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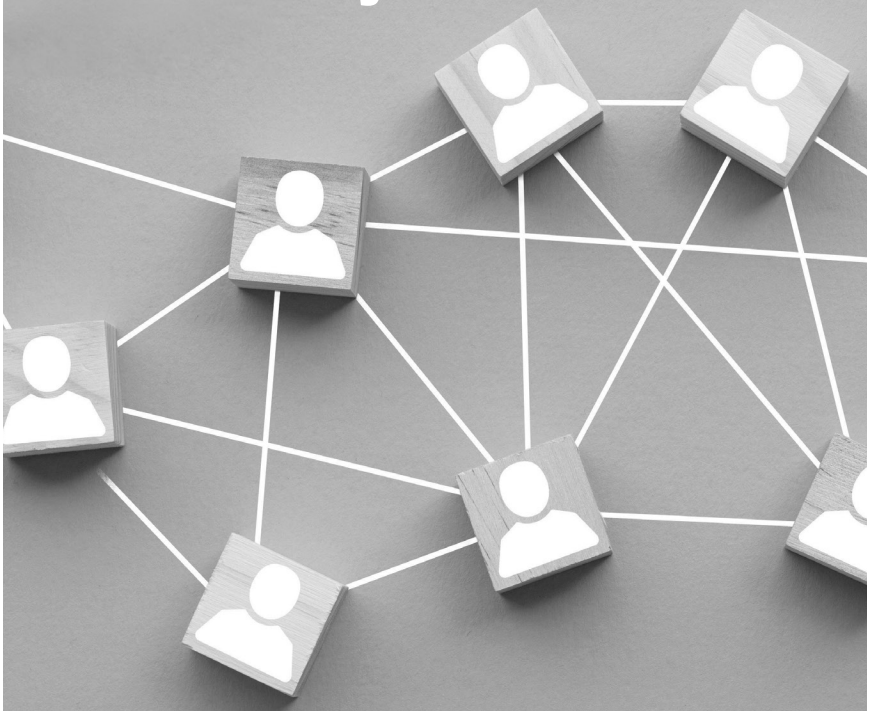

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2022 DEVELOPMENTS IN CONNECTICUT ESTATE AND PROBATE LAW

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

This Article provides a summary of selected 2022 legislation and case law affecting Connecticut estate planning and probate practice.

I. Legislation

Two major pieces of legislation will impact the field in 2022 and beyond.

A. *Connecticut Parentage Act*

On January 1, 2022, the Connecticut Uniform Parentage Act took effect.[1] This comprehensive act is intended to facilitate equal treatment under the law for same-sex couples and their children. The Act makes numerous changes to Connecticut law, including expanding recognition of non-biological parents, providing guidance on establishing and adjudicating parentage, updating the rules governing parentage of children born under surrogacy agreements, and establishing a procedure to enable children conceived through assisted reproduction to access medical and identifying information about any gamete donors.[2] Given the importance of this Act,

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

[1] An Act Concerning Adoption and Implementation of The Connecticut Parentage Act, P.A. 21-15 § 1 (Reg. Sess.), effective Jan. 1, 2022.

[2] Office of the Probate Court Administrator, 2021 Legislative Summary, 1-2 (2021).

it already has been explored in other publications and presentations.[3] Accordingly, this article will only touch on one aspect of the Act most directly relevant to the probate bar, namely the expansion of probate court jurisdiction into areas governed by the Act.[4]

Probate courts now have jurisdiction to decide the following types of petitions to establish parentage under General Statutes § 46b-454:[5] to determine parentage after death of the child or death of the person whose parentage is to be determined,[6] for parentage orders for consensual assisted reproduction,[7] to validate gestational surrogacy agreements,[8] and to validate genetic surrogacy agreements.[9]

B. *An Act Concerning Real Estate and Probate Courts*

Public Act 22-136 amends General Statutes § 45a-107(b) and modifies the process of obtaining a release of probate fee liens.[10] The Act sets forth an amended process to obtain a release of lien under the circumstances where: (1) the lien arose out of a decedent's retained life use or survivorship interest in real property, (2) the decedent died more than 10 years before a petition for release is filed, (3) no proceeding to settle the estate has been filed in a Connecticut probate court, (4) no Connecticut estate or succession tax return has been filed, (5) no Connecticut estate tax has been assessed, and (6) based on the value of all known property and taxable gifts, no Connecticut estate tax could be assessed in connection with the estate.[11]

To obtain the release of lien, the petitioner must file a petition for release of lien in the probate court for the district

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[3] *See generally* Douglas NeJaime, Conn. Bar Ass'n, *I Have to Adopt My Own Kid? The Parentage Act's Impact on LGBTQ+ Families* (Nov. 9, 2021).

[4] Office of the Probate Court Administrator, 2021 Legislative Summary, 6 (2021).

[5] *Id*. at 3.

[6] *Id*.

[7] *Id*.

[8] *Id*.

[9] *Id*.

[10] An Act Concerning Real Estate and The Probate Courts, P.A. 22-136 § 1 (Reg. Sess.), approved May 27, 2022, effective from passage.

[11] *Id*.

where the decedent was domiciled at death or last resided or, if the decedent was a non-resident, where the real property is located.[12] The petitioner must also file an affidavit that includes: (1) a statement that the petitioner did not receive the title interest from the decedent as its immediate successor in interest in the chain of title or as a devise or distribution from the decedent's estate, (2) a statement that the petitioner does not possess the information required to file a complete Connecticut estate tax return, and (3) evidence that demonstrates a diligent search was made to locate the decedent's heirs, beneficiaries, or transferees and that any heirs, beneficiaries, or transferees found failed or refused to file a Connecticut estate tax return.[13] The petitioner must also file a Connecticut estate tax return reporting the value of the real property subject to the petition and, to the best of the petitioner's knowledge, the value of all other property of the decedent at the time of death and any taxable gifts.[14]

The probate court will determine whether the petitioner has successfully met the requirements of this section and calculate the statutory probate fee.[15] The petitioner will pay the fee, plus interest, and the court will issue the release of lien.[16] If the probate court subsequently receives an estate tax return for the decedent's estate and payment of the statutory probate court fee, the court shall refund the probate fee paid by the petitioner, but not the interest.[17]

The Act also includes a new section providing that: (1) liens for succession tax purposes shall be deemed released unless a tax had been assessed or imposed, (2) liens for the estate tax are deemed released after 10 years from the date of death unless an estate tax return is filed or a tax has been assessed, and (3) no lien that is released shall serve as a basis for a refund from the Department of Revenue Services.[18]

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12 *Id.*
13 *Id.*
14 *Id.*
15 *Id.*
16 *Id.*
17 *Id.*
18 *Id.* at § 3.

At first glance, this Act seems to be an efficient way to clear up the land records and secure the probate court's statutory fee. However, the Act applies only in limited circumstances, and the procedural requirements are rather cumbersome. Accordingly, it will be interesting to see how often this process will be utilized.

II. Case Law

A. *Conservatorships*

In *Day v. Seblatnigg*, the Supreme Court held that powers granted to a voluntary conservator were held by the conservator alone and could not be exercised jointly by the conserved person.[19] In reaching this conclusion, the Court upheld an opinion of the Appellate Court discussed in a prior year's update.[20]

The case concerns an individual who successfully petitioned the probate court for appointment of a voluntary conservator of her estate and person.[21] After the conservator was appointed, the conserved person created an irrevocable trust and funded that trust in part with the corpus of a previously-established revocable trust.[22] The conservator contended that the irrevocable trust was void and that any assets transferred to it should be returned.[23] The superior court granted summary judgment in the conservator's favor and the Appellate Court affirmed.[24] On further appeal, the Supreme Court also affirmed, finding that the conserved person had no power to control the assets of her estate.[25]

While at first blush, the Court's holding may appear to be a significant precedent regarding the nature of conservator-

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[19] 341 Conn. 815, 841, 268 A.3d 595 (2022).

[20] *See* Jeffrey A. Cooper & John R. Ivimey, *2018 Developments in Connecticut Estate and Probate Law*, 93 Conn. B.J. 3, 267-71 (2021) (discussing Day v. Seblatnigg, 186 Conn. App. 482 (2018)).

[21] *Day*, 314 Conn. at 819.

[22] *Id*.

[23] *Id*.

[24] *Id*.

[25] *Id*. at 819-20.

ships, a closer look reveals that it is not. The question certified for review was a narrow one, focusing on the question of whether a conserved person can exercise "joint authority" over assets under a conservator's control.[26] The Court's opinion addresses that narrow question and establishes that if a conservator has control of a given asset, the conservator has sole authority over that asset and not joint authority with the voluntarily-conserved person.[27]

As five justices note in a concurring opinion, authored by Justice McDonald, the majority opinion leaves unresolved arguably far more crucial questions related to the scope of a conservator's authority and the intersection of conservatorships and trusts.[28] For example, the majority opinion does not address the question of whether the assets of a funded revocable trust should have been subject to a conservator's authority in the first place.[29] That issue, while implicated in the case, was not briefed or argued and was not within the scope of the appeal.[30] In addition, the concurring opinion points out the unclear language of the current statutory regime governing voluntary and involuntary conservatorships.[31] The opinion urges the legislature to consider revising the conservatorship statutes to clarify the procedures and procedural protections available to those seeking a voluntary conservatorship.[32] We agree. In particular, we wish the legislature would clarify how the concept of "least restrictive means" applies in the context of a voluntary conservatorship.[33] In addition, legislation should clarify the meaning of the language in General Statutes § 45a-655 that provides that a voluntary conservator shall have "all of the powers" of an involuntary

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[26] *Id*. at 818.
[27] *Id*. at 841.
[28] *Id*.
[29] *Id*. at 849.
[30] *Id*.
[31] *Id*. at 850-51.
[32] *Id*.
[33] General Statutes § 45a-650(m) provides in relevant part that a "court shall assign to a[n involuntary] conservator appointed under this section only the duties and authority that are the least restrictive means of intervention necessary to meet the needs of the conserved person." General Statutes § 45a-646, which governs voluntary conservatorships, does not contain analogous language.

conservator.[34] It is not entirely clear whether this provision means that all voluntary conservatorships are plenary—that an involuntary conservator has all of the powers that c*ould have been granted* to a voluntary conservator—or whether a voluntary conservator, like an involuntary one, can be vested with limited powers.[35]

In the end, we agree with the concurring opinion's characterization of the outcome of this matter as "unfortunate."[36] Under the facts of this case, the decree appointing a voluntary conservator gave that conservator plenary authority, and all the opinion really resolves is that such authority was granted solely to the conservator and not held jointly by the conservator and the conserved person. While this holding resolves the question certified for appeal, it fails to address much larger questions regarding the proper reading of the governing statutes, the scope of authority that should be granted to voluntary conservators, and the types of property over which a conservator can be given control. Future judicial and or legislative guidance will be necessary to address these numerous crucial questions.

B. *Wills and Trusts*

1. In Terrorem Clause

In *Salce v. Cardello*, the Appellate Court considered the effect of an *in terrorem* clause in a trust that provided for a beneficiary who took certain actions to forfeit his or her beneficial interest in the trust.[37] The Court held that while the defendant in this case did technically violate the provisions of the trust's *in terrorem* clause, the clause as written vio-

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[34] General Statutes § 45a-646 provides in part that a voluntary conservator "shall have all the powers and duties of a conservator of the person or estate of an incapable person appointed pursuant to section 45a-650."

[35] *Day*, 314 Conn. at 835. The Court notes this source of confusion, but indicates that the question was not before it. *Id*.

[36] *Id*. at 841 (quoting Justice McDonald's concurring opinion).

[37] 210 Conn. App. 66, 71-72, 269 A.3d 889, *cert. granted*, 343 Conn. 902, 272 A.3d 657 (2022) (affirming No. CV176070740S, 2019 WL 6247662 (Conn. Super. Ct. Nov. 6, 2019)); *see also* Jeffrey A. Cooper, John R. Ivimey & Katherine E. Mulry, *2019 Developments in Connecticut Estate and Probate Law*, 93 CONN. B.J. 4, 381-82 (2021) (discussing prior superior court handling of case).

lated public policy and would not be enforced against her.[38]

The case began when the defendant, a beneficiary under a will and trust, noted some potential errors in the estate's state estate tax return and requested a probate court hearing on the matter.[39] The plaintiff, also a beneficiary under the will and trust, alleged that the defendant thereby violated *in terrorem* clauses contained in the governing will and trust document.[40] On appeal from the probate court, the superior court held that neither party had violated the *in terrorem* clauses, finding in relevant part that since the defendant had acted in good faith in challenging the fiduciary's actions, the clause would not be enforced against her.[41] In reaching its result, the superior court relied on a 1917 Connecticut Supreme Court case, *South Norwalk Trust Co. v. St. John*, where the Court held that *in terrorem* clauses are generally enforceable, but will not operate against a beneficiary who acts "in good faith, and upon probable cause and reasonable justification . . . ."[42]

The Appellate Court affirmed, but on slightly different grounds. The Appellate Court first addressed whether the defendant's actions violated the facial terms of the *in terrorem* clause, and held that they did.[43] The Court then went on to consider whether enforcing the clause would violate public policy and concluded that it would.[44] In reaching this conclusion, the Court seemed to draw a distinction in enforceability between *in terrorem* clauses that apply to fiduciary "actions that involve the exercise of judgment" and those that extend to "actions that are purely ministerial in nature."[45] In the case of the former, the Court concluded that a settlor could

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[38] *Salce*, Conn. App. 66 at 78.

[39] *Id.* at 70-71.

[40] *Id.* at 71. The defendant filed a counterclaim alleging that the plaintiff had violated the *in terrorem* clause. *Id.* at 72. We do not discuss that counterclaim as it was not before the Appellate Court

[41] *Id.* at 72.

[42] *Id.* at 74 (quoting South Norwalk Trust Co. v. St. John, 92 Conn. 168, 177 (1917)).

[43] *Id.* at 78.

[44] *Id.* at 79 (citing Peiter v. Degenring, 136 Conn. 331, 335 (1949) (*in terrorem* clauses are void if they violate public policy)).

[45] *Id.*

have a "keen interest in protecting her designated fiduciary from attacks on the fiduciary's good faith exercise of judgment" and thus a clause applying to such decisions generally would be enforceable.[46] In contrast, the Court saw "little benefit to, and potentially significant harm from, an in terrorem clause that punishes objections to errors made by a fiduciary in his nondiscretionary administration," such as the calculation of taxes central to the present case.[47] As a result, the Court concluded that "enforcing the clauses as written would violate public policy."[48]

In reaching this result, the Court did not reach the question of whether *South Norwalk Trust Co. v. St. John* established a general "good faith exception" that insulates a beneficiary who acts in good faith from the operation of any *in terrorem* clause, an exception that the superior court's opinion seemed to recognize.[49] The Court stated that the "good faith" exception established by *South Norwalk* applied "[i]n the case of will contests specifically."[50] While the Court did not formally address the question, it seemed hostile to expanding that exception to cover all *in terrorem* clauses, focusing on the scope of the *in terrorem* clause itself rather than on the motivation of the party bringing a challenge.

In light of the Court's approach to the issue, attorneys may wish to consider limiting the scope of an *in terrorem* clause used in future wills and trusts to apply solely to a fiduciary's good faith exercise of judgment and not to other, more ministerial, acts.

2. Undue Influence

In *Baras v. Baras*, the superior court affirmed the probate court's admission of a will to probate, finding that the plaintiffs had not sufficiently proven their allegation that the will was the product of undue influence.[51]

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[46] *Id*.
[47] *Id*.
[48] *Id*. at 82.
[49] *Id*. at 78. *See supra* note 38 to accompanying text.
[50] *Salce*, Conn. App. 66 at 74.
[51] Nos. FSTCV186035174S, FSTCV176032644S, 2022 WL 1060735, at *11 (Conn. Super. Ct. Mar. 9, 2022)

The case concerns the will of a decedent diagnosed with Alzheimer's disease, who made a dramatic change to his will near the end of his life, following the wishes of his second wife by largely disinheriting his own children in favor of his step-daughter.[52] While the court conceded that "[a]t first glance, this appeared to be a classic case of undue influence," its more detailed analysis showed that the plaintiffs had not proven such to be the case.[53]

The court began by noting that where, as in this case, the proponents of a will have met their initial burden of proving testamentary capacity, the burden of proof shifts to the contestants to prove the existence of undue influence.[54] In finding that the contestants had not met this burden, the court seemed most persuaded by several factors. First, the decedent and his second wife had been married for over fifty years, a far longer period of time than found in most cases where a second spouse is accused of undue influence.[55] Second, the decedent had made alternative financial arrangements for his own children, who were both older and more financially independent than his "considerably younger" step-daughter.[56] Finally, and seemingly most important, the court was reassured that the decedent's attorney had carefully evaluated the decedent's testamentary capacity before allowing him to sign his will, meeting with him alone, carefully explaining the provisions of his will, and satisfying herself that the decedent had capacity and was operating free from undue influence.[57] In reaching this conclusion, the court acknowledged there was "no doubt" that the decedent's wife "actively solicited and persuaded" the decedent to modify his estate plan, but that the decedent did have strained relations with his children, made other provisions for the children's financial support, and received independent advice from a competent attorney.[58] In the end, thus, the plaintiffs

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52 *Id.* at *1
53 *Id.*
54 *Id.* at *3 (citing In re Sanzo's Appeal, 133 Conn. App. 42, 51 (2012)).
55 *Id.* at *6 n. 17.
56 *Id.* at *6.
57 *Id.* at *7.
58 *Id.* at *6.

were unable to prove their claim of undue influence by the requisite clear and convincing evidence standard.[59]

The court's opinion provides useful guidance to attorneys dealing with clients of questionable capacity, including a detailed survey of major Connecticut cases addressing the subject of undue influence. It also provides a clear example of how difficult it may be for those alleging undue influence to meet their high burden of proof.

The opinion raises one significant question of Connecticut law insofar as the court stated that contestants alleging undue influence must prove their allegations by *clear and convincing evidence* rather than a mere preponderance of the evidence.[60] We think the opinion may be incorrect on this issue and the court's citations reveal a lack of clear appellate authority on the question.[61] Future case law may need to address this issue.

3. Tortious Interference with Inheritance

Two cases involved the question of whether this state recognizes a cause of action for tortious interference with an inheritance. The Appellate Court has implicitly endorsed the validity of such a claim in *Solon v. Slater*,[62] and in *Geremia v. Geremia*.[63] However, the Connecticut Supreme Court has yet to rule on the issue.[64]

In *Byrne v. Morales*, the superior court denied the defendant's motion to strike a count alleging tortious interference with inheritance.[65] In so doing, the court reasoned that a ma-

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[59] *Id*. at *7.

[60] *Id*. at *6 (citing Holloway v. Carvalho, 206 Conn. App. 371, 388-89 (2021)).

[61] For a more detailed analysis of the issue, see Jeffrey A. Cooper, *An Unclear Burden: Proving Undue Influence in Connecticut*, 37 Quinnipiac Prob. L. J. 31 (2024).

[62] *See generally Solon v. Slater*, 204 Conn. App. 647, 253 A.3d 503 (2021); *see also* Jeffrey A. Cooper & John R. Ivimey, *2018 Developments in Connecticut Estate and Probate Law*, 93 Conn. B.J. 3, 262-63 (2021).

[63] *See generally Geremia v. Geremia*, 159 Conn. App. 751, 125 A.3d 549 (2015); *see also* Jeffrey A. Cooper, John R. Ivimey & Katherine E. Coleman, *2015 Developments in Connecticut Estate and Probate Law*, 89 Conn. B.J. 307, 324-25 (2016).

[64] *See Solon v. Slater*, 345 Conn. 794, 820, 287 A.3d 574 (2023).

[65] *Byrne v. Morales*, No. DBDCV216041582S, 2022 WL 6369637, at *6 (Conn. Super. Ct. Sept. 15, 2022).

jority of the superior court judges who have ruled on the issue have found tortious interference to be a valid claim and that "the Appellate Court has implicitly endorsed the validity of such a claim."[66]

In *O'Sullivan v. Haught*, the superior court again recognized the tort of tortious interference with inheritance and explored the elements of the cause of action.[67] Most noteworthy is the court's discussion of the type of tortious conduct required to sustain the cause of action. In contrasting tortious interference with undue influence, the court made clear that a claim of tortious interference requires "*independent tortious conduct*" that transcends that required to prove undue influence.[68] Rather, the conduct complained of must involve tortious conduct such as "fraud, misrepresentation, intimidation or molestation."[69] Accordingly, while the cause of action is valid, it does have unique elements beyond those required to prove similar claims such as undue influence.

4. Signature

In *In re Harris*, the Appellate Court affirmed a superior court's admission of a will to probate even though the witnesses had signed the self-proving affidavit appended to the will rather than the will itself.[70] In reaching this result, the court relied extensively upon the Supreme Court's 1991 opinion in *Gardner v. Balboni*, holding a will to be validly executed even though the testator had signed the self-proving affidavit rather than the will itself.[71] Here, the Court extended *Gardner* to the facts of the current case, where it was the witnesses, rather than the testator, who signed the affidavit rather than the will.[72]

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[66] *Id.* at *4.

[67] *O'Sullivan v. Haught*, No. HHDCV206121602S, 2022 WL 16757407, at *2 (Conn. Super. Ct. Oct. 31, 2022).

[68] *Id.* at *3.

[69] *Id.* (quoting Solon v. Slater, 204 Conn. App. 647, 662-63 (2021)).

[70] 214 Conn. App. 596, 602, 282 A.3d 467, *cert. denied*, 345 Conn. 918, 284 A.3d 299 (2022); *see* Jeffrey A. Cooper, John R. Ivimey & Katherine E. Mulry, *2020 Developments in Connecticut Estate and Probate Law*, 94 CONN. B.J. 4, 352 (discussing the superior court's treatment of the case).

[71] *See Gardner v. Balboni*, 218 Conn 220, 227-29, 588 A.2d 634 (1991).

[72] *In re Harris*, 214 Conn. App. at 602-03.

At issue was the interpretation of Connecticut's Wills Act, which provides in relevant part that "[a] will or codicil shall not be valid to pass any property unless it is in writing, subscribed by the testator and attested by two witnesses, each of them subscribing in the testator's presence . . . ."[73] Citing Black's Law Dictionary, the *Gardner* court had defined the word "subscribe" to require a signature "underneath" the will rather than at the exact end of its text.[74] The Court here adopted the same definition, thus finding due execution where the witnesses, rather than the testator, were the ones who "subscribed" the will by signing the affidavit that followed the will rather than the will itself.[75]

As we noted in our prior discussion of the case, the Court's finding of due execution meant it need not consider the extent to which Connecticut law might recognize a curative doctrine such as "harmless error" in the case of a defective will execution.[76] As noted immediately below, a subsequent unrelated opinion, *Kabel v. Rosen*, suggests that the Court may not be particularly inclined to adopt such a doctrine.[77]

5. Will Reformation

In *Kabel v. Rosen*, the Appellate Court affirmed a superior court opinion refusing to reform a will on the grounds that the testator mistakenly failed to understand its terms and effect.[78] The Court referred to reformation of an unambiguous will as "a remedy that has never been recognized in Connecticut," and rejected the plaintiff's effort to redress the testator's alleged mistake.[79]

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[73] CONN. GEN. STAT. § 45a-251.

[74] *Gardner*, 218 Conn. at 228 (quoting Black's Law Dictionary (5th Ed. 1979)).

[75] *In re Harris*, 214 Conn. App. at 601-02.

[76] *See* Jeffrey A. Cooper, John R. Ivimey & Katherine E. Mulry, *2020 Developments in Connecticut Estate and Probate Law*, 94 CONN. B.J. 4, 352 (containing a fuller discussion on "harmless error"). Some states recognize doctrines such as "harmless error" and "substantial compliance" whereby a will executed in a manner that violates statutory formalities nevertheless may be admitted to probate if there is clear and convincing evidence that the testator intended the document to be a will.

[77] 215 Conn. App. 528, 531, 284 A.3d 301 (2022).

[78] *Id.* at 540-41.

[79] *Id.* at 531.

The case concerned a decedent who owned both property subject to probate and a much larger IRA account that had designated beneficiaries and thus would not pass under her will.[80] The plaintiff was one of the residuary beneficiaries of the will, but was not a named beneficiary of the IRA.[81] Accordingly, he received no distribution from that non-probate account.[82] The plaintiff alleged that the decedent mistakenly believed that the IRA would pass pursuant to her will and thus intended for the plaintiff to receive a portion of that account.[83] He sought a reformation of the will, which had been drafted by an attorney, to redirect to him some of the probate property otherwise passing to the beneficiaries of the IRA, thus achieving the overall division of assets he contended the decedent had intended.[84] The superior court rejected the plaintiff's request, concluding in part that "the court is not permitted to . . . consider extrinsic evidence relating to allegations [by the plaintiff] concerning scrivener's errors on the part of [the decedent's attorney] in drafting [the decedent's] will or [the decedent's] supposed misunderstanding about her IRA bequest in the will."[85] The Appellate Court could "discern no error" in the lower court's failure to consider such extrinsic evidence.[86]

The Court's treatment of the issue warrants comment. As the Appellate Court correctly points out, the superior court's ruling that extrinsic evidence was inadmissible to show an alleged scrivener's error was based on outdated law, ignoring the Supreme Court's decision in *Erickson v. Erickson* that a contestant *could* introduce extrinsic evidence of a scrivener's error.[87] The Appellate Court paid little heed to the lower court's erroneous reliance on the case overruled by *Erickson*,

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[80] *Id.* at 531-32.

[81] *Id.* at 532. The plaintiff was to receive ten percent of the residuary estate.

[82] *Id.* Even worse for the plaintiff, since the estate had insufficient assets to pay all pre-residuary bequests, the residue adeemed, and the plaintiff received nothing. *Id.*

[83] *Id.*

[84] *Id.* at 532-33.

[85] *Id.* at 533 (quoting superior court memorandum of decision).

[86] *Id.* at 538.

[87] *Id.* at 539 n.8 (citing Erickson v. Erickson, 246 Conn. 359, 372, 716 A.2d 92 (1998)).

noting that the plaintiff did not raise the *Erickson* case on appeal and provided no suggestion that he could meet the requisite clear and convincing evidentiary standard set forth by that case.[88] While we understand the Court's reluctance to reargue a case on a party's behalf, we think the Court could have more fully considered both the direct applicability of *Erickson* and the larger policy implications of that case. As the Supreme Court noted in that case, "principles of law which serve one generation well may, by reason of changing conditions, disserve a later one . . . . Experience can and often does demonstrate that a rule, once believed sound, needs modification to serve justice better."[89] In the present case, we can fairly characterize the overall tenure of the Court's opinion as extremely traditional, embracing strict common law doctrines and suggesting reluctance to fully consider the type of "novel remedy" urged by the plaintiff in this case and embraced by the Supreme Court in *Erickson*.[90]

C. *Probate Litigation*

1. Improper Party

In *Wagshol v. Kirson*, the superior court granted a motion to dismiss a probate appeal to the extent that it named the probate judge and the probate court as parties to the appeal.[91] The case provides yet another reminder to the bar, and the public, that the procedures for filing probate appeals have been modified over the past fifteen years, and that those filing such appeals should carefully review, and follow, the revised statutory procedures.[92]

The case concerns a probate appeal that named several defendants, including the probate judge who heard the un-

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[88] *Id*.

[89] *Erickson v. Erickson*, 246 Conn. 359, 372, 716 A.2d 92 (1998) (citing Connecticut Junior Republic v. Sharon Hospital, 188 Conn. 1, 17-18, 448 A.2d 190 (1982) (Peters, J., dissenting) (citations omitted; internal quotation marks omitted.)).

[90] *Kabel*, 215 Conn. App. at 542.

[91] No. CV195047167S, 2022 WL 1044947, at *3 (Conn. Super. Ct. Mar. 22, 2022).

