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## Contents



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# 2023 CONNECTICUT APPELLATE REVIEW

By Kenneth J. Bartschi and Karen L. Dowd*

## I. Supreme Court

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

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

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* Of the Hartford Bar

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

2 597 U.S. 215 (2022).

3 410 U.S. 113 (1973).

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

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

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

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

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

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

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

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

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

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

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

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

[9] *Id.* at 636.

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

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

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

[13] *Id.* at 424.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[28] *Id.*

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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[37] *Id*.

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

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

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

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

[42] *Id*. at 194.

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

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

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

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

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

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

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

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

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

the prenuptial agreement.[55]

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

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

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

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

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

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

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

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

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

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

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

[72] *Id*. at 364.

[73] *Id*. at 375.

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

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

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

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

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

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

[78] *Id*. at 274.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

## II. Appellate Court

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[130] *Id.* at 21.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[146] Conn. Gen. Stat. § 52-196a.

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

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

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

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

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

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

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

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

151 *Id.* at 170-71.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[180] 348 Conn. at 927.

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

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

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

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

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

We conclude with a smattering of miscellaneous cases.

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

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

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

Where the Probate Court disallowed the administrator's

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[204] Conn. Gen. Stat. § 52-592.

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

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

# BUSINESS LITIGATION: 2023 IN REVIEW

By William J. O'Sullivan[1]

In 2023 Connecticut's appellate courts decided numerous cases of interest to business litigators. Following is a summary of the year's most noteworthy decisions.

## I. Contracts

### A. *Continued employment may provide sufficient consideration to support a non-compete*

In *Schimenti Construction Co., LLC v. Schimenti*,[2] a non-compete case, the Appellate Court reversed the trial court's grant of summary judgment in favor of the defendant ex-employee. That ruling had been based on the premise that, when an established employee-at-will is required to sign a non-compete, the employer must provide consideration above and beyond continuation of the employment relationship. The Appellate Court disagreed.

The court noted a split among Superior Court decisions on the issue of whether continued employment may suffice as consideration for a non-compete. As for those decisions holding that additional consideration is required as a matter of law, the court held that they could not be reconciled with the Connecticut Supreme Court's decision in the 1934 case *Roessler v. Burwell*.[3] The court in *Roessler* had observed:

> The underlying purpose of the defendant in entering into the agreement was to continue thereafter in the employment of the plaintiff at a mutually agreeable salary; the benefit offered him was such a continuance, in return for which the plaintiff was to receive his services and the benefit of the restrictive covenant in the agreement. The defendant received the benefit he sought in that he was continued in the employment more than four years after the agreement was made, until he voluntarily left it. In such a

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1 Of the Hartford Bar.
2 217 Conn. App. 224, 288 A.3d 1038 (2023).
3 119 Conn. 289, 176 A. 126 (1934).

> situation … *there is consideration for the agreement, and it can be enforced*.[4]

But the Appellate Court did not go so far as to hold that continued employment *necessarily* constitutes sufficient consideration for a non-compete; the court found only that there was at least a genuine issue of material fact in this regard. "Because he was an at-will employee, the defendant's employment could have been terminated by the plaintiff at any time, and, thus, the defendant's continued employment could constitute sufficient consideration to support the nondisclosure agreement."[5] The court's observation that continued employment "could" support the non-compete underscores the need for factfinding.

The court also pointedly noted that – like the defendant in *Roessler* – the defendant "voluntarily resigned from his employment with the plaintiff four years after executing the nondisclosure agreement."[6] The court added that the defendant "may present evidence that there was no connection between the nondisclosure agreement [which included the covenant not to compete] and his continued employment; but, if connected, continued employment can be sufficient consideration for a restrictive covenant."[7]

Because a factbound inquiry was required, the Appellate Court determined that the trial court erred in granting summary judgment, reversed the judgment below, and remanded the case for further proceedings.

This decision is notable for the fact that in many of the Superior Court cases on this issue, the court's approach to consideration seems binary: either it exists or it does not. In *Schimenti*, the court frames the issue as the sufficiency, not mere existence, of consideration.

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[4] 217 Conn. App. at 238, quoting *Roessler*, 119 Conn. at 290, 291. (Emphasis added by the Appellate Court.)

[5] *Id*. at 250, 251.

[6] *Id*. at 251.

[7] *Id*. at 251.

B. *With no evidence of parties' intent concerning ambiguous contract term, court applies its own judgment on the most logical interpretation.*

In *Cody Real Estate, LLC v. G & H Catering, Inc.*,[8] the Appellate Court was tasked with interpreting ambiguous contract terms – which ordinarily requires a factual determination of the parties' intent – in a case that had a trial record bereft of evidence on that very issue.

The plaintiff, a commercial landlord, sued its tenant and certain guarantors for nonpayment of a lease. The original lease had an initial term of ten years, running from 1998 to 2008, followed by "one (1) single option to renew the term" for a period of five years.[9] The guarantee agreement provided, in relevant part, "[t]he obligations, covenants, agreement and duties of [g]uarantors under this [g]uarant[ee] are unconditional and shall in no way be affected or impaired by reason of … the renewal of the [l]ease…"[10]

The tenant exercised its contractual right to renew, and subsequently entered into two further lease modification and extension agreements with the landlord. During the term of the second extension, the tenant began to fall behind in its rent, prompting the landlord to sue the tenant and the guarantors.

The guarantors argued that their guarantee did not survive beyond the initial renewal term contemplated by the original lease. "Relying on the provision of the initial lease that the tenant had 'one (1) single option to renew,' as well as the language of the guarantee agreement providing that it would not be affected or impaired by the occurrence of certain events, including '*the* renewal of the [l]ease,' the corporate guarantors argue that the renewal language of that agreement applies only to the single renewal of the initial lease…"[11]

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[8] 219 Conn. App. 773, 296 A.3d 214, *cert. denied* 348 Conn. 910, 303 A.3d 11 (2023).

[9] *Id.* at 776.

[10] *Id.* at 778, 779.

[11] *Id.* at 782.

The landlord countered, "the guarantee agreement contains no language that limits its duration and, therefore, it is continuing in nature. Under this view, the agreement remained in full force and effect at the time of the second lease extension and, as a consequence, the corporate guarantors are liable for the tenant's obligations under the initial lease *and* both lease extensions."[12] The trial court agreed with the landlord, and entered judgment in its favor against the tenant and the guarantors.

The Appellate Court found "an arguable ambiguity in the guarantee agreement," but noted that the parties "presented no extrinsic evidence at trial to clarify that ambiguity,"[13] such as evidence about which party had drafted the guarantee agreement.[14] Consequently, "the trial court's interpretation of the guarantee agreement was based solely on the language of that agreement and the lease and did not involve the resolution of any evidentiary issues of credibility."[15] Because the trial court's decision was "predicated entirely on the four corners of those agreements,"[16] the Appellate Court's task involved a question of law, and thus the exercise of plenary review.

On that sparse record, the court's approach was simply to apply its own judgment as to "the more reasonable interpretation of [the contract] language."[17] In so doing, the court applied the "bedrock rule of construction" that contract language should be accorded "a rational construction based on its common, natural and ordinary meaning and usage as applied to the subject matter of the contract."[18] Under that approach, the court concluded that "the trial court adopted the better and more reasonable construction of the language at issue in concluding that renewals of the lease were expressly 'anticipated and proactively acknowledged as possible by the

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[12] *Id*. at 783.
[13] *Id*. at 784, 785.
[14] *Id*. at 785, fn. 9.
[15] *Id*. at 785.
[16] *Id*.
[17] *Id*. at 786.
[18] *Id*. at 787. (Citation and internal punctuation omitted.)

guarantee' agreement."[19]

C. *Insurance policy did not cover COVID-related loss of business income.*

In *Connecticut Dermatology Group, PC v. Twin City Fire Insurance Company*,[20] three healthcare facilities sought to recover COVID-19-related losses from their insurance companies, under policies requiring the insurers to "pay for direct physical loss of or physical damage to" covered property.[21] The plaintiffs claimed that as a result of the pandemic, they had suffered a loss of business income, and had incurred the expense of daily sanitation and the construction of physical barriers within the workspace. The Connecticut Supreme Court disagreed that losses of this type were covered, and affirmed the trial court's entry of summary judgment for the defendant insurance companies.

The plaintiffs argued that they were "seeking coverage for a 'direct physical loss' of their properties because the COVID-19 pandemic physically transformed their 'ordinary business properties' into 'potential viral incubators that were imminently dangerous to human beings.'"[22] The court credited "the ingenuity of this argument," but rejected the notion that there had been a "physical transformation" of the properties; "[r]ather, the COVID-19 pandemic caused a transformation in governmental and societal expectations and behavior that had a seriously negative impact on the plaintiffs' businesses."[23]

The plaintiffs also argued that the loss of productive use of their properties was equivalent to physical loss. The court rejected that proposition, instead "agree[ing] with the multiplicity of courts that have concluded that 'use of property' and 'property' are not the same thing, and the loss of the former does not necessarily imply the loss of the latter."[24]

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[19] *Id.*
[20] 346 Conn. 33, 288 A.3d 187 (2023).
[21] *Id.* at 36.
[22] *Id.* at 52.
[23] *Id.*
[24] *Id.* at 53.

The court also distinguished the plaintiffs' case from various decisions in which "contamination of a property by harmful substances or bacteria was deemed to be a direct physical loss."[25] The court noted that in those cases, "it was the physical presence of the contaminants at the properties that caused the loss," whereas the threat posed by COVID-19 was "the potential for person to person transmission of the virus within the building."[26] On this issue, the court was persuaded by "the cases that have held that the virus is not the type of physical contaminant that creates the risk of a direct physical loss because, once a contaminated surface is cleaned or simply left alone for a few days, it no longer poses any physical threat to occupants."[27]

In sum, "the plain meaning of the term 'direct physical loss of ... [p]roperty' does not include the suspension of business operations on a physically unaltered property in order to prevent the transmission of the coronavirus. Rather, in ordinary usage, the phrase 'direct physical loss of ... [p]roperty' clearly and unambiguously means that there must be some physical, tangible alteration to or deprivation of the property that renders it physically unusable or inaccessible."[28]

D. *Municipal building codes and associated statutes implicitly incorporated into contract.*

The Appellate Court's decision in *Ah Min Holding, LLC v. Hartford*[29] provides a useful example of statutory provisions being implicitly incorporated into a contract. The plaintiff, owner of numerous residential properties in Hartford occupied by low- and moderate-income tenants, entered into a tax abatement agreement with the defendant City of Hartford. The agreement required the plaintiff to "maintain" the dwelling units in the properties, and authorized the city to terminate the agreement if the plaintiff ceased to do so.

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[25] *Id.* at 58.
[26] *Id.* at 59.
[27] *Id.*
[28] *Id.* at 51.
[29] 217 Conn.App. 574, 289 A.3d 598 (2023).

The city terminated the agreement, based on the plaintiff's noncompliance with the city's building code. The plaintiff sued, pointing out that the agreement did not expressly require compliance with the code, and alleging that the termination was improper. The trial court disagreed, finding that compliance with the code, and with General Statutes Section 47a-7, which requires residential landlords to comply with municipal housing codes, must be read into the contract.

The Appellate Court agreed with the city that the relevant statutes and code provisions in effect at the time of the agreement "provide necessary guidance for the required maintenance of low and moderate income dwelling units" and therefore "must be read into the agreement."[30]

The court noted existing precedent from the Connecticut Supreme Court holding that "'statutes existing at the time a contract is made become a part of it and must be read into it just as if an express provision to that effect were inserted therein, except where the contract discloses a contrary intention.'"[31] The court does so in order to "'construe the scope or validity of an obligation already embraced within the terms of the contract,'" but "'do[es] not incorporate the law to create a substantive obligation where none previously had existed.'"[32]

## II. Creditors' Rights

### A. *Public Act that increased homestead exemption held applicable to pre-existing debts.*

In *In re Cole*,[33] the Connecticut Supreme Court examined Connecticut Public Acts 21-161 (act), which amended Connecticut's exemption statute, General Statutes Section 52-352b(21), to increase the homestead exemption from $75,000 to $250,000. The court considered the following certified question from the United Stated District Court in connection with

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[30] *Id.* at 584, 585.

[31] *Id.* at 585, quoting Deming v. Nationwide Mutual Ins. Co., 279 Conn. 745, 780, A.2d 623 (2006).

[32] *Id.*, quoting Deming at 781.

[33] 347 Conn. 284, 297 A.3d 151 (2023).

a bankruptcy appeal: "does the expanded homestead exemption contained in P.A. 21-161, § 1, apply in bankruptcy proceedings filed on or after the effective date of the act to debts that accrued prior to that date?"[34] The court answered yes.

The bankruptcy trustee, who sought to apply the older, lower homestead exemption in Ms. Cole's bankruptcy case, argued that giving her the benefit of the act "would give the act retroactive effect without the express authorization of the legislature."[35] But the court did not see a retroactivity issue "when applied to postenactment [bankruptcy] petitions,"[36] which was the situation here, as Ms. Cole filed for bankruptcy protection shortly after the October 1, 2021, effective date of the act. "[A]pplying the expanded homestead exemption to a bankruptcy proceeding that was initiated on or after the effective date of the act does not constitute a retroactive application, any more than a new law governing divorces would be retroactive with respect to already married couples."[37]

Nor did the court credit the notion that allowing Ms. Cole to avail herself of the higher exemption would "impair established rights of the creditors or the trustee," or "disturb other reasonable, settled expectations."[38] In this regard, the court drew a clear line between secured creditors and unsecured creditors. Quoting from a decision of the United States Bankruptcy Court for the District of Minnesota, the court noted that unlike a secured creditor, which "reasonably expects specific property to be available to satisfy an obligation," an unsecured creditor's "expectation of later realization of payment from unsecured property in existence at the time of contract" is generally "pure speculation … dependent [on] continued retention of ownership and equity in the property by a debtor as well as the subsequent creation of a lien by judgment and/or levy."[39]

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[34] *Id*. at 290.
[35] *Id*. at 298.
[36] *Id*.
[37] *Id*. at 309.
[38] *Id*. at 306.
[39] *Id*. at 306, 307, quoting In re Johnson, 69 B.R. 988, 993 (Bankr. D. Minn. 1987).

The court elaborated:

> [When] an unsecured claim has not been reduced to judgment prior to such legislation, the abstract right of potential enforcement out of specific unsecured property, standing alone, ordinarily has no substantial value to the contractual relationship .... This is particularly so [when] the legislation compromising or eliminating the right is in an area of established, long-standing legislative control and regulation, such as homestead exemption laws. The abstract right is simply one without reasonable expectation of fulfillment.[40]

The Connecticut Supreme Court therefore

> reject[ed] the trustee's argument that applying the increased homestead exemption to preexisting debts would be fundamentally unfair because it would frustrate the settled expectations of unsecured lenders who extended credit while the lower, $75,000 exemption was in place. There is no evidence in the record that the debtor's creditors ever considered the equity in her house, much less that they relied to their detriment on the size of the Connecticut homestead exemption when they decided to extend her credit. Rather, the unsecured creditors are presumed to have been aware that the legislature could increase the size of the homestead exemption at any time and that their rights might otherwise be adversely impacted by changes in federal or state law.[41]

### B. *Foreclosure defendant lacked standing to assert defense that was personal to another defendant*

In *Bayview Loan Servicing, LLC v. Ishikawa*,[42] the Appellate Court reinforced that the concept of standing applies not only to claims but also to defenses. The plaintiff brought a residential foreclosure action against a divorced couple, who had been co-obligors on the note and mortgage. In connection with the divorce, the husband, defendant Robert Hackett,

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[40] *Id*.
[41] 347 Conn. at 307, 308.
[42] 220 Conn.App. 625, 298 A.3d 1276 (2023).

quitclaimed his interest in the house to the wife, defendant Yoko Ishikawa. The bank sent notices of default and acceleration to both of them at the marital residence, but Hackett had already vacated the house and did not receive the notice.

Ishikawa asserted, by way of special defense, that HUD regulations required default notices to be delivered to both obligors as a condition precedent to commencing foreclosure. She claimed that, due to failure of notice to Hackett, the bank was barred from foreclosing.

The Appellate Court held that Ishikawa lacked standing to assert this defense. The court found no "authority demonstrating that she is the proper party to assert a special defense, even if viable, that is personal to Hackett."[43] The court noted that by operation of the quitclaim, Hackett "had no legal interest in the property securing the note and no equitable or statutory right of redemption in the property," and thus "it would strain logic to permit [Ishikawa] to rely on Hackett's alleged failure to receive the notice to defend against the plaintiff's foreclosure action against her."[44]

C. *Borrower's objection to affidavit of debt triggered obligation by bank to prove the debt by live testimony.*

In *JPMorgan Chase Bank v. Malick*,[45] a foreclosure case, the Connecticut Supreme Court clarified what a defendant is and is not required to do to force the lender to prove the amount of the debt by way of live testimony rather than affidavit.

Section 23-18(a) of the Practice Book provides that, in a foreclosure action, "where no defense as to the amount of the mortgage debt is interposed, such debt may be proved by presenting to the judicial authority the original note and mortgage, together with the affidavit of the plaintiff or other person familiar with the indebtedness, stating what amount, including interest to the date of the hearing, is due, and that

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[43] *Id.* at 633.
[44] *Id.* at 634.
[45] 347 Conn. 155, 296 A.3d 157 (2023).

there is no setoff or counterclaim thereto." The rule does not explain what steps a defendant must take to "interpose" a defense and thereby thwart the affidavit procedure.

In *Malick*, after the bank had e-filed its affidavit of debt, foreclosure worksheet and other documents in support of its motion for judgment of strict foreclosure, the defendant filed a written objection to the affidavit of debt. In the objection, he asserted that the affidavit "contained hearsay and inaccurate calculations as to the defendant's municipal tax liability and the interest owed on his loan."[46] More particularly, he "specifically objected that the plaintiff's failure to include property tax abatements the municipality had allegedly provided him for at least three years. Additionally, the defendant objected to the plaintiff's calculation of interest and requested that the court require the plaintiff to provide a breakdown of his variable interest rate for the years that he was not paying his mortgage."[47] He did not offer any evidence in support of his challenge to the bank's debt calculation.

The trial court accepted the bank's affidavit of debt, and entered a judgment of strict foreclosure. The Appellate Court reversed and remanded the case for further proceedings,[48] holding that "because the defendant had objected to the amount of the mortgage debt, § 23-18(a) did not apply as a matter of law in the present case."[49] The bank appealed to the Supreme Court.

The Supreme Court affirmed the Appellate Court's judgment for the defendant, and added clarity to the meaning of Section 23-18(a). A successful challenge to the rule "requires a supporting legal or factual argument, i.e., a specific argument about why the debt amount is incorrect."[50] It is not sufficient to "merely plead[] insufficient knowledge as to the amount of the debt";[51] the defendant must "provide argument as to

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[46] *Id*. at 160.
[47] *Id*. at 171.
[48] The Appellate Court decision is reported at 208 Conn. App. 38, 263 A.3d 920 (2021).
[49] 347 Conn. at 159.
[50] *Id*. at 171.
[51] *Id*. at 173.

why he or she is objecting to the amount of the debt, based on some articulated legal reason or fact."[52]

But the defendant is not required to offer evidence in support of such arguments. "Although it is the defendant's burden to sufficiently interpose a defense to the claimed amount of the debt, once a defense is interposed, the burden remains on the plaintiff to prove the amount of the debt. At no point does the burden shift to the defendant to prove that the plaintiff's affidavit is incorrect. In other words, once the defendant has sufficiently interposed a defense as to the amount of the debt, the plaintiff is required to satisfy its burden under the Connecticut Code of Evidence, without the benefit of § 23-18(a)."[53]

Here, "[t]he defendant sufficiently objected to the amount of interest and municipal taxes, and it was not his burden to provide further evidence to prove his objection. By placing the burden on the defendant to establish that the affidavit of debt was inaccurate, the trial court prevented the defendant from having an opportunity to cross-examine the plaintiff's witnesses, including the affiant."[54] Accordingly, the Appellate Court properly reversed the trial court's judgment of strict foreclosure.

D. *In foreclosure case, trial court's protective order unduly limited borrower's access to bank's file.*

In *JPMorgan Chase Bank, National Association v. Lakner*,[55] the Connecticut Supreme Court reversed the trial court's judgment of foreclosure by sale, on the grounds that the borrower had been unfairly prejudiced by an overly broad protective order.

In his answer to the complaint, the defendant raised a special defense of payment, claiming he had "submitted all payments due and owing on the subject mortgage note."[56] He

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[52] *Id*. at 174.
[53] *Id*. at 168, 169.
[54] *Id*. at 178.
[55] 347 Conn. 476, 298 A.3d 249 (2023).
[56] *Id*. at 481.

later issued a document production request to the plaintiff, seeking the bank's "complete mortgage file," including but not limited to "[a]ll records of mortgage payments, including payments for property taxes and/or property insurance, related to the subject [m]ortgage [n]ote, from the inception of the [m]ortgage [n]ote to the present, including records pertaining to returning payments to the [d]efendant."[57]

The bank moved for a protective order, characterizing the document request as "not reasonably calculated to lead to the discovery of admissible evidence," "a fishing expedition," and "simply too vague and broad to be answered."[58] The trial court granted the motion.

At trial, the bank offered into evidence its exhibit number twelve, a 28-page document from its mortgage file, consisting of "the 'Transaction Detail,' 'Payments Due Detail,' and 'Loan History Summary' of the defendant's account in order to prove its debt."[59] Counsel for the defendant objected, arguing that the document had never been produced in discovery, and renewed his demand for access to the bank's loan file. The court overruled his objection, denied his request and entered a judgment of foreclosure by sale.

The Supreme Court reversed, agreeing that the borrower had been unfairly prejudiced by being denied access to the bank's mortgage file. The court noted, "[s]ome of the very documents that the defendant was blocked from obtaining in discovery—those pertaining to the defendant's payment history—were ultimately entered into evidence by [the plaintiff] at trial without the defendant ever having seen them. … As illustrated by the records submitted into evidence by [the plaintiff] at trial, [the plaintiff's] mortgage file contained, among other things, the account's payment history, correspondence between the lender and borrower, and other important account information. These records make up the source material that gives rise to [the plaintiff's] foreclosure

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[57] *Id*. at 482.
[58] *Id*.
[59] *Id*. at 485.

action."[60]

The court rejected the bank's contention that the defendant should have made a more narrowly tailored discovery request. The court noted that under Connecticut's rules of practice, the bank had been required to "engage in a good faith effort to reach agreement with the defendant on any discovery related objections,"[61] but the record did not indicate that this had ever been done. Instead, the defendant had suffered a complete denial of document discovery, which is "seldom within the [trial] court's discretion."[62] As a result, "the defendant had no meaningful access to those very documents that would have allowed him to challenge the accuracy of [the bank witness's] testimony or the information contained in exhibit 12, which [the plaintiff] used to prove the amount of the debt."[63]

The court reversed the judgment below, with instructions that the motion for protective order be denied and the case set for a new trial.

E. *Bank's issuance of an Emergency Mortgage Assistance Act notice before commencement of a foreclosure action that was dismissed held insufficient to support a second foreclosure action.*

In *KeyBank, N.A. v. Yazar*,[64] the Connecticut Supreme Court reviewed the Appellate Court's holding[65] that, in a residential foreclosure action, (i) the bank's delivery of a pre-foreclosure notice under the Emergency Mortgage Assistance Program (EMAP)[66] to the borrowers is a jurisdictional prerequisite to foreclosure, and (ii) an EMAP notice sent before the commencement of a prior foreclosure action cannot be relied upon for the purposes of a subsequent foreclosure action.

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[60] *Id*. at 493, 494.

[61] *Id*. at 495.

[62] *Id*. at 495, quoting Standard Tallow Corp. v. Jowdy, 190 Conn. 48, 60, 459 A.2d 503 (1983).

[63] *Id*. at 498.

[64] 347 Conn. 381, 297 A.3d 968 (2023)

[65] The Appellate Court's decision is reported at 206 Conn. App. 625, 261 A.3d 9 (2021).

[66] Conn. Gen. Stat. §§ 8-265cc through 8-265kk.

As to the first issue, the court disagreed that compliance with EMAP is a matter of jurisdiction, but further concluded that such compliance is "a mandatory condition precedent," and "[a] foreclosure action may not proceed unless the EMAP notice requirement is carried out."[67] As to whether a statutory condition imposes a jurisdictional prerequisite or "merely" a condition precedent, that depends on whether the underlying right of action modified by the statute is itself statutory or one that exists under the common law. "[O]ur case law has distinguished between conditions imposed on the commencement of a statutorily created right of action and statutory conditions imposed on an action existing under the common law. The former generally is deemed to be jurisdictional, whereas the latter is not."[68] Because foreclosure is an action arising under the common law, the statutory requirements imposed by EMAP are not jurisdictional.

As to the second issue, the Supreme Court agreed with the Appellate Court that a fresh EMAP notice was required when the lender commenced a second foreclosure action. In *Yazar*, the original mortgagee, First Niagara Bank, N.A. had sent an EMAP notice before commencing foreclosure, but that action was dismissed due to the bank's failure to provide certain documents and information required by the foreclosure mediator. After First Niagara Bank merged into KeyBank, the latter commenced a new foreclosure action, without first issuing a new EMAP notice. This was improper, and according to the Supreme Court, would have been equally improper if the identity of the mortgagee had remained unchanged. "Our analysis does not turn on the particular entity that sent the EMAP notice; rather, what is of consequence is ensuring that an EMAP notice is sent prior to the initiation of any subsequent foreclosure action, as each foreclosure action must stand on its own EMAP notice."[69]

The decision is puzzling procedurally. The court's holding

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[67] 347 Conn. at 398.

[68] *Id*. at 394, 395, quoting Neighborhood Assn., Inc. v. Limberger, 321 Conn. 29, 46, 136 A.3d 581 (2016).

[69] *Id*. at 404.

that EMAP compliance is non-jurisdictional would appear to suggest that it would be improper to raise the issue by way of motion to dismiss. Rather, the issue would appear to be appropriately raised by a motion to strike, given the court's holding that "[u]ntil the condition is satisfied, the plaintiff has not alleged a cause of action on which relief can be granted."[70] But in its rescript, the Supreme Court directed the Appellate Court to "remand the case to the trial court with direction to render judgment *dismissing* the action for failure to comply with a mandatory condition precedent."[71] (Emphasis added.)

