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

Advertising: advertise@ctbar.org

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2022 CONNECTICUT APPELLATE REVIEW

By Wesley W. Horton and Kenneth J. Bartschi*

Co-author Bartschi yields to co-author Horton to make a personal statement.

Since the Connecticut Supreme Court's 1978-1979 term, I have been either the sole author of this annual Connecticut Appellate Review (1978-1984) or a co-author with Kenneth Bartschi (since 2000), Susan Cormier (1993-2000) and Alexandra Davis (now the Honorable Alexandra DiPentima) (1984-1993), which makes this Review number 44. It also will be my last, so I hereby bequeath my role to co-author Bartschi and whomever he chooses to co-author number 45.

When I started in 1978 there was no Appellate Court, Chief Justice Charles House had just retired, Justice John Cotter had just replaced him, and Yale Professor Ellen Ash Peters had just been appointed as an Associate Justice. Over the course of the next twenty-two years, twelve of them as Chief Justice, Peters would give the court an intellectual heft it had not had since Chief Justice William Maltbie retired in 1950. Most important, she got the attention of lawyers and the public with her vigorous revitalization of the Connecticut Constitution. During that period she had a very able colleague and foil in Justice David Shea in the 1980s and Justice David Borden in the 1990s.

Emphasis on the Connecticut Constitution did not wane when Justice Peters was constitutionally required to retire at age 70 in 2000. This Review each year before and since then has discussed all of the areas the Supreme Court has advanced into concerning the Connecticut Constitution. At the same time, this Review has often criticized lawyers for not paying sufficient attention to the Connecticut Constitution.

Since the advancement of state constitutional litigation is the one professional subject I would most like to be remem-

* Of the Hartford Bar

bered for, and since there is plenty of grist for that mill in the decisions issued in 2022, the Supreme Court section of this Review will focus more attention than usual on the Connecticut Constitution.

That ends my personal statement. Now to our joint 2022 Review.

I. Supreme Court

Lots of decisions in 2022 concerned individual rights, but only a handful specifically discuss the Connecticut Constitution. One of the most important decisions to do so is *State v. Patel*,[1] involving the confrontation clause. After first holding that the statement of a co-conspirator to a fellow inmate inculpating the defendant is non-testimonial under the Sixth Amendment of the United States Constitution,[2] the Supreme Court discussed article first, § 8 of the Connecticut Constitution and whether it would require a more protective approach, especially if the government had any role in inducing the conversation. While the court was not persuaded to depart from the federal standard on the record in this case, it left a broad hint that this general issue was a promising one for a future case.

Another important state constitutional decision is *State v. Jose A.B.*,[3] concerning *voir dire*. The issue was whether distrust of law enforcement is a race-neutral reason for exercising a preemptory challenge. Federal constitutional law clearly says yes,[4] so the issue was joined under article first, §§ 1, 8, 19 and 20 of the Connecticut Constitution. After an extensive analysis of the six *Geisler* factors,[5] the court declined to hold that the Connecticut constitution provided greater protection in light of a task force convened to address the issue. Unfortunately, the issue was not preserved at trial and

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1 342 Conn. 445, 270 A.3d 627, *cert. denied*, 143 S. Ct. 216 (2022).
2 Crawford v. Washington, 541 U.S. 36 (2004).
3 342 Conn. 489, 270 A.3d 656 (2022).
4 Hernandez v. New York, 500 U.S. 352 (1991).
5 Text, history, federal precedents, Connecticut precedents, out-of-state precedents, and contemporary norms. State v. Geisler, 222 Conn. 672, 684-86, 610 A.2d 1225 (1992).

so had to be raised under the four prongs of *State v. Golding*[6] as modified by *In re Yasiel R.*,[7] the most important prong being whether the trial record is adequate to decide the issue.

Jose A.B. thus highlights what is and is not working for the Connecticut Constitution: appellate lawyers make good, even if not always successful, appellate arguments on the subject, but trial lawyers often miss the issue entirely, thus leaving the appellate lawyers with a less than ideal record. In thirteen decisions, about one-third of all the Supreme Court decisions in which a constitutional issue was raised in 2022, the Supreme Court had to say that the issue, state or federal, was reviewed under *Golding*. This is frankly rather shocking.

In *In re Ivory W.*,[8] appellate counsel raised both state and federal constitutional issues but trial counsel had raised only a federal one, showing again that the Connecticut Constitution is an afterthought to many lawyers. *Ivory W.* was a termination of parental rights case. The mother had a criminal trial pending and wanted the termination trial continued until her criminal trial had been held. She claimed at the termination trial that the denial of a continuance violated her self-incrimination rights under the Fifth Amendment. The Supreme Court held that the penalty of a non-continuance was not so severe as to violate the Fifth Amendment. The court then turned under *Golding* to article first, §§ 8 and 10 and discussed at length the fundamental rights of parents to raise their children versus the public policy against allowing children to remain in foster care for a lengthy period. On balance, the latter policy prevailed on the facts of the case.

State v. Pan[9] concerns a right to bail under the Connecticut Constitution, and the good news is there is nary a footnote to *Golding*. Construing the bail provision in article first, § 8, the Supreme Court required that more extensive procedures be available to defendants after arraignment in order

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6 213 Conn. 233, 567 A.2d 823 (1989).
7 317 Conn. 773, 120 A.3d 1188 (2015).
8 342 Conn. 692, 271 A.3d 633 (2022).
9 345 Conn. 922, 291 A.3d 82 (2022).

to challenge bail orders.

We must also give credit to counsel for raising a Connecticut constitutional argument in *State v. Belcher*[10] that the defendant's sentence was disproportionate under article first, §§ 8 and 9. This is a subject worthy of future consideration, but the defendant won on a separate argument that the trial court at sentencing had improperly referred to him as a charter member of a group of superpredators.

In *State v. Gray*,[11] concerning the extent to which coercive measures that are taken to force a witness to testify might violate the defendant's right to a fair trial, the defendant raised only a federal constitutional issue. While the defendant did not prevail on the facts, the Supreme Court was very concerned about making sure that trial courts employed the least restrictive means necessary to ensure that a material witness appears in court.

In *In re Annessa J.*,[12] a parental rights termination case, a virtual trial was held in the fall of 2020, at the height of COVID-19. Via *Golding*, the mother claimed a state and federal constitutional right to a trial in court. The federal due process claim failed for an inadequate record. The state claim, however, was based in part on the "open courts" provision in article first, §10. The record was adequate for the claim that "open" means "in person." However, the court construed it as not necessarily requiring courts to conduct trials in person.

One major case in which the Supreme Court explicitly noted that no constitutional claim was raised is *Commission on Human Rights & Opportunities v. Edge Fitness, LLC*,[13] holding that General Statutes § 46a-64(b)(1) of the Public Accommodations Act does not contain an implied gender privacy exception for women-only workout areas.[14] While the

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[10] 342 Conn. 1, 4 n.3, 268 A.3d 616 (2022).
[11] 342 Conn. 657, 271 A.3d 101 (2022).
[12] 343 Conn. 642, 284 A.3d 562 (2022).
[13] 342 Conn. 25, 38 n.10, 268 A.3d 630 (2022).
[14] Several amicus briefs were filed at the invitation of the court. *Id.* at 31 n.5. Mr. Bartschi filed an amicus brief on behalf of GLAD, Lambda Legal, and the Connecticut TransAdvocacy Coalition.

court concluded that the statutory text adopted in 1994 was clear, 28 years is a long time ago in this area of the law and the court suggested at the end of its opinion that the legislature may wish to re-examine its understanding of the terms "gender" and "sex." We would also note that article first, § 20, unlike the U.S. Constitution, expressly bans discrimination on the basis of sex. That constitutional term invites examination by the court.

Another case that does not raise a Connecticut constitutional issue but nevertheless also demonstrates how the Connecticut Constitution deviates from the U.S. Constitution is *State v. Gore*,[15] in which the Supreme Court overruled *State v. Finan*[16] and held that lay opinion testimony that relates to the identification of a person in a video or photograph may be admissible as an ultimate issue under the Connecticut Code of Evidence. The important constitutional point is that the Code had been adopted by the justices of the Supreme Court and judges of the Appellate and Superior Courts. The Supreme Court exercised its ultimate power as the head of the judicial branch to amend the Code. Such a result would be inconceivable under the U.S. Constitution, which places such a matter under the ultimate control of Congress.

One Connecticut constitutional case not involving article first is *In re Petition of Reapportionment Commission Ex. Rel.*,[17] concerning reapportionment of Connecticut's five Congressional districts. The legislature deadlocked, so article third, § 6 as amended put that duty on the Supreme Court. The court ordered a special master to do as little as possible to change the 2012 reapportionment map, which also was court-ordered and followed along the lines of the 2002 map agreed-to by a bipartisan commission of the legislature.

This is about all there is for the Connecticut Constitution in 2022. To press home our argument that lawyers too often treat state constitutional litigation as an afterthought,

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[15] 342 Conn. 129, 269 A.3d 1 (2022).
[16] 275 Conn. 60, 881 A.2d 187 (2005).
[17] 342 Conn. 271, 268 A.3d 1185 (2022).

we now list major constitutional decisions in 2022 where it appears no state issue was raised or, if it was, it was not separately briefed (in which case the court assumes that the Connecticut Constitution means the same thing as the federal one).

Here is the list: *State v. Morel-Vargas*[18] (waiver of right to testify can be made by counsel under the Fifth Amendment); *State v. Police*[19] (John Doe arrest warrant identifying subject only through partial DNA profile violates the Fourth Amendment); *State v. Samoulis*[20] (emergency aid exception to Fourth Amendment read broadly to include the reasonable possibility that there was a dead body in the house); *State v. Brandon*[21] (defendant not in custody under *Miranda*); *State v. Smith*[22] (Fourth Amendment violated because warrant to search cell phone did not particularly describe the place to be searched); *Diaz v. Commissioner of Correction*[23] (police officer serving as defense counsel does not automatically create an actual conflict under the Sixth Amendment); *State v. Mekoshvili*[24] (unanimity charge on elements of a self-defense claim not required under Sixth Amendment; Connecticut cases, but not the Connecticut Constitution, cited); *Saunders v. Commissioner of Correction*[25] (incompetency of the accused satisfies cause prong to excuse procedural default under Fifth Amendment; whether the Court is saying anything about the Connecticut Constitution is unclear); *Adams v. Aircraft Spruce & Specialty Co.*[26] (minimum contacts under federal due process not met just because plaintiff

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[18] 343 Conn. 247, 273 A.3d 661, *cert. denied*, 143 S. Ct. 263 (2022). The state issue was not separately briefed. *Id.* at 251 n.2.

[19] 343 Conn. 274, 273 A.3d 211 (2022).

[20] 344 Conn. 200, 278 A.3d 1027 (2022).

[21] 345 Conn. 702, 278 A.3d 71 (2022), *pet. cert. filed*, U.S. Sup. Ct. No. 22-7197 (4/4/23).

[22] 344 Conn. 229, 278 A.3d 481 (2022).

[23] 344 Conn. 365, 279 A.3d 147 (2022).

[24] 344 Conn. 673, 280 A.3d 388 (2022).

[25] 343 Conn. 1, 272 A.3d 169 (2022).

[26] 345 Conn. 312, 284 A.3d 312 (2022). Unusually, the *Adams* action makes appearances in both sections of this Review. Not only did the Supreme Court affirm the granting of the motion to dismiss, but earlier in the year the Appellate Court had affirmed the grant-ing of summary judgment to a different defendant. *See infra* note 74.

lives in Connecticut); *State v. Ortega*[27] (hearsay statement of 3-year-old admissible under tender years statute consistent with Sixth Amendment); and *State v. Douglas C.*[28] (following Sixth Amendment unanimity rule of most federal circuit courts — but not the Second Circuit — that a single count alleging a single statutory violation is duplicitous when there are multiple separate incidents, each of which violates the statute). We could cite similar cases from previous years, but you get the point.

We conclude our discussion of the Connecticut Constitution by stating the obvious: it is alive and well whenever the lawyers think to raise an issue under it and present the issue properly. Doing so often involves a lot of original research and creative thinking but the rewards can be great for the client and especially for a free society. The Supreme Court and Connecticut bar leadership need to encourage lawyers to take the Connecticut Constitution seriously.

Now to significant statutory and common law decisions. If you are a zoning lawyer, you should read *Pfister v. Madison Beach Hotel, LLC*,[29] which holds that a Planning & Zoning Commission cannot deny a site plan application for a permitted use simply because it will be part of a non-conforming use. Zoning lawyers should also advise their clients to be careful what they say at a Planning & Zoning Commission meeting, which may not be quasi-judicial for the purpose of defamation law under *Priorie v. Haig*.[30]

If you are a corporate lawyer, you should read *Klass v. Liberty Mutual Insurance Company*,[31] in which the court took note of industry practice in conducting appraisals and narrowly construing the meaning of "coverage" in an insurance contract.

If you are a family lawyer you should read *O.A. v. J.A.*,[32]

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[27] 345 Conn. 220, 284 A.3d 1 (2022).
[28] 345 Conn. 421, 285 A.3d 1067 (2022).
[29] 341 Conn. 702, 267 A.3d 811 (2022).
[30] 344 Conn. 636, 280 A.3d 402 (2022).
[31] 341 Conn. 735, 267 A.3d 847 (2022).
[32] 342 Conn. 45, 268 A.3d 642 (2022). Mr. Bartschi represented the plaintiff.

holding that determining the validity of a marital agreement can be postponed until the end of trial regardless of whether the agreement is prenuptial, post-nuptial, or separation. Family lawyers especially need to advise clients that their actions during the trial court proceedings may adversely affect their appeals. In *Cohen v. Cohen*,[33] the trial judge was overheard to remark, referring to the plaintiff: "I just am not gonna have that stupid woman talk." The Supreme Court reviewed the plaintiff's activities in the trial court record and did not reverse. Finally, when it is time to return a child to the other parent, a parent's failure to take any action to induce a recalcitrant child to go can satisfy the refusal to return element under the custodial interference statute,[34] as in fact happened in *State v. Lori T.*[35]

If you are a personal injury lawyer, you need to read *Peek v. Manchester Memorial Hospital*,[36] holding that the two-year negligence statute of limitations[37] runs from the date that the plaintiff knows or should have known of "actionable harm," which means when the plaintiff knew or should have known of the injury *and* whom to sue. Personal injury lawyers also should read *Riccio v. Bristol Hospital, Inc.*,[38] holding that the accidental failure of suit statute[39] will not rescue a case that was dismissed because of the lawyer's failure to know the law if the law was clear and had been in effect for a while. In an appeal on questions certified to it by the Second Circuit Court of Appeals,[40] the court in *Glover v. Bausch & Lomb, Inc.*,[41] held that a failure of a product seller to report an adverse medical event to the Food & Drug Administration can raise a claim under the Connecticut Product Liability Act, which however provides an exclusive remedy

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[33] 342 Conn. 354, 270 A.3d 89 (2022).
[34] Conn. Gen. Stat. § 53a-98(a)(3).
[35] 345 Conn. 44, 282 A.3d 1233 (2022).
[36] 342 Conn. 103, 269 A.3d 24 (2022).
[37] Conn. Gen. Stat. § 52-584.
[38] 341 Conn. 772, 267 A.3d 799 (2022).
[39] Conn. Gen. Stat. § 52-592.
[40] 4 F.4th 229 (2d. Cir. 2021).
[41] 343 Conn. 513, 275 A.3d 168 (2022). *See also* 43 F.4th 304 (2d. Cir. 2022) (remanding action to District Court following Connecticut Supreme Court's decision).

and therefore preempts a claim under the Connecticut Unfair Trade Practice Act. Finally, tort lawyers should attend to the long-arm statute decision in *Adams*, cited above.[42]

Trust and estate lawyers should read *Day v. Seblatnigg*,[43] holding that in a voluntary conservatorship the conservator, not the conserved person, has sole control over the estate property.

Finally, we discuss a case of specific interest to tax lawyers but of general interest to all lawyers on how to construe statutes. The issue in *Seramonte Associates, LLC v. Hamden*[44] was the definition of "submit" in General Statutes § 12-63(c)(9), which imposes a sizeable penalty if certain tax information is not submitted to the town by a certain date, in this case June 1. The plaintiff mailed the information on May 31 but it was not received until June 2.

The result was unanimous (the taxpayer lost), but the reasoning was not. The majority said the statutory language is clear and unambiguous: "submit" means "received by the town." Pursuant to the plain language statute,[45] that conclusion ended the discussion. Justice Ecker, joined in part by Justice McDonald, shredded the majority's reasoning in a concurring opinion by showing that the only thing that is clear is that "submit" is ambiguous. While he expressly said he was not considering any question about the constitutionality of General Statutes § 1-2z,[46] that statute is the root of the problem. One branch of government should not tell another branch how to do its job. The judiciary has the job, among others, of saying what the law is. Section 1-2z requires the judiciary to read the statutory text and its relation to other statutes; if the text is clear and not absurd or unworkable, § 1-2z requires the court's analysis to stop there. But finding clear language to encompass a specific legislative thought, especially as time goes by, is a difficult job. The process of

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[42] *See supra* note 26.
[43] 341 Conn. 815, 268 A.3d 595 (2022).
[44] 345 Conn. 76, 282 A.3d 1253 (2022).
[45] CONN. GEN. STAT. § 1-2z
[46] *Id*. at 115 n.9.

saying what the law is is not made fairer when judges cannot look beyond what they may think is a clear statute to sources that on occasion would be sufficiently persuasive to change their minds.

Without saying so directly, Justice Ecker's excellent disquisition on the nature of ambiguity shows why § 1-2z has no business directing the Supreme Court's decision-making process. That statute is a violation of separation of powers pursuant to article second of the Connecticut Constitution.

II. Appellate Court

The Appellate Court issued 366 published decisions in 2022 by the authors' count, which is down considerably from the roughly 450-500 the Court typically decides in a year. The reduction is surely the result of the effects of COVID-19 on court operations in 2020. For some time during 2020, the trial courts heard only a limited number of cases, mostly those deemed of high importance. Although the appellate system quickly moved to virtual hearings, it took longer for the trial courts to adapt in light of procedures needed to deal with evidence and witnesses. Hence, few cases were tried in 2020 leading to few decisions to appeal.

The reduction in cases has not affected the reversal rate, which was approximately 18% overall. A handful of cases were submitted on briefs, only one of which resulted in reversal. It is for that reason that the authors repeated their annual admonition to appellants not to waive oral argument, if given a choice.

The reduction in the number of decisions does not deprive the authors of interesting cases to discuss. We begin with appellate procedure and everyone's favorite, the final judgment rule. In *State v. Guild*,[47] the denial of a motion to dismiss a petition to extend a psychiatric commitment was not a final judgment because the trial court might deny the petition on its merits. Ruling en banc, the court held in *Fairlake Capi-*

[47] 214 Conn. App. 121, 279 A.3d 222 (2022).

tal, LLC v. Lathouris[48] that a denial of a motion to discharge a lis pendens pursuant to General Statutes § 52-325a is final, even where there is no hearing on the motion. And in *Paniccia v. Success Village Apartments, Inc.*,[49] the court held that a trial court decision to allow reargument after a party had filed an appeal did not destroy jurisdiction over the appeal. The court noted that *RAL Management, Inc. v. Valley View Associates*[50] *sub silencio* overruled *Gardner v. Falvey*,[51] which reached the opposite result to *Paniccia*.

While appealing too early results in dismissal and the need to refile at the proper time, appealing too late, especially when the appeal period is statutory, can be fatal. In *Housing Authority v. Parks*,[52] the court concluded that the five-day appeal period set out in General Statutes § 47a-35 applies to both landlords and tenants, and so the plaintiff's motion to reargue filed after the appeal period had run was too late, depriving the Appellate Court of jurisdiction of the ensuing appeal.

Decisional law on stays is somewhat thin because the court seldom issues published opinions on motions for review. A rare and commendable exception in 2022 was *Rek v. Pettit*,[53] where the court held that visitation orders, for purposes of the exemption from the automatic stay,[54] include orders pertaining to health-care providers intended to facilitate visitation. In *Rek*, the trial court abused its discretion in denying a motion to stay an order suspending therapy sessions for the child where the court relied on the judgment of a different therapist who did not testify.

Two decisions clarified the standard of review when the claim is insufficient evidence to support the result. In *Cock-*

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[48] 214 Conn. App. 750, 281 A.3d 1240 (2022) (en banc).

[49] 215 Conn. App. 705, 284 A.3d 341 (2022).

[50] 278 Conn. 672, 899 A.2d 586 (2006).

[51] 45 Conn. App. 699, 697 A.2d 711 (1997).

[52] 211 Conn. App. 528, 273 A.3d 245 (2022).

[53] 214 Conn. App. 854, 280 A.3d 1260, *cert. dismissed*, 345 Conn. 969, 285 A.3d 1126 (2022). Note that interlocutory appellate orders are not immediately appealable. State v. Ellis, 224 Conn. 711, 719-21, 621 A.2d 250 (1993).

[54] *See* Practice Book § 61-11(c).

ayne v. Bristol Hospital, Inc.,[55] the court held that plenary review applies to insufficiency of the evidence claims, acknowledging that courts have said in the past that the abuse of discretion standard applies to review of a motion to set aside or motion for JNOV. And in *Rossonova v. Charter Communications, LLC*,[56] the court clarified that plenary review also applies to review of a motion for JNOV where the claim is insufficient evidence.

Turning to civil procedure, in *Deutsche Bank AG v. Vik*,[57] the court determined that because the litigation privilege attaches to claims for CUTPA violations and tortious interference with business relations, the privilege applies where the plaintiff alleges that the defendants filed frivolous actions and meritless appeals. The court explained that filing an action is a communicative act, and that the plaintiff must allege an improper use of the judicial system to avoid the privilege.

In *W. K. v. M. S.*,[58] the trial court improperly took judicial notice of a withdrawn summary process action in granting a protective order sought by a neighbor where the court did not give notice to the parties and used the allegations in the other action to buttress its credibility determinations.

The attorney-client privilege was the subject of a writ of error arising out of *Ghio v. Liberty Ins. Underwriters, Inc.*[59] The court adopted the subject-matter waiver rule in which the voluntary disclosure of privileged attorney-client relations waives the privilege as to all other such communications on the same subject. The scope of the waiver is fact intensive.

In another writ of error, the court held in *Epright v. Liberty Mutual Ins. Co.*[60] that Practice Book § 13-4 does not clearly

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[55] 210 Conn. App. 450, 270 A.3d 713, *cert. denied*, 343 Conn. 906, 272 A.3d 1128 (2022).

[56] 211 Conn. App. 676, 273 A.3d 697 (2022).

[57] 214 Conn. App. 487, 281 A.3d 12, *cert. granted*, 345 Conn. 964, 285 A.3d 388 (2022).

[58] 212 Conn. App. 532, 275 A.3d 232 (2022).

[59] 212 Conn. App. 754, 276 A.3d 984, *cert. denied*, 345 Conn. 909, 283 A.3d 506 (2022).

[60] 212 Conn. App. 637, 276 A.3d 1022, *cert. granted*, 345 Conn. 908, 283 A.3d 505 (2022).

prohibit counsel from engaging in ex parte communications with an opposing party's expert witness, and therefore the trial court's sanction of the plaintiff in error for doing so was improper.

The accidental failure of suit statute[61] is useful when things go wrong in an action. Two cases held, however, that for purposes of the accidental failure of suit statute, "commenced within the time limited by law" means the defendant actually received the summons and complaint.[62] So waiting until the last minute to commence an action under General Statutes § 52-592 is risky business.

A day at the beach can be a lovely occasion, but getting there is sometimes problematic. In *Tracey v. Miami Beach Assn.*,[63] the plaintiffs sought to enforce a 1953 judgment allowing for beach access, and the trial court granted injunctive relief. The Appellate Court held that while offensive res judicata was not recognized in Connecticut, the trial court properly enforced the prior judgment through the doctrine of merger. The opinion distinguishes between res judicata in the specific sense (a defense against re-litigating claims, which cannot be used offensively) and in the more general sense of the finality of judgments.

Lastly, sovereign immunity applies to writs of mandamus, according to the court in *Aldin Associates Ltd. Partnership v. State*.[64] Thus, an exception is necessary to obtain relief but General Statutes § 22a-449g, which authorizes an appeal to Superior Court from a decision by the Commissioner of Energy and Environmental Protection regarding payments for remediation, does not authorize a direct action in Superior Court to enforce such payments.

Speaking of administrative law, the court held in *Cohen v. Department of Energy & Environmental Protec-*

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[61] Conn. Gen. Stat. § 52-592.

[62] Kinity v. US Bancorp, 212 Conn. App. 791, 277 A.3d 200 (2022); Laiuppa v. Moritz, 216 Conn. App. 344, 285 A.3d 391 (2022), *cert. granted*, 346 Conn. 906, 288 A.3d 628 (2023).

[63] 216 Conn. App. 379, 288 A.3d 629 (2022), *cert. denied*, S.C. 22091 (4/4/23).

[64] 209 Conn. App. 741, 269 A.3d 790 (2022).

tion[65] that an intervening party may continue to litigate to pursue its rights after the claims of the original party have been dismissed for lack of standing. On the merits, the court construed General Statutes § 22a-113n to provide authority to the Harbor Commission to make nonbinding recommendations on applications concerning dock placements only when they arise from content included in an approved harbor-management plan.

Because timely service is jurisdictional for administrative appeals, errors in service could prove problematic. In *Idlibi v. State Dental Commission*,[66] however, service on the Department of Public Health rather than the dental commission did not deprive the court of jurisdiction where the two agencies shared the same address, the dental commissioner (who signed the decision on appeal) indicated he was an employee of DPH, and the defendant had actual notice.

In *Marshall v. Commissioner of Motor Vehicles*,[67] the majority held that a delay in transmitting the DUI report did not undermine its reliability and admitting it did not amount to an abuse of the hearing officer's discretion. Judge Eliot Prescott dissented because the plaintiff lacked the opportunity to cross examine on the report.

The Freedom of Information Act usually makes an appearance in this review and does so this year in *Clerk of the Common Council v. Freedom of Information Commission*.[68] There, attorney billing records in connection with a harassment investigation were personnel records exempt from disclosure under FOIA.

Finally, the court held in *Wethersfield ex rel. Monde v. Eser*[69] that the ninety-six hour period set out in General Stat-

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[65] 215 Conn. App. 767, 285 A.3d 760, *cert. denied*, 345 Conn. 968, 285 A.3d 1126 (plaintiff's petition), and *cert. denied*, 345 Conn. 969, 285 A.3d 737 (2022) (intervenors' petition).

[66] 212 Conn. App. 501, 275 A.3d 1214, *cert. denied*, 345 Conn. 904, 282 A.3d 980 (2022).

[67] 210 Conn. App. 109, 269 A.3d 816, *cert. granted*, 342 Conn. 912, 272 A.3d 198 (2022).

[68] 215 Conn. App. 404, 283 A.3d 1 (2022).

[69] 211 Conn. App. 537, 274 A.3d 203 (2022).

utes § 22-329a for an animal control officer to file a verified petition to gain emergency custody of animals in imminent harm is directory not mandatory.

A noteworthy arbitration case in 2022 was *Pickard v. Department of Mental Health & Addiction Services*.[70] The court held that the dismissal of an arbitration by the Office of Labor Relations for failure to provide a deposit was not an arbitration award nor was an arbitration pending for purposes of vacating or affirming an award or entering pendente lite orders for a lien on land.

As for substantive law, several torts cases warrant discussion. In *Miller v. Doe*,[71] a prisoner failed to overcome qualified immunity in his § 1983 action where he claimed that the defendant's failure to make him wear a seat belt and use a sufficiently large vehicle to transport him, and where the defendant drove erratically, did not violate clearly established constitutional rights. And in *Gonzalez v. New Britain*,[72] the court held that the plaintiff was not an identifiable person subject to imminent harm for purposes of discretionary act immunity where she was attacked by dogs that the animal control officer knew to be aggressive.

In *Poce v. O & G Industries, Inc.*,[73] the plaintiffs failed to state a claim for future injury based on exposure to asbestos because the claim requires an actual injury, which had not yet occurred. The court in *Adams v. Aircraft Spruce & Specialty Co*.[74] held that the defendant could not be held liable for negligent entrustment of an airplane that his daughter flew and crashed where he paid the rental and arranged for her use of the plane because any control he had over the plane was subordinate to the owner.

The trial court in *Chapnick v. DiLauro*[75] improperly granted a special motion to dismiss nuisance claims under

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70 210 Conn. App. 788, 271 A.3d 178 (2022).
71 214 Conn. App. 35, 279 A.3d 286 (2022).
72 216 Conn. App. 479, 285 A.3d 436 (2022).
73 210 Conn. App. 82, 269 A.3d 899, *cert. denied*, 342 Conn. 910, 271 A.3d 663 (2022).
74 215 Conn. App. 428, 283 A.3d 42, *cert. denied*, 345 Conn. 970, 286 A.3d 448 (2022).
75 212 Conn. App. 263, 275 A.3d 746 (2022).

the anti-SLAPP statute where the plaintiffs alleged that the defendants allowed their dogs to urinate and defecate outside the plaintiff's windows at their condominium. The defendants claimed that one of the plaintiffs had been arrested for stalking and that the suit was in retaliation. The Appellate Court held, however, that while anti-SLAPP suits involve constitutionally protected rights and matters of public concern, canine elimination locations did not fall within this ambit and the nuisance claims were not based on threats of retaliation.

In *Ocasio v. Verdura Construction, LLC*,[76] the plaintiff claimed a defective railing at his apartment building caused him to fall during an ice storm. But since he did not claim that the landlord failed to clear the ice properly, the trial court should not have charged the jury on the ongoing storm doctrine.

Two civil rights cases are worth attention. In *Sokolovsky v. Mulholland*,[77] the ninety-day period set out in General Statutes § 46a-101(e) to commence a court action for discrimination does not implicate subject matter jurisdiction. Compliance with the period is mandatory but is subject to waiver, consent, and equitable tolling. The plaintiff was not required to plead continuing course of conduct in his complaint but would have to plead it in a reply to special defenses. And in *Wallace v. Caring Solutions, LLC*,[78] causation for purposes of establishing a violation of the Connecticut Fair Employment Practices Act is established upon showing that the protected status was a motivating factor in an adverse employment decision. In other words, the standard is "because of," not "but for."

In an insurance case concerning uninsured/underinsured motorist coverage, the court held in *Russbach v. Yanez-Ventura*[79] that the trial court improperly excused the insurance

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[76] 215 Conn. App. 139, 281 A.3d 1205 (2022).
[77] 213 Conn. App. 128, 277 A.3d 138 (2022).
[78] 213 Conn. App. 605, 278 A.3d 586 (2022).
[79] 213 Conn. App. 77, 277 A.3d 874, *cert. denied*, 345 Conn. 902, 282 A.3d 465 (2022).

company's failure to comply with General Statutes § 38a-336(a)(2), which concerns reduction of UM/UIM. The trial court erroneously applied a narrow exception that applies to large fleets, which does not require all named insureds to sign off. The insured in *Russbach* was a small, used-car dealership with no dedicated legal department and more closely resembled the ordinary insurance purchaser.

Four contract cases are noteworthy. *Barclays Bank Delaware v. Bamford*,[80] which concerned an action on a credit card debt, held that each credit card transaction was a unilateral contract. Therefore, there was a written contract for purposes of Practice Book § 13-19 (concerning a demand for defense). In *Brass Mill Center, LLC v. Subway Real Estate Corp.*,[81] a security contract between sophisticated parties that includes an indemnification clause is subject to the same analysis as a duty to defend in insurance coverage matters.

The parol evidence rule is not a rule of evidence but a rule of construction that seems to confound litigants. In *Paniccia*,[82] the trial court properly used parol evidence to determine when a contract was signed as that did not vary the term of the contract but addressed whether it was properly executed, which it was not, as it turns out.

Finally, in *Bruno v. Whipple*,[83] the defendant was not the prevailing party for purposes of a contractual award for counsel fees where the plaintiff had proven a technical breach of the contract, entitling her to an award of only nominal damages. The issue was complicated by the fact that, in a prior appeal, the Appellate Court had declined to order judgment for the plaintiff because of the general rule that "our appellate courts will not reverse a judgment and grant a new trial for a mere failure to award nominal damages."[84]

Turning to property and land use, in *Canner v. Governor's*

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[80] 213 Conn. App. 1, 277 A.3d 151, *cert. denied*, 345 Conn. 905, 282 A.3d 982 (2022).

[81] 214 Conn. App. 379, 280 A.3d 1216 (2022).

[82] 215 Conn. App. at 727-28.

[83] 215 Conn. App. 478, 283 A.3d 26 (2022).

[84] *Id.* at 490.

Ridge Assn., Inc.,[85] the court held that General Statutes § 47-278, which authorizes a cause of action to enforce rights set out in condominium bylaws, is governed by the three-year torts statute of limitations. The Common Interest Ownership Act imposes a duty to maintain common elements, and the plaintiff claimed that the association was negligent in doing so, which sounded in tort.

Two cases involved summary process actions. In *Rogalis, LLC v. Vazquez*,[86] the trial court abused its discretion in dismissing a summary process action where it relied on facts gleaned from taking judicial notice of a summary process action filed by the plaintiff's predecessor in interest because the court failed to give notice to the parties that it was taking judicial notice of a subject that was susceptible to explanation or contradiction. In *Housing Authority v. Neal*,[87] the court held that an affidavit of noncompliance pursuant to Practice Book § 17-53 was the proper way to seek the eviction of a tenant at sufferance who violated drug laws.

Two foreclosure cases are worth noting. The trial court in *CIT Bank, N.A. v. Francis*[88] improperly limited discovery in a foreclosure action to the note, mortgage, assignments, and payment history where the defendant raised special defenses pertaining to the competency of her grandparents, who made the reverse mortgage annuity at issue. In *Lending Home Funding Corp. v. REI Holdings, LLC*,[89] the court held a timely motion to reargue the denial of a timely-filed motion to open a judgment (filed after the appeal period ran, but within four months of judgment) stays the order on the motion to open but not the underlying judgment. Because the motion to reargue could have resulted in opening the underlying judgment, the automatic stay rendered the law days ineffective.

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[85] 210 Conn. App. 632, 270 A.3d 694, *cert. granted sub nom.* Puteri v. Governor's Ridge Assn., Inc., 345 Conn. 907, 282 A.3d 1277 (2022).

[86] 210 Conn. App. 548, 270 A.3d 120 (2022).

[87] 211 Conn. App. 777, 274 A.3d 257 (2022).

[88] 214 Conn. App. 332, 280 A.3d 485 (2022).

[89] 214 Conn. App. 703, 281 A.3d 1 (2022).

Finally, in *Schaghticoke Tribal Nation v. State*,[90] the right of occupancy of certain land conveyed to the tribe by the General Assembly in 1752 was not a compensable interest for purposes of the takings clause of the state or federal constitutions. In 1736, the General Assembly enacted a resolution that allowed the tribe to stay where they were at the pleasure of the assembly. A second resolution in 1752 allowed the tribe to use additional land "during the pleasure of this Assembly." Permissive occupation does not amount to ownership.

Four probate cases merit discussion. The court held in *Rider v. Rider*[91] that a motion for revocation (which the plaintiff claimed was a motion for reconsideration) pursuant to General Statutes § 45a-128 does not create a new probate appeal period from a decree accepting a final accounting. *In re Harris*[92] held that a will was validly attested where the witnesses only signed the self-proving affidavit as the failure also to sign the witness line amounted to form over substance.

In *Salce v. Cardello*,[93] the court concluded that an in terrorem clause that punished a beneficiary for any challenge to the executor and trustee's actions violated public policy to the extent that the challenged actions were ministerial. And in *Kabel v. Rosen*,[94] the court held that equitable reformation of an unambiguous will is not a proper remedy under Connecticut law where the plaintiff claimed the decedent did not realize that her IRA was not part of the probate estate.

Several family cases caught the authors' attention, although the first, *Lawrence v. Gude*,[95] could also be considered a property or contract case. In *Lawrence*, the trial court erroneously failed to find the wife jointly and severally liable for back rent on a lease only the husband signed as General

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[90] 215 Conn. App. 384, 283 A.3d 508 (2022), *cert. denied*, 346 Conn. 902, 287 A.3d 601 (2023).

[91] 210 Conn. App. 278, 270 A.3d 206 (2022).

[92] 214 Conn. App. 596, 282 A.3d 467, *cert. denied*, 345 Conn. 916, 284 A.3d 299 (2022).

[93] 210 Conn. App. 66, 269 A.3d 889, *cert. granted*, 343 Conn. 902, 272 A.3d 657 (2022).

[94] 215 Conn. App. 528, 284 A.3d 301 (2022).