[92] The plaintiff in this case was acting *pro se*. See docket at https://civilinquiry.jud.ct.gov/CaseDetail/PublicCaseDetail.aspx?DocketNo=NNHCV195047167S.

derlying dispute and the probate court in which the matter was heard.[93] The probate court and the presiding judge filed a motion to dismiss, citing General Statutes § 45a-186(f), which governs the filing of a probate appeal and specifies that "[t]he Probate Court and the probate judge that rendered the order, denial or decree appealed from shall not be made parties to the appeal and shall not be named in the complaint as parties."[94] The superior court held that General Statutes § 45a-186(f) unequivocally states that the probate court and probate judge are not to be made parties to a probate appeal and thus granted their motion to dismiss.[95]

The case is noteworthy only insofar as it points out the ongoing confusion regarding major changes to the statutes governing the filing of probate appeals. Specifically in 2007, the General Assembly modified General Statutes § 45a-186 to provide that an appeal from probate no longer required probate court approval, but could be commenced by filing a complaint directly with the Superior Court.[96] In 2013, likely in response to continuing confusion about the role of the probate courts, the General Assembly again modified General Statutes § 45a-186 to specify that "[t]he Probate Court and the probate judge that rendered the order, denial or decree appealed from shall not be made parties to the appeal and shall not be named in the complaint as parties."[97] As suggested by this case, and as reported to the authors by numerous probate judges, some members of the bar and the public continue to name the probate judge or probate court as a defendant in probate appeals, requiring the state to expend the resources to file motions to dismiss those actions.

2. Appeal of "Non-order"

In *Morgan v. Baird*, the superior court held that a party

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[93] *Wagshol*, 2022 WL 1044947, at *1.

[94] CONN. GEN. STAT. § 45a-186; *see also id.* at *2.

[95] *Id.* at *3.

[96] An Act Concerning Conservators and Appeals of Conservatorships and Guardianships, P.A. 07–116, § 2 (Reg. Sess.), effective Oct. 1, 2007 (amending General Statutes § 45a-186).

[97] An Act Concerning Probate Court Operations, P.A. 13-81 § 4 (Reg. Sess.), effective Oct. 1, 2013 (modifying General Statutes § 45a-186).

may not appeal a probate court's failure to rule on a motion.[98] Rather, the proper remedy in such case of a such a "non-order" is to petition the Probate Court Administrator for relief.[99]

The case involved a dispute between two beneficiaries of a trust.[100] In the probate court, the plaintiff made several claims and moved for an evidentiary hearing on another related issue.[101] The probate court issued a ruling on the plaintiff's claims, but issued no ruling on the motion for an evidentiary hearing.[102] The plaintiff appealed all of these issues, including the probate court's failure to rule on his motion for an evidentiary hearing, to the superior court.[103]

As to the issue of the motion for an evidential hearing, the court held that the plaintiff could not properly appeal the probate court's failure to rule on this request.[104] The court reasoned that General Statues § 45a-186(b) gives "any person *aggrieved by an order, denial or decree* of a Probate Court" the right to appeal therefrom.[105] The plain language of this statute thus gives a party the right to appeal only from "affirmative acts" of a probate court and does not recognize the notion of an "appealable 'non-order'" as the plaintiff seems to suggest.[106] Rather than appeal pursuant to General Statutes § 45a-186, the plaintiff's remedy in the case at bar lies in General Statutes § 45a-134, which authorizes a party to petition the Probate Court Administrator for relief when a probate judge "fails to render a decision within one hundred twenty days from the completion date of the hearing . . . ."[107]

The facts of this case are complicated by the existence of multiple simultaneous actions between the parties, and it is

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[98] No. KNLCV226055429S, 2022 WL 3152646, at *3 (Conn. Super. Ct. Aug. 8, 2022).
[99] *Id.*
[100] *Id.* at *1.
[101] *Id.*
[102] *Id.*
[103] *Id.*
[104] *Id.* at *3.
[105] *Id.* (citing General Statutes § 45a-186(b) (emphasis added by the court)).
[106] See *id.*
[107] *Id.* (quoting General Statutes § 45a-134).

not clear to what extent the holding is limited to the unique facts of this case. Nevertheless, attorneys should be mindful of its potential applicability to more mundane cases where a probate court issues a decree on some issues raised by the parties, but fails to address others. To the extent that any "non-order" must be treated as distinct from issues actually addressed in a decree, a party might need to simultaneously appeal to the superior court on the issues addressed in the decree and petition the probate court for relief as to matters not addressed in that decree.

3. Tolling of Appeal Period

In *Rider v. Rider*, the Appellate Court held that a petitioner's filing of a motion for revocation in a probate court matter did not toll the 45-day appeal period for challenging the probate court's decree approving a conservator's final account.[108]

In this case, the plaintiff made several objections to a conservator's final account during a probate court hearing.[109] The probate court judge stated that the hearing would have to be continued because the judge needed to spend some time looking at the issues presented.[110] Without another hearing, the judge then issued a decree approving the final account.[111] Following the court's issuance of the decree, the plaintiff filed a motion for revocation of the probate decree, which requested documentation and explanation concerning items reported on the account and requested a continued hearing.[112] The probate court denied the plaintiff's motion for revocation.[113] The plaintiff then appealed to the superior court from the decree approving the account within forty-five days after the denial of the motion for revocation, but seventy days after the decree approving the account.[114] The defendant argued that the appeal was untimely because it was

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[108] 210 Conn. App. 278, 288, 270 A.3d 206 (2022).
[109] *Id.* at 279-80.
[110] *Id.* at 280.
[111] *Id.*
[112] *Id.* at 280-81.
[113] *Id.* at 281.
[114] *Id.* at 281-82.

filed over forty-five days after the mailing of the decree approving the account.[115] The superior court held that it lacked subject matter jurisdiction to consider claims related to the probate court decree approving the final account because the appeal from that decree was untimely.[116]

The plaintiff appealed the superior court decision and argued that the motion for revocation tolled the period for appealing the probate court decree.[117] On appeal, the Appellate Court affirmed. As the right to appeal from a probate court decree is "purely statutory," the Appellate Court focused its analysis on the language of the relevant statutes.[118] General Statutes § 45a-186(a) provides for a 45-day appeal period which makes no provision for tolling while a motion for revocation is pending.[119] The Court noted that General Statutes § 45a-186c provides for tolling in the case of the filing an application for waiver of costs, but there is no similar statutory provision for tolling upon the filing of a motion for revocation under General Statutes § 45a-128.[120] Lastly, the statute governing motions for revocation, General Statutes § 45a-128, addresses the procedure for appeal, but does not contain a tolling provision.[121]

This case serves as a reminder to closely follow the statutory guidance for probate appeals as courts have tended to strictly construe the statutes governing these appeals.

4. Rejected Claims

In *Sessa v. Reale*, the Appellate Court held that the superior court lacked standing to hear an appeal of a probate

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[115] *Id*. at 282; *see also* General Statutes § 45a-186(b) (providing that with respect to a conservatorship matter heard under Section 45a-660, "[a]ny person aggrieved by an order, denial or decree of a Probate Court may appeal therefrom to the Superior Court. An appeal from a matter heard under . . . sections 45a-644 to 45a-677 . . . shall be filed not later than forty-five days after the date on which the Probate Court sent the order, denial or decree.").

[116] *Rider*, 210 Conn. App. at 283-84.

[117] *Id*. at 284.

[118] *Id*. at 287 (citing In re Probate Appeal of Knott, 190 Conn. App. 56, 61 (2019)).

[119] *Id*.

[120] *Id*.

[121] *Id*. at 287-88.

court's denial of an application to hear and decide a rejected claim made pursuant to General Statutes § 45a-186.[122]

The plaintiff alleged that some of his personal property was destroyed when a residence owned by an estate was destroyed by fire and thus he was due a portion of the casualty insurance proceeds received by the estate.[123] Even though the probate court authorized the administrator of the decedent's estate to pay a portion of the proceeds to the plaintiff if he proved his losses, the successor administrator ultimately rejected the plaintiff's claim.[124] The plaintiff then made an application to the probate court under General Statutes § 45a-364(a) to hear and decide the rejected claim.[125] In ruling on the application, the probate court referenced the court's earlier ruling granting the administrator discretion to pay a portion of the proceeds to the plaintiff and stated the application was denied.[126] The plaintiff then appealed to the superior court under General Statutes § 45a-186.[127] The defendant moved to dismiss on the grounds that the court lacked subject matter jurisdiction because the proper procedure for challenging the denial was to commence suit on the claim under General Statutes § 45a-364(b), rather than filing a probate appeal.[128] The plaintiff countered that the court's ruling did not constitute a denial because it ruled on the merits of the claim.[129] The superior court granted the motion to dismiss and the Appellate Court affirmed.[130]

The Appellate Court reasoned that the probate court's ruling on the application constituted a denial because it ex-

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[122] 213 Conn. App. 151, 158, 278 A.3d 44 (2022).
[123] *Id.* at 154.
[124] *Id.* at 154-55.
[125] *Id.* at 155.
[126] *Id.*
[127] *Id.*
[128] *Id.* at 156; *see also* General Statutes § 45a-364(b) (providing as follows: "If the application to receive and decide such claim by the court . . . is denied, the claimant shall commence suit within one hundred twenty days from and including the date of the denial of the claimant's application or be barred from asserting or recovering on such claim from the fiduciary, the estate of the decedent or any creditor or beneficiary of the estate.").
[129] *Sessa,* 213 Conn. App. at 158.
[130] *Id.* at 157, 164.

pressly stated that the application was denied, despite the fact that the court explained the reasoning for its denial.[131] Accordingly, the Appellate Court found that the superior court lacked subject matter jurisdiction because the plaintiff did not commence suit on the claim under General Statutes § 45a-364(b).[132]

5. Standing

In *Wooden v. Perez*, the Appellate Court held that the executor of a decedent's estate did not have standing to bring an adverse possession action with respect to a piece of land that was adjacent to the decedent's real property that was specifically devised in the decedent's will to a testamentary trust.[133]

The executor of the decedent's estate made an adverse possession claim with respect to a piece of land adjacent to the decedent's property that the decedent had used as a driveway for over fifteen years.[134] The decedent's will had specifically devised the real property to a testamentary trust for the benefit of his children.[135] The defendant moved to dismiss the action on the basis that the administrator lacked standing because the estate had no interest in the real property.[136] The superior court granted the motion to dismiss and held that the executor did not have standing to bring the action because the trustee of the testamentary trust owned the real property upon the decedent's death and had no other interest that conferred standing.[137] The Appellate Court affirmed.[138]

In reaching this result, the Appellate Court addressed the two categories of aggrievement, classical and statutory.[139] First, the Appellate Court held that there was no classical

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[131] *Id*. at 162.
[132] *Id*. at 159.
[133] 210 Conn. App. 303, 308-09, 269 A.3d 953 (2022).
[134] *See id*. at 304-05, n.1. The original action was filed by the proposed executor of the estate, but the probate court later appointed a successor administrator who became the substitute plaintiff in this action.
[135] *Id*. at 305.
[136] *Id*. at 305-06.
[137] *Id*. at 306-07.
[138] *Id*. at 310.
[139] *Id*. at 308.

aggrievement because the trust, rather than the estate, was the owner with a stake in the outcome.[140] Second, the Appellate Court rejected the plaintiff's argument that there was statutory aggrievement under General Statutes § 45a-321.[141] In interpreting the statute, the Court looked to *Brill v. Ulrey*, in which the Connecticut Supreme Court held that an executor lacked standing to bring a suit to quiet title where there was no claim that the property was necessary to pay claims of the estate.[142] Since the plaintiff did not allege that the real property was necessary to satisfy the estate's debts, the Appellate Court concluded that there was also no statutory aggrievement.[143]

Implicit in the Court's ruling is an assumption that the adjacent parcel, if indeed acquired by adverse possession, would pass with the specifically devised real property. While the Court's decision does not address this issue, we think there could be an argument that it passes with the residue of the estate.

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[140] *Id*. at 308-09.

[141] *Id*. at 309; *see also* General Statutes § 45a-321(a) (providing that, "[t]he fiduciary of a decedent's estate shall, during settlement, have the possession, care and control of the decedent's real property . . . unless such real property has been specifically devised . . . .").

[142] *Wooden*, 210 Conn. App. at 309 (citing Brill v. Ulrey, 159 Conn. 371, 377 (1970)).

[143] *Id*. at 310.

2023 DEVELOPMENTS IN CONNECTICUT ESTATE AND PROBATE LAW

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

This Article provides a summary of selected 2023 case law affecting Connecticut estate planning and probate practice.

I. Probate Court Litigation

A. *Tortious Interference with Inheritance*

In *Solon v. Slater*, the Supreme Court had a long-awaited opportunity to clarify whether tortious interference with an inheritance is a cognizable cause of action in Connecticut.[1] Deciding the case on other grounds, the Court declined to resolve this open question.[2]

The case concerned a decedent's last will and testament.[3] In probate court, the plaintiff unsuccessfully challenged the will's admission to probate, alleging in part that it had been the product of undue influence.[4] Instead of appealing that ruling, the plaintiff brought an action in the superior court adding additional claims, including that of tortious interference with right of inheritance.[5] The defendants successfully moved for summary judgment, arguing that the probate court had ruled that the decedent had not been the victim

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**** Of the Hartford Bar. The authors thank Noah Swanson for his able research assistance. This article contains the opinions of the authors and may not reflect the position of any organization or entity with which they are affiliated. In addition, in cases where an author considered it inappropriate to comment on a specific issue, such as where that author was involved in a matter discussed herein, another author assumed complete responsibility for drafting the relevant portion of this article. Readers should be aware that cases discussed in this article may have been appealed and the results discussed herein may have been modified or reversed. This article was previously published in the Quinnipiac Probate Law Journal and is being republished here with minor alterations.

1 *Solon v. Slater*, 345 Conn. 794 (2023).
2 *Id.* at 798-99.
3 *Id.* at 801.
4 *Id.*
5 *Id.* at 804.

of undue influence and thus collateral estoppel barred the plaintiff's attempt to relitigate that issue as a tort claim.[6] The Appellate Court affirmed.[7]

The Supreme Court affirmed that portion of the ruling on the same grounds, holding that since the probate court resolved the key issue in the case (the absence of undue influence), that issue could not be relitigated in a different forum or in the form of a different claim.[8] The Court further clarified that collateral estoppel applies even if a probate court lacked jurisdiction to hear that additional claim, so long as there was "actual resolution of an identical *issue* in the prior proceeding following a full and fair opportunity for litigation."[9] By disposing of the case on the basis of collateral estoppel, the Supreme Court did not need to address the question of whether the plaintiff's claim of tortious interference was a valid cause of action, merely noting that, if it is, its essential elements would be as set out in prior superior court decisions, *viz*.: "(1) an expected inheritance, (2) the defendant's knowledge of the expected inheritance, (3) the defendant's intent to interfere with the expected inheritance, (4) the interference was tortious, and (5) actual loss suffered by the plaintiff as a result of the defendant's tortious conduct."[10]

The Supreme Court's opinion provides useful guidance on when and how collateral estoppel might bar subsequent litigation arising out of issues resolved in a probate court proceeding. Unfortunately, the Court failed to resolve the open question of whether tortious interference with the right of inheritance is a valid cause of action in this state. That question remains unanswered by the Supreme Court.

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[6] *Slater*, 345 Conn. at 805-07.
[7] *Id*. at 807.
[8] *Id*. at 823-25.
[9] *Id*. at 824 (emphasis in original).
[10] *Slater*, 345 Conn. at 820. In a lengthy footnote, the Court noted 'a split of authority among our sister state courts' both on the question of whether the tort is cognizable and the extent to which an adequate remedy is available in the Probate Court. *Id*. at 820 n. 12.

B. *Fiduciary Duties*

Two cases involved allegations of breach of fiduciary duty.

In *Abrahms v. Baitler*, the U.S. District Court for the District of Connecticut addressed an allegation that a trustee had breached his fiduciary duty.[11] In response to a procedural motion, the Court ruled that the claim at issue was without merit because a breach of fiduciary duty arises only when a fiduciary engages in self-dealing.[12] The Court's ruling relies on a distinguishable line of cases and thus does not correctly state the law governing trusts.

The underlying case involved an individual named as executor and trustee of a decedent's estate.[13] The plaintiff, a beneficiary of the trust, alleged that the trustee had breached his fiduciary duty by distributing the bulk of the trust assets to the plaintiff at an earlier age than directed in the trust document.[14] In connection with a motion to amend the complaint, the defendant argued that the allegations against him could not be sustained as he had not engaged in self-dealing or personally benefitted from the alleged breach of trust.[15] Citing authority, the Court agreed with the defendant, holding that "to plead a claim of breach of fiduciary duty, the plaintiff must allege facts that would support a claim of fraud, self-dealing[,] or conflict of interest, such as dishonesty, disloyalty or immorality."[16]

In reaching this conclusion, the Court seemed to have tapped into the wrong definition of "fiduciary duty" and thus the wrong line of cases applying that standard. The cases cited by the Court all dealt with cases where an advisor, typically an attorney, was accused of a breach of the duty of loyalty, which is just one variant of breach of fiduciary duty. In

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[11] *Abrahms v. Baitler,* No. 3:21-CV-01568 (VAB), 2023 WL 4145028, *1 (D. Conn. June 23, 2023).

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

[13] *Id.* at *1.

[14] *Id.* at *2.

[15] *Id.* at *3.

[16] *Baitler*, 2023 WL 4145028 at *3 (citing *Hennessey v. McManus*, No. CV-10-6001205-S, 2010 WL 5030103, at *5 (Conn. Super. Ct. Nov. 8, 2010) (internal quotation marks omitted)).

that limited circumstance, case law establishes that a finding of breach of fiduciary duty is a rare remedy, not applicable in cases of mere negligence.[17] The issue here was the conduct of a trustee who voluntarily took on the role of fiduciary and *all* of the duties attendant thereto. In such circumstances, "breach of fiduciary duty" is a far broader term of art, encompassing not only violations of the duty of loyalty, but rather a whole host of duties to be diligent, impartial, and prudent in following the terms of the trust and governing law.[18] The Court's opinion, and the cases cited therein, do not make this distinction.

In *Barash v. Lembo*, the Connecticut Supreme Court addressed "whether the trustee of an inter vivos trust that is the residuary beneficiary of the estate of the settlor-decedent has a duty to protect and collect assets that have not yet been transferred to the trust."[19] The Court concluded that a trustee has such a duty.[20]

The estate remained open after seventeen years as interests in certain commercial real estate development projects had not been distributed to the trust.[21] Due to this length of time and certain transactions involving these commercial

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[17] *Johnson v. Bank of Am., N.A,* No. X04-HHD-CV-15-6066060-S, 2016 WL 7974180, at *4 (Conn. Super. Ct. Dec. 12, 2016) ('[p]rofessional negligence alone . . . does not give rise automatically to a claim for breach of fiduciary duty. Although an attorney-client relationship imposes a fiduciary duty on the attorney . . . not every instance of professional negligence results in a breach of that fiduciary duty. . . . Professional negligence implicates a duty of care, while breach of fiduciary duty implicates a duty of loyalty and honesty.') (quoting *Beverly Hills Concepts, Inc. v. Schatz & Schatz, Ribicoff & Kotkin*, 247 Conn. 48, 56-57 (1998)).

[18] *See, e.g.,* Conn. Gen. Stat. § 45a-499ppp (2020) (establishing broadly that '[a] violation by a trustee of a duty the trustee owes to a beneficiary is a breach of trust.'); Gayle B. Wilhelm, Settlement of Estates in Connecticut, 7:14 (West Group 2d ed. 1996) (In addition to the duty of loyalty, a trustee has '[t]he duty to be diligent in the management of the estate in the interest of the beneficiaries' and '[t]he duty of impartiality as between the different beneficiaries.'); George Gleason Bogert, George Taylor Bogert, Susan N. Gary & Amy Morris Hess, *The Law of Trusts and Trustees*, § 541 ('[t]he trustee must continually demonstrate good faith and reasonableness in administering the trust and in dealing with beneficiaries. The trustee has an overall duty to administer the trust as a prudent person would and must exercise reasonable care, skill, and caution in doing so.') (citations omitted); Conn. Gen. Stat. §§ 45a-541-45a-541l (1997) (setting out numerous fiduciary duties regarding the prudent investment of trust funds).

[19] *Barash v. Lembo*, 348 Conn. 264, 269 (2023).

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

[21] *Id.* at 270.

real estate interests, the trust beneficiaries and one of the three co-trustees filed this action,

> alleging that the defendant and cotrustee, . . . breached her fiduciary duty as trustee by failing to protect and collect trust property, to investigate or ask questions regarding the alleged misconduct of the executor of the estate, . . . and to seek recovery from and hold [the executor] accountable for any damages sustained by the trust as a result of the alleged misconduct.[22]

The superior court rendered judgment in favor of the defendant on the basis of its conclusion that the defendant, as a trustee, had no duty prior to the distribution of the residuary assets to take any action against the executor with respect to those assets.[23] The Supreme Court disagreed and reversed judgment.[24]

The defendant argued that she lacked the power—and therefore any duty—to take action with respect to the residuary assets while those assets remained in the estate and under the control of the executor.[25] The Court disagreed:

> [a]lthough the defendant's lack of legal title to the residuary assets obviously rendered her powerless to collect any income from those assets or to distribute that income to the trust beneficiaries, these circumstances do not relieve the trustee of her duty to take reasonable steps to protect and collect the trust's interest in the residuary assets, after appropriate inquiry and investigation, and then to pursue a claim or other relief against the executor if required by the standard of care applicable to her position as trustee.[26]

The Court went further, explicitly stating that "[t]he fact that an executor controls the estate assets while the estate remains open is the very circumstance that triggers a trustee's duty to take reasonable steps to ensure that the executor

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[22] *Id.*
[23] *Id.* at 270-71.
[24] *See Lembo,* 348 Conn. at 271.
[25] *Id.* at 291.
[26] *Id.* at 291-92.

exercises that control in a manner consistent with the interests of the trust and its beneficiaries."[27] The Court placed a slight limit on this duty in saying that:

> the duty to secure possession of trust assets is not absolute but is limited to the exercise of due diligence in the light of the particular circumstances surrounding the administration of [the] trust. . . . A trustee must do [w]hat ordinary prudence would do under these circumstances . . . and need do no more.[28]

Even with this slight limit, the Court made clear that a trustee's fiduciary duties start the moment a trustee accepts the trusteeship and extends to assets that will be in the trustee's control even before those assets are distributed to the trust.

Trustees, and those who advise them, should be aware of these two cases as one has the potential to lead to confusion regarding the standard of care applicable to trustees, while the other arguably expands the fiduciary duties of trustees.

C. *Statutory Share*

In *Mirando v. Woodruff-Mirando*, the superior court ruled that a wife had abandoned her husband and thus was not entitled to a statutory share of his estate.[29]

At issue in the case was Connecticut General Statutes section 45a-436(g), which provides that a surviving spouse who abandoned the decedent "without sufficient cause" is not entitled to an intestate share or an elective share of the decedent's estate.[30] In the case at bar, the parties were living in separate homes at the time of the decedent's death and in the middle of an acrimonious divorce.[31] A series of text messages

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[27] *Id.* at 292.

[28] *Id.* at 293-94 (internal quotation marks omitted).

[29] *Mirando v. Woodruff-Mirando,* No. FST-CV-21-6053067-S, 2023 WL 5031026, at *4 (Conn. Super. Ct. July 31, 2023).

[30] *Id.* at *3.; Connecticut General Statutes section 45a-436 provides '(g) A surviving spouse shall not be entitled to a statutory share . . . or an intestate share, as provided in section 45a-437, in the property of the other if such surviving spouse, without sufficient cause, abandoned the other and continued such abandonment to the time of the other's death.' CONN. GEN. STAT. § 45a-436(g) (2023).

[31] *Woodruff-Mirando,* 2023 WL 5031026 at *1.

were admitted into evidence to show both that the surviving spouse had been the one to suggest that the decedent should move out of the marital residence and that the parties had no intent on reconciling at the time of the decedent's death.[32]

The court applied a liberal reading of the applicable statute in that it equated divorce proceedings with abandonment. In addition, the court seems to gloss over the issue of whether the surviving spouse had acted "without sufficient cause" in abandoning the decedent, an issue worth pursing given the surviving spouse's claim that the decedent's actions led to the breakdown of the marriage.[33]

D. *Pretermitted Spouse*

In *Nystrand v. D'Antonio*, the superior court construed a provision of Connecticut General Statutes section 45a-257a(a), which provides in relevant part that if a decedent's will fails to provide for a spouse who married the decedent after the execution of the will, the spouse is entitled to an intestate share of the decedent's estate unless "[i]t appears from the will that the omission was intentional."[34] Under ordinary circumstances, this statutory language prohibits the court from considering extrinsic evidence to determine the decedent's intent.[35]

The case concerns a decedent's will that made no provision for the plaintiff even though she had been living with the decedent at the time of its execution and later married him.[36] The probate court denied her claim for relief under Connecticut General Statutes section 45a-437, finding that

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[32] *Id.* at *4.

[33] CONN. GEN. STAT. § 45a-436(g) (2023).

[34] *Nystrand v. D'Antonio,* No. NNH-CV-23-6129289 S, 2023 WL 6995315, *2 (Conn. Super. Ct. Oct. 18, 2023), (quoting CONN. GEN. STAT. § 45a-257a(a) (1998)). Although not relevant to the case, the statute also denies an intestate share to a spouse not provided for in a premarital will where 'the testator provided for the spouse by transfer outside the will.'

[35] *Id.* at *4. In contrast, the prong of the statute which applies where 'the testator provided for the spouse by transfer outside the will' makes clear that the decedent's 'intent that the transfer be in lieu of a testamentary provision [may be] shown by the testator's statements, or . . . reasonably inferred from the amount of the transfer or other evidence.' CONN. GEN. STAT. § 45a-257a(a).

[36] *D'Antonio,* 2023 WL 6995315 at *1.

the omission had been intentional and relying on extrinsic evidence to reach its conclusion.[37] The plaintiff appealed, contending that the statute does not allow for the admission of extrinsic evidence insofar as it refers to that which "appears from the will."[38] On appeal, the superior court agreed with this reading of the statute, holding that a decedent's attempt to disinherit a spouse must be evident on the face of the will to be effective and that mere reliance on extrinsic evidence is not enough.[39]

In reaching this result, the court found no appellate guidance and only one other superior court opinion on point.[40] After reviewing that case and decisions construing similar statutes from Connecticut and other states, the court concluded that the provision at issue precluded consideration of extrinsic evidence, with only two exceptions to this general rule.[41] First, in the event the language of the will is ambiguous, a court can admit extrinsic evidence to construe it.[42] Second, under *Erickson v. Erickson*, the court could admit extrinsic evidence to identify and correct a scrivener's error.[43] Because neither of these situations applied in the current case, the court limited its inquiry to the actual wording of the will.[44] It concluded that the words of the will did not evidence the decedent's intent to omit his surviving spouse, and thus she was entitled to an intestate share of the decedent's estate.[45]

E. *Conservatorship*

In *Russell v. Philbin*, the superior court considered whether a voluntarily conserved person retained the ability to change a named beneficiary on an investment account.[46]

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[37] *Id.*; see also Conn. Gen. Stat. § 45a-437 (2023).
[38] *D'Antonio,* 2023 WL 6995315 at *2.
[39] *Id.* at *5.
[40] *See id.* at *2.
[41] *Id.* at *4.
[42] *Id.* (citing *Schwerin v. Ratcliffe*, 335 Conn. 300, 309 (2020)).
[43] *D'Antonio,* 2023 WL 6995315 at *5 (citing *Erickson v. Erickson*, 246 Conn. 359 (1998)).
[44] *Id.*
[45] *Id.*
[46] *Russell v. Philbin*, No. HHB-CV-21-6065245-S, 2023 WL 5698805, *1 (Conn. Super. Ct. Aug. 31, 2023).