Finally, in footnote five to the opinion, the court pointedly noted – but did not rule upon – another defense that had been pled by the pro se defendant but not decided by the trial court, or pursued on appeal. The defendant Ozlem Yazar, ex-wife of the borrower Emre Yazar, jointly owned the house with him, and both of them signed the mortgage deed, but the defendant was not an obligor on the note. The court observed, "[i]t is unclear on this record how the plaintiff can maintain a foreclosure action against the defendant when the defendant was not a borrower on the note that gave rise to the loan default. … The defendant asserted a special defense in the trial court regarding her lack of obligation under the note, but the trial court did not specifically address that defense in its decision … Should that special defense be raised in any subsequent foreclosure action, we would expect it to be specifically addressed by the trial court."[72]

F. *Foreclosure auction found to be conducted in violation of appellate stay.*

In *Finance of America Reverse, LLC v. Henry*,[73] the Appellate Court examined the scope of Practice Book Section 61-11(h),[74] a rule of appellate procedure adopted to curtail use of

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[70] *Id.*
[71] *Id.* at 405.
[72] *Id.* at 387, fn. 5.
[73] 222 Conn.App. 810, ___ A.3d ___ (2023).
[74] The rule provides: "In any action for foreclosure in which the owner of the equity has filed a motion to open or other similar motion, which motion was denied fewer than twenty days prior to the scheduled auction date, the auction shall proceed as scheduled notwithstanding the court's denial of the motion, but

the "perpetual motion machine"[75] by foreclosure defendants. Before the rule was adopted, "a party could indefinitely delay conclusion of the foreclosure proceedings by filing repeated dilatory motions to open the foreclosure judgment,"[76] each of which, once ruled upon by the court, would trigger a new appellate stay.

The rule provides that if the property owner files a motion to open or "other similar motion" that is denied within twenty days of an auction date, the auction can still proceed even though it is within the appeal period. But the rule adds a safeguard: no motion to approve the sale can be filed until after the appeal period has run after denial of the motion to open.

In *Henry*, the plaintiff obtained a judgment of foreclosure by sale, and the court set an auction date that was repeatedly postponed, ultimately to June 25, 2022. On May 10, 2022, the defendant moved to extend the auction date once again, and that motion was denied (first denial order), twenty-five days before the auction date. On June 7, 2022, the defendant moved for reargument and reconsideration of the denial. The court denied that motion (second denial order), three days before the auction date, and the auction went forward, with the plaintiff as the highest bidder. On September 19, 2022, the court entered orders approving the sale, from which the defendant appealed.

The Appellate Court reversed, holding that the auction sale had been conducted in violation of an automatic stay. The first denial order had been issued more than twenty days before the auction date, and thus "did not directly implicate Practice Book § 61-11 (h)."[77] (Indeed, if the defendant had taken no further action after the first denial order, "the appellate stay would have expired prior to the sale date and the fore-

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no motion for approval of the sale shall be filed until the expiration of the appeal period following the denial of the motion without an appeal having been filed. The trial court shall not vacate the automatic stay following its denial of the motion during such appeal period."

[75] 222 Conn.App. at 821.

[76] *Id.*

[77] *Id.* at 825.

closure auction could have proceeded as scheduled."[78]) The second denial order, as to the motion to reargue, triggered its own appeal period. "The existence of the appellate stay and the inapplicability of Practice Book § 61-11 (h) should have precluded the committee from conducting the foreclosure sale on June 25, 2022."[79]

G. *Business records rule allows successor mortgagee to introduce evidence acquired from its predecessors in interest.*

In *GMAT Legal Title Trust 2014-1, U.S. Bank, National Association, Legal Title Trustee v. Catale*,[80] the Appellate Court revisited the issue of how the "business records" hearsay exception applies to documents offered by a foreclosing lender that incorporate data obtained from previous owners of the loan.

The plaintiff purchased the subject note and mortgage deed after they had been assigned repeatedly. At trial, the plaintiff offered testimony from an officer of its loan servicer, Rushmore Loan Management Services, LLC. Through that witness, the plaintiff introduced exhibits about the loan history that incorporated data obtained by Rushmore from the predecessor loan servicer. The witness also testified about the "boarding process" implemented when Rushmore acquires loan files from another servicer. That process involves close review and audits of the information received. He also testified that "'prior servicers have an obligation to transfer … accurate information from their system to [Rushmore] so [it] can input that information in our system,'" and that Rushmore relies on that information when creating its own records.[81]

The defendant challenged the admissibility of the plaintiff's evidence, contending that the plaintiff was required to

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[78] *Id.*
[79] *Id.*
[80] 221 Conn. App. 90, 300 A.3d 1218, *cert. denied* 348 Conn. 928, 305 A.3d 265 (2023).
[81] *Id.* at 103.

"present evidence from each and every prior owner or servicer of the note in order to demonstrate that each had a duty to transmit accurate information regarding the records to the next holder."[82] The plaintiff countered that it "satisfied its burden under the business records exception to the rule against hearsay because it sufficiently demonstrated that the relevant data became part of its own business records through its transaction with the previous servicer, which had a business duty to transmit accurate information."[83] The trial court overruled the defendants' objection to this evidence, and entered judgment of strict foreclosure.

The Appellate Court agreed with the plaintiff that the trial court had properly admitted the challenged evidence. The court relied heavily on the Connecticut Supreme Court's decision in *Jenzack Partners, LLC v. Stoneridge Associates, LLC*,[84] in which the court held, "[i]f part of the data was provided by another business, as is often the case with loan records in connection with the purchase and sale of debt, the proponent does not have to lay a foundation concerning the preparation of the data it acquired but must simply show that these data became part of its own business record as part of a transaction in which the provider had a business duty to transmit accurate information." The Appellate Court found that the plaintiff had met this burden.

H. *Statutory procedure for challenging invalid liens held inapplicable to property owner's attack on mortgage.*

In *Fiorita, Kornhaas & Company, P.C. v. Vilela*,[85] the Appellate Court addressed whether a foreclosure defendant wishing to challenge the enforceability of the mortgage is required to follow the procedure of General Statutes Section 49-51, "Discharge of invalid lien." Under that statute, a person owning an interest in property "described in any certificate of lien, which lien is invalid but not discharged of record" should

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[82] *Id*. at 97.
[83] *Id*. at 98.
[84] 334 Conn. 374, 390, 391, 222 A.3d 950 (2020).
[85] 219 Conn. App. 881, 297 A.3d 236 (2023).

first make written demand for the lien's release, and then wait thirty days before applying to the court for an order discharging the lien.

The plaintiff, an accounting firm, had taken a mortgage on property owned by a client. The client quitclaimed the property to the defendant, whom the plaintiff understood to be the client's nephew. When the plaintiff brought an action to foreclose, the defendant counterclaimed, alleging that the mortgage had been procured by fraud, had been procured in violation of the plaintiff's code of professional conduct, and had been paid. The defendant sought a declaratory judgment voiding the mortgage.

The plaintiff moved to dismiss the counterclaim, alleging that the court lacked subject matter jurisdiction due to the defendant's failure to follow the statutory procedure. The trial court agreed, and granted the plaintiff's motion.

The Appellate Court reversed. The court noted that the statute neither uses the word "mortgage" nor defines "certificate of lien" or "lien," and therefore "look[ed] to the commonly approved usage of the relevant terms."[86] Citing previous caselaw, the court noted that a mortgage is "a form of contract" that "immediately vests legal title in the mortgagee and equitable title in the mortgagor," the foreclosure of which is "'an equitable action that precludes further proceedings on the underlying debt and requires an unsatisfied mortgagee to pursue his rights through a deficiency judgment.'"[87] A judgment lien, by contrast, "'results from the unilateral act of a creditor and does not vest him with legal title to the subject property. ... Foreclosure of a judgment lien is an action at law that does not extinguish the underlying debt.'"[88]

Based on these distinctions, and absent any indication that the legislature had intended the statute to apply to both liens and mortgages, the court concluded that mortgages are outside the ambit of the statute.

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[86] *Id*. at 893.

[87] *Id*. at 896, 897, quoting Stein v. Hillebrand, 240 Conn. 35, 43, n. 7, 688 A.2d 1317 (1997).

[88] *Id*. at 897.

## III. Remedies and Defenses

### *A. State Supreme Court rejects veil-piercing claim.*

In *Deutsche Bank AG v. Sebastian Holdings, Inc.*,[89] the Connecticut Supreme Court rejected the plaintiff's attempt to hold the defendant Alexander Vik personally liable, under the theory of piercing the corporate veil, for a $243 million judgment rendered against his company in the courts of England.

Vik, a citizen of Norway and Monaco who maintained a residence in Greenwich, Connecticut,[90] owned a trading company called Sebastian Holdings, Inc. (SHI), which was organized under the laws of Turks and Caicos Islands. SHI was engaged in the trading of foreign currencies. Its trades "often involved options or bets on the forward movement of the currencies involved," which, as found by the trial court, "could be highly lucrative," but were "extremely risky."[91]

In 2006, SHI entered into an agreement with the plaintiff, Deutsche Bank, by which the bank provided such services as "(1) credit intermediation, [which] permit[s] the client to trade with many banks through the prime broker, who serves as the counterparty, (2) back-office functions [such as] processing and confirming trades, and (3) risk control and management functions, including calculating limits, calculating margin requirements, [and] calculating exposures."[92] To provide collateral for its trading, SHI pledged $35 million that was held in an account at the bank.

Initially, SHI was "extraordinarily successful," but the atmosphere darkened as the markets melted down in September and October of 2008.[93] At a meeting on October 7, 2008,

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[89] 346 Conn. 564, 294 A.3d 1 (2023).

[90] Notwithstanding claims to the contrary asserted in certain beer commercials, Forbes Magazine characterized Mr. Vik, in a 2014 article, as "The Most Interesting Man in the World." Vardi, N., Forbes Magazine (online edition), "Alexander Vik Is The Most Interesting Man In The World (As Long As He Doesn't Owe You Money)," March 5, 2014, https://www.forbes.com/sites/nathanvardi/2014/03/05/the-riddle-of-alexander-vik/?sh=568e1a696460.

[91] 346 Conn. at 570.

[92] *Id.*

[93] *Id.* at 571.

representatives of the bank's London office congratulated Vik on "how well SHI was doing in such 'difficult and negative' financial markets."[94] That same day, an internal bank email asserted that the SHI trading account was "in good order from a margin viewpoint,"[95] and the bank provided Vik with a report showing that SHI's holdings at Deutsche Bank totaled almost a billion dollars.[96] SHI also had an additional $635 million in assets held in other financial institutions.[97]

In a series of transactions starting on October 8, 2008, and concluding by the end of the month, Vik transferred almost $900 million of SHI assets to various entities, including $160 million to a company owned by his father, and hundreds of millions of dollars to another company owned by Vik, the stock of which was in turn placed in trust for his children.[98] But he also left hundreds of millions of dollars with Deutsche Bank, and between October 13th and October 17th, SHI met capital calls issued by the bank that aggregated more than $500 million.[99]

At that point, the bank briefly paused its demands, but then in an internal meeting on October 22nd, the bank realized that due to a "failure to properly evaluate and enter ... [SHI's] trades, SHI's account balances had been overstated by at least ... $320 million, leaving SHI 'under water' by hundreds of millions of dollars."[100] Shortly thereafter, the bank issued another margin call, this time in the amount of $309 million, which SHI did not honor.[101]

In 2009, Deutsche Bank sued SHI, in the Queen's Bench Division of the High Court of Justice of England and Wales, to collect the amounts owed pursuant to the unpaid margin call. In November of 2013, that court issued a judgment in favor of Deutsche Bank, in the amount of $243,023,089.[102] A

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94 *Id.* at 572.
95 *Id.* at 573.
96 *Id.*
97 *Id.*
98 *Id.* at 575, fn. 3.
99 *Id.* at 577.
100 *Id.* at 578.
101 *Id.* at 579, 580.
102 *Id.* at 580.

month later, the bank sued Vik in the Connecticut Superior Court, seeking to pierce SHI's corporate veil and hold Vik personally liable for the judgment rendered in England.

The trial court determined that the veil-piercing claim should be evaluated under the law of the jurisdiction where SHI is incorporated, Turks and Caicos Islands, and that under the operative law, the plaintiff was tasked with proving "(1) domination and control of the corporation by the alleged wrongdoer, (2) commingling of the corporation's assets with those of the wrongdoer or with entities controlled by him, and (3) specific intent by the wrongdoer to leave the corporation unable to pay its debts."[103]

Following a courtside trial, the court found that the bank had proven the first two of these prongs, but not the third. As to that third element, "the court found that Vik had every intention of paying the October margin calls and credibly believed that SHI had sufficient funds in its Deutsche Bank account to do so up until the moment that Deutsche Bank informed Vik of its failure to accurately value [SHI's] trades."[104] The court noted, as a "salient fact [that] stands out," that Vik "left more than $500 million in SHI's accounts at [Deutsche Bank]."[105] When Vik "distribut[ed] approximately $900 million of SHI's assets, " he "credibly believed [that] they totaled at least $1.65 billion and had no reason to believe [that] the remainder of approximately $750 million would be inadequate to cover any debt to [Deutsche Bank]."[106]

The court also noted that the bank's harm had been caused in part by its "extraordinary … negligence and incompetence in calculating and reporting the status of" SEI's trades.[107] Emphasizing the equitable nature of a claim for veil-piercing, the court found that the equities favored Vik. The trial court noted that the bank had inexplicably failed to procure Vik's guaranty of SHI's obligations, and characterized its pursuit

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[103] *Id*. at 584.
[104] *Id*.
[105] *Id*. at 586.
[106] *Id*. at 587.
[107] *Id*.

of veil-piercing as "an attempt to circumvent the lack of a [personal] guarantee."[108] The court entered judgment for Vik.

On appeal, the bank claimed the trial court had erred in applying the law of Turks and Caicos Islands, and should have applied the law of either Connecticut[109] or New York, under which the bank allegedly would have prevailed. The Supreme Court found significant overlap in those bodies of law. "[I]n all three jurisdictions, [veil-piercing] is an extraordinary remedy that requires, at a minimum, a determination by the court that the corporate form was used to promote a wrong or injustice, and that a fundamental unfairness would result from a failure to disregard the corporate form.…The party seeking to pierce the corporate veil must also show that the corporate form was a mere shell used primarily as an intermediary to perpetrate fraud or to promote injustice."[110]

The court deemed it unnecessary to resolve the choice of law issue, on the grounds that "the trial court's factual findings foreclose Deutsche Bank's claim under New York, Connecticut, and TCI law, and, therefore, any error in the trial court's choice of law analysis or application of TCI law was harmless."[111] The court elaborated:

> In the present case, the trial court unequivocally absolved Vik of any wrongdoing vis-à-vis SHI's business dealings with Deutsche Bank and rejected Deutsche Bank's assertion that there was anything fundamentally unfair about leaving SHI's corporate veil intact. Indeed, the trial court found that 'the balance of equities' favored Vik and that Deutsche Bank's effort to pierce SHI's veil was simply an

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[108] *Id*.

[109] In its choice of law analysis, the Supreme Court observed, "[i]n Connecticut, courts recognize two theories under which the corporate veil may be pierced, namely, the instrumentality rule and the identity rule," and went on to discuss both approaches. 346 Conn. at 590, 591. The court's use of the present tense is surprising, given that in 2019, the Connecticut legislature enacted P.A. 19-181, later codified at General Statutes Section 33-673b, which effectively abolished the "identity rule" while codifying the "instrumentality rule." However, the statute's effective date was July 9, 2019, long after the relevant events and commencement of the suit, and so the court's statement of the law was accurate for the purposes of the case.

[110] *Id*. at 592, 593 (citation and internal punctuation omitted).

[111] 346 Conn. at 592.

> attempt to 'circumvent' the 'extraordinary' 'negligence and incompetence' Deutsche Bank exhibited in not obtaining a personal guarantee from Vik and in failing to accurately record and value [SHI's] trades.[112]

Applying the "clearly erroneous" standard of review, the court "conclude[d] that Deutsche Bank has not met its heavy burden,"[113] and affirmed the judgment below.

B. *Evidentiary rule barred evidence of settlement offer in support of defense of failure to mitigate damage.*

In *CCI Computerworks, LLC v. Evernet Consulting, LLC*,[114] the Appellate Court considered the issue of whether evidence of a late payment tendered by the defendant, but rejected by the plaintiff, was properly admissible in support of the defendant's special defense of failure to mitigate damages.

The plaintiff sued the defendant for failure to pay certain installment payments owing under an asset purchase agreement. The contract included a provision for interest on late payments.

Shortly after the commencement of suit, the defendant tendered two checks to the plaintiff: one in the amount of $30,937.97, representing the defendant's calculation of the missed payments and interest, and one in the amount of $4,000, which stated in the memo line that it was to compensate the plaintiff for its legal fees. The checks were accompanied by a letter from the defendant advising, "[i]f [the plaintiff] has incurred more than $4000 in legal fees, please provide me with that figure along with documentation supporting the reasonableness of the legal fees incurred."[115] The plaintiff refused the offer, and returned the checks. Citing this offer and rejection, the defendant asserted a special defense of failure to mitigate damages.

Over the plaintiff's objection, the trial court admitted evi-

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[112] *Id*. at 593.
[113] *Id*. at 594.
[114] 221 Conn. App. 491, 302 A.3d 297 (2023).
[115] *Id*. at 515.

dence of the defendant's tender of payments, and the plaintiff's rejection of the same. The court entered judgment for the plaintiff on its principal claim, together with interest up until the date that the payment was tendered, but denied interest after that date, finding the plaintiff's rejection of the payment constituted a failure to mitigate damages.[116]

The Appellate Court ruled that this was error. The court noted that pursuant to section 4-8 of the Connecticut Code of Evidence, "[e]vidence of an offer to compromise or settle a disputed claim is inadmissible on the issues of liability and the amount of the claim." The defendant pointed to separate language in the rule that such evidence may be admissible if it is "offered for another purpose, such as proving bias or prejudice of a witness, refuting a contention of undue delay or proving an effort to obstruct a criminal investigation or prosecution," and argued that its proffer had been for "another purpose," proving its special defense of failure to mitigate.[117] But the court disagreed, reasoning that "evidence of a settlement offer proffered to support a mitigation of damages defense speaks to the 'amount of the claim.'"[118]

C. *Appellate Court broadly construes petitioner's entitlement to a bill of discovery.*

In *Nowak v. Environmental Energy Services, Inc.*,[119] the Appellate Court threaded a fine needle in affirming the trial court's judgment granting a petition for a bill of discovery.

The plaintiff, Anna Nowak, executrix of the estate of Kenneth Nowak, controlled shares in the defendant Environmental Energy Services, Inc. (company). Her brother-in-law, the defendant Richard Nowak, also owned shares in the company, which he had co-founded with Kenneth. The plaintiff characterized Richard as the company's "controlling shareholder."

The plaintiff requested certain information from the company, but she received only partial compliance. She brought a

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[116] *Id.* at 517.
[117] *Id.* at 520.
[118] *Id.* at 522.
[119] 218 Conn. App. 516, 292 A.3d 4 (2023).

petition against Richard and the company for a bill of discovery, alleging probable cause to support claims for breach of fiduciary duty, an accounting, and shareholder oppression.[120] She claimed Richard had "caus[ed] the board to authorize excessive salaries and/or bonuses for himself and other executives; that she has been improperly excluded from company meetings; and that EES and/or Richard Nowak mismanaged the corporation by submitting for reimbursement as corporate expenses certain expenses for personal travel, meals and entertainment, by failing to investigate the reasonableness of certain corporate tax deductions, and by refusing to pay dividends to all shareholders."[121]

In her petition, the plaintiff sought seventeen different categories of records, claiming they were material and necessary for her to bring an action on her substantive claims. She asserted that there was no other adequate means to obtain the records. After a three-day hearing, the court granted her petition as to eleven of the seventeen categories of documents.

Before the court issued its judgment, the company had brought a separate action (civil action) against the plaintiff, alleging breach of contract, fraud and unfair trade practice, in connection with an agreement for the company to purchase some of the estate's shares. After judgment had been rendered in the bill of discovery case, she filed an answer, special defenses and counterclaim in the civil action, and also cited Richard into that case. Then she added claims for shareholder oppression, an accounting, and breach of fiduciary duty.

On appeal in the bill of discovery action, the defendants argued that by filing those pleadings in the civil action, the plaintiff had "in effect, admitted that she could have proceeded in the usual manner by commencing an action and seeking discovery in the ordinary course, thus obviating the need for a separate bill of discovery."[122] The plaintiff countered, "[s]hould the bill of discovery be upheld, the breach of fiduciary

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[120] "The plaintiff who brings a bill of discovery must demonstrate by detailed facts that there is probable cause to bring a potential cause of action." *Id*. at 530.

[121] *Id*. at 520.

[122] *Id*. at 523.

duty, shareholder oppression and accounting claims may be amplified or even refiled as derivative rather than individual actions," and "[t]he bill of discovery could provide information that would lead to [an] extension or otherwise revised pleading in [the civil] action or even the commencement of another action."[123]

The Appellate Court noted that under previous caselaw, a bill of discovery can co-exist with a separate action concerning the same subject matter. "[A]n action in equity seeking a bill of discovery is separate from a civil action and may be maintained seeking information relating to a civil action that already has been, or has yet to be, brought."[124] The court elaborated:

> The bill of discovery is an independent action in equity for discovery, and is designed to obtain evidence for use in an action other than the one in which discovery is sought. ... The bill is well recognized and may be entertained notwithstanding the statutes and rules of court relative to discovery.[125]

The court went on to state two governing principles that, if not directly contradictory, are quite challenging to reconcile. On the one hand, a petitioner seeking a bill of discovery "must … show that [it] has no other adequate means of enforcing discovery of the desired material."[126] But on the other hand, the "availability of other remedies for obtaining information does not require the denial of the equitable relief sought."[127]

To harmonize "no other adequate means" with "availability of other remedies," the court noted that "other remedies" are "adequate" if they are "specific and adapted to securing the relief sought conveniently, effectively and completely."[128]

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[123] *Id*. at 525.
[124] *Id*. at 527.
[125] *Id*. at 528, 529, quoting H & L Chevrolet, Inc. v. Berkley Ins. Co., 110 Conn.App., 428, 955 A.2d 565 (2008).
[126] *Id*. at 529.
[127] *Id*. (citation and internal punctuation omitted).
[128] *Id*.

The defendants argued that the plaintiff had adequate remedies at law that obviated the need for a bill of discovery: General Statutes Section 33-948, by which a shareholder can obtain a court order enforcing the shareholder's right to inspect corporate records, and the discovery process in the separate civil action. But the court rejected this argument, noting "the availability of a remedy at law does not necessarily preclude a party from obtaining a bill of discovery."[129]

With respect to the plaintiff's ability to obtain the material in question via the discovery process in the civil action, the court observed that in that case, the defendant "objected to the very same requests by the plaintiff that were made in the present action in equity, withheld the requested documents for months and, when a disclosure was finally made, it allegedly was incomplete and did not include all of the documents sought."[130] The court further noted that the discovery deadline in the civil action had passed with various objections unadjudicated, apparently limiting the plaintiff's options in that forum.

The court cited the principle that "a pure bill of discovery is favored in equity, [and] it should be granted unless there is some well founded objection against the exercise of the court's discretion,"[131] and affirmed the judgment below.

D. *"Grossly careless" commercial landlord allowed to reform lease under doctrine of mutual mistake.*

In *Stamford Property Holdings, LLC v. Jashari*,[132] the Appellate Court affirmed the trial court's judgment reforming a commercial lease, on the alternate grounds of mutual mistake and unilateral mistake coupled with inequitable conduct. In so doing, the court affirmed the continued vitality of an 1885 Connecticut Supreme Court case allowing reformation at the behest of even a very careless party.

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[129] *Id.* at 540.
[130] *Id.*
[131] *Id.* at 542.
[132] 218 Conn. App. 179, 291 A.3d 117, *cert. denied* 347 Conn. 901, 296 A.3d 840 (2023).

The parties negotiated a lease of the plaintiff's car-wash business from the plaintiff to the defendant. Their negotiations provided for a lease that would be triple net to the plaintiff landlord – the tenant bearing responsibility for insurance, maintenance, and real estate taxes – and executed a letter of intent with that provision.[133] But the actual lease, as drafted and signed, lacked a triple-net provision, due to a drafting error by the plaintiff's attorney.[134]

Shortly after the defendant took occupancy of the property, the plaintiff billed the defendant for reimbursement of real estate taxes. The defendant refused to pay, citing the absence of any such obligation in the lease. The plaintiff promptly brought suit to reform the lease.

Following a courtside trial, the court entered judgment for the plaintiff, "'primarily' determin[ing] that there was a mutual mistake but, alternatively, [holding] that the unilateral mistake ground was satisfied as well."[135] On appeal, the defendant argued that the plaintiff's claim should have been barred, asserting that the plaintiff's conduct in failing to notice the omission of the triple-net provision from the lease rose to the level of recklessness.

The Appellate Court disagreed. The court noted the 19th-century decision of the Connecticut Supreme Court in *Essex v. Day*,[136] which concerned the issuance of municipal bonds that should have been callable in ten years at the town's option, but lacked such a provision due to a printing error. In that case, the court determined that a party in the plaintiff's position may prevail even if it is guilty of "gross carelessness," which does not rise to the level of recklessness. The Appellate Court noted the following:

> The court [in *Essex v. Day*] recognized that there was 'unquestionably a reprehensible carelessness; a lack of intelligent attention to the matter that must be regarded as not

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[133] *Id.* at 183.
[134] *Id.*
[135] *Id.* at 187, 188.
[136] 52 Conn. 483, 1 A.620 (1885).