[95] 216 Conn. App. 624, 285 A.3d 1198 (2022)

Statutes § 46b-37 makes spouses jointly responsible for rent and other specified costs.

Simms v. Zucco[96] held that service by certified mail to an out-of-state party complied with General Statutes § 52-50 for purposes of making alimony retroactive to service. In *Bialik v. Bialik*,[97] the trial court should have considered COVID-19 relief aid in assessing the defendant's income as it constituted gross business receipts for purposes of the parties' separation agreement.

The court in *Olson v. Olson*[98] concluded that the trial court had subject matter jurisdiction under the Uniform Interstate Family Support Act to modify a support order entered in the United Kingdom because the U.K. Reciprocal Enforcement of Maintenance Orders did not indicate that the U.K. maintained exclusive jurisdiction. Judge Nina Elgo dissented because in her view the trial court properly considered the explanatory note to the act that indicated jurisdiction was exclusive over the maintenance order.

Contempt rulings are a regular part of family litigation, and three cases concerning contempt are notable. In *Ill v. Manzo-Ill*,[99] the trial court violated the plaintiff's due process rights by limiting his presentation in defending a motion for contempt to less than a day after the defendant had four days to present her prima facie case. In *Mazza v. Mazza*,[100] the defendant was held in contempt for failing to pay $100,000 he owed the plaintiff under a separation agreement because he had used the funds to buy real estate. The trial court did not abuse its discretion in ordering the defendant to transfer the property to the plaintiff to effectuate

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[96] 214 Conn. App. 525, 280 A.3d 1226, *cert. denied*, 345 Conn. 919, 284 A.3d 982 (2022).

[97] 215 Conn. App. 559, 283 A.3d 1062, *cert. denied*, 345 Conn. 965, 285 A.3d 390 (2022).

[98] 214 Conn. App. 4, 279 A.3d 230, *cert. denied*, 345 Conn. 916, 284 A.3d 299 (2022).

[99] 210 Conn. App. 364, 270 A.3d 108, *cert. denied*, 343 Conn. 909, 273 A.3d 696 (2022). Mr. Bartschi represented the defendant.

[100] 216 Conn. App. 285, 285 A.3d 90 (2022), *cert. granted*, 346 Conn. 904, 287 A.3d 600 (2023).

the judgment. Similarly, in *Walzer v. Walzer*,[101] an order to sell property that secured a property distribution pursuant to the parties' separation agreement merely effectuated the judgment where the defendant was held in contempt for failing to make payments.

In a case for relief from abuse, the court held in *L. L. v. M. B.*,[102] that persons "recently" in a dating relationship for purposes of a restraining order pursuant to General Statutes § 46b-15 do not include parties who dated two years prior to the application. In another case concerning § 46b-15, the court concluded in *K. D. v. D. D.*[103] that an objective standard should be employed to assess claims of a pattern of threatening to obtain a restraining order.

As for issues relating to children, General Statutes § 46b-56c requires both parents to participate in the college selection process. In *Buehler v. Buehler*,[104] the plaintiff refused to participate in the process and claimed unsuccessfully that he should not have to pay for his daughter's college as he did not agree with her choice. In *Lehane v. Murray*,[105] an order allowing the defendant to alter the plaintiff's visitation schedule with their minor child was not an improper delegation of judicial authority as the order did not permit the defendant to alter the right to visitation. Presumably, as long as the defendant did not refuse visitation entirely, there was no alteration to the right of visitation.

Turning to child protection matters, General Statutes § 46b-129(g) permits hearsay at a hearing on an ex parte order for temporary custody if it is reasonably necessary and reliable. *In re Alizabeth L.-T.*[106] held that the court must consider the age of the child, the materiality of the evidence, the prejudice due to the lack of cross examination, issues relat-

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[101] 209 Conn. App. 604, 268 A.3d 1187, *cert. denied*, 342 Conn. 907, 270 A.3d 693 (2022).

[102] 216 Conn. App. 731, 286 A.3d 489 (2022).

[103] 214 Conn. App. 821, 282 A.3d 528 (2022).

[104] 211 Conn. App. 357, 272 A.3d 736, *cert. denied*, 343 Conn. 917, 274 A.3d 869 (2022).

[105] 215 Conn. App. 305, 283 A.3d 62 (2022).

[106] 213 Conn. App. 541, 278 A.3d 547 (2022).

ing to obtaining in-person testimony, and whether testifying would harm the child. The proponent bears the burden of showing admissibility.

And in *In re Maliyah M.*,[107] the court declined to review unpreserved claims that virtual hearings during the COVID-19 pandemic violated due process. This case was one of several where the record was inadequate since the trial court did not make factual findings pertaining to the government's interest in holding virtual hearings.

Turning to criminal matters, the defendant in *State v. Garrison*[108] was in custody for purposes of his *Miranda* rights when the police interviewed him in the hospital while he was hooked up to an intravenous tube and being held until he sobered up.

In *State v. Gray*,[109] the police department's improper disposition of currency seized from the defendant did not violate his due process rights under article first, § 8 of the state constitution in light of the factors set forth in *State v. Asherman*.[110] Judge Prescott concurred but opined that the materiality prong of *Asherman* is problematic and should be addressed by the Supreme Court in a proper case.

Social media made an appearance in *State v. Billings*.[111] There, the court reversed convictions for stalking and harassment based on the defendant's Facebook conversation with a third party in which he indicated he wanted to expose his affair with his married ex-girlfriend as the convictions violated his First Amendment rights.

The courts continue to address problems with DNA evidence. In *State v. Glass*,[112] the evidence was insufficient to

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[107] 216 Conn. App. 702, 285 A.3d 1185 (2022), *cert. denied sub nom.* In re Edgar S., 345 Conn. 972, 286 A.3d 907 (2023).

[108] 213 Conn. App. 786, 278 A.3d 1085, *cert. granted*, 345 Conn. 959, 285 A.3d 52 (2022).

[109] 212 Conn. App. 193, 274 A.3d 870, *cert. denied*, 343 Conn. 929, 281 A.3d 1188 (2022).

[110] 193 Conn. 695, 478 A.2d 227 (1984), *cert. denied sub nom.* Asherman v. Connecticut, 470 U.S. 1050 (1985).

[111] 217 Conn. App. 1, 287 A.3d 146 (2022), *cert. denied*, 346 Conn. 907, 288 A.3d 217 (2023).

[112] 214 Conn. App. 132, 279 A.3d 203 (2022).

sustain the defendant's conviction for robbery based on DNA evidence. Although DNA found on a latex glove at the crime scene showed the defendant to be a major contributor, there was no evidence of what the threshold for being a major contributor was or whether it meant that he touched the glove or the DNA got there by secondary transfer.

The trial court in *State v. Marcello E.*[113] did not abuse its discretion in allowing evidence of uncharged misconduct directed toward the same victim two years earlier that was less violent than the stabbing attack for which the defendant was convicted as it was relevant to show intent. Judge Thomas Bishop dissented as the conduct was not relevant to the stabbing, the intent was evident from the attack itself, and there was no dispute as to intent as the defendant instead proffered an alibi defense.

Two habeas cases are worth noting. In *Sease v. Commissioner of Correction*,[114] the trial court erroneously concluded the petitioner was not prejudiced by his trial counsel's failure to provide his complete mental health records at sentencing. As the court had made no findings as to whether his counsel was deficient in doing so, the majority remanded the matter to the habeas court and retained jurisdiction over the appeal. Judge Melanie Cradle dissented. Although she agreed with the conclusion as to prejudice, she would have reversed and remanded for further proceedings on the deficiency prong. Her remand would have sent the matter to a different judge.

In *Gonzalez v. Commissioner of Correction*,[115] the trial court properly denied the petitioner's motion for immediate release during the COVID-19 pandemic and properly concluded that the Department of Correction acted reasonably in addressing the pandemic.

Finally, the court held in *Randolph v. Mambrino*[116] that

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[113] 216 Conn. App. 1, 283 A.3d 1007 (2022), *cert. granted*, 346 Conn. 901, 287 A.3d 136 (2023).

[114] 212 Conn. App. 99, 274 A.3d 129 (2022).

[115] 211 Conn. App. 632, 273 A.3d 252, *cert. denied*, 343 Conn. 922, 275 A.3d 212 (2022).

[116] 216 Conn. App. 126, 284 A.3d 645 (2022).

the three-year statute of limitations set forth in General Statutes § 52-582 to file a petition for new trial may be tolled by showing fraudulent concealment pursuant to General Statutes § 52-595. The court explained that § 52-582 is a jurisdictional bar to judicially-created remedies like equitable tolling but not to statutory remedies.

We end with a quartet of cases involving attorneys. In *Carter v. Bowler*,[117] the trial court properly dismissed an action against the statewide bar counsel on absolute immunity grounds as the counsel performs a quasi-judicial function.

In *Cummings Enterprise, Inc. v. Moutinho*,[118] appellate counsel made misrepresentations in his opening brief that he failed to correct in his reply brief when the appellee noted the errors. He also failed to correct the statement at oral argument. All of this drew a rebuke from the Appellate Court, which put him on notice that future conduct would result in disciplinary action.

The trial court in *Pringle v. Pattis*[119] properly dismissed the legal malpractice portion of the complaint pursuant to the exoneration rule because the plaintiff's convictions were still valid but the court improperly dismissed counts such as those involving a fee dispute that did not attack the validity of the conviction. Judge Prescott concurred, noting that the Supreme Court has not adopted the exoneration rule and that there are reasons not to do so, but agreed with the majority under Appellate Court precedent.

Finally, in *Disciplinary Counsel v. Spadoni*,[120] the court held that in assessing the defendant's application for reinstatement to the bar, the committee had authority to investigate pre-suspension conduct, including conduct pertaining to convictions that were ultimately reversed on appeal.

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[117] 211 Conn. App. 119, 271 A.3d 1080 (2022).
[118] 211 Conn. App. 130, 271 A.3d 1040 (2022).
[119] 212 Conn. App. 736, 276 A.3d 1042 (2022).
[120] 215 Conn. App. 249, 282 A.3d 1020, *cert. denied*, 345 Conn. 921, 284 A.3d 983 (2022).

As for personnel changes in 2022, Justice Christine Keller took senior status and ultimately reached retirement age. Judge Joan Alexander from the Appellate Court was elevated to the Supreme Court and, in turn, Superior Court Judge Hope Seeley was elevated to the Appellate Court.

We saw the passing of former Chief Justice William Sullivan in 2022. He served as a Superior Court judge for 19 years before being appointed to the Appellate Court in 1997 and to the Supreme Court in 1999 by Governor John Rowland. In 2001, he became the 36th Chief Justice of Connecticut. He took senior status in 2006 and continued on the Supreme Court until he turned 70 in 2009. He continued to serve as judge trial referee, sitting on Appellate Court panels and conducting preargument conferences.

BUSINESS LITIGATION: 2022 IN REVIEW

By William J. O'Sullivan[1]

In 2022, Connecticut's appellate courts decided numerous cases of interest to business litigators. The following is a summary of the year's most noteworthy decisions.

I. Contracts

A. *Government COVID restrictions did not excuse performance of restaurant lease under doctrines of impossibility and frustration of purpose.*

In *AGW Sono Partners, LLC v. Downtown Soho, LLC*,[2] the Connecticut Supreme Court weighed in, for the first time, on the impact of COVID-19 public-safety orders on the enforceability of a restaurant lease. The defendant restaurant asserted that, because of certain of those orders, the legal doctrines of impossibility and frustration of purpose relieved it of its payment obligations. Relying in significant part on the language of the lease, the court concluded otherwise.

The defendant operated a fine-dining restaurant, called Blackstones Bistro, in Norwalk. The defendant's lease called for it to use the leased premises "for the operation of a restaurant and bar selling food, beverages, and related accessories, together with uses incidental thereto, and for no other purpose…."[3]

Following the issuance of pandemic-related operational and crowd-density orders, the restaurant closed completely between March 11 and May 27, 2020. Although takeout and delivery service were not forbidden either by the government orders or by the lease, the restaurant was unable to conduct such operations profitably, and brought in no income during that timeframe. The restaurant then obtained a permit for outdoor dining, and eventually for limited indoor dining, but operated at a loss. The restaurant made no rental payments

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1 Of the Hartford Bar.
2 343 Conn. 309, 273 A.3d 186 (2022).
3 *Id*. at 313.

after March of 2020, received an eviction notice, and vacated the premises by September 11, 2020.[4]

In November of that year, the landlord re-let the property to another restaurant, called Sono Boil. The new lease had a ten-year term commencing in January of 2021, at rents lower than those that had been charged to the defendant. The landlord then sued the defendant restaurant, as well as its principal, who had signed a guaranty, for damages.

Following a brief courtside trial, the trial court entered judgment for the plaintiff. The court rejected the defendants' defenses of impossibility and frustration of purpose. The court's damages award included unpaid rent, use and occupancy through December of 2020, up to the point that the plaintiff's lease with its replacement tenant took effect.

The trial court credited the plaintiff for mitigating its damages by lining up a new tenant so quickly, but noted an absence of evidence about the lease negotiations, or about the possibility that the landlord could have obtained a better deal. Accordingly, the court did not award damages based on the lower rents to be paid by the replacement tenant.

On appeal, the defendants argued that the trial court had erred in rejecting their special defense of impossibility. The Supreme Court disagreed, noting that the impossibility doctrine applies only in extremely rare cases. "[O]nly in the most exceptional circumstances have courts concluded that a duty is discharged because additional financial burdens make performance less practical than initially contemplated."[5] Here, "as the trial court found, even under the most restrictive executive orders, use of the premises for restaurant purposes was not rendered factually impossible insofar as restaurants were permitted to provide curbside or takeout service, and the lease agreement did not prohibit curbside or takeout service."[6] The government restrictions "raised the cost of performance for the defendants in a manner that ren-

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[4] *Id*. at 318.
[5] *Id*. at 326. (Citation and internal punctuation omitted.)
[6] *Id*. at 329.

dered it perhaps highly burdensome, but not factually impossible."[7]

Furthermore, to sustain a defense of impossibility, "the event [on] which the obligor relies to excuse his performance cannot be an event that the parties foresaw at the time of the contract. …If an event is foreseeable, a party who makes an unqualified promise to perform necessarily assumes an obligation to perform, even if the occurrence of the event makes performance impracticable."[8]

Here, "the language of the lease agreement suggests that events of the magnitude of the COVID-19 pandemic were not entirely unforeseeable."[9] For one thing, the lease lacked a *force majeure* clause – a provision that, had it been included, typically would "relieve a party from its contractual duties when its performance has been prevented by a force beyond its control or when the purpose of the contract has been frustrated."[10]

But more importantly, the lease's section 4(d) "squarely tasks the defendants with the obligation of complying with all governmental 'laws, orders and regulations ...."[11] That section provided, in relevant part, that the defendants, at their "expense, shall comply with all laws, orders and regulations of [f]ederal, [s]tate and municipal authorities and with any direction of any public officer or officers, pursuant to [l]aw, which shall impose any violation, order or duty upon [l]andlord or [t]enant with respect to the use or occupancy thereof by [t]enant…"[12] Accordingly, the trial court had acted properly in rejecting the defendants' special defense of impossibility.

As for frustration of purpose, the court noted that, similar to the impossibility doctrine, this defense applies only under rare circumstances. "[T]he establishment of the defense re-

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7 *Id*. at 330.
8 *Id*. at 327. (Citation and internal punctuation omitted.)
9 *Id*. at 331.
10 *Id*. at 331, fn. 21.
11 *Id*. at 332.
12 *Id*. at 320, fn. 13.

quires convincing proof of a changed situation so severe that it is not fairly regarded as being within the risks assumed under the contract. ... The doctrine of frustration of purpose is given a narrow construction so as to preserve the certainty of contracts ...."[13] As applied here:

> Given the narrowness of the frustration of purpose doctrine, we conclude that the purpose of the lease agreement was not frustrated by the pandemic restrictions imposed by the executive orders, even those that barred indoor dining entirely. The language of the lease agreement was not limited to a certain type of dining and … did not preclude the takeout and subsequent outdoor dining that the defendants sought to provide. Put differently, the lease terms did not by themselves render the lease agreement valueless in light of the executive orders.[14]

Accordingly, the Supreme Court held that the trial court had acted properly in rejecting this defense as well.

B. *Defaulting commercial tenant had burden of proving inadequacy of landlord's effort to mitigate damages.*

In a cross-appeal in *AGW Sono Partners, LLC*, the plaintiff landlord claimed the trial court should have included, as an element of its damages award, "the full difference in value between the defendants' lease agreement and the new lease that the plaintiff entered into with Sono Boil, the replacement tenant."[15] More particularly, the plaintiff argued that the court had "improperly charged it with the burden of presenting evidence relating to its negotiations with Sono Boil to show an inability to mitigate its damages by obtaining the same lease or better terms than it had with the defendants, because the defendants, as the breaching party, bear the burden of proof as to failure of mitigation…"[16]

The Supreme Court agreed with the plaintiff that "when a tenant has breached a lease agreement, that tenant bears

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[13] *Id*. at 334, 335. (Citation and internal punctuation omitted.)
[14] *Id*. at 336.
[15] *Id*. at 339.
[16] *Id*.

the burden of proving that the landlord failed to undertake commercially reasonable efforts to mitigate its damages."[17] Here, the trial court had observed that "no evidence of the negotiations with [Sono Boil] was presented in detail *by the plaintiff*. The court can only speculate if further negotiations with [Sono Boil] could have resulted in a lease with the same terms the defendants' lease had."[18] From this language, it was apparent that "the trial court improperly cast the burden of proof onto the plaintiff."[19] The Supreme Court reversed this part of the judgment below, and remanded the case for a hearing in damages.

C. *Supreme Court finds implied contract right to notice and cure of alleged breach.*

The Connecticut Supreme Court's decision in "the Hartford baseball stadium case," *Centerplan Construction Company, LLC v. City of Hartford*,[20] focused on which party – the city, or the developer and builder – "controlled" the project architect during various phases of the design and construction process, and therefore bore responsibility for any mistakes in, and changes to, the stadium's design.

Following various pretrial rulings concerning the interpretation of the relevant contracts, a jury assigned responsibility to the developer and builder, and rendered judgment for the city. The Supreme Court reversed, finding error in certain of those pretrial rulings, and remanded the case for a new trial.

The court's decision turned in large part on an analysis of the contract language, and generally did not rely on novel or noteworthy principles of broader application. But one notable exception can be found in the court's discussion of an issue likely to arise following the remand: whether the builder had been entitled to notice of alleged default, and an opportunity to cure.

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[17] *Id*. at 345.
[18] *Id*. at 346. (Emphasis added by the court.)
[19] *Id*. at 345.
[20] 343 Conn. 368, 274 A.3d 51 (2022).

The court observed, "[u]nder our common law, when a contract is silent as to notice and cure rights, the right to cure is implied in every contract as a matter of law unless expressly waived."[21] Characterizing this principle as part of "our well established common law,"[22] the court cited a Tennessee Court of Appeals decision and a construction-law treatise as its authority for the proposition. The court added, "[t]hus, under our common law, silence in a contract regarding notice and cure rights does not create ambiguity. Rather, it supports a presumption in favor of common-law notice and cure rights."[23]

The court went on to note that a party claiming a breach may be excused from providing notice and an opportunity to cure upon a showing of futility, or that the breach is truly incurable. The party claiming breach bears the burden of proof on these exceptions.[24]

D. *Liquidated damages clause did not bar all claims for actual damage.*

In *Town of New Milford v. Standard Demolition Services, Inc.*,[25] a construction case, the Appellate Court held that a contract's liquidated damages clause, although enforceable, did not foreclose the plaintiff from also seeking actual damages for certain types of loss.

The plaintiff had acquired, through a tax lien foreclosure, a vacant brass factory contaminated with polychlorinated biphenyls (PCBs) and asbestos. The plaintiff issued a notice to bidders, inviting bids for demolition of the building. The bid form indicated that the winning bidder would be entitled to keep, for scrap value, any structural steel recovered from the building.[26] The defendant tendered the winning bid.

After commencing work, the defendant claimed that the

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[21] *Id.* at 412.
[22] *Id.*
[23] *Id.* at 413.
[24] *Id.* at 418, 419.
[25] 212 Conn. App. 30, 274 A.3d 911, *cert. denied* 345 Conn. 908, 283 A.3d 506 (2022).
[26] *Id.* at 36.

bidding materials had contained misleading information about the structural steel, which understated the likelihood that the steel was environmentally contaminated and therefore could not be salvaged profitably.[27] The dispute led to the defendant's demobilization from the site, and the plaintiff's issuance of a notice of termination.[28] The plaintiff hired a replacement demolition contractor, Costello Dismantling Company, Inc. (Costello), at a bid price about $250,000 more than the bid the plaintiff had previously accepted from the defendant.

In the ensuing litigation, the plaintiff claimed delay damages as well as "three categories of alleged nondelay damages: (1) the difference in the contract price between what the plaintiff agreed to pay the defendant and what it agreed to pay Costello allegedly for similar work; (2) additional costs associated with rebidding the job and the engineering support that went with it after the contract between the defendant and the plaintiff was terminated; and (3) additional costs to complete the job beyond Costello's accepted bid."[29]

After a lengthy courtside trial, the trial court rendered judgment for the plaintiff, but ruled that its damages were limited by a liquidated damages provision in section 2.1.1 of the contract. That clause provided, "[f]ailure of the Contractor to meet [the] established timeframe will result in liquidated damages being assessed in the amount of $2,000/day for each and every calendar day beyond the contract time limit."[30]

On appeal, the plaintiff claimed that the court erred in holding that the liquated damages provision was the exclusive measure for calculating the damages. The Appellate Court agreed.

The court acknowledged the general principle that a party "may not retain a stipulated sum as liquidated damages and

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[27] *Id*. at 44.
[28] *Id*. at 43, 46.
[29] *Id*. at 93, 94.
[30] *Id*. at 85.

also recover actual damages."[31] But it is also true that "[a] contract will not be construed to limit remedial rights unless there is a clear intention that the enumerated remedies are exclusive."[32]

Here, the liquidated damages clause, section 2.1.1 of the contract, was immediately followed by section 2.1.2, which provided in relevant part, "[i]n the event the Contractor fails to perform the work in a timely manner due to the Contractor's poor planning, financial status, errors in construction or any other reason directly attributed to the Contractor's circumstances, the [plaintiff] may institute default proceedings against the Contractor to recover *damages* and *losses*."[33] The court found this language to be very significant.

> Notably, § 2.1.2 of article 2 does not reference "liquidated damages"; instead, it refers to "damages and losses." Because § 2.1.1 of article 2 of the contract specifically references "liquidated damages," the fact that § 2.1.2, instead, references "damages and losses" is evidence of a contractual intent to allow for the recovery of nondelay damages and losses, in addition to the liquidated damages due to delays allowed in § 2.1.1. To construe the contract otherwise would render that provision in § 2.1.2 superfluous.[34]

The court found this contract language to be not inconsistent with the general principle that a party may not recover both liquidated damages and actual damages. "When, as here, a liquidated damages provision is limited in its application to damages resulting from delays and does not expressly provide that liquidated damages are the exclusive remedy, it does not prevent the recovery of actual damages for items to which the liquidated damages provision does not apply, i.e., nondelay damages."[35]

The Appellate Court reversed the judgment below, and remanded the case for a hearing in damages.

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[31] *Id*. at 86.
[32] *Id*. at 87.
[33] *Id*. at 85, 86 (emphasis added by court).
[34] *Id*. at 88.
[35] *Id*. at 89.

E. *Unsigned draft agreement gave rise to binding contract.*

In *Downing v. Dragone*,[36] the Appellate Court affirmed the trial court's finding that the plaintiff had proven a written contract between herself and the defendant, even though the defendant never countersigned the draft agreement that she had prepared. The trial court found, and the Appellate Court agreed, that the defendant had implicitly accepted the proposed written contract by knowingly accepting her performance and failing to object to its written terms.

The plaintiff, a professional auctioneer, met with principals of the defendant, Dragone Classic Motorcars, Inc., to discuss the possibility of her conducting a classic automobile auction for the defendant. At that meeting, as found by the trial court, the parties agreed on the tasks that the plaintiff would perform, and on the terms of her compensation. They further agreed that she would prepare a written agreement to memorialize the agreed-upon terms.[37] She did so, and at a follow-up meeting a week later, she delivered the document to the defendant's principal Emanuel Dragone. At his instruction, she left it on his desk.

Over the course of the ensuing months, the plaintiff "worked some hundreds of hours in connection with the auction, advised [the defendant] on the technology required for the auction, established Auction Flex software on [the defendant's] computers, revised [the defendant's] written history for brochures, and helped prepare advertising and marketing materials, revise the auction documents, [and] establish the technical and physical set up for the auction, thereby accomplishing and performing [her] obligations [pursuant to] the agreement."[38] The auction was held, bringing in more than $4 million in gross receipts, but the defendant refused to pay the plaintiff for her work.

The trial court found that the parties had entered into a

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[36] 216 Conn. App. 306, 285 A.3d 59 (2022), *cert. denied* 346 Conn. 903, ___A.3d ___(2023).

[37] *Id.* at 310, 311.

[38] *Id.* at 312.

written contract, observing "the parties may be bound by an unsigned contract where [assent] is otherwise indicated."[39] The court credited the plaintiff's testimony that all the terms of the proposed written agreement had been previously discussed between the parties. The court found that the defendant never "rejected the agreement or attempted to make any changes or additions. Instead, they accepted the plaintiff's services to plan the auction in accordance with exhibit 1 and did not pay her."[40] The trial court entered judgment for the plaintiff on her breach of contract claim.

Applying the "clearly erroneous" standard of review, the Appellate Court found no error in the trial court's finding that a contract had been created. "Whether the parties intended to be bound without signing a formal written document is an inference of fact [to be made by] the trial court … [M]anifestation of mutual assent may be made even though neither offer nor acceptance can be identified and even though the moment of formation cannot be determined. ... Parties are bound to the terms of a contract even though it is not signed if their assent is otherwise indicated."[41] The court affirmed the judgment below.

F. *Where purchase and sale agreement expressly provided "no knowledge of easements" on the part of seller, parol evidence rule barred evidence of actual knowledge.*

In *Sargent, Sargent & Jacobs, LLC v. Thoele*,[42] an escrow agent holding a deposit for the purchase of certain property in Westport brought an interpleader action against the prospective purchaser, Merwin, LLC and the prospective seller, Alan Thoele. The defendants filed crossclaims against each other, asserting, among other claims, breach of contract.

The purchaser had sought to cancel the transaction, relying on section 9(b) of the subject purchase and sale agreement (cancellation provision). The cancellation provision allowed

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[39] *Id.* at 313.
[40] *Id.* at 315.
[41] *Id.* at 317. (Citations and internal punctuation omitted.)
[42] 214 Conn. App. 179, 280 A.3d 514 (2022).

the purchaser to cancel the deal based on an undisclosed and uncured encumbrance "that arise[s] after the date of Purchaser's title search which either party become[s] aware of … prior to the Closing Date."[43] The encumbrance at issue was a sewer easement that was associated with, but not explicitly mentioned in, a notice recorded in the land records.[44]

A 2016 letter of intent between the parties had noted that a "Sewer Easement for Cottage Lane is in place on the property and runs with the land…"[45] But their purchase and sale agreement, executed two years later, did not mention the easement, and provided at section 16(m), "Seller's Representations and Warranties," that the "Seller is not aware of any claims for rights of passage, easements or other property rights over, on or to the Premises, other than as set forth herein."[46]

When the purchaser later invoked the cancellation provision, citing the sewer easement, the seller pointed to the letter of intent as evidence that the purchaser had had actual knowledge of the encumbrance, and therefore could not escape the contract. The purchaser countered by pointing to the "no easements" language in section 16(m), and argued that "this provision establishes its knowledge at the time the purchase and sale agreement was signed, meaning that any evidence offered to alter its knowledge is impermissible under the parol evidence rule."[47]

The trial court agreed with the purchaser that the seller's argument was precluded by the parol evidence rule. The Appellate Court affirmed. "The purchase and sale agreement signed in 2018 contained no reference to any potential easement on the property. … [T]he court correctly concluded that the 2016 letter of intent was not proper evidence regarding what the parties agreed to in 2018."[48]

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[43] *Id*. at 185.
[44] *Id*. at 184.
[45] *Id*.
[46] *Id*. at 185.
[47] *Id*. at 193.
[48] *Id*. at 194, 195.

G. *Where payment from building owner to general contractor was stated as a condition precedent to subcontractor's entitlement to payment, claim by subcontractor against unpaid general contractor was barred.*

In *Electrical Contractors, Inc. v. 50 Morgan Hospitality Group*,[49] the plaintiff, an electrical subcontractor on a commercial construction project, sued the defendant, the general contractor, for nonpayment. The subcontract provided that payment from the property owner to the general contractor was a condition precedent to the defendant's obligation to pay the plaintiff. Given that contractual language, and undisputed evidence that the owner had not yet paid the general contractor, the trial court entered summary judgment for the defendant.

On appeal, the plaintiff sought to equate the contract language at issue with the "pay when paid" language often found in construction contracts, and argued that a clause of that type "merely postpones a general contractor's obligation to pay its subcontractors for a reasonable period of time."[50] But the Appellate Court disagreed, finding the "condition precedent" language clear and unambiguous, and distinguishable from cases involving "pay when paid" clauses. The court affirmed the judgment below.

H. *Implied covenant of good faith and fair dealing cannot contradict contract.*

The Appellate Court's decision in *D2E Holdings, LLC v. Corporation for Urban Home Ownership*[51] illustrates the principle that "the implied covenant of good faith and fair dealing cannot be applied to achieve a result contrary to the clearly expressed terms of a contract."[52]

The plaintiff contracted with the defendant to purchase 73 residential housing units in New Haven. Their contract

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[49] 211 Conn. App. 724, 273 A.3d 726 (2022).

[50] *Id.* at 732.

[51] 212 Conn. App. 694, 277 A.3d 261, *cert. denied* 345 Conn. 904, 282 A.3d 981 (2022).

[52] *Id.* at 706 (citation and internal punctuation omitted).

required the defendant to provide the plaintiff with a variety of financial statements "[t]o the extent such documents are existing and available."[53] The plaintiff asked the defendant for certain documents to allow the plaintiff to pursue bank financing. The defendant supplied those documents that it had on hand, but did not provide certain requested documents that did not yet exist and could not be created by the closing date.

The lack of adequate documentation prevented the plaintiff from submitting a full mortgage application, and accordingly the plaintiff was unable to move forward with the purchase. The defendant declared a default, and retained the plaintiff's $100,000 deposit.

The plaintiff brought suit, claiming the defendant "breached the covenant of good faith and fair dealing implied in the real estate contract by failing to provide D2E Holdings with the necessary documents for it to secure mortgage financing and by retaining D2E Holdings' initial deposit without actual intent to transfer title to the subject units."[54] Following a courtside trial, the trial court rendered judgment for the defendant.

The Appellate Court affirmed. The court observed, "[t]here is no language in … the real estate contract, mandating that CUHO create nonexistent documents and provide them to D2E Holdings. Rather, [the contract] mandates the precise opposite: that CUHO must provide D2E Holdings with documents that "are *existing* and *available* ...."[55] Because the implied covenant cannot override express contract terms, the plaintiff's claim was unavailing.

I. *Appellate Court enforces reaffirmation of expired lease guaranty.*

The Appellate Court's decision in *Tolland Meetinghouse Commons, LLC v. CXF Tolland, LLC*,[56] in which the guar-

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[53] *Id*. at 699.
[54] *Id*. at 700.
[55] *Id*. at 706.
[56] 211 Conn. App. 1, 271 A.3d 1118 (2022).

antor of a commercial lease appealed a summary judgment rendered against him, illustrates the principle that "[p]arties ordinarily do not insert meaningless provisions in their agreements."[57]

The plaintiff's predecessor in interest, as landlord, and the defendant CXF Tolland, LLC d/b/a Cardio Express, as tenant, entered into a lease in 2007. The defendant Peter Rusconi signed a guaranty agreement, which provided in relevant part that his obligations as guarantor "shall terminate at the expiration of the initial five (5) years of the initial Lease term."[58]

Nine years later, after a default by the tenant, the parties entered into a lease modification, which included the tenant's agreement to pay a rent arrearage upon an agreed schedule. That agreement, also signed by Rusconi personally, provided at paragraph 5, "[t]he Guarantor hereby reaffirms his obligations in respect to the terms of the Guaranty dated May 10, 2007, which Guaranty shall remain in full force and effect."[59] When the tenant defaulted in its restructured obligations, the landlord brought suit against both the tenant and Rusconi.

Relying on the five-year sunset provision in the original Guaranty, Rusconi filed a special defense, claiming the guaranty agreement "previously expired on its own terms, and is therefore unenforceable."[60] The plaintiff countered that at the time of the restructure, "Rusconi reaffirmed his obligations in the second lease agreement as Cardio Express' guarantor and agreed that the guaranty shall remain in full force and effect."[61]

Following argument of the parties' cross-motions for summary judgment, the trial court entered judgment for the landlord. The court noted, "[t]he intention of the parties to

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[57] *Id.* at 15, quoting Connecticut Co. v. Division 425, 147 Conn. 608, 617, 164 A.2d 413 (1960).

[58] *Id.* at 3.

[59] *Id.* at 4.

[60] *Id.* at 6.

[61] *Id.*

a contract is to be determined from the language used interpreted in the light of the situation of the parties and the circumstances connected with the transaction."[62] Here, the circumstances were undisputed: "The arrearages that accumulated prior to the execution of the second amendment began accumulating after the original guaranty expired. They do not constitute obligations that were ever within the scope of the original guaranty agreement."[63] In order for Rusconi's reaffirmation of the Guaranty to have any meaning, "it must refer to obligations under the Cardio Express lease as to which Rusconi had no responsibility under the original guaranty agreement, but which are now made subject to the terms of that guaranty."[64]

The trial court thus concluded, the "only reasonable construction of paragraph 5 [of the second amendment to lease] that gives that provision any practical meaning is that Rusconi agreed to guarantee Cardio Express' remaining obligations under the lease at the time the second amendment was executed."[65] Adopting the trial court's memorandum of decision as its own, the Appellate Court affirmed.

II. Creditors' Rights

A. *Bank's foreclosure thwarted by carelessly drafted loan documents.*

In *JPMorgan Chase Bank v. Virgulak*,[66] the Connecticut Supreme Court affirmed the decision of the Appellate Court in favor of the defendant, Theresa Virgulak, in a residential foreclosure action.[67]

The defendant's husband, Robert Virgulak, executed a $533,000 note to the plaintiff bank. Theresa did not co-

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[62] *Id.* at 18, quoting Barnard v. Barnard, 214 Conn. 99, 110, 570 A.2d 690 (1990).

[63] *Id.* at 19.

[64] *Id.*

[65] *Id.* at 19.

[66] 341 Conn. 750, 267 A.3d 753 (2022).

[67] The Appellate Court decision is reported at 192 Conn. App. 688, 218 A.3d 596 (2019).

sign the note, nor did she sign a guaranty of the obligation. She did execute a mortgage of residential property that she owned. The mortgage properly recited the date and amount of the loan, but erroneously identified Theresa as maker of the note. The mortgage did not reference Robert. Based on the discrepancy in the loan documents, Theresa denied liability and pled special defenses.

The plaintiff argued that it could foreclose the mortgage as written, or alternatively that the court should order reformation of the note and/or mortgage, and then a judgment of foreclosure. The trial court denied both forms of relief, and entered judgment for the defendant. The Appellate Court affirmed. Following a grant of certification to appeal, the Supreme Court affirmed the judgment below.

As for the bank's attempt to reform the loan documents to conform to the alleged intent of the parties, this claim was undermined by "gaps in the factual record":

> Principal among those gaps is that the mortgage deed identifies a '[n]ote' but does not explicitly identify the note signed by Robert. In other words, the plaintiff failed to produce clear and convincing evidence of the particular debt obligation that was being secured by the mortgage deed executed by the defendant. Indeed, in its posttrial brief, the plaintiff conceded that the parties never intended the mortgage deed to secure a note signed by the defendant. There was no evidence produced or elicited by the plaintiff that required the trial court to find that the defendant intended the mortgage as security for Robert's loan.[68]

The court recognized that "the fact the mortgage deed and note have matching dates and refer to matching amounts could have allowed the trial court to infer that the transactions are related."[69] But the court was not required to draw that inference. The Supreme Court took note of "the absence of any direct evidence that either party did intend the mortgage deed to secure a note executed by Robert,"[70] such as "tes-

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[68] *Id.* at 764.
[69] *Id.* at 769.
[70] *Id.*

timony regarding whether JPMorgan Chase itself intended the defendant's signature on the mortgage deed to secure the note signed by Robert."[71] Thus, the Supreme Court "[could not] conclude that the absence of a finding by the trial court that the parties intended the mortgage deed signed by the defendant to secure Robert's note was clearly erroneous."[72]

The court also rejected the bank's alternative claim that the mortgage could be foreclosed even without a reformation of the loan documents. The court adopted the Appellate Court's reasoning that "the mortgage [deed], as executed, was a nullity because it secured a nonexistent debt."[73]

B. *In foreclosure of mortgage insured by the FHA, bank must plead and prove compliance with applicable HUD regulations.*

In *Wells Fargo Bank, N.A. v. Lorson*,[74] the Connecticut Supreme Court held that, in an action to foreclose a residential mortgage that is insured by the Federal Housing Administration (FHA), the lender's compliance with applicable Housing and Urban Development (HUD) regulations is a condition precedent to foreclosure, which the lender has the burden of pleading and proving.