In light of the Supreme Court's 2022 opinion in *Day v. Seblatnigg*, the court remanded the case to the probate court to determine whether the change of beneficiary was a testamentary act that remained within the discretion of the conserved person or a contractual matter within the conservator's authority.[47]

The case arose out of a conservator's final financial report with respect to an individual who died while under a voluntary conservatorship.[48] Prior to her death, while under the conservatorship, the decedent had changed the payable on death beneficiary on an investment account.[49] The probate court disallowed the conservator's final account, which had showed the assets in the account passing pursuant to the payable on death designation, holding that the conserved person lacked the legal ability to make such a change.[50] The conservator appealed.[51]

The superior court found the case to be governed by the Supreme Court's 2022 opinion in *Day v. Seblatnigg*.[52] Specifically, the court found relevant guidance in Justice McDonald's concurring opinion, which distinguished testamentary acts that remain within the power of the conserved person, with contractual matters that are within the conservator's authority.[53] Since the probate court had not clearly determined whether the payable on death designation should be considered a testamentary act or a contractual one, the court remanded the case for such determination.[54]

As Justice McDonald's concurrence noted, and as we discussed in last year's update, the Court's majority opinion in *Day v. Seblatnigg* left unresolved many key questions relating to the scope of a conservator's authority.[55] This case and

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[47] *Id.* (citing *Day v. Seblatnigg*, 186 Conn. App. 482, 485 (2018) *aff'd*, 341 Conn. 815 (2022).

[48] *Id.*

[49] *Id.*

[50] *Id.* at *2.

[51] *Philbin*, 2023 WL 5698805 at *2.

[52] *Id.* at *4 (citing *Day v. Seblatnigg*, 341 Conn. 815, 841-42 (2022)).

[53] *Id.* at *5.

[54] *Id.*

[55] *See Day v. Seblatnigg*, 341 Conn. 815, 841-42 (2022) (McDonald, J.

many others to follow will help resolve those questions.

F. *Adopted Persons*

In *Buzzard v. Fass*, the superior court held that two adopted persons were eligible for distributions from testamentary trusts.[56] The testamentary trusts were originally created upon the testator's death in 1947.[57] The probate court concluded that Connecticut General Statutes section 45a-731 applied, and therefore the adopted persons were beneficiaries of the trust.[58]

The case centers upon Connecticut General Statutes section 45a-731, which provides that adopted children are treated the same as biological children for purposes of distribution under a will or trust "unless [the] document clearly indicates a contrary intention."[59] Section 45a-731 applies to wills of individuals dying prior to October 1, 1959, unless there is clear and convincing evidence of the testator's contrary intention or if distribution under the will "has been or will be made pursuant to a court order entered prior to October 1, 1991."[60]

On appeal, the plaintiff argued that the adopted persons should not be considered "issue" or "descendants" of the testator's siblings because both exceptions found in Connecticut General Statutes section 45a-731(11) applied.[61] First, the plaintiff argued that the testator's estate was distributed under a 1949 probate court decree and therefore the

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concurring); *see* Cooper, Ivimey, Mulry & Geary, *2022 Developments in Connecticut Estate and Probate Law*, 95 CONN. B.J. (forthcoming) (discussing the reasoning behind Justice McDonald's concurrence).

[56] *Buzzard v. Fass,* No. HHD-CV-20-6130009-S, 2023 WL 1252092, *6 (Conn. Super. Ct. Jan. 24, 2023), *aff'd*, 255 Conn. App. 280, (2024).

[57] *Id.* at *1.

[58] *Id.* at *1-3; see CONN. GEN. STAT. § 45a -731 (2014).

[59] CONN. GEN. STAT. § 45a-731 (2014).

[60] CONN. GEN. STAT. § 45a-731(11) (2014).

[61] *Buzzard*, 2023 WL 1252092 at *2.; Connecticut General Statutes section 45a-731(11) provides in relevant part, '[t]he provisions of subdivisions (1) to (9), inclusive, of this section shall apply to the estate or wills of persons dying prior to October 1, 1959, and to inter vivos instruments executed prior to said date and which on said date were not subject to the grantor's power to revoke or amend, unless (A) a contrary intention of the testator or grantor is demonstrated by clear and convincing evidence, or (B) distribution of the estate or under the will or under the inter vivos instrument has been or will be made pursuant to court order entered into prior to October 1, 1991.' CONN. GEN. STAT. § 45a-731(11) (2014).

rights of the beneficiaries were fixed prior to 1991.[62] The court acknowledged that neither party presented controlling authority on whether this exception applies in the case of ongoing testamentary trusts subject to probate court jurisdiction.[63] Nevertheless, the court interpreted the statute in light of the intent of the public policy underlying the statutory scheme to treat adopted persons equally with biological children for purposes of interpretation of wills and trusts. The court held that the exception for distributions made pursuant to court orders prior to October 1, 1991, did not apply.[64] Second, the plaintiff argued that the testator's failure to expressly include adopted persons in the will demonstrates an intent to exclude them.[65] The superior court held that the failure to expressly include adopted persons does not constitute clear and convincing evidence of an intent to exclude adopted persons.[66]

G. *In Terrorem Clauses*

As discussed in last year's article, in *Salce v. Cardello*, the Appellate Court considered the effect of an *in terrorem* clause in a trust and held that while the defendant did technically violate the provisions of the clause, the clause as written violated public policy and would not be enforced against her.[67] The plaintiff appealed this decision to the Connecticut Supreme Court, which affirmed the judgment of the Appellate Court but on different grounds.[68]

The Supreme Court agreed with the Appellate Court that the enforcement of the *in terrorem* clauses in this case would violate public policy.[69] However, the Appellate Court seemed to draw a distinction in enforceability between *in terrorem*

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[62] *Buzzard*, 2023 WL 1252092 at *2.
[63] *Id.* at *3.
[64] *Id.* at *4.
[65] *Id.* at *5.
[66] *Buzzard*, 2023 WL 1252092.
[67] Cooper, Ivimey, Mulry & Geary, *2022 Developments in Connecticut Estate and Probate Law*, 95 CONN. B.J. (forthcoming) (discussing the Appellate Court's treatment of the case).
[68] *See Salce v. Cardello*, 348 Conn. 90, 111-12, (2023).
[69] *Id.* at 103.

clauses that apply to fiduciary "actions that involve the exercise of judgment," and those that extend to "actions that are purely ministerial in nature."[70] The Supreme Court instead concluded that "an in terrorem clause violates public policy when its application would interfere with the probate court's exercise of its statutorily mandated supervisory responsibilities over the administration of an estate and its superintendence of the fiduciary's statutory obligations."[71]

In this case, the Court found that the *in terrorem* clauses implicate the probate court's supervision over the fiduciary via the accounting process, as in connection with that accounting the probate court was called on to consider whether the fiduciary had properly discharged his responsibilities to minimize the estate's tax burden and his broader obligations not to mismanage estate assets or commit waste.[72] The Court also emphasized that this statutory duty and public policy exception protects only those challenges to the actions of a fiduciary that are brought in good faith.[73] A finding that a challenge to a fiduciary's action was brought in bad faith or is frivolous means the statutory duty exception will not, as a matter of public policy, shield the challenging beneficiary.[74] In coming to this conclusion, the Supreme Court, like the Appellate Court, did not reach the question of whether *South Norwalk Trust Co. v. St. John* establishes a general "good faith exception" that insulates a beneficiary who acts in good faith from the operation of any *in terrorem* clause. However, like the Appellate Court, the Supreme Court appears hostile to expanding that exception, instead focusing on how the enforcement of an *in terrorem* clause would interfere with the Probate Court's exercise of its supervisory responsibilities over the administration of an estate and the fiduciary.

In light of the Court's decision, we must modify the suggestions we issued last year and instead advise that attor-

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[70] *Salce v. Cardello*, 210 Conn. App. 66, 79 (2022).
[71] *Salce*, 348 Conn. at 111.
[72] *Id.* at 111-12.
[73] *See id.* at 113.
[74] *See id.* at 114.

neys may wish to consider limiting the scope of an *in terrorem* clause to apply to a fiduciary's good faith exercise of judgment in the fulfillment of statutory duties.

II. Probate Appeals

A. *Procedural Requirements*

In *Chase v. Chase*, the superior court considered the effect of a petitioner's failure to mail a copy of a probate appeal to the probate court as required by Connecticut General Statutes section 45a-186(f).[75] The superior court ruled that the failure to comply with this requirement did not deprive the superior court of jurisdiction over the appeal and could be cured at any time.[76]

At issue in the case was the interpretation of Connecticut General Statutes section 45a-186, which governs probate court appeals.[77] Subsection (e) of the statute provides in relevant part that "[e]ach person who files an appeal pursuant to this section shall serve a copy of the complaint on each interested party. The failure of any person to make such service shall not deprive the Superior Court of jurisdiction over the appeal."[78] Subsection (f) of the statute provides in relevant part that "[i]n addition to the notice given under subsection (e) of this section, each person who files an appeal pursuant to this section shall mail a copy of the complaint to the Probate Court that rendered the order, denial or decree appealed from."[79] Subsection (f) does not contain an analogous sentence found in subsection (e) explicitly providing that failure to comply does not deprive the court of jurisdiction over the appeal.

In resolving the issue, the superior court concluded that the linguistic differences between subsections (e) and (f) were the result of legislative oversight rather than conscious

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[75] *Chase v. Chase*, No. WWM-CV-22-6023680-S, 2023 WL 1990044, *5 (Conn. Super. Ct. Feb. 10, 2023).

[76] *Id.* at *4.

[77] *Id.*; Conn. Gen. Stat. § 45a-186 (2022).

[78] Conn. Gen. Stat. § 45a-186(e) (2022).

[79] Conn. Gen. Stat. § 45a-186(f) (2022).

policy.[80] In reviewing the applicable legislative history, the superior court observed that prior to 2013, sections (e) and (f) were contained within the same subsection.[81] When the legislature split that provision into separate subsections, the sentence providing that failure to strictly comply did not deprive the superior court of jurisdiction was left in the original subsection (e) and not copied into the new subsection (f).[82] The superior court found the resulting disparate language to be an unintended result of the legislative process rather than a change in policy, and concluded that while the petitioner at some point needed to comply with subsection (f) by mailing a copy of his complaint to the probate court, "the fact that he may not have done so yet does not deprive this Court of subject matter jurisdiction to hear the appeal."[83]

B. *Scope of Superior Court Authority in Probate Appeals*

In *Wolfel v. Wolfel*, the Appellate Court held that the superior court has authority to address issues that are necessary and proper to determination of a probate appeal even if the issues are not specifically raised in the appeal.[84]

The case involved a dispute between three brothers regarding a trust established by their late mother.[85] After a hearing on an accounting filed by the trustees, the probate court determined that the trustees violated their fiduciary duties and ordered them to pay funds owed to one of the brothers.[86] The trustees appealed to the superior court, and argued that they did not make any improper distributions and that they repaid the trust for payments made from the trust.[87] The superior court found that the trustees breached their fiduciary duties and ordered the trustees to terminate the trust and to equalize the shares for the three beneficia-

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[80] *Chase*, 2023 WL 1990044 at *4.
[81] *Id*.
[82] *Id*.
[83] *Id*.
[84] *Wolfel v. Wolfel,* 218 Conn. App. 760, 769-70 (2023), *cert. denied*, 348 Conn. 902 (2023).
[85] *Id*. at 762.
[86] *Id*. at 764.
[87] *Id*. at 764-65.

ries.[88] The trustees appealed those rulings.[89]

On appeal, the trustees argued that the superior court lacked the authority to decide issues that were not raised in the probate appeal, such as calculating the equalization of shares and ordering the termination of the trust.[90] The Court noted that:

> [t]he function of the Superior Court in appeals from a Probate Court is to take jurisdiction of the order or decree appealed from and to try that issue de novo . . . the [S]uperior [C]ourt should exercise the same power of judgment which the [P]robate [C]ourt possessed and decide the appeal as an original proposition unfettered by, and ignoring, the result reached in the [P]robate [C]ourt.[91]

The Appellate Court concluded that the superior court properly conducted a trial de novo and issued a decision to resolve the issues relating to the accounting without enlarging the scope of the issues.[92]

C. *Equitable Tolling*

In two cases, the superior court ruled that the doctrine of "equitable tolling" could be applied to validate an otherwise untimely probate appeal. The facts of both cases are unique, and it is unclear whether other courts will apply this doctrine under different circumstances.

1. Pro Se Litigant

In *Fuller v. Probate Appeal*, the superior court addressed the appeal of a will that had been admitted to probate by a decree mailed to the defendant on October 19, 2021.[93] The plaintiff, a pro se litigant and an inmate in a state correctional institute, had her summons and complaint signed by an assistant clerk of the superior court on November 16, 2021,

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[88] *Wolfel*, 218 Conn. App. at 765-66.
[89] *Id.* at 766.
[90] *Id.*
[91] *Id.* at 766-67 (citing *Kerin v. Stangle*, 209 Conn. 260, 263-64 (1988)).
[92] *Wolfel*, 218 Conn. App. at 768-69.
[93] *Fuller v. Probate Appeal,* No. KNL-CV-22-5022984-S, 2023 WL 2769869, *1 (Conn. Super. Ct. Mar. 30, 2023).

but did not formally file the same until some two months later.[94] The defendant moved to dismiss, contending that the appeal was untimely under Connecticut General Statues section 45a-186, which requires an appeal to be *filed* with the court within thirty days after the mailing of the decree being appealed from.[95] The superior court denied the motion, finding that under the facts of the case, the strict filing deadline should be equitably tolled and that the facially untimely appeal should be allowed to proceed.[96]

In reaching its decision, the superior court pursued two main lines of reasoning. First, the court seemingly erroneously contended that Connecticut General Statutes section 45a-186 provides that the thirty-day appeal period may be extended as "otherwise provided by law," an expansive phrase the court contends encompasses much broader exceptions than those specifically provided by statute, such as to parties who did not receive proper notice or who were below the age of minority.[97] The court's argument fails to reflect the fact that Public Act 19-47 removed the broad "provided by law" language cited by the court and replaced it with a narrow reference to those exceptions "provided in sections 45a-187 and 45a-188."[98] To the extent the court viewed the old language as encompassing more than the limited exceptions provided by the statutes themselves, the 2019 change would

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[94] *Id*.

[95] *Id*. at *2.; Connecticut General Statutes section 45a-186 provides in relevant part as follows: '(b) Any person aggrieved by an order, denial or decree of a Probate Court may appeal therefrom to the Superior Court. . . . Except as provided in sections 45a-187 and 45a-188, an appeal from an order, denial or decree in any other matter shall be filed on or before the thirtieth day after the date on which the Probate Court sent the order, denial or decree. The appeal period shall be calculated from the date on which the court sent the order, denial or decree by mail or the date on which the court transmitted the order, denial or decree by electronic service, whichever is later. (c) An appeal shall be commenced by filing a complaint in the Superior Court in the judicial district in which such Probate Court is located, or, if the Probate Court is located in a probate district that is in more than one judicial district, by filing a complaint in a superior court that is located in a judicial district in which any portion of the probate district is located . . . .' CONN. GEN. STAT. § 45a-186(b)-(c) (2022).

[96] *Fuller*, 2023 WL 2769869 at *4.

[97] *See id*. at *2.

[98] *See* 2019 Conn. Acts 19-47, 21 § 10 (Reg. Sess.). In addition, even prior to the 2019 revision, the statute provided that the strict statutory deadlines applied 'unless otherwise *specially* provided by law.' (emphasis added).

seem to undercut this argument. Second, relying extensively on a 2007 opinion from the U.S. District Court for the Southern District of New York, the court contended that even without specific statutory authority, broader principles of equity allow the court to toll a filing period when appropriate.[99] As in that 2007 case, the court found that equitable tolling is specifically appropriate where needed to protect the rights of a pro se litigant who failed to master nuanced technical requirements for maintaining a lawsuit.[100] Given the plaintiff's status as an incarcerated, pro se litigant, and given her failure to appreciate the subtle distinction between having a clerk sign her petition and formally "filing" the same, the court found equitable tolling to be appropriate in this case.[101]

The court's opinion here seems far more accommodating than other recent cases that have strictly construed Connecticut General Statutes section 45a-186 and found mere technical violations to deprive the court of jurisdiction over an appeal.[102] Given the unique circumstances of the case and the court's reliance on a superseded statute, it is unclear whether this case represents a meaningful departure from that established law.

2. Probate Court Error

In *Kutty v. Fleming*, the superior court applied the doctrine of equitable tolling in a case where the probate court gave a party erroneous information about the appeals process.[103] The plaintiff, also pro se, sought to appeal a probate decree mailed on June 27, 2022.[104] Under Connecticut General Statutes section 45a-186, the statutory deadline for filing that appeal would have been thirty days later, or July 27, 2022.[105] On July 19, 2022, the plaintiff, presuma-

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[99] *Fuller*, 2023 WL 2769869 at *3 (citing *Celestine v. Cold Crest Care Ctr.*, 495 F. Supp. 2d 428 (S.D.N.Y. 2007)).

[100] *Id.* at *3.

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

[102] *See, e.g., Connery v. Gieske*, 323 Conn. 377, 389 (2016) ('strict compliance with . . . [45a-186] is a prerequisite to an aggrieved party's right to appeal and to the Superior Court's jurisdiction over the appeal.').

[103] *Kutty v. Fleming*, No. TTD CV-22-6025261-S, 2023 WL 3317231, *4-5 (Conn. Super. Ct. May 3, 2023).

[104] *Id.* at *4.

[105] *Id.*; CONN. GEN. STAT. § 45a-186 (2022).

bly unaware of the procedures set forth in Connecticut General Statutes section 45a-186, emailed the probate court in an attempt to initiate her appeal.[106] Three days later, the probate clerk, who indicated she was dealing with a family medical emergency, replied and suggested she would set the matter down for a hearing when she returned to the probate court.[107] Three more days after that, the defendant replied to the email chain, alerting the plaintiff that a probate appeal must be filed in the superior court and not the probate court.[108] The next day, July 26, 2022, the clerk replied and confirmed that an appeal needed to be filed with the superior court.[109] This left the plaintiff with only one day to prepare and file her appeal.[110] She did not complete that task until three days later, July 29, 2022, which was two days past the deadline prescribed by Connecticut General Statutes section 45a-186.[111] The defendant moved to dismiss the untimely appeal.[112] The superior court denied the motion, holding that equitable tolling of the statute of limitations was appropriate since the missed deadline was caused by the probate court's providing misleading information.[113]

In reaching this conclusion, the court tapped into a series of rulings where Connecticut courts equitably tolled the statute of limitations in probate appeals where a probate court error occasioned the delay. For example, in *Kron v. Thelen*, a party called the probate court to inquire about a matter and was told it was still pending even though a decree had been issued.[114] On appeal, the Supreme Court held that error tolled the statute of limitations until the party learned of the decree and filed an appeal.[115] In similar cases, courts applied equitable tolling where late appeals could be attributed to

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[106] *Kutty*, 2023 WL 3317231 at *4.
[107] *Id*.
[108] *Id*.
[109] *Id*.
[110] *Id*.
[111] *Kutty*, 2023 WL 3317231 at *4.; Conn. Gen. Stat. § 45a-186 (2022).
[112] *Kutty*, 2023 WL 3317231 at *2.
[113] *Id*. at *5.
[114] *Id*. at *3 (discussing *Kron v. Thelen*, 178 Conn. 189 (1979)).
[115] *Id*.

the failure of a probate court to timely rule on matters relating to appeals,[116] misdirecting paperwork,[117] or wrongly reconsidering a decree that should have been appealed.[118] The court distinguished these cases from *Onate v. Probate Appeal*, where a party alleged she had been misled by improper information about the appeals deadline found in a publication produced by the Office of the Probate Court Administrator.[119] The court distinguished *Onate* insofar as the handbook at issue in that case contained a disclaimer that the information therein might be incomplete, and the party was represented by counsel who presumably should have been better versed in the governing law.[120] In this case, like the others where equitable tolling was applied, the aggrieved party was impacted by incorrect information provided directly by the probate court.

D. *Probate Court Orders*

In *Jezek v. Drozd*, the superior court explored the linguistic distinction between a probate court order "requiring" a fiduciary to take certain actions as compared to an order merely "authorizing" those actions.[121] The resulting holding should be of interest to both attorneys and judges.

The case arose in the context of a rather contentious estate settlement that included a dispute regarding the ownership of an automobile. Seeking to resolve the dispute, the probate court issued an order providing that "[t]he fiduciary shall complete the purchase of the [automobile]," and that "[t]he fiduciary is authorized to pay $7,000" as the purchase price.[122] Rather than immediately pay the specified $7,000.00, the executor attempted to negotiate a lower price on behalf

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[116] *See Molleur v. Perkins*, 82 Conn. App. 468 (2004), *cert. denied*, 270 Conn. 912 (2004).

[117] *See Jakaboski v. Jakaboski*, 28 Conn. Supp. 48, 51-52 (1968).

[118] *See Manzo v. Nugent*, 54 Conn. L. Rptr. 6 (Conn. Super. Ct. May 8, 2012).

[119] *Kutty*, 2023 WL 3317231 at *4 (discussing *Onate v. Probate Appeal*, 43 Conn. L. Rptr. 661 (Conn. Super. Ct. May 31, 2007)).

[120] *See Kutty*, 2023 WL 3317231 at *4.

[121] *Jezek v. Drozd*, No. CV-22-6033513, 2023 WL 2132928, *2 (Conn. Super. Ct. Feb. 15, 2023).

[122] *Id.* at *5.

of the estate.[123] A beneficiary alleged that the executor's attempt to negotiate a lower price was in direct violation of the probate court's order authorizing payment of $7,000.00, an allegation that ultimately led the probate court to surcharge and remove the fiduciary.[124] The fiduciary appealed those rulings.[125]

On appeal, the superior court set aside the probate court orders surcharging and removing the fiduciary.[126] Citing the American Heritage College Dictionary, the superior court agreed with the fiduciary's contention that the word "authorize" is a permissive term that gave the fiduciary permission or sanction to undertake an action.[127] Accordingly, by seeking to further negotiate the price he had been authorized to pay, he was properly seeking to preserve estate assets rather than willfully disobeying a probate court order.[128] His removal was thus improper.

While we do not necessarily expect to see a large number of cases litigating such linguistic distinctions in the context of probate court decrees, both attorneys and judges should be mindful of the distinction between mandatory words such as "require" and permissive ones such as "authorize," particularly where, as here, both words are used in the same document.[129]

E. *Undue Influence*

In *Goldrich v. Mulrooney*, the superior court dismissed a probate appeal alleging undue influence in the procurement of a will.[130] In so ruling, the superior court read the Appel-

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[123] *Id*.
[124] *Id*.
[125] *Id*. at *1.
[126] *Jezek*, 2023 WL 2132928, at *7.
[127] *Id*. at *6.; *Authorize*, Am. Heritage Coll. Dictionary 89 (4th ed. 2002).
[128] *See id*.
[129] For a more detailed discussion of the issue, *see* Jeffrey A. Cooper, *Speak Clearly and Listen Well: Negating the Duty to Diversify Trust Investments*, 33 Ohio N.U. L. Rev. 903, 920 (2007) (observing that '[m]odern fiduciary law draws a significant distinction between trust language which *requires* a trustee to invest in a certain manner and that which merely *permits* such conduct' and exploring the significance of that distinction.).
[130] *Goldrich v. Mulrooney*, No. CV-20-6102668, 2023 WL 6993726, *1 (Conn. Super. Ct. Oct. 17, 2023).

late Court's opinion in *Holloway v. Carvalho* as holding that a contestant alleging undue influence must prove their allegation by clear and convincing evidence.[131] We are not convinced that is an accurate statement of Connecticut law.

The case concerned a decedent's will that left her entire estate to her surviving children in equal shares.[132] The plaintiff, the decedent's son, unsuccessfully objected to the admission of the will to probate, alleging that his sisters, the defendants, had unduly influenced their mother.[133] An appeal ensued.

On appeal, the superior court set out a four factor test that must be met to prove undue influence, *viz*.: (1) that the testator is subject to influence; (2) the alleged influencer has an opportunity to exert undue influence; (3) the alleged influencer has a disposition to exert undue influence; and (4) the resulting will is impacted by that undue influence.[134] Applying those factors to the case at bar, the court found some evidence that the first three factors may have been proved, but found that there was no evidence to satisfy the fourth factor—that any undue influence actually impacted the decedent's choice to treat her children equally.[135] Citing *Holloway v. Carvalho* for the proposition that the plain-tiff had the burden to prove all four elements by *clear and convincing evidence*, the court found this burden had not been met.[136]

While the court's analysis seems relatively straightforward, its citation to *Holloway v. Carvalho* warrants comment. While the Appellate Court's ruling in *Holloway* did clearly state that the burden of proof in all undue influence cases is that of clear and convincing evidence, other cases have reached conflicting results.[137] We continue to urge the

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[131] *Id.* at *2 (citing *Holloway v. Carvalho*, 206 Conn. App. 371, 388-89 (2021), *cert. denied*, 339 Conn. 911, (2021)).

[132] *Id.*

[133] *Id.* at *1-2.

[134] *Id.* at *2 (quoting *Bassford v. Bassford*, 180 Conn. App. 331, 354 (2018)).

[135] *Goldrich*, 2023 WL 6993726, at *2.

[136] *Id.* at *2 (quoting *Holloway*, 206 Conn. App. 388-89 (emphasis added)).

[137] For a more complete discussion of the issue, *see* Jeffrey A. Cooper, *An Unclear Burden: Proving Undue Influence in Connecticut*, 37 Quinnipiac Prob. L. J. 31 (2024).

General Assembly or the Supreme Court to clarify the applicable burden of proof.

F. *Removal of Trustee*

In *Rubenstein v. Olin*, the superior court considered whether trustees removed from office pursuant to Connecticut General Statutes section 45a-499ww have a right to appeal their removal.[138] The court concluded that the trustees had not proved they were aggrieved by the removal and thus lacked standing to appeal under Connecticut General Statutes section 45a-186.[139]

The case involved a series of trustees removed by request of the beneficiaries under Connecticut General Statutes section 45a-499ww, part of the Connecticut Trust Code enacted in 2019.[140] The trustees appealed their removal pursuant to Connecticut General Statutes section 45a-186(b), which provides in relevant part that "[a]ny person aggrieved by an order, denial or decree of a Probate Court may appeal therefrom to the Superior Court."[141] The beneficiaries moved to dismiss, contending that the trustees had not been aggrieved by their removal as they have "no personal or legally protected interest in the Trust and [were] not personally injured by the Probate Court's removal order."[142] The court agreed and granted the motion to dismiss.[143]

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[138] *Rubenstein v. Olin,* No. FST CV-22-6058815 S, 2023 WL 7544119, *2 (Conn. Super. Ct. Nov. 9, 2023).

[139] *Id.* at *6.; Conn. Gen. Stat. § 45a-186 (2022).

[140] *Rubenstein*, 2023 WL 7544119, at *2.; Connecticut General Statutes section 45a-499ww (b) provides in rele-vant part as follows: 'the court may remove a trustee if: (1) The trustee becomes incapable of executing or neglects to perform the trustee's duties, wastes the trust assets, fails to furnish an additional or substitute probate bond ordered by the court, or has committed any other serious breach of trust; (2) Lack of cooperation among cotrustees substantially impairs administration of the trust; (3) Because of unfitness, unwillingness or persistent failure of the trustee to administer the trust effectively, the court determines that removal of the trustee best serves the interests of the beneficiaries; or (4) There has been a substantial change of circumstances or removal is requested by all of the qualified beneficiaries and the court finds that (A) removal of the trustee best serves the interests of all of the beneficiaries and is not inconsistent with a material purpose of the trust; and (B) a suitable cotrustee or successor trustee is available….' Conn. Gen. Stat. § 45a-499ww(b) (2020).

[141] Conn. Gen. Stat. § 45a-186 (2022)

[142] *Rubenstein*, 2023 WL 7544119, at *2.

[143] *Id.* at *6.

