment account in five equal shares to his three grandchildren and two other beneficiaries.[38] Upon the decedent's death, the investment account passed to only one of the beneficiaries pursuant to a beneficiary designation on file for the account.[39] The plaintiffs, who were several of the beneficiaries named in the Will, alleged that the attorney advised the decedent that nothing else needed to be done to accomplish the distribution of the investment account to the beneficiaries under the Will.[40]

The defendant, the attorney and his law firm, moved to dismiss the claims on the grounds that the plaintiffs lacked standing because they were not in privity to the decedent's relationship with his attorney.[41] The court reviewed several Connecticut cases regarding third-party liability for an attorney's malpractice and noted that the courts have been reluctant to expand third-party liability. Specifically in this regard, the Court cited *Leavenworth v. Mathes*, in which the Connecticut Appellate Court held that third-party liability for testamentary dispositions is limited to "errors in the drafting and execution of the wills."[42] The Court accordingly dismissed the negligence claim on the grounds that it did not relate to a drafting or execution error.[43]

In contrast, the Court denied the motion to dismiss with respect to the contract claim. The Court found that the plaintiffs had sufficiently pleaded that they were intended third-

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[37] No. HD4HHDCV196115653S, 2020 WL 6781738 (Conn. Super Ct. Oct. 19, 2020).
[38] *Id.* at *1.
[39] *Id.*
[40] *Id.*
[41] *Id.* at *2.
[42] *Id.* at *3 (citing *Leavenworth v. Mathes*, 38 Conn. App. 476, 480 (1995)).
[43] *Id.*

party beneficiaries of the contract between attorney and client and that they were damaged when the Will was not drafted as requested.[44]

B. *Estate and Trust Administration*

1. Domicile

In *Francois v. Poole*,[45] the United States District Court for the District of Connecticut found that a decedent remained domiciled in the probate court district in which he had previously maintained his primary home even though he resided in another state at the time the action was filed.

This case involved a husband and wife who were in the process of getting a divorce.[46] The plaintiff, the husband, sued his soon-to-be ex-wife in federal court, alleging state law claims by invoking diversity jurisdiction.[47] The wife argued that diversity jurisdiction was lacking because she and her husband were both domiciled in Connecticut.[48] The plaintiff countered that he was domiciled in New York where he lived at the time that he filed the action.

In arguing that he was a domiciliary of New York, the plaintiff conceded that he had resided in Connecticut for approximately ten years during his marriage to his wife.[49] However, during a serious illness, the defendant was appointed as plaintiff's conservator and made the decision to relocate the plaintiff to New York to live with his parents.[50] The plaintiff had remained living in New York for about two years at the time of the dispute.[51] He was registered to vote in New York and had a New York driver's license.[52]

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[44] *Id.*

[45] No. 3:20-CV-770 (JHC), 2020 WL 6701371 (D. Conn. 2020).

[46] *Id.* at *1.

[47] *Id. See* 28 U.S.C.A. § 1332 (West) (providing in relevant part that "[t]he district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $75,000, exclusive of interest and costs, and is between… citizens of different States.").

[48] *Id.*

[49] *Id.* at *3.

[50] *Id.* at *2.

[51] *Id.*

[52] *Id.*

The court's analysis focused on the question of domicile, as distinct from mere residence. To change domicile, one must relocate with the "intention to remain."[53] Accordingly, the question before the court was whether the plaintiff could demonstrate by clear and convincing evidence "the required intent to give up the old and take up the new domicile."[54] The court reviewed the evidence presented, including testimony from various prior court proceedings in which the plaintiff stated that he had been moved to New York against his will and requested that he be allowed to return to Connecticut.[55] The court held that this testimony illustrated that the plaintiff did not intend to remain in New York and thus the plaintiff remained domiciled in Connecticut notwithstanding his residency in New York.[56]

This case serves as a reminder of the key distinction between residency and domicile. Questions of domicile are fact-specific determinations that involve consideration of a variety of factors, including an individual's subjective intent when moving from one residence to another.