In *Lorson*, the loan was insured by the FHA, and the note stated on its face, "[t]his [n]ote does not authorize acceleration when not permitted by HUD regulations."[75] Among the HUD regulations concerning troubled loans are ones that prescribe "conditions of special forbearance," mortgage modifications, and "a requirement that [c]ollection techniques must be adapted to individual differences in mortgagors and take account of the circumstances peculiar to each mortgage."[76]

The trial court entered judgment of strict foreclosure. On appeal to the Appellate Court, the defendants asserted that

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[71] *Id.*
[72] *Id.* at 765.
[73] *Id.* at 771.
[74] 341 Conn. 430, 267 A.3d 1 (2022).
[75] *Id.* at 434.
[76] *Id.* at 442, 443.

compliance with HUD regulations is a condition precedent to acceleration and foreclosure, and that the plaintiff failed to establish this at trial.[77] The Appellate Court rejected this argument and affirmed the judgment of foreclosure, holding that the defendants had the burden of pleading and proving the lender's noncompliance with the applicable regulations, as a special defense.[78]

But the Supreme Court reversed, finding that compliance with applicable HUD regulations is a condition precedent to suit, which the plaintiff must affirmatively plead in its complaint. If the defendants deny this allegation, they have "the burden of pleading that the plaintiff has not complied with specific regulations that are applicable. In that event, the burden would then shift back to the plaintiff to prove compliance with the specific regulations alleged by the defendants."[79] The court remanded the case to the trial court for a new trial limited to the compliance issue.[80]

C. *Default provision in mortgage deed that specifically authorized foreclosure by sale thwarted borrower's claim that judgment should be for strict foreclosure.*

In *Toro Credit Company v. Zeytoonjian*,[81] the Connecticut Supreme Court affirmed a judgment of foreclosure by sale, as to two parcels encumbered by a blanket mortgage, despite the borrowers' protest that strict foreclosure as to one of the parcels would have fully satisfied the debt.

The obligation was a commercial note secured by a mortgage on two undeveloped parcels, denominated parcels A and B, in Enfield. The mortgage deed contained a remedies provision, which authorized the plaintiff, following default by the defendants, to exercise state foreclosure procedures, specifically including "the full authority to sell the [p]remises at public auction…"[82]

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77 *Id*. at 437.
78 Wells Fargo Bank, N.A. v. Lorson, 183 Conn. App. 200, 192 A.3d 439 (2018).
79 *Id*. at 439.
80 *Id*. at 462.
81 341 Conn. 316, 267 A.3d 71 (2022).
82 *Id*. at 319.

The loan went into default. The trial court found the debt to be $902,447.12, and ordered foreclosure by sale, with both parcels to be sold, either bundled together or sequentially, at the defendants' choice. Both sides' appraisers valued parcel A at $950,000, and the appraisers for the plaintiff and defendants found values of $850,000 and $840,000, respectively, for parcel B.[83]

In ordering foreclosure by sale, the trial court found that "the plaintiff 'successfully bargained for the right to select [that] remedy.'"[84] Accordingly, the court "rejected the defendants' request that it order a strict foreclosure as to only parcel A because that would '[rob] the plaintiff of a measure of the security which it was granted,' namely, a mortgage on both properties."[85] The court "was concerned that strict foreclosure of parcel A would 'leave the risk of a shortfall entirely' on the plaintiff after taking title to the property and then selling it."[86]

The defendants appealed, claiming strict foreclosure of parcel A would have satisfied the debt, foreclosure by sale exposes them to a deficiency judgment if parcel A sells for less than the appraised value, and the court should not have considered the remedies provision in the mortgage.[87] Applying the "abuse of discretion" standard of review, the Supreme Court affirmed.

The court observed, "[t]he plaintiff specifically bargained for, and the defendants agreed to, a blanket mortgage on both parcels and for the remedy of foreclosure by sale. … As a result, although strict foreclosure might technically satisfy the debt if the plaintiff took title to parcel A, it would leave the plaintiff in the position it specifically had bargained *not* to be in: holding title to real estate."[88] Furthermore, if the trial court ordered strict foreclosure of only parcel A, "and

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[83] *Id*. at 320.
[84] *Id*.
[85] *Id*. at 321.
[86] *Id*.
[87] *Id*. at 323.
[88] *Id*. at 325, 326. (Emphasis in original.)

if the plaintiff is later unsuccessful at selling parcel A at its appraised value, the plaintiff will lose the ability to foreclose as to parcel B."[89]

The trial court acted properly when it factored the mortgage deed's "remedies" provision into its decision without deeming that provision binding on the court.[90] "The trial court reasonably considered that it would be inequitable to place the parties in a position they did not contemplate when entering into this agreement."[91]

D. *Appellate Court rejects borrower's collateral estoppel defense.*

In *Wilmington Trust, National Association v. N'Guessan*,[92] the trial court rendered a judgment of strict foreclosure after an interlocutory summary judgment on the issue of liability. On appeal, the defendant argued that under the doctrine of collateral estoppel, the court had erred in rendering summary judgment for the plaintiff.

The defendant noted that in an earlier case, the plaintiff's predecessor in interest had sought to foreclose the same mortgage. In that case, which was ultimately dismissed for failure to prosecute with diligence, the trial court had denied the plaintiff's motion for summary judgment, finding the existence of a genuine issue of material fact. The defendant argued that because the court had "determined that issues of material fact existed that prevented the granting of summary judgment as to liability in the [first] foreclosure action, the doctrine of collateral estoppel barred the plaintiff, as the 'successor mortgagee,' from 'relitigating the same issue of summary judgment on liability in this case.'"[93]

The Appellate Court was unconvinced. The court framed the issue as "not whether the defendant had a defense to the [first] foreclosure action, but whether he had a defense to

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[89] *Id*. at 326.
[90] *Id*. at 327.
[91] *Id*.
[92] 214 Conn. App. 229, 279 A.3d 310 (2022).
[93] *Id*. at 235.

the action instituted six years later."[94] In that earlier case, the defendant had avoided summary judgment by submitting evidence "linking his failure to make his mortgage payments to the plaintiff's conduct."[95] But six years intervened between the two cases, during which the defendant continued to render no payments. He "submitted no evidence with his objection to the plaintiff's motion for summary judgment setting forth any equitable defense for his failure to make payments during those six years. Consequently, he cannot rely solely on the [earlier] court's conclusion that there was a genuine issue of material fact in 2011 as binding the court in the present action to conclude that such an issue of fact still exists."[96]

E. *Heir of borrowers' probate estate, seeking discovery from bank while defending against foreclosure, hurdles bank-privacy laws.*

In *CIT Bank, N.A. v. Francis*,[97] the plaintiff, the holder of a reverse annuity mortgage on a residence in New Canaan, brought a foreclosure action against the decedent borrowers' granddaughter, heir of their estate. The defendant suspected that her father, who had been arrested for stealing $500,000 from his mother's home equity account, had fraudulently orchestrated the loan. She pled special defenses to that effect, and sought relevant discovery from the plaintiff bank.

The bank sought a protective order against the defendant's discovery requests, relying on provisions in Connecticut General Statutes section 36a-42; the Fair Debt Collection Practices Act, 15 U.S.C. § 1692c(b); and the Gramm-Leach-Bliley Financial Modernization Act, 15 U.S.C. § 6802, limiting financial institutions and debt collectors from disclosing financial information to nonparties to the transaction. The trial court granted the bank's motion for protective order. Barred from developing her special defenses, the defendant

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[94] *Id*. at 240.
[95] *Id*.
[96] *Id*. at 241.
[97] 214 Conn. App. 332, 280 A.3d 485 (2022).

was unable to muster a defense to the bank's motion to strike her special defenses and subsequent motion for summary judgment. The bank ultimately obtained a judgment of strict foreclosure.

The Appellate Court reversed, finding that the trial court had erred in entering the protective order. The court noted that each of the privacy statutes relied upon by the bank contained an exception that allowed disclosure upon the consent of the customer. Here, the defendant, in her opposition to the bank's motion for protective order, had attached a letter from the executor of her grandmother's estate confirming his consent to her request for information. There was no suggestion that the defendant was pursuing her discovery in bad faith, and the bank never contended that the requested discovery was unlikely to lead to the discovery of relevant and admissible evidence.

Concurring separately, Judge Bright noted that litigants have broad latitude to plead claims and defenses even before they have developed the relevant evidentiary support, and that "the denial of a discovery request typically will not justify a failure to plead a legally sufficient cause of action or special defense."[98] But here, "the defendant Johanna Francis was not a party to the underlying transaction that gave rise to the plaintiff's foreclosure action and, therefore, lacked knowledge of those events. … Under these circumstances the defendant's discovery requests were reasonable because the best source of information relevant to the plaintiff's possible involvement, if any, in James M. Francis' alleged scheme was the plaintiff itself."[99] It followed that "the court's improper ruling depriving her of that discovery was not harmless."[100]

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[98] *Id.* at 354.
[99] *Id.*
[100] *Id.*

III. Business Torts

A. *Litigation privilege barred claim for tortious interference and unfair trade practice.*

In *Deutsche Bank AG v. Vik*,[101] the Appellate Court held that the litigation privilege barred claims under the theories of tortious interference with business expectancy, and violations of the Connecticut Unfair Trade Practices Act, General Statutes Section 42-110a et seq. (CUTPA).

The plaintiff held a judgment of $235,646,355 that it had obtained in the courts of England against nonparty Sebastian Holdings, Inc. (SHI), allegedly a shell company controlled by defendant Alexander Vik.[102] The plaintiff alleged that Alexander had used various tactics to thwart collection of the judgment against SHI, including concealing assets, fabricating documents and orchestrating approximately $1 billion in fraudulent transfers.[103] Among those assets was shares in a Norwegian software company, Confirmit AS (Confirmit), which Alexander allegedly transferred initially to his personal account, then to that of his father.

A key allegation was that Alexander fabricated and backdated a document that purported to give his daughter, defendant Caroline Vik, a right of first refusal to acquire the Confirmit shares, as part of a scheme to thwart a liquidation of those shares ordered by a Norwegian court. She then used that document as the basis to bring an action in the federal court in Connecticut to enjoin the sale. The court granted a temporary restraining order but denied Caroline's request for a preliminary injunction, after which she withdrew the case and then commenced injunction proceedings in the Norwegian court.[104]

The plaintiff relied on these allegations, and the claim that "the defendants brought 'frivolous,' 'meritless' or 'baseless'

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[101] 214 Conn. App. 487, 281 A.3d 12, *cert. granted* 345 Conn. 964, 285 A.3d 388 (2022).
[102] *Id*. at 489, 490, 493.
[103] *Id*. at 489, 490.
[104] *Id*. at 492.

legal claims or appeals in an effort to undermine or reverse the sale of Confirmit shares," in support of a claim for tortious interference with business expectancy. The plaintiff argued, "the English judgment formed a business relationship between the plaintiff and SHI insofar as the English court determined that SHI owed the plaintiff $235,646,355."[105]

The plaintiff also asserted a claim under CUTPA, repeating the same allegations and alleging "the defendants engaged in unfair methods of competition and unfair and deceptive acts to interfere with the sale of the Confirmit shares by filing for injunctions in both Connecticut and Norway on the false premise that Caroline genuinely sought to exercise her purported [right of first refusal]."[106]

The Appellate Court agreed with the defendants that these claims were barred by the litigation privilege. The court observed that in its most basic form, the litigation privilege provides that "communications uttered or published in the course of judicial proceedings are absolutely privileged so long as they are in some way pertinent to the subject of the controversy. This includes statements made in pleadings or other documents prepared in connection with a court proceeding."[107] The privilege may apply "regardless of whether the action is against an attorney, party opponent or witness."[108]

The court noted that claims for vexatious litigation and abuse of process represent exceptions to the privilege, but declined to further extend those exceptions, holding "the litigation privilege is applicable to claims of tortious interference with business expectations if the claim is premised on communications or statements made in the course of prior judicial or quasi-judicial proceedings."[109]

The plaintiff tried to make the distinction that "its claims are based on the defendants' alleged wrongful *conduct* of fil-

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[105] *Id*. at 493.
[106] *Id*. at 494.
[107] *Id*. at 497. (Citations and internal punctuation omitted.)
[108] *Id*. at 499, fn. 4.
[109] *Id*. at 501.

ing frivolous and meritless actions and appeals, not any communications or statements in a judicial proceeding."[110] But the court disagreed, saying "we can think of no communication that is more clearly protected by the litigation privilege than the filing of a legal action. The filing of a legal action, by its very nature, is a communicative act."[111] In any event, "our case law does not speak about the privilege solely in terms of communications, but also in terms of *conduct* in the course of judicial or quasi-judicial proceedings."[112]

Applying a similar analysis to its review of the tortious interference claim, the Appellate Court rejected the plaintiff's CUTPA claim as well.

The Connecticut Supreme Court subsequently granted the plaintiff's petition for certification, limited to the question, "Did the Appellate Court correctly conclude that the trial court improperly had declined to dismiss the plaintiff's complaint on the ground that the plaintiff's claims were barred by the litigation privilege?"[113]

B. *Unsuccessful bidder lacked standing to sue rival for unfair trade practice.*

In *Jefferson Solar, LLC v. FuelCell Energy, Inc.*,[114] the Appellate Court held that a bidder for the right to develop a clean-energy project lacked standing to sue a rival bidder, under the Connecticut Unfair Trade Practices Act (CUTPA),[115] for making an allegedly false representation in its bid package.

In response to a request for proposals issued jointly by Eversource Energy and the United Illuminating Company, the plaintiff and defendants submitted bids for the right to build a clean-energy facility, pursuant to a shared clean energy facility program established by statute. The request

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[110] *Id.*
[111] *Id.* at 502.
[112] *Id.*
[113] 345 Conn. 964, 285 A.3d 388 (2022).
[114] 213 Conn. App. 288, 277 A.3d 918 (2022).
[115] CONN. GEN.STAT. § 42-110a et seq.

for proposals included a requirement that each bidder certify that it had control, or the unconditional right to acquire control, of its proposed generation site (control certification). The defendants submitted a bid for a fuel-cell facility in Derby, within the territory of United Illuminating, and that bid was selected.

The plaintiff brought suit, alleging the defendants had submitted a false control certification, and that this conduct amounted to a violation of CUTPA. The plaintiff asserted it had suffered an ascertainable loss, as required to establish standing under the statute, because it stood to "lose the revenue from the [shared clean energy facility program] that it would have received but for [the] defendants' submission of a false bid certification."[116]

The trial court granted the defendants' motion to dismiss, in which they asserted the plaintiff lacked standing to prosecute its claim. The Appellate Court agreed.

The court noted that for a plaintiff to establish standing, it must make "a colorable claim of direct injury"[117]; injuries that are "remote, indirect or derivative" will not suffice.[118] The court agreed with the trial court's observations that the "direct recipient of any injury resulting from false certification would be [United Illuminating], the beneficiary of the project," and the "plaintiff's claims are remote and indirect."[119] The Appellate Court also observed that in the utility companies' request documents, they had expressly reserved the right to reject all bids.[120] It followed that "the plaintiff's purported injuries are purely speculative."[121]

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[116] 213 Conn. App. at 295, 296.
[117] *Id*. at 294. (Citation and internal punctuation omitted.)
[118] *Id*.
[119] *Id*. at 296.
[120] *Id*. at 296, 297.
[121] *Id*. at 297.

IV. Closely Held Businesses

A. *Lack of internal authority deprived limited partnership of standing to sue.*

In *Fischer v. People's United Bank*,[122] the Appellate Court ruled that a limited partnership's claims had been properly dismissed due to lack of standing, arising from a lack of institutional authority to bring suit.

The plaintiffs sued People's United Bank under various theories, stemming from the bank's recission of a commitment to refinance an existing mortgage. Co-plaintiff 1730 State Street Limited Partnership (1730 LP) was managed by a general partner called AJC Management, LLC (AJC). Under 1730 LP's partnership agreement, AJC had "'full, exclusive and complete discretion' to manage and control 1730 LP," including the right to "'[c]ompromise, submit to arbitration, sue or defend any and all claims for or against [1730 LP].'"[123]

AJC, in turn, had three members: co-plaintiff Alan Fischer, Jefferson Scinto and Christian Scinto. AJC's operating agreement allowed the members collectively to "delegate to ... an individual Member ... any management responsibility or authority except as set forth in this Agreement to the contrary."[124] Fischer claimed to be "the sole management authority for the property by unanimous agreement of AJC's members," and "the sole member of AJC that has carried out operations on behalf of 1730 LP."[125]

But the agreement also required unanimous consent of the members for certain matters, including "[a]ll decisions affecting the policy and management of [AJC]" and authorizing the company to "borrow or lend money, make, deliver, accept or endorse any commercial paper, execute any mortgage, security instrument, bond or lease, or purchase or con-

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[122] 216 Conn. App. 426, 285 A.3d 421 (2022), *cert. denied* 346 Conn. 904, ___A.3d.___ (2023).

[123] *Id.* at 429.

[124] *Id.* at 443.

[125] *Id.* at 444.

tract to purchase any property ... or sell or contract to sell any assets of the Company, all other than in the ordinary course of the Company business…"[126]

It was undisputed that, of the three members of AJC, only one of them, Fischer, had authorized the company as general partner of 1730 LP to bring suit on behalf of the latter. The issue presented was whether that decision was an "ordinary course" decision that AJC could delegate to a single member, Fischer, or the opposite, in which case unanimity among the members would be required.

The Appellate Court observed that, according to AJC's operating agreement, "[t]he business to be conducted by the Company shall be limited to (i) the sale, acquisition, ownership, development, operation, lease, investment and management of real properties ...."[127] It followed that "the commencement of litigation on behalf of 1730 LP against its mortgage lender is not an act that is within the scope of AJC's ordinary course of business and is, instead, a decision that affects the policy and management of AJC."[128] The company's operating agreement "clearly requires that such actions must be made with the unanimous consent of all of AJC's members."[129]

As a result, 1730 LP failed to satisfy its "burden of establishing that its action was brought with proper authority."[130] Absent such authority, 1730 LP lacked standing to pursue its claims, which deprived the court of jurisdiction and supported dismissal.

B. *Prospective business owner who negotiated a contract on behalf of not-yet-created entity lacked standing to sue personally for breach.*

In *Bernblum v. Grove Collaborative, LLC*,[131] the Appellate Court considered whether a person who conducted lease

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[126] *Id.*
[127] *Id.*
[128] *Id.* at 444.
[129] *Id.* at 445.
[130] *Id.* at 446.
[131] 211 Conn. App. 742, 274 A.3d 165, *cert. denied* 343 Conn. 925, 275 A.3d 626 (2022).

negotiations on behalf of a limited liability company that had not yet been formed would have standing, personally, to prosecute claims arising from the failure to consummate the lease.

The plaintiff, Steven Bernblum, who owned a commercial building at 770 Chapel Street in New Haven, conducted extensive negotiations with the defendant, a prospective tenant in the building. The parties exchanged multiple versions of a proposed lease, each of which identified the prospective landlord as 770 Chapel Street, LLC, an entity that Bernblum intended to create. Not until after the negotiations broke down did Bernblum form 770 Chapel Street, LLC, and quitclaim the property to it.

Shortly thereafter, Bernblum brought suit, alleging, among other things, breach of contract and breach of lease. The plaintiff also asserted a claim styled "detrimental reliance," based on improvements he made to the property allegedly in reliance on the defendant's promise to lease the space. After a courtside trial, the trial court entered judgment for the plaintiff.

On appeal, the defendant contended that the plaintiff lacked standing individually to prosecute these claims, and that accordingly they should have been dismissed. The Appellate Court agreed. "No contractual relationship between the plaintiff in his individual capacity and the defendants existed or was ever contemplated. The plaintiff was not a named party to the contract with respect to any of the underlying proposed lease agreements, and he was negotiating solely on behalf of his contemplated and soon to be formed limited liability company, 770 Chapel Street, LLC."[132]

The Appellate Court had previously ruled, in a 2007 case called *BRJM, LLC v. Output Systems, Inc.*,[133] that "contracts entered into by individuals acting on behalf of unformed entities are enforceable."[134] Here, 770 Chapel Street, LLC, was

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[132] *Id*. at 758, 759.

[133] 100 Conn. App. 143, 917 A.2d 605, *cert. denied*, 282 Conn. 917, 925 A.2d 1099 (2007).

[134] 211 Conn. App. at 746, fn. 4

the real party in interest, and should have been named as the plaintiff. As to the counts at issue, the Appellate Court reversed the trial court, with instructions to enter a judgment of dismissal.

V. Settlement Agreements

A. *Ambiguous settlement agreement leaves uncertainty in the wake of its breach.*

In *307 White Street Realty, LLC v. Beaver Brook Group, LLC*,[135] the Appellate Court addressed whether the parties' settlement agreement, never performed, barred the plaintiff from pursuing its original claims.

The plaintiff, a commercial tenant, sued its landlord for breach of an option under the lease to purchase the property. While the case was pending, the parties entered into a new purchase and sale agreement for the property, but that agreement was never carried out.

The defendant moved to dismiss the plaintiff's complaint, asserting that the action had become moot. The defendant argued that the negotiated purchase and sale agreement "replaces and supersedes the option to purchase in the lease. ... Because the instant action seeks interpretation and enforcement of a lease option that is no longer of any force or effect, the instant action is moot, thereby depriving [the court] of subject matter jurisdiction."[136] The trial court granted the motion, and dismissed the case.

The Appellate Court reversed, finding the doctrine of mootness did not apply. "[T]he proper inquiry with regard to mootness is not whether some change in circumstances has occurred after the claim or cause of action is asserted that forecloses any chance of success on the merits but, rather, whether that change would prevent the court from granting any and all practical relief *even assuming that the proponent is able to prevail on the merits, no matter how unlikely*."[137]

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[135] 216 Conn. App. 750, 286 A.3d 467 (2022).
[136] *Id.* at 758.
[137] *Id.* at 768. (Emphasis supplied by the court.)

Here, the plaintiff contended that "the purchase and sale agreement was executed as part of the parties' efforts to settle the current litigation and was intended to have no legal effect unless the sale actually closed. If the plaintiff is correct, then there remains a possibility that the plaintiff could prevail and obtain practical relief."[138] That is, if the court accepted the plaintiff's theory that the settlement agreement was a complete nullity if not performed, then the plaintiff could obtain relief under its complaint as originally presented. Accordingly, the defendant's motion to dismiss did not implicate mootness.

The Appellate Court further noted that, even if the motion did properly raise the issue of mootness, the trial court erred by deciding the issue without conducting an evidentiary hearing. Specifically, the parties were entitled to be heard with respect to their intent when they entered into the settlement agreement. It was an issue of fact "whether the parties agreed that the settlement agreement itself constituted satisfaction of the original cause of action, or whether the performance of the agreement was intended to be the satisfaction."[139] Framing the issue another way, "whether a settlement agreement constitutes an executory accord or a substitute agreement turns upon the intent of the parties."[140]

B. *Ambiguous term in settlement agreement resolved based on one party having good reason to know the opposing party's likely understanding.*

In *Reiner v. Reiner*,[141] the meaning of a hotly contested term in a settlement agreement was decided by applying an obscure rule of construction from the Restatement (Second) of Contracts (Restatement).

The parties had resolved previous litigation by entering into a written agreement, by which the plaintiff agreed to buy out the defendant's interest in various properties. The

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[138] *Id*. at 769.
[139] *Id*. at 773.
[140] *Id*.
[141] 214 Conn. App. 63, 279 A.3d. 788 (2022).

agreement provided that the buyout price would be "based on the fair market value" of the properties.

When the time came to implement the transactions, the parties reached an impasse. The plaintiff contended that the buyout price should be based on the defendant's equitable interest in the properties, starting with fair market value but deducting the balance owing on any mortgages. The defendant countered that a price "based on the fair market value" should not consider the mortgage balances. The plaintiff brought suit, seeking, among other things, a declaratory judgment adopting his interpretation of the contract language.

Following a courtside trial, the trial court did just that. In reaching its conclusion, the court was guided by Section 201(2) of the Restatement, which provides in relevant part:

> Where the parties have attached different meanings to a promise or agreement or a term thereof, it is interpreted in accordance with the meaning attached by one of them if at the time the agreement was made ... (b) that party had no reason to know of any different meaning attached by the other, and the other had reason to know the meaning attached by the first party.

Applying that provision here, the trial court found no basis to conclude that the plaintiff had "'reason to know' that [the defendant] believed that 'interest' meant percentage of the fair market value. On the other hand, [the defendant] did have reason to know that [the plaintiff] … believed that 'interest' meant equitable interest."[142]

In reaching that conclusion, the trial court noted that the defendant was an experienced real estate attorney, who presumably "[knew] that Connecticut follows the title theory of mortgages and that, therefore, he did not have legal title to properties encumbered by mortgages. Thus, he could not convey a full legal interest in his share of the fair market value of the three properties."[143] In addition, the court noted that

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[142] *Id*. at 73.
[143] *Id*. at 74.

"logically, [the plaintiff] would only want to pay the lesser of the two possible prices for the property."[144]

Applying the "clearly erroneous" standard of review, the Appellate Court affirmed the judgment below.

VI. Miscellaneous

A. *Case that failed due to lack of personal jurisdiction could not be rescued by Accidental Failure of Suit statute.*

In *Kinity v. US Bancorp*,[145] the Appellate Court addressed the issue of when the accidental failure of suit statute, General Statutes Section 52-592 (saving statute), will save, and when it will not save, a case that failed for lack of proper service. The saving statute provides, in relevant part, "[i]f any action, commenced within the time limited by law, has failed one or more times to be tried on its merits because of insufficient service … or because the action has been dismissed for want of jurisdiction … [the plaintiff] may commence a new action … for the same cause at any time within one year after the determination of the original action…"

In *Kinity*, the plaintiff attempted to sue his mortgage lender, under various theories, arising from the bank's procurement of force-placed insurance for the plaintiff's house. A marshal attempted to make service upon the defendant via certified mail, but sent the papers to an incorrect address. No return receipt was provided to the court. The plaintiff obtained a default judgment against the bank, but the bank succeeded in opening and vacating the judgment, and obtaining a judgment of dismissal, based on the failure of service.

The plaintiff then reasserted his claims in a new action. By the time he commenced suit, the limitations period for his claims had expired, but he proceeded under the purported authority of the saving statute. The bank moved for summary judgment, asserting that the plaintiff's claims were time barred, and that the saving statute did not apply. The trial

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[144] *Id*.

[145] 212. Conn. App. 791, 277 A.3d 200 (2022).

court agreed, and granted the bank's motion.

The Appellate Court affirmed. Critical to the court's analysis is the fact that the saving statute applies only if the initial, failed action was "commenced within the time limited by law." That is, the initial action must, in some sense, have commenced. "Without the commencement of an original action, no action exists for the statute to save."[146]

For purposes of the saving statute, timely "commencement" is effectuated "when the defendant receive[s] clear and unmistakable notice of [the] action upon delivery of the summons, complaint and related materials."[147] A plaintiff must establish that the defendants "actually received the summons and complaint, and thereby got actual or effective notice of the action within the time period prescribed by the applicable statute of limitations"[148] – even though the method of delivery did not comport with the requirements of formal service.

In *Kinity*, "the plaintiff failed to provide the court with any evidence that the bank itself had actual or effective notice of the original action by way of receipt of the summons and complaint."[149] Accordingly, the plaintiff did not establish an earlier, "commenced" action for the saving statute to save, and could not rely on the statute.

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[146] *Id*. at 840. (Citation and internal punctuation omitted.)
[147] *Id*. at 851. (Citation and internal punctuation omitted.)
[148] *Id*. at 848.
[149] *Id*. at 852.

2021 DEVELOPMENTS IN CONNECTICUT ESTATE AND PROBATE LAW

By Jeffrey A. Cooper* and John R. Ivimey**

This Article provides a summary of selected 2021 case law affecting Connecticut estate planning and probate practice.

A. Wills and Trusts

1. Scrivener's Error

In *Giglio v. Robinson*,[1] the superior court corrected a scrivener's error in a will. The case marks a rare, and potentially important, application of the Supreme Court's 1998 holding in *Erickson v. Erickson*.[2]

The case involved a decedent who wished to revise his will to leave his farm to his son, subject to his wife's life estate in the residence located thereon.[3] His attorney drafted a will that did not clearly reflect these wishes, including contradictory provisions that alternatively gave a life estate in the property to his wife and a fee simple to his son.[4] The probate court reformed the will, and a *de novo* appeal ensued.[5]

The superior court began its analysis of the case with the statement that a will is typically interpreted based on language of the will itself—the so-called "four corners" of the document—without looking to extrinsic evidence of the tes-

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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. The authors thank Gina Geary for her able research assistance and Lisa Staron and the editors of the Connecticut Bar Journal for their review and input. 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. HHDCV196117851S, 2021 WL 929950 (Conn. Super. Ct. Feb. 17, 2021).

2 *Erickson v. Erickson*, 246 Conn. 359, 716 A.2d 92 (1998).

3 *Giglio*, 2021 WL 929950 at *2.

4 *Id.* at *3.

5 *Id.* at *1.

tator's intent.[6] The court then noted a well-established exception to this general rule whereby extrinsic evidence may be considered to clarify ambiguous language.[7] The court applied this exception in the present case and found that ample evidence showed the nature of the ambiguity and revealed the decedent's true intent.[8]

Although the court's ambiguity analysis had redressed the plaintiff's concerns, the court went one step further, citing *Erickson* for the further proposition that a will, whether ambiguous or not, may be reformed when a party presents clear and convincing evidence of a scrivener's error that has frustrated the testator's intent.[9] Applying that rule to this case, the court found such evidence existed, and thus the scrivener's error provided an independent basis for reforming the will.[10] It is on this final ground that the case is particularly noteworthy. *Erickson*'s holding that a scrivener's error can be corrected has been called a "cutting-edge decision"[11] which significantly deviated from the traditionally strict rules governing reformation.[12] Yet, *Erickson* previously seems to have had relatively little impact on Connecticut's case law.[13] The superior court's extensive reliance on *Erickson* in this case may serve to shine new light on that landmark opinion, and may lead to more frequent, and more straightforward, reformation of scrivener's errors in wills.

2. Validity of Unfunded Trust

In *Benjamin v. Corasaniti*,[14] the Supreme Court upheld

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[6] *Id.* at *4 (citing Schwerin v. Radcliffe, 335 Conn. 300, 310, 238 A.3d 1 (2020)).

[7] *Giglio*, 2021 WL 929950 at *4 (citing Erickson, 246 Conn. at 372).

[8] *Giglio*, 2021 WL 929950 at *4.

[9] *Id.* at *4 (citing Erickson, 246 Conn. at 371-73 (1998)).

[10] *Giglio*, 2021 WL 929950 at *4.

[11] G. Sidney Buchanan, *No Connecticut Yankee in the Texas Supreme Court*, 40 Hous. L. Rev. 931, 932 (2003).

[12] Martin L. Fried, *The Disappointed Heir: Going Beyond the Probate Process to Remedy Wrongdoing or Rectify Mistake*, 39 Real Prop. Prob. & Tr. J. 357, 397 (2004) (noting Erickson's "liberal approach to reformation . . . .").

[13] *See* Jeffrey A. Cooper, *A Lapse in Judgment: Ruotolo v. Tietjen and Interpretation of Connecticut's Anti-Lapse Statute*, 20 Quinnipiac Prob. L.J. 204, 219-21 (2007) (decrying the Appellate Court's failure to discuss Erickson in a case involving a scrivener's error).

[14] 341 Conn. 463, 267 A.3d 108 (2021).

the validity of an exercise of a power of appointment in favor of a previously unfunded trust. In reaching this conclusion, the Court upheld an opinion of the superior court discussed in last year's update.[15]

The decedent was the beneficiary of two trusts and held a testamentary power of appointment over the trust corpus.[16] In his will, he exercised his power of appointment in favor of a charitable trust he had created during his life, but never funded.[17] The plaintiffs contended that the exercise of the power of appointment in favor of the charitable trust was invalid since the trust had not been funded during the decedent's life.[18] The probate court and superior court found the exercise valid.[19] On appeal, the Supreme Court affirmed.[20]

In its relatively brief opinion, the Supreme Court held that under common law principles a trust can be created by the valid exercise of a power of appointment.[21] The Court further held that Connecticut's recently-enacted version of the Uniform Trust Code makes this rule explicit, stating that "[a] trust may be created by . . . exercise of a power of appointment . . . in favor of a trustee . . . ."[22]

3. Equitable Divorce

In *Mongillo v. Butteiger*,[23] the superior court held that a plaintiff was equitably estopped from claiming an intestate share of a decedent's estate even though their foreign divorce was technically not valid.

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[15] *See* Cooper, Ivimey & Mulry, *2020 Developments in Connecticut Estate and Probate Law*, 94 CONNECTICUT B.J. (forthcoming) (discussing the case).

[16] *Benjamin*, 341 Conn. at 466-67. One of the trusts was governed by Illinois law. *Id.* at 467. This article only discusses the Court's application of Connecticut law.

[17] *Id.* at 469.

[18] *Id.* at 469-70.

[19] *Id.* at 470-72.

[20] *Id.* at 482.

[21] *Id.* at 478 (citing 1 Restatement (Third) of Trusts § 10 (d) ("a trust may be created by . . . an exercise of a power of appointment by appointing property to a person as trustee for one or more persons who are objects of the power . . . .")).

[22] *Id.* at 479 (quoting CONN. GEN. STAT. § 45a-499v (3); CONN. GEN. STAT.§ 45a-487t (a) (1) provides for this provision to operate retroactively).

[23] No. CV196031587S, 2021 WL 4777076 (Conn. Super. Ct. Sept. 15, 2021).

The decedent and the plaintiff married in 1962.[24] Four years later, the decedent went to Mexico to obtain a divorce.[25] Subsequently, the plaintiff moved out of the decedent's home, threw her wedding ring in a river, represented herself as single on her application for citizenship, and remarried in 1973.[26] When the decedent died intestate decades later, the plaintiff claimed an intestate share of his estate as his surviving spouse, arguing that the foreign divorce decree was invalid under Connecticut law.[27] The probate court denied her claim and an appeal ensued.[28]

The superior court affirmed.[29] The court agreed that Connecticut law is clear that the parties' Mexican divorce was invalid as a matter of state law since neither party lived in Mexico at the time that divorce was obtained.[30] However, the court held that Connecticut has adopted the doctrine of practical recognition of a foreign divorce decree, whereby an invalid foreign divorce will be recognized where "under the circumstances, it would be inequitable not to do so."[31] Applying that doctrine to this case, the court found that the plaintiff's 40-year history of treating the Mexican divorce as valid precluded her for renouncing it for purposes of inheritance.[32]

While the court's decision does not seem controversial given the facts of the case, it does tie into a far larger question of whether, and when, an individual can be treated as a spouse, former spouse, or child as a matter of equity even in cases where the individual would not meet that definition as a matter of law. For example, some courts have recognized the concept of equitable adoption to allow an individual to

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[24] *Id*. at *1.
[25] *Id*.
[26] *Id*.
[27] *Id*. at *2.
[28] *Id*.
[29] *Id*. at *4.
[30] *Id*. at *3 (citing Litvaitis v. Litvaitis, 162 Conn. 540, 545-60, 295 A.2d 519 (1962)).
[31] *Mongillo*, 2021 WL 4777076 at *3 (citing Bruneau v. Bruneau, 3 Conn. App. 453, 457, 489 A.2d 1049 (1985) (ruling divorce rendered in a jurisdiction where neither party resided may be recognized as valid if ". . . under the circumstances, it would be inequitable" to consider the marriage invalid.
[32] *Mongillo*, 2021 WL 4777076 at *3-*4.

take an intestate share as a child of the decedent even when that "child" was not formally adopted.[33] In a different context, Connecticut statutes provide that a spouse is not entitled to either an intestate share or elective share of her spouse's estate if she willfully abandoned that spouse.[34] Other states have taken that concept further and denied a spousal right to those who committed abuse or adultery.[35] While there is no indication the case at bar was an attempt to expand Connecticut law in these disparate areas, readers should consider whether future litigants might seek to do just that by asking a court to apply the equitable considerations which governed this case in other areas of probate law.