Prior to enactment of the trust code, this appeal would have been governed by Connecticut General Statutes section 45a-242, which would have set out the grounds for removal, and Connecticut General Statutes section 45a-243, which would have given the trustee so removed a right to appeal.[144] When the trust code was enacted in 2019, Connecticut General Statutes section 45a-242(f) was added to clarify that the removal provisions in Connecticut General Statutes section 45a-242 no longer applied to trustees as removal of trustees was now governed by the analogous provisions of Connecticut General Statutes section 45a-499ww.[145] Because removal *pursuant to Connecticut General Statutes section 45a-242* is the statutory prerequisite to a fiduciary's right to appeal their removal pursuant to Connecticut General Statutes section 45a-243, this change had the effect of also eliminating a trustee's right to appeal the trustee's removal pursuant to that section. It is not clear to us whether this result was intended by the legislature or whether it was an inadvertent result of how the trust code was enacted. If the latter, further legislation may be needed to clarify the procedural landscape.

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[144] Connecticut General Statutes section 45a-242 provides in relevant part: '(a) The Probate Court having jurisdiction may, upon its own motion or upon the petition of any person interested or of the surety upon the fiduciary's probate bond, after notice and hearing, remove any fiduciary if: (1) The fiduciary becomes incapable of executing such fiduciary's trust, neglects to perform the duties of such fiduciary's trust, wastes the estate in such fiduciary's charge, or fails to furnish any additional or substitute probate bond ordered by the court, (2) lack of cooperation among cofiduciaries substantially impairs the administration of the estate, (3) because of unfitness, unwillingness or persistent failure of the fiduciary to administer the estate effectively, the court determines that removal of the fiduciary best serves the interests of the beneficiaries, or (4) there has been a substantial change of circumstances or removal is requested by all of the beneficiaries, the court finds that removal of the fiduciary best serves the interests of all the beneficiaries and is not inconsistent with a material purpose of the governing instrument and a suitable cofiduciary or successor fiduciary is available.' CONN. GEN. STAT. § 45a-242(a) (2020). Connecticut General Statutes section 45a-243 provides in relevant part: '(a) When any fiduciary has been removed by a court of probate, as provided in section 45a-242, the fiduciary may appeal from such order of removal in the manner provided in sections 45a-186 to 45a-193, inclusive.' CONN. GEN. STAT. § 45a-243(a) (2004).

[145] 2019 Conn. Acts 19-137, 88 § 113 (Reg. Sess.) (effective Jan. 1, 2020).

2024 DEVELOPMENTS IN CONNECTICUT ESTATE AND PROBATE LAW

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

This Article provides a summary of selected 2024 case law and legislation affecting Connecticut estate planning and probate practice.

I. Legislation

A. *Uniform Trust Decanting Act*

On January 1, 2025, the Connecticut Uniform Decanting Act took effect.[1] Decanting is a power exercised by a Trustee to distribute trust property from one trust to another trust. It has its origins in common law where a trustee with discretion to distribute to or for the benefit of a beneficiary could make that distribution in further trust subject to new terms and conditions.[2]

For a decanting to be permissible under the Act, the Trustee must have the power to make principal distributions to or for the benefit of the beneficiary.[3] If the Trustee has limited distributive discretion, the terms of the second trust are limited in that the second trust may not have different beneficiaries, modify the distribution standard, modify a power

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

1 Connecticut Uniform Trust Decanting Act, effective Jan. 1, 2025, P.A. 104, § 1.

2 *See Morse v. Kraft*, 992 N.E.2d 1021 (Mass. 2013); *Ferri v. Powell-Ferri*, 72 N.E.3d 541 (Mass. 2017).

3 *See* Conn. Gen. Stat. § 45a-545k(a); *see also* Conn. Gen. Stat. § 45a-545l(b).

of appointment, or reduce or eliminate a vested interest.[4] If the Trustee has expanded distributive discretion, the terms of the second trust can be broader in that the second trust may reduce or eliminate the interest of a beneficiary, other than a vested interest, and create or modify a power of appointment.[5] Under the Act, a decanting can only occur under most circumstances after notice is given.[6]

While the Act does clarify when and how a decanting can take place, it does not displace common law decanting, which may offer more flexibility than decanting under the Act.

II. Case Law

A. *Collateral Estoppel*

In *O'Sullivan v. Haught*, the Supreme Court addressed whether a probate court order that was under appeal can support a motion to dismiss on the basis of collateral estoppel.[7] The Court ruled that denial of a motion for summary judgment on the grounds of collateral estoppel is considered a final judgment that may be immediately appealed.[8] The Court further ruled, however, that since the underlying probate order in this case was under appeal *de novo*, it cannot form the basis for a claim of collateral estoppel.[9]

The underlying case involved an allegation of undue influence. In the Probate Court, the Plaintiff, the Decedent's only child, unsuccessfully alleged that the Defendant had unduly influenced the Decedent in connection with the execution of her Will.[10] The Plaintiff then appealed that matter *de novo* to the superior court pursuant to Connecticut General Statutes section 45a-186.[11] While the *de novo* appeal was pending,

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[4] Conn. Gen. Stat. § 45a-545l(c).
[5] *Id.*
[6] Conn. Gen. Stat. § 45a-545g(b).
[7] *O'Sullivan v. Haught,* 348 Conn. 625, 628 (2024).
[8] *Id.*
[9] *Id.* at 628-29.
[10] *Id.* at 629.
[11] *Id.* at 629-30. Conn. Gen. Stat. § 45a -186(a) provides in relevant part: "Except as provided in sections 45a-187 and 45a-188, any person aggrieved by any order, denial or decree of a Probate Court in any matter, unless otherwise specially

the Plaintiff filed a separate action alleging, inter alia, that the Defendant had tortiously interfered with the Plaintiff's expected inheritance.[12] The Defendant moved for summary judgment on the grounds of collateral estoppel and the superior court denied that motion.[13] The Defendant then appealed to the Appellate Court, which granted the Plaintiff's motion to dismiss on the grounds that a denial of a motion for summary judgment is not considered an appealable final judgment.[14] A further appeal to the Supreme Court ensued.[15]

The Supreme Court affirmed the Appellate Court's denial of the motion for summary judgment, but on very different grounds. First, the Court disagreed with the Appellate Court and ruled that denial of a motion for summary judgment on the basis of a colorable claim of collateral estoppel is considered a final judgment that can be immediately appealed.[16] While the Court conceded normally the ruling would result in a remand, the Court went further and ruled on the merits of the Defendant's motion.[17] On the merits, the Court ruled that a Probate Court Decree that is the subject of a pending appeal *de novo* is not entitled to preclusive effect and thus cannot support a claim of collateral estoppel.[18]

In a dissenting opinion, two Justices took issue with the Court's taking this further step, arguing that the matter should have been remanded to the Appellate Court for further proceedings.[19]

Our recent updates have discussed a number of cases in which courts have had to opine on the intersection between

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provided by law, may, not later than forty-five days after the mailing of an order, denial or decree for a matter heard under any provision of section 45a-593, 45a-594, 45a-595 or 45a-597, sections 45a-644 to 45a-677, inclusive, or sections 45a-690 to 45a-705, inclusive, and not later than thirty days after mailing of an order, denial or decree for any other matter in a Probate Court, appeal therefrom to the Superior Court."

12 *O'Sullivan,* 348 Conn. at 630.

13 *Id.*

14 *Id.* at 630-31.

15 *Id.* at 631.

16 *Id.* at 632-35.

17 *O'Sullivan,* 348 Conn. at 635.

18 *Id.* at 640-42.

19 *Id.* at 647-48.

the nascent claim of tortious interference with an inheritance and more well-established claims of incapacity and undue influence. Readers should add this case to that evolving jurisprudence.

B. *Claims Procedures*

In *Romano v. Romano*, the superior court ruled that an email exchange between opposing attorneys discussing a claim against an estate did not comply with the statutory formalities for presenting and responding to claims against an estate.[20] Accordingly, the superior court did not have jurisdiction to review the validity of that claim pursuant to Connecticut General Statutes section 45a-363.[21] The case provides a cautionary tale for those who have become used to corresponding by more modern methods such as email and text messaging—they may not meet the requirements of statutes requiring particular forms of communication.

At issue was the Plaintiff's claim against a decedent's estate. After presenting that claim to the Fiduciary, the Plaintiff sought superior court review under Connecticut General Statutes section 45a-363, which provides in relevant part that "[n]o person who has presented a claim shall be entitled to commence suit unless and until such claim has been rejected, in whole or in part, as provided in section 45a-360."[22] The Defendant responded by alleging that the claim had been acted upon and provided evidence in the form of an email chain between opposing counsel discussing the claim.[23] The issue before the Court was thus whether that email chain met the statutory requirements for notice as required by Connecticut General Statutes section 45a-360 and as defined in Connecticut General Statutes section 45a-353.[24]

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[20] *Romano v. Romano*, No. FBT-CV-23-6127310S, 2024 WL 3949029 (Conn. Super. Ct. Aug. 21, 2024).

[21] *Id.* at *14.

[22] CONN. GEN. STAT. § 45a-363.

[23] *Romano*, 2024 WL 3949029, at *4.

[24] *Id.* at *5. The Court quoted CONN. GEN. STAT. §45a-353(k), which defines notice as "a written instrument containing the required information sent to the person to whom the notice is to be given by certified mail or registered mail. . ."

The superior court ruled that the email discussion did not provide clear notice of the acceptance of the claim. The Court observed that the statute specifies notice must be sent by registered mail.[25] The Court further observed that the legislature had amended the statute in 2013 and had elected to leave the registered mail requirement in place, even though both email and overnight delivery services were in widespread use at that time.[26] The Court ruled that requiring notice to be sent by registered mail was not requiring "ritualistic compliance" with the statutory scheme, but rather ensuring that the form of notice was clear and unambiguous in a way the email exchange at issue was not.[27]

C. *Effectiveness of Court Appointment*

In *West Coast Life Insurance Co. v. Degner*, the U.S. District Court for the District of Connecticut reviewed the effective date of an appointment of voluntary conservator.[28] The Court ruled that the appointment was not effective until the Probate Court issued a written order appointing the conservator and not when the Probate Court judge orally indicated her intent to grant the petition.[29]

The dispute concerned the beneficiary of a life insurance policy. The insured petitioned the Probate Court for appointment of a voluntary Conservator of her Estate.[30] The Court held a hearing on that petition on May 18th, during which the judge stated she was "going to grant the petition," and after which a Fiduciary Probate Certificate would be issued to the Conservator.[31] The next day, May 19th, the purported Conservator electronically changed the beneficiary of the life insurance policy at issue.[32] On June 17th, the Probate Court judge issued a written order appointing the Conservator, and

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[25] *Id.*
[26] *Id.*
[27] *Id.*
[28] *W. Coast Life Ins. Co. v. Degner*, No. 3:22-CV-00443 (VDO), 2024 WL 4274843 (D. Conn. Sept. 24, 2024).
[29] *Id.* at *5.
[30] *Id.* at *1.
[31] *Id.*
[32] *Id.* at *2.

subsequent communication from the Court referred to June 17th as the date of the Conservator's appointment.[33]

In an interpleader action seeking to determine the rightful beneficiary of the policy, the District Court ruled that there was no dispute that the Conservator's appointment was not effective until June 17th and thus the purported change of beneficiary made on May 19th was not valid.[34] In reaching this conclusion, the Court relied in part on Probate Court Rule Section 3.3, which requires decrees to be in writing.[35] But as the Court notes, yet seemingly glosses over, the same rule requires Probate Courts to "memorialize each oral ruling in writing."[36] Accordingly, the rule seems to envision that a Probate Court may issue an oral ruling, in which case the subsequent decree is a memorialization of that prior ruling rather than the ruling itself. When this rule is combined with the fact that the Probate Court actually issued the Fiduciary Certificate on May 18th, we question whether the factual history is as "conclusive" as the District Court found it to be.

D. *Conservator Fees*

In *Cutlip v. Cutlip*, the superior court ruled that the Probate Court had correctly disallowed a portion of the fees claimed by an individual acting as Conservator.[37] The case is potentially noteworthy to the extent the Court strictly limited the Conservator's ability to bill for certain tasks.

The case concerned an individual who had been appointed as Conservator of the estate and person of both his mother and father.[38] Several months after his appointment, the Conservator petitioned the Probate Court for approval of his fees to date and to establish a fee schedule for the future.[39] The

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[33] *W. Coast Life Ins. Co.*, 2024 WL 4274843, at *2.
[34] *Id.* at *5.
[35] *Id.*
[36] *Id.*
[37] *Cutlip v. Cutlip*, No. CV-23-6028273-S, 2024 WL 4023800 (Conn. Super. Ct. Aug. 29, 2024).
[38] *Id.* at *1.
[39] *Id.*

Probate Court denied a significant portion of the requested fees, most notably restricting the Conservator's ability to charge for attendance at certain medical appointments and shopping for personal items for the conserved persons.[40] Specifically, the Court ruled that the Conservator could not charge for time spent with his parents in the emergency room, could bill one hour maximum for hospital visits, could not bill for routine eye care or primary care visits with his parents, and could not bill for any time spent shopping for personal items.[41] On appeal, the superior court affirmed the Probate Court's Decree, finding that it did not represent an abuse of discretion and was consistent with the standards set out in *Hayward v. Plant*.[42]

The case is interesting to the extent the Court was clearly struggling to decide when the Conservator was acting in his court-appointed role and when he was merely acting as an involved son. For example, the Court urged the Conservator to be more willing to accept the assistance of other family members who volunteered to take his parents to medical appointments.[43] Similarly, the Court reasoned that a child naturally would visit their parent in the emergency room and thus could not bill for that time.[44]

The case illustrates the difficulties of navigating the common factual situation of a child taking on increased responsibility for the care of aging parents, and disentangling those acts a child should perform *without expectation* of renumeration from those acts a child *should be* compensated for when acting as a fiduciary.

E. *Annulment of Marriage*

In *Ciarleglio v. Martin*, the Appellate Court held that an action to annul a marriage can continue after one party's death when a fiduciary has been appointed to act on behalf of the decedent.[45]

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40 *Id.* at *2.
41 *Id.*
42 *Cutlip*, 2024 WL 4023800, at *3, 7.
43 *Id.* at *6.
44 *Id.* at *4 n.9.
45 *Ciarleglio v. Martin*, 228 Conn. App. 241 (2024).

The case concerns a marriage between an eighty-two year old man with serious medical issues and a fifty-two year old woman.[46] Four months after the marriage, the husband initiated an annulment action, contending that he lacked the mental capacity to enter into the marriage.[47] Two months later, the husband died.[48] After the substitution of the Administrator of the husband's estate as Plaintiff, the superior court ordered the marriage annulled and an appeal ensued.[49]

In the Appellate Court, the appeal centered on the question of whether the Administrator had the right to continue the annulment action after the Plaintiff's death, a question governed by Connecticut General Statutes section 52-599.[50] The Defendant argued that the action was barred by Connecticut General Statutes section 52-599(c), which provides that a fiduciary may not continue an action after the death of a party when "the purpose or object of [such lawsuit] is rendered useless by the death of any party thereto."[51] The Court disagreed with this analysis, reasoning that the key issue in the current case was the surviving spouse's legal rights as a married person, including the right to inherit from the decedent.[52] Under such circumstances, the Court concluded "the purposes of the underlying litigation becomes heightened—not useless" as a result of one spouse's death.[53]

F. *Adoption*

In *Buzzard v. Fass*, the Appellate Court upheld a superior court decision that two adopted persons were beneficiaries under a testamentary trust created in a Will of a decedent who died in 1947.[54] This is a follow up to a case that we discussed in the 2023 article.[55]

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[46] *Id.* at 243.
[47] *Id.*
[48] *Id.* at 244.
[49] *Id.* at 248.
[50] *Ciarleglio*, 228 Conn. App. at 249.
[51] *Id.* at 253 (quoting Conn. Gen. Stat. § 52-599(c)(1)).
[52] *Id.* at 255.
[53] *Id.* (citing *Perlstein v. Perlstein*, 26 Conn. Supp. 257, 258 (1966)).
[54] *Buzzard v. Fass*, 225 Conn. App. 280, 283-84 (2024).
[55] *See* Cooper, Mulry, Geary & Ivimey, *2023 Developments in Connecticut Estate and Probate Law,* 38 Quinnipiac Prob. L.J., 2025 (discussing the superior court's treatment of the case).

The case focused on the interpretation of Connecticut General Statutes section 45a-731. Under that statute, the terms "issue" and "descendants" when used in the will of a decedent who died prior to October 1, 1959, include adopted persons unless one of two exceptions applies.[56] The first exception applies if the testator's contrary intention can be demonstrated by clear and convincing evidence.[57] The second exception applies if distribution of the estate or under the will has been or will be made pursuant to a court order entered prior to October 1, 1991.[58] The Plaintiff argued that both of these exceptions applied.

With regards to the first exception, the Plaintiff argued that the use of the terms "issue" and "descendants" in the Decedent's Will constituted evidence of the Decedent's intent to exclude adopted persons as adopted persons were not included in those classes at the time the Decedent signed his Will.[59] The Court rejected this argument and found the Plaintiff had failed to meet her burden.[60]

The Court also rejected the Plaintiff's argument that the 1949 Decree which merely transferred the residue of the estate to the testamentary trust satisfied the second exception, as it was not a final trust distribution to a beneficiary that occurred prior to October 1, 1991.[61] The Court reasoned that after the 1949 Decree, the testamentary trust remained subject to continued probate court review as the trust continued to make periodic distributions to beneficiaries.[62]

This case serves as a reminder that the modern legal presumptions weigh in favor of treating adopted persons the same as biological persons for purposes of inheritance rights.

G. *Persons of Interest in Estate*

In *Vecchiarino v. Potter*, the Appellate Court held that the

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[56] Conn. Gen. Stat. § 45a-731(4) (2014).
[57] Conn. Gen. Stat. § 45a-731(11) (2014).
[58] *Id.*
[59] *Buzzard*, 225 Conn. App. at 302.
[60] *Id.* at 308.
[61] *Id.* at 298-301.
[62] *Id.* at 300.

Defendant, a former romantic partner of the Decedent, was not a person of interest in the estate under Connecticut General Statutes section 45a-434.[63]

In this case, after a finding that the Decedent's most recent Will was a product of undue influence, the beneficiaries under that Will and the Decedent's heirs-at-law entered into a settlement agreement regarding the administration of the Decedent's estate.[64] Per the terms of the settlement agreement, the parties agreed that the Decedent's prior Will would not be admitted to probate and that the estate would be administered intestate.[65] The Defendant did not participate in the settlement negotiations or join the settlement agreement as she was neither an heir-at-law nor a beneficiary under the Decedent's most recent Will, although she was a beneficiary under prior Wills.[66] The Defendant objected to the approval of the settlement agreement on the grounds that (1) she was not a party to it even though she was an interested party in the underlying probate proceedings, (2) certain estate assets were hers, and (3) under the doctrine of dependent relative revocation, she was an interested party as she was a named beneficiary under a prior Will.[67] The superior court approved the settlement agreement over the objections of the Defendant, concluding that the Defendant's participation in the underlying Probate Court proceedings did not give rise to an interest in the estate within Connecticut General Statutes section 45a-434 and the Defendant's status as a potential beneficiary was too remote to bring her within the scope of "persons interested in the estate" as she did not seek to admit the prior Will under which she was a beneficiary.[68]

The Appellate Court agreed with the superior court that the Defendant failed to demonstrate that she had any distributive interest in the estate.[69] The Appellate Court found

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63 *Vecchiarino v. Potter*, 223 Conn. App. 676, 679-80 (2024).
64 *Id.* at 681-683.
65 *Id.* at 683.
66 *Id.*
67 *Id.*
68 *Vecchiarino*, 223 Conn. App. at 683.
69 *Id.* at 687.

that the Defendant was neither a named beneficiary of the only Will that was petitioned to be admitted to probate nor was she recognized as an heir-at-law.[70] Additionally, the Defendant did not seek to admit any Will to probate that named her as a beneficiary, thus not allowing her to apply the doctrine of dependent relative revocation.[71] Lastly, the Defendant failed to establish that she was a creditor of the estate, even assuming *arguendo* that a creditor would be considered "persons interested in the estate."[72]

The superior court and the Appellate Court seem to be hinting that the Defendant may have been considered a "person interested in the estate" if she sought to admit a prior Will under which she was a named beneficiary. It is also worth noting that if the Defendant was successful in applying the doctrine of dependent relative revocation to admit a prior Will of which she was a beneficiary, she would have been considered a "person interested in the estate."

H. *Lawsuit Against Conserved Person*

In *Harrington v. Campbell*, the superior court addressed a premises liability case brought against a conserved person and his Conservators.[73] The case raises several procedural issues relating to lawsuits against conserved persons.

The Plaintiff claimed he was injured on the property of a conserved person.[74] He brought suit against the conserved person, the Conservator of the person, and the Conservator of the estate.[75] The Conservator of the estate moved to dismiss the complaint against her, contending that as a conservator whose actions were subject to probate court oversight, she was immune from personal liability under *Gross v. Rell*.[76] The Court agreed with the Conservator and granted

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[70] *Id.* at 688.

[71] *Id.*

[72] *Id.* at 690.

[73] *Harrington v. Campbell*, No. FBT-CV-22-6113296S, 2024 WL 4824212, at *1 (Conn. Super. Ct. Nov. 12, 2024).

[74] *Id.*

[75] *Id.*

[76] *Id.* at *1-2 (citing *Gross v. Rell*, 304 Conn. 234, 238 (2012) (holding that conservators have quasi-judicial immunity from liability for acts that are authorized or approved by the probate court)).

her motion to dismiss.[77]

What makes the case noteworthy is not necessarily the ruling on this narrow motion to dismiss, but rather the Court's extensive dicta discussing many other procedural "loose ends" that will need to be addressed in further proceedings.[78] The unresolved issues include how to properly serve process on conserved persons, as well as a conserved person's role in complying with discovery requests.[79] As the Court intimates, traditional approaches to these issues may need to be revisited in light of the Supreme Court's 2022 opinion in *Day v. Seblatnigg*, where the Court considered the nature of incapacity and the ability of conserved persons to exercise control over their property.[80] Readers should look for further proceedings to see how the Court addresses these crucial issues.

I. *Attorney's Fees*

In *Barbera v. Barbera*, the superior court held that it lacked jurisdiction to award attorney's fees in an appeal from probate.[81]

The Plaintiff filed a motion for payment and petition for surcharge in the Probate Court, asking for reimbursement of legal fees he had expended for the benefit of the trust he was a beneficiary of when seeking removal of a trustee.[82] The Probate Court denied the Plaintiff's motion and petition for surcharge.[83] The Plaintiff timely appealed from the Probate Court decree to the superior court.[84]

On appeal, the superior court concluded that it did not have jurisdiction to award attorney's fees in this particular case because the Probate Court had no statutory authority to award fees.[85] Although the superior court generally has

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[77] *Id.* at *6.
[78] *Harrington*, 2024 WL 4824212, at *6.
[79] *Id.* at *5-6.
[80] *Id.* at *2-3 (quoting *Day v. Seblatnigg*, 341 Conn. 815, 829 (2022)).
[81] *Barbera v. Evelyann L. Barbera Revocable Trust*, CV-22-6054842-S, 2024 WL 4441664, at *10 (Conn. Super. Ct. Oct. 2, 2024).
[82] *Id.* at *1.
[83] *Id.*
[84] *Id.*
[85] *Id.* at *6.

jurisdiction to hear and decide equitable claims, because the Court was hearing the case on a probate appeal, it could only exercise the limited powers of the probate court, which did not include the power to award such fees.[86]

The superior court noted that even if the probate court had authority to award attorney's fees to the Plaintiff, the doctrine of *res judicata* would have prevented the Plaintiff from adjudicating the issue before the superior court insofar as he had made a prior unsuccessful claim for such fees and did not timely appeal the denial of that claim.[87]

J. *Domicile for Connecticut Estate Tax Purposes*

In *Daniels v. Commissioner of Revenue Services*, the superior court held that the Decedent was a Connecticut domiciliary and therefore owed over $13 million in Connecticut estate tax.[88]

The Commissioner of Revenue Services issued a final determination that the estate owed Connecticut estate tax because the Executor failed to prove that the Decedent was not a Connecticut domiciliary at his death.[89] The Executor disagreed, stating that the Decedent was actually a Florida domiciliary at his death.[90]

Connecticut law imposes an estate tax on its residents and, for purposes of estate tax, "each decedent shall be presumed to have died a resident" of Connecticut.[91] To determine whether a decedent died a resident of Connecticut, the Commissioner has issued regulations that list several factors including: location of domicile for prior years, where the individual votes, ownership of other real property, jurisdiction in which a valid driver's license was issued, location of any bank accounts, location of social clubs in which the individual was a member, the percentage of time the individual

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[86] *Barbera,* 2024 WL 4441664, at *5-6.

[87] *Id.* at *6.

[88] *Daniels, Ex'r of Est. of Jack Anderson v. Comm'r of Revenue Services*, CV-22-6070572-S, 2024 WL 4540712, at *1 (Conn. Super. Ct. Oct. 15, 2024).

[89] *Id.* at *1.

[90] *Id.*

[91] Conn. Gen. Stat. § 12-391(d)(1)(C); Conn. Gen. Stat. § 12-391(h)(1).

was physically present in Connecticut, and the percentage of time the individual was present in other jurisdictions.[92]

In weighing those and other factors, the superior court found that one-time administrative elections of changing voter registration, issuing a driver's license, and opening a bank account favored finding the taxpayer a domiciliary of Florida.[93] The Decedent's personal, social, and property connections favored neither Connecticut nor Florida.[94] However, the Court found the most persuasive evidence to be where the Decedent chose to spend his most valuable and limited resource, his time.[95] The Decedent had substantial homes in Florida, Arizona, and Connecticut.[96] He spent approximately five and a half months in Connecticut each year, three and a half months in Florida, and three months in Arizona.[97] Since the Decedent regularly spent more time in Connecticut than Florida or Arizona, the Court concluded that the Decedent was a Connecticut domiciliary.[98]

Given this decision, practitioners should be mindful of where clients with residences in more than two states spend their time when analyzing state estate tax exposure. The Supreme Court clearly seemed more interested in this factor than easily-altered administrative decisions such as where a taxpayer is registered to vote or obtains a driver's license.

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92 *See* Conn. Agencies Regs. § 12-701(a)(1)-1(d).
93 *Daniels,* 2024 WL 4540712, at *1.
94 *Id.* at *8.
95 *Id.*
96 *Id.* at *1.
97 *Id.* at *3.
98 *Daniels,* 2024 WL 4540712, at *1.

AWARDS OF ATTORNEYS' FEES, PUNITIVE DAMAGES AND/OR MULTIPLE DAMAGES IN CIVIL ACTIONS IN CONNECTICUT BASED ON STATE COMMON LAW, RULE AND/OR STATUTE

By James R. Fogarty*

Table of Contents

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Introduction

As all experienced trial lawyers have learned, one of the first, and most often repeated, entreaties of a client involved in civil litigation is, "Can we recover my legal fees?" In the absence of a contractual provision allowing recovery, Connecticut courts have *generally* adhered to the American rule under which parties must pay their own attorneys' fees.[1] However, the key word here is "generally." There are exceptions to the American rule. In addition, our common law measure of punitive damages is the cost of the litigation, i.e., attorneys' fees and nontaxable costs.[2] Though literally these common law punitive damages are not awards of attorneys' fees, the practical effect is the same. Further, there are hundreds of statutes and/or Practice Book rules permitting an award of attorneys' fees, punitive damages and/or multiple damage awards, e.g., double or treble compensatory damages.

This work will attempt to identify and to cite all of the authorities that permit these awards. It will *not* attempt to explain all of the procedural or substantive requirements to obtain such awards. But it will attempt to provide a comprehensive list of State *sources* providing for a potential recovery of damages in addition to compensatory damages. It is to be hoped that this work might be used as a starting point for ascertaining or verifying whether an additional claim or cause of action would enhance a client's recovery. These sources will be discussed in the following parts: (I) exceptions to the American rule; (II) common law causes of action allowing potential recovery of punitive damages; (III) fifteen Practice Book rules providing for awards of attorneys' fees; (IV) 189 statutes providing for awards of attorneys' fees identified in Appendix A; (V) fifty-four statutes allowing potential recovery of multiple damages, twenty-nine of which also provide for attorneys' fees, identified in Appendix B; (VI) twenty-two statutes providing for awards of punitive damages, eighteen

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[1] Town of Ledyard v. WMS Gaming, Inc., 338 Conn. 687, 696, 258 A.3d 1268 (2021); Ferri v. Powell-Ferri, 326 Conn. 438, 451, 165 A.3d 1137 (2017).