C. *Probate Litigation*

1. Standing

In *Mason v. Mason*,[57] the superior court considered whether an estate's beneficiaries, rather than the executor, had standing to bring suit on behalf of the estate. The Court held that the beneficiaries in this case did have standing to sue on behalf of the estate because the executor faced a potential conflict of interest that prevented him from bringing this lawsuit.[58]

The case concerned the distribution of the plaintiffs' father's estate.[59] They alleged that the defendant, their step-

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[53] *Id.* (citing *Linardos v. Fortuna*, 157 F.3d 945, 948 (2d Cir. 1998)).
[54] *Id.* at *3 (quoting *Palazzo ex rel. Delmage*, 232 F.3d 38, 42 (2d Cir. 2000)).
[55] *Id.* at *4.
[56] *Id.*
[57] No. FSTCV195021013, 2020 WL 1656214 (Conn. Super. Ct. Mar. 2, 2020).
[58] *Id.* at *3-4.
[59] *Id.* at *1.

mother, had misappropriated estate assets.[60] The defendant moved to dismiss the complaint, arguing that only the executor of the estate had standing to bring a claim on behalf of the estate.[61] The plaintiffs countered that they had standing to bring the claims because the executor had an attorney-client relationship with the defendant and thus was unable or unwilling to bring suit against her.[62]

The court began its analysis by making clear that under ordinary circumstances the executor is the proper person to bring suit on behalf of an estate.[63] As an exception to that general rule, the beneficiaries can bring suit on behalf of an estate if the fiduciary "has failed or refused to act."[64] The court found the exception was met in this case because the fiduciary was an attorney who had represented both the estate and the defendant.[65] That conflict of interest prevented the fiduciary from zealously pursuing the estate's potential claim against the defendant. As a result, the plaintiff beneficiaries had standing to pursue that claim directly.

2. Jurisdiction

In *In Re Buckingham*,[66] the Appellate Court held that the superior court lacks jurisdiction to reconsider a probate court decree, even if the appellant alleges fraud.

The case concerns a will admitted to probate without objection.[67] Long after expiration of the statutory period for filing an appeal, the plaintiffs sought to challenge the will's validity, effectively asking the probate court to reconsider its decree admitting the will.[68] The probate court held that it lacked statutory authority to do so and dismissed the ac-

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[60] *Id.*
[61] *Id.*
[62] *Id.*
[63] *Id.* at *3 (citing *Geremia v. Geremia*, 159 Conn. App. 751, 781, (2015)).
[64] *Id.* (quoting *Geremia*, 159 Conn. App. at 784).
[65] *Id.*
[66] 197 Conn. App. 373 (2020).
[67] *Id.* at 375.
[68] *Id.* at 375. General Statues § 45a-186 provides that appeals in most types of probate matters, including the case at bar, "shall be filed on or before the thirtieth day after the date on which the Probate Court sent the order, denial or decree." In certain enumerated matters the deadline is 45 days rather than 30. *Id.*

tion.[69] The plaintiffs timely appealed that ruling to the superior court, alleging in part that the will's admission to probate had been the product of unspecified fraud.[70] The superior court dismissed the action and a further appeal ensued.[71]

On appeal, the plaintiff's alleged that the superior court had jurisdiction to hear the appeal pursuant to General Statutes Section 45a-24, which gives the court jurisdiction to hear matters involving fraud "without any applicable statutory time limitation."[72] The Appellate Court disagreed, holding that General Statutes Section 45a-24 is unavailable in the context of a direct appeal.[73] The court reasoned that when hearing an appeal from probate, the superior court sits as a court of probate and has only the powers of a probate court.[74] Since a probate court generally has no authority to reconsider or reverse its prior decrees, a superior court sitting as a probate court similarly lacks jurisdiction to reconsider a probate decree absent specific statutory authorization.[75] Section 45a-186 does provide such authorization in the case of a timely-filed appeal.[76] In contrast, Section 45a-24, the provision relied upon by the plaintiffs, authorizes a superior court to exercise its general equitable jurisdiction to hear a *collateral* attack in the case of fraud, not an untimely *direct appeal*.[77] As a result, the plaintiffs could have either filed a

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[69] *Id.* at 376.