B. Probate Litigation

1. Undue Influence

In *Holloway v. Carvalho*,[36] the Appellate Court considered which party properly bore the burden of proof in an action alleging undue influence. The Court ruled that the party alleging undue influence bore the burden of proof, as the burden of proof shifts to the alleged influencer only in extremely limited circumstances.[37]

The case concerned a decedent's will that left his entire estate to his surviving daughter, the defendant, and nothing to the plaintiff, the only child of the decedent's predeceased daughter.[38] The defendant was the decedent's attorney-in-

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[33] *See generally* Irene D. Johnson, *A Suggested Solution to the Problem of Intestate Succession in Nontraditional Family Arrangements: Taking the "Adoption" (and the Inequity) Out of the Doctrine of "Equitable Adoption,"* 54 St. Louis U. L.J. 271, 295-96 (2009).

[34] General Statutes § 45a-436 (g) provides that "[a] surviving spouse shall not be entitled to a statutory share, as provided in subsection (a) of this section, or an intestate share, as provided in section 45a-437, in the property of the other if such surviving spouse, without sufficient cause, abandoned the other and continued such abandonment to the time of the other's death."

[35] *See generally* Allison Bridges, *Marital Fault as a Basis for Terminating Inheritance Rights: Protecting the Institution of Marriage and Those Who Abide by Their Vows- 'til Death Do Them Part*, 45 Real Prop. Tr. & Est. L.J. 559, 566-67 (2010) (discussing how a minority of states bar a spouse from inheriting if the spouse has abused the decedent spouse and if there is an adulterous spouse).

[36] 206 Conn. App. 371, 261 A.3d 57, *cert. denied*, 339 Conn. 911, 261 A.3d 746 (2021).

[37] *Id*. at 389.

[38] *Id*. at 373-74.

fact, primary caretaker, and financial advisor.[39] After the will was admitted to probate, the plaintiff appealed, alleging *inter alia* that the defendant had unduly influenced the testator and that the defendant bore the burden of proof on the issue of undue influence.[40] The superior court held that there was clear and convincing evidence that the defendant had not unduly influenced the decedent and thus did not need to rule on the question of which party bore the burden of proof.[41] An appeal to the Appellate Court ensued.[42]

As a general rule, a party alleging undue influence has the burden of proving their allegation.[43] However, the burden of proof shifts when the party accused of undue influence was in a confidential relationship with the testator and suspicious circumstances raise the specter of undue influence.[44] The Connecticut rule on the issue is set forth in the Connecticut Supreme Court's 1908 opinion *In re Lockwood*, which provides that the burden of proof shifts to the alleged influencer only when three conditions are met, *viz* (1) the alleged influencer was in a fiduciary relationship with the testator, (2) the will favors the fiduciary, and (3) the fiduciary is a stranger who supplants the natural objects of the testator's bounty.[45] In applying the *Lockwood* test to the facts at bar, the Appellate Court made clear that this exception is an extremely narrow one.[46]

Two aspects of the Court's analysis are worthy of note. First, the Court adopted a rather restrictive view of who is in a "fiduciary relationship" with the testator. Quoting the 1960 Supreme Court opinion in *Berkowitz v. Berkowitz*, the Court noted that there is no presumption of undue influence merely because the "legatee enjoys the trust and confidence

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[39] *Id.* at 374.
[40] *Id.* at 375-76.
[41] *Id.* at 378.
[42] *Id.* at 373.
[43] *See generally*, Restatement (Third) of Property (Wills & Don. Trans.) § 8.3 comment (b) (discussing the burden of proof).
[44] *Id.* at comment f.
[45] *Holloway*, 206 Conn. App. at 380 (quoting In re Lockwood, 80 Conn. 513, 522, 69 A.8 (1908)).
[46] *Holloway*, 206 Conn. App. at 387-88.

of the testator."[47] Rather, the burden of proof shifts "only where the beneficiary is . . . a religious, professional or business adviser, or a position clearly analogous thereto . . . ."[48] The Court held that the fact that the defendant was the decedent's attorney-in-fact, and served as his primary caregiver and personal manager at the time of his death, did not rise to the level required.[49] Other authorities have taken a contrary view, finding that an attorney-in-fact is in a fiduciary relationship with her principal.[50]

Second, the Court applied the *Lockwood* holding that even if a fiduciary relationship is found, the burden of proof cannot be shifted where the alleged influencer is a member of the decedent's family.[51] Again quoting from *Berkowitz*, the Court reasoned that a child in particular can never be presumed to be an undue influencer as "[i]t is the child's privilege to anticipate some share of the parent's estate" and to "use all fair and honest methods to secure his parent's confidence and obtain a share of his bounty."[52] Thus, even if the defendant had been deemed to have been in a fiduciary relationship with the decedent, the burden of proof could not have been shifted to her.[53]

While the Court's opinion is consistent with prior law, it suggests that Connecticut may be more reluctant than other jurisdictions to shift the burden of proof in cases alleging undue influence. While we certainly have no reason to believe the defendant engaged in undue influence, the facts that she was the decedent's attorney-in-fact, drove the decedent to legal appointments, and secured more under the will than she would have under the laws of intestacy might well have been

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[47] *Id*. at 388 (quoting Berkowitz v. Berkowitz, 147 Conn. 474, 476-78, 162 A.2d 709 (1960)).

[48] *Holloway*, 206 Conn. App. at 388 (quoting Berkowitz, 147 Conn. 474 at 476-78).

[49] *Id*. at 379.

[50] *See, e.g.*, Restatement (Third) of Property (Wills & Don. Trans.) § 8.3 ("an agent under a power of attorney is in a fiduciary relationship with his or her principal . . . .").

[51] *Holloway*, 206 Conn. App. at 389.

[52] *Id*.

[53] *Id*.

sufficient to raise a rebuttable presumption of undue influence in some other jurisdictions.[54]

2. Removal of Fiduciary

In *Probate Appeal of Douglas McIntyre*,[55] the Appellate Court considered the law governing an action seeking to remove a fiduciary. The Court ruled that the party seeking removal of a fiduciary bore the burden of proof, and that removal is an extraordinary remedy to be used only when necessary.[56]

The case concerned a dispute over a minor child's Uniform Transfer to Minors Act (UTMA) account.[57] The plaintiff was the custodian of a UTMA account established for a minor child of the parties.[58] The defendant, his ex-wife, successfully petitioned the probate court to remove him as custodian for breaching his fiduciary duties by improperly withdrawing funds from the account.[59] After the superior court affirmed his removal, plaintiff appealed to the Appellate Court.[60] Among the grounds for appeal was that the superior court had put the burden of proof on the plaintiff to disprove the allegations against him.[61]

The Appellate Court reversed in an opinion that provides guidance on both the burden of proof in removal actions and the appropriateness of removal as a remedy.[62] As to the burden of proof, the Court ruled that in an action seeking removal of a fiduciary the burden is on the party seeking that removal.[63] While acknowledging that under common law the fiduciary normally bears the burden of proof in an action

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[54] *See* Alaska in *Matter of Estate of McCoy*, 844 P.2d 1131, 1135 (Alaska 1993); Arizona in *In re Harber's Estate*, 102 Ariz. 285, 291, 428 P.2d 662 (1967); Colorado in *Breeden v. Stone*, 992 P.2d 1167, 1170 (2000); and Hawaii in *In re Estate of Herbert*, 90 Hawai'i 443, 456-59, 979 P.2d 39 (1999).

[55] 207 Conn. App. 433, 263 A.3d 925 (2021).

[56] *Id*. at 440.

[57] *Id*. at 435.

[58] *Id*. at 436.

[59] *Id*. at 436-38.

[60] *Id*. at 438.

[61] *Id*. at 440.

[62] *Id*. at 440-49.

[63] *Id*. at 445.

arising out of an alleged breach of fiduciary duty, the Court noted that Connecticut Supreme Court's opinion in *Cadle Co. v. D'Addario* makes clear that this general rule does not apply in an action seeking removal of the fiduciary.[64] The Court reasoned that when one establishes a fiduciary account, they, not the beneficiaries, have the authority to select the fiduciary to oversee that account.[65] The Court read *Cadle* as deferring to that choice, setting it aside only when a challenger proves that removal is warranted.[66] The Court bolstered its holding by citing consistent authority from other jurisdictions.[67]

The Court's discussion of the burden of proof led into a more expansive discussion about the appropriateness of removing a fiduciary for a breach of fiduciary duty.[68] Here again, the Court carved a path largely deferring to the settlor's choice of fiduciary. Quoting from *Cadle*, the Court held that removal is an extraordinary remedy only to be used when necessary "to protect against harm caused by the continuing depletion or mismanagement of an estate. . . ." and not "as a punishment for a fiduciary's past misconduct."[69] The Court seemed particularly persuaded by the fact that the superior court focused "almost entirely on the plaintiff's past breach," even though he had subsequently returned the custodial funds.[70]

In sum, the Appellate Court's opinion suggests a high bar, both procedurally and substantively, for those seeking to remove a fiduciary for cause.

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[64] *Id*. at 441-43 (citing to Cadle Co. v. D'Addario, 268 Conn. 441, 457-61, 844 A.2d 836 (2004)).

[65] *McIntyre*, 207 Conn. App. at 444-45.

[66] *Id*.

[67] *Id*. at 445-46 (citing In re Taylor's Estate, 5 Ariz. App. 144, 147, 424 P.2d 186 (1967) (party seeking removal of trustee has burden of proof); Matter of Rose BB., 243 App. Div. 2d 999, 1000, 663 N.Y.S.2d 415 (1997) (same); Tomazic v. Rapoport, 2012 -Ohio- 4402, 977 N.E.2d 1068, 1074 (Ohio App. 2012) (same), review denied, 134 Ohio St. 3d 1485, 984 N.E.2d 29 (2013); Guerra v. Alexander, Docket No. 04-09-00004-CV, 2010 WL 2103203, *6 (Tex. App. May 26, 2010) (same), review denied, Texas Supreme Court, Docket No. 10-0982 (October 21, 2011); 1 Restatement (Third) of Trusts § 1 comment (a) (referring to minors' custodianships as virtual trusts)).

[68] *McIntrye*, 207 Conn. App. at 446-49.

[69] *Id*. at 448 (quoting Cadle, 268 Conn. at 457).

[70] *McIntrye*, 207 Conn. App. at 448-49.

3. Power to Reconsider

In *Sacramone v. Harlow, Adams & Friedman*,[71] the superior court held that the probate court lacked power to reconsider its decree denying attorneys' fees presented on a fiduciary's final account.[72]

The case concerned the settlement of a decedent's estate.[73] Attorneys were retained to assist in the administration of the estate and paid from estate funds, with such payment reflected on the fiduciary's final account submitted to the court.[74] The court disallowed the final account in its entirety, specifically indicating that the legal fees were being denied in their entirety because the administrator had not adequately substantiated the basis for and reasonableness of those fees.[75] The court also removed the fiduciary and appointed a successor.[76] Rather than appealing the court's ruling, the attorneys submitted a separate application for approval of legal fees.[77] The plaintiff, the successor administrator, objected that the application for legal fees was effectively a motion to reconsider the court's decree denying the final account and argued that the probate court lacked authority to reconsider that decree.[78] Over the plaintiff's objections, the court approved nearly all of the requested fees and an appeal ensued.[79]

The superior court reversed, finding that the probate court lacked subject matter jurisdiction to issue the second decree approving fees.[80] The court held that the probate court's initial order disallowing the fees was a final decree, and that General Statutes Section 45a-128 authorizes a probate court to reconsider decrees only under extremely limited circum-

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[71] No. AANCV156017499S, 2021 WL 4896124 (Conn. Super. Ct. Sept. 23, 2021).
[72] *Id.* at *1.
[73] *Id.*
[74] *Id.*
[75] *Id.*
[76] *Id.*
[77] *Id.* at *2.
[78] *Id.*
[79] *Id.*
[80] *Id.* at *5.

stances, none of which applied in the present case.[81] Accordingly, since the attorneys failed to timely appeal from the probate court's denial of their attorneys' fees, they were left without statutory recourse.

The case provides a cautionary tale to probate lawyers and judges about the importance of making clear whether or not a ruling is to be considered a final order or decree that would invoke General Statutes Section 45a-128 and foreclose further probate court action on that matter. In the present case, the attorneys argued that they did not consider the probate court's denial of their fees to be a final order, but that the court envisioned that they would subsequently reapply for those fees and provide the requisite documentation.[82] The superior court ruled that if such intent existed, it was not reflected in the court's order, which was titled "Memorandum of Decision" and contained no specific language indicating that the matter had been resolved "without prejudice" or had been "continued" to a later date.[83] Absent such explicit language, the court held that probate court decrees are to be considered final.[84]

4. Scope of Appeal

In *Kline v. Kline*,[85] the superior court held that in a *de novo* appeal from probate, a party may raise additional is-

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[81] *Id.* at *3-*4 (citing General Statutes § 45a-128 (b), which provides in relevant part that the probate court could only reconsider the type of decree at issue 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.").

[82] *Id.* at *4. The probate court's subsequent approval of the attorney's fees might suggest that the court had been operating under similar assumptions. *Id.* at *2.

[83] *Id.* at *4.

[84] *Id.* (citing Heussner v. Day, Berry & Howard, LLP, 94 Conn. App. 569, 576, 893 A.2d 486 ("our case law is clear that Probate Court decrees are final judgments for the purpose of the doctrines of res judicata and collateral estoppel"), *cert. denied*, 278 Conn. 912, 899 A.2d 38 (2006); *see also* General Statutes § 45a-24, which 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.")).

[85] No. CV206045831S, 2021 WL 830053 (Conn. Super. Ct. Jan. 19, 2021).

sues not ruled upon in the initial probate court proceeding.[86]

At issue was the approval of the defendant's final account as a co-trustee.[87] The plaintiff had not objected to the accounting in the probate court, and it was approved.[88] The plaintiff then brought a *de novo* appeal, raising objections to the final account he had not raised in probate court and seeking leave to amend his complaint to raise additional issues concerning the final account.[89] The defendant objected and moved to dismiss.[90]

The superior court began its analysis by drawing a clear distinction between an appeal on the record and a de novo appeal. In the former, the superior court is limited to the record before it and thus limited to the specific allegations made, and ruled upon, in the probate court.[91] In contrast, a de novo appeal represents a completely fresh evaluation of the *order or decree* appealed from—in this case the final account.[92] In a de novo appeal, a party may raise new issues and present new evidence which would have been admissible in the probate court proceeding that led to that order or decree.[93]

The case represents an expansive view of the scope of a de novo appeal.

5. Collateral Estoppel

In *Gladstein v. Goldfield*,[94] the U.S. District Court dismissed a plaintiff's claims alleging, *inter alia*, intentional interference with inheritance, undue influence, larceny, and infliction of emotional distress relating to the preparation of a decedent's will.[95] The court held that since the probate

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[86] *Id.* at *4.
[87] *Id.* at *1.
[88] *Id.* at *3.
[89] *Id.*
[90] *Id.*
[91] *Id.* at *4.
[92] *Id.* at *5 (citing State v. Gordon, 495 Conn. App. 490, 494, 696 A.2d 1034, *cert. granted*, 243 Conn. 911, 701 A.2d 336 (1997)).
[93] *Kline*, 2021 WL 830053 at *4 (quoting Gordon, 495 Conn. App. 494-95).
[94] No.3:18-cv-00926, 2021 WL 2037799 (D. Conn. May 21, 2021).
[95] *Id.* at *1.

court had found that the decedent had testamentary capacity and was free from undue influence, the doctrine of collateral estoppel barred the plaintiff from re-litigating those same factual questions in a different forum.

The probate court had issued a decree admitting the decedent's will to probate, specifically finding that the decedent had testamentary capacity and rejecting claims of undue influence.[96] When the plaintiff subsequently brought her various claims in federal court, the defendants successfully moved to dismiss those claims on the basis of collateral estoppel.[97]

In dismissing the claims, the court reviewed the law governing the related doctrines of res judicata and collateral estoppel. The court observed that res judicata, often referred to as claim preclusion, provides that "a judgment on the merits in a prior suit bars a second suit involving the same parties or their privies based on the same cause of action."[98] The doctrine of collateral estoppel "bars a party from raising an issue of law or fact in a second suit that the party had a full and fair opportunity to litigate . . . in [a] prior proceeding and where the decision of the issue was necessary to support a valid and final judgment on the merits in the first action."[99] The court further specified that "[a]n issue is actually litigated if it is properly raised in the pleadings or otherwise, submitted for determination, and in fact determined," and is "necessarily determined if, in the absence of a determination of the issue, the judgment could not have been validly rendered."[100]

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[96] *Id*. at *3.

[97] *Id*. at *6.

[98] *Id*. at *2 (quoting Parklane Hosiery Co. v. Shore, 439 U.S. 322, 326 n.5 (1979)).

[99] *Gladstein*, 2021 WL 2037799 at *2 (quoting Irish Lesbian & Gay Org. v. Giuliani, 143 F.3d 638, 644 (2d Cir. 1998) (internal citations and quotations omitted) (alterations in original)).

[100] *Gladstein*, 2021 WL 2037799 at *2 (quoting Lighthouse Landings, Inc. v. Conn. Light and Power Co., 300 Conn. 325, 343 (Conn. 2011); *see also* Gross v. Rell, 485 F. Supp. 2d 72, 78–79 (D. Conn. 2007), *aff'd in part*, *question certified*, 585 F.3d 72 (2d Cir. 2009), *certified question answered*, 304 Conn. 234 (2012) (quoting Golino v. New Haven, 950 F.2d 864, 869 (2d Cir. 1991)) ("For 'an issue to be subject to collateral estoppel, (1) it must have been fully and fairly litigated in the first action, and (2) it also must have been actually decided[,] and (3) the decision must have been necessary to the judgment.'")).

Applying those precedents to the case before it, the District Court found that collateral estoppel barred the federal claims.[101] Even though the plaintiff did not present her allegations of undue influence to the probate court, she had full and fair opportunity to do so.[102] In fact, the court specifically found that the decedent had testamentary capacity and was free from undue influence, and those findings were necessary to the court's decision to admit the will to probate.[103] The doctrine of collateral estoppel thus precluded the District Court from revisiting those factual findings.[104] Since the plaintiff's various claims could not succeed absent a finding of incapacity or undue influence, the court dismissed them all.[105]

6. Timeliness of Appeal

In *Dreher v. Dreher*,[106] the superior court considered how Executive Orders issued by Governor Lamont in response to the COVID-19 pandemic extended the deadlines for timely filing probate appeals.[107] The court ruled that under the relevant Executive Orders, the period for filing probate appeals was tolled from March 19, 2020 to March 1, 2021, with the time period for filing appeals of orders issued during this period commencing on March 1, 2021.[108]

At issue in the case was the deadline for filing appeals of several probate court orders issued between April and August 2020.[109] The plaintiffs filed an appeal of those orders on April 1, 2021.[110] The defendant argued that the appeals were untimely insofar as they were not filed within the forty-five (45) days of the probate court's decree as required by General Statutes Section 45a-186 (b).[111] The plaintiffs countered

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[101] *Gladstein*, 2021 WL 2037799 at *5-*6.
[102] *Id.* at *3.
[103] *Id.* at *5-*6.
[104] *Id.* at *6.
[105] *Id.*
[106] No. WWMCV216021624S, 2021 WL 5542085 (Conn. Super. Ct. Oct. 27, 2021).
[107] *Id.* at *1.
[108] *Id.* at *3.
[109] *Id.* at *1.
[110] *Id.*
[111] *Id.* at *2. General Statutes § 45a-186 (b) provides in relevant part: "Any person aggrieved by an order, denial or decree of a Probate Court may appeal

that they never received notice of the probate court hearings and thus their deadline for filing an appeal was extended to twelve months pursuant to General Statutes Section 45a-187.[112] Since their appeal was filed within that time, the appeal was timely.

The superior court held for the plaintiffs, but not for the reasons argued.[113] Rather, the court held that Governor Lamont's Executive Order 7G suspended the period for filing appeals until March 1, 2021, and the relevant deadlines for appeals did not begin running until that date.[114] Since the plaintiffs' appeals were filed on April 1, 2021, which was filed less than forty-five (45) days after the appeals period began running, they were timely under either parties' view of the applicable appeals period.[115] In reaching this conclusion, the court rejected the defendant's argument that the Executive Orders merely extended all appeals periods until March 1, 2021, citing superior court opinions in other contexts agreeing with its reading of the Executive Orders.[116]

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therefrom to the Superior Court. An appeal from a matter heard under any provision of section 45a-593, 45a-594, 45a-595 or 45a-597, sections 45a-644 to 45a-677, inclusive, or sections 45a-690 to 45a-703, inclusive, shall be filed not later than forty-five days after the date on which the Probate Court sent the order, denial or decree."

[112] *Dreher*, 2021 WL 5542085 at *2. General Statutes § 45a-187 provides in relevant part: "If such persons have no notice to be present and are not present, or have not been given notice of their right to request a hearing, such appeal shall be taken within twelve months . . . ."

[113] *Dreher*, 2021 WL 5542085 at *3.

[114] *Id*.

[115] *Id*.

[116] *Id*. (citing Drumm v. Freedom of Info. Comm'n, No. HHBCV216063380S, 2021 WL 4047111 (Conn. Super. Ct. Aug. 13, 2021); Strileckis v. Int'l Holding Co., No. UWYCV196048260S, 2021 WL 2302601 (Conn. Super. Ct. April 19, 2021) (plaintiff's failure to strictly comply with the filing deadline set forth in § 52-102a(c) does not deprive the court subject matter jurisdiction); Silvestro v. Roper, No. HHDCV216137760S, 71 Conn. L. Rptr. 253 (Conn. Super. Ct. July 13, 2021) (Executive Order 7G applies to suspend the time requirement present in § 30-102); Osborne v. Hamden, No. NNHCV186084179S, 70 Conn. L. Rptr. 469 (Conn. Super. Ct. Nov. 10, 2020) (court entertained plaintiff's objection to defendant's motion for summary judgment even though objection was filed more than seven months late pursuant to Practice Book § 17-45(b) "because Executive Order, 7G has temporarily vitiated such deadlines for the Superior Court")).

7. Tortious Interference

In *Solon v. Slater*,[117] the Appellate Court considered whether the doctrine of collateral estoppel precluded a plaintiff from bringing an action for tortious interference with an inheritance after unsuccessfully alleging undue influence in the probate court.[118] The Court ruled that collateral estoppel did preclude the plaintiff's attempt to effectively re-litigate the issue of undue influence, and thus affirmed the superior court's dismissal of the action.[119]

The case concerned a will that the plaintiff had unsuccessfully alleged to have been the product of undue influence.[120] Rather than appealing that ruling, the plaintiff brought an action in the superior court alleging, *inter alia*, tortious interference with right of inheritance.[121] The defendants successfully moved for summary judgment, arguing that since the probate court had ruled that the will was not impacted by any impropriety by the defendants, the doctrine of collateral estoppel barred the plaintiff's attempt to revisit the same question in a different forum.[122]

The Appellate Court's opinion implies, although it never explicitly states, that the plaintiff's claim of tortious interference with an inheritance did represent a viable cause of action in Connecticut.[123] As we have noted previously, lower courts have given conflicting opinions as to whether this state does, or should, recognize that tort, and the appellate courts have not addressed the question directly.[124]

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[117] 204 Conn. App. 647, 253 A.3d 503, *cert. granted*, 337 Conn. 908, 253 A.3d 43 (2021). *See* Jeffrey A. Cooper & John R. Ivimey, *2018 Developments in Connecticut Estate and Probate Law*, 93 CONN. B.J. 251, 262-63 (2019) (discussing superior court case).

[118] *Id.* at 648-49.

[119] *Id.* at 665.

[120] *Id.* at 653.

[121] *Id.* at 655.

[122] *Id.* at 656-57. For a more detailed discussion of the doctrine of collateral estoppel, see our analysis of *Gladstein v. Goldfield*, supra Section B (5).

[123] *See id.* at 664.

[124] *See, e.g.,* Jeffrey A. Cooper & John R. Ivimey, *2014 Developments in Connecticut Estate and Probate Law,* 89 CONN. B.J. 80, 88-89 (2015) (noting conflicting trial court decisions and suggesting the need for appellate resolution); Jeffrey A. Cooper & John R. Ivimey, *2017 Developments in Connecticut Estate and Probate Law,* 92 CONN. B.J. 154, 171-72 (discussing another superior court case

8. Standing

In *Derblom v. Archdiocese of Hartford*,[125] the Appellate Court determined who had standing to enforce a testamentary charitable gift.[126]

The decedent had created a will leaving the residue of his estate to a Catholic school in Madison, Connecticut, "or its successor, for its general uses and purposes."[127] After the decedent died, the will was admitted to probate and nearly $5 million was distributed to the school.[128] Shortly thereafter, the school closed.[129] After the school ceased operations, a group consisting of the executrix of the decedent's estate, former students, parents of former students, and a private school formed in part by some of the plaintiffs and purporting to be the successor of the closed school, brought an action to reclaim the charitable gift.[130] They contended in part that the gift should be considered as an endowment rather than an outright gift, and thus the now-shuttered school had a fiduciary duty to ensure its continued use for its intended purposes.[131]

The defendant moved to dismiss for lack of standing, arguing that only the attorney general had standing to enforce a charitable gift.[132] The plaintiffs disagreed, contending in part that Connecticut courts have recognized a "special interest exception" that can give parties other than the attorney general standing to enforce the provisions of a charitable

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addressing the tort of tortious interference with an inheritance); Jeffrey A. Cooper & John R. Ivimey, *2018 Developments in Connecticut Estate and Probate Law,* 93 Conn. B.J. 263-65 (again urging appellate consideration of tortious interference with an inheritance); *see also* Gina M. Geary, *The Light at the End of the Tunnel: Why the Timing is Right for Connecticut to Consider Tortious Interference with Inheritance as a Valid Cause of Action*, 32 Quinnipiac Prob. L.J., 169-90 (2019) (advocating for Connecticut's appellate courts to resolve the conflicting trial decisions).

[125] 203 Conn App. 197, 247 A.3d 600, *cert. granted*, 336 Conn. 938, 249 A.3d 354 (2021).

[126] *Id*. at 199.

[127] *Id*. at 200.

[128] *Id*. at 201.

[129] *Id*.

[130] *Id*. at 203-04.

[131] *Id*.

[132] *Id*. at 204.

gift.[133] The defendant responded that the special interest exception applied only to charitable trusts, not testamentary gifts, and thus was inapplicable to the present case.[134] The superior court agreed and granted the motion to dismiss.[135] The plaintiffs appealed.[136]

The Appellate Court affirmed the superior court's decision dismissing the action for lack of standing.[137] The Court first concluded that the provision leaving the residue of the decedent's estate to the school "for its general uses and purposes" constituted an outright gift rather than an endowment or charitable trust.[138] Accordingly, the attorney general, and not the plaintiffs, was the proper party to enforce the terms of the gift.[139] The Court further noted that the special interest exception that allows someone other than the attorney general to enforce a charitable donation applies only in cases involving charitable trusts, not all charitable gifts, and thus is a narrow exception.[140]

C. Ethics and Practice

1. Disqualification of Attorney

In *Clark v. Saucier*,[141] the superior court granted a motion to disqualify a defendant's attorney.[142]

The plaintiff was the executor of the decedent's estate.[143]

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[133] *Id.* at 204-05 (citing to Grabowski v. Bristol, No. CV950468889S, 19 Conn. L. Rptr. 623 (Conn. Super. Ct. June 3, 1997), *aff'd*, 64 Conn. App. 448, 780 A.2d 953 (2001)).

[134] *Derblom*, 203 Conn App. 197 at 205.

[135] *Id.* at 205.

[136] *Id.* at 206.

[137] *Id.* at 217.

[138] *Id.* at 208-12.

[139] *Id.* at 212-17. At common law, the donor of a gift did not have standing to enforce a charitable gift, whether it was an absolute gift or a gift in trust. *Id.* at 212-13; *see Carl J. Herzog Found., Inc. v. U. of Bridgeport*, 243 Conn. 1, 5–6, 699 A.2d 995 (1997). In General Statutes § 3-125, the Connecticut legislature codified this rule and entrusted the enforcement of gifts to the attorney general. *Derblom*, 203 Conn. App. at 213.

[140] *Derblom*, 203 Conn App. 197 at 215 (citing Carl J. Herzog Foundation, Inc., 243 Conn. at 8 n.4 ("it is well established in the context of *charitable trusts* that there are others, in addition to the attorney general, who may enforce *the terms of a trust*" (emphasis added))).

[141] No. HHBCV196054707S, 2021 WL 1054471 (Conn. Super. Ct. Feb. 16, 2021)

[142] *Id.* at *9.

[143] *Id.* at *1.

She alleged that the defendants had unduly influenced the decedent in the year before her death and thus undermined her estate planning.[144] She further alleged that the defendants' lawyers, who had represented the decedent before death, had facilitated this undue influence.[145] The plaintiff filed a motion to add the attorneys as additional defendants and to disqualify them from representing the current defendants.[146] The court granted the latter motion, and disqualified the attorneys.[147]

The court cited numerous grounds for granting the motion to disqualify the defendants' counsel, including the fact that their prior representation of the decedent created a duty to their former client which conflicted with their current representation of the defendants.[148] Perhaps more significantly, the court reasoned that since the attorneys were "material witnesses" to the alleged undue influence, their testimony "would be necessary at trial to describe whether other persons participated in or were present" when they met with the decedent, as well as "what intentions she stated and what understanding she manifested."[149] The court thus ruled that the attorneys could not represent a party in a matter in which the attorneys could expect to be called as witnesses.[150]

On its face, this ruling could be of widespread applicability. In many types of probate matters, a party may wish to elicit testimony from the decedent's attorneys regarding the decedent's state of mind or factual issues relating to the decedent's estate planning. If attorneys cannot represent a party under such circumstances, it would be impossible for

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[144] *Id.*

[145] *Id.* at *6.

[146] *Id.* at *3.

[147] *Id.* at *7.

[148] *Id.* at *6. *See* Conn. Rules of Prof. Conduct 1.9 (a) ("A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client gives informed consent, confirmed in writing").

[149] *Clark*, 2021 WL 1054471 at *6.

[150] *Id.* at *7. *See* Conn. Rules of Prof. Conduct 3.7 (providing a general rule that "[a] lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness" and setting out limited exceptions).

a lawyer who drafted a will, for example, to represent the executor in a will contest. We do not believe that the court intended this result. Rather, it seems likely that the court's decision to disqualify the attorneys in this case was more responsive to the unique facts and circumstances of the case than may have been reflected in some of the court's rather expansive language.[151]

[151] The court seemed to imply as much, noting that "*in this case*, the issues under Rule 1.9 [the attorneys' alleged conflict of interest with their former client] and 3.7 [the potential that the lawyers would be called as witnesses] are intertwined." *Clark*, 2021 WL 1054471 at *5 (emphasis added).

RECENT TORT DEVELOPMENTS

By James E. Wildes*

This review covers some of most important tort cases and related developments from 2020 through some of 2022. The focus of the article is on appellate decisions. In recent years, there has been some concern about whether the deceasing number of trials will impede the development of the law. It appears that, at least in Connecticut, tort and civil litigation continues to yield a large number of cases. Some decisions are discussed in greater depth than others. The volume of cases necessarily requires that some cases not be included in this survey. The areas of the law most prominently represented in this article include damages, defamation, governmental immunity, indemnification, motor vehicle, negligence, premises liability, professional negligence, trial practice, underinsured motorist, and workers' compensation.

I. Abnormally Dangerous Activities

In *Gonzalez v. O & G Industries, Inc.*,[1] the principal issue was whether a gas blow procedure employed by the defendants was an abnormally dangerous activity, a determination which would subject the defendants to strict liability. The facts that gave rise to the lawsuit involved the construction of a power plant that was nearing completion.[2] Before the power generating equipment could start up, the manufacturer of the gas turbines required that the natural gas fuel supply pipelines be cleared of construction debris.[3] In order to clear the debris from the pipelines, the named defendant and its subcontractors performed a procedure commonly referred to as a "gas blow," in which natural gas flows through the piping at a higher pressure than during normal operation to propel debris through the pipeline until it is ejected.[4]

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* Of the New Haven Bar

1 341 Conn. 644, 653, 267 A.3d 766 (2021).

2 *Id.* at 649.

3 *Id.*

4 *Id.* at 649-50.

A blast occurred during this procedure that took the lives of six construction employees and injured nearly thirty more.[5] Some of the victims and their families brought suit against the owner of the power plant, the owner's agent, the general contractor and others.[6] On appeal, the plaintiffs contended that the trial court improperly rendered judgment in favor of the defendants on their strict liability claims.[7] The Supreme Court disagreed with the plaintiffs and affirmed.[8] The Court stated that strict liability is imposed on a defendant who engages in any intrinsically dangerous, ultrahazardous or abnormally dangerous activity.[9] Under this doctrine, a plaintiff is not required to show that his or her loss was caused by the defendant's negligence because it is sufficient to show only that the defendant engaged in the activity that caused the loss.[10] The Court in reaching its conclusion looked to its own precedents, as well as the Restatement (Second) of Torts Sections 519 and 520.[11] Specifically, the Court referred to the six factors set forth in Section 520 in determining whether an activity is abnormally dangerous: (a) the existence of a high degree of risk of some harm to the person, land or chattels of others; (b) the likelihood that the harm that results from it will be great; (c) the inability to eliminate the risk by the exercise of reasonable care; (d) the extent to which the activity is not a matter of common usage; (e) the inappropriateness of the activity to the place where it is carried on; and (f) the extent to which its value to the community is outweighed by its dangerous attributes.[12] The Court concluded after reviewing the six factors and its prior case law that the gas blow procedure was not an abnormally dangerous activity and, there-

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[5] *Id*. at 647.
[6] *Id*. at 647-48.
[7] *Id*. at 648.
[8] *Id*. at 701.
[9] *Id*. at 656.
[10] *Id*. at 656-57.
[11] *Id*. at 657-62. The Supreme Court had imposed strict liability in two earlier decisions: *Whitman Hotel Corp. v. Elliott & Watrous Engineering Co.*, 137 Conn. 562, 79 A.2d 591 (1951) (holding that the defendants were strictly liable for damages resulting from exploding dynamite); and *Caporale v. C.W. Blakeslee & Sons, Inc*., 149 Conn. 79, 175 A.2d 561 (1961) (the defendant was strictly liable for damages resulting from pile driving operations during highway construction).
[12] *Gonzales*, 341 Conn. at 659-62.

fore, the plaintiffs could not maintain a strict liability cause of action against the defendants.[13]

II. Apportionment

In *Costanzo v. Town of Plainfield*,[14] the central issue was whether the apportionment statute, General Statutes Section 52-572h(o),[15] permits municipal defendants whose liability is based General Statutes Section 52-557n(b)(8),[16] to file an apportionment complaint sounding in negligence. The plaintiff, the administratrix of the estate of the decedent, brought claims against the defendants, the town of Plainfield and two of its employees, pursuant to Section 52-557n(b)(8), arising out of the drowning of the decedent in a pool located on privately owned property in the town.[17] The Court stated that Section 52-572h(o) expressly prohibits apportionment claims between a party liable for negligence and a party liable pursuant to any action created by statute, except where liability may be apportioned among parties liable for negligence in an action created by statute based upon negligence.[18] The plaintiff objected to the defendants' efforts

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[13] *Id*. at 670-71, 679.

[14] 344 Conn. 86, 89-90, 277 A.3d 772 (2022).

[15] General Statutes § 52-572h(o) provides: "Except as provided in subsection (b) of this section, there shall be no apportionment of liability or damages between parties liable for negligence and parties liable on any basis other than negligence including, but not limited to, intentional, wanton or reckless misconduct, strict liability or liability pursuant to any cause of action created by statute, except that liability may be apportioned among parties liable for negligence in any cause of action created by statute based on negligence including, but not limited to, an action for wrongful death pursuant to section 52-555 or an action for injuries caused by a motor vehicle owned by the state pursuant to section 52-556."

[16] General Statutes § 52-557n(b)(8) provides: "Notwithstanding the provisions of subsection (a) of this section, a political subdivision of the state or any employee, officer or agent acting within the scope of his employment or official duties shall not be liable for damages to person or property resulting from … (8) failure to make an inspection or making an inadequate or negligent inspection of any property, other than property owned or leased by or leased to such political subdivision, to determine whether the property complies with or violates any law or contains a hazard to health or safety, unless the political subdivision had notice of such a violation of law or such a hazard or unless such failure to inspect or such inadequate or negligent inspection constitutes a reckless disregard for health or safety under all the relevant circumstances …."