[2] Alaimo v. Royer, 188 Conn. 36, 41, 448 A.2d 207 (1982); Vandersluis v. Weil, 176 Conn. 353, 358, 407 A.2d 982 (1978).

of which also provide for attorneys' fees and one of which is incorporated by reference in 101 other statutes, identified in Appendices C and D; (VII) substantive ramifications relating to awards of punitive damages in terms of vicarious liability and insurance coverage; (VIII) procedural aspects, prejudgment and postjudgment; and (IX) conclusion. Cumulatively, therefore, there are presently 352 Connecticut statutes and rules of court providing for the allowance of counsel fees. Most of the legal research and writing of this article took place in 2023. In the editing and printing process that occurred thereafter, several revisions were necessary to incorporate the teachings of more recent court decisions. If any source of counsel fees is not mentioned herein, it is due to the author's oversight, the adoption of a rule, the enactment of a statute or the rendering of a relevant court decision after the most recent revision of this work in May 2025.

I. Exceptions to the American Rule

There are only two full-fledged exceptions to the American rule, one for improper conduct in bad faith and the other for creation of a benefit to an estate or trust or beneficiary thereof. There is a third exception for common law indemnification, which provides a kind of half-loaf remedy, as explained herein in sub-part C. But there is no common law exception based on a private attorney general doctrine or substantial benefit doctrine, as explained herein in sub-part D.

A. *Improper Conduct in Bad Faith*

Three Connecticut Supreme Court decisions establish an exception to the American rule allowing an award of attorneys' fees when the losing party has "acted in bad faith, vexatiously, wantonly or for oppressive reasons."[3] The exception requires clear evidence of two elements. First, the challenged actions must be "entirely without color," or "wholly without merit," which is an objective standard. Second, the challenged actions must have been taken "for reasons of ha-

[3] Berzins v. Berzins, 306 Conn. 651, 51 A.3d 941 (2012); Maris v. McGrath, 269 Conn. 834, 850 A.2d 133 (2004); CFM of Connecticut v. Chowdhury, 239 Conn. 375, 685 A.2d 1108 (1996).

rassment or delay or for other improper purposes," a subjective standard.[4] A claim is "colorable" if a "reasonable person, given his or her first-hand knowledge of the underlying matter, could have concluded that the facts supporting the claim might have been established."[5] The bad faith exception applies not only to the filing of an action, but also to the conduct of the litigation, and it applies both to parties and their counsel.[6] A trial court decision holds that the bad faith exception is not applicable to "pre-litigation conduct of a party giving rise to a cause of action."[7] The Supreme Court decisions hold that the exception is applicable to the conduct of a party "in instigating or maintaining" the litigation.[8]

A more recent decision of the Appellate Court explains that the evidence necessary to prove the subjective element of "bad faith" can include oppressive tactics or wilful disregard of court orders, stating:

> Bad faith in general implies both actual or constructive fraud, or a design to mislead or deceive another, or a neglect or refusal to fulfill some duty or some contractual obligation, not prompted by an honest mistake as to one's rights or duties, but by some interested or sinister motive. . . . "Bad faith means more than mere negligence; it involves dishonest purpose…." *De La Concha of Hartford, Inc. v. Aetna Life Ins. Co.,* 269 Conn. 424, 433, 849 A.2d 382 (2004). The definition of bad faith in *Maris* is somewhat different: "To determine whether the bad faith exception applies, the court must assess whether there has been substantive bad faith as exhibited by, for example, a party's use of oppressive tactics or its wilful violations or [sic] court orders; [t]he appropriate focus for the court…is the conduct of the party in instigating or maintaining the litigation." *Maris v. McGrath, supra*, 269 Conn. 847.[9]

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[4] *Berzins*, *supra* at 662.

[5] *Maris, supra* note 3, 269 Conn. at 847.

[6] *CFM of Connecticut, supra* note 3, 239 Conn. at 394.

[7] Unifoods, S.A. de C.V. v. Magallanes, Docket No. FST-CV20-6047191S (August 12, 2021), 2021 Conn. Super. LEXIS 1299, *17.

[8] See note 3.

[9] Stamford Hospital v. Schwartz, 190 Conn. App. 63, 91, 209 A.3d 1243, *cert. denied*, 332 Conn. 911 (2019). *See also*, Jacques v. Jacques, 223 Conn. App. 501, 510, 309 A.3d 372 (2024).

The bad faith exception was applied in complex insurance coverage litigation as a compromise between conflicting case law of states, some of which allow awards of attorneys' fees, irrespective of statutory or contractual provisions, and others of which do not.

> [E]ven without an authorizing contractual or statutory provision, a trial court may award attorney's fees to a policyholder that has prevailed in a declaratory judgment action against its insurance company only if the policyholder can prove that the insurer has engaged in bad faith conduct prior to or in the course of the litigation. This limited exception reflects an appropriate accommodation between the policy underlying the American rule of permitting parties, including insurance companies, to litigate claims in good faith, but still provides protection to those policyholders that might confront "stubbornly litigious" insurance companies that take specious positions in order to attempt to avoid paying legitimate claims.[10]

B. *Creating Benefit to Estate or Trust or Beneficiary Thereof*

Separate and apart from statutory and/or contractual rights, there is a common law equitable exception to the American rule that allows a beneficiary to recover attorneys' fees expended to create an actual benefit to the trust fund or estate. In one case, beneficiaries of an estate objected to the trustees' proposed sale of certain real property for the sum of $100,000. While the objection was pending in the Probate Court, the purchasers increased their offer to $144,000, which was then accepted and approved by the Probate Court. The beneficiaries engaged counsel to file an appeal from probate, which was resolved several years later with a sale of part of the property for $165,000 (with the retained portion being valued at $20,000). Thereafter, the beneficiaries brought new actions in the trial court through which they were awarded a recovery of a total of $8,000 expended for their attorneys' fees. The Supreme Court affirmed the trial

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[10] ACMAT Corp. v. Greater N.Y. Mut. Ins. Co., 282 Conn. 576, 592, 923 A.2d 697 (2007).

court's judgment, holding, in pertinent part:

> [A] beneficiary who aids a trust fund acts the part of a trustee of the common interest. While the beneficiary, unlike the trustee, must, in the end, be proven to have been right in his claim, if he is successful the fund receives a benefit and it, in turn, bears the cost of that benefit as any administration expense. Thus the right to recover need not be provided for in the statute under which the litigation arose, if indeed any statute is involved.[11]

At the end of its opinion, the Court added the following qualification to its holding:

> There must be a benefit, and a large enough benefit to have made the expenses incurred worthwhile. The benefit must appear, overall, looking backward from the fait accompli.[12]

The requirement of providing a substantial benefit to the trust fund or estate raises a question of fact,[13] which has been found unfulfilled in cases where a beneficiary's petition to remove fiduciaries was unsuccessful,[14] where a beneficiary failed to prove that a trustee's "decanting" of an asset of a trust was unauthorized[15] and where an executor's attorneys' fees were expended only for the purpose of increasing the amount of the executor's fees.[16]

This exception was expanded somewhat by the Appellate Court in 2006 to allow an award of counsel fees expended

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[11] Palmer v. Hartford National Bank & Trust Co., 160 Conn. 415, 428, 279 A.2d 726 (1971).

[12] *Id.* at 435. In his dissenting opinion, Justice House indicated he was underwhelmed by the beneficiaries' recovery for the estate, observing "…that after the two-year delay in the sale of the property it was sold at a higher price than originally contemplated. I cannot agree, however, that…it was the action of the plaintiffs which resulted in this higher price. . . . That the sun rose after the cock crowed does not support a conclusion that the sun rose as a result of the crowing."

[13] Kennedy v. Kennedy, Docket No. CV96-0153444S (February 10, 1998, Stamford), 1998 Conn. Super. LEXIS 378, *8.

[14] Phillips v. Moeller, 148 Conn. 374, 170 A.2d 904 (1961).

[15] Ferri v. Powell-Ferri, 326 Conn. 438, 452, n. 9, 165 A.3d 1137 (2017).

[16] In re Andrews' Appeal from Probate, 78 Conn. App. 441, 451, 826 A.2d 1267 (2003).

by a beneficiary to provide a benefit to the beneficiary, herself, as opposed to the trust fund or estate. The case dealt with a custodial account held by a mother under the Uniform Transfers to Minors Act for the benefit of her daughter. About one year after creating this account, the mother was divorced and required to pay child support to her former husband in the amount of seventy-five dollars per week for the support of her daughter. She did so by withdrawing these periodic payments from the UTMA custodial account until its entire balance of approximately four thousand dollars was depleted. In the first action of the daughter against her mother, the trial court and Appellate Court held, among other things, that the withdrawals constituted breaches of the mother's fiduciary duties to her daughter.[17] In the second action of the daughter against her mother, the trial court and Appellate Court held, among other things:

> …In light of the practice of our courts in allowing equitable exceptions to the American rule and the grant of certain equitable powers under the act, we are persuaded that the court did not abuse its discretion in awarding attorney's fees to preserve the value of the trust to the plaintiff in its entirety. The beneficiary of an account established pursuant to the act should not have to bear the costs of the litigation necessary to establish a custodian's breach of her fiduciary duty owed to the minor beneficiary.[18]

The components and amounts of these fees and expenses are normally itemized in accountings which are reviewed and approved by Probate Courts.[19] The seminal authority on the nine factors to be considered in the determination of the reasonableness of fees is *Hayward v. Plant*,[20] decided one hundred years ago. Fees are allowed for expenses incurred

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[17] Mangiante v. Niemiec, 82 Conn. App. 277, 284, 843 A.2d 656 (2004).

[18] Mangiante v. Niemiec, 98 Conn. App. 567, 575, 910 A.2d 235 (2006).

[19] *See, for example*, Kyek v. Estate of Nichols, Docket No. FST-CV11-6011013S (July 11, 2012), 2012 Conn. Super. LEXIS 1780; Killian v. Estate of Killian, Docket No. CV05-4006065S (August 7, 2006, New Haven), 2006 Conn. Super. LEXIS 2385.

[20] 98 Conn. 374, 385, 119 A. 341 (1923).

both before[21] and after[22] a fiduciary has been duly appointed by a court.

C. *Limited Exception for Breach of Common Law Indemnification*

In its landmark decision in *Kaplan v. Merberg Wrecking Corp.*,[23] the Supreme Court established a common law indemnification of a passive tortfeasor by an active tortfeasor, provided that four elements are proven: (1) negligence of the active tortfeasor; (2) this negligence is the direct, immediate cause of the injuries or damages in question; (3) the active tortfeasor is in control of the situation to the exclusion of the passive tortfeasor; and (4) the plaintiff did not know of the active tortfeasor's negligence, had no reason to anticipate it and could reasonably rely on the active tortfeasor not to be negligent. After trial on a stipulation of facts, the trial court found that the third element (exclusive control of the situation) had not been proven. The Supreme Court affirmed, but nevertheless created the common law indemnification for future cases in which all four elements are proven. The plaintiffs, owners of a burned out building being razed by the defendant, had been found liable in an earlier jury trial during which injured pedestrians had settled their claims against other parties, including the demolition company without releasing the building owners from liability.[24] In the subsequent action under review, the building owners sought to recover (1) the amount of the verdict rendered against them in the first trial; (2) counsel fees and costs incurred in defending the first trial; and (3) counsel fees and costs incurred in prosecuting the second trial. Because the third element required for indemnification was found lacking, the Supreme Court never had occasion to consider the three components of damages sought. Similarly, in three subsequent appellate

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[21] Lamberton v. Lamberton, 197 Conn. App. 240, 253, 231 A.3d 275 (2020).

[22] Tunick's Appeal from Probate, Docket No. FST-CV17-6031598S (May 10, 2019), 2019 Conn. Super. LEXIS 1286, *11.

[23] 152 Conn. 405, 416, 207 A.2d 732 (1965).

[24] Bonczkiewicz v. Merberg Wrecking Corp., 148 Conn. 573, 577-78, 172 A.2d 917 (1961).

decisions[25] the courts never had occasion to consider the different components of damages arising from breach of common law indemnification. The issue does not appear to have been squarely addressed until 2021 when a trial court ruled:

> While an exception to the American rule allows for recovery of fees for indemnity, recovery is limited to the fees associated with the indemnity itself, and does not extend to recovery of fees for services establishing the right to indemnification. The plaintiff may recover attorneys' fees and costs associated with the prosecution of the complaint only if there is specific language or contractual provisions that explicitly allow for such recovery.[26]

The holding is consistent with an Appellate Court decision dealing with the components of a breach of an indemnity provided by statute (General Statutes Section 7-101a), rather than common law.[27] It is also consistent with an Appellate Court decision dealing with a fiduciary's suit to recover additional fees for services rendered to an estate.[28]

D. *No Exception Based on Private Attorney General Doctrine or Substantial Benefit Doctrine Established by Common Law*

In two decisions[29] following successful challenges to regulations concerning state funding for abortions, the Supreme Court declined to award attorneys' fees to the plaintiffs based upon either a private attorney general doctrine or a substantial benefit doctrine established by common law.[30]

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[25] Ferryman v. Groton, 212 Conn. 138, 561 A.2d 432 (1989); Pellecchia v. Conn. Light & Power Co., 139 Conn. App. 767, 57 A.3d 803 (2012); Chicago Title Ins. Co. v. Accurate Title Searches, Inc., 173 Conn. App. 463, 497, 164 A.3d 682 (2017).

[26] Stop & Shop Supermarket, Co., LLC v. Waverly Restaurant, LLC, Docket No. NNH-CV20-6103290S (January 21, 2021), 2021 Conn. Super. LEXIS 78, *15.

[27] O'Brien v. City of New Haven, 178 Conn. App. 469, 488-89, 175 A.3d 589 (2017), *cert. improvidently granted, appeal dismissed*, 330 Conn. 791 (2019).

[28] In re Andrews' Appeal from Probate, 78 Conn. App. 441, 451, 826 A.2d 1267 (2003).

[29] Doe v. Heintz, 204 Conn. 17, 23, 526 A.2d 1318 (1987); Doe v. State, 216 Conn. 85, 107, 579 A.2d 37 (1990).

[30] There are statutes that adopt the private attorney general doctrine. *See, for example*, Langer, Morgan & Belt, 12 Connecticut Practice Series: Unfair Trade Practices (2020-21 edition) §§ 6:10, 6:11 ("CUTPA Treatise"); Sherwood & Brooks, 15 Connecticut Practice Series: Connecticut Environment Protection Act *§ 10:23.*

Under the private attorney general doctrine, some states award attorneys' fees when litigation has resulted in the vindication of a strong or societally important public policy, the costs of which transcend the individual plaintiffs' pecuniary interests and a substantial number of persons stand to benefit from the decision. However, a majority of the Appellate Court ambiguously made a footnote reference to the private attorney general doctrine to uphold legal fees incurred to create a benefit for the beneficiary of a trust, while recognizing the Supreme Court's rejection of the doctrine.[31] The separate concurring opinion of Judge Flynn specifically states that the doctrine has no applicability to the case, and the trial court opinion never mentioned the doctrine.[32] Under the substantial benefit doctrine, some states award attorneys' fees where a successful suit has conferred a substantial benefit to members of an ascertainable class, the costs of which should be borne proportionately by all those benefitted. However, the Connecticut Supreme Court adheres to the ruling of the United States Supreme Court in *Alyeska Pipeline Service Co. v. Wilderness Society* that the American rule is "…deeply rooted in our history and in congressional policy; and it is not for us to invade the legislature's province by redistributing litigation costs in the manner suggested. . . ."[33]

II. Common Law Punitive Damages

A. *Measure of Damages and Purpose*

Strictly speaking, an award of punitive damages is not the same as award of attorneys' fees. Effectively though, the two awards produce substantially the same monetary result in Connecticut. This is because, as a matter of common law which has existed for more than a century, the measure of punitive damages has been the expenses of litigation of the prevailing party in suit, less its taxable costs. In 1906, the Supreme Court reversed and remanded a judgment based

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[31] Mangiante v. Niemiec, 98 Conn. App. 567, 572, n. 3, 910 A.2d 235 (2006).

[32] *Id.*; Mangiante v. Niemiec, Docket No. CV00-0598525S (October 29, 2002, Hartford), 2002 Conn. Super. LEXIS 3502.

[33] 421 U.S. 240, 271, 95 S. Ct. 1612 (1975).

on a verdict which awarded punitive damages for a malicious assault and battery upon the plaintiff. The trial court's charge had instructed the jury that they "might consider" counsel fees and other expenses of the plaintiff, but that the amount of punitive damages awarded rested in their discretion, dependent upon "the degree of malice or wantonness evinced by the defendant."[34] The Supreme Court held that the costs of litigation, less taxable costs, constitute the *limit* of punitive damages.

The purpose of an award of common law punitive damages in Connecticut is sometimes confused with the purpose of punitive damage awards in other states and with awards of multiple damages or punitive damages under Connecticut statutes. There is an impressive line of appellate authority standing for the proposition that such an award is to "do no more than to make the litigant whole"[35] or "serve primarily to compensate the plaintiff for his injuries."[36] Yet, Form 3.4-4 of the Judicial Branch Civil Jury Instructions states an instruction that is incorrect under the common law, i.e, ". . . Punitive damages are damages *not* awarded to compensate the plaintiff for any injuries or losses but to *punish* the defendant for outrageous conduct and to deter . . . similar conduct in the future." (Emphasis added.) The authorities cited in its support relate to statutory punitive damages[37] which are different from common law punitive damages, awards of attorneys' fees or awards of multiple damages.[38]

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[34] Hanna v. Sweeney, 78 Conn. 492, 495, 62 A. 785 (1906).

[35] Harty v. Cantor Fitzgerald & Co., 275 Conn. 72, 97, 881 A.2d 139 (2005).

[36] Tedesco v. Maryland Casualty Co., 127 Conn. 533, 538, 18 A.2d 357 (1941).

[37] Neither *Votto v. American Car Rental, Inc.*, 273 Conn. 478, 871 A.2d 981 (2005) nor *Gaudio v. Griffin Health Services Corp.*, 249 Conn. 523, 733 A.2d 197 (1999), has anything to do with common law punitive damages, the former dealing with CUTPA punitive damages, the latter with noneconomic compensatory damages.

[38] In their dissenting opinion in *Tomick v. UPS*, 324 Conn. 470, 501, 153 A.3d 615 (2016), Justices Palmer and McDonald explained that common law punitive damages are neither the equivalent of statutory attorneys' fees nor statutory multiple damages and that the *dictum* of *Ames v. Commissioner of Motor Vehicles*, 267 Conn. 524, 531, 839 A.2d 1250 (2003) is "legally flawed" to the extent it confuses these "doctrinally distinct terms." It is also a mistake to equate the measure of common law punitive damage awards in Connecticut with those in other jurisdictions. *See, for example*, Your Mansion Real Estate, LLC v. RCN Capital Funding, LLC, 206 Conn. App. 316, 334, 261 A.3d 110, *cert. denied*, 339 Conn. 908 (2021).

Periodically, there have been attempts to persuade the Supreme Court to abandon our "archaic" common law rule and join the majority of jurisdictions which allow much greater monetary awards designed to punish and deter wrongdoers. In 1984, such an attempt was rejected when the Court expressed satisfaction with the existing common law rule, stating that it strikes a balance by providing additional compensation for prevailing parties, while providing "some element of punishment and deterrence" in addition thereto, and the rule avoids the "potential for injustice which may result from the exercise of unfettered discretion by a jury."[39] In 1992, the Court again declined an "invitation" to adopt a more liberal measure of punitive damages, quoting extensively from its earlier opinion.[40] And again, in 2016, the Court expressed satisfaction with the existing common law measure of punitive damages, while construing the reference to "punitive damages" in the Connecticut Products Liability Act, General Statutes Section 52-240b, to be not so limited.[41]

B. *Elements of Proof Required for Award of Common Law Punitive Damages*

Numerous cases hold that an award of punitive damages requires pleading and proof of "reckless indifference to the rights of others or an intentional and wanton violation of those rights."[42] There is redundancy in this holding, as the Court has explained that in practice "the terms wilful, wanton or reckless . . . have been treated as meaning the same thing."[43] The conduct required for an award of punitive damages must be "highly unreasonable . . . involving an extreme

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[39] Waterbury Petroleum Products, Inc. v. Canaan Oil & Fuel Co., 193 Conn. 208, 238, 477 A.2d 988 (1984).

[40] Berry v. Loiseau, 223 Conn. 786, 827, 614 A.2d 414 (1992).

[41] Bifolck v. Philip Morris, Inc., 324 Conn. 402, 446, 152 A.3d 1183 (2016). In her dissenting opinion, Justice Vertefeuille held that section 52-240b adopts the common law measure of punitive damages. *Id*. at 463. In their concurring opinion, Justices Zarella and Espinosa joined the majority on this issue, noting, however, that the answer was an "extremely close call." *Id*. at 461.

[42] *See, for example, Alaimo v. Royer*, 188 Conn. 36, 42, 448 A.2d 207 (1982); *Vandersluis v. Weil*, 176 Conn. 353,358, 407 A.2d 982 (1978); *Collens v. New Canaan Water Co*., 155 Conn. 477, 489, 234 A.2d 825 (1967).

[43] Matthiessen v. Vanech, 266 Conn. 822, 832, 836 A.2d 394 (2003).

departure from ordinary care, in a situation where a high degree of danger is apparent."[44] It appears that an intentional tort, without more, is insufficient, as the court has held:

> "In this state an actionable assault and battery may be one committed wilfully or voluntarily, and therefore intentionally; one done under circumstances showing a reckless disregard of consequences; or one committed negligently." *Alteiri v. Colasso, supra*, 168 Conn. at 333, 362 A.2d 298. Since an assault may be committed in any one of these three ways and since only a wilful or a wanton assault would warrant a recovery of punitive damages, a complaint charging a defendant with an assault and battery without more would not sufficiently characterize the assault so as to alert the defendant respecting the aggravated character of his conduct.[45]

In one case the Supreme Court found no error in a charge to the jury that instructed that punitive damages could be awarded if it found that one party had a reckless indifference to the rights of another party or committed an intentional and wanton violation of the rights of the other party.[46] The disjunctive reference to reckless or intentional and wanton misconduct as a basis for an award of punitive damages does not appear to have been an issue raised on appeal, creating uncertainty in the proof required.[47]

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[44] *Id.*

[45] Markey v. Santangelo, 195 Conn. 76, 78, 485 A.2d 1305 (1985) (citations omitted).

[46] Hi-Ho Tower, Inc. v. Com-Tronics, Inc., 255 Conn. 20, 35, 761 A.2d 1268 (2000).

[47] In *Murphy v. Kelly*, Docket No. CV02-0077886S (November 7, 2002, Tolland), 2002 Conn. Super. LEXIS 3566, the defendant intentionally disregarded a residential subdivision restrictive covenant prohibiting use of synthetic siding, believing that, once constructed, his neighbors would no longer notice or care. The court found that the defendant's intentional violation of the restrictive covenant was sufficient for an award of punitive damages but declined to render such an award because it concluded that the plaintiffs did not prove any monetary loss and that the defendant would be sufficiently punished by the injunctive relief requiring that he remove the siding and replace it, as specified. A more difficult issue might arise if a person were to intentionally and significantly injure another person spontaneously upon provocation by a very offensive insult.

C. *Common Law Causes of Action in Which Punitive Damages Have and Have Not Been Awarded*

Examples of causes of action for intentional torts in which common law punitive damages have been awarded are assault,[48] strict liability,[49] trespass,[50] vexatious suit,[51] fraud,[52] tortious interference with business expectancies,[53] intentional infliction of emotional distress,[54] defamation,[55] loss of consortium,[56] breach of fiduciary duty,[57] false imprisonment,[58] and conversion (with fraud).[59] Examples of causes of action for intentional torts in which punitive damages have *not* been awarded are attorney malpractice,[60] invasion of privacy;[61] fraudulent transfer;[62] breach of covenant of good faith and fair dealing in employment contract,[63] trespass (without malice),[64] and conversion (without fraud).[65]

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[48] Berry v. Loiseau, 223 Conn. 786, 614 A.2d 414 (1992); *Markey, supra* note 45.

[49] Champagne v. Raybestos-Manhattan, Inc., 212 Conn. 509, 559, 562 A.2d 1100 (1989).

[50] Collens v. New Canaan Water Co., 155 Conn. 477, 234 A.2d 825 (1967).

[51] Vandersluis v. Weil, 176 Conn. 353, 407 A.2d 982 (1978).

[52] Alaimo v. Royer, 188 Conn. 36, 448 A.2d 207 (1982); Whitaker v. Taylor, 99 Conn. App. 719, 729, 916 A.2d 834 (2007).

[53] Hi-Ho Tower, Inc. v. Com-Tronics, Inc., 255 Conn. 20, 761 A.2d 1268 (2000).

[54] Berry v. Loiseau, 223 Conn. 786, 614 A.2d 414 (1992).

[55] SBD Kitchens, LLC v. Jefferson, 157 Conn. App. 731, 740, 118 A.3d 550, *cert. denied*, 319 Conn. 903 (2015); *Berry, supra* note 54.

[56] Champagne v. Raybestos-Manhattan, Inc., 212 Conn. 509, 562 A.2d 1100 (1989).

[57] Chioffi v. Martin, 181 Conn. App. 111, 141, 186 A.3d 15 (2018).

[58] Nationwide Mutual Insurance Company v. Pasiak, 327 Conn. 225, 262, 173 A.3d 888 (2017).

[59] Litchfield County Auctions, Inc. v. Brideau, Docket No. CV15-6012328S (September 3, 2019, Litchfield), 2019 Conn. Super. LEXIS 2459, *111; Veccharelli v. Valentina, Docket No. CV02-0389531S (January 22, 2004, Bridgeport), 2004 Conn. Super. LEXIS 156, *10.

[60] Baruno v. Slane, Docket No. FST-CV08-5008010S (July 16, 2013), 2013 Conn. Super. LEXIS 1578, *6, *rev'd judgment based on malpractice*, 151 Conn. App. 386, 94 A.3d 1230, *cert. denied*, 314 Conn. 920 (2014).

[61] Venturi v. Savitt, Inc., 191 Conn. 588, 590, 468 A.2d 933 (1983).

[62] Litchfield Asset Management Corp. v. Howell, 70 Conn. App. 133, 146, 799 A.2d 298, *cert. denied*, 261 Conn. 911 (2002); Moorman v. Potash, Docket No. CV19-5016647S (December 3, 2019, Ansonia-Milford), 2019 Conn. Super. LEXIS 3126, *10.

[63] Barry v. Posi-Seal International, 40 Conn. App. 577, 585, 672 A.2d 514, *cert. denied*, 231 Conn. 942 (1994).

[64] Delahunty v. Targonski, Docket No. CV08-4009499S (April 8, 2014, Middlesex), 2014 Conn. Super. LEXIS 820, *23, *aff'd on other grounds*, 158 Conn. App. 741, 121 A.3d 727 (2015).

[65] Withers Bergman, LLP v. New England Personnel of Hartford, LLC, Docket No. CV05-4007937S (April 5, 2007, New Haven), 2007 Conn. Super. LEXIS 908, *21.