[70] *Id.*

[71] *Id.*

[72] *Id.* General Statutes § 45a-24 provides in relevant part as follows: "All orders, judgments and decrees of courts of probate, rendered after notice and from which no appeal is taken, shall be conclusive and shall be entitled to full faith, credit and validity and shall not be subject to collateral attack, except for fraud." *Id.* at n1.

[73] *Id.* at 383.

[74] *Id.*

[75] *Id.* at 378-79 (citing *Delehanty v. Pitkin*, 76 Conn. 412, 417 (1904)). In addition, General Statutes § 45a-128 provides that a probate court may reconsider and modify or revoke an order or decree in four limited circumstances: "(1) For any reason, if all parties in interest consent to reconsideration, modification or revocation, or (2) for failure to provide legal notice to a party entitled to notice under law, or (3) to correct a scrivener's or clerical error, or (4) upon discovery or identification of parties in interest unknown to the court at the time of the order or decree." CONN. GEN. STAT. § 45a-128.

[76] *In re Buckingham*, 197 Conn. App. at 384.

[77] *Id.* at 383 (citing *VanBuskirk v. Knierim*, 169 Conn. 382, 388 (1975)).

timely direct appeal or brought a separate complaint alleging fraud in the superior court. Since they did neither, the court lacked jurisdiction to hear their appeal.[78]

3. Pleadings

In *Cuseo v. Westport-Weston Probate Court*,[79] the superior court considered the effect of several procedural defects in the filing of a probate appeal. The court applied strict procedural requirements, finding that relatively minor procedural violations each warranted dismissal of the appeal.

At issue was an appeal from probate. The defendant moved to dismiss the appeal as untimely because it was filed more than 30 days after the mailing of the order appealed from.[80] The defendant also alleged numerous procedural defects in the appeal.[81] The superior court found the appeal untimely and dismissed on that ground.[82] Nevertheless, the court went on to review the alleged procedural defects and found that each of them provided further basis for dismissal of the appeal.[83]

The court addressed four procedural defects. First, the summons failed to state the court to which it was returnable, thus violating Practice Book 8-1.[84] Second, the plaintiff used a general civil summons, form JD-CV-1, thus also violating Practice Book 8-1, which provides that such form is not to be used in probate appeals.[85] Third, the plaintiff failed to timely

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[78] *Id*. at 384. While clarifying the applicability of the relevant statutes, the Court's opinion may not represent the final disposition of this case. The plaintiffs seemingly could file a new action in the superior court pursuant to General Statutes § 45a-24.

[79] No. FSTCV185019043S, 2020 WL 927643 (Conn. Super. Ct. Jan. 9, 2020).

[80] *Id*. at *3. In reaching this result, the court ruled that the 30-day appeals period began to run on the date the probate court certified that it had mailed its decree, even though the plaintiffs alleged that the postmark on the envelope showed it had not been mailed until two days thereafter.

[81] *Id*. at *3.

[82] *Id*. at *3-4.

[83] *Id*. at *4.

[84] *Id*. Connecticut Practice Book § 8-1 provides that, "Process in civil actions shall be a writ of summons or attachment, describing the parties, *the court to which it is returnable and the time and place of appearance." Id*. at *3 (emphasis added).

[85] *Id*. at *4. Connecticut Practice Book § 8-1 (c) provides that, "Form JD-FM-3, JD-HM-32, and JD-CV-1 shall not be used in the following actions and proceedings . . . (3) Probate appeals." *Id*. at *3.

file reasons of appeal as required by Practice Book 10-76.[86] Fourth, the plaintiff had service on the probate court filed by hand delivery, thus violating General Statutes Section 45a-186(d), which requires service by mail.[87] The court conceded that its attributing legal significance to this distinction "would appear to place form over substance," yet held it could not "overlook the plaintiff's failure to conform" to a clear statutory requirement.[88]

Those filing probate appeals should be aware of this opinion and be wary of the extent to which it requires the strictest compliance with the details of appellate procedure.