[17] *Costanzo*, 334 Conn. at 90.

[18] *Id*. at 89. In *Allard v. Liberty Oil Equipment Co*., 253 Conn. 787, 788-89, 756 A.2d 237 (2000), the issue was whether a defendant sued for failing to provide a safe service area to a customer who fell on a hand truck could apportion liability

to seek apportionment against the owners of the property where the pool was located, arguing that the complaint set forth a cause of action alleging recklessness or intentional acts under Section 52-557n(b)(8), rather than negligence.[19] The Court explained that there are two distinct causes of action available under Section 52-557n(b)(8): one that requires notice of a violation or hazard; and another that requires a reckless disregard for health or safety.[20] The Court concluded that the first exception is directed at negligent conduct, not intentional conduct.[21] The Court held that the plaintiff alleged, at least in part, a claim created by statute based on negligence and, therefore, it found that the Appellate Court correctly overruled the trial court order dismissing the defendants' apportionment complaint and notice of intent to seek apportionment.[22]

III. Damages

In *Maldonado v. Flannery*,[23] the Supreme reversed the Appellate Court, which had held that the trial court had improperly ordered additurs in the amount of $8000 in favor of

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as to a product seller of the truck that the plaintiff was alighting from. The Court affirmed the trial court's granting of the product seller's motion to strike, reasoning that Section 52-572h(o) prohibited apportionment of liability between parties liable on the basis of intentional, wanton or reckless misconduct, strict liability, or liability pursuant to any cause of action created by statute where the basis of liability is other than one in negligence. *Id.* at 801. The Court stated that product liability claims were a form of strict liability and not based on fault. *Id.* at 804-06. In addition, the allegations in the apportionment complaint constituted a product liability claim within the meaning of General Statutes Section 52-572m *et seq.*, and as such, the exclusive remedy for making a claim against a product seller was under the product statute. *Id.* at 800.

[19] *Costanzo*, 344 Conn. at 90-91.

[20] *Id.* at 105.

[21] *Id.* at 112.

[22] *Id.* at 113.

[23] 343 Conn. 150, 153, 158-60, 272 A.3d 1089 (2022). Chief Justice Robinson dissented. The Appellate Court in *Maldonado v. Flannery*, 200 Conn. App. 1, 13, 238 A.3d 127, *cert. granted*, 335 Conn. 967, 240 A.3d 284 (2020) stated that the jury reasonably could have found that the plaintiffs failed to prove noneconomic damages for pain and suffering caused by the motor vehicle accident because the jury was not required to believe the plaintiffs' testimony and could have determined that the plaintiffs lacked credibility. The Court also found that the trial court's failure to identify the portion of the record that supported its conclusion that the jury's failure to award noneconomic damages was unreasonable under the circumstances was an abuse of discretion. *Id.* at 9.

first named plaintiff and $6500 in favor of the other plaintiff. The jury had awarded the first named plaintiff $17,228,38 in economic damages and zero noneconomic damages and awarded the other plaintiff $11,864.94 in economic damages and zero noneconomic damages.[24] The Supreme Court noted that its caselaw has articulated that the trial court must conduct its own independent evaluation of the record to determine if the jury could have rendered its verdict on the basis of the facts and reasonable inferences drawn therefrom.[25] The Court further noted that the standard to be employed by the trial court is whether the award of damages falls somewhere within the necessarily uncertain limits of fair and reasonable compensation, or whether the verdict so shocks the sense of justice as to compel the conclusion that the jury was influenced by partiality, mistake or corruption.[26] The Court also noted that if the trial court concludes that the jury's award of damages is excessive or inadequate and that the motion to set aside should be granted, the trial court must provide an explanation setting forth the reasons for the decision.[27] In addition, the Court stated although an award of economic damages and zero noneconomic damages is not per se inadequate as a matter of law, this does not mean that all split verdicts should be sanctioned.[28] The Court emphasized that noneconomic damages are not an optional element of damages if the physical injuries that form the basis for the jury's award of economic damages caused the plaintiff to have pain and suffering.[29] Turning to the instant case, the Court found that the trial court's articulation of the grounds for granting the plaintiffs' joint motion for additurs was adequate for appellate review.[30] The Court concluded that it was inconsistent for the jury to find, on one hand, that the plaintiffs sustained injuries in the accident that required medical treatment, but also find, on the other hand, that the plaintiffs experienced

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[24] *Maldonado*, 343 Conn. at 157-58.
[25] *Id*. at 164-65.
[26] *Id*. at 166.
[27] *Id*. at 167.
[28] *Id*. at 172-77.
[29] *Id*. at 177.
[30] *Id*. at 183.

no pain or suffering that warranted an award of noneconomic damages.[31] Because the trial court could have reasonably found that the verdict was inconsistent, the Court held that the trial court's decision to grant the plaintiff's joint motion for additur was not an abuse of discretion.[32]

In *Fain v. Benak*,[33] the issue was whether the plaintiff presented sufficient evidence to support an award for future medical expenses. The case was tried to the court after which judgment was entered for the plaintiff in the amount of $344,867.33.[34] The award included economic damages of $84,867.33 and noneconomic damages of $260,000.[35] The court granted the plaintiff's motion for reconsideration and added $14,250 for future medical expenses.[36] The Appellate Court stated that an award of future medical expenses should be based upon an estimate of reasonable probabilities, not possibilities.[37] The Court stated that future medical expenses can be calculated based upon the history of medical expenses that have accrued as of the trial date when there is a degree of medical certainty that future medical expenses will be necessary.[38] The Court reviewed the evidence and found that the treating physician's letter and other evidence supported the conclusion that the plaintiff would incur future medical expenses and also provided evidence of the costs of the medical expenses.[39] The Court concluded that the trial court did not abuse its discretion in granting the motion for reconsideration and in finding that the evidence was sufficient to support the award of future medical expenses.[40]

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[31] *Id*. at 187.

[32] *Id*. at 188.

[33] 205 Conn. App. 734, 736, 258 A.3d 112, *cert. granted*, 339 Conn. 906, 260 A.3d 1223 (2021), *appeal dismissed as improvidently granted*, 345 Conn. 912, 283 A.3d 980 (2022).

[34] *Id*. at 738.

[35] *Id*. at 738-39.

[36] *Id*. at 739. The Appellate Court stated that whether to grant a motion for reconsideration is within the sound discretion of the court. *Id*. at 746.

[37] *Id*. at 748.

[38] *Id*.

[39] *Id*.

[40] *Id*. at 749.

IV. Defamation

NetScout Systems, Inc. v. Gartner, Inc.[41] concerned the sometimes elusive distinction between actionable statements of fact and nonactionable statements of opinion. The plaintiff, a business involved with the development and selling of information technology products, sued the defendant, a publisher of research reports in which it rates vendors, such as the plaintiff, that sell and service various forms of information technology, in defamation and for violating the Connecticut Unfair Trade Practices Act (CUTPA), General Statutes Section 42-110a *et seq*.[42] The Supreme Court agreed with the defendant that its statements about the plaintiff were expressions of opinion and, accordingly, could not provide the basis for a defamation claim.[43] The Court explained that for a defamatory statement to be actionable, the statement in issue must convey an objective fact because generally a defendant cannot be held liable for expressing a mere opinion.[44] The Court further explained that a statement can be defined as factual if it relates to an event or state of affairs that existed in the past or present and is capable of being known, and that such statements of fact usually are with respect to a person's conduct or character.[45] The Court added that an opinion is a personal comment about another's conduct, qualifications or character that has some basis in fact.[46] The Court stated that context is a crucial consideration in attempting to distinguish a nonactionable statement of opinion from an actionable statement of fact and that the salient point is whether an ordinary person hearing or reading the matter complained of would be likely to understand it as an expression of the speaker's or writer's opinion, or as a statement of existing fact.[47] Moreover, the Court observed that claims for defamation based upon ratings or grades gen-

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41 334 Conn. 396, 223 A.3d 37 (2020).
42 *Id*. at 398-99.
43 *Id*. at 408.
44 *Id*. at 410.
45 *Id*. at 411.
46 *Id*.
47 *Id*. at 412.

erally fail because ratings or grades cannot be objectively verified as true or false and, therefore, are matters of opinion.[48] The Court stated that generally the determination of whether a statement is an opinion, as opposed to a factual representation, is a question of law for the court; however, where the court cannot reasonably characterize the allegedly defamatory words as either fact or opinion because, for example, innuendo is present, it becomes a question of fact for the jury.[49] With this above legal framework in mind, the Court found that all of the statements that the defendant made about the plaintiff were expressions of nonactionable opinion, which undermined the plaintiff's claims for defamation and a violation of CUTPA.[50]

The applicability of the doctrine of absolute immunity was the central question in *Priore v. Haig*.[51] The plaintiff brought a defamation action against the defendant, seeking to recover damages as a result of statements made by the defendant during a hearing before a planning and zoning commission.[52] On appeal to the Supreme Court, the plaintiff argued that the Appellate Court erred in concluding that the defendant's statements were entitled to absolute immunity because the hearing before the commission was not quasi-judicial and the statements regarding the plaintiff were not relevant to the subject matter of the commission's hearing.[53] At the commission hearing, the defendant stated that the plaintiff had a criminal history and was untrustworthy.[54] The Supreme Court explained that absolute litigation immunity prevents a person from being sued for defamation for statements made in the course of a judicial or quasi-judicial proceeding so long as the statement is relevant to the subject matter of the proceeding.[55] The Court stated absolute litiga-

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[48] *Id*. at 416.
[49] *Id*. at 417.
[50] *Id*. at 430-31.
[51] 344 Conn. 636, 280 A.3d 402 (2022).
[52] *Id*. at 638-39.
[53] *Id*. at 639. In *Priore v. Haig*, 196 Conn. App. 675, 712, 230 A.3d 714, *cert. granted*, 335 Conn. 955, 239 A.3d 317 (2020), the Appellate Court affirmed the trial court's dismissal of the plaintiff's lawsuit.
[54] *Priore*, 344 Conn. at 641.
[55] *Id*. at 645.

tion immunity attaches to any hearing before a tribunal that performs a judicial function, ex parte or otherwise, whether the hearing is public or not, including lunacy, bankruptcy, naturalization proceedings, contested elections, and proceedings before boards and commissions, so far as they have powers of discretion in applying the law to the facts, which are regarded as judicial or quasi-judicial in character.[56] The Court agreed with the plaintiff that the procedural safeguards of the proceeding and the authority of the entity to regulate the proceedings to make sure that accusatory or unflattering allegations are subject to the requirements of reliability are relevant considerations as to whether a proceeding is quasi-judicial in nature.[57] The Court stated that the hearing before the commission that was the subject of the litigation had almost no procedural safeguards in place to promote the reliability of the information presented at the hearing.[58] The Court noted that this consideration weighed against a determination that the hearing was quasi-judicial.[59] The Court concluded that given the absence of procedural safeguards to promote the reliability of the proceedings before the commission, the benefit to be derived from statements made by the public during the hearing were not sufficiently compelling to outweigh the possible damage that untruthful statements could cause to individual reputations to warrant granting absolute immunity to such statements.[60] The judgment of the Appellate Court was reversed and the case was remanded to the Appellate Court with direction to reverse the trial court's judgment and to remand the case to the trial court for further proceedings.[61]

Elder v. 21st Century Media Newspaper, LLC[62] discussed whether reporters and news publishers were protected in a defamation action when reporting on a court decision that

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[56] *Id*. at 646-47.
[57] *Id*. at 651, 657.
[58] *Id*. at 655.
[59] *Id*. at 657.
[60] *Id*. at 661.
[61] *Id*. at 663-64.
[62] 204 Conn. App. 414, 415, 254 A.3d 344 (2021).

described the result of disciplinary proceedings against an attorney. The trial court granted the defendants' motion for summary judgement on the grounds of the fair report privilege.[63] The disciplinary matter arose out of two phone calls during which, according to the Office of Disciplinary Counsel, the plaintiff mispresented his identity to a person he later learned was a police officer conducting an investigation regarding certain advice that the plaintiff had allegedly provided to a client who was a suspect in a separate investigation.[64] The disciplinary proceeding resulted in the plaintiff being suspended from the practice of law for one year.[65] The Connecticut Supreme Court later reversed the suspension on statute of limitations grounds.[66] The Appellate Court summarized the fair report privilege as follows: If the reporting is accurate or a fair abridgement of a proceeding, an action sounding in defamation cannot be maintained.[67] Further, the privilege exists even where the publisher does not believe the defamatory words he or she reports to be true, and even when he or she knows them to be false, and even if they are libel per se.[68] The privilege does not demand that the report be exact in every immaterial detail; it is sufficient if it conveys a substantially correct account of the proceeding.[69] Regarding the subject case, the Court stated that much of the plaintiff's claim concerned articles that used the word "impersonating" to describe the plaintiff's actions, the characterization of the legal advice he gave that formed the basis of the police investigation, and the alleged omissions in the investigation.[70] The Court found that the use of the word "impersonating" in the articles accurately described the conduct set forth in the suspension decision.[71] The Court affirmed the decision of the trial court.[72]

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63 *Id.* at 415-16.
64 *Id.* at 416-17.
65 *Id.* at 417.
66 *Id.*
67 *Id.* at 422.
68 *Id.*
69 *Id.* at 424.
70 *Id.* at 424-25.
71 *Id.* at 425-26.
72 *Id.* at 432.

V. Defective Highway

In *Dobie v. City of New Haven*,[73] the issue was whether the plaintiff's claim fell within the purview of General Statutes Section 13-149.[74] The plaintiff was following a snow plow on the defendant's street when he suddenly struck an open manhole, which resulted in injuries to the plaintiff.[75] After the jury returned a plaintiff's verdict, the trial court denied the defendant's posttrial motion to dismiss based upon the plaintiff's failure to comply with the notice requirements of Section 13a-149 because it interpreted the complaint to assert a negligence claim, rather than a highway defect claim.[76] Before considering the merits of the defendant's argument, the Appellate Court explained that Section 13a-149 allows a person to recover damages against a municipality for injuries caused by a defective highway.[77] The Court further explained that a highway defect is any object in, upon, or near the traveled path, which would necessarily obstruct or hinder one in the use of the road for the purpose of traveling thereon.[78] The Court stated that the plaintiff's injuries were caused by an impact between his vehicle and an open manhole in a municipal road.[79] The Court found that the manhole was an object in the traveled path that necessarily obstructed or hin-

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[73] 204 Conn. App. 583, 254 A.3d 321, *cert. granted*, 338 Conn. 901, 258 A.3d 90 (2021).

[74] General Statutes § 13a-149 provides: "Any person injured in person or property by means of a defective road or bridge may recover damages from the party bound to keep it in repair. No action for any such injury sustained on or after October 1, 1982, shall be brought except within two years from the date of such injury. No action for any such injury shall be maintained against any town, city, corporation or borough, unless written notice of such injury and a general description of the same, and of the cause thereof and of the time and place of its occurrence, shall, within ninety days thereafter be given to a selectman or the clerk of such town, or to the clerk of such city or borough, or to the secretary or treasurer of such corporation. If the injury has been caused by a structure legally placed on such road by a railroad company, it, and not the party bound to keep the road in repair, shall be liable therefor. No notice given under the provisions of this section shall be held invalid or insufficient by reason of an inaccuracy in describing the injury or in stating the time, place or cause of its occurrence, if it appears that there was no intention to mislead or that such town, city, corporation or borough was not in fact misled thereby."

[75] *Dobie*, 204 Conn. App. at 585.

[76] *Id*. at 587.

[77] *Id*. at 588.

[78] *Id*. at 589.

[79] *Id*. at 590-91.

dered the use of the road and, therefore, the condition was a highway defect within the purview of Section 13a-149.[80] The Court reversed the trial court because the plaintiff failed to comply with the notice provisions of Section 13a-149.[81]

VI. Governmental Immunity

Doe v. Madison[82] arose out of the sexual abuse of the minor plaintiffs by a teacher at a town high school. The plaintiffs appealed from the judgment of the trial court granting the motions for summary judgment filed by the defendants, the town of Madison (town), the Board of Education of the Town of Madison (board), and the principal of the high school on the ground of governmental immunity.[83] The Supreme Court noted that it was undisputed that the employees of the town and the board, all teachers, and various football coaches, had a ministerial duty to report to the Commissioner of Children and Families if they obtained reasonable cause to suspect abuse of or imminent risk of serious harm to a child or student.[84] However, the Court concluded that none of the defendant employees had reasonable cause to suspect that the teacher was sexually abusing the plaintiffs or exposing them to imminent risk of sexual abuse.[85] The Court noted that General Statutes Section 52-557n(a)(2)(B) shields a municipality from liability for damages to person or property caused by negligent acts or omissions which require the exercise of judgment or discretion as an official function of the authority expressly or impliedly granted by law.[86] The Court

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[80] *Id.*

[81] *Id.* at 595.

[82] 340 Conn. 1, 262 A.3d 752 (2021).

[83] *Id.* at 5.

[84] *Id.* at 23.

[85] *Id.* at 24-25.

[86] *Id.* at 35. General Statutes § 52-557n (a) provides: "(a)(1) Except as otherwise provided by law, a political subdivision of the state shall be liable for damages to person or property caused by: (A) The negligent acts or omissions of such political subdivision or any employee, officer or agent thereof acting within the scope of his employment or official duties; (B) negligence in the performance of functions from which the political subdivision derives a special corporate profit or pecuniary benefit; and (C) acts of the political subdivision which constitute the creation or participation in the creation of a nuisance; provided, no cause of action shall be maintained for damages resulting from injury to any person or property by

stated that it had recognized an exception to discretionary act immunity.[87] The Court explained that the identifiable person-imminent harm exception has three requirements: (1) imminent harm; (2) an identifiable victim; and (3) a public official to whom it is apparent that his or her conduct is likely to subject that victim to harm.[88] The Court explained that the proper standard for determining whether harm was imminent is whether it was apparent to the municipal defendant that the dangerous condition was so likely to cause harm that the defendant had a clear and unequivocal duty to act immediately to prevent the harm.[89] In affirming the judgments, the Court stated that the facts of the case suggested that the teacher's actions were a culmination of a generally clandestine pattern of behavior.[90]

Whether state and municipal policies can render a police officer's acts during a pursuit of a motorist ministerial, as opposed to discretionary, for purposes of governmental immunity was the subject of *Cole v. City of New Haven*.[91] The plaintiff sued the city of New Haven and one of its officers in negligence for injuries sustained when the officer pulled directly into an oncoming traffic lane in which the plaintiff was operating a dirt bike, causing him to strike a tree.[92] The Supreme Court agreed with the plaintiff that the trial court committed an error in granting the defendants' motion for summary judgment on the basis of governmental immunity.[93] The Court found that the officer's decision to drive into an oncoming traffic lane violated several policies that imposed ministerial duties regarding roadblocks, the operation

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means of a defective road or bridge except pursuant to section 13a-149. (2) Except as otherwise provided by law, a political subdivision of the state shall not be liable for damages to person or property caused by: (A) Acts or omissions of any employee, officer or agent which constitute criminal conduct, fraud, actual malice or wilful misconduct; or (B) negligent acts or omissions which require the exercise of judgment or discretion as an official function of the authority expressly or impliedly granted by law."

87 *Doe*, 340 Conn. at 36.

88 *Id*.

89 *Id*. at 37.

90 *Id*. at 38-41.

91 337 Conn. 326, 328, 253 A.3d 476 (2020).

92 *Id*.

93 *Id*. at 328-29.

of police vehicles and pursuits.[94]

Buehler v. Town of Newtown[95] involved an appeal by the plaintiff from the summary judgment entered by the trial court in favor of the defendants on the ground that were immune from liability under the doctrine of government liability. The plaintiff, a volleyball referee, fell from a stand while officiating a volley ball game and sustained injuries.[96] After the accident, he brought a claim sounding in premises liability against the town of Newtown, the Newtown Board of Education and the former athletic director of Newtown High School.[97] The Appellate Court affirmed, finding that the identifiable person-imminent harm exception to discretionary immunity was not available to the plaintiff.[98] The Court explained that the only identifiable class of foreseeable victims that has been recognized is that of school children attending public schools during school hours.[99] The Court additionally explained that it had consistently held that students who are injured outside of school hours do not fall within the class of identifiable persons within the exception.[100] The Court rejected the plaintiff's claim that he was an identifiable person because as a sports official he was compelled to be at the school, noting that the plaintiff was present at the time to officiate a voluntary activity outside of school hours.[101]

Gonzales v. City of New Britain[102] affirmed the judgment entered in favor of the defendants after the trial court granted the defendants' motion to strike the plaintiff's amended complaint on the basis of governmental immunity. The plaintiff, after she was attacked by pit bulls on property where she lived as a tenant, sued the named municipality and an animal control officer of the municipality.[103] The plaintiff alleged

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94 *Id.*
95 206 Conn. App. 472, 473, 262 A.3d 170 (2021).
96 *Id.*
97 *Id.*
98 *Id.* at 473-74.
99 *Id.* at 484.
100 *Id.* at 485.
101 *Id.* at 486-87.
102 216 Conn. App. 479, 480-81, A.3d (2022).
103 *Id.* at 481-82.

that based upon previous attacks the control officer knew or should have known that the plaintiff would be attacked by pit bulls on property where she lived.[104] The plaintiff did not dispute that her claims directed against the defendants were subject to governmental immunity in light of the discretionary nature of the animal control officer's actions.[105] The plaintiff claimed that the identifiable person-imminent harm exception to governmental immunity applied.[106] In support of her claim, the plaintiff maintained that she was legally compelled to be on the property at the time of the incident because she was a tenant of the property.[107] The Appellate Court found that the complaint did not contain allegations demonstrating that the plaintiff was legally compelled to be at the property when the pit bulls attacked her and that the only logical reading of the complaint was that the plaintiff's residence at the property as a tenant was purely voluntary.[108] The Court concluded that the plaintiff did not allege sufficient facts in support of her claim that she was an identifiable victim or a member of an identifiable class of foreseeable victims for purposes of the exception.[109]

The legal sufficiency of a complaint sounding in public nuisance against a municipality was the subject of *Bennetta v. City of Derby*.[110] The plaintiff, a senior citizen, alleged that she went for a walk along a municipal walking trail in the town of Derby when she was physically and sexually assaulted.[111] The plaintiff also alleged that the defendant municipality was itself especially dangerous, and that the defendant's conduct of constructing a trail while permitting vandals and other non-law abiding people on the trail created a nuisance.[112] On appeal, the Appellate Court, disagreed with the

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[104] *Id*. at 482.
[105] *Id*. at 484-85.
[106] *Id*. at 485-86.
[107] *Id*.
[108] *Id*. at 489.
[109] *Id*.
[110] 212 Conn. App. 617, 276 A.3d 455, *cert. denied*, 344 Conn. 903, 277 A.3d 135 (2022).
[111] *Id*. at 620.
[112] *Id*. at 626.

plaintiff that the trial court improperly granted the defendant's motion to strike the nuisance claim.[113] The Court set forth the principles applicable to a nuisance claim brought against a municipality, explaining that the plaintiff must prove four elements to succeed in a nuisance cause of action: (1) the condition complained of had a natural tendency to create danger and inflict injury upon persons or property; (2) the danger created was a continuing one; (3) the use of the land was unreasonable or unlawful; and (4) the existence of the nuisance was the proximate cause of the plaintiff's injuries and damages.[114] The Court stated that when the alleged tortfeasor is a municipality, the plaintiff must also prove that the defendant, by some positive act, created the condition constituting the nuisance.[115] The Court additionally stated that the above common-law rule had been codified at General Statutes Section 52-557n(a) (1) (C), which provides, in pertinent part, that a "political subdivision of the state shall be liable for damages to person or property caused by ... acts of the political subdivision which constitute the creation or participation in the creation of a nuisance …."[116] The Court further explained that the failure to remedy a dangerous condition, not of the municipality's own making, is not sufficient to constitute the required positive act.[117] The Court stated that although the plaintiff alleged that the location of the trail was a dangerous condition, the complaint alleged that the nuisance, if any, was created by vandals and other non-law abiding people on the trail, and not by the defendant municipality.[118]

A recent piece of legislation is worth noting. General Statutes Section 52-571k established a civil cause of action against police officers who deprive an individual or a class of individuals of the equal protection or privileges and immunities of state law and eliminates governmental immunity as

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[113] *Id*. at 619.
[114] *Id*. at 622.
[115] *Id*. at 622-23.
[116] *Id*. at 623.
[117] *Id*.
[118] *Id*. at 625-26.

a defense in certain suits under some circumstances.[119] The action must be commenced within one year after the action

[119] Whether courts in interpreting General Statues Section 52-571k will look to existing case law interpreting similar statutes and causes of action in addressing issues that will undoubtedly arise is something that will be determined. Briefly, under 42 U.S.C. Section 1983 a person may bring a civil action against governmental officials, including state and local police officers, who deprive that person of federal statutory or constitutional rights under the color of state law. There is no federal statute that allows civil actions against federal officials for a violation of constitutional rights. However, the United States Supreme Court has recognized a civil remedy in *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), which held that a violation of a person's Fourth Amendment right to be free from unreasonable searches and seizures by a federal agent acting under color of his authority gives rise to a cause of action for damages premised upon unconstitutional conduct. The Supreme Court has described Bivens as a more limited federal analog to Section 1983. *Hernandez v. Mesa*, 140 S. Ct. 735, 747 (2020). State courts may also create a civil remedy, as the Connecticut Supreme Court has done in *Binette v. Sabo*, 244 Conn. 23, 710 A.2d 688 (1998), where it created a cause of action for money damages under the Connecticut Constitution for illegal searches and seizures of private homes by police officers. An excessive force claim brought under Section 1983 that arises in the context of an arrest or investigatory stop of a free citizen is characterized as one invoking the protections of the Fourth Amendment, which guarantees citizens the right to be secure in their persons against unreasonable seizures of the person. *Graham v. Connor*, 490 U.S. 386, 394 (1989). "[T]he 'reasonableness' inquiry in an excessive force case is an objective one: the question is whether the officers' actions are 'objectively reasonable' in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation." *Id.* at 397. Per the notes to Connecticut Civil Jury Instructions 5.1-1, the elements of claims under Section 1983 are likely the same as those for claims for damages for violations of the Connecticut Constitution, as recognized by *Binette*, and for violations of the Fourth Amendment to the United States Constitution, as recognized by *Bivens*. https://jud.ct.gov/JI/Civil/Civil.pdf. By way of background, the 1871 Ku Klux Klan Act was a Reconstruction-era statute that included what is now known as Section 1983. The United States Supreme Court in *Monroe v. Pape*, 365 U.S. 167 (1961), *overruled on other grounds by Monell v. Department of Social Services of City of New York*, 436 U.S. 658 (1978), expanded the reach of Section 1983 by allowing actions against police officers for actions that violate the United States Constitution. Civil actions brought under Section 1983 and *Bivens* are subject to the defense of qualified immunity. A defense of good faith and probable cause in an action brought under Section 1983 was first recognized in *Pierson v. Ray*, 386 U.S. 547, 557 (1967). Qualified immunity was further refined in an action brought under Section 1983 in *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982), which found that governmental officials performing discretionary functions generally are shielded from civil liability damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known. The difficulty in overcoming a defense of qualified immunity can be found in the recent Section 1983 excessive police force case of *Kisela v. Hughes*, 138 S. Ct. 1148, 1152 (2018), where it was explained that immunity protects all but the plainly incompetent or those who knowingly violate the law. The United States Supreme Court's view of a *Bivens* cause of action and a Section 1983 action was on display recently in two cases. In *Egbert v. Boule*, 142 S. Ct. 1793 (2022), the majority refused to allow a Fourth Amendment excessive force claim or a First Amendment retaliation claim by a United States citizen who was allegedly assaulted by a government border control officer. In *Vega v. Tekoh*, 142 S. Ct. 2095, 2099 (2022), the majority held

accrues. Governmental immunity is not a defense for actions seeking damages unless, at the time of the alleged misconduct, the officer had an objectively good faith belief that his or her conduct did not violate the law. The effective date of the Act was July 1, 2021. The contours of this new cause of action will be developed as parties litigate the issues and courts render decisions interpreting the scope of the statute.

VII. Indemnification

In *Brass Mill Center, LLC v. Subway Real Estate Corp.*,[120] the plaintiff, an owner of a shopping mall, and the defendant, a security company, were parties to a security contract, which contained an indemnification provision. By way of background, a pedestrian crossing a travel lane of the mall on her way to work at the mall was fatally hit by an unlicensed driver.[121] The administrator of the decedent's estate brought a wrongful death action against the plaintiff and other parties, alleging that the plaintiff failed to install or use traffic calming measures on the roadway and designed the premises in a way that permitted motorists to drive at unsafe speeds.[122] The plaintiff sued the defendant claiming that the defendant had a contractual duty to defend and indemnify it in connection with the wrongful action.[123] The plaintiff and defendant filed cross motions for summary judgment.[124] The trial court granted the plaintiff's motion for summary judgment on its

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that a plaintiff may not sue a police officer under Section 1983 based on the alleged improper admission of an "un-*Mirandized*" statement in a criminal prosecution. Importantly, a local government may not be sued under Section 1983 on the basis of respondeat superior, but it may be responsible under Section 1983 when the execution of a government policy or custom inflicts an injury. *Monell*,436 U.S. at 694. Although not a substitute for the recovery of damages for injuries sustained by an individual, the United States Department of Justice may sue local and state governments under 42 U.S. Code Section 14141 if there is a patten of constitutional violations. These suits often result in a consent decree overseen by a federal judge. The history of civil rights actions and remedies against governmental officials is explored in two recent books: Erwin Chemerinsky, *Presumed Guilty: How the Supreme Court Empowered the Police and Subverted Civil Rights* (2021) and Aziz Z. Huq, *The Collapse of Constitutional Remedies* (2021).

[120] 214 Conn. App. 379, 381, 280 A.3d 1216 (2022).

[121] *Id*. at 382.

[122] *Id*. at 383.

[123] *Id*. at 383-84.

[124] *Id*. at 384.

contractual claim against the defendant.[125] The trial court subsequently held a hearing in damages and awarded damages to the plaintiff.[126] The Appellate Court initially determined the appropriate legal analysis to employ in deciding whether one sophisticated business party to a contract had a contractual duty to defend a claim asserted against another sophisticated business party to that contract.[127] The Court stated that the duty to defend most commonly arises in the context of a contract of insurance.[128] In the insurance context, the Court stated that it was well settled that an insurer's duty to defend is determined by reference to the allegations in the complaint and if an allegation in the complaint falls even possibly within the coverage, then the insurer must defend the insured.[129] The Court further stated that it discerned no reason to apply a different analysis regarding the duty to defend in contracts between sophisticated business entities that contain duty to defend provisions.[130] The Court additionally stated that whether one sophisticated business party has a contractual duty to defend another sophisticated business party is a question of law, which is to be determined by comparing the allegations of the complaint to the terms of the contract.[131] The Court stated that in contrast to the duty to defend, the duty to indemnify turns on the facts proven at trial and the theory under which judgment is actually entered in the case.[132] The Court also stated that where there is no duty to defend, there can be no duty to indemnify because the duty to defend is broader than the duty to indemnify.[133] The Court found that the trial court conflated the allegations in the wrongful death complaint regarding traffic control and design with the defendant's responsibility for crime prevention pursuant to the security contract and, consequently, de-

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[125] *Id*.
[126] *Id*. at 385.
[127] *Id*. at 386.
[128] *Id*.
[129] *Id*. at 387-88.
[130] *Id*. at 386.
[131] *Id*. at 387.
[132] *Id*. at 388.
[133] *Id*.

termined that the defendant did not have a duty to defend the plaintiff.[134] Because the Court concluded that the defendant did not have a duty to defend the plaintiff, it inexorably followed that the defendant had no duty to indemnify the plaintiff.[135] The Court reversed the trial court and remanded the case with direction to deny the plaintiff's motion for summary judgment and to grant the defendant's motion for summary judgment.[136]

VIII. Motor Vehicle

The viability of the unavoidable accident doctrine was discussed in *Fain v. Benak*.[137] The defendant, on appeal, argued that the trial court in a courtside trial erred in refusing to apply the unavoidable accident doctrine.[138] The defendant argued that the blowout of her tire just before her vehicle struck the plaintiff's vehicle was not foreseeable and amounted to an unavoidable accident.[139] The Appellate Court after determining, as a threshold matter, that its review was plenary, explained its general antipathy toward an unavoidable accident jury.[140] The Court stated that a jury instruction on unavoidable accident usually should be given only when the evidence can support a finding that neither party was negligent or where a driver suffers an unanticipated loss of consciousness while operating a motor vehicle.[141] The Court found no error in the trial court declining to apply the unavoidable accident doctrine because the trial court's findings that the defendant was negligent with respect to her speed and braking necessarily precluded a determination that the accident was unavoidable.[142]

McCall v. Sopneski[143] addressed the parameters of Gen-

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134 *Id.* at 392.
135 *Id.* at 394.
136 *Id.* at 394.
137 *Fain*, 205 Conn. App. 734.
138 *Id.* at 739.
139 *Id.* at 739-40.
140 *Id.* at 741, 744-45.
141 *Id.* at 745.
142 *Id.* at 746.
143 202 Conn. App. 616, 246 A.3d 531 (2021).

eral Statutes Section 14-60.[144] The plaintiff was injured when the motorcycle he was operating was struck by a vehicle operated by the defendant, Gina Sopneski (Sopneski), and owned by the defendant, Reynolds Garage & Marine, Inc. (Reynolds).[145] Sopneski had been provided the vehicle by Reynolds on a temporary basis while her vehicle was being repaired.[146] Prior to obtaining use of the vehicle, Sopneski had entered into a written agreement with Reynolds concerning the use of the vehicle and had furnished proof of her automobile insurance.[147] The trial court granted Reynolds's motion for summary judgment, agreeing with Reynolds that the claim was barred because the transaction between Sopneski and Reynolds fell within the purview of Section 14-60.[148] The plaintiff contended that Reynolds was not entitled to immunity under Section 14-60 because Reynolds provided Sopneski a vehicle but not a dealer plate.[149] The Appellate Court rejected the plaintiff's argument, noting that Section 14-60 encompasses situations where a dealer either lends a dealer vehicle, a dealer plate or a dealer vehicle containing a dealer plate.[150] The Court also rejected the plaintiff's con-

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[144] General Statutes § 14-60 provides, in pertinent part:"No dealer or repairer may loan a motor vehicle or number plate or both to any person except for (1) the purpose of demonstration of a motor vehicle owned by such dealer, (2) when a motor vehicle owned by or lawfully in the custody of such person is undergoing repairs by such dealer or repairer, or (3) when such person has purchased a motor vehicle from such dealer, the registration of which by him is pending, and in any case for not more than thirty days in any year, provided such person shall furnish proof to the dealer or repairer that he has liability and property damage insurance which will cover any damage to any person or property caused by the operation of the loaned motor vehicle, motor vehicle on which the loaned number plate is displayed or both. Such person's insurance shall be the prime coverage. If the person to whom the dealer or repairer loaned the motor vehicle or the number plate did not, at the time of such loan, have in force any such liability and property damage insurance, such person and such dealer or repairer shall be jointly liable for any damage to any person or property caused by the operation of the loaned motor vehicle or a motor vehicle on which the loaned number plate is displayed. ..."

[145] *McCall*, 202 Conn. App. at 617-18.

[146] *Id*. at 618.

[147] *Id*. at 618-19.

[148] *Id*. at 619-20. In *Cook v. Collins Chevrolet, Inc*., 199 Conn. 245, 250, 506 A.2d 1035 (1986), the Supreme Court concluded that where the dealer confirmed that the purchaser of a vehicle was insured prior to lending him dealer plates and did not violate General Statutes Section 14-60 in any other way, no remedy was afforded the plaintiff against the dealer.

[149] *McCall*, 202 Conn. App. at 624.