While all of the aforementioned cases involve causes of action for intentional torts, punitive damages may also be awarded in negligence cases – provided that the negligence is "reckless." One of the most complete explanations of what constitutes "recklessness" is provided in *Matthiessen v. Vanech*, as follows:

> "Recklessness requires a conscious choice of a course of action either with knowledge of the serious danger to others involved in it or with knowledge of the facts which would disclose this danger to any reasonable man, and the actor must recognize that his conduct involves a risk substantially greater . . . than that which is necessary to make his conduct negligent."[66]

"Recklessness" is more than gross negligence; in fact, gross negligence has never been recognized in Connecticut as a separate basis of liability in the law of torts.[67] The sufficiency of allegations in complaints to support a request for punitive damages based on recklessness has been tested on occasion, with some judges requiring greater factual detail[68] while others have been satisfied with allegations that might be characterized as conclusory.[69]

In February 2025, responding to a certified question from the U.S. District Court (D. Conn.), the Supreme Court unanimously held that our state common law does not permit an award of punitive damages in a breach of contract action in the absence of conduct that is also a tort for which punitive damages are recoverable.[70] The underlying action began as a collection suit by the plaintiff law firm to recover legal fees incurred in contentious commercial litigation that was concluded with an adverse verdict against the defendant client. A malpractice counterclaim was alleged, and each party

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[66] Matthiessen v. Vanech, 266 Conn. 822, 832, 836 A.2d 394 (2003).

[67] *Id.*, at 833, n. 10.

[68] *See, for example*, Jendrick v. Breeland, Docket No. CV11-6011994S (April 5, 2013, Stamford), 2013 Conn. Super. LEXIS 766, *6.

[69] Ludwicki v. Sliwa, Docket No. CV08-6001447S (September 2, 2009, New Britain), 2009 Conn. Super. LEXIS 2348, *8.

[70] McCarter & English, LLP v. Jarrow Formulas, Inc., 351 Conn. 186, 209, 329 A.3d 898 (2025).

claimed common law punitive damages against the other. After the District Court granted partial summary judgment for the plaintiff awarding approximately $980,000 damages, a jury returned a verdict in favor of the plaintiff on all claims and counterclaims, awarding more than $1 million in additional compensatory damages and finding that the defendant's conduct in breaching its contract was willful and malicious. Because of its uncertainty of whether state common law would permit an award of punitive damages on these facts, it certified the question and held that, if the Supreme Court were to permit an award of punitive damages, it found that the plaintiff had reasonably incurred $3.6 million in litigation expenses.

In reaching its holding, the Supreme Court adopted the majority rule of 35 states, as well as the principles adopted in the Restatements of both Contracts and Torts. The Court observed, however, that some states that have adopted the majority rule also recognize exceptions that allow parties to recover punitive damages in certain actions involving a "special relationship," such as a breach of contract that is also a breach of fiduciary duty, or a bad faith breach of an insurance contract. As a practical matter, it seems that the best solution is to provide for the recovery of legal fees in the underlying contract between the parties.

D. *Well-known Alex Jones Case*

In November 2022, a trial court awarded common law punitive damages, as well as statutory punitive damages under the Connecticut Unfair Trade Practices Act ("CUTPA"), in three consolidated cases against Alex Jones and affiliated companies, arising out of the Sandy Hook Elementary School massacre. The complaint was in five counts: invasion of privacy; defamation; intentional infliction of emotional distress; negligent infliction of emotional distress; and violations of CUTPA. A disciplinary default was entered against the defendants based upon their abuses of discovery and failure to comply with court orders. A jury returned separate verdicts in favor of the fifteen plaintiffs in the total amount of $965

million. Each of the fifteen verdict forms states two awards of compensatory damages, one for "defamation/slander damages (past and future)" and the other for "emotional distress damages (past and future)." In addition, the jury returned a separate verdict stating, "We the jury find that the standard charged for the assessment of attorney's fees and costs has been met." This form reflects a box checked by the foreperson, stating affirmatively that reasonable attorney's fees and costs were to be awarded by the judge at a later date.

Subsequently, following an evidentiary hearing in which, among other things, the plaintiffs introduced into evidence their contingent fee agreement of one-third of the amount recovered, and extensive briefing, Judge Bellis, in a 45-page Memorandum of Decision, awarded "common law punitive damages for attorneys fees" in the amount of one-third of the amount of compensatory damages awarded to each of the fifteen plaintiffs. The total amount of these common law punitive damages was $321.65 million, plus itemized nontaxable costs totaling $1.49 million.[71] In addition, the court awarded $150 million in total punitive damages under CUTPA ($10 million for each plaintiff). However, this award was vacated by the Appellate Court based upon its holding that the Complaint failed to state a viable cause of action under CUTPA, as described *infra* in part VI.

III. Practice Book Rules Providing for Awards of Attorneys' Fees

There are fifteen Practice Book rules providing for awards of attorneys' fees, four of which provide for compensation of attorneys and eleven of which provide for sanctions against attorneys and/or parties.

A. *Awarded as Compensation*

Two of the four rules provide for the potential of modest compensation in very limited circumstances for successful appeals from the Bar Examining Committee or the Statewide

[71] Lafferty v. Jones, Docket No. X06-UWY-CV18-6046436S (November 10, 2022), 2022 Conn. Super. LEXIS 2813. See Docket Entry #1010.00 (10/12/22).

Grievance Committee, to wit sections 2-11A(g) and 2-38(g). Each is completely discretionary with the trial court and limited to a maximum award of $7,500. Each requires that the action of the committee successfully appealed was undertaken "without any substantial justification." This means that the action of the committee must have been "entirely unreasonable or without any reasonable basis in law or fact."[72]

The third rule, section 25-62(d), provides that a judicial authority may order compensation for services rendered by a court-appointed guardian *ad litem*. The rule appears to be duplicative of authority provided in General Statutes Section 46b-62(a) and/or Section 45a-132(g).

From a monetary perspective, by far the most important of the Practice Book rules providing for compensation of an attorney is the fourth rule, section 9-9(f), authorizing a discretionary award of attorneys' fees and nontaxable costs in certified class actions. The fees which can be awarded under this authority are normally generous by State standards, as they are determined through the guidance of federal class action standards.[73] They are set by either using a multiple of the "lodestar" approach (i.e., hours reasonably billed times an appropriate hourly rate) or by a percentage of the recovery. The multiple used on the lodestar approach has varied from a low of 0.5607 (56 percent of the lodestar), to a high of 4 (four times the lodestar). In the first of those cases, the resulting fee represented 32 percent of the recovery;[74] in the second, it represented 23.5 percent of the recovery.[75] In ar-

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[72] *See* Burinskas v. Department of Social Services, 240 Conn. 141, 156, 691 A.2d 586 (1997).

[73] Standard Petroleum Co. v. Faugno Acquisition, LLC, 330 Conn. 40, 48, 191 A.3d 147 (2018); Collins v. Anthem Health Plans, Inc., 266 Conn. 12, 33, 836 A.2d 1124 (2003).

[74] Gruber v. Starion Energy, LLC, Docket No. X03-HHD-CV17-6075408S (November 13, 2017), 2017 Conn. Super. LEXIS 4865). *See also*, Bushansky v. Phoenix Cos., Docket No. X08-FST-CV15-6027891S (February 23, 2017), 2017 Conn. Super LEXIS 370, *18-21 (fee of $230,000 awarded on request in excess of $311,000 based on lodestar in settlement consisting only of limitation of release, no monetary relief).

[75] Towns of New Hartford & Barkhamsted v. Conn. Res. Recovery Auth., Docket No. X02-CV04-0185580S (December 7, 2007, Waterbury), 2007 Conn. Super. LEXIS 3288, * 17-27, *aff'd*, 291 Conn. 511, 970 A.2d 583 (2009) (fee of $9 million awarded on recovery of $36 million).

riving at an award at the high end of the spectrum, Judge Eveleigh referred to the fact that the recovery was the result of twelve months of trial, post-trial and appellate activity, and that lodestar multiples of 4-5 and percentages of recovery between 25-30 percent often are awarded in federal class action litigation.[76]

B. *Imposed as Sanctions*

The Practice Book contains eleven rules which provide sanctions for (1) untrue or frivolous allegations, (2) abuses of discovery, (3) failures or refusals to comply with court orders or rules and, (4) under certain circumstances prescribed by statute, failures to accept offers of compromise filed by plaintiff or defendant. All of these rules have been adopted in the exercise of the judiciary's inherent rule-making authority.[77]

1. Rule 1-25(c) imposes sanctions for bringing or defending an action or asserting or opposing a complaint or counterclaim "unless there is a basis in law and fact for doing so that is not frivolous." These sanctions expressly include an order requiring the offending party to pay costs and expenses, including attorneys' fees. Section 10-5 provides that any allegation or denial made without reasonable cause and found untrue shall subject the party pleading the same to the payment of reasonable expenses, including attorneys' fees not exceeding $500 "for any one offense." A trial court has interpreted this limit as referring to each allegation within a pleading, so that it found twenty-five offenses within one pleading comprising an answer, special defenses and counterclaim.[78] Section 17-48 provides that if the court determines that an affidavit filed in connection with a motion for summary judgment has been made in bad faith or solely for the purpose of delay, it may order the offending party to pay

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[76] *Id*.

[77] Millbrook Owners Ass'n v. Hamilton Standard, 257 Conn. 1, 10, 776 A.2d 1115 (2001); Stanley Shenker & Assocs. v. World Wrestling Fed'n. Entertainment, Inc., 48 Conn. Supp. 357, 373, 844 A.2d 964 (2003).

[78] Rosier v. Reilly, Docket No. CV01-0449340S (February 20, 2002, New Haven), 2002 Conn. Super. LEXIS 637 ($300/offense then doubled per General Statutes § 52-245).

reasonable expenses incurred by the other party, including attorneys' fees. An application for fees based on these Practice Book provisions might be augmented by General Statutes Section 52-245 providing for double costs, together with a reasonable attorneys' fee, in any case in which an affidavit has been filed on behalf of a defendant or "a statement that he has a *bona fide* defense" which the court determines was made without just cause or for the purpose of delay. A trial court has interpreted "statement" to include any pleading, even one which is withdrawn.[79] The statute does not have a monetary limit on the amount of any award, but like the Practice Book provisions, any award is discretionary.

2. Section 13-14(a) and (b)(2) and its corollary in family support matters, Section 25a-25(a) and (b)(2), provide for an award of attorneys' fees for specified discovery abuses, such as false, misleading or incomplete discovery responses.[80] Additional sanctions may be imposed, such as the establishment of facts as true, *per diem* fines, defaults or dismissals.[81]

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[79] Strom v. Curtiss, Docket No. CV00-092123S (November 8, 2002, Middletown), 2002 Conn. Super. LEXIS 3607, *45-57.

[80] In *Ramin v. Ramin*, 289 Conn. 324, 351, 915 A.2d 790 (2007), the majority opinion of four justices held that existing matrimonial case law should be expanded to provide a trial court with discretion to award attorneys' fees to an innocent party who has incurred substantial attorneys' fees due to egregious litigation misconduct of the other party when the trial court's other financial orders have not adequately addressed that misconduct. The dissenting opinion of three justices urged, among other things, that Practice Book § 13-14, as well as the inherent power of the court, provided an adequate remedy and that it had been effectively employed by the trial court. *Id*., 373.

[81] Practice Book § 13-14 provides, in part:

(a) If any party has failed to answer interrogatories or to answer them fairly, or has intentionally answered them falsely or in a manner calculated to mislead, or has failed to respond to requests for production or for disclosure of the existence and contents of an insurance policy of the limits thereof, or has failed to submit to a physical or mental examination, or has failed to comply with a discovery order made pursuant to Section 13-13, or has failed to comply with the provisions of Section 13-15, or has failed to appear and testify at a deposition duly noticed pursuant to this chapter, or has failed otherwise substantially to comply with any other discovery order made pursuant to Sections 13-6 through 13-11, the judicial authority may, on motion, make such order proportional to the noncompliance as the ends of justice require.

(b) Such orders may include the following:
(1) An order of compliance;
(2) The award to the discovering party of the costs of the motion, including a reasonable attorney's fee;
(3) The entry of an order that the matters regarding which the discovery was sought or other designated facts shall be taken to be established

The specific sanctions enumerated in Section 13-14 "do not necessarily demarcate the trial courts inherent powers," so that other remedies may be employed.[82] Sanctionable misconduct includes failure to appear for a court ordered out-of-state deposition,[83] creating and back-dating a document,[84] failure to disclose prior back injury in personal injury action for another back injury,[85] false deposition testimony,[86] failure to produce disclosed expert witness at noticed deposition,[87] failure to disclose financial information,[88] failure to produce documents ordered,[89] evasive and dilatory answers to interrogatories,[90] document dump, disorganized and including majority of irrelevant documents,[91] prolonged piecemeal pro-

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for the purposes of the action in accordance with the claim of the party obtaining the order;

(4) The entry of an order prohibiting the party who has failed to comply from introducing designated matters in evidence;

(5) An order of dismissal nonsuit or default.

[82] Yeager v. Alvarez, 302 Conn. 772, 780, 31 A.3d 794 (2011) (offer of compromise stricken due to plaintiff's late disclosure of subsequent surgical procedures).

[83] Noll v. Hartford Roman Catholic Diocesan Corp., Docket No. HHD-XO4-CV02-4034702S (September 26, 2008), 2008 Conn. Super. LEXIS 2453, *39-40 (default and attorneys; fees and travel costs awarded).

[84] Bell v. Hope Home Health Agency, Inc., Docket No. HHD-CV17-6075904S (October 2, 2019), 2019 Conn. Super. LEXIS 2689, *12-14 (establishment of facts as true; jury instruction that three individuals gave intentionally false and misleading testimony; and attorneys' fees related to depositions, motion practice and hearings awarded).

[85] Colvin-Bruch v. McMechen, Docket No. CV97-0073568S (February 25, 2002, Tolland), 2002 Conn. Super. LEXIS 606 (case dismissed but denial of defendant's attorneys' fees).

[86] Evans v. GMA, 277 Conn. 496, 524, 893 A.2d 371 (2006) ($556,000 attorneys' fees awarded but not a default); Stanley Shenker & Assocs. v. World Wrestling Fed'n. Entertainment, Inc., 48 Conn. Supp. 357, 373, 844 A.2d 964 (2003) (dismissal and statement of Court's willingness to consider award of attorneys' fees if not already awarded after trial of counterclaim).

[87] Brandt v. New Eng. Basket & Gift Co., Docket No. CV04-4002331S (December 1, 2006, Stamford), 2006 Conn. Super. LEXIS 3684, *5-6, n. 4 (modest award of attorneys' fees for preparation of motion only).

[88] Massop v. Massop, Docket No. FA14-4073564S (December 15, 2014, Hartford), 2014 Conn. Super. LEXIS 3058 (attorneys' fees awarded, plus fine of $50/day, increasing to $75/day for each day of nonproduction); Final Cut, LLC v. Sharkey, Docket No. X05-CV08-5007365S (June 1, 2010), 2010 Conn. Super. LEXIS 1392, *17-18 (disclosure of assets ordered plus attorneys' fees in connection with motion).

[89] Spatta v. American Classic Cars, LLC, 150 Conn. App. 20, 28, 90 A.3d 318 (2014).

[90] Westborough Reman, LLC v. Camerota, Docket No. HHD-XO7-CV21-6137444S (December 1, 2022) (attorneys' fee of $500 awarded; $2500 had been requested).

[91] Burkowski v. Pro Park, Inc., Docket No. FST-CV20-6046309S (November 2, 2021, Stamford) 2021 Conn. Super. LEXIS 1820 ($15,000 attorneys; fees awarded to defray otherwise unnecessary litigation costs).

duction of documents[92] and obvious dishonesty responding to postjudgment discovery and disobeying court orders.[93] Trial courts are given broad discretion to sanction, but the discretion is reviewable to assure that the sanction is proportionate to the misconduct.[94] A party cannot be sanctioned for failure to produce documents in the custody of a nonparty, even a closely-held corporation.[95] Section 13-25 provides for an award of attorneys' fees when a party proves the truth of a matter which another party fails to admit in response to a request for admission. However, such a determination cannot be made until a post-trial hearing to compare the evidence against the request.[96] Fees awarded under this section can be substantial.[97]

3. Section 14-13 authorizes the court to award an attorneys' fee if any person fails to attend, or be available by telephone for, a scheduled pretrial conference and Section 14-14 authorizes the court to award an attorneys' fee if any party fails to abide by a pretrial order. Section 85-2 authorizes the Supreme Court and the Appellate Court to order the "appropriate discipline," including fines, attorneys' fees and other

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[92] Artie's Auto Body v. Hartford Fire Ins. Co., Docket No. X08-CV03-0196141S (May 7, 2009), 2009 Conn. Super. LEXIS 1286, *35-36 (entire cost of re-taking any of 17 depositions plus attorneys' fees for preparation, briefing and argument of motion).

[93] Alpha Beta Capital Partners, L.P. v. Pursuit Inv. Mgmt., LLC, 198 Conn. App. 671, 683-85, 234 A.3d 997 (2020) (attorneys' fees in excess of $40,000 requested; attorneys; fees of $16,704 awarded).

[94] There is a three-pronged test of proportionality, sometimes referred to as the "*Yeager* factors" (Yeager v. Alvarez, 302 Conn. 772, 780, 31 A.3d 794 (2011)): (1) the order to be complied with must be reasonably clear; (2) the record must establish that the order was in fact violated; and (3) the sanction imposed must be proportional to the violation. Millbrook Owners Ass'n v. Hamilton Standard, 257 Conn. 1, 17-18, 776 A.2d 1115 (2001); Speer v. Danjon Capital, Inc., 222 Conn. App. 624, 631, 306 A.3d 1162 (2023).

[95] Kolashuk v. Hatch, 195 Conn. App. 131, 153-54, 233 A.3d 843 (2020).

[96] White Sands Beach Ass'n v. Bombaci, 287 Conn. 302, 306 n. 6, 950 A.2d 489 (2008); Martinez v. Ramos, Docket No. ANN-CV17-6023331 (November 21, 2019), 2019 Conn. Super. LEXIS 2959, *7.

[97] Keough v. Keough, Docket No. FST-FA03-01955891 (June 19, 2018), 2018 Conn. Super. LEXIS 1266, *8 ($37,000 fee to prove cohabitation); Roome v. Shop-Rite Supermarkets, Inc., Docket No. CV02-0281250S (August 16, 2006, New Haven), 2006 Conn. Super. LEXIS 2525, *15 ($30,000 fee to prove food ingredient in product liability action); Ruiz v. Cole, Docket No. CV96-0132283S (August 12, 1999, Waterbury), 1999 Conn. Super. LEXIS 2220, *3 ($4,360 fee to prove liability in jury trial.

sanctions,[98] for noncompliance with their rules and for other specified misconduct.

4. Sections 17-13 and 17-18 authorize the court to award, among other sanctions, attorneys' fees not exceeding $350, in the event a plaintiff recovers more than the amount stated in its own offer of compromise or less than the amount stated in a defendant's offer of compromise, as provided in General Statutes Sections 52-192a(c) and 52-195(b).[99]

IV. Connecticut Statutes Providing for Awards of Attorneys' Fees

As of this writing in 2023, there are at least 337 Connecticut statutes providing for awards of attorneys' fees. This part IV, coupled with Appendix A hereto, will identify 189 of those statutes which do not also provide for multiple damages or punitive damage awards. Part V, coupled with Appendix B hereto, will identify fifty-four additional Connecticut statutes providing for multiple damage awards, of which twenty-nine also provide for awards of attorneys' fees. Part VI, coupled with Appendix C hereto, will identify twenty-two additional Connecticut statutes, providing for punitive damage awards, of which eighteen also provide for awards of attorneys' fees. And, finally, one of these nineteen statutes, Section 42-110g, a part of CUTPA, is incorporated by reference in 101 other statutes identified in Appendix D hereto. Awards of punitive damages and/or attorneys' fees may be made by arbitration panels pursuant to General Statutes Section 52-407uu, as well as by courts. The proliferation of these statutes has been steady for the past fifty years, outpacing developments in common law exceptions to the American rule discussed in Part I, common law punitive damage awards discussed in Part II and the Practice Book rules discussed in Part III.

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[98] Miller v. Appellate Court, 320 Conn. 759, 773, 136 A.3d 1198 (2016) (suspension of practice before the court for six months); J. G. v. Curtis-Stanley, 223 Conn. App. 149, 307 A.3d 960 (2023) (*per curiam*) (dismissal of *pro se* appeal based on unilateral termination of appellant's remote oral argument).

[99] For a discussion of these provisions and their disparity, see Fogarty, "*Offers of Compromise in Civil Actions in Connecticut: Excessively Punitive and Disparate Sanctions*," 94 Conn. Bar J. 169 (2022).

A. *Types of Cases For Which Statutes Provide for Awards*

The 337 Connecticut statutes cover a multitude of causes of action, which are treated herein in three tiers of magnitude of potential awards. The first tier, discussed in this part IV, deals with statutes which provide only for an award of attorneys' fees. The kinds of cases covered are so varied that they are difficult to generalize but seem to be mostly concerned with consumer, employment, collection and discrimination cases (in descending order in terms of quantity of statutes). Yet, the quantity of statutes is not necessarily the most important factor indicative of frequency of use, as awards of counsel fees in family law cases are covered primarily in only two statutes, Sections 46b-62(a) and 46b-87. These two statutes create a system and rules governing awards of attorneys' fees in family law cases which are *sui generis*, governed by different principles than are applicable to other civil actions.[100] The matrimonial bench and bar probably have more experience and knowledge on the subject of determining the appropriate amount of counsel fees to be awarded than any other specialty of civil litigation. The areas covered by all of the statutes generally seem to be legitimate areas for legislatively enhanced remedies. However, some of the statutes are applicable only in such isolated and specific circumstances that suggest they are the products of lobbying by special interest groups. But any damage created by these specific statutes probably is not of great statewide importance because of the infrequency of their utilization and the fact that any award thereunder must always satisfy the requirement that the fees awarded be "reasonable" in the equitable and discretionary determination of a trial court.

It is the second and third tiers of statutes that are cause for greater concern, i.e., the fifty-four statutes also providing for multiple damage awards and the 123 statutes (of which CUTPA accounts for 102) also providing for punitive dam-

[100] *See, for example*, Hornung v. Hornung, 323 Conn. 144, 168, 146 A.3d 912 (2016); Seder v. Errato, 211 Conn. App. 167, 181, 272 A.3d 252, *cert. denied*, 343 Conn. 917 (2022); Giordano v. Giordano, 203 Conn. App. 652, 660, 249 A.3d 363 (2021).

ages, as discussed in parts V and VI, respectively. These statutes can provide the equivalent of a racetrack *trifecta*, enabling the recovery of multiple and/or punitive damages in addition to attorneys' fees, as discussed in parts V and VI, respectively.

B. *Mandatory vs. Discretionary Awards*

Of the statutes identified in this article, a substantial number purport to provide that an award of statutory attorneys' fees is mandatory when the stated conditions of such an award have been satisfied. These statutes expressly provide that the court "shall," as opposed to "may," grant such an award. However, as we have learned in so many cases on different subjects, "shall" is not always construed by our courts as meaning "shall." For example, Section 8-12 provides, in pertinent part:

> . . . If the court renders judgment for such municipality and finds that the [zoning] violation was wilful, the court *shall* allow the municipality its costs, together with reasonable attorney's fees to be taxed by the court.

(Emphasis added.)

Notwithstanding the italicized text, the circumscribed circumstances in which such an award might be granted, i.e., a *wilful* violation, as well as the limited potential beneficiaries of such an award, i.e., only municipalities, the Appellate Court has construed the statute as providing only for a discretionary award, not a mandatory award.[101]

The interpretation of this statute may well portend that the many other statutes providing that awards "shall" be granted in circumstances less circumscribed will also be construed as discretionary rather than mandatory. Further, the text of statutes is not always clear as to whether awards are intended to be mandatory or discretionary. For example,

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[101] Town of Wethersfield v. PR Arrow, LLC, 187 Conn. App. 604, 649, 203 A.3d 645, *cert. denied*, 331 Conn. 907 (2019); City of Stamford v. Stephenson, 78 Conn. App. 818, 825, 829 A.2d 26 (2003).

some provide that a party "shall be liable,"[102] while others provide only that a party may institute a legal action to recover damages, including reasonable attorneys' fees.[103] It is clear that even when a statute might be construed as *requiring* an award of attorneys' fees, the determination of the amount of such an award is in the discretion of the trial court, reviewable only for manifest abuse, which is rarely found. As a practical matter, therefore, it is prudent for counsel to be cautious when urging that an application for an award of attorneys' fees *must* be granted. Otherwise counsel might win the battle of persuading a trial court that it must render an award, only to lose the war after the court, in its broad discretion, disappoints counsel with the amount of its award.

C. *Eligibility of Only One Party vs. Prevailing Party*

Most of the statutes identified in Appendix A provide for awards in favor of the party seeking recovery (see third column), with the balance in favor of the party that successfully defended suit (see fourth column) or the prevailing party (see third and fourth columns combined). Each statute must be read carefully to determine which party is eligible for an award of attorneys' fees because sometimes plaintiffs are not eligible;[104] other times, intervening parties are eligible.[105] For example, although Section 52-251 purports to allow an award of reasonable counsel fees to "each of the parties" to a will construction action, some parties thereto have been held to be "interlopers" ineligible for such an award,[106] as have

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[102] General Statutes § 16-262f, the constitutionality of which was upheld in *Hartford Electric Light Co. v. Tucker*, 183 Conn. 85, 91, 438 A.2d 828 (1981), predicated on the assumption that the fees would be determined to be "reasonable" after an evidentiary hearing is conducted.

[103] *See, for example*, General Statutes §§ 1-241, 8-270a, 22a-506(b), 31-52(d), 42-133ee, 52-570d(c) and 52-571i.

[104] Commissioner of Environmental Protection v. Mellon, 286 Conn. 687, 691, 945 A.2d 464 (2008) (Commissioner held not to be a "person . . . or other legal entity which maintains an action" within meaning of General Statutes §§ 22a-16 and 22a-18(e)).

[105] Conservation Commission v. Red 11, LLC, 135 Conn. App. 765, 783, 43 A.3d 244 (2012) (nearby property owner intervening in inland wetlands appeal held to qualify as party who "brought such action" within meaning of General Statutes § 22a-44(b) and awarded attorneys' fees of $392,000).

[106] Connecticut Bank & Trust Co. v. Coffin, 212 Conn. 678, 696, 563 A.2d 1323 (1989).

successful contestants of admission of a will to probate.[107] On the other hand, a party nominated as executor of an estate is always allowed reasonable counsel fees to defend the admission of a will to probate pursuant to Section 45a-294(a), even when the will is not admitted to probate.[108]

It is not always easy to determine which party is the "prevailing" party within the meaning of a statute providing for an award of reasonable attorneys' fees to such party. In *Bruno v. Whipple*,[109] after several trials and appeals, the plaintiff-homeowner succeeded in proving that the defendant-contractor had breached its construction contract, but failed to prove any damages resulting from said breach. The trial court entered judgment for the defendant, which the Appellate Court held was technically incorrect because judgment for nominal damages should have been entered in favor of the plaintiff. Each of the parties applied for an award of attorneys' fees in the same amount of $305,533.75, the defendant based upon a contractual provision for an award to the "prevailing" party and the plaintiff based upon General Statutes Section 42-150bb providing for an award to a consumer who successfully defends an action or counterclaim, in which event the size of the fee "shall be based as far as practicable upon the terms governing the size of the fee for the commercial party." The trial court denied the applications of each party, and the Appellate Court affirmed in a unanimous decision containing several important holdings. The Court found that under the narrow circumstances of the case, the defendant was not the "prevailing" party because the form of the trial court judgment was technically incorrect though not reversible in accordance with established case law. It held:

> A party need not prevail on all issues to justify a full award of costs, and it has held that if the prevailing party obtains judgment on even a fraction of the claims advanced, *or is awarded only nominal damages*, the party may neverthe-

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[107] Miller v. Haggerty, Docket No. DBD-CV07-4007169S (December 29, 2011), 2011 Conn. Super. LEXIS 3312, *5-10.

[108] Lamberton v. Lamberton, 197 Conn. App. 240, 244, 231 A.3d 275 (2020).

[109] 215 Conn. App. 478, 283 A.3d 26 (2022).