4. Tolling of Statute of Limitations

In *Tunick v. Tunick*,[89] the Appellate Court considered whether the continuous course of conduct doctrine applied to toll the statute of limitations in a case involving claims made by a trust beneficiary against former trustees and the bookkeeper for the trust.

The former trustees and bookkeeper argued that the claims against them should be dismissed because they were barred under the relevant statute of limitations for torts, as provided in General Statutes Section 52-577.[90] The plaintiff countered by making several arguments, including that the statute of limitations was tolled pursuant to the "continu-

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[86] *Id.* at *4. Connecticut Practice Book § 10-76 provides that, "Unless otherwise ordered, *in all appeals from probate the appellant shall file reasons of appeal, which upon motion shall be made reasonably specific, within ten days after the return day*; and pleadings shall thereafter follow in analogy to civil actions." *Id.* at *3 (emphasis added). *Cf. Beckett v. Every*, No. HHDCV186095422S, 2020 WL 922175, at *4 (Conn. Super. Ct. Jan. 29, 2020) (suggesting that since the complaint in a probate appeal makes clear the basis for appeal, failure to file a separate reasons of appeal "is merely a technical superfluity.").

[87] *Cuseo*, 2020 WL 927643 at *4. General Statutes § 45a-186(d) provides that, "Not later than fifteen days after a person files an appeal under this section, the person who filed the appeal shall file or cause to be filed with the clerk of the Superior Court a document containing (1) the name, address and signature of the person making service, and (2) a statement of the date and manner in which a copy of the complaint was served on each interested party *and mailed to the Probate Court that rendered the order, denial or decree appealed from." Id.* at *3 (emphasis added).

[88] *Id.* at *4.

[89] 201 Conn. App. 512 (2020).

[90] *Id.* at 519.

ous course of conduct doctrine."[91] The trial court rejected the plaintiff's arguments and granted the motions for summary judgment filed by the former trustees and the bookkeeper.[92]

In reaching its result, the Appellate Court reviewed the three-prong test for application of the continuous course of conduct doctrine. The doctrine applies when (1) the defendant committed an initial wrong upon the plaintiff; (2) the defendant owed a continuing duty to the plaintiff; and (3) the defendant continually breached that duty.[93]

When applying this test to the bookkeeper who assisted the former trustees, the Appellate Court held that the test had not been met because the bookkeeper did not owe a duty directly to the plaintiff.[94]

With respect to the former trustees, the Court reasoned differently. The Court found that the trustees did owe duties toward the beneficiaries and those duties did not end at the moment the trustees were removed from office.[95] Rather, the trustees had a continuing fiduciary duty to the plaintiff "for some period of time beyond the date of removal."[96] While the Court did not precisely define the duration of this obligation, it reviewed numerous authorities which suggest that the duties of a trustee continue at least until the affairs of the trustee have been fully wound-up and their final account filed.[97] Notwithstanding this continuing duty, the Court found that there was no continuing *breach* of duty after the trustees were removed by the probate court, and thus the third prong of the test had not been met.[98] The Court reasoned that the initial injury alleged by the plaintiff, a failure of the trustees to properly account for certain assets, was an act of malfeasance now barred by the applicable statute of limitations rather than "a continuous series of events that

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91 *Id.*
92 *Id.* at 520.
93 *Id.* at 535 (citing *Martinelli v. Fusi*, 290 Conn. 347, 357 (2009)).
94 *Id.*
95 *Id.* at 541.
96 *Id.* at 541.
97 *Id.* at 538-41.
98 *Id.* at 549.

give rise to a cumulative injury."[99] As a result, the Appellate Court upheld the trial court's ruling that the continuous course of conduct doctrine did not apply.[100]

5. Timeliness of Appeal

In *Cuseo v. Lerner*,[101] the superior court held that the filing of a motion for reconsideration does not extend the 30-day statutory deadline for filing of a probate appeal.