[150] *Id*. at 625.

tention that because the words "rental" or "rent" appeared in the agreement that there was a genuine issue of material fact as to whether it was a loan, finding that irrespective of its label in the agreement, the transaction, in essence, was a loan.[151] The Court affirmed the granting of the motion for summary judgment.[152]

IX. Negligence

The economic loss doctrine is sometimes a source of confusion. *Raspberry Junction Holding, LLC v. Southeastern Connecticut Water Authority*[153] expounded on and applied the doctrine to the facts of the case. The plaintiff, the owner of the hotel, sued the defendant in negligence, seeking damages for economic loss in the form of lost revenue due to the inability to rent rooms and the need to provide refunds to hotel guests, when an explosion at the defendant's pumping station caused an interruption in the plaintiff's water service.[154] The Supreme Court agreed that the trial court correctly determined that the defendant owed the plaintiff no legal duty of care.[155] The Court observed that the economic loss doctrine, as employed in tort cases to preclude a plaintiff's action, is merely another way of saying that the defendant owed no duty to the plaintiff because the claimed loss was a remote and indirect consequence of the misconduct of the defendant.[156] The Court set forth its often stated duty analysis, observing that the existence of a duty is a question of law and only if such a duty is found to exist does the trier of fact then determine whether the defendant violated that duty.[157] The Court stated that the test for the existence of a legal duty of care involves a determination of whether an ordinary person in the defendant's position, knowing what the defendant knew or should have known, would anticipate

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151 *Id*. at 625-28.
152 *Id*. at 628.
153 340 Conn. 200, 263 A.3d 796 (2021).
154 *Id*. at 202-05.
155 *Id*. at 803.
156 *Id*. at 211-12.
157 *Id*. at 210.

that harm of the general nature of that suffered was likely to result, and a determination of the fundamental policy of the law as to whether the defendant's responsibility should extend to the plaintiff in the case.[158] The Court remarked that it had recognized four factors to be considered in determining the extent of a legal duty as a matter of public policy: (1) the normal expectations of the participants in the activity under review; (2) the public policy of encouraging participation in the activity, while weighing the safety of the participants; (3) the avoidance of increased litigation; and (4) the decisions of other jurisdictions.[159] The Court found that each of the factors militated against the imposition of a duty and, therefore, concluded that imposing a duty would be against public policy.[160]

Whether the defendant construction manager owed a duty in a wrongful death action was the prinicipal question addressed by *Lasso v. Valley Tree and Landscaping, LLC*.[161] The accident arose out a construction project undertaken by the borough of Naugatuck to renovate its high school.[162] As part of the project, a contract was awarded to the defendant, O & G Industries, Inc., as the construction manager.[163] The borough building committee also decided to have trees removed near a parking lot that was adjacent to but not part of the high school renovation project.[164] The tree removal con-

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[158] *Id*. at 211.

[159] *Id*. at 215.

[160] *Id*. With respect to the normal expectations of the parties, the Court explained that, in a variety of contexts, it had denied the plaintiff a recovery in negligence for economic losses resulting from injury to the person or property of another, concluding in each case that the damages were simply too remote or the relationship between the parties too attenuated for the imposition of a duty on the defendant. *Id*. at 216. In support of its analysis, the Court cited to cases: *Lawrence v. O & G Industries, Inc*., 319 Conn. 641, 643-44, 126 A.3d 569 (2015) (holding that the plaintiff construction workers could not recover economic losses in the form of lost wages from the defendant construction companies whose negligence destroyed the plaintiffs' work site, resulting in the plaintiffs losing their jobs); and *RK Constructors, Inc. v. Fusco Corp*., 231 Conn. 381, 382-83, 650 A.3d 153 (1994) (employer could not bring a negligence action against a third party to recover economic losses in the form of increased workers' compensation costs caused by the third party's injury of the employer's employee).

[161] 209 Conn. App. 584, 586-87, 269 A.3d 202 (2022).

[162] *Id*. at 587.

[163] *Id*.

[164] *Id*.

tract was awarded to the decedent's employer.[165] The decedent died due to injuries he sustained during the course of the tree removal.[166] At the completion of discovery, the construction manager moved for summary judgment, argung that it had no duty to the plaintiffs because the scope of its duties was limited to those duties set forth in its contract with the borough.[167] The trial court granted the motion, finding that the area for which the defendant construction manager was responsible was restricted to the area shown in the site drawings which did not include the area where the tree removal was being done.[168] The Appellate Court stated that issues of negligence are ordinarily not susceptible to summary adjudication; however, the issue of whether a defendant owes a duty of care is appropriate for summary judgment because it is a question of law.[169] The Court further stated that a duty to use care may arise from a contract.[170] The Court stated that although ordinarily the question of contract interpretation, being a question of the parties' intent, is a question of fact, where there is definitive contract language the determination of what the parties intended by their commitments is a question of law.[171] In affirming the summary judgment in favor of the movant, the Court agreed with the trial court that the provisions of the contract were clear and unambiguous in the description, the extent of the project, and the work for which the movant had a duty to perform.[172]

In a case of first impression, *Streifel v. Bulkley*[173] held that a patient may not be liable in a claim sounding in negligence for causing injuries to a medical care provider while that provider was furnishing medical care to a patient. The defendant, a patient at Griffin Hospital, while attempting to

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[165] *Id.*
[166] *Id.*
[167] *Id.* at 589.
[168] *Id.* at 594-95.
[169] *Id.* at 593.
[170] *Id.*
[171] *Id.* at 594.
[172] *Id.* at 598.
[173] 195 Conn. App. 294, 296, 224 A.3d 539, *cert. denied*, 335 Conn. 911, 228 A.3d 375 (2020).

transition from a supine position to a seated position on an examining table grabbed hold of the plaintiff, a registered nurse assisting him, resulting in injuries to the plaintiff.[174] The Appellate Court affirmed the trial court's granting of the defendant's motion for summary judgment on the basis that no duty was owed to the plaintiff.[175] The Court concluded that recognizing a duty on the part of a patient to avoid negligent conduct toward a medical provider giving the plaintiff treatment is inconsistent with public policy in Connecticut.[176] The Court added certain caveats in issuing its decision. First, the Court stated that its decision should not be understood to encompass a conclusion concerning the viability of a claim brought by a medical provider against a patient for injuries sustained as a result of the patient's intentional tort or for conduct that is reckless, wanton or malicious.[177] Second, the Court stated that its decision should be interpreted as being limited to situations in which the alleged negligence occurs while the patient is receiving medical treatment.[178] Third, the Court indicated that it did not offer an opinion on whether a medical provider may assert a cause of action against a patient for injuries sustained during a time less directly involving the provision of medical services; for example, where a patient discards a gown and a medical provider falls due to the presense of the gown.[179]

In *Poce v. O & G Industries, Inc.*,[180] the Appellate Court in affirming the decisions of the trial court granting the named defendant's motion to strike and motion for summary judgment, adopted the trial court's decisions as proper statements of the facts and applicable law. The plaintiffs' claims sounded in negligence, premises liability and recklessness; in particular, the plaintiffs alleged an increased risk of contracting asbestos related medical conditions and the need for

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[174] *Id*. at 297.
[175] *Id*. at 332-33.
[176] *Id*. at 332.
[177] *Id*. at 333.
[178] *Id*.
[179] *Id*.
[180] 210 Conn. App. 82, 83-85, 269 A.3d 899, *cert. denied*, 342 Conn. 910, 271 A.3d 663 (2022).

future medical treatment as a result of exposure to asbestos due to the conduct of the named defendant, a project manager for the construction of a school.[181] The trial court granted the motion to strike the above claims because those claims require an actual physical injury.[182] However, the trial court denied the motion to strike the claims for negligent infliction of emotional distress because a plaintiff does not need to allege a present bodily injury.[183] The trial court stated that the plaintiff must allege only an unreasonable risk of causing the plaintiff emotional distress, that the distress was foreseeable, that the emotional distresss was severe enrough that it might result in illness or bodily harm, and that the defendant's conduct was the cause of the plaintiff's distress.[184] With respect to the named defendant's motion for summary judgment as to the negligent infliction of emotional distress claims, the trial court found that under the terms of the contract the named defendant was not responsible for discovering or removing asbestos and, therefore, it owed no duty to the plaintiffs regarding any exposure to asbestos.[185] The court noted that negligence cannot be predicated upon the failure to perform an act which the actor was under no obligation to perform.[186] Lastly, in rejecting the plaintiffs' argument that the named defendant owed them a duty arising from OSHA regulations, the trial court explained although OSHA regulations may be used as evidence of the standard of care in a negligence case, they may not be used to create a private cause of action.[187]

In *Salamone v. Wesleyan University*,[188] the plaintiffs challenged the summary judgment rendered in favor of the defendant on the ground that a genuine issue of material fact existed as to whether the harm alleged was reasonably foreseeable. The plaintiffs alleged that they were sexually as-

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[181] *Id.* at 86.
[182] *Id.*
[183] *Id.*
[184] *Id.* at 96.
[185] *Id.* at 104.
[186] *Id.* at 103-04.
[187] *Id.* at 105-06.
[188] 210 Conn. App. 435, 437,270 A.3d 172 (2022).

saulted by a resident advisor or head resident on the campus of the defendant.[189] The defendant argued that the resident or advisor was not its employee when the alleged sexual assaults involving the plaintiffs occurred and that those incidents were not reasonably foreseeable.[190] The Appellate Court affirmed, noting that the defendant presented undisputed evidence that the resident or advisor had no criminal record and there were no complaints or accusations against him either before or during his tenure as a student at the defendant.[191] Because the plaintiffs presented no facts from which material facts alleged in the pleadings could be inferred as to whether the defendant knew or should have known of the risk to the plaintiffs, the Court found that summary judgment was properly entered in the defendant's favor.[192]

The legal sufficiency of a jury instruction on superseding cause was addressed in *Allen v. Shoppes At Buckland Hills, LLC*.[193] The plaintiff, an off duty police officer, while shopping at the named defendant's shopping mall, attempted to stop a shop lifting crime occurring in the parking lot.[194] He sustained injuries when he was struck in the face and leg by a door of the car that was involved in the commission of the crime.[195] The plaintiff brought a lawsuit sounding in negligence against the shopping mall and its security company.[196] The jury found that the defendants had proven that the conduct of driver of the car was intentional or criminal and not foreseeable and, therefore, was a superseding cause of the plaintiff's injuries.[197] The trial court charged that, in order to prevail on a special defense of superseding cause, the defendants had to establish that the conduct alleged to constitute a superseding cause—that the driver intentionally or criminally struck the plaintiff with his car—occurred

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189 *Id*. at 436.
190 *Id*. at 438.
191 *Id*. at 446.
192 *Id*. at 449.
193 206 Conn. App. 284, 259 A.3d 1227 (2021).
194 *Id*. at 286-87.
195 *Id*. at 287.
196 *Id*.
197 *Id*. at 287-88.

as alleged.[198] The trial court further charged that in order for the instruction on superseding cause to apply, the act must be intentionally harmful or criminal.[199] The plaintiff argued on appeal that the jury charge on the doctrine of superseding cause was too general and thus improper and harmful.[200] The Appellate Court was not persuaded, finding that the jury charge, read as a whole, was correct in law, adapted to the issues, and provided sufficient guidance for the jury.[201]

X. Premises Liability

The ongoing storm doctrine first adopted in *Kraus v. Newton*[202] was the subject of *Belevich v. Renaissance I, LLC*.,[203] where the plaintiffs appealed from the summary judgment entered in favor of the defendants. The plaintiff, Belevich, and his employer, Yale University, brought claims against the defendants based in premises liability for injuries sustained by Belevich after he fell on ice.[204] The trial court grant-

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[198] *Id*. at 295.

[199] *Id*.

[200] *Id*. at 289.

[201] *Id*. at 297. *In Barry v. Quality Steel Products, Inc*., 263 Conn. 424, 440-42, 820 A.2d 258 (2003), the Supreme Court decided that the doctrine of superseding cause had no place in the modern system of comparative responsibility and apportionment of liability since if a defendant's negligent conduct is found to be a proximate cause of the plaintiff's injuries, the defendant will pay his or her proportionate share pursuant to the apportionment statute, regardless of whether another's conduct was also a contributing cause. The Court limited its holding to situations where a defendant claims its negligent conduct is superseded by the subsequent negligent act or acts of others. *Id*. at 439, note 16. The Court left to a different day whether its holding would necessarily apply where an unforeseen intentional criminal act supersedes tortious conduct or where the doctrine of superseding cause arises in the context of criminal law. *Id*. More recently, in *Snell v. Norwalk Yellow Cab, Inc*., 332 Conn. 720, 747-50, 212 A.3d 646 (2019), the Court stated that although it had previously determined that the doctrine of superseding cause had outlived its usefulness as to subsequent negligent conduct of third persons, unforeseeable intentional torts, forces of nature and criminal events were exempted.

[202] 211 Conn. 191, 558 A.2d 240 (1989). *Kraus* held that in the absence of unusual circumstances, a property owner, in fulfilling its duty owed to invitees upon his property to exercise reasonable care in removing dangerous accumulations of snow and ice, may await the end of a storm and a reasonable time thereafter before removing the ice and snow. *Id*. at 198. The Court continued in stating that its decision did not prevent the submission to the jury, where there is a proper evidentiary foundation, the determination as to whether a storm had ended or whether a plaintiff's injury was caused by new ice or old ice when the effects of separate storms converge. *Id*. at 197-98.

[203] 207 Conn. App. 119, 120, 261 A.3d 1 (2021).

[204] *Id*. at 120-21.

ed the defendants' motion for summary judgment based on the ongoing storm doctrine.[205] On appeal, the plaintiffs contended that the defendants failed to establish the absence of a genuine issue of material fact as to the applicability of the ongoing storm doctrine.[206] The plaintiffs also argued that the trial court improperly shifted the burden to the plaintiffs to negate the applicability of the doctrine because the defendants provided no evidence that the ongoing storm produced the black ice that Belevich allegedly fell on.[207] In reviewing whether it was proper for the trial court to grant summary judgment based upon the ongoing storm doctrine, the Appellate Court expressly adopted a burden shifting approach as a matter of Connecticut common law.[208] The Court stated that the defendants met their initial burden to demonstrate that there was no genuine issue of material fact that there was an ongoing storm when Belevich fell because the plaintiff testified at his deposition that it was snowing when he fell and that it had been snowing all day.[209] The Court next stated that the burden then shifted to the plaintiffs to demonstrate the existence of a genuine issue of fact as to whether Belevich's fall was caused by a slippery condition that existed prior to the ongoing storm and whether the defendants had actual or constructive notice of the allegedly pre-existing condition.[210] The Court noted that Belevich's submission in opposition to the motion for summary judgment failed to create a genuine issue of fact because it contained no evidence to suggest that the allegedly icy condition at the location where he fell existed prior to the ongoing storm or that the defendant had actual or constructive notice of any pre-existing condition.[211] The Court affirmed the summary judgment in favor of the defendants.[212]

The ongoing storm doctrine was also the subject of *Ocasio*

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[205] *Id*. at 123.
[206] *Id*. at 125.
[207] *Id*.
[208] *Id*. at 126-28.
[209] *Id*. at 128-29.
[210] *Id*. at 129.
[211] *Id*. at 132.
[212] *Id*. at 133.

v. Verdura Construction, LLC.[213] The Appellate Court agreed with the plaintiff that the trial court erred when it instructed the jury and provided it with interrogatories to answer regarding the ongoing storm doctrine.[214] The plaintiff was a tenant in a building owned and controlled by the defendant.[215] At the time of the accident, sleet and/or freezing rain was falling, which caused ice and snow to accumulate on the building's porch and stairs.[216] Notwithstanding the weather, the plaintiff walked across the stairs and grabbed the allegedly defective railing which gave way, causing him to fall down the stairs.[217] The plaintiff adamantly denied that a slippery condition on the porch and/or stair caused his fall.[218] The defendant's attorney argued that the ongoing storm doctrine barred the plaintiffs recovery.[219] A majority of the Appellate Court panel found the doctrine inapplicable and irrelevant because the plaintiff was not claiming that his fall was due to snow and ice.[220] The Court remarked that although the defendant was free to argue to the jury that the plaintiff could not prevail because his injuries were caused by snow and ice, not by the defective railing, that causation argument did not implicate the ongoing storm doctrine.[221] The Court also found that the jury charge regarding the ongoing storm doctrine and the interrogatories submitted to the jury were harmful because the doctrine was irrelevant to the case and, therefore, the jury was likely misled and confused.[222] Additionally, the Court was not persuaded by the defendant's al-

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[213] 215 Conn. App. 139, 281 A.3d 1205 (2022).
[214] *Id*. at 141-42.
[215] *Id*. at 142.
[216] *Id*.
[217] *Id*.
[218] *Id*. at 144.
[219] *Id*. at 149.
[220] *Id*. at 154. Judge Flynn concurred, in part, and dissented, in part. He concurred in the reversal of the judgment because the jury may have been misled by the jury charge because there can be more than one proximate cause of an injury. *Id*. at 165. He dissented because the plaintiff alleged in his complaint that the defendant failed to isolate an icy area. *Id*. at 166. He further observed that the plaintiff's medical records made reference to the plaintiff slipping on ice. *Id*. He emphasized that he did not agree with the majority's decision that the ongoing storm doctrine was not implicated. *Id*.
[221] *Id*. at 155.
[222] *Id*. at 156-58.

ternative argument that the plaintiff failed to present expert testimony as to the standard of care regarding railings.[223] The Court explained that the plaintiff was not required to introduce expert testimony concerning the standard of care for railings because such knowledge was within the ken of the average juror.[224]

XI. Product Liability

In *Normandy v. American Medical Systems, Inc.*,[225] the principal issue was whether a hospital that purchases, stocks and supplies a medical device, and bills a patient for its use during surgery, was a product seller under Connecticut's product liability act. The Supreme Court explained that once a particular transaction is labeled a service, as opposed to a sale of a product, it is outside the purview of the product liability act.[226] The Court further explained that all claims or actions for personal injury caused by the sale of any product must be brought under the product liability act.[227] The Court noted that the product liability act defines a "product seller" as any person or entity, including a manufacturer, wholesaler, distributor or retailer who is engaged in the business of selling such products whether the sale is for resale or for use or consumption.[228] The Court stated that Connecticut courts have considered a party to be a product seller when a sale of a product is a principal part of the transaction and when the essence of the relationship between the buyer and seller is not the furnishing of professional skill or services.[229] The Court held that because the defendant did not actively advertise the mesh sling used in a surgical procedure for sale to patients, and because the particular transaction between the plaintiff and the defendant was primarily for services rather than the sale of a medical product, the trial court correctly

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[223] *Id*. at 163-64.
[224] *Id*. at 164.
[225] 340 Conn. 93, 95-96, 262 A. 3d. 698 (2021).
[226] *Id*. at 101.
[227] *Id*.
[228] *Id*; General Statutes Section 52-572m(a).
[229] *Id*.

determined, as a matter of law, that the defendant was not a product seller.[230] The Court affirmed the defendant's motion for summary judgment on the product liability count.[231]

XII. Professional Negligence

The doctrine of acceptable alternatives was the subject of *Kos v. Lawrence + Memorial Hospital*.[232] The plaintiffs, on appeal, argued that the trial court improperly instructed the jury by including a charge on the acceptable alternatives doctrine.[233] The Supreme Court agreed with the plaintiffs but found the error harmless.[234] The plaintiffs brought a medical malpractice case against the defendants, a doctor and her employer, alleging that the doctor was negligent in performing a medical procedure.[235] The Court discussed the propriety of an acceptable alternatives instruction in a medical malpractice case; specifically, where the treatment or procedure is one of choice among competent doctors, a doctor cannot be guilty of malpractice in selecting the one which, according to his or her best judgment, is best suited to the patient's needs.[236] The Court stated that the acceptable alternatives doctrine did not apply in every case; rather, it applies only when there is evidence of more than one acceptable method of inspection, diagnosis or treatment.[237] Turning to the case at bar, the Court stated that the evidence did not establish that the defendant physician chose between two acceptable alternatives in performing the medical procedure.[238] Under the facts of the case, the Court agreed with the plaintiff that the court should have not given an acceptable alternatives instruction.[239] However, the Court emphasized that an error is only reversible if the error was harmful; in other words,

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230 *Id*. at 109.
231 *Id*.
232 334 Conn. 823, 225 A.3d 261 (2020).
233 *Id*. at 825.
234 *Id*.
235 *Id*. at 829.
236 *Id*. at 839.
237 *Id*. at 840.
238 *Id*. at 841-43.
239 *Id*. at 843.

if it is likely that the error affected the verdict.[240] The Court was not persuaded that there was harmful error because the jury's answers to the jury interrogatories established that the verdict was not tainted by the acceptable alternatives charge given to the jury.[241]

Young v. Hartford Hospital[242] addressed whether the trial court properly determined that the allegations of the plaintiff's complaint involved medical malpractice and whether the court properly dismissed the action for failing to file a certificate of good faith as mandated by General Statutes Section 52-190a.[243] The plaintiff alleged that the defendant was negligent in allowing a robotic camera to fall on her during a robotic hysterectomy surgery.[244] On appeal, the plaintiff maintained that the trial court improperly characterized her action as sounding in medical malpractice.[245] The Appellate Court explained that pursuant to the express language of Section 52-190a, the section applies only when two criteria are met: first, the defendant must be a healthcare provider; and, second, the claim must be one of medical malpractice

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[240] *Id*. at 845.

[241] *Id*. at 848-52.

[242] 196 Conn. App. 207, 208, 229 A.3d 1112 (2020).

[243] General Statutes § 52-190a provides, in part: "(a) No civil action or apportionment complaint shall be filed to recover damages resulting from personal injury or wrongful death occurring on or after October 1, 1987, whether in tort or in contract, in which it is alleged that such injury or death resulted from the negligence of a health care provider, unless the attorney or party filing the action or apportionment complaint has made a reasonable inquiry as permitted by the circumstances to determine that there are grounds for a good faith belief that there has been negligence in the care or treatment of the claimant. The complaint, initial pleading or apportionment complaint shall contain a certificate of the attorney or party filing the action or apportionment complaint that such reasonable inquiry gave rise to a good faith belief that grounds exist for an action against each named defendant or for an apportionment complaint against each named apportionment defendant. To show the existence of such good faith, the claimant or the claimant's attorney, and any apportionment complainant or the apportionment complainant's attorney, shall obtain a written and signed opinion of a similar health care provider, as defined in section 52-184c, which similar health care provider shall be selected pursuant to the provisions of said section, that there appears to be evidence of medical negligence and includes a detailed basis for the formation of such opinion... The claimant or the claimant's attorney, and any apportionment complainant or apportionment complainant's attorney, shall retain the original written opinion and shall attach a copy of such written opinion, with the name and signature of the similar health care provider expunged, to such certificate …."

[244] *Young*, 196 Conn. App. at 208-09.

[245] *Id*. at 211.

and not one sounding in ordinary negligence. The Court reiterated the following test in determining whether a claim sounds in medical malpractice: (1) whether the defendants are sued in their capacity as medical professionals; (2) whether the alleged negligence is of a specialized medical nature that arises out of the medical professional-patient relationship; and (3) whether the alleged negligence is substantially related to medical diagnosis or treatment and involved the exercise of medical judgment.[246] With respect to the subject case, the Court agreed with the trial court that the defendant was a healthcare provider for purposes of Section 52-190a.[247] The plaintiff challenged the trial court's conclusion that the claim sounded in medical malpractice.[248] The Court agreed with the plaintiff and reversed the trial court because some of the allegations in the complaint may have supported a finding of ordinary negligence; for example, the defendant's failure to properly secure the camera so it did not fall on patients.[249]

The exoneration rule was found applicable to the plaintiff's legal malpractice claim in *Green v. Paz*.[250] The plaintiff appealed from a judgment of the trial court rendered in favor of the defendants, arguing that the trial court erred in dismissing his legal malpractice action for lack of subject matter jurisdiction on the basis of the exoneration rule; namely, that a legal malpractice claim is not ripe for adjudication unless the plaintiff can demonstrate that the relevant underlying conviction has been invalidated.[251] The Appellate Court stated the plaintiff was serving a total effective sentence of 20 years of incarceration in connection with his judgment of conviction rendered after he pleaded guilty to three counts of assault.[252] The Court further stated that the plaintiff had retained the

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[246] *Id.* at 212-13. The three-part test was first established in *Trimel v. Lawrence & Memorial Hospital Rehabilitation Center*, 61 Conn. App. 353, 764 A.2d 203, *appeal dismissed*, 258 Conn. 711, 784 A.2d 889 (2001).

[247] *Young*, 196 Conn. App. at 212.

[248] *Id.* at 213.

[249] *Id.* at 220.

[250] 211 Conn. App. 152, 271 A.3d 1138 (2022).

[251] *Id.* at 153.

[252] *Id.* at 154.

defendants to represent him in his appeal from the judgment of the habeas court denying his petition.[253] The defendants filed a motion to dismiss for lack of subject matter jurisdiction on ripeness grounds under the exoneration rule.[254] The Court stated that it was undisputed that the plaintiff's conviction, which the plaintiff's legal malpractice claims collaterally attacked, remained valid.[255] The Court found that the trial court properly dismissed the plaintiff's legal malpractice action for lack of subject matter jurisdiction.[256]

The need to disclose an expert in a legal malpractice claim was central to *Gottesman v. Kratter*.[257] The plaintiff challenged the trial court's granting of the defendant Mark Kratter's motion for summary judgment due to the plaintiff's failure to disclose an expert to support her claim of professional negligence.[258] The Appellate Court in affirming the summary judgment in favor of Kratter, stated that, generally, a plaintiff must prove the following elements in a legal malpractice case: (1) the existence of an attorney-client relationship; (2) the attorney's wrongful act or omission; (3) causation; and (4) damages.[259] The Court further stated that a plaintiff is generally obligated to furnish expert testimony to establish both (1) the standard of care against which the attorney's conduct should be evaluated and (2) the element of causation.[260] The Court rejected the plaintiff's claim that there was no scheduling order in place requiring her to disclose an expert witness.[261] The Court's review of the record indicated that there was, in fact, a scheduling order in place which required the plaintiff to disclose an expert witness.[262] The Court also re-

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[253] *Id*.

[254] *Id*. The Appellate Court remarked that the exoneration rule does not implicate standing; rather, it implicates the related justiciability doctrine of ripeness. *Id*. at 155, note 1.

[255] *Id*. at 155.

[256] *Id*.

[257] 211 Conn. App. 206, 272 A.3d 241, *cert. denied*, 343 Conn. 918, 274 A.3d 868 (2022).

[258] *Id*. at 211.

[259] *Id*. at 213.

[260] *Id*.

[261] *Id*. at 213-14.

[262] *Id*. at 214.

jected the plaintiff's challenge to the trial court's granting of the motion for summary judgment as to the count sounding in transferee liability.[263] The Court stated that because the trial court found no liability on the part of the predecessor law firm there could be no possible successor liability.[264] The Court explained that the liability of a successor is derivative in nature and the successor may be held liable for the conduct of its predecessor only to the same extent as the predecessor.[265] The Court added that successor liability does not create a new cause of action against the purchaser.[266] The Court affirmed the summary judgment in favor of the defendant law firms on the claim of transferee liability.[267]

XIII. Sovereign Immunity

Vossbrinck v. Hobart[268] addressed whether the defendant, a state marshal, was cloaked by the doctrine of sovereign immunity. The defendant had served an order of ejectment with respect to foreclosure proceeding.[269] The plaintiff, who was a party to the foreclosure matter, alleged in his complaint against the defendant that the defendant stole or allowed to be stolen numerous items of the plaintiff's personal property during the course of the ejectment.[270] The defendant filed a motion styled a motion to dismiss and/or for summary judgment, which the trial court granted because the plaintiff's affidavits lacked sufficient information to create a genuine issue of fact with respect to any of his claims and, in the alternative, because the court lacked subject matter jurisdiction on the basis of sovereign immunity.[271] On appeal, the Appellate Court, agreed with the plaintiff that the doctrine of sovereign immunity was not properly invoked by the defendant.[272] The Court explained that the doctrine of sover-

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[263] *Id.* at 222.
[264] *Id.* at 223.
[265] *Id.*
[266] *Id.*
[267] *Id.*
[268] 207 Conn. App. 490, 491, 263 A.3d 390 (2021).
[269] *Id.* at 492.
[270] *Id.* at 492-93.
[271] *Id.* at 495.
[272] *Id.* at 496.

eign immunity implicates subject matter jurisdiction and is, accordingly, a basis for granting a motion to dismiss.[273] The Court set forth the criteria used in determining whether an action is, in effect, brought against the state and cannot be pursued without its consent: (1) whether a state official has been sued; (2) the suit involves some matter in which that official represents the state; (3) the state is the real party against relief is claimed; and (4) the judgment, although nominally against the official, will operate to control the activities of the state or subject it to liability.[274] The Court emphasized that a key question is whether the officer is carrying out a sovereign function.[275] The Court stated that the defendant was effectuating an order of ejectment on behalf of an attorney representing a foreclosing party in a dispute between private parties and, as such, the defendant was not performing a sovereign function.[276] The Court added that because state marshals were not state officials or state employees, the doctrine of sovereign immunity was not triggered.[277] However, the Court found that the defendant was entitled to statutory immunity pursuant to General Statutes Section 6-38a(b)[278] because there was no evidence that the defendant's actions were wanton, reckless or malicious.[279] Based upon the above analysis, the judgment was affirmed.[280]

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[273] *Id*. There are three exceptions to sovereign immunity: (1) when the legislature, either expressly or by force of a necessary implication, waives sovereign immunity; (2) when an action seeks declaratory or injunctive relief on the basis of a substantial claim that the state or one of its officers violated the plaintiff's constitutional rights; and (3) when an action seeks declaratory or injunctive relief on the basis of a substantial allegation of wrongful conduct to promote an illegal purpose in excess of the officer's statutory authority. Devine v. Fusaro, 205 Conn. App.554, 564-65, 259 A.3d 655, *appeal dismissed*, 346 Conn. 29, 287 A.3d 598 (2021)..

[274] *Vossbrinck*, 207 Conn. App. at 497.

[275] *Id*. at 498.

[276] *Id*. at 500.

[277] *Id*. at 509.

[278] General Statutes § 6-38a (b) provides: "Any state marshal, shall, in the performance of execution or service of process functions, have the right of entry on private property and no such person shall be personally liable for damage or injury, not wanton, reckless or malicious, caused by the discharge of such functions."

[279] *Vossbrinck*, 207 Conn. App. at 511.

[280] *Id*. at 512.

XIV. Statutes of Limitations

In *Doe #2 v. Rackliffe*,[281] the issue was whether the specialized statute of limitations in General Statutes Section 52-577d, which creates an extended limitations period for personal injury claims arising from sexual misconduct, applied to negligence claims for personal injuries brought against the alleged perpetrator of a sexual assault. The plaintiffs, each of whom were minors at the time of the alleged sexual assaults, appealed from the trial court's granting of the defendant's motion for summary judgment on the basis that the plaintiffs' negligence claims were barred by the general negligence statute of limitations in General Statutes Section 52-584.[282] The Supreme Court affirmed, finding that the extended statute of limitations in Section 52-577d did not apply to the plaintiffs' claims of medical negligence and negligent infliction of emotional distress because Section 52-577d is directed only toward claims of intentional misconduct.[283]

XV. Trespass

Kloiber v. Jellen[284] concluded that the plaintiffs lacked the requisite standing to maintain the action and, therefore, reversed the judgment of the trial court and remanded the case with direction to render a judgment of dismissal. The plaintiffs alleged that the defendants developed a woodland lot by constructing a house with roofs, gutters, leaders and downspouts, a driveway and parking area, resulting in surface water being channeled onto the property in dispute.[285] During the argument before the Appellate Court, one of self-represented plaintiffs confirmed that title to the subject property was held by a limited liability company.[286] The Court noted that the question of subject matter jurisdiction may be raised at any time, including *sua sponte* by a reviewing court.[287] The

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[281] 337 Conn. 627, 629, 255 A.3d 842 (2020).
[282] *Id*. at 629-30.
[283] *Id*. at 643.
[284] 207 Conn. App. 616, 617, 263 A.3d 952 (2021).
[285] *Id*. at 619.
[286] *Id*. at 620-21.
[287] *Id*. at 621.

Court ordered the parties to file a supplemental briefs on the issue of standing.[288] The Court stated that standing is the legal right to set judicial machinery in motion and that one cannot rightfully invoke the jurisdiction of the court unless he or she has, in an individual or representative capacity, some real interest in the cause of action.[289] If a party is found to lack standing, the Court explained that it was without subject matter jurisdiction to determine the cause.[290] The Court further explained that title is an essential element in a plaintiff's case when an injunction is sought to restrain a trespass, and that when both monetary damages for trespass and an injunction are sought, as in the case before it, both title to and possession of the disputed area must be proved by the plaintiff.[291] The Court concluded that the plaintiffs lacked standing to maintain the trespass action alleged in the complaint.[292] The Court reached the same result with respect to the plaintiffs' private nuisance claim because the plaintiffs did not own and never occupied the property in question.[293] The Court rejected the plaintiffs argument that the payment of certain bills and expenses on behalf of a limited liability company by one of his members was sufficient to establish a possessory interest in real property owned by the company.[294] The Court found that the self-represented plaintiffs were not entitled to bring the action in their individual capacities on behalf of a limited liability company notwithstanding the fact that one of the plaintiffs was the sole member of that company.[295]

XVI. Trial Practice

North Sails Group, LLC v. Boards and More GMBH[296] addressed whether a Connecticut court could properly exercise

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[288] *Id*.
[289] *Id*. at 621-22.
[290] *Id*. at 622.
[291] *Id*. at 622-23.
[292] *Id*. at 623.
[293] *Id*. at 623-24.
[294] *Id*. at 627.
[295] *Id*. at 628.
[296] 340 Conn. 266, 268, 264 A.3d 1 (2021). The named defendants were Boards and More GmbH (B & M) and Emeram Capital Partners GmbH (Emeram). *Id*. The sole theory against Emeram was that it was the alter ego of B & M. The Supreme

personal jurisdiction over a foreign national defendant in a breach of contract case. A majority of the Supreme Court found that the plaintiff had failed to establish that the defendants had sufficient minimum contacts with Connecticut based on its long term contractual relationship with the defendant and, accordingly, affirmed the judgment of the trial court dismissing the case for lack of personal jurisdiction over the defendants.[297] The Court stated that in the case before it there were no disputed facts relevant to its minimum contacts analysis so its task was to determine whether the plaintiff had set forth sufficient allegations and evidence to demonstrate minimum contacts.[298] The Court first noted that when a defendant challenges personal jurisdiction, the trial court must undertake a two-part inquiry to determine the propriety of its exercising jurisdiction over the defendant: first, the trial court must decide whether the applicable state long arm statute authorizes the assertion of jurisdiction over the defendant; and second, if the statutory requirements are satisfied, the court must then decide whether the exercise of jurisdiction over the defendant would violate constitutional principles of due process.[299] Because the Court agreed with the trial court that the exercise of personal jurisdiction over the defendants would violate due process, it did not consider whether Connecticut's long arm statute would allow the exercise of jurisdiction over them.[300] The Court reiterated the familiar principle that due process requires that the defendant have minimum contacts with the forum state such that

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Court noted that jurisdiction as to Emeram depended on jurisdiction as to B & M. *Id*. at 272, note 5.

[297] *Id*. at 268-69. The Supreme Court set forth the standards to be employed by the trial court in determining whether there is personal jurisdiction. It noted that a motion to dismiss tests whether on the face of the record the trial court is without jurisdiction. *Id*. at 269. When the defendant challenging the court's personal jurisdiction is a foreign corporation or non-resident individual, the plaintiff has the burden to establish jurisdiction. *Id*. The trial court must take the facts to be those alleged in the complaint, including facts necessarily implied from the allegations, and construe them in a matter most favorable to the pleader. *Id*. In most cases, the motion is decided on the complaint alone, but when the complaint is supplemented by undisputed facts established by affidavits submitted in support of the motion, the trial court may consider those supplementary undisputed facts. *Id*.

[298] *Id*. at 270.

[299] *Id*. at 273.

[300] *Id*. at 273-74.

the maintenance of the suit does not offend traditional notions of fair play and substantial justice.[301] The Court further stated that a contract with an out-of-state party alone does not automatically prove sufficient minimum contacts in the other party's home forum; rather, the totality of the circumstances, including previous negotiations, the terms of the contract and the parties' actual course of dealing, must be evaluated in determining the minimum contacts with the forum.[302] In response to the plaintiff's reliance on the long-term relationship between the parties, the Court stated that is not the length of the relationship but the quality of the relationship—whether the defendant has purposefully reached into the forum—that matters the most in evaluating forum contacts.[303] The Court stated that, notwithstanding the length of the contractual relationship between the parties, the lack of evidence regarding whether the defendant initiated contact and whether its physical presence in the forum or performance of the contract in the forum, in addition to the terms of the contract, belied the contention that the defendant purposefully availed itself of the benefits and protections of Connecticut laws.[304] In conclusion, the Court found that the plaintiff failed to satisfy its burden regarding sufficient minimum contacts.[305]

DeMaria v. City of Bridgeport[306] clarified when a medical record is admissible pursuant to General Statutes Section 52-174(b).[307] The defendant argued that the trial court improperly admitted into evidence certain medical records that

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[301] *Id*. at 274. In support of this principle, the Court cited to *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945).

[302] *North Sails Group, LLC*, 340 Conn. at 275. The Court noted that the seminal case involving minimum contacts in a contract case where the totality of the circumstances analysis was utilized was *Burger King Corp. v. Rudzewicz*, 471 U.S. 462 (1985).