> less be regarded as the prevailing party and thus entitled to an award of costs.[110]

As to the plaintiff's claims, the Court held that, first, notwithstanding the text of Section 42-150bb, a consumer seeking an award of counsel fees must demonstrate the reasonableness of those fees and cannot, therefore, rely exclusively upon the amount of counsel fees claimed by the commercial party.[111] Second, the Court held that the evidence offered by the plaintiff to establish the amount of attorneys' fees allegedly incurred by her ($92,101) was insufficient for the reason, among others, that it did not include itemized invoices, affidavits or testimony to describe the legal services rendered.[112]

Another complexity of determining whether a party is "prevailing" arises when there is recovery on fewer than all of multiple courts or for a sum of compensatory damages substantially less than that claimed. The resolution of the first complexity depends upon whether all of the claims are intertwined and dependent upon the same underlying facts.[113] Resolution of the second complexity is one of many factors considered by courts in arriving at the determination of the amount of a "reasonable" award, all of which, again, emphasize and confirm the discretionary nature of such awards.[114]

D. *Criteria Used to Determine Whether Award Should be Granted*

Most of the statutes identified herein provide for awards to the party that succeeded in the prosecution or defense of an eligible action. In these instances, there is no requirement

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[110] *Id*. at 491 (Emphasis supplied).

[111] *Id*. at 495-96, n. 10. However, if § 42-150aa is applicable, a "reasonable" fee is subject to the statutory limit of fifteen percent of the damages awarded; *Cioffoletti Constr. v. Nering*, 14 Conn. App. 161, 163, 540 A.2d 91 (1988); or justified by reliance upon another statute providing for an award of counsel fees. *Russo Roofing, Inc. v. Rottman*, 86 Conn. App. 767, 776, 863 A.2d 713 (2005).

[112] *Id*. at 500-01.

[113] Total Recycling Services of Connecticut, Inc. v. Connecticut Oil Recycling Services, LLC, 308 Conn. 312, 325-33, 63 A.3d 896 (2013); Kelley v. Hare, Docket No. FST-CV15-6024223S (July 26, 2016), 2016 Conn. Super. LEXIS 2039, *10.

[114] Rizzo Pool Co. v. Del Grosso, 240 Conn. 58, 76-77, nn. 18-19, 689 A.2d 1097 (1997); *see also*, CT River Plaza, LLC v. Citigroup, Inc., Docket No. X03-HHD-CV11-4054881S (August 1, 2018, 2018 Conn. Super. LEXIS 1655, *6.

to show a wilful violation of the statute,[115] as would be required for an award of common law punitive damages. Other statutes require proof of additional culpability, such as bad faith, wilfulness or lack of any substantial justification. In these instances, the additional requirements must be satisfied with proof.[116] There are split decisions involving the interpretation of two statutes substantially similar in which one trial court[117] required additional proof and another trial court did not.[118]

E. *Criteria Used to Determine Amount of Award*

For more than seventy years, the Supreme Court has observed, "A court has few duties of a more delicate nature than that of fixing counsel fees."[119] Given the great breadth of factors considered in setting fees and the disparate awards of trial courts upheld in light of the broad discretion given them in setting fees, only three points will be offered on this issue. First, fee agreements are not *binding* on trial courts, but they must be considered. There is a two-step analysis required. The court must first determine whether the terms of the agreement are reasonable. If the terms are reasonable, the trial court may depart from them only when necessary to prevent "substantial unfairness to the party responsible for payment."[120]

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[115] New Milford Bd. of Educ. v. New Milford Educ. Ass'n, Docket No. LLI-CV16-6013977S (November 22, 2019), 2019 Conn. Super. LEXIS 3128, *6 (interpreting CONN. GEN. STAT. § 10-153m); Borough of Fenwick Historic Dist. v. Sciame, Docket No. CV10-6003531S (May 16, 2013 Middletown), 2013 Conn. Super. LEXIS 1141, *7 (interpreting CONN. GEN. STAT. § 7-147h); Crystal Lake Condo. Ass'n v. New Eng. Equity, Inc., Docket No. CV02-0558305S (October 31, 2002, New London), 2002 Conn. Super. LEXIS 3550, *2 (interpreting CONN. GEN. STAT § 47-278(a)).

[116] Town of Wethersfield v. PR Arrow, LLC, 187 Conn. App. 604, 650, 203 A.3d 645, *cert. denied*, 331 Conn. 907 (2019) (interpreting Conn. Gen. Stat. § 8-12); Clearwater Sys. Corp. v. EVAPCO, Inc., D. Conn., Docket No. 3:05-cv-507 (SRU) (March 20, 2006), 2006 U.S. Dist. LEXIS 11318, *2 (interpreting CONN. GEN. STAT. § 35-54); Burinskas v. Department of Social Services, 240 Conn. 141, 156, 691 A.2d 586 (1997) (interpreting CONN. GEN. STAT. § 4-184a).

[117] Stamford Educ. Ass'n v. Stamford Bd. of Educ., Docket No. FST-CV08-4015485S (July 8, 2010), 2010 Conn. Super. LEXIS 1760, *2 (interpreting CONN. GEN. STAT. § 10-153f to require "blatantly frivolous arguments").

[118] *New Milford Bd. of Educ., supra* note 115 (interpreting CONN. GEN. STAT. § 10-151m).

[119] Murtha v. City of Hartford, 303 Conn. 1, 14, 35 A.3d 177 (2011); Hoenig v. Lubetkin, 137 Conn. 516, 525, 79 A.2d 278 (1951).

[120] Schoonmaker v. Lawrence Brunoli, Inc., 265 Conn. 210, 270, 828 A.2d 64 (2003) (recovery of wages in amount of $14,436; one third contingent fee agreement;

Second, if there is no fee agreement or the agreement is not adopted as the basis for an award, most trial courts have used a lodestar approach where a reasonable hourly rate is applied to legal time determined to have been necessary and appropriate. This lodestar approach to determining the proper amount of reasonable attorneys' fees has been used in numerous CUTPA cases,[121] often with the hourly rates and time adjusted downward after consideration of the twelve "*Johnson* factors"[122] and/or the eight factors stated in Rule 1.5(a) of the Rules of Professional Conduct. The results have been so varied that they are impossible to generalize. For example, in *Stone v. East Coast Swappers, LLC*, one trial judge awarded no attorneys' fees and the next, upon remand, awarded $169,942.[123] In *Medical Device Solutions v. Aferzon*,[124] the Appellate Court reversed a judgment based upon CUTPA and breach of contract, reducing the amount of compensatory damages and prejudgment interest from $2.2 million to $1.2 million and remanding the case to the trial court to recalculate its prior award of attorneys' fees in the amount of $756,000. On remand, the trial court awarded attorneys' fees in the amount of $780,381 through the entry of judgment in the trial court, plus $235,056 attributed to post-judgment litigation.[125]

The more recent awards of attorneys' fees based on lodestar hourly rates seem to be in a range of $325-$500.[126] In

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fee request of $222,000 based upon time records; trial court award of $39,750 reversed because trial court failed to determine whether to consider reasonableness of contingent fee agreement); Sorrentino v. All Season Services, Inc., 245 Conn. 756, 773, 717 A.2d 150 (1998) (recovery of $176,077, which included award of $30,000 for attorney's fees, rather than $48,644 obligated under fee agreement; reversed and remanded with direction to award fees in accordance with fee agreement).

[121] CUTPA Treatise, § 6.11, n. 67.

[122] Johnson v. Georgia Highway Express, Inc., (488 F.2d 714 (5th Cir. 1974) (despite its criticism in *Perdue v. Kenny A.*, 559 U.S. 542, 551, 130 S. Ct. 1662 (2010) of providing "very little actual guidance" and producing "disparate results").

[123] 337 Conn. 589, 255 A.3d 851 (2020); Stone v. East Coast Swappers, LLC, Docket No. HHD-CV13-6046343S (March 9, 2021), 2021 Conn. Super. LEXIS 225, *3.

[124] 207 Conn. App. 707, 773, 791, 264 A.3d 130, *cert. denied*, 340 Conn. 911 (2021).

[125] Medical Device Solutions, LLC v. Aferzon, Docket No. X07-CV18-6103682S (February 18, 2022, Hartford), 2022 Conn. Super. LEXIS 374, *17, 28.

[126] Konover Development Corp. v. Waterbury Omega, LLC, Docket No. HHD-CV18-6093417S (December 19, 2023), 2023 WL 8889250,*2 (plaintiff requested

addition to the variance of hourly rates used in the awards, there are variances in adjustments attributed to duplication of time, inadequate record-keeping and/or inefficiencies;[127] allocation of time with counts that are not based upon statutes providing for awards of attorneys' fees[128] and degree of success achieved.[129]

Third, as further discussed in part VIII B, *infra*, there is variance in the decisions as to whether an evidentiary hearing is required and, if so, the extent and kind of evidence required.[130]

V. Connecticut Statutes Providing for Awards of Multiple Damages, Some of Which Also Provide for Awards of Attorneys' Fees

There are fifty-four Connecticut statutes providing for awards of multiple damages, identified in Appendix B here-

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$686,277 based on hourly rates of $250-$275; court awarded $550,000, noting evidence that median hourly rate charged by litigation partners in Hartford was $501 in 2022); Illbrich v. Groth, Docket No. X06-CV08-4016022S (March 22, 2011), 2011 Conn. Super. LEXIS 717, *20, *aff'd in part, rev'd in part*, note 181 *infra*; Rhomes v. Mecca Auto, LLC, D. Conn., Docket No. 3:21-cv-01360 (KAD) (August 3, 2022), 2022 U.S. Dist. LEXIS 138122, *16 ($475); Senquiz v. Hartford Auto Grp., Inc., D. Conn., Docket No. 3:20-cv-1304 (JBA) (June 3, 2022), 2022 U.S. Dist. LEXIS 99309, *2 ($475); Companions & Homemakers, Inc. v. A&B Homecare Sols, LLC, Docket No. HHD-CV17-6075627S (April 13, 2021), 2021 Conn. Super. LEXIS 523, *23-25 (survey of rates awarded between $300-$514); *Murphy v. Rosen*, Docket No. UWY-CV20-6056754S (October 27, 2022), 2022 Conn. Super. LEXIS 2401, *9 ($405/hour requested and awarded); Abandoned Angels Cocker Spaniel Rescue, Inc. v. Baity, Docket No. CV19-5021251S (October 19, 2022, Stamford), 2022 Conn. Super. LEXIS 2272, *8 ($900/hour requested for partners' time; $375/hour rate for associates' time awarded); Dipippa v. Fulbrook Capital Mgmt. LLC, D. Conn. Docket No. 3:19-cv-01386 (KAD) (April 22, 2020), 2020 U.S. Dist. LEXIS 70795 ($350/hour requested and awarded for postjudgment work); Madison Land Conservation Trust, Inc. v. Suppa, Docket No. CV16-5037477S (May 4, 2018, New Haven), 2018 Conn. Super. LEXIS 959, *87 ($375/hour requested and awarded).

[127] Bridgeport Harbour Place I, LLC v. Ganim, Docket No. X06-CV04-0184523S, (October 31, 2008, Waterbury), 2008 Conn. Super. LEXIS 2723, *35-47, *aff'd*, 131 Conn. App. 99, 30 A.3d 703, *cert. granted on other gnds*, 303 Conn. 904 (2011).

[128] *See, for example, Medical Device Solutions, supra* note 125.

[129] *See, for example, Bridgeport Harbour, supra* note 127.

[130] Commission on Human Rights & Opportunities v. Sullivan, 285 Conn. 208, 235, 939 A.2d 644 (2008); Smith v. Snyder, 267 Conn. 456, 471, 839 A.2d 589 (2004); Borg v. Cloutier, 200 Conn. App. 82, 122, 239 A.3d 1249 (2020); Carrillo v. Goldberg, 141 Conn. App. 299, 313, 61 A.3d 1164 (2013); Thorsen v. Durkin Dev., LLC, 129 Conn. App. 68, 78 n. 13, 20 A.3d 707 (2011); Jacques All Trades Corp. v. Brown, 42 Conn. App. 124, 131-32, 679 A.2d 27, *aff'd per curiam*, 240 Conn. 654, 692 A.2d 809 (1997).

to. Twenty-four of these statutes provide for treble damages; twenty-four for double damages; three for either double or treble; and three for quintuple damages. As indicated in Appendix B hereto, thirty-two of these fifty-four statutes provide that the award of multiple damages – whether it be double or treble – is mandatory; nineteen statutes provide that the award is discretionary; and three statutes are ambivalent on this issue. Of the fifty-four statutes, twenty-nine provide for an award of attorneys' fees in addition to multiple damages, of which eleven provide for mandatory awards and eighteen for discretionary awards of attorneys' fees. Four statutes provide for punitive damages, in addition to multiple damages and attorneys' fees, directly or through incorporation of CUTPA.

Instinctively, one might expect that statutes providing for such extraordinary remedies would be reserved to address the most important and/or frequent civil wrongs. It is surprising, then, to find that most of the statutes appear to be applicable only in unusual, even rare, cases and many in cases which have the potential for recovery of only modest monetary damages. While these statutory multiple damage awards serve a similar purpose, they are regarded as "separate and distinct" from common law punitive damage awards.[131] The primary purpose of a common law punitive damage award is to compensate the injured party for its injuries, while the primary objective of a statutory multiple damage award is to punish the wrongdoer.[132]

In light of the heightened damage awards provided by these statutes, it is not surprising that they have produced more case law. This discussion will focus on five of these statutes, which have generated eighty-two percent of the decisions of Connecticut courts referring to any of the fifty-four statutes. These five statutes are: (a) Section 14-295, violations of certain specified motor vehicle statutes; (b) Section 31-72, employee wage claims; (c) Section 47a-21(d), violations of landlords' obligations regarding security deposits on leases of residential

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[131] Caulfield v. Amica Mutual Insurance Co., 31 Conn. App. 781, 786 n. 3, 627 A.2d 466 (1993).

[132] Harty v. Cantor Fitzgerald & Co., 275 Conn. 72, 94-97, 881 A.2d 139 (2005).

units; (d) Section 52-564, theft of property of another; and (e) Section 52-568, vexatious suit or defense. In four of these five statutes, the provision for an award of multiple damages purports to be mandatory; only Section 14-295 gives the trial court discretion whether to grant such an award.

A. *Section 14-295 – Violations of Certain Specified Motor Vehicle Statutes*

This statute provides that double or treble damages may be awarded upon proof that a party's deliberate or reckless[133] disregard of certain specified motor vehicle statutes was a substantial factor in causing personal injury,[134] wrongful death or damage to property.[135] The origins of the statute trace back to a 1797 act providing for treble damages for negligent or careless violation of certain rules governing the operation of horse-drawn carriages.[136] Until 1988, the statute referred to violations of other motor vehicle statutes dealing substantially with technical rules of the road, such as failure to drive in the correct lane. Thereafter, it has referred to violations of other motor vehicle statutes dealing with more substantive rules of the road, e.g., speeding, reckless driving, DWI and, most recently since 2019, cell phone use while driving.

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[133] Prior to its amendment in 1988, the statute did not expressly require that the offending statutory violations be deliberate or reckless. However, this degree of culpability was read into the statute by case law and helped to defeat a challenge to its constitutionality based upon alleged lack of standards. Jack v. Scanlon, 4 Conn. App. 451, 457, 495 A.2d 1084, *cert. dismissed*, 197 Conn. 808 (1985).

[134] "Personal Injury" includes a spouse's claim for loss of consortium arising from physical injury of the other spouse by a third person. Bebry v. Zanauskas, 81 Conn. App. 586, 593, 841 A.2d 282 (2004).

[135] General Statutes § 14-295 provides:

> In any civil action to recover damages resulting from personal injury, wrongful death or damage to property, the trier of fact may award double or treble damages if the injured party has specifically pleaded that another party has deliberately or with reckless disregard operated a motor vehicle in violation of section 14-218a, 14-219, 14-222, 14-227a or 14-227m, subdivision (1) or (2) of subsection (a) of section 14-227n or section 14-230, 14-234, 14-237, 14-239, 14-240a or 14-296aa, and that such violation was a substantial factor in causing such injury, death or damage to property. The owner of a rental or leased motor vehicle shall not be responsible for such damages unless the damages arose from such owner's operation of the motor vehicle.

[136] Bishop v. Kelly, 206 Conn. 608, 618, 539 A.2d 108 (1988).

Public Act No. 88-229 amended the statute by providing that (a) the decision whether to grant double or treble damages shall be made by the "trier of fact," rather than "the court;" and (b) the statutory violation(s) relied upon must be "specifically pleaded." The amendment requiring that the determination be made by the "trier of fact" rectified the effect of the decision of the Connecticut Supreme Court in *Bishop v. Kelly*[137] decided a few months earlier in 1988, which held that the version of Section 14-295 then existing was in violation of the right to trial by jury provided by Article I, Section 19 of our State Constitution. In order to reach that result, the Court found that the cause of action provided in Section 14-295 was in existence as of the adoption of the Constitution in 1818 and that it provided a legal, as opposed to an equitable, remedy. None of the other statutes providing for multiple damages contain the provision that the determination whether to make the award shall be determined by the "trier of fact," i.e., either judge or jury. An issue resulting from the enactment of Public Act No. 88-229 that remains unresolved by appellate authority is the degree to which a plaintiff must "specifically" plead a violation of one or more of the statutes specified therein. The apparent majority view of the trial courts is that a complaint alleging a claim under Section 14-295 is legally sufficient if the allegations state that the defendant deliberately or with reckless disregard violated one or more of the specified statutes and that the violation was a substantial factor in causing the plaintiff's injuries or damages.[138] The minority view requires that a plaintiff plead specific facts to indicate a "high degree of danger" that would take the case "out of the realm of ordinary negligence."[139]

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[137] *Id*.

[138] Arduini v. Mendez, Docket No. FST-CV23-6063230-S (May 20, 2024), 2024 WL 2719736, *3; Carnevale v. Dipaola, Docket No. KNL-CV22-6056929S (August 19, 2022), 2022 Conn. Super LEXIS 1954, *5; McAdam v. Fed. Express Corp., Docket No. HHD-CV20-6121087S (August 16, 2022), 2022 Conn. Super. LEXIS 1931, *11. *See also*, Angermann v. Ramirez, Docket No. CV22-6042248S (August 4, 2022, Danbury), 2022 Conn. Super. LEXIS 1889, *4; Bernabe v. Hernandez, Docket No. FST-CV22-6054742S (August 2, 2022), 2022 Conn. Super. LEXIS 1879, *6.

[139] Grabon v. Mainville, Docket No. KNL-CV14-6020879S (August 4, 2014), 2014 Conn. Super. LEXIS 1910, *6. *See also*, Grant v. Luna-Piquave, Docket No. FBT-CV18-6076399S (August 31, 1988), 2018 Conn. Super. LEXIS 6908, *3.

B. *Section 31-72 – Employee Wage Claims*

This statute provides employees with a remedy to recover double the amount of wages wrongfully withheld by their employers, plus reasonable attorney's fees as may be allowed by the court.[140] The statute was amended by Public Act No. 15-86, section 2 in two ways, one which changes the doubling from discretionary (". . . such employee . . . *may* recover . . .") to mandatory (". . . such employee . . . *shall* recover . . ."), and the other which adds a provision that if the employer establishes that it had a good faith belief that the underpayment was lawful, then it is liable for the full amount of such wages (but not doubled), plus reasonable attorney's fees as may be allowed by the court. This Public Act passed in the House of Representatives by a vote of 70-69 and in the Senate by a vote of 18-15.[141] The debate was spirited and sometimes eloquent, with legislators acknowledging that passage would result in reducing the power of the courts by virtue of the change from discretionary doubling to mandatory doubling.[142]

The case law that had developed interpreting the pre-2015 version of Section 31-72 providing for *discretionary* doubling of wages required a finding by the court of the employer's bad faith, arbitrariness or unreasonableness.[143] Effectively, the

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[140] General Statutes § 31-72 provides, in part:

> When any employer fails to pay an employee wages in accordance with the provisions of sections 31-71a to 31-71i, inclusive, or fails to compensate an employee in accordance with section 31-76k or where an employee or a labor organization representing an employee institutes an action to enforce an arbitration award which requires an employer to make an employee whole or to make payments to an employee welfare fund, such employee or labor organization shall recover, in a civil action, (1) twice the full amount of such wages, with costs and such reasonable attorney's fees as may be allowed by the court, or (2) if the employer establishes that the employer had a good faith belief that the underpayment of wages was in compliance with law, the full amount of such wages or compensation, with costs and such reasonable attorney's fees as may be allowed by the court. . . ..

[141] Connecticut General Assembly House Proceedings, vol. 58, part 18 (5/29/15), pp. 6226-27; Senate Proceedings, vol. 58, part 3 (5/7/15), p. 943.

[142] Connecticut General Assembly House Proceedings, *supra* note 141 at 6185-86.

[143] Sansone v. Clifford, 219 Conn. 217, 229, 592 A.2d 931 (1991); Anderson v. Schieffer, 35 Conn. App. 31, 42, 645 A.2d 549 (1994); Crowther v. Gerber Garment Technology, Inc., 8 Conn. App. 254, 265, 513 A.2d 144 (1986).

addition of the second part of Public Act No. 15-86, section 2 appears to maintain the requirement that the employer's withholding of wages be in bad faith, but it shifts the burden of persuasion on this issue from employee to employer. Both before and after the 2015 amendment, Section 31-72 has provided for an award of reasonable attorney's fees in the discretion of the court.

C. *Section 47a-21(d) – Violations of Landlord's Obligations regarding Security Deposits on Leases of Residential Units*

Among other things, Section 47a-21(d)(2) provides:

> . . . Not later than thirty days after termination of a tenancy or fifteen days after receiving written notification of such tenant's forwarding address, whichever is later, each landlord . . . shall deliver to the tenant or former tenant at such forwarding address either (A) the full amount of the security deposit paid by such tenant plus accrued interest, or (B) the balance of such security deposit and accrued interest after deduction for any damages suffered by such landlord by reason of such tenant's failure to comply with such tenant's obligations, together with a written statement itemizing the nature and amount of such damages. *Any landlord who violates any provision of this subsection shall be liable for twice the amount of any security deposit paid by such tenant*. . . .

(Emphasis added.)

More frequently than with any of the other statutes providing for multiple damage awards, Section 47a-21(d) has been parlayed with CUTPA claims, in which tenants not only have sought a doubling of their "security deposits," as broadly defined by statute and case law, but, in addition thereto, punitive damages and attorney's fees under CUTPA. In *Carrillo v. Goldberg*,[144] the plaintiffs-tenants entered into a one-year lease of a house for agreed upon rent of $4800/month, at the inception of which the first and last month's rent were

[144] Carrillo v. Goldberg, 141 Conn. App. 299, 61 A.3d 1164 (2013). For applicability of CUTPA to residential lease transactions, *see, Conaway v. Prestia*, 191 Conn. 484, 493, 464 A.2d 847 (1983); *Fallon v. Rutkowski*, Docket No. NWH-CV18-6003976S (December 22, 2022), 2022 Conn. Super. LEXIS 2753, *24.

paid to the defendants-landlords, together with a payment that was referred to by the parties as a "security deposit" of $4800. The trial court entered judgment in favor of the plaintiffs in the amount of $4800 plus interest, but declined to double it, in light of the fact that the defendants had purported to comply with the statute by providing the plaintiffs with "a written statement itemizing the nature and amount of such damages" claimed to have been incurred, as provided in the statute. Further, the trial court found that CUTPA had been violated, granting the plaintiffs $3000 punitive damages, but awarding only $2500 of the $35,000 claim for their attorney's fees.

The Appellate Court reversed the trial court's judgment, finding, first, that Section 47a-21(a)(10) defines "security deposit" as "any advance rental payment . . . except an advance payment for the first month's rent." Consequently, the correct amount of the "security deposit" received by the defendants was $9600, not $4800.[145] Second, the Appellate Court held that judgment for the plaintiffs should have been doubled because Section 47a-21(d) requires that landlords provide a *legitimate* itemization of actual damages caused by a tenant's breach of lease, not a pretextual itemization of fabricated damages.[146] Third, after finding that an award of $3000 punitive damages under CUTPA was not an abuse of discretion, it was an abuse of discretion to award only $2500 for the plaintiffs' attorney's fees when the "public policy underlying the award of attorney's fees in CUTPA cases is to encourage the pursuit of actions arising from unfair trade practices."[147]

On remand, the trial court entered judgment for a total of $39,096, consisting of (a) double the "security deposit" plus interest but less the one minor legitimate damage item claimed by defendants as well as the last month's rent; (b) $3000 punitive damages under CUTPA; (c) attorney's fees and costs in the amount of $11,119; and (d) offer of compro-

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[145] *Carrillo, supra* at 308.
[146] *Id.* at 310.
[147] *Id.* at 318.

mise interest in the amount of $10,136. With respect to the attorney's fee, the court found that the time charges, as well as the billing rate, were excessive for a trial which was concluded in less than four hours in a case that would have been a "small claims matter" but for the violation of Section 47a-21(d) and the CUTPA claim.[148]

In *Herron v. Daniels*,[149] the Appellate Court made it clear that in the case of a landlord claiming itemized damages for a tenant's breach(es), some of which are legitimate and others of which are pretextual, the recovery under Section 47a-21(d) requires doubling the entire security deposit, not just the portion which should have been returned to the tenant. Further, the Appellate Court affirmed an award of punitive damages under CUTPA amounting to 1.5 times the amount of the security deposit, plus attorney's fees in excess of $12,000.

D. *Section 52-564 – Theft of Property of Another*

General Statutes Section 52-564 provides:

> Any person who steals any property of another, or knowingly receives and conceals stolen property, shall pay the owner treble his damages.

With one minor exception,[150] the text of the statute has not changed since 1902. The word "property" has been construed to refer to specific, identifiable property, not merely an obligation to pay a sum of money.[151] The word "steals" has been construed to be synonymous with the definition of larceny under General Statutes Section 53a-119.[152] This

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[148] Carrillo v. Goldberg, Docket No. CV08-006826S (May 9, 2013, Stamford Housing), 2013 Conn. Super. LEXIS 1080, *8.

[149] 208 Conn. App. 75, 94, 264 A.3d 184 (2021).

[150] P.A. 63-99 substituted "his damages" in lieu of "its value."

[151] Mystic Color Lab, Inc. v. Auctions Worldwide, LLC, 284 Conn. 408, 421, 934 A.2d 227 (2007); Deming v. Nationwide Mutual Ins. Co., 279 Conn. 745, 772, 905 A.2d 623 (2006); Hamann v. Carl, 196 Conn. App. 583, 598, 230 A.3d 803, *cert. denied*, 335 Conn. 949 (2020).

[152] Scholz v. Epstein, 341 Conn. 1, 19, 266 A.3d 127 (2021); Suarez-Negrete v. Trotta, 47 Conn. App. 517, 520, 705 A.2d 215 (1998); Delta Capital Group, LLC v. Smith, Docket No. CV97-0571407S (March 31, 1998, New Britain), 1998 Conn. Super. LEXIS 946, *5.

statutory definition requires an intent[153] to deprive another of property or to appropriate the same to himself, herself or a third person. It is broadly inclusive, stating various ways in which larceny can be committed and providing eighteen examples, detailed in four pages of text. Although the criminal definition of "larceny" is employed by our courts when considering application of Section 52-564, it is clear that the ordinary civil burden of proof by a fair preponderance of evidence is applicable in civil actions thereunder.[154]

When the elements of the statute are proven, an award of treble damages is mandatory, but there has been inconsistency as to whether the amount of the resulting judgment is inclusive of trebling or, alternatively, multiplicative of and in addition to compensatory damages. Some trial courts have entered judgments in the amount of three times the compensatory damages awarded.[155] Others have added treble damages to compensatory damages, so that the total is effectively four times compensatory damages.[156]

Trial courts have also trebled prejudgment interest on compensatory damages at the maximum ten percent rate allowed in Section 37-3a.[157] However, trial courts have not tre-

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[153] Intent must be alleged in a complaint for theft. Padilla v. Reichman Brodie Real Estate, Docket No. CV21-6113614S (April 22, 2022, New Haven), 2022 Conn. Super. LEXIS 440, *13.