At issue was a dispute over the defendants' legal fees charged to an estate.[102] After the plaintiff had unsuccessfully objected to those fees in probate court, he filed a motion for reconsideration.[103] The probate court denied the motion for reconsideration, holding that the case did not fall within the limited circumstances in which a probate court matter may be reconsidered.[104] The plaintiff then appealed to the superior court.[105] The defendant moved to dismiss the appeal as untimely because it was filed more than 30 days after the probate court's initial ruling approving the legal fees.[106]

The court granted the motion to dismiss in part.[107] The court held that the defendant's filing of a motion for reconsideration did not extend the 30-day statutory deadline for appealing the probate court's decision in the underlying dispute.[108] Since the plaintiff's appeal was filed more than 30 days after the mailing of that decision, the court lacked ju-

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[99] *Id.* at 548.

[100] *Id.* at 549.

[101] No. FSTCV195021329S, 2020 WL 1656176 (Conn. Super. Ct. Feb. 21, 2020).

[102] *Id.* at *1.

[103] *Id.*

[104] *Id.* Pursuant to General Statutes § 45a-128, a probate court may reconsider and modify or revoke an order or decree in four limited circumstances: "(1) For any reason, if all parties in interest consent to reconsideration, modification or revocation, or (2) for failure to provide legal notice to a party entitled to notice under law, or (3) to correct a scrivener's or clerical error, or (4) upon discovery or identification of parties in interest unknown to the court at the time of the order or decree." CONN. GEN. STAT. § 45a-128.

[105] *Cuseo*, 2020 WL 1656176 at *1.

[106] *Id.* General Statutes § 45a-186(b) provides that appeals in most types of probate matters, including the fee dispute at issue, "shall be filed on or before the thirtieth day after the date on which the Probate Court sent the order, denial or decree." In certain enumerated matters the deadline is 45 days rather than 30. *Id.*

[107] *Id.* at *3-4.

[108] *Id.* at *4.

risdiction to hear that appeal.[109]

Even though the court lacked jurisdiction to hear an appeal of the underlying fee dispute, the plaintiff had timely appealed the probate court's denial of his motion for reconsideration. Accordingly, the court did have jurisdiction to review the propriety of that denial.[110]

6. Unauthorized Practice of Law

In *Cook v. Purtill*,[111] the Appellate Court held that a trustee who is not an attorney cannot represent the trust in litigation.

The case centered on the proper interpretation of General Statutes Section 51-88, which provides that a non-attorney seeking to appear in court can do so solely when "representing one's own cause," and not when acting "in a representative capacity."[112] The Court held that a trustee seeking to pursue litigation would be doing so in a representative capacity and thus the plaintiff was precluded from doing so because he was not a licensed attorney.[113]

7. Legal Fees

In *Lamberton v. Lamberton*,[114] the Appellate Court held that an executor who is nominated in a will but not yet appointed by a probate court has standing to seek reimbursement of legal fees incurred in defending a will contest.

The case concerned a protracted will contest.[115] The defendant, the nominated executor under the decedent's will, successfully petitioned the probate court pursuant to Gener-

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[109] *Id.*

[110] *Id. See also Rider v. Rider*, No. CV186090440S, 2020 WL 854675 (Conn. Super. Ct. Jan. 29, 2020) (affirming a probate court's denial of a motion to reconsider filed pursuant to General Statutes § 45a-128).

[111] 195 Conn. App. 828 (2020).

[112] *Id.* at 831 (quoting *Gorelick v. Montanaro*, 119 Conn. App. 785, 793 (2010)). General Statutes § 51-88(d) provides in relevant part that "[t]he provisions of this section [prohibiting the unauthorized practice of law] shall not be construed as prohibiting… any person from practicing law or pleading at the bar of any court of this state in his or her own cause." CONN. GEN. STAT. § 51-88.

[113] *Cook*, 195 Conn. App. at 831.

[114] 197 Conn App. 240 (2020).