[303] *North Sails Group, LLC*, 340 Conn. at 286-88.

[304] *Id*. at 300.

[305] *Id*. at 314. Justice Ecker, joined by Justice Kahn, dissented.

[306] 339 Conn. 477, 261 A.3d 696 (2021).

[307] General Statutes § 52-174 provides, in pertinent part: "(b) In all actions for the recovery of damages for personal injuries or death, pending on October 1, 1977, or brought thereafter, and in all court proceedings in family relations matters, as defined in section 46b-1, or in the Family Support Magistrate Division, pending on October 1, 1998, or brought thereafter, and in all other civil actions pending

been written by a physician's assistant, who was the plaintiff's treater at a Veteran's Affair hospital.[308] Specifically, the defendant argued that it would have no opportunity to cross examine the physician's assistant at a deposition or at trial because the physician's assistant was prevented from testifying by 38 C.F.R. Section 14.808.[309] The Appellate Court agreed with the defendant that because the provider was prohibited from providing any opinion or expert testimony under federal regulations and, therefore, was unavailable for

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on October 1, 2001, or brought thereafter, any party offering in evidence a signed report and bill for treatment of any treating physician or physician assistant, dentist, chiropractor, naturopath, physical therapist, podiatrist, psychologist, social worker, mental health professional, an emergency medical technician, optometrist or advanced practice registered nurse, may have the report and bill admitted into evidence as a business entry and it shall be presumed that the signature on the report is that of such treating physician, physician assistant, dentist, chiropractor, naturopath, physical therapist, podiatrist, psychologist, social worker, mental health professional, emergency medical technician, optometrist or advanced practice registered nurse and that the report and bill were made in the ordinary course of business. The use of any such report or bill in lieu of the testimony of such treating physician, physician assistant, dentist, chiropractor, naturopath, physical therapist, podiatrist, psychologist, social worker, mental health professional, emergency medical technician, optometrist or advanced practice registered nurse shall not give rise to any adverse inference concerning the testimony or lack of testimony of such treating physician, physician assistant, dentist, chiropractor, naturopath, physical therapist, podiatrist, psychologist, social worker, mental health professional, emergency medical technician, optometrist or advanced practice registered nurse. In any action to which this subsection applies, the total amount of any bill generated by such physician, physician assistant, dentist, chiropractor, naturopath, physical therapist, podiatrist, psychologist, social worker, mental health professional, emergency medical technician, optometrist or advanced practice registered nurse shall be admissible in evidence on the issue of the cost of reasonable and necessary medical care. The calculation of the total amount of the bill shall not be reduced because such physician, physician assistant, dentist, chiropractor, naturopath, physical therapist, podiatrist, psychologist, social worker, mental health professional, emergency medical technician, optometrist or advanced practice registered nurse accepts less than the total amount of the bill or because an insurer pays less than the total amount of the bill.

(c) This section shall not be construed as prohibiting either party or the court from calling the treating physician, dentist, chiropractor, naturopath, physical therapist, podiatrist, psychologist, social worker, mental health professional, emergency medical technician, optometrist, physician assistant or advanced practice registered nurse as a witness for purposes that include, but are not limited to, providing testimony on the reasonableness of a bill for treatment generated by such physician, dentist, chiropractor, naturopath, physical therapist, podiatrist, psychologist, social worker, mental health professional, emergency medical technician, optometrist, physician assistant or advanced practice registered nurse."

[308] *DeMaria*, 339 Conn. at 480-82.

[309] Title 38 of the Code of Federal Regulations § 14.808, provides, in pertinent part: "(a) [Department of Veterans Affairs] personnel shall not provide, with or without compensation, opinion or expert testimony in any legal proceedings …."

cross-examination, the medical records she authored should not have been admitted into evidence.[310] The Supreme Court reversed, holding that medical records that are created in the ordinary course of diagnosing, caring for and treating the plaintiff are admissible under Section 52-174(b), regardless of whether there was an opportunity to cross examine the author of the record.[311] Further, the Court stated that the fact the report in issue contained opinions on causation and permanency, issues which typically require expert testimony, did not establish, in and of itself, that the report was not prepared for use in the care and treatment of the plaintiff.[312] The Court further stated that the defendant failed to make a distinct argument at trial that the report was inadmissible under Section 52-174(b) on the ground that it was prepared exclusively for use in litigation.[313]

Larmel v. Metro North Commuter Railroad Company[314] held that where a case results in a judgment in favor of the defendant following a plaintiff's failure to demand a trial de novo after an arbitration proceeding pursuant to General Statutes Section 52-549z,[315] a subsequent action under the

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[310] 190 Conn. App. 449, 211 A.3d 98, *cert. granted*, 333 Conn. 916, 217 A.3d 1 (2019).

[311] *DeMaria*, 339 Conn. at 484. The Supreme Court remarked that to the extent that *Rhode v. Milla*, 287 Conn. 731, 949 A.2d 1227 (2008) and *Milliun v. New Milford Hospital*, 310 Conn. 711, 80 A.3d 887 (2013) suggest that an opportunity to cross examine the author of a medical record is an absolute prerequisite to the admission of a medical records under Section 52-174 (b), they are disavowed. DeMaria, 339 Conn. at 493.

[312] *Id*. at 494-95.

[313] *Id*. at 495.

[314] 341 Conn. 332, 334-36, 267 A.3d 162 (2021). Justice Ecker, with whom Chief Justice Robinson joined, dissented.

[315] General Statutes § 52-549z provides: "(a) A decision of the arbitrator shall become a judgment of the court if no appeal from the arbitrator's decision by way of a demand for a trial de novo is filed in accordance with subsection (d) of this section.

(b) A decision of the arbitrator shall become null and void if an appeal from the arbitrator's decision by way of a demand for a trial de novo is filed in accordance with subsection (d) of this section.

(c) For the purpose of this section the word "decision" shall include a decision and judgment rendered pursuant to subsection (a) of section 52-549y, provided the appeal is taken by a party who did not fail to appear at the hearing, and it shall exclude any other decision or judgment rendered pursuant to said section.

(d) An appeal by way of a demand for a trial de novo shall be filed with the court clerk not later than twenty days after the date on which (1) notice of the arbitrator's decision is sent electronically to the parties or their counsel, or (2) the arbitrator's decision is deposited in the United States mail, whichever is later, and

accidental failure of suit statute, General Statutes Section 52-592(a),[316] is barred. The Supreme Court stated that the plaintiff's claim against the defendant was presented to a neutral fact finder who was empowered both to receive evidence and find facts under Section 52-549z.[317] The Court stated that because the statutory proceeding turned on the merits, Section 52-592(a) did not permit the plaintiff to circumvent the judgment entered by the trial court.[318]

State v. Manuel T[319] analyzed the foundational requirements to authenticate electronic evidence. After the defendant was convicted of multiple counts of sexual assault and risk of injury to a child, the defendant appealed, arguing, among other things, that the trial court erred in excluding screen shots of text messages purportedly sent by the mi-

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shall include a certification that a copy thereof has been served on each party or counsel of record, to be accomplished in accordance with the rules of court. The decision of the arbitrator shall not be admissible in any proceeding resulting after a claim for a trial de novo or from a setting aside of an award in accordance with section 52-549aa.

(e) The Superior Court may refer any proceeding resulting from the filing of a demand for a trial de novo under subsection (d) of this section to a judge trial referee without the consent of the parties, and said judge trial referee shall have and exercise the powers of the Superior Court in respect to trial, judgment and appeal in the case, including a judgment of fifty thousand dollars or more."

[316] General Statutes § 52-592 (a) provides: "If any action, commenced within the time limited by law, has failed one or more times to be tried on its merits because of insufficient service or return of the writ due to unavoidable accident or the default or neglect of the officer to whom it was committed, or because the action has been dismissed for want of jurisdiction, or the action has been otherwise avoided or defeated by the death of a party or for any matter of form; or if, in any such action after a verdict for the plaintiff, the judgment has been set aside, or if a judgment of nonsuit has been rendered or a judgment for the plaintiff reversed, the plaintiff, or, if the plaintiff is dead and the action by law survives, his executor or administrator, may commence a new action, except as provided in subsection (b) of this section, for the same cause at any time within one year after the determination of the original action or after the reversal of the judgment."

[317] *Larmel*, 341 Conn. at 341-42.

[318] *Id.* at 342. In *Nunno v. Wixner*, 257 Conn. 671, 673-674, 778 A. 2d 145 (2001), the Supreme Court found that offer of judgment interest does not attach to a judgment entered as a result of a mandatory arbitration proceeding pursuant to General Statutes Section 52-549u. The Court noted that the arbitration proceeding was not conducted as a trial as it was informal, not presided over by a judge, and did not result in a binding determination of any of the claims. *Id.* at 680-81. In *Larmel*, the Court distinguished *Nunno* because in that case it was interpreting the offer of compromise statute, General Statutes Section 52-192a, which was textually distinguishable from the accidental failure of suit statute. Larmel, 341 Conn. at 346.

[319] 337 Conn. 429, 254 A.3d 278 (2020).

nor accuser of the defendant to the defendant's niece.[320] The defendant's theory of the case was that the minor had fabricated the allegations of abuse.[321] The defendant attempted to introduce two cell phone screenshots depicting text messages purportedly sent by the minor to the defendant's niece a couple of months before the minor reported the abuse.[322] The minor denied sending the text messages to the defendant's niece.[323] The Supreme Court analyzed the admissibility issue as a legal question subject to plenary review and determined that the trial court had incorrectly found that the defendant had not met his burden of authenticating the evidence.[324] The Court noted that authentication is a subset of relevancy because evidence cannot have a tendency to make the existence of a disputed fact more or less likely if the evidence is not what the proponent claims.[325] The Court stated that the writing may be authenticated by a number of methods, including direct testimony or circumstantial evidence.[326] The Court stated that authenticity is not on a par with the more technical evidentiary rules that govern admissibility, such as hearsay exceptions, competency and privilege; instead, there need only be a prima facie case showing authenticity.[327] The Court added that a prima facie showing of authenticity is a low burden.[328] Importantly, the Court stated that electronic communications, such as text messages, are subject to the same standard of authentication and the same methods of authentication as other forms of evidence.[329] In addition, the Court explained that a witness with personal knowledge may testify that the offered evidence is what the proponent claims it to be.[330] The Court further stated that corroborative

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[320] *Id*. at 431. The Appellate Court in *State v. Manuel T*, 186 Conn. App. 51, 198 A.3d 648 (2018) found that the trial court properly excluded the text messages.

[321] *State*, 337 Conn. at 434.

[322] *Id*.

[323] *Id*.

[324] *Id*. at 452-53.

[325] *Id*. at 453.

[326] *Id*.

[327] *Id*. at 453-54.

[328] *Id*. at 454.

[329] *Id*. at 455.

[330] *Id*. The defendant's niece testified to the following: That she and the minor accuser had been close while growing up; she had been provided the minor accuser's

evidence, such as the date of the communication, is an unnecessary predicate to the authentication of text messages or other similar electronic communications.[331] The Court also stated that the fact the screenshots did not capture the complete communication was not a basis to exclude the evidence.[332] Moreover, the Court rejected the argument that the text message or email could have been generated by someone other than the named sender, observing that questions about the integrity of electronic data generally go to the weight of electronically based evidence and not its admissibility.[333] The Court concluded that the defendant clearly established a prima facie case of authentication through his niece's testimony and that any doubts which might exist as to her credibility or as to the reliability of the source of the messages went to the weight, not the admissibility of the text messages.[334] The Court found that the text messages were improperly excluded and, therefore, reversed and remanded the case for a new trial.[335]

Jenzack Partners, LLC v. Stoneridge Associates, LLC[336] addressed the admission of a record under General Statutes Section 52-180, the business record exception to the hearsay rule. The issue was whether an initial entry into a record of debt was admissible under the business record exception when that entry was provided by a third party in the course of the sale of the debt.[337] The Supreme Court noted that un-

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phone number and that she had entered the number in her phone contacts; a couple of months before the alleged abuse was reported she had sent a text message to the minor accuser; the minor accuser replied; she believed that the replies were from the minor accuser because of their substance and manner of expression; and that the screenshots accurately reflected the text messages that she received. *Id*. at 455-56.

[331] *Id*. at 456.

[332] *Id*. at 458.

[333] *Id*. at 460-61.

[334] *Id*. at 461.

[335] *Id*.

[336] 334 Conn. 374, 222 A.3d 950 (2020). General Statutes § 52-180(a) provides: "Any writing or record, whether in the form of an entry in a book or otherwise, made as a memorandum or record of any act, transaction, occurrence or event, shall be admissible as evidence of the act, transaction, occurrence or event, if the trial judge finds that it was made in the regular course of any business, and that it was the regular course of the business to make the writing or record at the time of the act, transaction, occurrence or event or within a reasonable time thereafter."

[337] *Jenzack Partners, LLC*, 334 Conn. at 377.

like in previous cases before the Court, the plaintiff did not attempt to introduce a document as a business record that was created by a third party bank to prove the debt owed on the note; instead, the plaintiff introduced its own record of the debt owed on the note that incorporated an initial entry that the third party bank had provided to the plaintiff in conjunction with the sale of the note.[338] The defendant, Jennifer Tine, argued that without supporting documentation or testimony from the third party bank to attest to its accuracy, the initial entry was not part of the plaintiff's business record.[339] The Court concluded that regardless of whether supporting documentation or testimony from a third-party is offered, it is the third party's duty to report information in a business context which provides the reliability to justify the business records exception to the hearsay rule.[340] The Court further explained that a business record is admissible if the information therein is reliable, which in the case of information provided by a third party is established by the third party's business duty to report information.[341] The Court noted that there is no requirement that the accuracy of the business record be proved as a prerequisite to its admission into evidence.[342]

In a case of first impression, the *Supreme Court in Lafferty v. Jones*[343] addressed the scope of the trial court's inherent authority to sanction a party to litigation for his or her remarks about the case in light of that party's right to free speech under the First Amendment to the United States Constitution. The case arose out of the Sandy Hook Elementary School tragic shooting of children and staff members. The plaintiffs, including a first responder and family members of those killed in the mass shooting, brought claims against the defendants, including Alex Jones, sounding in invasion of privacy by false light, defamation and defama-

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[338] *Id*. at 389.
[339] *Id*. at 391-92.
[340] *Id*. at 392.
[341] *Id*.
[342] *Id*.
[343] 336 Conn. 332, 336, 246 A.3d 429 (2020), *cert. denied*, 141 S. Ct. 2467 (2021).

tion per se, intentional infliction of emotional distress, negligent infliction of emotional distress, civil conspiracy and violations of the Connecticut Unfair Trade Practices Act, General Statutes Section 42-110a et seq.[344] The defendants filed special motions to dismiss the plaintiffs' complaints pursuant to Connecticut's anti-SLAPP Statute, General Statutes Section 52-196a(b).[345] The trial court granted the plaintiff's request for limited discovery over the defendants' objection.[346] As a result of the defendants' conduct during the course of discovery, the trial court imposed sanctions against the defendants by revoking their opportunity to pursue the merits of their special motions to dismiss.[347] On appeal, the Court first considered whether the trial court's actions were permissible under First Amendment free speech protections.[348] The Court stated that although it agreed with the defendants that a trial court's inherent authority is subject to constitutional limitations, it nonetheless concluded that Jones's speech during a broadcast was not protected by the First Amendment because it posed an imminent and likely threat to the administration of justice.[349] In its discussion of the issues, the Court observed that First Amendment protections involving actual speech and symbolic or expressive speech were not absolute because the government may regulate certain categories of expression consistent with the Constitution.[350] The Court held that if extrajudicial speech by a party to litigation poses an imminent and likely threat to the administration of judicial proceedings, a court may sanction a party for that speech.[351] The Court further stated that

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[344] *Id*. at 338-39.

[345] *Id*. at 339. General Statutes § 52-196a(b) provides: "In any civil action in which a party files a complaint, counterclaim or cross claim against an opposing party that is based on the opposing party's exercise of its right of free speech, right to petition the government, or right of association under the Constitution of the United States or the Constitution of the state in connection with a matter of public concern, such opposing party may file a special motion to dismiss the complaint, counterclaim or cross claim."

[346] *Lafferty*, 336 Conn. at 339-40.

[347] *Id*. at 340-47.

[348] *Id*. at 348.

[349] *Id*.

[350] *Id*. at 352.

[351] *Id*. at 359.

speech is more likely to interfere with the administration of justice if it is calculated to intimidate or threaten other participants in the litigation.[352] Moreover, the Court stated that it must consider whether the sanction is narrowly tailored to achieve the government's substantial interest in protecting the administration of justice.[353] Turning to the particulars of Jones's broadcast, the trial court found that Jones had accused opposing counsel of a felony (planting child pornography), used threatening language toward opposing counsel and harassed and intimidated opposing counsel.[354] The Court acknowledged that in the absence of litigation the above speech may have been protected; however, the Court concluded that the broadcast posed an imminent and likely threat to the administration of justice.[355] In finding that the sanctions were narrowly tailored to the state's interest in ensuring fair judicial proceedings, the Court observed that the trial court refrained from imposing more severe sanctions, such as defaulting the defendant, issuing a gag order, or issuing orders involving civil or criminal contempt.[356] Furthermore, in reviewing the sanctions based upon the defendants' discovery abuses, the Court stated that it considered three factors: (1) the order to be complied with must be reasonably clear; (2) the record must establish that the order was in fact violated; and (3) the sanction imposed must be proportional to the violation.[357] The Court found that the sanctions imposed by the trial court satisfied the above considerations.[358] The Court affirmed the sanction orders.[359]

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[352] *Id*. at 362.

[353] *Id*. at 363.

[354] *Id*. at 366.

[355] *Id*. at 366-68.

[356] *Id*. at 371-72.

[357] *Id*. at 373-74. The three factors were first set forth in *Millbrook Owners Assn., Inc. v. Hamilton Standard*, 257 Conn. 1, 17-18, 776 A.2d 1115 (2001).

[358] *Id*. at 374-82. Although the sanctions ordered by the trial court were not sanctions set forth in the rules of practice, the Supreme Court remarked that they fell within the ambit of judicial power contemplated by the court's inherent authority and that the trial court may enter orders "as the ends of justice require" under Practice Book Section 13-14 (a). *Id*. at 379-80. *Accord* Yeager v. Alvarez, 302 Conn. 772, 778, 31 A3d. 794 (2011) (the trial court had the authority to strike an otherwise valid offer of compromise as a sanction for a discovery violation).

[359] *Id*. at 385.

The application of Connecticut's anti-SLAPP Statute, General Statutes Section 52-196a(b), was considered in *Chapnick v. DiLauro*.[360] The Appellate Court reversed the granting of the defendants' special motions to dismiss pursuant to Section 52-196a the plaintiff's complaint alleging nuisance and seeking injunctive relief.[361] The Court observed that the anti-SLAPP statute, Section 52-196a(e)(3),[362] concerns the exercise of the right of free speech, the right to petition, and the right of association.[363] The Court added that a second requirement of the anti-SLAPP statute is that the conduct be done in connection with a matter of public concern.[364] Turning to the facts of the case, the Court stated that the alleged nuisance of a neighbor walking a dog and allowing it to relieve itself in a location disagreeable to another neighbor, while a third neighbor encourages the behavior, does not fall within the scope of the protected constitutional conduct as set forth in the anti-SLAPP statute.[365] The Court also found that the conduct in question was not a matter of public concern.[366]

In *Brown v. Cartwright*,[367] the Appellate Court rejected the plaintiff's claim in a product liability action that the trial court's delivery of the defendants' exhibits to the jury before the delivery of his exhibits to the jury, deprived him of a fair

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[360] 212 Conn. App. 263, 275 A.3d 746 (2022). SLAPP is an acronym for strategic lawsuit against public participation. *Id*. at 265, note 2.

[361] *Id*. at 264-65.

[362] General Statutes § 52-196a(e)(3) provides, in pertinent part: "The court shall grant a special motion to dismiss if the moving party makes an initial showing, by a preponderance of the evidence, that the opposing party's complaint ... is based on the moving party's exercise of its right of free speech, right to petition the government, or right of association under the Constitution of the United States or the Constitution of the state in connection with a matter of public concern, unless the party that brought the complaint ... sets forth with particularity the circumstances giving rise to the complaint ... and demonstrates to the court that there is probable cause, considering all valid defenses, that the party will prevail on the merits of the complaint ...."

[363] *Chapnick*, 212 Conn. App. at 271.

[364] *Id*. at 272.

[365] *Id*. at 270-71.

[366] *Id*. at 272. General Statutes § 52-196a(a)(1) defines a "matter of public concern" as "an issue related to (A) health or safety, (B) environmental, economic or community well-being, (C) the government, zoning and other regulatory matters, (D) a public official or public figure, or (E) an audiovisual work ...."

[367] 203 Conn. App. 490, 498, 249 A.3d 59 (2021).

trial. The plaintiff pointed to Practice Book Section 16-15(a) which provides that "[t]he judicial authority shall submit to the jury all exhibits received in evidence."[368] The Court noted that it was undisputed that the jury received all the exhibits prior to returning its verdict.[369] The Court found that the plaintiff's claim was purely speculative because he presented no evidence that the jury began deliberations prior to the delivery of all the exhibits.[370] The Court additionally noted that the time that a jury spends in deliberation cannot form the basis of a claim that its verdict was affected by improper influences.[371]

Budrawich v. Budrawich[372] held that the trial court erred in denying the defendant's motion for reassignment pursuant to Practice Book Section 11-19(b)[373] and, therefore, reversed the court's decision on the plaintiff's motion for order. The defendant appealed, *inter alia*, from the trial court's ruling on his motion for reassignment of the plaintiff's motion for order seeking reimbursement for children's expenses and unreimbursed medical expenses.[374] The trial court found that the defendant waived the 120 day filing deadline by failing

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[368] *Id*.

[369] *Id*.

[370] *Id*.

[371] *Id*. at 498-99.

[372] 200 Conn. App. 229, 240, 240 A.3d 668 (2020), *cert. denied*, 336 Conn. 909, 244 A.3d 561 (2021).

[373] Practice Book §11-19 provides: "(a) Any judge of the Superior Court and any judge trial referee to whom a short calendar matter has been submitted for decision, with or without oral argument, shall issue a decision on such matter not later than 120 days from the date of such submission, unless such time limit is waived by the parties. In the event that the judge or referee conducts a hearing on the matter and/or the parties file briefs concerning it, the date of submission for purposes of this section shall be the date the matter is heard or the date the last brief ordered by the court is filed, whichever occurs later. If a decision is not rendered within this period the matter may be claimed in accordance with subsection (b) for assignment to another judge or referee.

(b) A party seeking to invoke the provisions of this section shall not later than fourteen days after the expiration of the 120 day period file with the clerk a motion for reassignment of the undecided short calendar matter which shall set forth the date of submission of the short calendar matter, the name of the judge or referee to whom it was submitted, that a timely decision on the matter has not been rendered, and whether or not oral argument is requested or testimony is required. The failure of a party to file a timely motion for reassignment shall be deemed a waiver by that party of the 120 day time."

[374] *Budrawich*, 200 Conn. App. at 233.

to respond to the case flow coordinator's emails sent before the deadline had lapsed requesting that the parties waive the 120 day deadline and by failing to appear at a status conference where the notice provided the address of the wrong courthouse.[375] The Appellate Court explained that waiver is the intentional relinquishment or abandonment of a known right or privilege and that it may be express or may consist of acts or conduct from which waiver may be implied or inferred.[376] The Court noted that although it did not condone the defendant's failure to respond to the emails or the defendant's failure to communicate with the court or the plaintiff's attorney following the missed status conference, it could not construe this conduct as a waiver of the 120 day filing deadline.[377]

In *Corbo v. Savluk*,[378] the plaintiff appealed from the judgment of the trial court entered after a jury returned a defense verdict, arguing that the court improperly allowed the defendant's attorney to ask the plaintiff when she first contacted an attorney. The Appellate Court found that under the facts of the case the trial court did not abuse its discretion in allowing the inquiry for purposes of impeachment.[379] The Court noted that the mere fact, in and of itself, that someone is represented by an attorney is generally irrelevant.[380] However, the Court decided that the defendant's attorney established a proper foundation for the question; in particular, the plaintiff reported no neck or back pain at a visit to a walk-in clinic after the accident and then a few days later reported constant pain, including to her neck and back since the accident.[381] The Court explained that evidence the plaintiff retained an attorney between her visit to the walk-in clinic and beginning treatment with her chiropractor was relevant to the defense argument that the plaintiff's description of her

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375 *Id*. at 234-37.
376 *Id*. at 238.
377 *Id*. at 239-40.
378 209 Conn. App. 351, 353, 267 A. 3d 919 (2021).
379 *Id*. at 359.
380 *Id*. at 357.
381 *Id*. at 357-58.

injuries was not credible.[382]

McCrea v. Cumberland Farms, Inc.[383] also focused on evidentiary issues. After the jury returned a general verdict in favor of the defendants, the plaintiffs appealed, arguing that the trial court erred in permitting defense counsel to ask certain questions at trial and by preventing the plaintiffs from testifying that the reason they were referred to certain medical providers by their attorney was because of a lack of adequate medical insurance.[384] The Appellate Court first noted that it will set aside an evidentiary ruling only when there has been a clear abuse of discretion.[385] The Court found that the fact that the named plaintiff filed a lawsuit after having injuries in an earlier motor vehicle accident was relevant to the defendants' claim that one of the plaintiff's assertions that her injuries were related to the subject accident lacked credibility.[386] The Court also found that it relevant that the plaintiffs selected medical providers from a list provided by their attorneys with respect to the defendants' argument that the plaintiff's medical providers were biased in favor of the plaintiffs.[387] Similarly, the Court found evidence that the plaintiffs' former attorney had referred the plaintiffs to a particular medical provider was relevant to motive, bias and credibility.[388] However, the Court found error in the exclusion of evidence that the plaintiffs sought treatment from medical providers referred to them by their attorneys because of a lack of medical insurance.[389] The Court reasoned that the plain-

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[382] *Id.* at 358. In *Trumpold v. Besch*, 19 Conn. App. 22, 24, 561 A.2d 438, *cert. denied*, 212 Conn. 812, 565 A.2d. 538 (1989), *cert. denied*, 494 U.S. 1029 (1990), the Appellate Court, under similar circumstances, found no error where defense counsel was permitted to ask the plaintiffs when they had first contacted an attorney. The Court agreed with trial court that the jury could conclude that the evidence was useful in evaluating the testimony because there was a dispute as to the force of the impact, the seriousness of the injuries and when the plaintiff consulted an attorney before seeking medical assistance. *Id.* at 26.

[383] 204 Conn. App. 796, 255 A.3d 871, *cert. denied*, 338 Conn. 901, 258 A.3d 676 (2021).

[384] *Id.* at 798.

[385] *Id.* at 804.

[386] *Id.* at 806.

[387] *Id.*

[388] *Id.*

[389] *Id.* at 812.

tiffs should been allowed to rebut the defense argument that focused on the plaintiffs' credibility.[390] The Court stated that even when it concludes that a trial court's ruling was made in error, it must also consider whether the ruling was harmful.[391] The Court found that the error was harmful because such testimony was directly relevant to a central challenge to the plaintiffs' credibility by the defendants.[392] Next, the Court addressed whether the general verdict rule precluded review of the plaintiffs' claims.[393] The Court explained that in a typical general verdict rule case, the record is silent regarding whether the jury verdict resulted from the issue that the appellant seeks to have adjudicated.[394] The Court further explained that the general verdict rule applies in certain situations, including in the case before it where there had been a denial of the allegations in a complaint and the pleading of a special defense.[395] The Court added that the general verdict rule insulates a verdict that may have been reached under a cloud of error but which also could have been reached by an untainted route.[396] The Court concluded that the general verdict rule did not apply because the trial court improperly precluded the plaintiffs from offering evidence to rehabilitate their credibility, and given that the prejudicial effect on their credibility could not be limited to the complaint or the special defense of comparative negligence, the preclusion of that evidence necessarily tainted the entire case.[397]

The Appellate Court in *Manson v. Conklin*[398] disagreed with plaintiff's argument that the trial court improperly precluded him from impeaching Conklin, the named defendant, about findings regarding his veracity made by his employer during an unrelated internal affairs investigation. The case arose out of an accident when the plaintiff while operating a

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390 *Id.* at 811-12.
391 *Id.* at 812.
392 *Id.* at 814.
393 *Id.*
394 *Id.* at 814-15.
395 *Id.* at 815.
396 *Id.*
397 *Id.* at 818.
398 197 Conn. App. 51, 52, 231 A.3d 254 (2020).

dirt bike was struck by a police cruiser being operated by the named defendant, an on-duty police officer.[399] The Court stated the Code of Evidence generally prevents the use of character evidence to prove that a person has acted in conformity with a character trait on a particular occasion, except where the admission of the evidence of a witness' character for untruthfulness is to impeach the credibility of the witness.[400] The Court stated that a party may cross examine a witness about prior misconduct (other than a felony conviction which is governed by a separate section of the Code of Evidence) if those specific acts of misconduct bear a special significance upon the issue of veracity.[401] The Court explained that the party examining the witness must accept the witness' answers about a particular act of misconduct and may not use extrinsic evidence to contradict the witness' answers.[402] Turning to the facts of the case, the Court noted that the plaintiff would have been allowed to question Conklin about his misconduct but would have been precluded from offering extrinsic evidence of that misconduct if denied by Conklin.[403] The Court explained that the conclusions contained in the internal investigation reports constituted extrinsic evidence of alleged prior misconduct because they reflected the opinions of the police department that Conklin acted untruthfully.[404]

The procedure to obtain an extension to respond to a motion for summary judgment was discussed in *Goody v. Bedard*.[405] In response to the defendant's motion for summary judgment, the plaintiff moved for two extensions of time to file a reply.[406] Both motions were granted by the trial court.[407] The plaintiff filed a third motion for extension of time.[408] The

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[399] *Id*. at 52-53.
[400] *Id*. at 60.
[401] *Id*.
[402] *Id*.
[403] *Id*. at 62.
[404] *Id*. The Appellate Court noted that although the trial court appeared to have precluded the evidence proffered by the plaintiff on somewhat different grounds, it may affirm on an alternative ground. *Id*. at 55 and note 3.
[405] 200 Conn. App. 621, 241 A.3d 163 (2020).
[406] *Id*. at 626.
[407] *Id*.
[408] *Id*.

trial court granted the defendant's motion for summary judgment without acting on the plaintiff's third motion for extension of time.[409] On appeal, the plaintiff argued that the trial court abused its discretion in not granting his third motion for extension of time so that he could obtain documents, conduct depositions to contradict the defendant's affidavit and respond to the defendant's motion for summary judgment.[410] In finding that the trial court did not err, the Appellate Court initially stated that a trial court's decision on a motion for continuance pursuant to Practice Book Section 17-47 is reviewed for an abuse of discretion.[411] The Court stated that the trial court had before it representations of counsel but no affidavits articulating with any particularity what additional discovery might justify a continuance of the hearing on the motion for summary judgment.[412] The Court added that the requirement of proper affidavits with a required showing of precisely what facts are within the exclusive knowledge of the party to be deposed is not merely a procedural rule.[413]

The utilization of a motion to dismiss to test the legal sufficiency of a complaint was addressed in *Godbout v. Attanasio*.[414] The trial court granted the defendants' motion to dismiss and, on appeal, the plaintiff argued that a motion to dismiss was not the proper vehicle to contest the legal sufficiency of the plaintiff's complaint.[415] The Appellate Court observed that it is the office of a motion to strike to test the legal sufficiency of the allegations of a complaint.[416] The Court explained that a motion to dismiss does not test legal sufficiency and should not be granted on other than jurisdictional grounds.[417] The Court further explained that allow-

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[409] *Id*.

[410] *Id*. at 627.

[411] *Id*. Practice Book § 17-47 provides: "Should it appear from the affidavits of a party opposing the motion that such party cannot, for reasons stated, present facts essential to justify opposition, the judicial authority may deny the motion for judgment or may order a continuance to permit affidavits to be obtained or discovery to be had or may make such other order as is just."

[412] *Goody*, 200 Conn. App. at 629.

[413] *Id*.

[414] 199 Conn. App. 88, 234 A.3d 1031 (2020).

[415] *Id*. at 108.

[416] *Id*.

[417] *Id*. at 109.

ing a motion to dismiss to challenge the legal sufficiency of pleadings would be especially unfair to the plaintiff in light of the rules permitting a right to plead over after a motion to strike is granted but not permitting such a right after a motion to dismiss is granted.[418] The Court resolved the issue against the plaintiff because he never made this procedural argument to the trial court in opposition to the motion to dismiss.[419] Additionally, the Court stated that the plaintiff failed to ask for an opportunity to replead and did not claim that, if the court had afforded him the opportunity, he would have alleged additional factual allegations.[420]

Pizzoferrato v. Community Renewal Team, Inc.[421] held that the trial court properly denied the plaintiff's motion to open and vacate a judgment entered in favor of the defendant in accordance with a decision of an arbitrator in a court annexed arbitration because General Statutes Section 52- 549z(a) does not require, as argued by the plaintiff, that notice of the arbitration decision be sent both electronically and by mail. The plaintiff claimed that she was injured while walking on a sidewalk owned and controlled by the defendant.[422] The Appellate Court stated that electronic notice of the arbitration decision was provided to the parties' counsel on the same day as the hearing and neither party filed a demand for trial de novo within twenty days of when the electronic notice was sent.[423] The Court stated that Section 52-549z(a) allows for the notice of the arbitration decision to be sent in either of two ways: (1) it can be sent electronically to the parties or their counsel; or (2) the arbitration decision can be deposited in the United States mail.[424] The Court found that the trial court did not abuse its discretion by denying the plaintiff's motion to open and vacate the judgment in favor of the defendant.[425]

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[418] *Id*.
[419] *Id*. at 111.
[420] *Id*.
[421] 211 Conn. App. 458, 459-63, 272 A.3d 1145 (2022).
[422] *Id*. at 460.
[423] *Id*. at 461.
[424] *Id*. at 462-63.
[425] *Id*. at 465.

Epright v. Liberty Mutual Insurance Company[426] addressed a writ of error brought by the plaintiff in error, the law firm representing the plaintiff in the underlying action to recover underinsured motorist benefits from the defendant in error. The plaintiff in error sought review of the trial court's order granting a motion for sanctions pursuant to which the plaintiff in error had been ordered to pay the defendant in error all costs related to the defendant in error's retention of a medical expert first disclosed by the defendant in error as a potential trial witness.[427] The Appellate Court reversed and remanded the case with direction to render judgment denying the defendant in error's motion for sanctions.[428] The basis of the trial court order was that the plaintiff in error had impermissible ex party communication with the defendant in error's expert in violation of the expert disclosure rules contained in Practice Book Section 13-4.[429] The Court stated that it could not conclude that either Section 13-4 or case law in Connecticut was reasonably clear in alerting attorneys that they were prohibited from having ex party communications with experts who had been disclosed by their opponents as potential trial witnesses.[430] The Court added that it had no occasion to take a position on whether ex party communications with an opposing party's disclosed expert should or should not be permissible; it simply held that Connecticut law did not clearly prohibit such conduct.[431] The Court held that the trial court's justification for the sanction was clearly erroneous.[432]

Pascola-Milton v. Millard[433] rejected the plaintiff's claim that she had an absolute right to a trial de novo following an arbitrator's decision of her claims pursuant to General

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[426] 212 Conn. App. 637, 638, 276 A.3d 1022, *cert. granted*, 345 Conn. 908, 283 A.3d 505 (2022).

[427] *Id.* at 638-39.

[428] *Id.* at 662.

[429] *Id.* at 639.

[430] *Id.* at 655-56.

[431] *Id.* at 656.

[432] *Id.* at 656-57.

[433] 203 Conn. App. 172, 173-74,178-79, 247 A.3d 652, *cert. denied*, 336 Conn. 934, 248 A.3d 710 (2021).