> only unreasonable but culpable.' [Citation.] Nonetheless, the court noted that '[t]he question however, as we conceive, is not so much whether a culpable negligence existed, as it is, whether such negligence should operate to bar the plaintiffs from relief against this defendant. This negligence is not of the extremist kind which the courts sometimes characterize as the equivalent of fraud. It was not recklessness; it was mere want of care. There was no indifference to the effect; it was simply an honest assumption that all was right. It is to be classed only with those incautious and unbusiness-like acts which are constantly presenting themselves and would not have been noticed but for some mischief that they have wrought.'[137]

The Appellate Court agreed with the trial court that the *Day* decision was indistinguishable from the case before it, and affirmed the judgment below.

E. *State supreme court clarifies "reasonable certainty" standard for proving damages.*

In *Roach v. Transwaste, Inc.*,[138] the Connecticut Supreme Court clarified that the often-cited "reasonable certainty" standard for proving damages may be less daunting than it sounds: the plaintiff may meet the standard by providing the factfinder with a "reasonable estimate" of the plaintiff's loss. "The term 'reasonable certainty' in this context … requires only evidence that is sufficient to enable the fact finder to arrive at a reasonable estimate and thereby remove the award from the realm of speculation."[139]

The plaintiff in *Roach* was a truck driver who sued his former employer for wrongful termination. He testified that as a result of his termination, he had been unemployed for about six months; that his compensation had been 46 cents per mile driven, and that he had driven approximately 230,000 miles during his two years as the defendant's employee. He provided no other evidence of damages, and based solely on his

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[137] 218 Conn. App. at 200, quoting *Essex v. Day*, 52 Conn. 483, 492, 493, 1 A.620 (1885).

[138] 347 Conn. 405, 297 A.3d 1004 (2023).

[139] *Id.* at 413.

testimony, the jury awarded him a sum that closely tracked these figures.

The Supreme Court deemed this evidence sufficient to provide a reasonable estimate of the plaintiff's damage. "The jury … based its award on figures drawn directly from uncontroverted testimony, and the method it employed for its calculations is set forth in the jury interrogatories form. Consequently, the damages award was not based on speculation or guesswork. …Rather, the plaintiff proved his damages to a reasonable certainty by providing nonspeculative evidence from which the jury derived a fair and reasonable estimate."[140]

F. *Probate decree has mixed res judicata effect on subsequent tortious interference action in Superior Court.*

In *Solon v. Slater*,[141] the Connecticut Supreme Court resuscitated a widow's claim that her late husband's son and attorney had tortiously interfered with the amendment of the couple's prenuptial agreement. The trial court and Appellate Court had ruled that her claim was barred, under the doctrine of collateral estoppel, due to an earlier ruling in the Probate Court.

The plaintiff was the second wife of Michael Solon (decedent), who died in 2014, less than a year after their marriage. On the eve of their wedding, in May of 2013, they had signed a prenuptial agreement granting her a life estate in the decedent's house in Stamford.

Shortly thereafter, the decedent was diagnosed with inoperable cancer. Several months later, in February of 2014, he executed a new will. At about that time, he and the plaintiff discussed the possibility of an amended prenuptial agreement, on terms that would have been more generous to her, but no such amendment was ever finalized.

In March of 2014, the decedent moved out of the marital home, and into his former wife's home on Long Island – an arrangement that the plaintiff would later characterize as a

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[140] *Id.* at 415, 416.
[141] 345 Conn. 794, 345 Conn. 794 (2023).

"kidnapping" orchestrated by the defendants. A month later, still residing in Long Island, the decedent died. In probate proceedings, the plaintiff objected to the admission of the decedent's 2014 will, claiming it was the product of the defendants' undue influence, and that the decedent had lacked testamentary capacity.

While the probate matter was pending, she sued the defendants in Superior Court, claiming, among other things, tortious interference with contractual relations (the proposed amendment of the prenuptial agreement) and tortious interference with right of inheritance (a possible amendment of the will). The trial court dismissed those claims due to lack of jurisdiction, because the decedent's assets were under the jurisdiction of the Probate Court.

In 2015, the Probate Court admitted the 2014 will, over the plaintiff's objections. The court found insufficient evidence of undue influence or lack of capacity. The plaintiff did not appeal from that decision.

The plaintiff then filed a second suit in the Superior Court, presenting claims that were substantially the same as those asserted in the dismissed first action. The trial court granted the defendants' motion for summary judgment as to both tortious interference claims, based on collateral estoppel. The court noted the "interrelationship between the [antenuptial] agreement and the [2014] will with respect to the ultimate disposition of the decedent's estate."[142] The Appellate Court affirmed.

The Supreme Court agreed with the judgment below with respect to the plaintiff's claim based on the proposed amendment of the will. "Because the Probate Court determined that the defendants' conduct regarding the testamentary disposition of the Solon assets was not tortious, we conclude that the plaintiff's tortious interference with the right of inheritance claim is barred by the doctrine of collateral estoppel."[143]

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[142] *Id*. at 806.
[143] *Id*. at 822.

But that did not hold true with respect to the plaintiff's claim of tortious interference with amendment of the prenuptial agreement. In the court's view, "the plaintiff's claim of tortious interference with the amendment of the antenuptial agreement is predicated on different (albeit partly overlapping) conduct relating to a different legal instrument, not the 2014 will. The sole issue in the Probate Court was whether to admit the decedent's 2014 will to probate. Notably, the plaintiff did not challenge the validity of the preexisting antenuptial agreement …"[144] Although the Probate Court did consider and reject the plaintiff's claim of undue influence and capacity concerning the will, that court "made no factual findings regarding the defendants' conduct pertaining to the proposed amendment of the antenuptial agreement."[145]

The court recognized "there is some overlap between the facts underlying the plaintiff's undue influence claim in the Probate Court and her tortious interference with contractual relations claim in the present case, because both claims are predicated on the defendants' allegedly wrongful conduct during the same general time period regarding the Solon assets."[146] But, "[a]n overlap in issues is not enough to trigger application of the doctrine of collateral estoppel; the doctrine becomes operative only if the issue decided in the prior proceeding and the issue presented in the subsequent proceeding are *identical*."[147]

## IV. Business Torts

### A. *Company that pretended to join with competitors in suit against the State found liable for tortious interference and unfair trade practice.*

In *Companions & Homemakers, Inc. v. A&B Homecare Solutions, LLC*,[148] the Connecticut Supreme Court affirmed the trial court's finding that a company committed tortious

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144 *Id.* at 814.
145 *Id.*
146 *Id.* at 815, 816.
147 *Id.* at 816.
148 348 Conn. 132, 302 A.3d 283 (2023).

interference and unfair trade practices when it misleadingly pretended to join its competitors in litigation against their common client, the State of Connecticut.

The plaintiff and defendant were providers of homemaking and companion care to the elderly, and both companies had contracts with the Connecticut Department of Social Services (DSS). In 2016, DSS implemented a new billing and timekeeping system, the Electronic Visit Verification system (EVV), for contractors of this type. The plaintiff was dissatisfied with this new requirement, and rallied various of its competitors, including the defendant, to join a legal challenge to EVV, under the Uniform Administrative Procedure Act.

The defendant joined with the plaintiff and three other home-care companies in a complaint alleging that the home care providers were "unable to implement EVV" and would be irreparably harmed if it became mandatory.[149] But unbeknownst to its competitors and fellow litigants, the defendant successfully implemented the system, billing more than $715,000 through EVV by December of 2016, while the plaintiff and other providers had billed nothing at all.[150] As found by the trial court, the defendant's CEO "'played both sides of the litigation' because doing so 'enabled him to continue to receive strategic information from the [other providers] and to plan to benefit at their expense from their nonuse of EVV.'"[151]

In early 2017, DSS terminated its provider agreement with the plaintiff, "based, in part, on its knowledge that [the defendant] had successfully implemented EVV and that it could rely on [the defendant] to take on [the plaintiff's] clients."[152] The defendant then began doing precisely that, via referrals from DSS, and hiring the plaintiff's employees, with full knowledge that they were bound by noncompete agreements.[153]

In a two-count complaint, the plaintiff alleged that this

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[149] *Id*. at 137, 138.
[150] *Id*. at 139.
[151] *Id*. at 139.
[152] *Id*. at 140.
[153] *Id*.

conduct constituted tortious interference with its agreements with DSS and its employees, as well as a violation of the Connecticut Unfair Trade Practice Act, General Statutes Section 42-110a et seq. (CUTPA). Following a lengthy bench trial, the trial court agreed.

On appeal, the defendant challenged the trial court's finding of tortious interference with the plaintiff's relationship with DSS, asserting that that conclusion was based on findings of multiple fraudulent misrepresentations even though the defendant owed the plaintiff no duty of disclosure. The Supreme Court rejected this argument, noting the established principle that "a duty to disclose will be imposed on a party insofar as he voluntarily makes disclosure. A party who assumes to speak must make a full and fair disclosure as to the matters about which he assumes to speak."[154] Concluding that the claim of tortious interference was well supported, the Supreme Court summarily affirmed the trial court's judgment on the CUTPA claim as well, citing an earlier decision for the proposition that "it is difficult to conceive of a situation [in which] tortious interference would be found but a CUTPA violation would not."[155]

## V. Closely Held Businesses

### A. *Saving statute rescues LLC claim initially, and incorrectly, brought in the name of the LLC's member.*

In *AAA Advantage Carting & Demolition Service, LLC v. Capone*,[156] the Appellate Court weighed the applicability of General Statutes Section 52-591 (savings statute) to a situation where an LLC member pursued a company claim in his own name, obtained a judgment that was reversed by the Appellate Court, then brought suit in the name of the company after the limitations period had expired. The Appellate Court

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[154] *Id.* at 145, quoting Macomber v. Travelers Property & Casualty Corp., 261 Conn. 620, 636, 804 A.2d 180 (2002).

[155] *Id.* at 151, quoting Sportsmen's Boating Club v. Hensley, 192 Conn. 747, 757, 474 A.2d 780 (1984).

[156] 221 Conn. App. 256, 301 A.3d 1111, *cert. denied* 348 Conn. 924, 304 A.3d 443 (2023).

agreed that the second action was saved by the savings statute.

The savings statute provides, "[w]hen a judgment in favor of a plaintiff suing in a representative character, or for the benefit of third persons, has been reversed, on the ground of a mistake in the complaint or in the proper parties thereto, and, while the action was pending, the time for bringing a new action has expired, the parties for whose special benefit the action was brought may commence a new action in their individual names at any time within one year after the reversal of the judgment, if the original action could have been so brought."

In *Capone*, the plaintiff limited liability company sued a former 50% member, Joseph Capone, for statutory theft of company funds committed on the eve of Capone's sale of his membership interest to the other member, Frank Bongiorno. In a previous action commenced in 2012, Bongiorno had brought the same claim in his own name, and prevailed at trial, but the Appellate Court reversed, holding that he lacked individual standing to prosecute the claim.[157] Bongiorno then caused the company to bring a second action in the company's name. Capone asserted that the claim was time-barred, but the plaintiff countered by citing the savings statute.

Capone contended that the savings statute did not apply "because Bongiorno brought the 2012 action in his individual capacity only and did not assert a derivative claim on the plaintiff's behalf."[158] Thus, he argued, the situation did not meet the requirement of the savings statute that the earlier case be one that was brought "in a representative character, or for the benefit of third persons." The trial court disagreed, holding that "[a]lthough [Bongiorno] commenced suit [in the 2012 action] individually and not derivatively, the object of the [2012 action] was to recover the [$17,000 in] funds withdrawn without authorization from the [plaintiff's checking]

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[157] Bongiorno v. Capone, 185 Conn. App. 176, 196 A.3d 1212, *cert. denied* 330 Conn. 943, 195 A.3d 1134 (2018).

[158] 221 Conn. App. at 272.

account …. For this reason, [the 2012 action] can be viewed as brought 'for the benefit of' a third person, [the plaintiff]…"[159]

The Appellate court agreed, echoing the trial court's observation that in the 2012 suit, "Bongiorno sought the recovery of the $17,000 withdrawn by the defendant from the *plaintiff's* checking account."[160] The court also pointed out that Bongiorno was the plaintiff LLC's sole member, and under the authority of the Connecticut Supreme Court's 2019 decision Saunders v. Briner (which had not yet been released at the time of the Appellate Court's decision in the 2012 case),[161] it is possible that Bongiorno as sole member may have had standing to prosecute the claim individually.

The Appellate Court concluded that "[u]nder these unique circumstances, we conclude that the claims of statutory theft and conversion in the 2012 action in their essence were asserted 'for the benefit of' the plaintiff notwithstanding that Bongiorno brought the 2012 action in his individual capacity only,"[162] and accordingly the savings statute applied to the second action.

One of the "unique circumstances" apparently relied upon by the Appellate Court was the plaintiff company's status as a single-member LLC. It is therefore less than 100% clear that the court would have reached the same conclusion as applied to a multi-member LLC.

The plaintiff argued, and the trial court agreed, that the second suit was saved by not only the savings statute but also by the accidental failure of suit statute, General Statutes Section 52-592.[163] The Appellate Court decided the issue based solely on the former, and expressly declined to address the latter.

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[159] *Id.* at 271, 272. (Brackets inserted by the Appellate Court.)

[160] *Id.* at 273. (Emphasis by the court.)

[161] 334 Conn. 135, 221 A.3d 1 (2019).

[162] *Id.* at 274.

[163] The statute provides, in relevant part, "(a) If any action, commenced within the time limited by law, has failed one or more times to be tried on its merits … 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 or after the reversal of the judgment."

# RECENT TORT DEVELOPMENTS

By James E. Wildes*

In this article significant tort developments from 2022 through some of 2024 are covered. Some decisions are discussed in more depth than others. The number of decisions that were decided requires that some cases not be included in this survey or that some cases be discussed only briefly. The areas of the law represented in this article include defamation, governmental immunity, malicious prosecution, premises liability, professional negligence, sovereign immunity, trial practice, vexatious litigation and underinsured motorist.

## I. Animal Liability

In *Houghtaling v. Benevides*,[1] the Appellate Court affirmed the summary judgment entered in favor of the defendant, Jakub Micengendler, because the plaintiff at the time she was injured was a keeper of the dog that allegedly caused her injuries. The plaintiff had borrowed a vehicle from the named defendant and agreed to take the named defendant's dog with her in the car while she went to an appointment.[2] The plaintiff alleged that the named defendant and Micengendler were the owners and/or keepers of the dog and were liable under General Statutes Section 22-357.[3] The

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1 217 Conn. App. 754, 755-56, 290 A.3d 429, *cert. denied*, 346 Conn. 924, 295 A.3d 418 (2023).

2 *Id*. at 756.

3 *Id*. at 756-57. General Statutes § 22-357 provides: "(a) As used in this section:

(1) "Law enforcement officer" means: Each officer, employee or other person otherwise paid by or acting as an agent of (A) the Division of State Police within the Department of Emergency Services and Public Protection; (B) the Office of the State Capitol Police; (C) a municipal police department; and (D) the Department of Correction;

(2) "Property" includes, but is not limited to, a companion animal, as defined in section 22-351a; and

(3) "The amount of such damage", with respect to a companion animal, includes expenses of veterinary care, the fair monetary value of the companion animal, including all training expenses for a guide dog owned by a blind person or an assistance dog owned by a deaf or mobility impaired person and burial expenses for

trial court granted Micengendler's motion for summary judgment, concluding that there was no genuine issue of material fact that the plaintiff was a keeper of the dog at the time of the incident.[4] On appeal, the plaintiff argued that, at most, she had temporary physical custody of the dog and that such custody did not rise to the level of possession for purposes of Section 22-357.[5] The Court explained that a keeper of a dog is precluded from recovery under Section 22-357.[6] The Court further explained that a person will not be deemed to be a keeper of a dog unless that person exercises control over the dog in a manner similar to that which would ordinarily be exerted by an owner.[7] The Court also explained that proof of being a keeper generally consists of evidence that the nonowner was feeding, giving water to, exercising, sheltering, or otherwise caring for the dog when the incident happened.[8] The Court agreed with the trial court that the plaintiff was a keeper for several reasons: (1) the plaintiff voluntarily agreed to take the dog with her to the appointment in the car that she borrowed; (2) the plaintiff had sole possession of the dog at the time that the incident occurred; (3) the plaintiff exercised control over the dog's actions from the moment that she took the dog; and (4) the plaintiff was in possession of both the car and the dog in a location away

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the companion animal.

(b) If any dog does any damage to either the body or property of any person, the owner or keeper, or, if the owner or keeper is a minor, the parent or guardian of such minor, shall be liable for the amount of such damage, except when such damage has been occasioned to the body or property of a person who, at the time such damage was sustained, was committing a trespass or other tort, or was teasing, tormenting or abusing such dog. If a minor, on whose behalf an action under this section is brought, was under seven years of age at the time such damage was done, it shall be presumed that such minor was not committing a trespass or other tort, or teasing, tormenting or abusing such dog, and the burden of proof thereof shall be upon the defendant in such action. In an action under this section against a household member of a law enforcement officer to whom has been assigned a dog owned by a law enforcement agency of the state, any political subdivision of the state or the federal government for damage done by such dog, it shall be presumed that such household member is not a keeper of such dog and the burden of proof shall be upon the plaintiff to establish that such household member was a keeper of such dog and had exclusive control of such dog at the time such damage was sustained."

4 *Houghtaling*, 217 Conn. App. at 759.

5 *Id.* at 760-61.

6 *Id.* at 761.

7 *Id.* at 762.

8 *Id.*

from the owner's property at the time of the incident.[9]

## II. Defamation

Whether a defendant in a defamation action should be afforded absolute immunity in a suit for statements made during a university proceeding on sexual misconduct was the central issue in *Khan v. Yale University*.[10] By way of background, in the proceeding held by the defendant Yale University, the defendant Jane Doe accused the plaintiff of sexual assault in violation of Yale's sexual misconduct policy, resulting in the plaintiff's expulsion from school.[11] The Supreme Court stated that absolute immunity attaches to statements made in judicial or quasi-judicial proceedings.[12] The Court stated when Doe made accusations during a criminal trial, an official governmental proceeding with procedural safeguards, Doe enjoyed absolute immunity in any subsequent civil action claiming her testimony during the criminal proceeding was defamatory.[13] The plaintiff argued that the Yale proceeding was not quasi-judicial because it was neither a governmental proceeding nor a proceeding with sufficient judicial-like procedures to protect him from defamatory statements.[14] The Court explained that a proceeding is quasi-judicial only when the proceeding is specifically authorized by law, applies law to fact in an adjudicatory manner, contains adequate procedural safeguards, and is supported by public policy encouraging absolute immunity for proceeding participants.[15] The Court concluded that the proceeding in issue did not meet the conditions necessary to be considered quasi-judicial and, therefore, Doe was not entitled to absolute immunity.[16] However, the Court decided that a qualified privilege was appropriate for alleged victims of sexual assault in the context of the case.[17] The Court fur-

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[9] *Id*. at 765-66.
[10] 347 Conn. 1, 295 A.3d 855 (2023).
[11] *Id*. at 7.
[12] *Id*. at 8.
[13] *Id*. at 7.
[14] *Id*. at 8.
[15] *Id*. at 10.
[16] *Id*. at 11.
[17] *Id*.

ther found that the factual allegations in the plaintiff's complaint, including that the statements were made with malice, defeated the defendant's asserted privilege at the motion to dismiss stage of the proceedings.[18] The Court added that, at a later stage of the proceedings, with a more fulsome factual record, it may be appropriate to revisit whether the qualified privilege had been defeated.[19] In explaining its conclusion, the Court stated that Connecticut had long held that communications stated or published in the course of judicial proceedings are absolutely privileged as long as they are in some way relevant to the subject of the controversy.[20] The Court found that the proceeding in question could not properly be recognized as quasi-judicial because it lacked the adequate procedural safeguards necessary for absolute immunity to apply.[21] The Court stressed that the proceeding failed: to require the complainant to testify under oath; to afford the plaintiff or his counsel a meaningful opportunity to cross examine adverse witnesses in real time; to provide plaintiff a reasonable opportunity to call witnesses to testify; to afford the plaintiff an opportunity to have active assistance of counsel during the proceeding; and to provide the plaintiff a record or transcript of the proceeding that would assist him in obtaining adequate review.[22] The Court stated that not all of the procedural safeguards were required for a hearing to be recognized as quasi-judicial, but the collective absence of such features militated against a determination that the proceeding in question had adequate safeguards to ensure reliability and promote fundamental fairness.[23]

The distinct pleading requirements for defamation per se and defamation per quod were addressed in *Stevens v. Khalily*.[24] The plaintiff sued his ex-wife's mother and ex-

[18] *Id*. The issues in the appeal were certified to the Supreme Court by the United States Court of Appeals for the Second Circuit pursuant to General Statutes § 51-199b (d).

[19] *Id*.

[20] *Id*. at 19.

[21] *Id*. at 36.

[22] *Id*. at 38-39.

[23] *Id*. at 39.

[24] 220 Conn. App. 634, 298 A.3d 1254, *cert. denied*, 348 Conn. 915, 303 A.3d 260 (2023).

wife's stepfather for defamation.[25] He alleged that his ex-wife's stepfather stated to representatives of the Department of Children and Families (department) that he was in the habit of sleeping with transvestite prostitutes.[26] He also alleged that his ex-wife's mother told representatives of the department that he had engaged in physical violence, had no interest in spending time with his daughter, was only interested in seeing his child to the extent that she was the beneficiary of a $50 million trust, lived a dangerous lifestyle, and was so desperate for money that he would prostitute his daughter.[27] The plaintiff, on appeal, argued that the trial court erred in striking the above claims for failure to plead defamation with requisite specificity.[28] The Appellate Court affirmed, concluding that the plaintiff failed to plead reputational harm, an element of defamation.[29] The Court reviewed the elements of a defamation action: (1) the defendant published a defamatory statement; (2) the statement identified the plaintiff to a third person; (3) the statement was published to a third person; and (4) the plaintiff's reputation was harmed.[30] The Court added that each statement furnishes a separate cause of action.[31] Whether a party must allege facts sufficient to prove reputational harm depends on the type of defamation: per se or per quod.[32] The Court summa-

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[25] *Id*. at 636-37.

[26] *Id*. at 637.

[27] *Id*.

[28] *Id*. at 645. The Appellate Court stated that a motion to strike challenges the legal sufficiency of a pleading. *Id*. The court takes the facts as pled and the complaint must be construed in the manner most favorable in sustaining its legal sufficiency. *Id*. If facts provable under the allegations in the complaint would support a cause of action, the motion to strike must be denied. *Id*. However, a motion to strike is properly granted if the complaint contains mere conclusions of law that are unsupported by the facts alleged. *Id*. at 645-46.

[29] *Id*. at 644. The trial court granted the motion to strike because the plaintiff failed to allege the defamation claim with the requisite specificity as set forth in *Stevens v. Helming*, 163 Conn. App. 241, 135 A.3d 728 (2016). The Appellate Court noted that the pleadings requirements in a defamation case as discussed in *Helming* was dicta. Stevens, 220 Conn. App. at 643-44. The Court stated that it did not need to reach the issue of the degree of specificity required to plead defamation because the plaintiff's complaint failed to allege reputation harm. *Id*. at 644. The Court explained that it may affirm a trial court decision that reaches the correct result, albeit for a different reason. *Id*.

[30] *Id*. at 642.

[31] *Id*.

[32] *Id*. at 646.

rized the law on defamation per se: A plaintiff must show that the libel, on its face, either charged some impropriety in the plaintiff's business or profession or that it charged a crime of moral turpitude or to which an infamous penalty is attached.[33] The Court additionally explained that, in a defamation per se action, proof of actual damages is not necessary in order to recover general damages; as opposed to a defamation per quod claim where the plaintiff may recover general damages for harm to their reputation only upon proof of actual damages.[34] Turning to the subject case, the Court noted that counsel for the plaintiff conceded at oral argument that the statements in question were not defamatory per se.[35] The Court stated that in the operative complaint the plaintiff alleged he suffered fear, terror and emotional distress as a result of the alleged defamatory statements made by the defendants.[36] The plaintiff attempted to argue that the trial court may reasonably infer reputational harm from the harms pleaded.[37] The Court disagreed with the plaintiff, stating that neither fear, terror nor emotional distress relate to the community perception of the plaintiff.[38] The Court found that the trial court properly granted the defendants' motion to strike because the plaintiff's complaint was devoid of any allegations of harm that he suffered to his reputation as a result of the alleged defamatory statements.[39]

## III. Defective Highway

*Murphy v. Clinton*[40] addressed the notice requirements contained in General Statutes Section 13a-149. The plaintiff claimed she was injured when she tripped and fell while crossing a street in Clinton.[41] The plaintiff provided written notice pursuant Section 13a-149 to the defendant, which in-

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33 *Id.* at 646-47.
34 *Id.*
35 *Id.* at 647.
36 *Id.* at 648.
37 *Id.*
38 *Id.*
39 *Id.* at 649.
40 217 Conn. App. 182, 287 A.3d 1150 (2023).
41 *Id.* at 184-85.

cluded a written description and photographs of the alleged defect.[42] The defendant argued that the language that the plaintiff set forth in the notice was conclusory and that the photographs included as part of the notice could not cure the lack of express language in describing the alleged defect.[43] The trial court found that the notice was not sufficient and granted the defendant's motion to dismiss.[44] The Appellate Court, in reversing the judgment dismissing the case, noted that the failure to comply with the requirements of Section 13a-149 deprives the Superior Court of subject matter jurisdiction over a plaintiff's action.[45] The Court further noted that pursuant to Section 13a-149 the plaintiff must provide statutory notice within ninety days of the accident in order for an action to lie for damages caused by a defective highway, and that notice must include certain elements: (1) written notice of the injury; (2) a general description of that injury; (3) the cause; (4) the time and date; and (5) the place.[46] The Court also noted that the notice requirement should be liberally construed.[47] The Court rejected the defendant's argument that the appended photographs to the plaintiff's notice should not be considered in determining the sufficiency of the notice and found that the written notice and the photographs considered together sufficiently described the cause of injury and satisfied the mandates of Section 13a-149.[48]

## IV. Governmental Immunity

*Adesokan v. Town of Bloomfield*[49] addressed whether the special defense of governmental immunity for discretionary

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[42] *Id*. at 185.
[43] *Id*. at 188.
[44] *Id*. at 185-86.
[45] *Id*. at 187.
[46] *Id*. at 186.
[47] *Id*. at 187. The Appellate Court contrasted the notice requirement contained in General Statutes § 13a-144 which must be strictly construed. *Id*.
[48] *Id*. at 188-91.
[49] 347 Conn. 416, 419-420, 297 A.3d 983 (2023). General Statutes §14-283 provides, in relevant part: "(a) As used in this section, 'emergency vehicle' means (1) any ambulance or vehicle operated by a member of an emergency medical service organization responding to an emergency call or taking a patient to a hospital, (2) any vehicle used by a fire department or by any officer of a fire department while on the way to a fire or while responding to an emergency call but not while returning

acts bars claims of negligence against drivers operating an "emergency vehicle" pursuant to the privileges provided by the emergency vehicle statute, General Statutes Section 14-283. The plaintiff claimed, on appeal, that the trial court improperly granted the motion for summary judgment filed by the defendants, the town of Bloomfield, the Bloomfield Police Department, and one of its officers.[50] The plaintiff argued that Section 14-283 (d) imposed a ministerial rather than a discretionary duty on emergency vehicle operators to drive with due regard for the safety of all persons and property.[51] The Supreme Court held that the defense of discretionary act immunity provided by General Statutes Section 52-557n (a) (2) (B)[52] does not apply to claims arising from the manner

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from a fire or emergency call, [or] (3) any state or local police vehicle operated by a police officer or inspector of the Department of Motor Vehicles answering an emergency call or in the pursuit of fleeing law violators ....