[115] *Id.* at 242-43.

al Statutes Section 45a-294 for reimbursement of legal fees incurred and an allowance against future expenses.[116] The plaintiffs, who objected to admission of the will, appealed the probate court's ruling to the superior court, arguing that reimbursement under General Statutes Section 45a-294 is available only to duly-appointed executors.[117] The superior court affirmed and a further appeal ensued.[118]

On review, the Appellate Court affirmed. Since the term "executor" is not defined in General Statutes Section 45a-294, the Court needed to rely on other principles of statutory construction.[119] In this effort, the Court found most compelling the fact that the language of Section 45a-294 provides that an executor may seek reimbursement for fees spent defending a will "whether or not the will is admitted to probate."[120] The Court reasoned that if only a duly-appointed executor counted as an "executor" for purposes of Section 45a-294, then it would be impossible for a nominated executor to claim reimbursement if the will were not admitted to probate.[121] Because the plaintiff's interpretation of the statute would thus "render the critical portion of the statute – 'whether or not the will is admitted to probate' – meaningless," the Court affirmed the ruling in favor of the defendant.[122]

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116 *Id.* at 243.
117 *Id.*
118 *Id.*
119 *Id.* at 246.
120 *Id.* at 248.
121 *Id.*
122 *Id.*

Business and Commercial Litigation in Federal Courts, Fifth Edition

–Robert L. Haig, Editor-In-Chief, American Bar Association Section of Litigation & Thomson Reuters, 2022. 19,866 pages.

If you want to know everything there is to know about commercial litigation in federal courts – from pre-suit analysis and litigation avoidance, to commencing, prosecuting and defending specific types of claims, to post-judgment enforcement mechanisms and appeals – then the Fifth Edition of *Business and Commercial Litigation in Federal Courts*, an extensive treatise edited by Robert L. Haig, is a must-have resource. The sixteen-volume set, which is also available online as an eBook through Thomson Reuters, includes comprehensive coverage of every possible issue you might face in litigating a commercial matter in federal court and contains digital access to hundreds of useful forms associated with each of the topics covered in the treatise.

The last edition, published in 2016, consisted of fourteen volumes covering every topic one could imagine encountering in federal court litigation. The new Fifth Edition updates the existing chapters with the latest information and adds to this remarkable coverage with 26 new chapters covering such timely and forward-looking topics as Artificial Intelligence, Climate Change, Virtual Currencies, Corporate Sustainability and Environmental, Social, and Governance (ESG) criteria and Shareholder Activism. The Fifth Edition also incorporates new chapters on the business of running an effective litigation practice, including such topics as Fee Arrangements, Budgeting and Controlling Costs and Third-Party Litigation Funding. A few of these newly incorporated chapters are the focus of this review.

Chapter 80: *Artificial Intelligence*. In 2022, the EEOC cautioned employers on potential biases and discrimination in the use of artificial intelligence, or "AI," in hiring deci-

sions, and the City of New York enacted legislation penalizing employers where bias was found in the use of AI in hiring. Product liability claims involving AI, from self-driving car accidents to security breaches in personal devices like cell phones, are on the rise and will become a regular part of litigation practice for many firms.

Chapter 80 of the Fifth Edition starts with background explaining what AI is and where and how it is used before setting out detailed information about the types of claims a litigator might encounter which involve AI. Cross-references and links in the eBook version to related substantive areas of the law, such as class actions and product liability claims in federal court, allow the reader to move seamlessly through the Fifth Edition to obtain a full understanding of potential claims. A checklist section provides examples of protective order language where disclosure of a party's trade secret algorithm will be necessary in discovery.

In addition to federal claims that might be litigated over the use of AI, the chapter also addresses the surge in the use of AI by lawyers and law firms, for instance, to conduct "technology assisted review" or "TAR" of electronically stored information. The chapter provides tips on how to effectively utilize TAR in litigation and avoid problems with quality control over results. The chapter also provides insight into ethical issues associated with use of AI for conducting legal research and litigation analysis.