Statutes Section 52-549z. The Appellate Court dispensed with the plaintiff's claim, noting that the plaintiff voluntarily submitted her claims to arbitration and any review of the arbitration decision was governed by General Statutes Section 52-418 under which there is no right to a trial de novo.[434] *Karanda v. Bradford*[435] instructs counsel that a motion to reopen a judgment of nonsuit entered against a plaintiff for failing to comply with discovery pursuant to General Statutes Section 52-212 must be accompanied by an affidavit. The Appellate Court affirmed the judgment because the record before it unambiguously reflected that the plaintiff failed to timely file an affidavit with the motion to open.[436]

The admissibility of photographic evidence was the crucial issue in *Ulanoff v. Becker Salon, LLC*.[437] The Appellate Court agreed with the plaintiff that the trial court erred when it prevented her from introducing into evidence a photograph of the glass door entrance to the salon that the plaintiff walked into showing that there was no lettering or handles that was on the defendant's website.[438] The trial court granted the defendant's motion in limine to preclude the admission of the photograph on the basis that the photograph was taken long after the accident and that it had been photoshopped to remove the signage and handles from the door.[439] The Court first described the standard of review by noting that a trial court's ruling on admissibility of evidence is entitled to great deference and will be overturned only where there is clear abuse of discretion.[440] The Court observed that it was unnecessary to consider the plaintiff's contention that the trial court erred in determining that the plaintiff needed to establish the chain of custody of the photograph because the defendant conceded that that the trial court erred in that regard.[441] The Court also remarked that

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[434] *Id*. at 179.
[435] 210 Conn. App. 703, 705-09, 270 A.3d 743 (2022).
[436] *Id*. at 713.
[437] 208 Conn. App. 1, 262 A.3d 863 (2021).
[438] *Id*. at 2-3.
[439] *Id*. at 5.
[440] *Id*. at 6-7.
[441] *Id*. at 7. Code of Evidence § 9-1(a) provides: "The requirement of

to the extent the trial court implied that the photograph was not admissible because it had not been taken of the date of the accident, such a ruling would be improper because when a photograph is taken goes to the weight that should be afforded to evidence and not to it admissibility.[442] The Court rejected the defendant's argument that the photograph was not admissible because the picture had been altered before it was uploaded to the defendant's website.[443] The Court explained that the alteration of the photograph was for the jury's consideration after its presentation to the jury, but the alteration did not go to admissibility since the plaintiff, based on personal knowledge, was prepared to testify that the photograph was a fair and accurate representation of the glass doors to the entrance to the defendant's salon on the date of accident.[444]

The learned treatises exception to the hearsay rule was the dispositive issue in *Williams v. Lawrence + Memorial Hospital, Inc.*[445] The plaintiff, the administrator of the estate of the decedent, appealed from the judgment of the trial court rendered after a jury trial in favor of the defendant, an emergency room physician.[446] The plaintiff claimed, on appeal, that the trial court abused its discretion by refusing to admit into evidence certain portions from the Advanced Trauma Life Support (ATLS) guidelines, which the plaintiff argued were admissible under Connecticut Code of Evidence Section 8-3(8).[447] The plaintiff alleged that the defendant

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authentication as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the offered evidence is what its proponent claims it to be."

[442] *Ulanoff,* 208 Conn. App. at 8.

[443] *Id.*

[444] *Id.* at 9-10.

[445] 211 Conn. App. 610, 273 A.3d 235 (2022).

[446] *Id.* at 611.

[447] *Id.* at 612. Code of Evidence § 8-3(8) provides: "The following are not excluded by the hearsay rule, even though the declarant is available as a witness ... (8) Statement in learned treatises. To the extent called to the attention of an expert witness on cross-examination or relied on by the expert witness in direct examination, a statement contained in a published treatise, periodical or pamphlet on a subject of history, medicine, or other science or art, recognized as a standard authority in the field by the witness, other expert witness or judicial notice." The commentary to Section 8-3(8) states: "Section 8 explicitly permits the substantive use of statements contained in published treatises, periodicals or pamphlets on

failed to recognize that the decedent's condition required an immediate transfer to a designated trauma facility and that the defendant failed to follow appropriate protocols for the care and treatment of a trauma patient.[448] The plaintiff's medical expert stated that the ATLS guidelines were an authoritative source that sets forth the best practices for the initial stabilization of trauma patients.[449] At the end of the plaintiff's case-in-chief, the plaintiff's counsel moved to admit into evidence certain excerpts from the ATLS guidelines.[450] The trial court denied the plaintiffs motion on the ground that the admission of the excerpts could confuse the jurors as to the relevant standard of care.[451] The jury found that the plaintiff failed to prove by preponderance of the evidence the prevailing professional standard of care applicable to the defendant with respect to the treatment of the decedent.[452] The Appellate Court stated that a learned treatise may be admitted into evidence if the work is recognized as a standard authority in the field by the expert witness and the work must be brought to the attention of the expert witness on cross examination or have been relied upon by the expert witness during direct examination.[453] The Court further explained that Connecticut's rule differed from that of most other jurisdictions, including the federal rule, in that Connecticut allowed the material to be taken into the jury room as a full exhibit.[454] The Court added that Connecticut permits

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direct examination or cross-examination under the circumstances prescribed in the rule. In the case of a journal article, the requirement that the treatise is recognized as a 'standard authority in the field' ... generally requires proof that the specific article at issue is so recognized. ... There may be situations, however, in which a journal is so highly regarded that a presumption of authoritativeness will arise with respect to an article selected for publication in that journal without any additional showing. ... Although most of the earlier decisions concerned the use of medical treatises ... Section 8-3(8), by its terms, is not limited to that one subject matter or format. ... Connecticut allows the jury to receive the treatise, or portion thereof, as a full exhibit. ... If admitted, the excerpts from the published work may be read into evidence or received as an exhibit, as the court permits."

[448] *Williams,* 211 Conn. App. at 613-14.

[449] *Id*. at 614.

[450] *Id*. at 616-17.

[451] *Id*. at 617.

[452] *Id*. at 622.

[453] *Id*. at 625.

[454] *Id*.

the admission of learned treatises but neither mandates its admission nor limits the trial court's discretion to exclude the evidence if it carries the danger of misunderstanding or misapplication by the jury.[455] The Court held that the trial court did not abuse its discretion in excluding the evidence because throughout the trial the plaintiff's attorney repeatedly and erroneously argued that the guidelines actually set forth the relevant standard of care.[456] The Court clarified that under General Statutes Section 52-184c(a) the proper standard of care is that level of care, skill and treatment which, in light of all relevant surrounding circumstances, is recognized as acceptable and appropriate by reasonably prudent similar health care providers.[457] The Court affirmed the judgment in the case because the trial court properly determined that, had the excerpts been admitted into evidence, the jury may have mistakenly evaluated the defendant's conduct only in light of the guidelines, rather than assessing whether the defendant deviated from the standard of care.[458]

Code of Evidence Section 9-3A is a new section that permits an alternative way to authenticate business records. The authentication requirement as a condition precedent to admitting a business record under Code of Evidence Section 8-4 may be satisfied by a sworn certification of the custodian of the record or other qualified witness. The affiant must set forth the foundational requirements under General Statute 52-180. The information contained in the record must be based on the entrant's own observation or information of others whose business duty it was to transmit it to entrant. It must also indicate that based upon the certifying person's knowledge, after reasonable inquiry, that the record or copy thereof is an accurate version of the record that is in the possession of the certifying person. The certification is admissible evidence. A party opposing the admissibility of the record bears the burden of showing that the record is not what it purports to be. A party intending to introduce a record under

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[455] *Id.* at 626.
[456] *Id.* at 627.
[457] *Id.* at 627-28.
[458] *Id.* at 628.

this Section must provide written notice of that intention to all parties and must make the record and certification available for inspection sufficiently in advance of the offer to allow an adverse party an opportunity to challenge them. Section 9-3A became effective on June 13, 2022.

XVII. Uninsured/Underinsured Motorist

In *Pollard v. Geico General Insurance Company*,[459] the Appellate Court affirmed the summary judgment in favor of the defendant underinsured motorist insurer on the grounds that the action was barred because the plaintiff failed under the conditions of the parties' insurance policy to commence suit timely or to invoke the policy's tolling provision. The Court initially stated that the time to commence suit timely and the tolling requirements under General Statutes Section 38a-336(g)(1)[460] were incorporated in the subject insurance policy.[461] The Court observed that there was no dispute that the plaintiff brought the claim for underinsured motorist benefits outside of the three year limitation timeframe.[462] The plaintiff claimed she sent a letter to the defendant in order to provide notice to the defendant of a potential underinsured motorist claim and toll the time in which to file a claim.[463] The Court, in deciding that the letter was insufficient to satisfy the tolling provision of Section 38a-336(g)(1), noted that although the letter was within three years of the date of the accident, it did not contain a specific refer-

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[459] 215 Conn. App. 11, 12-13, 282 A.3d 535 (2022), *cert. denied*, 346 Conn. 910, 289 A.3d 597 (2023).

[460] General Statutes § 38a-336 provides that "[n]o insurance company doing business in this state may limit the time within which any suit may be brought against it ... on the ... underinsured motorist provisions of an automobile liability insurance policy to a period of less than three years from the date of accident, provided, in the case of an underinsured motorist claim the insured may toll any applicable limitation period (A) by notifying such insurer prior to the expiration of the applicable limitation period, in writing, of any claim which the insured may have for underinsured motorist benefits and (B) by commencing suit or demanding arbitration under the terms of the policy not more than one hundred eighty days from the date of exhaustion of the limits of liability under all automobile bodily injury liability bonds or automobile insurance policies applicable at the time of the accident by settlements or final judgments after any appeals."

[461] *Pollard*, 215 Conn. App. at 17-18.

[462] *Id.* at 18.

[463] *Id.* at 18-20.

ence to a potential claim for underinsured motorist benefits as mandated by the unambiguous language of the insurance policy.[464]

XVIII. Workers' Compensation

Lavette v. Stanley Black Decker, Inc.[465] is an example of the narrowness of the alter ego intentional tort exception to the exclusivity provision of the Workers' Compensation Act, General Statutes Section 31-275 et seq. The plaintiff alleged that the defendant hired him as a store attendant where his employment included painting by brush and spray.[466] The plaintiff further alleged that the defendant's safety manager advised him that he could not use a respirator in the workplace.[467] The plaintiff alleged that he developed pain, nausea, diarrhea and headaches from his exposure to paint.[468] After the trial court granted the defendant's motion to strike, the plaintiff appealed.[469] In arguing that his complaint was legally sufficient, the plaintiff relied on his allegations that the safety manager acted as the alter ego of the defendant and committed an intentional tort.[470] The Appellate Court observed that employees who are injured in the course of their employment are generally barred from bringing a common-law claim against their employers for injuries as their right to compensation is exclusively through the workers' compensation system.[471] The Court iterated the narrow exception

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[464] *Id*. at 20-23.
[465] 213 Conn. App. 463, 278 A.3d 1072 (2022).
[466] *Id*. at 465.
[467] *Id*.
[468] *Id*.
[469] *Id*. at 470.
[470] *Id*. at 474.
[471] *Id*. at 471-72. General Statutes § 31-284 (a) provides: "An employer who complies with the requirements of subsection (b) of this section shall not be liable for any action for damages on account of personal injury sustained by an employee arising out of and in the course of his employment or on account of death resulting from personal injury so sustained, but an employer shall secure compensation for his employees as provided under this chapter, except that compensation shall not be paid when the personal injury has been caused by the wilful and serious misconduct of the injured employee or by his intoxication. All rights and claims between an employer who complies with the requirements of subsection (b) of this section and employees, or any representatives or dependents of such employees, arising out of personal injury or death sustained in the course of employment are abolished other

to the exclusivity provision of the Act for intentional torts committed by the alter ego of a corporation.[472] The Court emphasized that this exception did not apply to supervisory employees but only an alter ego of a corporation.[473] The Court further explained that the standard requires that the corporation, functionally speaking, have no separate existence from the alter ego who controls the corporation's affairs.[474] The Court concluded that the motion to strike was properly granted because the plaintiff's allegations demonstrated nothing more than that the safety manager exercised the control typical of any corporate safety manager and did not rise to the level of an alter ego.[475] The Court also agreed with the trial court that the plaintiff's bald assertion that the defendant lacked a separate mind, will or existence from its safety manager constituted a legal conclusion, which a motion to strike does not admit.[476]

In *Desmond v. Yale-New Haven Hospital*,[477] the Appellate Court found no error in the trial court's granting of the defendant's motion to strike the complaints in plaintiff's consolidated actions. The plaintiff contended that the trial court misconstrued her claims as sounding in bad faith processing of a workers' compensation claim, as opposed to claims sounding in employment discrimination pursuant to General Statutes Section 31-290a.[478] According to the Court, in order to establish a discrimination claim under Section 31-290a the plaintiff must show that he or she was exercising a right afforded under Section 31-290a and that the defendant

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than rights and claims given by this chapter, provided nothing in this section shall prohibit any employee from securing, by agreement with his employer, additional compensation from his employer for the injury or from enforcing any agreement for additional compensation."

[472] *Lavette*, 213 Conn. App. at 474.

[473] *Id*.

[474] *Id*. at 474-75.

[475] *Id*. at 480.

[476] *Id*.

[477] 212 Conn. App. 274, 276, 275 A.3d 735, *cert. denied*, 343 Conn. 931, 276 A.3d 433 (2022).

[478] *Id*. General Statutes § 31-290a provides that no employer shall discharge or in any manner discriminate against any employee because the employee filed a workers' compensation claim. *Id*. at 287.

discriminated against him or her for exercising that right.[479] The Court stated that the plaintiff must show that the defendant employer took adverse action against the plaintiff.[480] The Court concluded after reviewing the plaintiff's complaint that she did not allege an adverse employment action, rather she alleged a bad faith claim in processing her compensation claim, and, as such, her action was barred by the exclusivity provisions of Section 31-284.[481]

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[479] *Id*. at 288.
[480] *Id*.
[481] *Id*. at 289.

PITFALLS IN STATE CONSTITUTIONAL THEORIZING: FREE SPEECH IN CONNECTICUT

By Mitchell S. Brody*

In reacting to the increasing conservatism of the United States Supreme Court after William H. Rehnquist replaced Earl Warren as Chief Justice, the historically liberal Connecticut Supreme Court, relying on the Connecticut Constitution, expanded individual rights beyond the protections afforded by the U.S. Constitution and retained rights that were being diminished under federal jurisprudence. In doing so, the Connecticut Supreme Court joined other state courts in responding to the observation of United States Supreme Court Justice William J. Brennan that they were empowered by their independent state constitutions to safeguard constitutional rights in the face of eroding federal constitutional protections.[1] To this end, the Connecticut Supreme Court has interpreted the Connecticut Constitution during the last three decades, and its constitutional analysis sheds light on its likely response to the United States Supreme Court's new conservative majority.

At the core of the Connecticut Supreme Court's state constitutional analysis has been its conclusion that the Connecticut constitution is a "living document."[2] The Court explained that a living document must be interpreted in accordance with the "demands of modern society," and not "too narrowly or too literally," to ensure that, as an "instrument for progress," it retains contemporary effectiveness.[3] The Court also identified various nonexclusive factors that could

* Of the Hartford Bar. The author formerly served as an Assistant State's Attorney in the Appellate Bureau of the Office of the Chief State's Attorney. The views expressed in this article are the author's own and not those of the Division of Criminal Justice.

[1] William J. Brennan, *State Constitutions and the Protection of Individual Rights*, 90 Harv. L. Rev. 489, 501-03 (1977); State v. Dukes, 209 Conn. 98, 112, 547 A.2d 10 (1988); State v. Brown, 930 N.W.2d 840, 856 (Iowa 2019); Goodwin Liu, *State Courts and Constitutional Structure*, 128 Yale L.J. 1304, 1312 (2019).

[2] *Dukes*, 209 Conn. at 115 (internal quotation marks omitted); State v. Joyce, 229 Conn. 10, 18 n.10, 639 A.2d 1007 (1994).

[3] *Dukes*, 209 Conn. at 115 (internal quotation marks omitted).

be germane to identifying modern societal demands, including: relevant federal, Connecticut, and sister-state precedent; the constitutional text; the intent of the Connecticut Constitution's adopters; and public policy considerations.[4] What has received insufficient attention is the Court's caveat that often, in determining what it means to be a living document, constitutional interpretation will "turn upon a factual assessment of how society feels about certain matters," as gauged by either a national or local consensus on the matter at hand.[5] The Court also observed that, previously, it had invoked the state constitution to afford "broader protection of certain personal rights than that afforded by similar or even identical provisions of the federal constitution,"[6] thereby associating the progress that a living constitution seeks to achieve with the expansion of existing rights. The analytic upshot of the Connecticut Supreme Court deeming the Connecticut Constitution to be a living document is that constitutional meaning may be derived from sources other than the adopters' intentions, the literal scope of constitutional text, and related societal trends around the time of the ratification of Connecticut's 1818 Constitution.

But this method of analyzing the meaning of a living constitution is inherently contradictory because it is intertwined with ascertaining societal feelings and demands: it aims to be enduring by creating durable precedent,[7] but explicates modern societal preferences,[8] which are temporary because they are contemporary and, therefore, change as a dynamic society changes. And, for Connecticut jurisprudence, there is an imperative to resolve this contradiction, which stems from the recent preferred position of the state constitution when it matters most: where federal constitutional claims are based upon unsettled or inconclusive law, this jurispru-

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[4] State v. Santiago, 318 Conn. 1, 17-18, 122 A.3d 1 (2015); State v. Geisler, 222 Conn. 672, 684-85, 610 A.2d 1225 (1992).

[5] State v. Correa, 340 Conn. 619, 640 n.16, 264 A.3d 894 (2021) (internal quotation marks omitted); State v. Kono, 324 Conn. 80, 89 n.6, 152 A.3d 1, 9 (2016); *Joyce*, 229 Conn. at 19 n.12.

[6] *Dukes*, 209 Conn. at 112; *accord Geisler*, 222 Conn. at 684.

[7] *Dukes*, 209 Conn. at 115.

[8] *Correa*, 340 Conn. at 640 n.16.

dence turns first to the state constitution because the resulting "interpretation … is final and conclusive," whereas "only an informed guess of the meaning of the federal constitution" can be offered.[9]

One of the ways the Connecticut Supreme Court has, in effect, attempted to resolve this contradiction is by finding continuity in the original and modern meaning of article first, sections 4 and 5, of the Connecticut Constitution, based on these provisions continuously and expansively protecting speech from punishment under state criminal laws. This linkage between the Connecticut Constitution's past and present renders the precedential value of decisions applying sections 4 and 5 more durable because they are grounded in more than societal feelings and demands about a particular free speech matter, which otherwise would be subject to the vagaries of changing times and court membership. This linkage also lends legitimacy to conclusions as to the content of societal feelings and demands by virtue of countering the appearance that they are little more than the sum of individual judges either declaiming what society believes or assuming that their personal beliefs and societal beliefs are the same.

The pitfall of this analysis is that, originally, sections 4 (then § 6) and 5 (then § 7) never supplied expansive free speech rights. Instead, these provisions offered qualified rights that are circumscribed when they trench upon, by abusing, the rights of others. Therefore, the Connecticut Supreme Court has erroneously captured original constitutional meaning to support living constitution outcomes consistent with, and bolstering, its assumption that modern society believes in safeguarding free speech by expanding it. This flawed constitutional analysis does not merge original and living constitutional meaning; instead, it misappropriates the former in the interests of the latter. Left uncorrected, it could mar how the abidingly liberal Connecticut Supreme Court will respond to the new conservative majority of the United States Supreme Court.

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[9] *Kono*, 324 Conn. at 123 & n.24 (internal brackets and quotation marks omitted).

It was the Connecticut Supreme Court's decision in *State v. Linares*,[10] that erroneously altered the meaning of article first, sections 4 and 5, by concluding that these provisions originally provided expansive free speech rights. The *Linares* Court's analysis compared the First Amendment's text ("Congress shall make no law ... abridging the freedom of speech, or of the press …") with the text of section 4 ("[e]very citizen may freely speak, write and publish his sentiments on all subjects, being responsible for the abuse of that liberty") and section 5 ("[n]o law shall ever be passed to curtail or restrain the liberty of speech or of the press"). The *Linares* Court concluded that sections 4 and 5 afforded greater free speech protection than the First Amendment because of section 4's broad ambit, in that only its text contains the word "publish" and the words "on all subjects," and because of section 5's forcefulness, in that only its text contains the word "ever."[11]

In addition, the *Linares* Court derived the expansive free speech protections of sections 4 and 5 from society's belief in, or feelings for, "tolerance and cultural diversity" during the years surrounding the adoption of Connecticut's 1818 Constitution, which was manifested in support for the separation of church and state that fostered enhanced civil liberties and individuality.[12] According to the *Linares* Court, the value that society placed in such tolerance and cultural diversity revealed that the adopters of the 1818 constitution contemplated "vibrant public speech, and a minimum of governmental interference."[13] Importantly, the *Linares* Court linked these original sources of the expansive free speech rights to sections 4 and 5's place within a living state constitution, which, as an instrument of progress, aimed to have contemporary effectiveness by rigorously protecting speech.[14]

Yet the Connecticut Supreme Court's conclusion that sections 4 and 5 originally afforded expansive free speech rights is plainly refuted by its prior decisions in *Cologne v. West-*

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[10] State v. Linares, 232 Conn. 345, 655 A.2d 737 (1995).
[11] *Id.* at 380-81.
[12] *Id.* at 385 (internal quotation marks omitted).
[13] *Id.* at 386 (internal quotation marks omitted).
[14] *Id.* at 382.

farms Associates,[15] and *State v. McKee*.[16] Tellingly, the *Linares* Court only considered *Cologne*'s dissenting opinion and its characterization of the state constitution as playing an independently vital role in safeguarding freedom of speech.[17] In addition, the *Linares* Court only considered *McKee*'s general discussion of the key role that free speech plays in a democratic society.[18] Unaccounted for is the *Cologne* Court's refusal to extend state constitutional free-speech protection to expressive activity occurring on private property and the sources of the Court's conclusion: the debates of the adopters of the 1818 Constitution, the language of sections 4 and 5, and the relationship of these provisions to each other. These sources revealed that the adopters viewed sections 4 and 5 as furnishing only qualified freedom of speech. According to the *Cologne* Court, the adopters deemed section 4's first clause, which protects the right to speak and write freely, to be limited by its second clause, which permits the speaker to be punished if she abuses that right.[19] Moreover, the *Cologne* Court indicated that the adopters viewed section 4 as limiting section 5's absolute bar on laws restricting freedom of speech or the press by providing that a person may be liable under statute or the common law for abusing such freedom.[20] Crucially, as the Court in *Cologne* pointed out, "a broader proposal which prohibited the molestation of any person for his opinions on any subject whatsoever was considered at the [constitutional] convention but rejected."[21]

In addition to these omissions from its constitutional analysis, the *Linares* Court failed to address the *McKee* Court's construction of sections 4 and 5, which was the earliest and most thorough interpretation of these provisions as affording qualified rather than expansive free speech rights.

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[15] Cologne v. Westfarms Associates, 192 Conn. 48, 469 A.2d 1201 (1984).

[16] State v. McKee, 73 Conn. 18, 46 A. 409 (1900).

[17] *Linares*, 232 Conn. at 381 (citing *Cologne*, 192 Conn. at 69-72) (Peters, J. dissenting)).

[18] *Linares*, 232 Conn. at 382 (citing *McKee*, 73 Conn. at 28-29).

[19] *Cologne*, 192 Conn. at 63 n.9.

[20] *Id*.

[21] *Id*.; Wesley W. Horton, *Annotated Debates of the 1818 Constitutional Convention*, 65 CONN. B.J. SI-19 (1991).

This interpretation placed sections 4 and 5 within the overarching doctrine of civil liberty.[22] The *McKee* Court explained that this doctrine allowed "free expression of opinion on matters of church or State[, which is] essential to the successful operation of free government … by the people …."[23] But the Court in *McKee* also explained that the doctrine of civil liberty recognizes "the equal right of all to exercise gifts of property and faculty in any pursuit in life," and that each citizen has "no right" to exercise his "right … to freely express his sentiments on all subjects" "so as to injure his fellow-citizens or to endanger the vital interests of society."[24] Therefore, in the *McKee* Court's view, "freedom of speech and press does not include the abuse of the power of tongue or pen, any more than freedom of other action includes an injurious use of one's occupation, business or property."[25] The *McKee* Court could not have been clearer in holding that the reach of state constitutional freedom of speech did not extend to its abuse and that the state is obligated to protect the citizenry so that they may not suffer from the wrongful exercise of any right.[26]

As for the *Linares* Court deriving sections 4 and 5's expansive free speech protections from a societal trend in Connecticut towards religious tolerance and diversity,[27] which presumably would have had the effect of widening the scope of permissible religious speech, it does not follow that society's solicitude for such speech extended to speech that was critical of government, which was the type of expression that

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[22] *McKee*, 73 Conn. at 28. The origins of this doctrine of civil liberty, which qualified the free speech protections of the state constitution, can be found in Connecticut's pre-constitutional declaration of rights, which is contained in its first code of laws in 1650 and recognized the enjoyment of "liberties," but only to "every man in his place and proportion." 1 Records of the State of Connecticut (1636-1665), p. 509; State v. Conlon, 65 Conn. 478, 490, 33 A. 519 (1895). This limitation on liberty also was reflected in the common law principle that human nature cannot "bear total servitude or total liberty." 1 Zephaniah Swift, A System of the Laws of the State of Connecticut, p.31 (1795).

[23] *Id.*

[24] *Id.*

[25] *Id.* at 29.

[26] *Id.* at 28-29; *see also* State v. Pape, 90 Conn. 98, 103, 96 A. 313 (1916) ("[l]iberty of speech and of the press is not license, not lawlessness, but the right to fairly criticize and comment" without abusing the right).

[27] *Linares*, 232 Conn. at 385-86.

was at issue in *Linares*. In fact, prior to the adoption of 1818 Constitution and the creation of a separate judicial branch of government, the Connecticut legislature, exercising judicial powers,[28] directly fined members of the public and individual legislators for defaming the governor, individual legislators, or the legislature as a whole.[29] These fines were based on legislative enactments that proscribed defamation of the authority of the State.[30] Moreover, following the adoption of the 1818 Constitution, Connecticut jurisprudence did not consider libeling public officers or the government to be protected by sections 4 and 5.[31]

It was not until the concurring and dissenting opinion in *State v. Baccala*,[32] that the *Cologne* Court's explication of the original meaning of sections 4 and 5 saw the light of day, based on the plain meaning of its text and the adopters' intention that section 4 circumscribe its own and section 5's broad protection of speech and permit speech to be punished if abused.[33] In addition, this opinion recognized that the original meaning of sections 4 and 5 had been incorporated into the *McKee* Court's doctrine of civil liberty that called for the

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[28] Ellen A. Peters, *Getting Away from the Federal Paradigm: Separation of Powers in State Courts*, 81 MINN. L. REV. 1543, 1550-52 (1997).

[29] 3 Records of the State of Connecticut (Records) 72 (1680) (fine for sending contemptuous letters to the governor); 5 Records 47 (1708) (John Rainey fined for saying before both Houses that General Assembly and judges are against him); 7 Records 42 (1726) (Thomas Waterman fined for saying that members of General Assembly are rogues and the governor a knave); 9 Records 20-21 (1744) (William Leet called before General Assembly for saying outside of legislative confines that representatives are scoundrels); 11 Records 139 (1758) (Daniel Scott fined for expressing outside of legislative confines contempt for governor and General Assembly).

[30] Public Statute Laws of the State of Connecticut, p. 229 & n.1 (1808); *see* State v. Joyner, 225 Conn. 450, 468, 625 A.2d 791 (1993) (during pre and post constitutional period, Connecticut's "constitutional tradition [did] not historically draw[] hard lines of separation between constitutional … [and] statutory precepts"). The fines were also consistent with English common law, which permitted summary punishment of contempt for affronts, insults, and indignities directed at Parliament because that body possessed the "inherent" and "essential right" to "remove any immediate obstructions to the course of its proceedings." Burdett v. Abbot, 104 Eng. Rep. 501, 553-54 (K.B. 1811).

[31] 2 Zephaniah. Swift, DIGEST OF THE LAWS OF THE STATE OF CONNECTICUT, p. 340 (1823).

[32] State v. Baccala, 326 Conn. 232, 163 A.3d 1, *cert. denied*, 138 S. Ct. 510 (2017).

[33] *Id.* at 273-75, 279 & nn. 13 & 14 (Eveleigh, J., concurring in part and dissenting in part).

public to exercise its rights responsibly so as not to abuse the rights of others.[34] However, this opinion did not come to terms with the *Linares* Court's faulty interpretation of sections 4 and 5 as originally providing expansive free-speech protections and misappropriation of these provisions' original meaning to legitimate the contemporary expansion of such protections.

In considering how to apply the purportedly expansive free speech protections of the state constitution to expression occurring within the confines of the state legislature, the *Linares* Court rejected the federal "forum test," which is geared to assessing the parameters of permissible speech in a traditional forum devoted to assembly and debate, a forum the government opens up for expressive activity, or a forum the government reserves for its intended use, expressive or otherwise.[35] Instead, for purposes of sections 4 and 5, the *Linares* Court employed a superseded federal approach set out in *Grayned v. Rockford*,[36] that hinged the protection of free speech on its compatibility with a particular place's normal activities.[37] The *Linares* Court then employed a federal time-place-and-manner test to ascertain whether the defendant's verbal and physical expression (chanting and displaying a banner from the legislature's public gallery that advocated for a lesbian and gay rights bill during the then-governor's address to the legislature that caused him to pause while speaking) could be punished under Connecticut General Statutes §§ 2-1d(2)(C) and (E), which prohibited unreasonable noise and other acts impeding or interfering with a legislative proceeding.[38] The *Linares* Court concluded that the Connecticut Constitution did not stand in the way of punishing the defendant's expressive activity because the punishment was not aimed at the content of the message conveyed by the defendant's expression and that that expression was essentially incompatible with a proceeding of the

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[34] *Id.* at 280-81; *McKee*, 73 Conn. at 28-29.
[35] Perry Education Ass'n. v. Perry Educators' Ass'n., 460 U.S. 37, 45 (1983).
[36] Grayned v. Rockford, 408 U.S. 104, 115-21 (1972).
[37] *Linares,* 232 Conn. at 378-86.
[38] *Id.* at 353-55.

state's General Assembly in terms of its timing, loudness, and duration.[39]

For the *Linares* Court, the value of importing the superseded *Grayned* test into its state constitutional analysis was twofold. The test was deemed to be flexible because of its general applicability to all places and activities, unlike the forum test that is applicable to a limited variety of places, far afield of the legislative confines where the public's voice is largely channeled through its elected representatives. More relevant here is that the test was considered to be speech-sensitive, which resonates in the Court's finding of continuity in the original meaning of sections 4 and 5 advancing expansive free speech rights and a living constitution associating societal progress with a preference for the rigorous protection of speech.[40] To be sure, it is likely that, in any era, the expressive disruption of a governor's address to the legislature, as occurred in *Linares*, would be unprotected under either the *Grayned* test or the doctrine of civil liberty.[41] Nevertheless, in other circumstances, the conclusion that the original meaning of sections 4 and 5 and current societal beliefs coalesce around expanded free speech protections would require that the dividing line between a speaker's protected and unprotected expression be drawn in the speaker's favor, a line that could be drawn differently if unencumbered by that faulty conclusion.

A hypothetical example well illustrates this point. In a series of recent cases, the Connecticut Supreme Court assessed whether defendants' speech constituted "fighting

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[39] *Id*. at 387.

[40] *Id*. at 382-84.

[41] Similarly supported by either test is the related decision in *Trusz v. UBS Realty Investors, LLC*, 319 Conn. 175, 123 A.3d 1212 (2015), a civil case, where the Connecticut Supreme Court incorporated into the state constitution a superseded first amendment test governing the speech of public employees in the workplace, which prohibited disciplining employees for speech on "wide-ranging topics" of "significant public interest" as long as the expression at issue did not undermine an employer's interest in maintaining workplace discipline and efficiency. *Id*. at 178-79, 184, 193. The *Trusz* Court declined to follow a first amendment test that was excessively weighted in the employer's favor because it was founded on the notion that the cornerstone of an efficient workplace was an employer's need to control its employees' speech to a "significant degree." *Id*. at 184, 201, 210-11.

words," which is a category of verbal expression that is unprotected by the First Amendment and, therefore, subject to punishment if reached under state criminal statutes.[42] Of note is the Connecticut Supreme Court's misgivings about the scope of "fighting words," which permits punishment of lewd, obscene, profane, libelous, insulting, or threatening speech that, by its very utterance, tends to incite immediate and violent retaliation.[43] The Connecticut Supreme observed that "public sensitivities have been dulled to some extent by the devolution of discourse,"[44] which presumably would diminish the likelihood of a retaliatory response by members of the public to such speech. If, for purposes of sections 4 and 5, this observation were to prompt consideration of the question of whether to protect or punish devolved speech by placing it within or outside the unprotected category of "fighting words," on the basis of whether the public would be inured to or increasingly incensed by the ubiquity of such speech, continuity in the expansiveness of sections 4 and 5's free speech protections from their original to their living meaning surely would put a thumb on the scales in favor of the speaker and the conclusion that, despite recent national events, devolved speech has yet to become incendiary speech.

And even if the Connecticut Supreme Court were to decouple its analysis of sections 4 and 5 as "living" documents from its faulty interpretation of their original meaning, it does not follow that the Court will also throw off its assumption of contemporary society's feelings for, or belief in, the expansiveness of state constitutional free-speech rights, let alone rely on the proper original meaning of these rights to constrain their expansive application in order to avoid abusing the rights of others. Indeed, the Court's recent decision in *State v. Correa*, albeit interpreting article first, section 7, of the state constitution, which protects against unreasonable

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[42] *See, e.g.,* State v. Liebenguth, 336 Conn. 685, 250 A.3d 1 (2020), *cert. denied*, 141 S. Ct. 1394 (2021); State v. Parnoff, 329 Conn. 386, 186 A.3d 640 (2018); *Baccala*, 326 Conn. at 271-72 (Eveleigh, J., concurring in part and dissenting in part).

[43] Texas v. Johnson, 491 U.S. 397, 409 (1989); Chaplinsky v. New Hampshire, 315 U.S. 568, 571-71, 574 (1944).

[44] *Baccala*, 326 Conn. at 254-55.

searches and seizures, suggests that, for purposes of state constitutional analysis, the Court no longer places much store in, or at least has grown impatient with, trying to ascertain original constitutional meaning. Instead, the Court may be signaling that it will resort to an analysis of a living state constitutional document based solely on its own judgments as to the feelings and beliefs of contemporary society, however transient the preferences of a dynamic society may be.

In *Correa*, the Court assessed whether a police dog sniff of a rented motel room from an open-air hallway in front of the room's door constituted a search of the room under section 7, which would bring this provision's protections into play, including the requirement of a warrant supported by probable cause. The *Correa* Court evaluated section 7 as part of a living state constitution that, as an instrument of progress, aimed to effectuate the demands of modern society.[45] The Court in *Correa* defined its role in interpreting a living state constitutional provision as identifying what "society feels about the matter" at hand, which the Court then relied upon to distinguish section 7 from its counterpart in the Fourth Amendment to the U.S. Constitution and its attendant jurisprudence that the Court almost exclusively employed.[46] The matter at hand in *Correa* was whether the sniff revealing contraband narcotics within the room trenched upon the renter's expectation of privacy in an area comparable to a home.[47] In the *Correa* Court's view, because the occupant of a motel room has an expectation of privacy in every item in it, including the contraband narcotics stored there, the sniff constituted a search even though it could detect only the narcotics and not anything else ordinarily considered private.[48] The *Correa* Court also determined that the occupant of the motel room had an expectation of privacy in the open-air hallway outside the room because he would not have ex-

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[45] *Correa*, 340 Conn. at 642 n.17.
[46] *Id*. at 640 n.16.
[47] *Id*.
[48] *Id*. at 644-46.

pected "law enforcement officers trolling the walkway with a trained police dog in search of contraband in th[e] room[]."[49] Yet these privacy judgments of the Court, which constituted assertions as to contemporary societal beliefs or feelings, may already have been overtaken by the recent rising tide of criminality and associated narcotics depredations that could call into question society's willingness to recognize that a motel room's occupant has a privacy interest in the room and its immediate surroundings that would enable the occupant to shield contraband or a drug factory within the room.

Thus, if the new conservative majority of the U.S. Supreme Court diminishes First Amendment protection of speech and expands the permissible scope of its punishment, it can be expected that the Connecticut Supreme Court will counter with the expansive safeguards of article first, sections 4 and 5, of the Connecticut Constitution. But neither the original meaning of these provisions nor their modern meaning as living state constitutional documents necessarily yields expansive free speech safeguards. Consequently, in responding, it would be incumbent upon the Connecticut Supreme Court to acknowledge that sections 4 and 5 were originally meant to furnish qualified free speech protection; that an assessment of the meaning of these living state constitutional documents should be unencumbered by the assumption that contemporary society believes in expanding freedom of speech; and that societal beliefs about freedom of speech should be tempered by the historical state constitutional anticipation of the abuse of this freedom. Otherwise, the Connecticut Supreme Court's response risks being limited to an ahistorical, arbitrary, and temporary judgment as to the extent of protected speech that modern society believes in and demands.

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[49] *Id*. at 655-57.

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