(b) (1) The operator of any emergency vehicle may (A) park or stand such vehicle, irrespective of the provisions of this chapter, (B) except as provided in subdivision (2) of this subsection, proceed past any red light, stop signal or stop sign, but only after slowing down or stopping to the extent necessary for the safe operation of such vehicle, (C) exceed the posted speed limits or other speed limits imposed by or pursuant to section 14-218a, 14-219, or 14-307a as long as such operator does not endanger life or property by so doing, and (D) disregard statutes, ordinances or regulations governing direction of movement or turning in specific directions.

(2) The operator of any emergency vehicle shall immediately bring such vehicle to a stop not less than ten feet from the front when approaching and not less than ten feet from the rear when overtaking or following any registered school bus on any highway or private road or in any parking area or on any school property when such school bus is displaying flashing red signal lights and such operator may then proceed as long as he or she does not endanger life or property by so doing.

(c) The exemptions granted in this section shall apply only when an emergency vehicle is making use of an audible warning signal device, including, but not limited to, a siren, whistle or bell which meets the requirements of subsection (f) of section 14-80, and visible flashing or revolving lights which meet the requirements of sections 14-96p and 14-96q, and to any state or local police vehicle properly and lawfully making use of an audible warning signal device only.

(d) The provisions of this section shall not relieve the operator of an emergency vehicle from the duty to drive with due regard for the safety of all persons and property.

(e) Upon the immediate approach of an emergency vehicle making use of such an audible warning signal device and such visible flashing or revolving lights or of any state or local police vehicle properly and lawfully making use of an audible warning signal device only, the operator of every other vehicle in the immediate vicinity shall immediately drive to a position parallel to, and as close as possible to, the right-hand edge or curb of the roadway clear of any intersection and shall stop and remain in such position until the emergency vehicle has passed, except when otherwise directed by a state or local police officer or a firefighter. ..."

[50] *Adesokan*, 347 Conn. at 420-21.

[51] *Id.* at 422-23.

[52] 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

in which an emergency vehicle is operated under the privileges provided by Section 14-283.[53] In particular, the Court concluded that "the duty to drive with due regard" mandated by Section 14 283 (d) functions as an exception "provided by law" under the savings clause applicable to discretionary act immunity in Section 52-557n (a) (2) (B).[54] The Court reversed the summary judgment and remanded the case for further proceedings according to law.[55]

In *Hughes v. Board of Education of City of Waterbury*,[56] the Appellate Court affirmed the judgment rendered in favor of the defendants. The plaintiffs, a minor and her mother, argued that the trial court improperly granted the defendants' motion to strike the complaint on the basis of governmental immunity.[57] The suit was brought against the city of Waterbury, the Board of Education, a teacher and a counselor.[58] The gravamen of the complaint was that another student was not properly supervised when the defendants knew or should have known of the aggressive tendencies of the student, resulting in the student striking the minor plaintiff with a metal object.[59] The Court stated that where it is ap-

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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 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."

[53] *Adesokan*, 347 Conn. at 421.

[54] *Id*. at 432. *River Front Development, LLC v. New Haven Police Department*, 222 Conn. App. 504, 306 A.3d 2 (2023) relied on *Adesokan v. Town of Bloomfield*, 347 Conn. 416, 297 A.3d 983 (2023) in reversing the summary judgment in favor of the defendants where the plaintiffs' claims arose from the manner in which an emergency vehicle was operated under General Statutes § 14-283.

[55] *Adesokan*, 347 Conn. at 449.

[56] 221 Conn. App. 325, 326-27, 300 A.3d 1209, *cert. denied*, 348 Conn. 922, 304 A.3d 147 (2023).

[57] *Id*.

[58] *Id*. at 327.

[59] *Id*. at 327-28.

parent from the face of the complaint that a municipality was engaged in a governmental function while performing the acts and omissions complained of, the municipality is not required to plead governmental immunity as a special defense and may file a motion to strike to test the legal sufficiency of the complaint.[60] The Court stated that a municipality may be liable for the negligent performance of a duty only if the official's duty is clearly ministerial.[61] The Court also stated that the plaintiffs did not allege that the supervision of children was ministerial in nature.[62] The Court further stated that the subject conduct was indisputably discretionary in nature and, therefore, the defendants were entitled to governmental immunity unless an exception to the doctrine applied.[63] The Court stated that there is a limited exception to governmental discretionary act immunity when it is apparent to the municipal officer that his or her failure to act would be likely to subject an identifiable person to imminent harm.[64] The defendants agreed that the minor plaintiff was an identifiable victim because she was a student at the school during school hours when the alleged incident occurred.[65] The Court stated that to satisfy the imminent harm element of the exception, the plaintiff must establish that (1) the dangerous condition alleged by the plaintiff was apparent to the municipal defendant, (2) the alleged dangerous condition must be likely to have caused the harm suffered by the plaintiff, (3) the likelihood of the harm must be sufficient to place upon the municipal defendants a clear and unequivocal duty to alleviate the dangerous condition, and (4) the probability that harm would occur must be so high as to require the defendant to act immediately to prevent the harm.[66] The Court found that the allegations in the plaintiffs' complaint failed to set forth the above elements with requisite specificity to survive the motion to strike.[67]

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60 *Id.* at 330.
61 *Id.* at 331.
62 *Id.*
63 *Id.*
64 *Id.*
65 *Id.* at 332.
66 *Id.*
67 *Id.* at 334.

*Ahern v. Board of Education of Regional School District Number 13*[68] addressed whether the defendants were entitled to governmental immunity. The plaintiff, a former student of Coginchaug Regional High School and a former member of the high school's cheerleading squad, sued the following defendants: the board of education of the school district; the superintendent of the district; the high school's head cheerleading coach; and the high school's assistant cheerleading coach.[69] The plaintiff alleged that, due to the negligence of the defendants, she was injured while attempting a stunt during a high school cheerleading practice.[70] Summary judgment was rendered for all of the defendants.[71] The Appellate Court dismissed the appeal with respect to the board because it was not a final judgment as to the board since the trial court's decision did not dispose of all of the counts against the board.[72] The Court affirmed the summary judgment in favor of the other defendants on the ground that they were entitled to governmental immunity because there was no genuine issue of material fact that the plaintiff was not subject to imminent and apparent harm.[73] The Court stated that the determination of whether governmental immunity applies is generally a question of law for the court, unless there are unresolved factual issues material to the applicability of the defense, in which case resolution of the factual questions are left to the jury.[74] The Court found that the evidence in support of the motion for summary judgment demonstrated that the continued practice of a stunt after the plaintiff repeatedly had fallen safely and without injury during the same practice while practicing that same stunt did not subject the plaintiff to a harm that was imminent and apparent.[75]

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[68] 219 Conn. App. 404, 295 A.3d 496 (2023).
[69] *Id*. at 406-07.
[70] *Id*. at 407.
[71] *Id*.
[72] *Id*. at 407-08.
[73] *Id*.
[74] *Id*. at 424-25.
[75] *Id*. at 425.

## V. Invasion of Right to Privacy

In *Cornelius v. Markle Investigations, Inc.*,[76] the plaintiff appealed from the judgment of the trial court granting the motions for summary judgment filed by the defendants, Markle Investigations, Inc. (Markle) and Hopkins School, Inc. (Hopkins). By way of background, the plaintiff attended high school at Hopkins, during which time he was disciplined on several occasions, and was expelled from the school for plagiarism.[77] At a later time, the police lawfully searched the plaintiff's home which was located across the street from Hopkins and seized an arsenal of weapons of mass destruction, bomb making materials, racist materials, and anti-Semitic materials.[78] The plaintiff pleaded guilty in state and federal court to charges stemming from the conduct underlying the search.[79] Hopkins registered as a victim of the plaintiff's crimes.[80] The plaintiff alleged that the defendants invaded his right to privacy because Hopkins retained Markle to conduct surveillance of him following his release from prison.[81] In particular, the plaintiff alleged that the defendants intentionally intruded upon his solitude, seclusion and private affairs or concerns.[82] The Appellate Court reviewed the applicable law and stated that to prove a claim for intrusion upon the seclusion of another, a plaintiff must establish three things: (1) an intentional intrusion, physical or otherwise; (2) upon the plaintiff's solitude or seclusion or private affairs or concerns; (3) which would be highly offensive to a reasonable person.[83] The Court agreed with the trial court that the conduct that the plaintiff complained of could not, as a matter of law, satisfy the second element.[84] The Court stated that because the defendants surveilled the plaintiff only while he was in a public setting, such as riding

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[76] 220 Conn. App. 135, 137, 297 A.3d 248 (2023).
[77] *Id.* at 138.
[78] *Id.* at 139.
[79] *Id.*
[80] *Id.*
[81] *Id.*
[82] *Id.* at 140.
[83] *Id.* at 152-53.
[84] *Id.* at 163.

public transportation, visiting the library and walking along the street, he lacked an objectively reasonable expectation of seclusion or solitude.[85] The Court further stated that the defendants never reviewed the plaintiff's private or personal mail, safe, wallet or bank account.[86] Additionally, the Court stated that the defendants only used basic equipment including cell phones, walkie-talkie radio devices and binoculars to obtain images of the plaintiff while he was in public.[87] The Court also found that the plaintiff's claim failed as to the third element of his claim.[88] The Court agreed with the trial court that the defendants' surveillance of the plaintiff was not conduct to which a reasonable person would strongly object.[89] The Court further noted that once the moving party has met its burden, as in the case before it, the opposing party must present evidence that demonstrates the existence of some genuine issue of material fact.[90] The Court found that the plaintiff had not submitted sufficient evidence to show a genuine issue of material fact and affirmed the judgment of the trial court.[91]

## VI. Malicious Prosecution

In *Silano v. Cooney*,[92] the plaintiff appealed from the summary judgment entered in the defendant's favor. The plaintiff sued the defendant, a police officer, for malicious prosecution.[93] The Court stated that the elements of an action for malicious prosecution against a private person include that: (1) the defendant initiated or procured the institution of criminal proceeding against the plaintiff: (2) the criminal proceedings have terminated in favor of the plaintiff; (3) the defendant acted without probable cause; and (4) the defendant acted with malice, primarily for a purpose other

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[85] *Id*. at 162-63.
[86] *Id*. at 162.
[87] *Id*. at 162-63.
[88] *Id*. at 164-68.
[89] *Id*. at 167-68.
[90] *Id*. at 168.
[91] *Id*. at 168-70.
[92] 223 Conn. App. 692, 694, 309 A.3d 333, *cert. denied*, 348 Conn. 960, 312 A.3d 36 (2024).
[93] *Id*. at 694.

than that of bringing an offender to justice.[94] In affirming the summary judgment, the Appellate Court found that the defendant satisfied his burden in establishing the absence of a genuine issue of material fact that the arrest warrant was supported by probable cause.[95] With respect to the plaintiff's recitation of circumstances regarding the issue of malice, the Court remarked that the defendant's state of mind does not negate the existence of probable cause.[96] The Court stressed that proof of malice does not dispense with the need to prove want of probable cause.[97]

## VII. Premises Liability

In *Herrera v. Meadow Hill, Inc.*,[98] the plaintiff appealed from the summary judgment entered in favor of the defendants, a condominium association and the property manager. The plaintiff claimed that he was on his way home to his condominium unit when he fell due to icy exterior steps on the premises.[99] The defendants argued that at the time of the accident that there was an ongoing storm or that a reasonable amount of time had not passed after the cessation of the storm for them to have remediated the condition.[100] The defendants argued that under the facts of the case they had no liability pursuant to the ongoing storm doctrine adopted in *Kraus v. Newton*.[101] In granting the motion for summary judgment, the trial court found that liability may be imposed for snow and ice removal remediation that occurs during a

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94 *Id.* at 703.
95 *Id.*
96 *Id.* at 708.
97 *Id.* at 707-08.
98 217 Conn. App. 671, 672, 290 A.3d 377 (2023).
99 *Id.* at 673.
100 *Id.*
101 *Id.* at 673-74. In *Kraus v. Newton*, 211 Conn. 191, 558 A.2d 240 (1989), the Supreme Court 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.

storm if it is done in a negligent manner.[102] The trial court also found that the plaintiff had offered no evidence to rebut the defendants' proffer of the local ordinance regarding the removal of snow, sleet and ice after the end of precipitation as evidence of the standard of care.[103] The trial court further found that the plaintiff failed to establish that the defendants' remediation efforts were negligent in any way.[104] The Appellate Court noted that there was a split of authority in the Superior Court as to whether there was an exception to *Kraus v. Newton* that would allow liability to be imposed for snow or ice remediation that occurs during a storm if it is done negligently.[105] The Court stated that it did not need to decide whether the trial court correctly recognized this exception to the ongoing storm doctrine because, even if the trial court properly recognized the exception, the plaintiff did not present evidence demonstrating the existence of a disputed issue of material fact in opposition to the motion for summary judgment.[106] The Court stated that it had to determine whether the plaintiff provided any evidence that the allegedly negligent actions of the defendants caused the plaintiff's fall.[107] The Court further stated the plaintiff was required to show that there was an issue of fact as to whether the snow abatement efforts by the defendants exacerbated the natural hazard created by the snowstorm.[108] The Court agreed with the trial court that the plaintiff failed to raise a genuine issue of material fact as to whether the precipitation from the storm was not the cause of the accident.[109] The Court noted that it was unclear as to when and if salt was applied to the steps on which the plaintiff fell.[110] The Court further noted that even if the plaintiff was correct that the defendants did not salt the steps where he fell, he failed to raise an issue of

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[102] *Herrera*, 217 Conn. App. at 675-76.
[103] *Id*. at 676.
[104] *Id*.
[105] *Id*. at 679.
[106] *Id*. at 680.
[107] *Id*. at 682.
[108] *Id*.
[109] *Id*. at 683.
[110] *Id*. at 685.

fact as to whether the defendants created or exacerbated the allegedly dangerous condition by engaging in remediation efforts during the storm.[111] The Court stated that the failure of the defendant to remove all snow and ice, without more, does not establish that the defendant increased the risk of harm.[112] The Court affirmed the judgment.[113]

## VIII. Professional Negligence

In *Carpenter v. Daar*,[114] the Supreme Court found that the good faith opinion letter requirement contained in General

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[111] *Id.*

[112] *Id.*

[113] *Id.* at 687.

[114] 346 Conn. 80, 84-87, 287 A.3d 1027 (2023). General Statutes § 52-190a provides: "(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. Such written opinion shall not be subject to discovery by any party except for questioning the validity of the certificate. 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. The similar health care provider who provides such written opinion shall not, without a showing of malice, be personally liable for any damages to the defendant health care provider by reason of having provided such written opinion. In addition to such written opinion, the court may consider other factors with regard to the existence of good faith. If the court determines, after the completion of discovery, that such certificate was not made in good faith and that no justiciable issue was presented against a health care provider that fully cooperated in providing informal discovery, the court upon motion or upon its own initiative shall impose upon the person who signed such certificate or a represented party, or both, an appropriate sanction which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion or other paper, including a reasonable attorney's fee. The court may also submit the matter to the appropriate authority for disciplinary review of the attorney if the claimant's attorney or the apportionment complainant's attorney submitted the certificate.

Statutes Section 52-190a was a statutory procedural device that does not implicate the court's jurisdiction in any way and, according, overruled *Morgan v. Hartford Hospital*.[115] In coming to its conclusion, the Court reviewed the rules of statutory construction, the legislative history of the statute in question, and remarked that the doctrine of stare decisis is not an inexorable command.[116] The Court additionally concluded that for purposes of a motion to dismiss pursuant to Section 52-190a (c) the sufficiency of the opinion letter is to be determined solely on the basis of the allegations contained in the complaint, without resort to a jurisdictional fact-finding process, and that the trial court retained authority to permit amendment or supplementation of an opinion letter.[117]

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(b) Upon petition to the clerk of any superior court or any federal district court to recover damages resulting from personal injury or wrongful death, an automatic ninety-day extension of the statute of limitations shall be granted to allow the reasonable inquiry required by subsection (a) of this section. This period shall be in addition to other tolling periods.

(c) The failure to obtain and file the written opinion required by subsection (a) of this section shall be grounds for the dismissal of the action."

[115] 301 Conn. 388, 21 A.3d 451 (2011).

[116] *Carpenter*, 346 Conn. at 103-113. General Statutes § 1-2z provides: "The meaning of a statute shall, in the first instance, be ascertained from the text of the statute itself and its relationship to other statutes. If, after examining such text and considering such relationship, the meaning of such text is plain and unambiguous and does not yield absurd or unworkable results, extratextual evidence of the meaning of the statute shall not be considered."

[117] *Carpenter*, 346 Conn. at 87. The Appellate Court in *Carpenter v. Daar*, 199 Conn. App. 367, 396, 405, 236 A.3d 239 (2020) affirmed the trial court's dismissal of the complaint on the grounds that the opinion letter did not establish that the author was a similar health care provider to the defendant pursuant to Section 52-184c (b). Section 52-184c provides: "(a) In any civil action to recover damages resulting from personal injury or wrongful death occurring on or after October 1, 1987, in which it is alleged that such injury or death resulted from the negligence of a health care provider, as defined in section 52-184b, the claimant shall have the burden of proving by the preponderance of the evidence that the alleged actions of the health care provider represented a breach of the prevailing professional standard of care for that health care provider. The prevailing professional standard of care for a given health care provider shall be 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.

(b) If the defendant health care provider is not certified by the appropriate American board as being a specialist, is not trained and experienced in a medical specialty, or does not hold himself out as a specialist, a 'similar health care provider' is one who: (1) Is licensed by the appropriate regulatory agency of this state or another state requiring the same or greater qualifications; and (2) is trained and experienced in the same discipline or school of practice and such training and experience shall be as a result of the active involvement in the practice or teaching of medicine within the five-year period before the incident giving rise to the claim.

(c) If the defendant health care provider is certified by the appropriate

The Court added that a motion to dismiss for failure to file an opinion letter pursuant to Section 52-190a was waivable, including by inaction.[118] Turning to the opinion letter in issue, the Court agreed with the plaintiff that his complaint and opinion letter read broadly and realistically sufficiently established compliance with Section 52-190a.[119]

In *Gervais v. JACC Healthcare Center of Danielson, LLC*,[120] the issue was whether the trial court improperly concluded that it lacked authority to permit the plaintiff to amend the opinion letter in the plaintiff's medical malpractice action in response to the defendants' motion to dismiss. The Appellate Court explained that the trial court in its order dismissing the plaintiff's action, found that (1) the opinion letter attached to the plaintiff's complaint was deficient pursuant to Connecticut's good faith opinion letter statute, General Statutes Section 52-190a, because it failed to sufficiently identify the author's qualifications, thereby depriving the trial court of the ability to ascertain whether the author was a "similar health care provider" as set forth in General Statutes Section 52-184c and (2) it lacked the authority to grant the plaintiff's request to amend the complaint in response to the motion to dismiss.[121] The Court found in light of *Carpenter v. Daar* that the trial court improperly denied the plaintiff's request to amend the complaint to supplement

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American board as a specialist, is trained and experienced in a medical specialty, or holds himself out as a specialist, a 'similar health care provider' is one who: (1) Is trained and experienced in the same specialty; and (2) is certified by the appropriate American board in the same specialty; provided if the defendant health care provider is providing treatment or diagnosis for a condition which is not within his specialty, a specialist trained in the treatment or diagnosis for that condition shall be considered a 'similar health care provider'.

(d) Any health care provider may testify as an expert in any action if he: (1) Is a 'similar health care provider' pursuant to subsection (b) or (c) of this section; or (2) is not a similar health care provider pursuant to subsection (b) or (c) of this section but, to the satisfaction of the court, possesses sufficient training, experience and knowledge as a result of practice or teaching in a related field of medicine, so as to be able to provide such expert testimony as to the prevailing professional standard of care in a given field of medicine. Such training, experience or knowledge shall be as a result of the active involvement in the practice or teaching of medicine within the five-year period before the incident giving rise to the claim."

[118] *Carpenter*, 346 Conn. at 126.

[119] *Id.* at 127-28.

[120] 221 Conn. App. 148, 150-51, 300 A.3d 1244 (2023).

[121] *Id.*

the opinion letter.[122] The Court also found unpersuasive the defendants' argument that the trial court's decision should be affirmed because the denial of the request to amend did not constitute an abuse of discretion.[123] The Court found that the trial court never exercised its discretion because it concluded that it lacked authority to permit the amendment.[124] Accordingly, the Court could not determine whether the trial court abused its discretion by denying the plaintiffs' request to amend.[125] The judgment was reversed and the case was remanded for further proceedings consistent with the opinion.[126]

The wrongful conduct rule was the subject of *Lastrina v. Bettauer*.[127] The plaintiff, as conservator of the estate of his son Daniel, appealed from the granting of the motions for summary judgment filed by the defendants, a psychologist and a physician.[128] The plaintiff claimed that the defendant psychologist violated the applicable standard of care by improperly diagnosing Daniel with posttraumatic stress disorder and that the defendant physician violated the applicable standard of care by prescribing medical marijuana to his son when he knew that Daniel suffered from bipolar disorder.[129] The Appellate Court affirmed the judgment of the trial court.[130] The Court stated that the wrongful conduct rule served as a limitation on liability in civil actions based on the notion that a plaintiff should not recover for injuries that are the result of his or her knowing and intentional participation in a criminal act.[131] The trial court determined that

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[122] *Id*. at 151.
[123] *Id*. at 163-64.
[124] *Id*. at 164.
[125] *Id*.
[126] *Id*.
[127] 217 Conn. App. 592, 289 A.3d 1222 (2023). In *Greenwald v. Van Handel*, 311 Conn. 370, 374, 88 A.3d 467 (2014) the Supreme Court found that it was not necessary to adopt a sweeping rule or exceptions thereto because under the facts of the case it would violate public policy to impose a duty on the defendant to protect the plaintiff from injuries arising as a result of the plaintiff's admitted illegal conduct.
[128] *Lastrina*, 217 Conn. App. at 594-95.
[129] *Id*. at 596-97.
[130] *Id*. at 595.
[131] *Id*. at 597.

Daniel's behavior in intentionally deceiving the defendants to obtain certification for medical marijuana constituted a felony.[132] The Court stated that Daniel did not seek treatment from the defendants for a condition from which he suffered; rather, he misrepresented to the defendants that he suffered from posttraumatic stress disorder when he knew that he did not.[133] The Court stated that Daniel's illegal conduct was intertwined with the alleged negligent treatment by the defendants because the treatment was part of and resulted from Daniel's fraud.[134] The Court further stated that there was no genuine issue of material fact as to whether the alleged injuries of Daniel arose from his volitional criminal conduct and, therefore, the claims against the defendants were barred even if they were negligent.[135]

In *Perdikis v. Klarsfeld*,[136] the Appellate Court agreed with the plaintiff that the trial court erred in denying his request to charge the jury that the jury could not consider his postsurgical actions as a cause of his injuries. The Court concluded that the introduction of competent evidence in the form of a expert medical opinion stated within a degree of reasonable medical certainty was required to allow the jury to infer a causal link between the plaintiff's actions and his injury.[137] The plaintiff sued the defendant, a surgeon who specialized in otolaryngology, commonly known as an ear, nose and throat doctor, asserting that the defendant had been negligent in the performance of the nasal surgery on him and that as a result of such malpractice, he suffered injuries.[138] The trial court instructed the jury on the law and included a sole proximate cause charge; specifically, that if the jury found the plaintiff's actions were the sole proximate cause of his injuries, then they should find for the defendant.[139] The Court stated that

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[132] *Id*. at 598.
[133] *Id*. at 608.
[134] *Id*.
[135] *Id*. at 613.
[136] 219 Conn. App. 343, 346, 295 A.3d 1017, *cert. denied*, 348 Conn. 903, 301 A.3d 528 (2023).
[137] *Id*.
[138] *Id*. at 346-47.
[139] *Id*. at 359.

it was error to give the sole proximate cause charge in the absence of any competent evidence supporting the charge.[140] The Court noted that in a medical malpractice case expert testimony is generally required to establish a causal link between an injury and its alleged cause.[141] The Court explained that although the defendant may rely on a general denial to introduce evidence to establish that an actor other than the defendant was the sole proximate cause of the plaintiff's injuries, in medical malpractice actions, in which the causation issue raised by the defendant goes beyond the field of ordinary knowledge and experience of the layperson, competent expert medical opinion evidence must be introduced.[142] The Court further explained that the trial court has a duty not to submit to the jury an issue upon which the evidence would not reasonably support a finding.[143] The Court found that the jury charge in issue was improper and further concluded that the sole proximate cause instruction was harmful because it likely affected the outcome of the case.[144] The defendant argued that the sole proximate cause instruction was harmless because the plaintiff did not submit jury interrogatories in the case and, therefore, the record was silent as to whether the jury addressed the issue of sole proximate cause at all as the jury may have decided that the defendant met the applicable standard of care.[145] The Court concluded that, based on Supreme Court and Appellate Court precedent, the general verdict rule did not apply where various grounds are advanced to defeat a claim under a general denial.[146] The Court stated that, as an intermediate appellate tribunal, it could not overrule the precedent established by a previous panel, nor was it at liberty to modify, evaluate or overrule the precedent of the Supreme Court.[147] For the foregoing reasons, the Court concluded that the likelihood of prejudice to

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[140] *Id*. at 361.
[141] *Id*. at 364.
[142] *Id*. at 366.
[143] *Id*. at 380.
[144] *Id*. at 381-82.
[145] *Id*.
[146] *Id*. at 383.
[147] *Id*. at 383-84.

the plaintiff was significant enough to warrant a new trial.[148]

*Gianetti v. Neigher*[149] discussed causation in a legal malpractice case; specifically, the need of a plaintiff to establish the "case-within-a-case" to prevail in a legal malpractice action. The Appellate Court affirmed the summary judgment granted in favor of the defendant, an attorney who represented the plaintiff in a prior civil action against a hospital.[150] The plaintiff alleged that the defendant committed professional malpractice by failing to bring on his behalf claims of Connecticut Unfair Trade Practice Act (CUTPA) violations and tortious interference with business expectancies against the hospital in the prior action.[151] The Court rejected the plaintiff's claim that the trial court abused its discretion in precluding the plaintiff's expert witness from testifying.[152] The Court explained that the trial court principally precluded the plaintiff's expert from testifying as a sanction for the plaintiff's noncompliance with the disclosure requirements set forth in Practice Book Section 13-4.[153]

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[148] *Id.* at 389.