Chapter 98: *Corporate Sustainability and ESG*. With the SEC mandating that public corporations disclose certain environmental, social and governance (ESG) information, the Fifth Edition now includes an entire chapter on new litigation stemming from enforcement of these new regulations, as well as on investor and shareholder responses to ESG disclosures (or lack of disclosures).

While the role of ESG in corporate governance may, by itself, trigger volumes of discussion on a controversial topic, this chapter focuses on providing a tool for navigating the

new world of social responsibility in the corporate context. Beginning with a comprehensive discussion on the growing trend toward implementing ESG requirements, the chapter sets out in detail the potential arenas in which ESG litigation will take place, including application of consumer protection and unfair competition laws, labor disputes, board governance, fiduciary duty and shareholder actions, and various tort theories that might come into play. Sections also focus on SEC and DOL enforcement actions that are likely to increase over the next decade as ESG becomes a standard part of corporate litigation. The chapter also addresses the interplay between ESG litigation and climate litigation, which also is a new chapter in the Fifth Edition (*see below*).

Lastly, the chapter contains excellent "practice aids," including an ESG checklist to help advise your publicly traded corporate clients on ESG compliance before litigation commences. As with other sections, the chapter also includes sample forms and jury instructions, just in case.

Chapter 111: *Virtual Currency*. The bankruptcy filing and federal investigation of the cryptocurrency exchange, FTX Trading Ltd., continues to fill the news headlines, and the litigation fallout will likely continue for the foreseeable future. But because the concept of cryptocurrency is so new, the landscape of litigation in the field is still very much in the infancy stages. Chapter 111 of the Fifth Edition centers entirely on what a litigator needs to know to be proficient in the field, from an overview of the blockchain technology behind cryptocurrencies and non-fungible tokens ("NFTs"), to federal regulation and enforcement actions regarding such currencies, to the fundamentals of civil litigation of claims over the sale and use of those currencies and related "smart contracts."

Are cryptocurrencies, NFTs, or related contracts subject to federal regulations under the Securities Act of 1933 and the Securities and Exchange Act of 1934? Your answers are in this section. The Fifth Edition synthesizes this new area

of the law into useful sub-topics, cross-references existing substantive areas of the law that intersect with novel issues involving cryptocurrency claims, analyzes the existing case law in the field, and provides checklists to assist in litigating virtual currency claims.

Each section under "Civil Litigation Involving Virtual Currencies" includes not only insightful practice tips associated specifically with cases involving virtual currencies, but also links directly to other areas of substantive law within the treatise that have been utilized in existing cases to address the new legal area of virtual currencies. Of particular interest, the chapter includes everything you need to know to assert or defend virtual currency claims for violations of federal securities or trade secret laws and trademark infringement.

We found the eBook edition to be particularly useful in allowing the reader to toggle between sections of the treatise, as well as articles and cases on Westlaw, for a complete overview of relevant topics. The "Discovery and Evidentiary Issues" section includes a useful practice guide to navigating the typically anonymous world of cryptocurrency and blockchain transactions, including the importance of utilizing forensics and the swiftly evolving evidentiary rules for authenticating records stored in blockchain.

Chapter 174: *Art Law*. As this chapter aptly begins, "[a]rt litigation is on the rise." From contract and ownership disputes, to claims of forgery and fraud, to infringement claims and, more recently, to the intersection and use of art in the virtual currency world of NFTs, global litigation in the art world has turned significantly complex in the last decade. This chapter provides the springboard for understanding this area of the law, reviewing how courts have addressed art-related claims, and providing a framework to formulate claims and defenses on behalf of your own clients.

The chapter provides useful practice tips, beginning with how and why to avoid public litigation altogether to prevent

potentially impacting the value of a work of art. This section dovetails well with Chapter 72 in the treatise on *Litigation Avoidance and Prevention*.