[149] 214 Conn. App. 394, 280 A.3d 555, *cert. denied*, 345 Conn. 963, 285 A.3d 390 (2022).

[150] *Id.* at 397-98.

[151] *Id.* at 450-51.

[152] *Id.* at 447-48.

[153] *Id.* at 435. Practice Book § 13-4 provides, in pertinent part: "(a) A party shall disclose each person who may be called by that party to testify as an expert witness at trial ....

(b) A party shall file with the court and serve upon counsel a disclosure of expert witnesses which identifies the name, address and employer of each person who may be called by that party to testify as an expert witness at trial, whether through live testimony or by deposition. In addition, the disclosure shall include the following information:

(1) ... [T]he field of expertise and the subject matter on which the witness is expected to offer expert testimony; the expert opinions to which the witness is expected to testify; [and] the substance of the grounds for each such expert opinion ....

(3) ... [T]he party disclosing an expert witness shall, upon the request of an opposing party, produce to all other parties all materials obtained, created and/or relied upon by the expert in connection with his or her opinions in the case within fourteen days prior to that expert's deposition ....

(c) (1) Unless otherwise ordered by the judicial authority upon motion, a party may take the deposition of any expert witness disclosed pursuant to subsection (b) of this section ....

(h) A judicial authority may, after a hearing, impose sanctions on a party for failure to comply with the requirements of this section. An order precluding the testimony of an expert witness may be entered only upon a finding that: (1) the sanction of preclusion, including any consequence thereof on the sanctioned party's

The Court found that based on the record before it the trial court reasonably could have concluded that the sanction of preclusion was proportional to the plaintiff's noncompliance with disclosure rules and that his pattern of gamesmanship rose to a level of discovery abuse.[154] The Court also disagreed with the plaintiff that even if the trial court properly precluded his expert testimony, that genuine issues of material fact nonetheless existed as to the elements of causation and damages in his malpractice case.[155] The Court stated that, in general, 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.[156] The Court stated that, as a general rule, the plaintiff in a malpractice case must present expert testimony to establish the standard of care or skill that an attorney must exercise.[157] The Court further stated that expert testimony is also generally required to establish the element of causation.[158] The Court explained that the traditional method of presenting the merits of the prior action is often called the case-within-a-case: the plaintiff must prove that, in the absence of the alleged breach of duty by the attorney, the plaintiff would have prevailed in the prior cause of action.[159] In other words, the plaintiff must present expert testimony to establish that the defendant's conduct caused the injury of which he or she complains.[160] With respect to the claimed violations of CUTPA, General Statutes Section 42-110a et seq., the Court stated that Section 42-110b (a) provides: "[n]o person shall engage in unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce."[161] The Court stated that, in de-

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ability to prosecute or to defend the case, is proportional to the noncompliance at issue, and (2) the noncompliance at issue cannot adequately be addressed by a less severe sanction or combination of sanctions. ..."

154 *Gianetti*, 214 Conn. App. at 447-48.

155 *Id*. at 448.

156 *Id*. at 448-49.

157 *Id*. at 449.

158 *Id*.

159 *Id*. at 450.

160 *Id*.

161 *Id*. at 451.

termining whether a practice violates CUTPA, Connecticut has adopted the criteria set out in the cigarette rule by the Federal Trade Commission: (1) whether the practice, without necessarily having been previously considered unlawful, offends public policy, as it has been established by statutes, the common law, or otherwise, or is within at least the penumbra of some common-law, statutory, or other established concept of unfairness; (2) whether it is immoral, unethical, oppressive, or unscrupulous; or (3) whether it causes substantial injury to consumers or competitors or other business persons.[162] The Court continued by explaining that all three criteria do not need to be satisfied to support a finding of unfairness, and a practice may be unfair because of the degree to which it meets one of the criteria or because to a lesser extent, it meets all three.[163] The Court additionally stated that although a breach of contract may form the basis for a CUTPA claim, not every contractual breach rises to the level of a CUTPA violation.[164] The Court also stated that to prevail on his CUTPA claim the plaintiff was required to show that he was entitled to relief in the prior action, above and beyond the damages award he received in connection with his prevailing on the breach of contract claim.[165] The Court next set forth the legal standard that governed the plaintiff's claim of tortious interference with business expectancies. The Court stated that in order to recover in an action for tortious interference with business expectancies, the plaintiff must establish: (1) A business relationship existed between the plaintiff and another party; (2) the defendant intentionally interfered with the business relationship while knowing of the relationship; and (3) as a result of the interference, the plaintiff suffered actual loss.[166] The Court noted that the plaintiff failed to present expert testimony as to the elements of CUTPA, including whether the defendant's actions qualified as unfair pursuant to the cigarette rule, and whether he was entitled

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[162] *Id*.
[163] *Id*.
[164] *Id*. at 452.
[165] *Id*.
[166] *Id*. at 452-53.

to additional relief above and beyond the damages he recovered for breach of contract.[167] The Court also found that the plaintiff was unable to expert testimony as to the elements of his tortious interference with business expectancies claim.[168] In light of the fact that the plaintiff was unable to present expert testimony as to the foregoing material issues, the Court affirmed the summary judgment entered on behalf of the defendant.[169]

## IX. Sovereign Immunity

*Escobar-Santana v. State*[170] addressed whether the statutory phrase "medical malpractice claims" as contained in General Statutes Section 4-160 (f) is broad enough to encompass a mother's allegation that she suffered emotional distress damages from physical injuries to her child that were proximately caused by the negligence of healthcare professionals during the birthing process. The Supreme Court held that claims alleging such damages can qualify as a medical malpractice claim under Section 4-160 (f).[171] The Court explained that Section 4-160 (f) waives the state's sovereign immunity with respect to certain medical malpractice actions and permits those actions to proceed against the state without the need of prior authorization from the Claims Commissioner.[172] The Court found that the trial court properly denied the defendant's motion to dismiss addressed to a count of the complaint brought by the named plaintiff and her son because the plaintiffs alleged a valid medical malpractice action in that count.[173] The Court acknowledged that in the healthcare context, both negligent infliction of emotional distress and bystander emotional distress are causes of action distinct from medical malpractice.[174] The Court also

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[167] *Id*. at 454.
[168] *Id*.
[169] *Id*.
[170] 347 Conn. 601, 604-05, 298 A.3d 1222 (2023).
[171] *Id*. at 605.
[172] *Id*. at 604-05.
[173] *Id*. at 605.
[174] *Id*. at 625. Connecticut recognizes a cause of action for bystander emotional distress arising out of medical malpractice. Squeo v. Norwalk Hospital Assn., 316 Conn. 558,113 A.3d 932 (2015).

noted that the waiver of sovereign immunity contained in Section 4-160 (f), which is limited to medical malpractice actions, does not extend to negligent infliction of emotional distress and bystander emotional distress claims.[175] The Court further remarked that the count in question could be read to allege a medical malpractice claim, and that the defendant could have eliminated portions of the complaint alleging negligent infliction of emotional distress and bystander emotional distress by utilizing a request to revise.[176]

In *Caverly v. State*,[177] the issue was whether the plaintiff's medical malpractice case against the state was barred by the doctrine of sovereign immunity. The state argued that, because the plaintiff received a settlement payment from a joint tortfeasor related to the plaintiff's decedent's death, the plaintiff's lawsuit was barred by General Statutes Section 4-160b (a).[178] The Supreme Court agreed with the trial court's denial of the state's motion to dismiss, holding that Section 4-160b (a) applies only to subrogated or assigned claims and not to payments made by joint tortfeasors.[179] The Court explained that the action against the joint tortfeasor, a pharmacy, sought damages for its own independent acts of alleged negligence, and, accordingly, the settlement proceeds the plaintiff received in that action did not constitute an indirect payment of the plaintiff's claim for monetary damages against the state.[180] The Court further explained that because the plaintiff's claims against the joint tortfeasor and the state were separate and distinct, the plaintiff's medical malpractice claim was not "indirectly paid by … a third party" within the meaning of Section 4-160b (a).[181] The Court

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[175] *Escobar-Santana v. State*, 347 Conn. at 625.

[176] *Id.* at 625-26.

[177] 342 Conn. 226, 228-29, 269 A.3d 94 (2022).

[178] *Id.* at 229. General Statutes § 4-160b (a) provides: "[t]he Office of the Claims Commissioner shall not accept or pay any subrogated claim or any claim directly or indirectly paid by or assigned to a third party."

[179] *Caverly*, 342 Conn. at 229. Although the denial of motion to dismiss is generally a nonappealable interlocutory ruling, the denial of a motion to dismiss based on a claim of sovereign immunity is an immediately appealable final judgment. *Id.* at 232, note 5.

[180] *Id.* at 235.

[181] *Id.*

also stated that its interpretation of Section 4-160b (a) does not permit a double recovery.[182] The Court stated that plaintiffs are not foreclosed from suing multiple defendants, either jointly or separately, for injuries for which each is liable, nor are they foreclosed from obtaining multiple judgments against joint or successive tortfeasors.[183] However, the possible rendering of multiple judgments does not defeat the rule that a litigant may recover just damages only once.[184] The Court added that a negotiated settlement does not equate to a satisfaction of a judgment representing full compensation for injuries.[185]

## X. Trial Practice

Piercing the corporate veil was the principal issue discussed in *Deutsche Bank AG v. Sebastian Holdings, Inc.*[186] The plaintiff brought the action against the defendants, a holding company and its sole shareholder, in an attempt to enforce an approximately $243 million foreign judgment (English judgment) against the defendants.[187] After a trial to the court, the trial court denied the plaintiff's requested relief and render judgment in favor of the defendants.[188] On appeal, the plaintiff contended that the trial court improperly declined to pierce the defendant holding company's corporate veil and to hold the defendant shareholder jointly and severally liable for the foreign judgment.[189] The Supreme Court disagreed and affirmed.[190] The plaintiff argued that the trial court erred in applying the law of Turks and Caicos Islands, a British territory, when determining whether to allow the plaintiff to pierce the corporate veil because the trial court should have applied New York or Connecticut law.[191] The

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[182] *Id*. at 236.
[183] *Id*.
[184] *Id*.
[185] *Id*. at 237.
[186] 346 Conn. 564, 294 A.3d 1 (2023).
[187] *Id*. at 568.
[188] *Id*.
[189] *Id*. at 568-69.
[190] *Id*. at 569.
[191] *Id*. at 589. In Connecticut, there are two theories under which the corporate veil may be pierced, specifically, the instrumentality rule and the identity rule. *Id*. at 590. The instrumentality rule requires in any case, except an express agency,

Court concluded that the trial court's factual findings foreclosed the plaintiff's claim under the law of New York, Connecticut and Turks and Caicos Islands and, therefore, any error in the trial court's choice of law analysis or the application of the law of Turks and Caicos Islands was harmless.[192] The Court explained that although the law on piercing the corporate veil was not coextensive in the three jurisdictions, the law in all three of the jurisdictions demonstrates that it is an extraordinary remedy that requires, at a minimum, a determination by the trial court that the corporate form was used to promote a wrong or injustice, and that it would be fundamentally unfair if the corporate form were not disregarded.[193] The Court found that the trial court unequivocally absolved the defendant shareholder of any wrongdoing vis-à-vis the defendant corporation's dealing with the plaintiff.[194]

A bill of discovery was the subject of *Benvenuto v. Brookman*.[195] The defendant, who published an Internet blog, appealed from an order granting a bill of discovery requiring him to submit his laptop and cell phone for a forensic analysis that would allow the plaintiff to find out the identities of individuals who posted comments on the blog containing allegedly defamatory statements about the plaintiff.[196] The

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proof of: (1) control, not mere majority or complete stock control, but complete domination, not only of finances but of policy and business practice with respect to the transaction challenged so that the corporate entity had no separate mind, will or existence of its own; (2) that such control must have been used to commit fraud or wrong, to perpetuate the violation of a statutory or other positive legal duty, or a dishonest or unjust act in contravention of the plaintiff's rights; and (3) that the control and breach of duty proximately caused the injury or loss complained of. *Id*, note 8. On the other hand, the identity rule states that if the plaintiff can show that there was such unity of interest and ownership that the independence of the corporation had in fact ceased or had never begun, and adherence to the fiction of separate identity would serve only to defeat justice and equity by permitting the entity to escape liability arising out of the operation conducted by one corporation for the benefit of the whole enterprise. *Id.* Under either rule, piercing the corporate veil is not lightly imposed. *Id*. at 591. The corporate veil is pierced only under exceptional circumstances, for example, when the corporation is a mere shell, serving no legitimate purpose, and used primarily as an intermediary to perpetuate fraud or to promote injustice. *Id*.

[192] *Id*. at 592.

[193] *Id*.

[194] *Id*. at 593.

[195] 348 Conn. 609, 612, 309 A.3d 292 (2024).

[196] *Id*.

trial court also ordered that the parties attempt to reach an agreement as to the conditions of a protective order that governed the scope and procedures to be utilized in the forensic analysis, or, in the absence of an agreement, submit proposed orders so the court could resolve any disagreements regarding the protective order and forensic analysis.[197] The plaintiff claimed that he needed the information so he could file defamation actions against anonymous commenters on the blog.[198] The Supreme Court explained that a bill of discovery is an equitable action which seeks no remedy other than the disclosure of information or documentation for use in another action.[199] The Court further stated that a bill of discovery is an independent action.[200] Following oral argument, the Court ordered the parties to file supplemental briefs addressing whether the trial court's order was an appealable final judgment.[201] The Court stated that except as set forth in the state constitution, the jurisdiction of appellate courts is determined by statute.[202] The Court added that General Statutes Sections 51-197a and 52-263 limit the statutory right to appeal to appeals by aggrieved parties from final judgments.[203] Because the requirement of a final judgment implicates the Court's jurisdiction, the Court explained that it must determine whether a judgment is final before reaching the merits of the appeal.[204] The Court stated that the parties had not complied with the trial court order requiring them prior to conducting discovery to either file an agreed upon protective order and search protocols, or, in the event that there was no agreement, to return to the trial court for resolution of those issues.[205] The Court noted that both parties, in their supplemental briefs, agreed that the judgment in issue for purposes of appeal was not final unless it came

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197 *Id*.
198 *Id*. at 613.
199 *Id*. at 618.
200 *Id*.
201 *Id*. at 616.
202 *Id*.
203 *Id*. at 617.
204 *Id*.
205 *Id*. at 616.

within a *State v. Curcio*[206] exception.[207] The Court stated that an otherwise nonfinal judgment may be considered final and appealable under *Curcio* (1) when the order or action terminates a separate and distinct preceding or (2) the order or action so concludes the rights of the parties that further proceedings cannot affect them.[208] The defendant argued that the judgment was appealable under the second prong of *Curcio*.[209] The Court disagreed with the defendant and dismissed the appeal for lack of jurisdiction.[210]

*King v. Hubbard*[211] discussed whether the plaintiffs had an absolute right to withdraw an action. In response to the plaintiffs' action, the defendant filed a special motion to dismiss pursuant to General Statutes Section 52-196a, based on the defendant's claimed exercise of his right of free speech in connection with a matter of public concern. The defendant also requested costs and reasonable attorney's fees.[212] The trial court ordered a hearing on the defendant's special motion to dismiss but before the hearing took place the plaintiffs withdrew the action.[213] The defendant filed a motion to restore the case to the docket, which was denied by the trial court.[214] The Appellate Court stated that the issue of whether a case should be restored to the docket is one of judicial discretion.[215] The Court stated that a plaintiff may withdraw an action pursuant to General Statutes Section 52-80 before the commencement of a hearing on the merits, but that after the commencement of a hearing on the merits of an issue of

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[206] 191 Conn. 27, 463 A.2d 566 (1983).
[207] *Benvenuto*, 348 Conn. at 616.
[208] *Id*. at 620.
[209] *Id*.
[210] *Id*. at 620-25.
[211] 217 Conn. App. 191, 288 A.3d 218 (2023).
[212] *Id*. at 196-97. 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."
[213] *King*, 217 Conn. App. at 197.
[214] *Id*. at 199.
[215] *Id*. at 201.

fact, the plaintiff may withdraw such action only upon leave of court for cause shown.[216] The Court construed Section 52-80 as reflecting only that prior to a hearing on the merits, the withdrawal of an action does not require the permission of the court.[217] The Court concluded that at the time of the plaintiffs' withdrawal of their action, the defendant did not have the right to have the court consider the merits of the special motion to dismiss.[218] The Court further concluded that the defendant had not acquired a vested right to attorney's fees by merely filing a special motion to dismiss.[219] The Court additionally concluded that the defendant had failed to demonstrate that the trial court's ruling prejudiced a vested right of the plaintiff.[220]

*Laiuppa v. Moritz*[221] found that the accidental failure of suit statute, General Statutes Section 52-592,[222] did not save the plaintiff's action. The trial court granted the defendant's motion to dismiss the plaintiff's underlying action due to insufficient service of process.[223] In response to the plaintiff's

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[216] *Id*. at 202. General Statutes § 52-80 provides: "If the plaintiff, in any action returned to court and entered in the docket, does not, on or before the opening of the court on the second day thereof, appear by himself or attorney to prosecute such action, he shall be nonsuited, in which case the defendant, if he appears, shall recover costs from the plaintiff. The plaintiff may withdraw any action so returned to and entered in the docket of any court, before the commencement of a hearing on the merits thereof. After the commencement of a hearing on an issue of fact in any such action, the plaintiff may withdraw such action, or any other party thereto may withdraw any cross complaint or counterclaim filed therein by him, only by leave of court for cause shown."

[217] *King*, 217 Conn. App. at 202-203.

[218] *Id*. at 209.

[219] *Id*. at 210.

[220] *Id*.

[221] 216 Conn. App. 344, 347, 285 A.3d 391 (2022), *cert. granted*, 347 Conn. 906, 288 A.3d 628 (2023).

[222] 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."

[223] *Laiuppa*, 216 Conn. App. at 350-51.

new suit under the accidental failure of suit statute, the defendant filed a motion for summary judgment, arguing that she did not have actual notice of the first action to allow the plaintiff to claim the protection of the accidental failure of suit statute.[224] After the trial court granted the summary judgment motion, the plaintiff appealed contending that a genuine issue of material fact existed as to whether the action was saved by the accidental failure of suit statute.[225] The Appellate Court rejected the plaintiff's arguments including that the defendant's insurance company and designated counsel for the defendant each had actual notice before the statute of limitations had expired, noting that the plaintiff failed to provide any legal authority that the defendant's insurance company was her "agent" for the purpose of receiving service of process.[226] The Court further stated that General Statutes Section 52-57 (a)[227] permits only personal or abode service on an individual and not on an individual's agent.[228]

An issue raised in *Kinity v. US Bancorp*.[229] was whether a trial court has the authority to summarily enforce a settlement agreement, reached by the parties postjudgment, during the pendency of an appeal. The case arose from actions taken by the defendants, as servicer of a residential loan from a lender to the plaintiff, and his spouse (borrowers), under a note secured by a mortgage on the borrowers' residential property.[230] The Appellate Court concluded that a party seeking to enforce an agreement should not be deprived of the ability to file a motion to enforce simply because the matter that settled is on appeal when the parties reached

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[224] *Id*. at 351-52.

[225] *Id*. at 355.

[226] *Id*. at 368.

[227] General Statutes § 52-57 (a) provides, in part: "that process in any civil action shall be served by leaving a true and attested copy of it …with the defendant, or at his usual place of abode, in this state."

[228] *Laiuppa*, 216 Conn. App. at 368.

[229] 212 Conn. App. 791, 814-15, 277 A.3d 200 (2022). The trial court has the inherent authority to enforce summarily a settlement agreement, as a matter of law, when the terms of the agreement are clear and not in dispute. Audubon Parking Associates Ltd. Partnership v. Barclay & Stubbs, Inc., 225 Conn. 804, 811, 626 A.2d 729 (1993).

[230] *Kinity*, 212 Conn. App. at 794-95.

an agreement.[231] The Court also disagreed with the plaintiff's argument the trial court's decision was clearly erroneous because there was no meeting of the minds as to the nature of the agreement.[232] The Court stated that a settlement agreement is a contract between the parties.[233] The Court stated that in order for an enforceable contract to exist, the trial court must find that the parties' minds had truly met because if there had been a misunderstanding between the parties or a misapprehension by one or both so that their minds had never met, no contract had been entered into by them and the trial court will not make one for them which they themselves did not make.[234] The Court further stated that a meeting of the minds is defined as a mutual agreement and assent of two parties to contract to substance and terms.[235] The Court also explained that mutual assent is to be judged only by overt acts and words rather than by the hidden, subjective or secret intention of the parties.[236] The Court further stated that although the phrase meeting of the minds is commonly used by the courts to determine whether there has been mutual assent, it has been described as a misnomer because the minds of the parties to a contract may not, in fact, subjectively meet; rather the objective assent is what is required.[237] The Court concluded that the trial court did not err in finding that the parties had a meeting of the minds because the overt acts and words established assent to a settlement agreement.[238]

The failure to satisfy either prong of the test to set aside a judgment rendered after a nonsuit was fatal in *McDonnell v. Roberts*.[239] The plaintiff appealed after the trial court entered a judgment of nonsuit against her for failing to comply with discovery orders.[240] The Appellate Court stated that

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[231] *Id*. at 823.
[232] *Id*.
[233] *Id*. at 824.
[234] *Id*. at 825.
[235] *Id*.
[236] *Id*.
[237] *Id*. at 826.
[238] *Id*. at 828.
[239] 224 Conn. App. 388, 312 A.3d 1103 (2024).
[240] *Id*. at 390-92.

the authority to set aside a judgment of nonsuit is conferred by General Statutes Section 52-212.[241] The Court explained that there is a two-pronged test for setting aside a judgment of nonsuit; specifically, there must be a showing (1) that a good cause of action, the nature of which must be set forth, existed at the time judgment was entered, and (2) that the plaintiff was prevented from prosecuting the claim because of mistake, accident or other reasonable cause.[242] The Court affirmed the denial of the plaintiff's motion to open and set aside the judgment of nonsuit, finding that the plaintiff did not satisfy her burden of showing reasonable cause for her failure to comply with discovery.[243] The Court further found that, because the failure of the plaintiff to satisfy either prong is fatal to her motion to open, it was unnecessary to discuss the plaintiff's arguments as to the first prong.[244]

*In Re Cole*,[245] the primary issue, which reached the Supreme Court by way of a certified question in a bankruptcy

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[241] *Id.* at 396. General Statutes § 52-212 (a) provides, in part: "Any judgment rendered or decree passed upon a default or nonsuit in the Superior Court may be set aside, within four months following the date on which the notice of judgment or decree was sent, and the case reinstated on the docket, on such terms in respect to costs as the court deems reasonable, upon the complaint or written motion of any party or person prejudiced thereby, showing reasonable cause, or that a good cause of action or defense in whole or in part existed at the time of the rendition of the judgment or the passage of the decree, and that the plaintiff or defendant was prevented by mistake, accident or other reasonable cause from prosecuting the action or making the defense...." Practice Book § 17-43 (a) provides in part: "Any judgment rendered or decree passed upon a default or nonsuit may be set aside within four months succeeding the date on which notice was sent, and the case reinstated on the docket on such terms in respect to costs as the judicial authority deems reasonable, upon the written motion of any party or person prejudiced thereby, showing reasonable cause, or that a good cause of action or defense in whole or in part existed at the time of the rendition of such judgment or the passage of such decree, and that the plaintiff or the defendant was prevented by mistake, accident or other reasonable cause from prosecuting or appearing to make the same. Such written motion shall be verified by the oath of the complainant or the complainant's attorney, shall state in general terms the nature of the claim or defense and shall particularly set forth the reason why the plaintiff or the defendant failed to appear. The judicial authority shall order reasonable notice of the pendency of such written motion to be given to the adverse party, and may enjoin that party against enforcing such judgment or decree until the decision upon such written motion...."

[242] *McDonnell*, 224 Conn. App. at 397.

[243] *Id.* at 400.

[244] *Id.*

[245] 347 Conn. 284, 288-90, 297 A. 3d 151 (2023). The amended homestead exemption is codified at General Statutes § 52-352b (21). The relevant change by the legislature was to increase the homestead exemption from $75,000 to $250,000

appeal from the United States District Court for the District of Connecticut, was whether the expanded homestead exemption, contained in P.A. 21-161 (Reg. Sess.) Section 1 (Act), applied in bankruptcy proceedings filed on or after the effective date of the Act to debts that accrued prior to that date. The arguments of the parties centered around the principle, contained in General Statutes Section 55-3,[246] that procedural amendments to a statute presumptively apply retrospectively and substantive amendments presumptively apply prospectively only.[247] The Court stated that Section 55-3 is applicable only if the amendment would have a retrospective effect.[248] The Court found that the Act was not retroactive as applied to the debtor's bankruptcy petition and, therefore, Section 55-3 was not applicable.[249] The Court concluded that, because the legislature did not direct otherwise, the enhanced homestead exemption set forth in the Public Act applied to all bankruptcy and postjudgment proceedings filed on or after the effective date of the Act, regardless of when the underlying debts accrued.[250]

In *John Hancock Life Insurance Company v. Curtin*,[251] the plaintiff insurance company instituted an interpleader action to determine the appropriate distribution of a life insurance policy issued to the decedent. The defendants, the decedent's former spouse and her daughter, appealed from a summary judgment entered in favor of the coexecutors of the decedent's estate and the order distributing the proceeds

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to certain debts. *In Re Cole*, 347 Conn. at 288. The legislature maintained the $75,000 exemption for money judgments arising out of certain tort claims. *Id.*, note 2. The Court explained that under the federal Bankruptcy Code all property of the debtor, including exempt property, initially becomes part of the bankruptcy estate, and the debtor is, thereafter, permitted to assert exemptions by filing a list of property that he or she claims as exempt. *Id.* at 290, note 4.

[246] General Statutes § 55-3 provides: "No provision of the general statutes, not previously contained in the statutes of the state, which imposes any new obligation on any person or corporation, shall be construed to have retrospective effect." Section 55-3 is a rule of presumed legislative intent that statutes affecting substantive rights shall apply prospectively only. *In Re Cole*, 347 Conn. at 298.

[247] *In Re Cole*, 347 Conn. at 289.

[248] *Id.* at 299.

[249] *Id.* at 310.

[250] *Id.*

[251] 219 Conn. App. 613, 615, 295 A.3d 1055, *cert. granted*, 348 Conn. 921, 304 A.3d 147 (2023).

of the policy to the decedent's estate.[252] The Appellate Court explained that actions pursuant to General Statutes Section 52-484[253] involve two distinct parts: (1) the trial court must determine whether the interpleader plaintiff has alleged facts sufficient to establish that there are adverse claims to the fund or property at issue, and if the court considers interpleader to be proper under the circumstances, then the court may render an interlocutory judgment of interpleader; and (2) only once an interlocutory judgment of interpleader has been rendered may the court hold a trial on the merits, compelling the parties to litigate their respective claims to the disputed property.[254] The Court concluded that the trial court properly determined, as a matter of law, that the decedent's former spouse and her daughter, were not entitled to equitable relief in the form of a distribution of the policy proceeds.[255]

*Stanley v. Scott*[256] found that the failure to brief a claim, even by a self-represented party, can be fatal to an appeal. The plaintiff appeared to claim that the defendants illegally obtained his cell phone records and used them against him in his underlying criminal prosecution.[257] The Appellate Court stated that the plaintiff's brief failed to identify any claim of error made by the trial court nor did it analyze any of the bases for the trial court's granting of the defendants' motion for summary judgment.[258] The Court noted that the plaintiff

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[252] *Id.*

[253] General Statutes § 52-484 provides: "Whenever any person has, or is alleged to have, any money or other property in his possession which is claimed by two or more persons, either he, or any of the persons claiming the same, may bring a complaint in equity, in the nature of a bill of interpleader, to any court which by law has equitable jurisdiction of the parties and amount in controversy, making all persons parties who claim to be entitled to or interested in such money or other property. Such court shall hear and determine all questions which may arise in the case, may tax costs at its discretion and, under the rules applicable to an action of interpleader, may allow to one or more of the parties a reasonable sum or sums for counsel fees and disbursements, payable out of such fund or property; but no such allowance shall be made unless it has been claimed by the party in his complaint or answer."

[254] *John Hancock Life Insurance Company*, 219 Conn. at 621.

[255] *Id.*

[256] 222 Conn. App. 301, 302, 306, 304 A.3d 892 (2023), *cert. denied*, 348 Conn. 945, 308 A.3d 34 (2024).

[257] *Id.* at 305.

[258] *Id.* at 306.

had filed other civil actions and appeals in connection with his conviction and incarceration.[259] The Court stated that although Connecticut courts are solicitous of self-represented parties, the treatment afforded to self-represented parties does not permit it to address a claim when the self-represented party has failed to brief that claim.[260] The Court affirmed the judgment, noting that plaintiff's omissions operated as an abandonment of any challenge to the trial court's judgment.[261]

Another self-represented party fared no better in *Worth v. Picard*,[262] where the Appellate Court dismissed the appeal as moot. The plaintiff appealed the summary judgment entered in favor of the defendant.[263] Although the plaintiff argued, on appeal, that the trial court erred in concluding that the litigation privilege applied, she did not challenge one of the independent grounds upon which summary judgment was entered.[264] The Court explained that since the plaintiff did not challenge every independent ground, it needed to consider whether the appeal was moot.[265] The Court stated that mootness is a question of justiciability that must be decided, as a threshold matter, because it invokes subject matter jurisdiction.[266] The Court dismissed the appeal because it was moot, explaining that where a plaintiff fails to challenge all bases of a trial court's adverse ruling, even if the Court were to agree with the plaintiff on the issue raised, the Court still would not be able to provide any relief in light of the adverse rulings which were not raised.[267] In *Doe v. Quinnipiac Uni-*

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[259] *Id*. at 303. The Appellate Court explained that it, like the trial court, may take judicial notice of files of the Superior Court in the same or other cases. *Id*., note 2.

[260] *Id*. at 306.

[261] *Id*.

[262] 218 Conn. App. 549, 550-51, 292 A.3d 754 (2023). The plaintiff brought an action against the defendant, who was the attorney for the mortgagee who obtained a summary process execution following a judgment of strict foreclosure of the subject property against the plaintiff. *Id*. at 551-52. The gravamen of the complaint was that the defendant engaged in impropriety with respect to the summary process execution. *Id*. at 552.

[263] *Id*. at 550.

[264] *Id*. at 553.

[265] *Id*. at 553-54.

[266] *Id*. at 554.

[267] *Id*. at 554-55.

*versity*,[268] the Appellate Court also dismissed the plaintiff's appeal as moot because the plaintiff did not challenge every independent basis on which the trial court granted the defendants' motion to dismiss the plaintiff's claims.

*Cameron v. Santiago*,[269] another case involving a self-represented party, resulted in a reversal where the Appellate Court found that the plaintiff had been denied her procedural due process where the trial court *sua sponte* dismissed her action, with prejudice, because she was not given notice and an opportunity to be heard with respect to the reasons on which the trial court based its dismissal. The Court stated that whether a party was deprived of his or her due process rights is a question of law to which the appellate courts grant plenary review.[270] The Court further stated that fundamental principles of due process require that all persons directly concerned in an adjudication be given reasonable notice and an opportunity to present their claims or defenses.[271] In deciding in the plaintiff's favor, the Court noted that the plaintiff was entitled to adequate notice of the issues that the trial court intended to address at a pretrial conference and that the trial court did not give the plaintiff an opportunity to be heard on any of the grounds that it raised on its own on which it based its dismissal of the action.[272]

*Stanziale v. Hunt*[273] discussed the applicability of the general verdict rule and certain evidentiary issues. The plaintiff appealed from a judgment entered in favor of the defendants, which was rendered upon the general verdict of a jury.[274] On appeal, the plaintiff asserted, among other things, that the trial court improperly denied his pretrial motion in limine to redact from his medical records all statements as to the speed at which he was operating his motor vehicle at the time of

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[268] 218 Conn. App. 170, 177-179, 291 A.3d 153 (2023).
[269] 223 Conn. App. 836, 837, 310 A.3d 391 (2024).
[270] *Id.* at 842.
[271] *Id.*
[272] *Id.* at 843.
[273] 219 Conn. App. 71, 293 A.3d 931, *cert. denied*, 347 Conn. 905, 297 A.3d 198 (2023).
[274] *Id.* at 73.

the accident.[275] The defendants argued that the general verdict rule precluded review of the plaintiff's arguments, and, if the general verdict rule did not bar the review of those arguments, the arguments did not require the reversal of the judgment.[276] In their answer, the defendants denied the essential allegations of the plaintiff's complaint and interposed a special defense of comparative negligence, alleging that the plaintiff due to his own negligence in operating his motorcycle caused the accident and his own injuries.[277] The Appellate Court began by summarizing the relevant legal principles governing the operation of the general verdict rule. The Court stated that under the general verdict rule, if a jury renders a general verdict for one party, and the party raising a claim of error on appeal did not request interrogatories, an appellate court will presume that the jury found every issue in favor of the prevailing party.[278] The Court further explained that in a case in which the general verdict rule operates, if any ground for the verdict is proper, the verdict must stand; only if every ground is improper does the verdict fall.[279] The Court continued in stating that, as in the case before it, the general verdict rule applies where there is a denial of a complaint and the pleading of a special defense.[280] With respect to the specific arguments advanced by the plaintiff, the Court stated that when an appellant's claim on appeal challenges the trial court's evidentiary rulings, the applicability of the general verdict rule to any such claim is contingent on whether the evidence challenged is relevant to just some, but not all, of the grounds on which the jury may have based its verdict.[281] In addition, the general verdict rule does not bar review of claims if the contested evidence is relevant to all the possible grounds of the jury's general verdict.[282] The Court concluded that the general verdict rule did not bar its

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[275] *Id*.
[276] *Id*. at 74.
[277] *Id*. at 75-76.
[278] *Id*. at 85.
[279] *Id*.
[280] *Id*. at 86.
[281] *Id*. at 87-88.
[282] *Id*. at 89.

review of the plaintiff's claims because the evidence of the speed of the plaintiff's motorcycle and the distance it skidded were relevant to the jury's determination whether the plaintiff or the defendant operator was negligent, and if both were negligent, whose negligence was greater.[283] Turning to the plaintiff's contention that the trial court improperly denied his motion in limine to redact from his medical records all statements as to the speed at which he was operating his motor vehicle, the Court noted initially that the moving party has the burden in demonstrating that the challenged statements were inadmissible.[284] The Court also noted that with respect to an otherwise admissible medical record, the burden is on the objecting party to specify in his or her objection which statements are inadmissible under the medical treatment hearsay exception.[285] The Court rejected the plaintiff's argument that he did make any of the challenged statements regarding his speed because a review of the record showed that at least several of the statements were attributable to him.[286] The Court further noted that the plaintiff failed to establish that the statements involving speed were inadmissible under the hearsay exception for statements by a party opponent.[287] Moreover, the Court found that the plaintiff failed to show that the challenged statements were not admissible under the medical treatment exception to the hearsay rule by demonstrating that they were not relevant to the diagnosis or treatment of his injuries.[288] The plaintiff maintained that statements in medical records as to facts regarding only the legal responsibility of other persons in causing the accident should be excluded from such records since they are not relevant to the plaintiff's medical treatment.[289] The Court agreed with the defendant that if the medical records include additional information as to the nature and extent of the injury and inform the medical provider's judgment as to

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[283] *Id*. at 90-92.
[284] *Id*. at 96.
[285] *Id*. at 96-97.
[286] *Id*. at 97-98.
[287] *Id*. at 99.
[288] *Id*.
[289] *Id*. at 99-100.

the type of treatment, then such information is admissible.[290] The Court stated that it was clear that information regarding speed and physical impact was relevant to the diagnosis of the extent of injuries and treatment and was, therefore, admissible.[291]

The standards to be applied in order to find a party in civil contempt were addressed in *Lafferty v. Jones*.[292] The horrific underlying facts to the case are, unfortunately, well known. The case arose out of the Sandy Hook Elementary School mass shooting of children and adults.[293] The plaintiffs, including a first responder and family members of those killed in the shooting, brought claims against the defendants, including Alex Jones.[294] Before the case proceeded to trial for a hearing in damages, the plaintiffs noticed the deposition of Jones.[295] By agreement of the parties the deposition was to take place on two consecutive days.[296] The day before the deposition Jones filed a motion for protective order, asserting that he was under the care of a doctor for a medical condition that required immediate testing and that his doctor was of the opinion that he should not be submit to the deposition.[297] An emergency hearing took place that day, during which Jones's attorney submitted a letter from a doctor, under seal, for an in camera inspection.[298] The trial court found that the letter was actually a bare-bones note.[299] At the hearing, the plaintiffs' attorney argued that Jones was not at home under his doctor's care, but was actually broadcasting his live show at that time.[300] The trial court denied the motion for protective order.[301] Jones did not appear for his deposition and the plaintiff filed a motion for civil contempt against Jones.[302]

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290 *Id*. at 100.
291 *Id*. at 101-102.
292 222 Conn. App. 855, 307 A.3d 923 (2023).
293 *Id*. at 858.
294 *Id*.
295 *Id*. at 859.
296 *Id*.
297 *Id*.
298 *Id*. at 859-60.
299 *Id*. at 860.
300 *Id*.
301 *Id*.
302 *Id*. at 862-63.

After a hearing on the motion for civil contempt, the trial court granted the motion and ordered Jones to pay conditional fines, which would be suspended on each day that Jones completed a full day's deposition.[303] Thereafter, Jones submitted to the deposition and the court ordered the fines to be returned to Jones.[304] On appeal to the Appellate Court, Jones argued that the trial court abused its discretion in holding him in civil contempt.[305] The Court stated that civil contempt is committed when a person violates a court order which requires a person in specific and definite language to do or refrain from doing an act or a series of acts.[306] To constitute contempt, it is not sufficient that a party violate a court order; the violation must be willful, and the party seeking an order has the burden to prove, by clear and convincing evidence, that there was willful noncompliance of a clear and unambiguous directive.[307] The only issue that Jones raised on appeal was whether the trial court abused its discretion in finding that his violation of a court order was willful.[308] The Court agreed with the trial court that the fact that Jones elected to host a live radio broadcast from his studio at the time of the motion for protective order hearing undermined his claim that he was too ill to submit to a deposition.[309] The Court concluded that the trial court could reasonably infer, based on the facts before it, that Jones's violation of the trial court's order was willful and, accordingly, the trial court did not abuse its discretion in finding Jones in contempt.[310]

The right to oral argument on a summary judgment motion was addressed in *Bradley v. Yovino*.[311] The plaintiff argued, on appeal, that the trial court improperly failed to provide him an opportunity for oral argument before rendering summary judgment on behalf of the defendant because

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303 *Id*. at 863.
304 *Id*. at 864.
305 *Id*.
306 *Id*. at 865.
307 *Id*.
308 *Id*. at 866.
309 *Id*. at 867.
310 *Id*.
311 218 Conn. App. 1, 291 A.3d 133 (2023).

a motion for summary judgment is arguable as a matter of right under Practice Book Section 11-18.[312] The Appellate Court found that the plaintiff had a right to oral argument on the motion and that his right was improperly denied.[313] The Court also stated that to prevail on a claim of a procedural error, the party must demonstrate that the trial court's erroneous actions likely affected the result.[314] The Court set forth the standard of review and the legal principles relevant to the claim. The Court stated that the party seeking summary judgment has the initial burden of showing the absence of any genuine issue of material fact, which under applicable substantive law entitle him to judgment as a matter of law.[315] The Court further stated that the party opposing the motion for summary judgment must provide an evidentiary foundation to demonstrate the existence of a genuine issue of material fact.[316] Turning to the record before it, the Court stated that the defendant had met its initial burden in establishing that there was no genuine issue of material fact and that the burden then shifted to the plaintiff to establish, on the basis of timely submission of evidentiary materials, that a genuine issue of material fact existed in order to defeat the defendant's motion.[317] The Court further noted that, during the approximately six month period after the motion was filed and before it was granted, the plaintiff failed to file any opposition to the motion and, accordingly, failed to meet his burden to defeat the motion.[318] The Court found that in light of the procedural posture of the record, it was not convinced

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[312] *Id*. at 20. Practice Book § 11-18 (a) provides in relevant part: "Oral argument is at the discretion of the judicial authority except as to ... motions for summary judgment ... and/or hearing on any objections thereto. For those motions, oral argument shall be a matter of right, provided: (1) the motion has been marked ready in accordance with the procedure that appears on the short calendar on which the motion appears, or (2) a nonmoving party files and serves on all other parties ... a written notice stating the party's intention to argue the motion .... Such a notice shall be filed on or before the third day before the date of the short calendar date ...."

[313] *Bradley*, 218 Conn. App. at 24.

[314] *Id*.

[315] *Id*. at 23.

[316] *Id*.

[317] *Id*. at 28.

[318] *Id*.

that oral argument on the defendant's motion for summary judgment likely would have resulted in a decision other than the one granting the motion in favor of the defendant.[319] The Court concluded that the improper denial of oral argument was harmless under the circumstances.[320]

*Glory Chapel International Cathedral v. Philadelphia Insurance Company*[321] addressed whether the trial court committed error by sustaining the defendant's objection to an offer of compromise that the plaintiff filed during the pendency of the appeal. The plaintiff appealed from the judgment of the trial court entered in favor of the defendant, striking all counts of the plaintiff's complaint against the defendant.[322] The offer of compromise was filed more than six months after the trial court rendered judgment in favor of the defendant and during the pendency of the appeal.[323] The Appellate Court agreed with the defendant, finding that General Statutes Section 52-192a does not allow the plaintiff to file an offer of compromise directed to a defendant for whom judgment has already been rendered.[324]

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[319] *Id*. at 28-29.

[320] *Id*. at 29. The Court distinguished *Bayview Loan Serving, LLC v. Frimel*, 192 Conn. App. 786, 218 A.3d 717 (2019) and *Chase Home Finance, LLC v. Scroggin*, 194 Conn. App. 843, 222 A.3d 1025 (2019) where it reversed the trial court's granting of summary judgment for not providing oral argument because in those cases the trial court did not consider whether the moving party met its burden in demonstrating that there was no genuine issue of material fact and granted the motions solely because no timely opposition to the motions had been filed. *Bradley*, 218 Conn. App. at 28, note 16.

[321] 224 Conn. App. 501, 505, 313 A.3d 1273 (2024).

[322] *Id*. at 504-05.

[323] *Id*. at 518.

[324] *Id*. at 520. General Statutes § 52-192a provides: "(a) Except as provided in subsection (b) of this section, after commencement of any civil action based upon contract or seeking the recovery of money damages, whether or not other relief is sought, the plaintiff may, not earlier than one hundred eighty days after service of process is made upon the defendant in such action but not later than thirty days before trial, file with the clerk of the court a written offer of compromise signed by the plaintiff or the plaintiff's attorney, directed to the defendant or the defendant's attorney, offering to settle the claim underlying the action for a sum certain. For the purposes of this section, such plaintiff includes a counterclaim plaintiff under section 8-132. The plaintiff shall give notice of the offer of compromise to the defendant's attorney or, if the defendant is not represented by an attorney, to the defendant himself or herself. Within thirty days after being notified of the filing of the offer of compromise and prior to the rendering of a verdict by the jury or an award by the court, the defendant or the defendant's attorney may file with the clerk of the court a written acceptance of the offer of compromise agreeing to settle the claim underlying the action for the sum certain specified in the plaintiff's offer

## XI. Uninsured/Underinsured Motorist

*Menard v. State*[325] addressed underinsured motorist claims brought by Connecticut state troopers who had been injured in a motor vehicle accident. The plaintiffs argued that the Appellate Court improperly (1) affirmed the trial court's judgments insofar as the trial court concluded that the plaintiffs were not entitled to recover underinsured motorist benefits for alleged post-traumatic stress disorder, and (2) reversed the judgments insofar as the trial court determined that the State was not entitled to a reduction in the trial court's awards for sums received by the plaintiffs in settlement of a claim under Connecticut's Dram Shop Act, Gen-

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of compromise. Upon such filing and the receipt by the plaintiff of such sum certain, the plaintiff shall file a withdrawal of the action with the clerk and the clerk shall record the withdrawal of the action against the defendant accordingly. If the offer of compromise is not accepted within thirty days and prior to the rendering of a verdict by the jury or an award by the court, the offer of compromise shall be considered rejected and not subject to acceptance unless refiled. Any such offer of compromise and any acceptance of the offer of compromise shall be included by the clerk in the record of the case.

(b) In the case of any action to recover damages resulting from personal injury or wrongful death, 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, the plaintiff may, not earlier than three hundred sixty-five days after service of process is made upon the defendant in such action, file with the clerk of the court a written offer of compromise pursuant to subsection (a) of this section and, if the offer of compromise is not accepted within sixty days and prior to the rendering of a verdict by the jury or an award by the court, the offer of compromise shall be considered rejected and not subject to acceptance unless refiled.

(c) After trial the court shall examine the record to determine whether the plaintiff made an offer of compromise which the defendant failed to accept. If the court ascertains from the record that the plaintiff has recovered an amount equal to or greater than the sum certain specified in the plaintiff's offer of compromise, the court shall add to the amount so recovered eight per cent annual interest on said amount, except in the case of a counterclaim plaintiff under section 8-132, the court shall add to the amount so recovered eight per cent annual interest on the difference between the amount so recovered and the sum certain specified in the counterclaim plaintiff's offer of compromise. The interest shall be computed from the date the complaint in the civil action or application under section 8-132 was filed with the court if the offer of compromise was filed not later than eighteen months from the filing of such complaint or application. If such offer was filed later than eighteen months from the date of filing of the complaint or application, the interest shall be computed from the date the offer of compromise was filed. The court may award reasonable attorney's fees in an amount not to exceed three hundred fifty dollars, and shall render judgment accordingly. This section shall not be interpreted to abrogate the contractual rights of any party concerning the recovery of attorney's fees in accordance with the provisions of any written contract between the parties to the action."

[325] 346 Conn. 506, 509, 291 A.3d 1025 (2023).

eral Statutes Section 30-102.[326] The Supreme Court resolved the first issue by holding that the plaintiffs' claims failed on grounds of evidentiary insufficiency and, accordingly, declined to reach the broader legal issue as to whether Connecticut's uninsured/underinsured motorist statute provides coverage for post-traumatic stress disorder, if accompanied by physical manifestations.[327] With respect to the second issue, the Court stated that the legislature abrogated the common law rule with respect to pre-trial settlement payments when it adopted General Statutes Section 52-216a.[328] The Court stated that a jury award may be reduced by amounts obtained pursuant to such settlements only by way of a trial court's order of remittitur, which is available only if the trial court determines that settlement payments, when added to the jury award, render the award excessive as a matter of law.[329] The Court noted that although the subject case was determined by the court in a bench trial, not by a jury, the same principles apply.[330] The Court further explained that the trial court may reduce the damages to account for pre-trial settlement payments, whether in a trial to the jury or to the court, only when the award would otherwise be excessive as a matter of law.[331] The Court explained that a settlement does not necessarily represent fair, just and reasonable damages; rather, it represents, in part, the parties' assessments

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[326] *Id.* at 509-10. *Menard v. State*, 208 Conn. App. 303, 264 A.3d 1034, *cert. granted*, 340 Conn. 916, 266 A.3d 886 (2021) sets forth the underlying facts.

[327] *Menard*, 346 Conn. at 518.

[328] *Id.* at 525. General Statutes § 52-216 provides: "An agreement with any tortfeasor not to bring legal action or a release of a tortfeasor in any cause of action shall not be read to a jury or in any other way introduced in evidence by either party at any time during the trial of the cause of action against any other joint tortfeasors, nor shall any other agreement not to sue or release of claim among any plaintiffs or defendants in the action be read or in any other way introduced to a jury. If the court at the conclusion of the trial concludes that the verdict is excessive as a matter of law, it shall order a remittitur and, upon failure of the party so ordered to remit the amount ordered by the court, it shall set aside the verdict and order a new trial. If the court concludes that the verdict is inadequate as a matter of law, it shall order an additur, and upon failure of the party so ordered to add the amount ordered by the court, it shall set aside the verdict and order a new trial. This section shall not prohibit the introduction of such agreement or release in a trial to the court."

[329] *Menard*, 346 Conn. at 526.

[330] *Id.*

[331] *Id.*

of litigation risks.[332] The Court held that the Appellate Court incorrectly concluded that the trial court should have reduced the underlying award by sums received in settlement of a dram shop claim.[333]

In *Curley v. Phoenix Insurance Company*,[334] the plaintiff brought an action to recover underinsured motorist benefits. After summary judgment was entered for the defendant, the plaintiff appealed claiming, inter alia, that the trial court improperly rendered summary judgment because the trial court's construction of the commercial automobile liability insurance policy issued by the defendant to the plaintiff's employer violated General Statutes Section 38 a-336 (a) (2).[335] The Appellate Court agreed with the plaintiff and reversed the judgment for the defendant.[336] The Court stated that appellate review of a trial court's decision to grant summary

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[332] *Id*.

[333] *Id*. at 530.

[334] 220 Conn App. 732, 734, 299 A.3d 1133, *cert. denied*, 348 Conn. 914, 303 A.3d 260 (2023). The author was counsel for the defendant at the trial level and on appeal. General Statutes § 38a-336 (a) (2) requires that an automobile liability insurance policy "provide uninsured and underinsured motorist coverage with limits for bodily injury and death equal to those purchased to protect against loss resulting from the liability imposed by law unless any named insured requests in writing a lesser amount, but not less than the limits specified in subsection (a) of section 14-112." By way of background, in response to the defendant's motion for summary judgment, the plaintiff set forth several arguments in her objection. *Id*. at 736-38. Following the trial court's granting of the motion based on the defendant's contention that the plaintiff was not an insured under the underinsured endorsement issued to the plaintiff's employer, the plaintiff filed a motion for reargument claiming that the trial court's interpretation of the policy violated General Statutes § 38a-336 (a) (2). *Id*. at 738-40. The defendant filed an objection to the motion to reargue, arguing that the plaintiff failed to raise this argument in her objection and that she should not have been permitted to raise arguments for the first time in a motion to reargue. *Id*. at 740. The trial court denied the motion to reargue without comment and the plaintiff then appealed. *Id*. On appeal, the defendant maintained that the Appellate Court should not consider the above argument because it was raised for the first time in the motion to reargue. *Id*. at 742. The Appellate Court found that the plaintiff's claim was reviewable. *Id*. at 743. The Appellate Court decided that the interests of justice, fairness, integrity of the courts and consistency of the law significantly outweighed the interest in enforcing procedural rules governing the preservation of claims. *Id*. at 748. The Appellate Court remarked that its conclusion was limited to the particular circumstances of the present case and that it should not be construed as relaxing the well-established rule that it would not review claims of error not raised before and decided by the trial court. *Id*., note 9.