Key concepts around meeting the federal amount-in-controversy are discussed with references to standards applied to date, mostly in the Second Circuit, for ascertaining whether a work of art meets the $75,000 threshold. Naturally, determining the value of a work of art requires an understanding of such factors as authenticity of the work. A substantial portion of this chapter is devoted to issues and disputes involving authenticity and provenance. In addition to standard advice on the importance of expert testimony, the chapter focuses on navigating the various legal standards that have developed in art-related cases.

Choice of law issues also frequently arise in disputes regarding ownership of artwork. For instance, in addition to existing federal and state trademark, copyright, RICO and UCC laws already utilized in art-related cases, the United States has enacted numerous statutory schemes to address claims regarding stolen, copied or destroyed artwork, including the Holocaust Expropriated Art Recovery Act, the Visual Artists Rights Act and the Architectural Works Copyright Protection Act, often making litigation in a United States federal court more attractive to litigants. This chapter homes in on how best to formulate claims and convince courts to apply these protective laws to art-related claims. And, as with other chapters in this treatise, links are provided to existing and related substantive areas of the law which might apply in an art-related case.

Chapter 178: *Climate Change*. Along with the new chapter on Corporate Sustainability and ESG, the Fifth Edition includes a new chapter devoted to litigation regarding climate change in general. The political shift in presidential administrations, and whether the United States remains in or out of the Paris Agreement on climate change, also impacts the direction and frequency of lawsuits raising global

warming and climate change claims. While this field of law remains in the very early stages, litigation in this space is on the rise, particularly as private plaintiffs seek ways to assert claims against entities in the energy and manufacturing sectors.

Much of this chapter involves speculation. Regulatory, corporate governance and ESG reporting issues (*see above*) certainly will lead to claims. But as the chapter predicts, litigation also is likely to grow in such areas as common law torts and climate-related provisions in commercial and insurance contracts. The links to cases already addressing climate change litigation are a good starting place for any research on the issue.

Of course, the Fifth Edition also includes updated analysis and reference of topics already in the treatise, providing an excellent starting point for those who are new to litigating in federal courts as well as for experienced practitioners who seek an in-depth discussion of complex procedural issues. For instance, the treatise provides well researched and comprehensive discussions about complex topics such as RICO litigation, including addressing arguments that can be made in support of the claims and to defeat the claims. It provides comprehensive guidance about class actions and multidistrict litigation, including insight from dozens of accomplished practitioners on virtually every issue or complication likely to arise in the course of litigating such matters.

All the chapters are well researched and address the topics in a sophisticated and comprehensive manner with hundreds of links to relevant case law, statutes, secondary sources and practice aids. After reading each chapter, the practitioner is left with a sense of command over the subject matter and confidence in how to address contested issues. Everything is geared to the practitioner and designed to provide the practitioner with the tools needed to litigate in the federal courts at a high level.

The Fifth Edition is so comprehensive that we found ourselves considering all the headaches we could have avoided

in dealing with complex or unique federal practice questions if we had started by reviewing chapters in the treatise. For instance, in a recent matter, a plaintiff attempted, under Fed. R. Civ. P. 41, to voluntarily withdraw a federal court complaint against our client without prejudice. The same plaintiff had previously withdrawn a similar case against the client in state court which, under Rule 41, raised the question of whether we could respond that the second dismissal in federal court had to be *with prejudice*. Instead of searching for cases addressing this unique situation, separately researching whether a *with prejudice* dismissal had res judicata effect and, all the while risking swift entry of a dismissal by the Court, we could have started with Chapter 22 of the treatise which quickly answers all of our questions. In a single section (Section 22:38, for those who are interested), we found everything we needed to know on the topic, which would have allowed us to strategize and file responsive pleadings almost instantaneously.

In short, rather than simply explaining each issue that might arise in federal litigation, the treatise provides analysis on the interplay between theories and rules, providing a meaningful tool for thinking strategically about such issues. The Fifth Edition, particularly the electronic eBook version, should be a go-to resource for any litigator practicing in federal court.

—David P. Friedman*

—Lorey Rives Leddy**

* Of the Stamford Bar.
** Of the Hartford Bar.

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