[335] *Id*. at 734.

[336] *Id*. at 735.

judgment is plenary.[337] The Court further stated that when an insurance policy is unambiguous, the construction of an insurance policy presents a question of law that it reviews de novo.[338] The Court explained that when construing an insurance policy it looks to the policy as a whole, considers all relevant portions together and, if possible, gives operative effect to every provision in order to reach a reasonable result.[339] The Court also stated that the construction of a statute presents a question of law subject to de novo review.[340] The Court first determined that the plaintiff was an insured under the policy for purposes of liability coverage, and then turned to the plaintiff's argument that, in the absence of a waiver by the named insured, Section 38a-336 mandated that she also be insured for underinsured motorist coverage.[341] The Court stated that Section 38a-336 (a) (1) requires that each automobile liability policy provide uninsured and underinsured motorist coverage to a class of persons that is coextensive with that insured under the liability section of the policy.[342] The defendant argued that Section 38 a-336 (f)[343] by its express terms did not authorize an underinsured motorist claim by the plaintiff because, although she was an employee of the named insured, she was not occupying a covered motor vehicle at the time of the accident.[344] The Court disagreed with the defendant's reading of the statutes and found that the "otherwise applicable" language of Section 38 a-336 (f) clearly required that the defendant comply with the other provisions of Section 38a-336 before reducing the limits of uninsured and underinsured coverage to an amount less than the limits of liability coverage under

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[337] *Id*. at 742.
[338] *Id*.
[339] *Id*.
[340] *Id*.
[341] *Id*. at 757.
[342] *Id*. at 759.
[343] General Statutes § 38a-336 (f) provides: "Notwithstanding subsection (a) of section 31-284, an employee of a named insured injured while occupying a covered motor vehicle in the course of employment shall be covered by such insured's otherwise applicable uninsured and underinsured motorist coverage."
[344] *Curley*, 220 Conn App. at 765. The plaintiff was operating a rental vehicle at the time the accident and was on her way to an event as part of her duties for her employer when her vehicle was struck by the tortfeasor. *Id*. at 735.

the policy.[345] The Court found that because there was no evidence establishing that the named insured expressly waived the statutorily mandated coverage, as required by Section 38 a-336 (a) (2), the trial court erred in rendering summary judgment for the defendant.[346]

## XII. Vexatious Litigation

*Christian v. Iyer*[347] reversed the trial court because it failed to apply the correct legal standard or make the requisite findings with respect to its conclusion that the defendants established the defense of good faith reliance on advice of counsel in a vexatious litigation trial. The litigation arose out of a dispute involving a prior trespass case brought by the defendants against the plaintiffs.[348] After a bench trial in the underlying trespass action, the trial court found in favor of the plaintiffs.[349] Thereafter, the plaintiffs brought a vexatious litigation action against the defendants, asserting a common law vexatious litigation claim and two statutory vexatious litigation claims pursuant to General Statutes Section 52-568 (1) and (2).[350] The plaintiffs appealed from the judgment entered for the defendants after a bench trial in the vexatious litigation action.[351] The Appellate Court explained that the cause of action for vexatious litigation exists both at common law and pursuant to Section 52-568.[352] The Court stated that to prove a claim for vexatious litigation at common law, the plaintiff must prove want of probable cause, malice and a termination of suit in the plaintiff's favor.[353] The statutory cause of action for vexatious litigation differs

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[345] *Id*. at 770.
[346] *Id*.
[347] 221 Conn. App. 869, 870-71, 303 A.3d 604 (2023).
[348] *Id*. at 871.
[349] *Id*. at 872.
[350] *Id*. General Statutes § 52-568 provides: "Any person who commences and prosecutes any civil action or complaint against another, in his own name or the name of others, or asserts a defense to any civil action or complaint commenced and prosecuted by another (1) without probable cause, shall pay such other person double damages, or (2) without probable cause, and with a malicious intent unjustly to vex and trouble such other person, shall pay him treble damages."
[351] *Christian*, 221 Conn. App.at 870.
[352] *Id*. at 877.
[353] *Id*.

from a common-law action only in that a finding of malice is not an essential element, but will serve as a basis for higher damages.[354] The Court further explained that in a vexatious litigation suit, the defendant lacks probable cause if he or she lacks a reasonable, good faith belief in the facts alleged and the validity of the claim asserted.[355] With respect to the defense of good faith reliance on counsel, the Court stated that there are five elements: (1) the defendant must actually have consulted with legal counsel about his or her decision to institute a civil action; (2) the consultation with legal counsel must be based on a full and fair disclosure by the defendant of all facts he or she knew or was charged with knowing concerning the basis for his or her contemplated action; (3) the lawyer to whom the defendant turns for advice must be one from whom the defendant can reasonably expect to receive an accurate, impartial opinion as to the viability of his or her claim; (4) the defendant, having sought such advice, actually did rely upon it; and (5) the defendant must show that his or her reliance on counsel's advice was made in good faith.[356] The Court also stated that a defendant is not permitted to rely upon advice of counsel if the defendant did not disclose all of the material facts related to the claim because the lawyer cannot render accurate legal advice regarding whether there is a good faith basis to bring the claim in the absence of knowledge of all material facts.[357] With respect to the subject case, the Court found that the trial court failed to make a determination whether the defendants made a full and fair disclosure of all material facts concerning the contemplated trespass action to the defendants' attorney who brought the trespass action on their behalf.[358] The Court concluded that, because the trial court failed to apply the proper legal standard or make the material findings of fact, it was compelled to reverse and remand for a new trial.[359]

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[354] *Id.*
[355] *Id.*
[356] *Id.* at 878.
[357] *Id.* at 878-79.
[358] *Id.* at 879.
[359] *Id.* at 882.

## XIII. Workers' Comensation

In *Dusto v. Rogers Corporation*,[360] the Appellate Court agreed with the plaintiff, the executrix of the estate of Harold Dusto and his spouse Anita Dusto, that the trial court improperly rendered summary judgment in favor of the defendant, Harold's former employer, on the ground that her claims against the defendant were barred by the exclusivity provision of the Workers' Compensation Act (Act), General Statutes Section 31-275 *et seq*. The Court found that a genuine issue of material fact existed as to whether the plaintiff's claims against the defendant satisfied the substantial certainty exception to the exclusivity provision of the Act.[361] The plaintiff alleged that Harold was employed by the defendant, an asbestos product manufacturer, and that throughout the course of his employment he was exposed to dust and particles of asbestos fibers from asbestos materials supplied to the defendant, which caused him to develop cancer and ultimately die.[362] The Court stated that the exclusive remedy provision of the Act provides that an employer 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 or her employment with one narrow exception where the employer has committed an intentional tort or where the employer has engaged in willful or serious misconduct.[363] The Court noted that Connecticut first recognized the narrow intentional tort exception where an employer intentionally directed or authorized another employee to assault the injured party.[364] The Court further noted that the intentional tort exception was not extended to situations in which an injury resulted from the employer's intentional, willful, or reckless violation of safety standards as provided under federal or state laws.[365] The Court also explained that Connecticut has

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[360] 222 Conn. App. 71, 74-75, 304 A.3d 446 (2023), *cert. denied*, 348 Conn. 939, 307 A.3d 274 (2024).

[361] *Id*. at 75.

[362] *Id*.

[363] *Id*. at 77-78.

[364] *Id*. at 79.

[365] *Id*.

adopted an alternative method of proving intent where the employer's intentional conduct permits an inference that the employer knew that there was a substantial certainty that an injury would occur.[366] The Court added that under the substantial certainty test the employer must be shown actually to believe that the injury would occur.[367] The Court further explained that satisfaction of the substantial certainty exception requires a showing of the employer's subjective intent to engage in activity that it knows bears a substantial certainty of injury to its employees.[368] The Court also stated that Connecticut has adopted four factors for consideration in determining whether a plaintiff has satisfied the substantial certainty test: (1) prior similar accidents related to the conduct at issue that resulted in an injury, death or a near-miss; (2) deliberate deceit on the part of the employer with respect to the existence of the dangerous condition; (3) intentional and persistent violations of safety regulations over a lengthy period of time; and (4) affirmative disabling of safety devices.[369] The Court found, after its review of the evidence submitted to the trial court in support of and in opposition to the defendant's motion for summary judgment, that the defendant was aware of the risks associated with asbestos exposure before the plaintiff's decedent commenced his employment with the defendant, that the defendant had a history of workplace safety violations, and that the defendant had engaged in deception with respect to the danger.[370] The Court concluded that a jury could reasonably infer that the defendant subjectively believed that his conduct was substantially certain to result in injury to its employees and, therefore, the trial court erred in rendering summary judgment in favor of the defendant.[371]

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366 *Id*. at 80-81.
367 *Id*. at 81.
368 *Id*. at 82.
369 *Id*. at 83.
370 *Id*. at 99.
371 *Id*. at 101. Judge Prescott dissented with respect to this part of the decision.

# THE IDEOLOGICAL ORIGINS OF CONNECTICUT'S STATE CONSTITUTIONAL JURISPRUDENCE

By Mitchell S. Brody*

## I. Introduction

In *State v. Dukes*,[1] the Connecticut Supreme Court adopted a "living" approach to analyzing the Connecticut Constitution, deriving its meaning primarily from society's contemporary beliefs and requirements rather than exclusively from that document's original constitutional meaning.[2] But the Court employed this analysis for the purpose of expanding state constitutional rights beyond the rights afforded by the U.S. Constitution, which reflected the shared values amongst the Court's membership and the strength of its commitment to a bedrock belief in, or ideology of,[3] expansive rights. And in two early and seminal cases, *State v. Linares*[4] and *State v. Oquendo*,[5] the Court made clear that this ideology was paramount by running roughshod over its analysis of the state constitution as a living document in order to expand rights.

First, in *Linares*, the Court considered the contemporary meaning of article first, sections 4 and 5, the Connecticut Constitution, and concluded that these free speech provisions provided greater protection than the First Amendment to the U.S. Constitution. As I have argued before,[6] the *Linares* Court transparently misinterpreted the original meaning of sections 4 and 5 in order to construe the contemporary meaning of these provisions as requiring the expansion of state free-speech rights. Second, here, I examine and dis-

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1 209 Conn. 98, 112-15, 547 A.2d 10 (1988).

2 State v. Correa, 340 Conn. 619, 640 n.16, 264 A.3d 894 (2021); State v. Kono, 324 Conn. 80, 90 n.6, 152 A.3d 1 (2016); State v. Joyce, 229 Conn. 10, 19 n.12, 639 A.2d 1007 (1994).

3 Richard Posner, How Judges Think 94 (2008) (defining ideology as a "body of more or less bedrock beliefs").

4 232 Conn. 345, 655 A.2d 737 (1995).

5 223 Conn. 635, 613 A.2d 1300 (1992).

6 Mitchell S. Brody, *Pitfalls In State Constitutional Theorizing: Free Speech In Connecticut*, 95 Conn. B.J. 148-159 (2025).

cuss the *Oquendo* Court's conclusion that the Connecticut Constitution, article first, section 7, furnishes greater protection than the Fourth Amendment to the U.S. Constitution in defining the seizure of a person.[7] I posit that the *Oquendo* Court, in order to expand state constitutional rights, unjustifiably discarded its living approach to constitutional analysis and considered only the original meaning of a seizure under section 7, based on transparently misconstruing Connecticut's common law of arrests. What the decisions in *Linares* and *Oquendo* show is that, at its inception, the Connecticut Supreme Court's approach to interpreting the state constitution was founded on neither original nor contemporary constitutional meaning, but rather on a fixed belief in the value of expanding state constitutional rights. Finally, I conclude that the consequences of the Court's choice to direct the development of the law in this way selects a definition of "seizure" without first assessing how it triggers constitutional safeguards and constrains criminal investigations, ignores society's contemporary interest in the definition of the term (which seeks to accommodate safeguards and investigations), and assumes that changes in the federal definition can only erode those safeguards, warranting state constitutional intervention, rather than incentivize adherence to them.

## II. Overview of Oquendo

In *Oquendo*, the Connecticut Supreme Court's expansion of rights via the state constitution grew out of its refusal to read into section 7 of the Connecticut Constitution the Fourth Amendment's seizure definition as set out in the U.S. Supreme Court's decision in *California v. Hodari D.*[8] The *Oquendo* Court reasoned that: (1) it already had incorporated into section 7 the Fourth Amendment definition of a seizure as set out in the U.S. Supreme Court's decision in

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[7] Compare Conn. Const. art. first, § 7 ("The people shall be secure in their persons, houses, papers and possessions from unreasonable searches and seizures. . . .") with U.S. Const. amend. IV ("The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searched and seizures, shall not be violated. . . .").

[8] 499 U.S. 621 (1991).

*United States v. Mendenhall*;[9] (2) it adopted *Mendenhall*'s definition before it was replaced for Fourth Amendment purposes by *Hodari D.*'s definition; and (3) *Hodari D.* derived its seizure definition from the definition of a common law arrest around the time of the adoption of the Fourth Amendment that differed from Connecticut's less restrictive definition of a common law arrest around the time of the adoption of section 7.[10] But the *Oquendo* Court's reasoning was flawed because it: (1) erroneously maintained that *Mendenhall*'s seizure definition already had been incorporated into section 7; (2) misinterpreted Connecticut's common law definition of an arrest to be inconsistent with *Hodari D.*'s definition; and (3) failed to compare the two definitions in terms of their effect on section 7 rights by employing a living state constitutional analysis.

Historically, under Connecticut jurisprudence, an analysis of our state constitution as a living document may also include an examination of its original meaning along with pertinent case law,[11] but the analysis principally has focused on public policy issues and treated originalism intermittently, and only then as a secondary consideration.[12] Notwithstand-

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[9] 446 U.S. 544 (1980).

[10] In invoking the common law of arrests, the *Hodari D.* Court meant state common law. 499 U.S. at 624 (relying on Whitehead v. Keyes, 85 Mass. 495, 501 (1862)); *see infra note 75; cf.* Erie R. Co. v. Tompkins, 304 U.S. 64, 78 (1938) (there is no federal general common law).

[11] State v. Geisler, 222 Conn. 672, 684-86, 610 A.2d 1225 (1992) (factors examined in state constitutional analysis include text, framers' intentions, common law and societal developments surrounding adoption of Connecticut's 1818 Constitution, pertinent state and federal jurisprudence, and public policy); *accord* State v. Skok, 318 Conn. 699, 708, 122 A.3d 608 (2015).

[12] *See, e.g.*, State v. Kimbro, 197 Conn. 219, 235-37, 496 A.2d 498 (1985) (pre-*Dukes* decision providing greater protection under section 7 by adopting superseded Fourth Amendment test for probable cause supporting warrant based on informant's information, on ground of test's specificity and practicality protecting interests of police and suspects); State v. Barton, 219 Conn. 529, 541-46, 552, nn.8 & 9, 594 A.2d 917 (1991) (overruling *Kimbro* by incorporating into section 7 existing Fourth Amendment test for probable cause due to superseded test's analytic rigidity and shared common law history of issuing valid warrants); *Dukes*, 209 Conn. at 114-23 (section 7 provides greater protection than Fourth Amendment by barring police, incident to traffic arrests, from conducting full-body searches of suspects for evidence on ground of inapplicability of societal interest in protecting police officers); State v. Miller, 227 Conn. 363, 380-85, 630 A.2d 1315 (1993) (despite shared origins, finding section 7 supplying greater protection than Fourth Amendment by requiring warrant prior to search of automobile towed to

ing this approach to state constitutional interpretation, the *Oquendo* Court relied exclusively on the original meaning of section 7, and narrowly on Connecticut's common law of arrests, while declining to consider the policy issues implicated in a seizure's definition.[13] Yet policy issues are an inherent part of analyzing the state constitution as a living document because they address public consequences that necessarily involve societal interests and preferences. What the *Oquendo* Court failed to consider is that society has an interest in ensuring that seizures are constitutionally lawful, that securing this interest is dependent upon how a seizure is defined because the occurrence of a seizure brings into play the safeguards of the Fourth Amendment and section 7, and that such a definition sets the terms of initial encounters between the police and suspects according to how their respective interests in investigating criminality and protecting rights are valued and accommodated by these provisions.

For both the *Hodari D.* and *Oquendo* definitions, the seizure of a person, "however brief,"[14] interferes with his freedom of movement, triggers the prohibition against unreasonable

police station and impounded after driver's arrest, despite probable cause to search and automobile exception to warrant requirement supporting immediate search at arrest scene, because section 7's strong policy in favor of warrants predominates over law enforcement's interest in officer safety and impracticality of obtaining warrant on account of automobile's inherent mobility). *See also Dukes*, 209 Conn. at 107-11 (overruling decades-old precedent by suppressing evidence obtained in violation of section 7, based on modern jurisprudence recognizing success of Fourth Amendment's exclusionary rule in deterring unlawful police conduct); State v. Marsala, 216 Conn. 150, 159, 167-69, 579 A.2d 58 (1990) (rejecting applicability of good faith exception to Fourth Amendment's exclusionary rule to section 7 because exception erodes deterrence of police and judges' incentive to err on side of constitutional behavior); *Geisler*, 222 Conn. at 686-87 (following illegal warrantless entry into suspect's home and his detention supported by probable cause, section 7's exclusionary rule, unlike Fourth Amendment's rule, applicable to suspect's subsequent statements at police station because, if taint of illegal entry viewed as dissipated, police incentivized to violate privacy of home in order obtain statements outside of home).

[13] Critics of the U.S. Supreme Court's originalist approach to interpreting the U.S. Constitution have argued that the Court has inconsistently applied this approach in its jurisprudence. Erwin Chermerinsky, Worse Than Nothing 139-65 (2022).

[14] United States v. Jacobsen, 466 U.S. 109, 113 n.5 (1984). A seizure of property triggering constitutional protection occurs when there is "some meaningful interference with an individual's possessory interests in that property." *Id.* at 113; *see also* Katz v. United States, 389 U.S. 347, 352-53 & n.13 (1967) (finding seizure of intangible property via interception of telephone conversation).

seizures, and can pass constitutional muster with a reasonable and articulable suspicion of criminal activity to justify an investigative stop[15] (as was the case in *Oquendo*) and probable cause to justify an arrest.[16] The physical seizure of a person is common to both events,[17] but an arrest's seizure is normally of a protracted duration, or more permanent, and "typically leads to a trip to the station house and prosecution for crime."[18] The definitions differ in that, under *Mendenhall*,[19] a seizure occurs when, in response to a police officer's show of authority, a reasonable person would believe that he was not free to leave, irrespective of whether the actual suspect submitted or fled. In contrast, under *Hodari D.*,[20] a seizure occurs when an officer: (1) applies physical force to a suspect, even by just touching him, and even if the officer fails to gain control over the suspect;[21] or (2) makes a show of authority without applying physical force and the suspect submits.[22]

## III. The Oquendo Case

In *Oquendo*, following a jury trial, the defendant was convicted of the crimes of felony murder, robbery in the first

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[15] State v. Edmonds, 323 Conn. 34, 49, 145 A.3d 861 (2016).

[16] Florida v. Royer, 460 U.S. 491, 498-99 (1983).

[17] State v. Young, 294 Wis. 2d 1, 15-19, 717 N.W.2d 729 (2006). "Because arrests are seizures of a person, *Hodari D.* properly looked to the common law of arrest for historical understandings of what was deemed an unreasonable search and seizure when the Fourth Amendment was adopted." Torres v. Madrid, 141 S. Ct. 989, 996 (2021) (internal quotation marks omitted). The unstated reason why the *Oquendo* Court derived the meaning of a constitutional seizure from Connecticut's common law of arrests rather than investigative stops, for which there was common law authority, State v. White, 229 Conn. 125, 152, 640 A.2d 572 (1994), is that the common law only defined an arrest.

[18] *Young*, 294 Wis. 2d at 18-19 (internal ellipses and quotation marks omitted).

[19] 446 U.S. at 554.

[20] 499 U.S. at 626-28.

[21] The *Hodari D.* Court further explained that "an arrest is affected by the slightest application of physical force," but when an arrestee escapes, there is no "*continuing* arrest during the period of fugitivity" for Fourth Amendment purposes. 499 U.S. at 625. In addition, although *Hodari D.* "principally concerned a show of authority," the Court in *Torres*, 141 S. Ct. at 995, made abundantly clear that the Fourth Amendment's seizure definition also applies to the application of physical force.

[22] According to *Hodari D.*, 499 U.S. at 627-29, *Mendenhall*'s concept of an officer's show of authority, which is based on how a reasonable person would understand an officer's conduct, is a component of the type of Fourth Amendment seizure involving an officer's show of authority and a suspect's submission.

degree, burglary in the second degree, conspiracy to commit robbery in the first degree, and conspiracy to commit burglary in the second degree.[23] The defendant's connection to these crimes was based largely on evidence the police found in the woods near Center Street in Wallingford, and, in particular, the contents of an open duffle bag lying on the ground.[24] Four days after the murder, the police searched the woods as an offshoot of a police officer encountering the defendant and Nanette Williams near Center Street at 12:50 a.m.[25] The officer, who was in uniform and armed, was patrolling in a marked cruiser in a neighborhood that was primarily residential and where small businesses had closed.[26] The officer was aware that there had been a recent series of burglaries nearby, that Williams recently had been arrested on larceny and burglary charges, that the defendant was wearing a thick winter jacket despite the warm weather, and that burglars typically wear heavy clothing to protect themselves when gaining entry to buildings by breaking through windows.[27] The defendant and Williams looked at each other and quickened their pace upon seeing the cruiser, and, on a hunch, the officer stopped the cruiser seven yards away, exited, stood by the cruiser's door, and asked what they were doing.[28] Williams replied that she and the defendant were coming from a nearby café, but the officer knew that the café had closed two hours earlier and that the two were walking in the café's direction.[29] When the officer asked the defendant to identify himself, he said his name was Freddy Velez, and he and Williams started glancing nervously at each other.[30] The officer asked the defendant to approach the cruiser; the defendant handed the duffle bag to Williams and approached the officer; the officer instructed the defendant to bring the bag with him; and the defendant grabbed the bag from Williams and

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[23] 223 Conn. at 637.
[24] *Id.* at 639-42.
[25] *Id.* at 641.
[26] *Id.*
[27] *Id.*
[28] *Id.*
[29] *Id.* at 641-42.
[30] *Id.* at 644.

fled.[31] The officer yelled, "Stop," and pursued the defendant on foot and into a wooded area, where the officer observed the defendant throwing the bag away before escaping.[32]

At trial, the defendant, relying on article first, section 7, of the Connecticut Constitution and the Fourth Amendment to the U.S. Constitution,[33] unsuccessfully sought to suppress the evidence in the duffle bag and the identification of him as the person who discarded the bag as the fruit of an illegal investigative seizure.[34] The trial court concluded that the police seized the defendant "at some point after [the officer] exited his cruiser and began to question [him] and Williams," and that the officer had reasonable and articulable suspicion of criminal activity to justify the seizure for constitutional purposes based on: the recent burglaries in the area of the seizure; Williams's arrest record; the defendant's clothing that, in the officer's experience, tied him to the commission of the recent burglaries; Williams's response to the officer's questions; and the defendant's flight.[35] Separately, the trial court held that the defendant lacked a privacy interest in the duffle bag to support his motion to suppress its contents because he had discarded and therefore abandoned the bag.[36]

On appeal, however, the Connecticut Supreme Court reversed the trial court, concluding that, pursuant to section 7, the defendant was seized for investigative purposes without sufficient evidence of criminal activity to justify the seizure.[37]

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[31] *Id*.

[32] *Id*.

[33] Both at trial and on appeal the defendant also invoked article first, section 9, of the Connecticut Constitution. ("No person shall be arrested, detained or punished, except in cases clearly warranted by law."). *Oquendo*, 223 Conn. at 640, 644. The dissent questioned the majority's reliance on section 9 because it "is our criminal due process clause and has not generally been regarded as adding significantly to search and seizure analysis." *Id*. at 669 n.1 (Borden, J. dissenting) (citing State v. Lamme, 216 Conn. 172, 579 A.2d 484 (1990)). More recently, in State v. Jenkins, 298 Conn. 209, 3 A.3d 806 (2010), the Court stated that section 9 is Connecticut's "criminal due process provision that does not provide protections greater than those afforded by either the [F]ourth [A]mendment or its coordinate specific state constitutional provision, article first, [section] 7." *Id*. at 259 n.39. Therefore, this article focuses only on the definition of a section 7 seizure.

[34] *Oquendo*, 223 Conn. at 640.

[35] *Id*. at 642-43.

[36] *Id*. at 643 & n.4

[37] *Id*. at 645-46.

The Court noted that the defendant also invoked the Fourth Amendment to contest the trial court's ruling that upheld the constitutionality of the seizure, while appearing to concede that he could not prevail on this constitutional basis.[38] This apparent concession reflected the fact that there was no seizure for Fourth Amendment purposes because, under *Hodari D.*'s seizure definition, the police did not touch the defendant and he never submitted in response to a show of authority. Consequently, Fourth Amendment safeguards were never brought into play and evidence incriminating the defendant could not be suppressed as the fruit of an unconstitutional seizure.

The Court then declined to incorporate *Hodari D.*'s seizure definition into section 7 on the ground that this definition was derived from a common law definition of an arrest that was inconsistent with Connecticut's less restrictive common law definition.[39] In addition, despite recognizing that Connecticut jurisprudence analyzed the state constitution as a living document, with contemporary effectiveness,[40] the Court declined to consider the public policy issues implicated by *Hodari D.*'s definition, finding that the state's briefing of these issues lacked "substantive arguments."[41] Instead, the Court employed *Mendenhall*'s seizure definition,[42] maintaining that, in *State v. Ostroski*,[43] it previously had incorporated this definition into section 7.[44] Applying the *Mendenhall* definition to the facts of the case before it, the Court determined that: (1) a seizure occurred when the officer asserted his authority by instructing the defendant to approach and bring the duffle bag with him; (2) a reasonable person, unlike the defendant who fled, would not have felt free to ignore the officer's show of authority and depart;[45] (3) there was insufficient reason-

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[38] *Id.* at 644, 646.

[39] *Id.* at 646, 650-52. The *Hodari D.* Court bolstered its common-law-based seizure definition with dictionary definitions and public policy considerations. 499 U.S. at 624, 627; *see infra* note 55.

[40] *Id.* at 649.

[41] *Id.* at 652 n.10.

[42] *Id.* at 647.

[43] 186 Conn. 287, 291, 440 A.2d 984, *cert. denied*, 459 U.S. 878 (1982).

[44] *Oquendo*, 223 Conn. at 646-47, 653.

[45] *Id.* at 653.

able and articulable suspicion of criminal activity to justify the seizure for section 7 purposes;[46] and (4) the bag and its contents, which the defendant discarded during his successful flight from the police, should have been suppressed as the tainted fruit of an unlawful seizure rather than found to have been abandoned and, therefore, admissible.[47]

## IV. Reverting To Originalism

In defining a seizure for purposes of section 7, the Connecticut Supreme Court's explanation for its exclusive reliance on Connecticut's common law of arrests and its failure to engage in a living state constitutional analysis was limited to the state relying on a conclusory public policy rationale in support of *Hodari D.*'s seizure definition.[48] This explanation would have made sense only if the *Ostroski* Court already had incorporated *Mendenhall*'s seizure definition into section 7, as the *Oquendo* Court maintained, and if the *Ostroski* Court had employed a living state constitutional analysis in doing so. However, as the *Oquendo* dissent pointed out, the *Ostroski* Court resolved a defendant's seizure claim solely under the Fourth Amendment and *Mendenhall*'s seizure definition,[49] years before this definition was replaced by *Hodari D.*'s definition. Consequently, the *Oquendo* Court would have been expected to resolve the seizure claim under the Fourth Amendment and *Hodari D.*'s settled seizure definition because the defendant's briefing of the policy reasons in favor of *Mendenhall*'s definition, which essentially constitut-

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[46] *Id.* at 653-57.

[47] *Id.* at 657-60.

[48] *Id.* at 652 n.10. The *Oquendo* Court summarized the state's conclusory policy arguments in favor of *Hodari D.*'s seizure definition as follows: "(1) it would provide a 'bright line rule' for both police and defendants; (2) it is unlikely that the police would abuse such a standard; and (3) a suspect who has not submitted to an assertion of authority and who has not been in custody should not benefit from the constitutional provisions applicable to detentions." *Id.*

[49] *Id.* at 673 n.5 (Borden, J. dissenting). To be sure, the *Ostroski* Court noted that the defendant had raised a claim implicating the definition of a seizure under both the Fourth Amendment and section 7, but the Court then defined a seizure by invoking only the Fourth Amendment and its seizure definition, which, at the time, was set out in *Mendenhall*. *Ostroski*, 286 Conn. at 290-92. Other than this single reference to the section 7 basis of the defendant's seizure claim, the *Ostroski* Court never mentioned the state constitution, let alone analyzed the meaning of section 7.

ed his living state constitutional analysis, lacked developed arguments,[50] just as the state's briefing of the policy reasons in favor of *Hodari D.*'s definition was too conclusory.[51] Alternatively, instead of leaving an examination of policy issues for another case and full briefing by the parties, the *Oquendo* Court could have taken the rare step of exercising its discretion and, on its own, assessed the living, or contemporary, meaning of a section 7 seizure,[52] aided by the policy exchange between *Hodari D.*'s majority and dissenting opinions.[53] The *Oquendo* Court could have properly limited itself to the original meaning of section 7 and sided with *Mendenhall*'s seizure definition only if Connecticut's common law of arrests was inconsistent with *Hodari D.*'s definition and consistent with *Mendenhall*'s definition, and if the policy issues implicated in defining a seizure lacked a plausible bearing on the scope of section 7 rights, none of which is the case.

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[50] The *Oquendo* Court did not address the adequacy of the defendant's briefing of the policy issues supporting *Mendenhall*'s seizure definition. In his appeal from the trial court's decision, the defendant argued in his opening brief for the applicability of *Mendenhall*'s seizure definition on the ground that *Hodari D.*'s definition would unduly limit section 7's protection against unreasonable seizures. Defendant Opening Brief at 3, 5. In his supplemental brief addressing the abandonment issue, the defendant maintained that *Hodari D.*'s definition was more restrictive than *Mendenhall*'s definition because it enabled police officers to intimidate suspects with impunity. Defendant's Supplemental Brief at 7-9.

[51] Perry v. Perry, 222 Conn. 799, 810 n.7, 611 A.2d 400, 405 (1992) (declining to review "important constitutional issue" due to Attorney General's brief's deficiencies, including inadequate research and analysis), *overruled on other grounds* by Bryant v. Bryant, 228 Conn. 630, 636 n.4, 637 A.2d 1111 (1994), and Tomasso Bros. v. October Twenty-Four, Inc., 230 Conn. 641, 650 n.9, 646 A.2d 133 (1994).

[52] State v. Pompei, 338 Conn. 749, 755 n.2, 259 A.3d 644 (2021) (exercising "discretion" to review defendant's Fourth Amendment claim despite "somewhat conclusory" briefing; relying on Ward v. Greene, 267 Conn. 539, 546, 839 A.2d 1259 (2004)).

[53] *E.g., Hodari D.*, 499 U.S. at 627 (because street pursuits place public at some risk, police orders to stop should be complied with and encouraged, and compliance is a responsible response due to presumption of adequate basis of most orders; also, police expectation that they will not be ignored or outrun cuts against application of exclusionary rule to unjustified rather than successful seizures); *but see id.* at 630 (police officer should not be permitted to fire weapon at innocent citizen and not implicate Fourth Amendment as long as target missed) (Stevens, J. dissenting)); 643-44 (effective law enforcement interest undermined by officer's difficulty in ascertaining suspect's submission) (Stevens, J. dissenting)); 645-46 (character of suspect's response shouldn't govern constitutionality of officer's conduct or operation of exclusionary rule) (Stevens, J. dissenting)); 647 (majority opinion defines seizure as commencing "not with egregious police conduct, but rather with submission by the citizen") (Stevens, J. dissenting)).

## V. Misreading Connecticut's Common Law of Arrests

In declining to incorporate *Hodari D.*'s seizure definition into section 7, the *Oquendo* Court thoroughly misinterpreted the extent of Connecticut's common law of arrests at the time of section 7's adoption in order to justify its holding that the two were inconsistent. Instead of an actual analysis of the two definitions, the *Oquendo* Court relied on cherry-picked language from two of Zephaniah Swift's tomes published in the late 1700s/early 1800s to show that Connecticut's common law of arrests did not cover a police officer touching a suspect without controlling his freedom of movement, a touching that *Hodari D.* defines as one type of common law arrest and constitutional seizure.[54] The *Oquendo* Court quoted Swift in proffering language that defined an arrest in terms of "'apprehending or restraining the person of another [to have him forthcoming to answer for some crime],'"[55] which, on its face, effectively distinguishes a touch from an arrest by essentially requiring some degree of confinement. In the same vein, the *Oquendo* Court proffered and summarized language that explained that an arrest could not be made with "'mere words,'" but a person could be confined by an arrest "without touching the person if sufficient indicia were present that the person was not free to leave," such as "when [a] peace officer enters a room, tells defendant he is arresting him and locks the door."[56] What the *Oquendo* Court omitted is Swift's most extensive definition of a common law arrest that provides for an arrest occurring via either an officer touching a suspect or—under the circumstances—a suspect submitting to an officer, which is precisely how *Hodari D.* defined a common law arrest.[57]

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[54] 2 Zephaniah Swift, System of the Laws of the State of Connecticut (1796) (hereafter,"System"); 1 Zephaniah Swift, Digest of the Laws of the State of Connecticut (1822) (hereafter,"Digest").

[55] *Oquendo*, 223 Conn. at 650 (quoting System at 386).

[56] *Id.* (quoting Digest at 499); *see Torres*, 141 S. Ct. at 1001 (unlike common law seizure by force, "a seizure by acquisition of control involves either voluntary submission to a show of authority or the termination of freedom of movement").

[57] The following is the complete text of this definition:

> What shall be deemed a legal arrest. *a* (citing Genner v. Sparks, 1 Salk. 79, 91 Eng. Rep. 74 (K.B. Ct. 1705)). Bare words will not make an arrest, there must be an actual touching of the

Swift states that, under Connecticut's common law, "words will not make an arrest, there must be an actual touching of the body, or what amounts to the same thing, a power of taking immediate possession of the body, and the parties submission thereto."[58] He then differentiates between, on the one hand, the absence of an arrest (such as where an officer tells a suspect that he is under arrest, but the suspect holds the officer at a distance with a fork and retreats inside his home, or where an officer tells a man on horseback that he is under arrest and the man flees) and, on the other hand, an arrest occurring where the suspect flees, but the officer has "laid hold of him" or the man "submits."[59] Notably, the English common law "frequently called a laying of hands" a touch.[60] And if there is any doubt that Swift's rendition of the common law deemed an arrest by touching to be on equal footing with an arrest by either a show of authority and submission, or the creation of a situation that effectively forces a submission,[61] it is dispelled by his citation to the English common law case of *Genner v. Sparks*,[62] which provides that "[b]are words will not make an arrest; but if the bailiff had touched him, that had been an arrest."[63] Although Swift cited no Connecticut common law case on this matter, and Connecticut did not completely incorporate the English com-

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> body, or what amounts to the same thing, a power of taking immediate possession of the body, and the parties submission thereto. And, therefore, in the case where the officer said to the person against whom he had the writ, he being at some distance, that he arrested him by warrant that he had against him, and the person having a fork in his hand, kept the officer at a distance, till he retreated into the house, this was held to be no arrest. So where an officer having a writ against a person, met him horseback and said to him, you are my prisoner, upon which he turned back and submitted, this was held to be a good arrest, tho the officer never laid hands on him. But if the officer's saying these words, he had fled, if had been no arrest unless the officer had laid hold of him.

SYSTEM at 110.

58 *Id.*

59 *Id.*

60 *Torres,* 141 S. Ct. at 996.

61 The *Hodari D.* Court suggested that, under the common law of arrests, a touch could be understood as a constructive detention. 499 U.S. at 625.

62 SYSTEM at 110 (citing *Genner*, 1 Salk. 79).

63 *Genner,* 1 Salk. at 80.

mon law into its common law, he wrote that he had selected English cases that were in force in Connecticut, cases that Connecticut jurisprudence recognizes as part of the common law.[64]

In addition, the *Oquendo* Court, without analysis, summarized only some of Swift's observations to show that that an arrest could not encroach on the right of personal liberty on the basis of a touching because a touching did not constitute an arrest. Specifically, the Court relied on Swift to:

- explain that no restraint could be placed on a person's right of personal liberty by preventing him from moving from place to place or imprisoning or confining him in any way against his inclination, unless by virtue of express laws of land,[65]
- identify a single and general way this right could be violated, namely via false imprisonment, which consisted of the detention of a person in the absence of any legal authority,[66]
- broaden the definition of an unlawful detention to cover the confinement of a person in any shape or form without legal authority, giving the example of a forcible detention of a person in the street,[67] and
- reiterate that "[a]mong the specific intrusions on personal liberty that constituted an imprisonment at common law was the unlawful, forcible detention of a person in the street."[68]

To be sure, Swift's singling out of an unlawful street detention as an example of an unauthorized intrusion on personal liberty reflects his definition of an arrest in terms of various forms of detaining a person.[69] But Swift was not, thereby, suggesting that the necessary predicate of an un-

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64 Ullmann v. State, 230 Conn. 698, 707 n.7, 647 A.2d 324 (1994).
65 *Oquendo*, 223 Conn. at 650-51 (relying on SYSTEM at 180).
66 *Id*. at 651 (relying on SYSTEM at 57).
67 *Id*. (relying on DIGEST at 17-18 (1822)).
68 *Id*. at 652 (relying on DIGEST at 17-18).
69 *Id*. at 650 (relying on SYSTEM at 386).

lawful arrest violating the right of personal liberty was an arrest that limited a person's movements, as opposed to an arrest that touched without controlling him. Notably, Swift offered various other examples of arrests intruding on the right of personal liberty by unlawfully imprisoning or confining a person in a private home, prison, or stocks,[70] explaining that a person cannot be confined in this way by words alone, but can be confined without a touching, such as when an officer comes into a room, tells a person he is under arrest, and locks the door.[71] And then, tellingly, as authority for this explanation, Swift cited to *Genner*[72] thereby demonstrating that his series of examples were meant to be illustrative, not limitative, so as not to exclude precisely what this case recognized, an arrest based on an officer touching a suspect.[73] The

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[70] DIGEST at 494.

[71] *Id*. at 499.

[72] DIGEST at 499 (citing *Genner*, 1 Salk. at 91).

[73] It follows that an attempted common law arrest occurs when, in the absence of a touching, an officer fails to create a situation that effectively controls a suspect, or a suspect fails to submit to an officer's show of authority. Consequently, and contrary to *Oquendo*, 223 Conn. at 652 (relying on *Hodari D.*, 499 U.S. at 631-32 (Stevens, J., dissenting)), the distinction between a common law arrest and an attempted arrest is, indeed, reflected in the distinction between common law battery (defined as the unlawful beating of another that involves at least a touching) and assault (defined as the attempt or offer to beat another in the absence of a touching). 3 BLACKSTONE'S COMMENTARIES ON THE LAWS OF ENGLAND 120 (Oxford 1768). Moreover, undergirding the *Oquendo* Court's unexplained reliance on the observation of the *Hodari D.* dissent that an unauthorized attempted arrest at common law was unlawful, is the faulty assumption that a touch can best be understood as an attempted arrest. *Oquendo*, 223 Conn. at 651 (relying on *Hodari D.*, 499 U.S. at 631-32) (Stevens, J., dissenting)). It should come as no surprise that Connecticut's common law of arrests was not unique among the states and that, consistent with *Hodari D.*, it deemed a touch to be an arrest instead of an attempted arrest. Notably, in *Hodari D.*, 449 U.S. at 624, the Court relied upon *Whithead v. Keyes*, 85 Mass. 495, 501 (1862), for the proposition that an arrest at common law occurs when an officer lays his hands on a suspect, despite failing to succeed in stopping and holding him. The Court in *Keyes* had relied on *Genner v. Sparks* for this proposition, as did Swift. SYSTEM at 110.

In addition, none of the other state courts that rejected *Hodari D.*'s definition of a seizure as a matter of state constitutional law relied on a state common law definition of an arrest that differs from the common law definition relied on in *Hodari D.* Instead, many of those state courts relied on public policy considerations that largely tracked the *Hodari D.* dissent, *see, e.g.*, State v. Randolph, 74 S.W.3d 330, 335-37 (Tenn. 2002); Commonwealth v. Stoute, 422 Mass. 782, 784-90, 665 N.E.2d 93 (1996); State v. Quino, 74 Haw. 161, 166-75, 840 P.2d 358 (1992), or rested on a state constitutional right of privacy, *see, e.g.*, Commonwealth v. Matos, 543 Pa. 449, 459-61, 672 A.2d 769 (1996), a common law right of privacy, *e.g.*, People v. Hollman, 79 N.Y.2d 181, 194-96, 590 N.E.2d 204 (1992), or a combination of public policy considerations and privacy rights. *See, e.g.*, State v. Garcia, 147 N.M.

*Oquendo* Court simply disregarded the citation to *Genner*.

That there was no basis in Connecticut's common law of arrests for the *Oquendo* Court to have picked *Mendenhall* instead of *Hodari D.* in defining a section 7 seizure should have been obvious and led the Court either to rely exclusively on the Fourth Amendment and *Hodari D.*'s settled seizure definition or to exercise its discretion and analyze the relevant policy issues without the parties' full briefing.

## VI. Hodari D.'s Public Policy Merits

There is a further reason why the *Oquendo* Court should have eschewed an originalist approach to defining a section 7 seizure for the first time, which is that public policy considerations have a direct bearing on the scope of section 7 rights and arguably support *Hodari D.*'s definition. This is especially so in that, when viewed from the perspective of police officers in the field and the suspects they encounter, *Hodari D.*'s seizure definition is more effective in securing society's policy interest in constitutionally lawful seizures, and this important policy interest has ramifications for how police officers carry out seizures, how suspects respond, and how section 7 rights are thereby affected.

Under *Mendenhall*'s definition of a seizure, after a police officer applies physical force to a suspect, or directs a show of authority towards him, the officer must engage in a rough calculus as to whether a reasonable person would interpret the officer's behavior to mean that he was not free to leave.

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134, 144, 217 P.3d 1032 (2009); Joseph v. State, 145 P.3d 595, 604-05 (Alaska Ct. App. 2006); State v. Beauchesne, 151 N.H. 803, 809-15, 868 A.2d 972 (2005); State v. Clayton, 309 Mont. 215, 217-19, 45 P.3d 30 (2002); Jones v. State, 745 A.2d 856, 865-69 (Del. 1999); State v. Young, 135 Wash. 2d 498, 504-12, 957 P.2d 681 (1998) (en banc). At most, the court in *State v. Tucker*, 136 N.J. 158, 165, 642 A.2d 401 (1994), generally agreed with the *Hodari D.* dissent that the majority's common law interpretation failed to adequately distinguish an arrest from an attempted arrest. *Accord Stoute*, 422 Mass. at 787 n.12 (also assuming applicability of common law to state constitutional construction). This statewide uniformity in the common law can be explained by the fact that "[e]arly American courts adopted this mere-touch rule from England, just as they embraced other common law principles of search and seizure" "through the framing of the Fourteenth Amendment, which incorporated the protections of the Fourth Amendment against the States." *Torres*, 141 S. Ct. at 996-97 (collecting cases).

To be sure, such a calculus has the advantage of being objective in that it examines a reasonable person's characteristics and how this hypothetical person would understand and respond to an officer's behavior, obviating the need to assess the vagaries of a particular suspect's state of mind.[74] Yet an officer's assessment of a reasonable person's response to his contemplated conduct is too impressionistic to enable him to reliably anticipate whether a seizure will occur and trigger section 7 safeguards.[75] This is so because the officer is faced with a potential variance between the viewpoint of the reasonable person and the conduct of the actual suspect, who may refuse to submit and either go about his business or depart. Therefore, it can be expected that an officer will often be unable (or at least find it difficult in the absence of any demonstrable assurances) to differentiate between these two viewpoints with sufficient accuracy to prevent being taken unaware of the occurrence of a seizure. This prospect of not knowing whether a seizure has occurred incentivizes the officer to either: (1) act more forcefully or emphatically to ensure that there is no degree of separation between the seizure of the actual suspect and the hypothetical reasonable person, conduct that is subject to excess and heightens the dangerousness of the encounter; or (2) forgo approaching the suspect despite a public-safety imperative to intervene instead of conduct surveillance. The byproduct of *Mendenhall*'s failure to provide an officer in the field with a reliable benchmark for determining when a seizure will occur is that there is a negligible deterrent value in excluding evidence that is the fruit of an unlawful, but not readily discernable, seizure.

In contrast, *Hodari D.*'s definition furnishes an officer in the field with clearer and more reliable benchmarks for determining in advance when a seizure will occur and must be justified with sufficient indicia of suspicion of criminal

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[74] *See* Michigan v. Chesternut, 486 U.S. 567, 574 (1988) (reasonable person standard guards against Fourth Amendment protection varying with "state of mind" of particular individual approached).

[75] *But see id.* (objective reasonable person standard "allows the police to determine in advance whether the conduct contemplated will implicate the Fourth Amendment").

activity: the officer's own conduct in touching the suspect or the suspect's own conduct in submitting to the officer's show of authority. Because, ordinarily, an officer can control his conduct and decision to touch a suspect,[76] the officer knows in advance when he is required to justify the touch. And because, ordinarily, the suspect can control his conduct in manifesting his decision to submit and obtain constitutional protection, it is the suspect who has the power to dictate when an officer must justify his show of authority. As a result, an officer is incentivized to be forearmed with sufficient indicia of suspicion of criminal activity to support his display of authority and disincentivized to intimidate a suspect into headlong flight or other suspicious behavior with the aim of transforming an unjustified display into one that is justified. Intimidation of this sort risks being preempted by a suspect's exercise of his power to submit, which enables him to avoid the dangers inherent in being pursued by an officer and expose the unlawfulness of any resulting seizure. It is this incentive, derived from a suspect's power to bring section 7 protections into play on his own behalf by submitting, that cuts against the *Oquendo* Court's conclusory observation that *Hodari D.* "encourage[s] illegal stops by the police."[77] It is this incentive that bolsters the observation of the *Hodari D.* Court that "policemen do not command 'Stop' hoping to be ignored, or give chase hoping to be outrun,"[78] explaining that officers may expect the suspect to stop out of his self-interest rather than simply because most people will obey an officer's command on account of his status or armed presence.[79] And it is the suspect's incentive to momentarily give up a right—walking away or going about his

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[76] *See Torres,* 141 S. Ct. at 998 (2021) (Fourth Amendment seizure requires officer to "objectively manifest[] an intent to restrain" in asserting authority towards or touching suspect, which does not "depend on the subjective perceptions of the seized person"); *see also id.* at 995 (common law of arrest included application of force to body of person with intent to restrain); *Hodari D.*, 499 U.S. at 626 (Fourth Amendment seizure means "laying on of hands or application of physical force to restrain movement").

[77] *Oquendo*, 223 Conn. at 660.

[78] 499 U.S. at 627.

[79] *See Young*, 294 Wis. 2d at 31 (2006) (police must presume that target of stop will comply because most people will acquiesce to show of authority).

business—to secure it in the long run which supports the conclusion that, under *Hodari D.*, self-interest will drive his acquiescence to a show of authority instead of fear, which the *Hodari D.* dissent incorrectly posits.[80] Thus, *Hodari D.*'s seizure definition incentivizes suspects to protect their section 7 rights by obeying police commands and officers to abide by those rights by carrying out lawful seizures.[81]

## VII. Applying Hodari D.

A recent decision by the Connecticut Supreme Court, *State v. Davis*,[82] illustrates the policy consequences of the *Oquendo* Court's incorporation of *Mendenhall*'s seizure definition into section 7. In *Davis*, an anonymous caller informed the police that a weapon was being openly carried by an unidentified man among a group of men in a location that the police considered to be a high crime area.[83] At least five officers, some of whom had unholstered their firearms, arrived at the scene in three cruisers and approached the group.[84] The defendant, who was among this group, walked away.[85] The officers issued a series of commands for him to stop, and the defendant complied after discarding an item that the police later discovered to be an unregistered firearm, which served as the subject of the defendant's firearms convictions.[86] It was uncontested that, pursuant to *Oquendo*, the defendant was seized as soon as the police commanded him to stop as he was walking away, even though he did not stop until after he discarded the firearm, because a reasonable person would not have felt free to leave from the outset of the issuance of the commands to halt.[87] And the *Davis* Court determined that the police lacked reasonable and articulable suspicion to justify the seizure, which resulted in the suppression of a

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[80] 499 U.S. at 630 n.4 (Stevens, J. dissenting).

[81] *See Young*, 294 Wis. 2d at 31 (*Hodari D.* incentivizes people to obey police orders without creating incentive for police to violate their rights).

[82] 331 Conn. 239, 203 A.3d 1233 (2019).

[83] *Id.* at 242-44.

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

[85] *Id.* at 243.

[86] *Id.*

[87] *Id.* at 245.

firearm under the exclusionary rule as the fruit of an illegal seizure.[88]

But if *Hodari D.*'s seizure definition had been in effect, it would have forewarned the police officers that any of the men they would encounter could submit at any time and trigger section 7's protections, incentivizing the officers to ensure the viability of their investigation beforehand by monitoring the scene from a distance for the purpose of gathering additional evidence to justify a seizure or approaching and clarifying that their presence at the scene was prompted by a gun having been displayed in public and was not an assertion of authority directed at any specific person. And the defendant would have known that he could submit to the officers by not walking away, thereby invoking section 7 protection and avoiding the dangers inherent in ignoring the officers' commands to halt, which they reinforced by having unholstered their firearms. Therefore, the *Oquendo* Court should have either decided the seizure issue under the Fourth Amendment and *Hodari D.*'s settled seizure definition or considered the public policy issues pertinent to the definition for the purpose of ensuring section 7's contemporary effectiveness.[89]

## VIII. Conclusion

Only a bedrock belief in the imperative of expanding state constitutional rights beyond the rights protected by the fed-

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[88] *Id.* at 246-57.

[89] Had the *Oquendo* Court addressed the contemporary meaning of a section 7 seizure, it would have faced various policy considerations questioning *Hodari D.*'s seizure definition, such as: (1) whether the definition actually incentivizes officers to justify their investigations in advance and suspects to submit early on in their encounters with officers and trigger the benefits of section 7 safeguards; *see* State v. Edmonds, 323 Conn. 34, 83-86, 145 A.3d 861(2016) (some innocent individuals will flee from police officers out of fear and distrust believing any contact can be dangerous and turn them into suspects) (Robinson, J. concurring); (2) whether these incentives strike the right balance between the interests of law enforcement and individuals' rights; and (3) whether officers, without an objective basis in criminal activity, are incentivized to intimidate or coerce suspects into suspicious conduct that justifies seizing them, having exploited their fear of law enforcement to overcome their willingness to submit. *See Quino*, 840 P.2d at 365 (police cannot be allowed to randomly encounter individuals without any objective basis for suspecting them of misconduct and then coercing them to develop reasonable suspicion to justify their detention).

eral constitution can explain the *Oquendo* Court's replacement of its living analysis of the Connecticut Constitution with common-law originalism. Only a court with supreme authority, driven by the ideology of expansive rights, could have so transparently mischaracterized its common law, just as the *Linares* Court so transparently mischaracterized the original meaning of the state constitution's free speech provisions. And only a court that unswervingly assumes that changes in the meaning of the U.S. Constitution come at the expense of individual rights would have foreclosed examining, for purposes of defining a section 7 seizure for the first time, whether *Hodari D.*'s seizure definition was less restrictive than *Mendenhall*'s definition.

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