[154] Stuart v. Stuart, 297 Conn. 26, 36, 996 A.2d 259 (2010).

[155] *Id*., at 32; Marafi v. El Achchabi, 225 Conn. App. 415, 424, 316 A.3d 798 (2024); Allied World Insurance Company v. Keating, Docket No. 3:21-cv-00058 (VLB) (September 22, 2023, D. Conn. 2023 WL 6200320,*5; Fraccaroli v. Kusulas, Docket No. FST-CV15-5014844S (October 25, 2017), 2017 WL 5706153, *16; Young v. Delgado, Docket No. HHD-CV11-6025968S (July 12, 2013), 2013 Conn. Super. LEXIS 1563, *10-11; Bascom/Magnotta, Inc. v. Magnotta, Docket No. X04-CV04-4034706S (January 17, 2008), 2008 WL 283264,*3; Montano v. Anastasio, Docket No. CV02-078039S (June 15, 2004), 2004 WL 1488701, *3.

[156] Howard v. MacDonald, 270 Conn. 111, 123, 851 A.2d 1142 (2004) (additional trebling multiple used by jury; issue not raised on appeal); Wake v. Piedrahita, Docket No. FST-CV14-6021779S (April 7, 2016), 2016 Conn. Super. LEXIS 733, *9-11 (compensatory damages of $287,759 under breach of fiduciary count and $863,946 under statutory theft count); ; Thorne v. Mackeyboy Auto, LLC, Docket No. CV11-6017210S (October 11, 2013, New Haven), 2013 WL 5879081,*3 (in addition to compensatory damages, CUTPA punitive damages (2x compensatory), attorneys' fees and postjudgment interest, the trial court also awarded three times the amount of compensatory damages pursuant to section 52-564, "the treble damages statute for conversion under CUTPA."

[157] Jalbert v. Mulligan, Docket No. UWY-CV08-6001044S (August 29, 2013), 2013 Conn. Super. LEXIS 1948, *39-45 (underlying theft of $135,000, with

bled attorneys' fees awarded as common law punitive damages on a conversion count, coupled with a statutory theft count.[158]

E. *Section 52-568 – Vexatious Suit or Defense*

General Statutes Section 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.

Until Public Act No. 86-339, Section 9 amended it to insert subsection (1) above, this statute provided only the same cause of action as that already existing under the common law for vexatious suit. Both the common law and the statute had required malicious intent as well as the absence of probable cause, in order to satisfy the requirements for liability. As amended, the statute, in subsection (1) above, provides for an additional cause of action when a complaint or defense is filed without probable cause but not with malicious intent and the action is terminated against the party which asserted the vexatious claim.Under subsection (1) damages are doubled; under subsection (2) damages are trebled.

The absence of probable cause is expressly stated as the sole requirement for double damages under subsection (1), or as one of two requirements for treble damages under subsection (2). In *Falls Church Group, Ltd. v. Tyler, Cooper & Alcorn, LLP*, the Supreme Court held, in pertinent part:

> Probable cause is the knowledge of facts sufficient to justify a reasonable person in the belief that there are reason-

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prejudgment interest, trebled), *aff'd*, 153 Conn. App. 124, 101 A.3d 279, *cert. denied*, 315 Conn. 901 (2014); Odell v. Wallingford Mun. Fed. Credit Union, Docket No. CV10-6012228S (August 8, 2013, New Haven), 2013 Conn. Super. LEXIS 1792, *130-31.

[158] Gray v. Cosi, Inc., Docket No. FST-CV05-4002871S (December 17, 2008), 2008 Conn. Super. LEXIS 3404, *44-45.

> able grounds for prosecuting an action. . .. [T]he presence of probable cause should be judged by an objective standard.[159]

The statute applies equally to litigants and their attorneys. The absence of probable cause is proven if a reasonable person in the position of the litigant or its counsel would believe that the underlying claim or defense was without merit. It is *not* required that *all* litigants or attorneys have this belief; it is only required that the litigant or attorney, as *one* reasonable person, believe that the claim or defense was without merit.[160]

In a 2-1 decision rendered in August 2024, the Appellate Court held that the statute, as well as the common law cause of action, may be based upon the continuation of a civil action without probable cause, including a bad faith denial of allegations of a complaint.[161] However, in order to avoid applicability of the litigation privilege providing for immunity of communications uttered or published in the course of judicial proceedings, the bad faith denial relied upon to support a vexatious litigation claim must have been alleged in prior litigation between the parties.[161a]

Liability under the statute, as well as the common law, also requires that the claim or defense of the underlying action be terminated "in favor of" the party asserting the claim. This requirement is not expressly stated in the statute, itself, but is well-established in the case law.

> . . . Courts have taken three approaches to the "termination" requirement. The first, and most rigid, requires that the action have gone to judgment resulting in . . . no liability, in the civil context. The second permits a vexatious suit action even if the underlying action was merely withdrawn so long as the plaintiff can demonstrate that the withdrawal took place under circumstances creating an inference that the plaintiff was . . . not liable, in the civil context. The third approach, while nominally adhering to the "favorable termi-

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[159] 281 Conn. 84, 94, 98, 912 A.2d 1019 (2007).

[160] *Id.* at 103.

[161] Dorfman v. Liberty Mutual Fire Insurance Company, 227 Conn. App. 347, 322 A.3d 331 (2024), *cert. denied*, 351 Conn. 907 (2025).

[161a] *Bouazza v. GEICO Insurance Company*, 230 Conn. App. 297, 310, 313, nn. 5,15, 330 A.3d 209 (2025).

> nation" requirement, in the sense that any outcome other than a finding of . . . liability is favorable to the accused party, permits a . . . vexatious suit action whenever the underlying proceeding was abandoned or withdrawn without consideration, that is, withdrawn without . . . a settlement favoring the party originating the action.[162]

A claim for vexatious suit may be based upon the favorable termination of a prior civil action or administrative appeal,[163] but an application for a prejudgment remedy is not regarded as a "civil action" for this purpose.[164]

VI. Connecticut Statutes Providing for Awards of Punitive Damages, Some of Which Also Provide for Attorneys' Fees

There are twenty-two Connecticut statutes providing for punitive damage awards identified in Appendix C hereto, one of which, Section 42-110g, part of CUTPA, is incorporated by reference in 101 additional statutes identified in Appendix D hereto. Of the twenty-two statutes, all but two provide that any award of punitive damages is discretionary rather than mandatory. Six of these statutes state maximum limitations on the amount of punitive damages which may be awarded, from a lowest limit of three hundred dollars to a highest limit of double that amount of compensatory damages. Eighteen statutes also provide for awards of attorneys' fees, eight mandatory and ten discretionary.

To date, only three of these twenty-two statutes have been interpreted definitively[165] to provide for a measure of punitive damages different from the common law measure: Sections 35-53 (misappropriation of trade secrets), 52-240b

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[162] DeLaurentis v. New Haven, 220 Conn. 225, 250, 597 A.2d 807 (1991) (footnotes and references to criminal prosecutions omitted.), *cited with approval* in Bhatia v. Debek, 287 Conn. 397, 409, 948 A.2d 1009 (2008).

[163] *Id.*, *supra* note 162; Zeller v. Consolini, 235 Conn. 417, 422, 667 A.2d 64 (1995).

[164] Bernhard Thomas Bldg. Sys., LLC v. Dunican, 286 Conn. 548, 560, 944 A.2d 329 (2008).

[165] In the context of granting a prejudgment remedy application, utilizing the probable cause standard, U.S. District Judge Janet C. Hall interpreted the punitive damages provision of the Elder Exploitation Statute, Conn. Gen. Stat. § 17b-462(a), as analogous to CUTPA, permitting in addition to an award of attorneys' fees, an award of punitive damages in an amount double that of compensatory damages. Prange v. Arszyla, Docket No. 3:22-cv-1133 (JCH) (July 10, 2023), D. Conn., 2023 WL 7277256,*6.

(products liability) and 42-110g(a) (CUTPA). All three of these statutes provide that an award of punitive damages is discretionary with the trial court. The first two statutes (Sections 35-53 and 52-240b) limit a punitive damages award to twice the award of compensatory damages. Only CUTPA has been interpreted to permit an unlimited amount of punitive damages, refined, however, by case law to a "normative range" which is similar to the limits imposed in the two statutes providing for punitive damages as well as the fifty statutes providing for multiple damages.[166] And CUTPA is the only one of the three statutes that restricts awards of attorneys' fees to plaintiffs, rather than the prevailing party. Almost ninety percent of the cases citing any of the twenty-two statutes are concerned with these three statutes. Hence, this discussion will focus on these three statutes, the other nineteen statutes being applicable in specific situations encountered far less frequently by private litigants.

A. *Section 35-53 – Connecticut Uniform Trade Secrets Act*

Section 35-53, part of the Uniform Trade Secrets Act ("CUTSA") which has been adopted in every state except New York, provides:

> (a) In addition to or in lieu of injunctive relief, a complainant may recover damages for the actual loss caused by misappropriation. A complainant also may recover for the unjust enrichment caused by misappropriation that is not taken into account in computing damages for actual loss.
>
> (b) In any action brought pursuant to subsection (a) of this section, if the court finds wilful and malicious misappropriation, the court may award punitive damages in an amount not exceeding twice any award made under subsection (a) and may award reasonable attorney's fees to the *prevailing party*.

(Emphasis added.)

Section 35-51 provides definitions for some of the key words and phrases. "Misappropriation" is defined to include

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[166] This judicially created symmetry with legislation is an example of why our State has been known as the "Land of Steady Habits" for more than two centuries. See www.connecticuthistory.org/the unsteady meaning of the land of steady habits.

both the improper "acquisition of a trade secret of another or the improper use or disclosure of a trade secret of another." "[T]rade secret" is defined as "information . . . that (1) derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use, and (2) is the subject of efforts that are reasonable under the circumstances to maintain its secrecy."

Section 35-53 requires that a claimant prove an "actual loss." This does not include the costs of investigation, including attorneys' fees, to determine whether a trade secret has been misappropriated.[167] For an award of punitive damages or attorneys' fees, it is also necessary to prove that the misappropriation of the trade secret was "wilful and malicious." This requires knowledge of the trade secret, itself, as well as an intent to injure the owner of the trade secret.[168]

When a wilful and malicious misappropriation of a trade secret is proven by a fair preponderance of evidence, the court has broad discretion whether to award any punitive damages and/or attorneys' fees and, if so, the amount thereof. Punitive damages in the amount of $2,292,979 were awarded in a case where the compensatory damages amounted to $1,146,490.[169] On the other end of the spectrum, punitive damages in the amount of $40,000 were awarded under CUTSA (plus another $40,000 under CUTPA) in a case where the compensatory damages amounted to $235,000.[170] In between these two examples, it appears that the "going

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[167] News Am. Mktg. In-Store, Inc. v. Marquis, 86 Conn. App. 527, 542, 862 A.2d 837 (2004), *aff'd*, 276 Conn. 310, 885 A.2d 758 (*per curiam*) (2005).

[168] Dur-A-Flex, Inc. v. Samet DY, 349 Conn. 513, 610, 321 A.3d 295 (2024); Lydall, Inc. v. Ruschmeyer, 282 Conn. 209, 245-46, 919 A.2d 421 (2007)(intent to injure found lacking); Elm City Cheese Co. v. Federico, 251 Conn. 59, 92, 752 A.2d 1037 (1999) (5-2) (intent to injure found proven); Dur-A-Flex, Inc. v. Laticrete Int'l, Inc., Docket No. X02-CV06-5014930S (June 21, 2010, Waterbury), 2010 Conn. Super. LEXIS 1521, *8 (intent to injure found lacking).

[169] Assa Abloy Sales & Mktg. Grp. v. Task, Docket No. 3:15-cv-00656 (JAM), D. Conn. (February 2, 2018), 2018 U.S. Dist. LEXIS 17282, *19-21.

[170] Smith v. Snyder, 267 Conn. 456, 469-70, 839 A.2d 589 (2004), (5-1) (extensive discussion of evidence required for award of attorneys' fees in majority opinion and dissent).

rate" of punitive damages awarded under CUTSA is determined by the amount of compensatory damages.[171] In other words, the *total* damages typically awarded is double compensatory damages, not the maximum treble as permitted by application of Section 35-53(b).

The Supreme Court has held that CUTSA, unlike CUTPA, provides a cause of action which is sufficiently "rooted" in our common law as of 1818 so that there is a constitutional right to a jury trial for claims of all damages under Section 35-53(b), including punitive damages and attorneys' fees.[172]

B. *Sections 52-240a and 52-240b – Connecticut Product Liability Act*

Sections 52-240a and 52-240b, enacted in 1979 as part of the Connecticut Product Liability Act ("CPLA"), provide for awards of attorneys' fees and punitive damages, respectively.

Section 52-240a provides:

> If the court determines that the claim or defense is frivolous, the court may award reasonable attorney's fees to the *prevailing party* in a products liability action.

(Emphasis added.)

Section 52-240b provides:

> Punitive damages may be awarded if the claimant proves that the harm suffered was the result of the product seller's reckless disregard for the safety of product users, consumers or others who were injured by the product. If the trier of fact determines that punitive damages should be awarded, the court shall determine the amount of such damages not to exceed an amount equal to twice the damages awarded to the plaintiff.

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[171] MacDermid Printing Solutions, LLC v. Cortron Corp., Docket No. 3:08-cv-01649 (MPS), D. Conn. (January 20, 2015), 2015 U.S. Dist. LEXIS 5955, *53-56, *rev'd on other gnds*, 833 F.3d 172 (2d Cir. 2016) (thorough analysis of factors considered in determination of amount); Drummond Am. LLC v. Share Corp., Docket No. 3:08-cv-1665 (MRK) D. Conn. (April 9, 2010), 2010 U.S. Dist. LEXIS 81014, *3, 5-8.

[172] Evans v. GMC, 277 Conn. 496, 508, 893 A.2d 371 (2006).

As is clear by the express terms of these statutes, there are different criteria for an award of attorneys' fees versus an award of punitive damages. An award of attorneys' fees can be made to a "prevailing party" when the adverse losing party has made a "frivolous" claim or defense. Hence, unlike most statutes providing for awards of attorneys' fees, Section 52-240a can be used by defendants as well as plaintiffs. "Prevailing party" is a phrase of legal art, defined mainly in federal court actions to refer to one who has been awarded some relief by the court, but which also includes a plaintiff which accepted a defendant's offer of judgment.[173] Because the determination of whether a claim or defense is "frivolous" cannot be made prior to trial, claims for attorneys' fees alleged in complaints pursuant to Section 52-240a have been stricken as premature.[174] "Frivolous" has been construed to require claims that are "totally without merit;" claims regarded as "very weak" do not satisfy the "frivolous" standard.[175]

In addition to pleading and proving substantive elements of a "product liability claim," as defined in Section 52-572m and as further specified in Sections 52-572n through 52-572q, an award of punitive damages requires pleading[176] and proving that the harm suffered was the result of "reckless disregard" for the safety of product users, consumers or others who were injured by the product. Punitive damages are

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[173] Wallerstein v. Stew Leonard's Dairy, 258 Conn. 299, 305, 780 A.2d 916 (3-2) (2001), discussed in Fogarty, "*Offers of Compromise in Civil Actions in Connecticut: Excessively Punitive and Disparate Sanctions*," 94 CONN. BAR J. 169 (2022).

[174] Hanes v. Solgar, Inc., Docket No. CV15-6054626S (January 13, 2017, New Haven), 2017 Conn. Super. LEXIS 117, *2; Commaroto v. Guzzo, Docket No. X08-FST-CV12-6013645S (August 11, 2016), 2016 Conn. Super. LEXIS 2166.

[175] Ostapowicz v. J.M. Equip. & Transp., Inc., Docket No. HHD-CV06-6000866S (October 4, 2010), 2010 Conn. Super. LEXIS 2513, *22.

[176] Dujack v. Brown & Williamson Tobacco Corp., Docket No. CV99-0060703S (February 16, 2000, Putnam), 2000 Conn. Super. LEXIS 379, *18 (motion to strike complaint denied; allegation that defendant knew or should have known ingredients in Kool cigarettes would cause lung cancer and failed to disclose such information deemed sufficient); Andrews v. H.J. Heinz Co., Docket No. CV96-0153316S (February 25, 1997, Stamford), 1997 Conn. Super. LEXIS 461, *4 (motion to strike complaint granted; no allegation that defendant knew of alleged defects in can of cat food); Pulitano v. Amide Pharms., Inc., Docket No. X06-CV02-0171899S, (November 4, 2002, Waterbury), 2002 Conn. Super. LEXIS 3522 (motion to strike complaint denied; "reckless" does not require specific intent to cause injury.

designed to punish a party based upon the extent of its misconduct and to deter others from committing such misconduct in the future.[177] The standard of proof in Connecticut is a fair preponderance of evidence.[178] Failure to include safety devices in products has been held insufficient to prove "reckless disregard" in the absence of proof that the safety device was "universally accepted by the industry" and "required under applicable safety standards."[179] However, proof of "harm" to other product users may be relevant and admissible evidence of "reckless disregard."[180]

Two important issues regarding Section 52-240b are the measure of punitive damages which may be awarded thereunder and the possibility that there exists a state constitutional right of a litigant to have the amount of punitive damages thereunder decided by a jury. In light of the fact that Section 52-240b, as well as Section 52-240a, have remained intact without amendment since their enactment in 1979, it is surprising that the first of these issues was not resolved until 2016 and that the second issue has yet to be resolved. In a split decision in *Bifolck v. Philip Morris, Inc.* in 2016,[181] the Supreme Court answered "no" to a certified question from the U.S. District Court (D. Conn.) inquiring whether the common law measure of punitive damages is applicable to Section 52-240b. An effect of the holding is that awards of punitive damages under the CPLA are similar to those awarded under CUTSA, as discussed *supra*,[182] and under

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[177] Champagne v. Raybestos-Manhattan, Inc., 212 Conn. 562-63, 559, 562 A.2d 1100 (1989).

[178] The CPLA was based on a draft uniform product liability law that included a requirement of proof by clear and convincing evidence. The legislature amended the bill to delete this provision. 22 Connecticut General Assembly House Proceedings, part 21, 1979 Sess. pp. 7297-98.

[179] Klorczyk v. Sears, Roebuck & Co., Docket No. 3:13-cv-00257 (JAM), March 29, 2019, D. Conn., 2019 U.S. Dist. LEXIS 53979, *49 (summary judgment denied due to genuine issue of material fact whether there was reckless disregard); Wagner v. Clark Equip. Co., 243 Conn. 168, 201, 700 A.2d 38 (1997) (no error when trial court declined to charge jury on punitive damages regarding lack of safety device on forklift); Ames v. Sears, Roebuck & Co., 8 Conn. App. 642, 654, 514 A.2d 352, *cert. denied*, 201 Conn. 809 (1986) (no error when trial court declined to charge jury on punitive damages regarding lack of safety device on riding lawnmower).

[180] Potter v. Chicago Pneumatic Tool Co., 241 Conn. 199, 261, 694 A.2d 1319 (1997).

[181] 324 Conn. 402, 456, 152 A.3d 1183 (2016).

[182] Smith v. Snyder, 267 Conn. 456, 471, 839 A.2d 589 (2004).

CUTPA, as discussed *infra*.[183] There was only one dissent to *Bifolck* (Vertefeuille, J.), but a separate concurring opinion of Justice Zarella, joined by Justice Espinosa, stated that the answer to the certified question was "an extremely close call."[184] Substitute House Bill No. 5870, which resulted in enactment of the CPLA, initially provided that if the trier of fact determined that punitive damages should be awarded, then it shall determine the amount of such damages after consideration of seven specified factors, two of which were the profitability of the misconduct to the product seller and the financial condition of the product seller. This provision was deleted in its entirety prior to passage of the Bill, creating some of the uncertainty over construction of the measure of punitive damages described in the three opinions of the Court.[185] While the majority decision establishes that the measure of punitive damages under Section 52-240f is not limited to litigation costs, it does not provide any guidance as to factors to be considered in determining the amount of those punitive damages.

Bifolck also increases the likelihood that other statutes[186] providing for both an award of punitive damages and an award of attorneys' fees might also be interpreted so that any punitive damage award is not limited by the common law measure. However, prior to the deletion of the phrase "punitive damages" from Section 31-51q in 2022, several trial courts had ruled that the measure of punitive damages under this statute was the prevailing party's attorneys' fees and costs.[187]

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[183] Associated Inv. Co. Ltd. Partnership v. Williams Assocs. IV, 230 Conn. 148, 159, 645 A.2d 505 (1994).

[184] *Bifolck*, *supra* note 181, 324 Conn. at 461.

[185] *Bifolck, supra* note 181, 324 Conn. at 467-68, nn. 3-5.

[186] As shown in Appendix C, sections 19a-550(c), 42-900(e), 46a-89(b) and 46a-98 do not provide for awards of attorneys' fees. Sections 22-351a and 52-564a provide for a low monetary limit on awards of punitive damages. And sections 35-53, 42-110g and 52-240b have been construed to provide for punitive damages that are not limited to the common law measure. That leaves thirteen of the twenty-two statutes shown on Appendix C in which the measure of punitive damages is uncertain.

[187] Aumueller v. Optimus Mgmt. Grp., Docket No. HHD-CV10-6010073S (September 10, 2012), 2012 Conn. Super LEXIS 3207, *6; Burrell v. Yale Univ., Docket No. X02-CV00-0159421S (May 10, 2004, Waterbury), 2004 Conn. Super.

Section 52-240b expressly provides that the punitive damages may not "exceed an amount equal to twice the damages awarded to the plaintiff." This text is substantially the same as the limit in CUTSA, wherein punitive damages may be awarded "in an amount not exceeding twice any award made under subsection (a). . .." These statutory limitations on punitive damages are not unusual, and have been enacted by numerous state legislatures, some with higher limitations and some lower.[188] As a result of *Bifolck* decision, any preceding case law determining the amount of punitive damages is unreliable, as it was likely based upon costs of litigation.[189]

As of this writing, there are only two reported decisions setting the amount of punitive damages under the CPLA post-*Bifolck*. One is U.S. District Judge Underhill's decision in *Izzarelli v. R. J. Reynolds Tobacco Co.*,[190] after remand from reversal of his earlier award based on costs of litigation. In his decision following remand, Judge Underhill applied the factors established for awards of punitive damages under CUTPA, as will be discussed *infra*. The result was an award of punitive damages in the amount of eight million dollars, double what he had awarded in his pre-*Bifolck* decision and roughly equal to the award of compensatory damages. The

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LEXIS 1185, *7; both decisions of Schuman, J. *But see*, Charron v. Town of Griswold, Docket No. KNL-CV06-5000849S (August 21, 2009), 2009 Conn. Super. LEXIS 2326, *17 (award of attorneys' fees of $223,650 under lodestar, but award of punitive damages of only $14,723 for cost of economist); Schumann v. Dianon Sys., Docket No. CV05-5000747S (October 16, 2009, Bridgeport), 2009 Conn. Super. LEXIS 2851 (jury verdict of $4,240,211 compensatory damages, to which court added $1,424,623 punitive damages based on one-third contingent fee, plus another $1,413,404 punitive damages), *rev'd on other grounds*, 304 Conn. 585, 43 A.3d 111 (2012) (no liability under § 31-51q).

[188] See Appendix to Opinion of Ginsburg, J. in BMW of North America v. Gore, 517 U.S. 559, 615, 116 S. Ct. 1589 (1996).

[189] *See, for example,* Fraser v. Wyeth, Inc., Docket No. 3:04-cv-1373 (JBA) (August 5, 2013), D. Conn., 2013 U.S. Dist. LEXIS 109293, *29 (award of punitive damages based on contingent attorneys' fees and costs of local counsel amounting to $1,769,932; Izzarelli v. R.J. Reynolds Tobacco Co., 767 F.Supp. 2d 324, 335 (D. Conn.) (award of punitive damages based on attorneys' fees and costs amounting to $3,970,290), *rev'd,* 701 Fed. Appx. 26 (2d Cir. 2017) (redetermination per *Bifolck*); Roome v. Shop-Rite Supermarkets, Inc., Docket No. CV02-0281250S (August 16, 2006, New Haven), 2006 Conn. Super. LEXIS (compensatory damages of $51,241; punitive damages of $25,000; attorneys' fees of $30,000).

[190] Izzarelli v. R. J. Reynolds Tobacco Co., Docket No. 3:99-cv-2338 (SRU), D. Conn. (December 13, 2018), 2018 U.S. Dist. LEXIS 210199, *11-15.

other decision determining the amount of CPLA punitive damages post-*Bifolck* is Judge Schuman's decision in *Roberto v. Boehringer Ingelheim Pharms., Inc.*[191] After a jury returned a verdict for the plaintiff in the amount of $542,464, finding that he was entitled to punitive damages, the Court awarded only one dollar in punitive damages, finding that the defendants were not motivated by greed and that they did not disregard scientific literature. Judge Schuman explained that there are two steps under Section 52-240b. On the first step, a jury decides whether punitive damages should be awarded. If a jury decides that punitive damages should be awarded, then the trial judge determines the amount of those damages on the second step, at which time, he explained, ". . . the court must act independently and in good conscience, guided by its own evaluation of the evidence."[192] As difficult as it is to reconcile a jury finding of "reckless disregard" by a product seller with a subsequent bench determination that the appropriate punishment should be only one dollar. Judge Schuman's 65-page decision is thoughtful and thorough, focusing primarily on defendants' argument in support of setting aside the verdict based upon preemption by the federal Food, Drug and Cosmetic Act.[193] Thus, we are left with great uncertainty and unpredictability with a range of one dollar versus eight million dollars of punitive damage awards under the CPLA post-*Bifolck*.

The second important issue regarding punitive damages under the CPLA is whether there is a state constitutional right to have a jury make the determination of the amount of such damages. This issue has not yet been determined by any court, but, in *Evans v. GMC*[194] the Supreme Court has held that there is a state constitutional right to have a jury determine the amount of punitive damages to be awarded under CUTSA. The relevant provisions of the two statutes

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[191] Roberto v. Boehringer Ingelheim Pharms., Inc., Docket No. CPL-HHD-CV16-6068484S (September 11, 2019), 2019 Conn. Super LEXIS 2525, *22-29).

[192] *Id.* at 23.

[193] *Id.* See court file, docket entry 339.00. An appeal was filed in 2019, transferred to the Supreme Court and then withdrawn in 2022.

[194] 277 Conn. 496, 893 A.2d 371 (2006).

are different, providing:

CUTSA Section 35-53(b)	CPLA Section 52-240b
". . .[I]f the *court* finds wilful and malicious misappropriation, the *court* may award punitive damages. . . ."	". . . If the *trier of fact* determines that punitive damages should be awarded, the *court* shall determine the amount of such damages. . . ."

(Emphasis added.)

In *Evans*, the Supreme Court found that a cause of action under CUTSA was a legal, as opposed to an equitable, claim and that it was sufficiently rooted in our common law, as to justify a demand for a trial by jury of factual issues arising thereunder. Since Sections 52-572m(b) and 52-572n provide that a "products liability claim" is the exclusive remedy for all claims against product sellers, including those based upon negligence, failure to warn, misrepresentation or nondisclosure, thereby displacing those common law causes of action, it seems likely that there is a state constitutional right to have a jury determine the amount of punitive damages to be awarded under Section 52-240b. This is true notwithstanding its express provision that the determination should be made by the "court," as opposed to the "trier of fact." However, this issue has not yet been determined by the Supreme Court, although the Appellate Court, in *Iino v. Spalter*[195] seems to indicate that it had been resolved in *Bifolck*.

C. *Section 42-110g – Connecticut Unfair Trade Practices Act*

In pertinent part, Section 42-110g of CUTPA provides:

> (a). . . The court may, in its discretion, award punitive damages and may provide such equitable relief as it deems necessary or proper.

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[195] 192 Conn. App. 421, 467, 218 A.3d 152 (2019). In this action for sexual abuse under the common law the Appellate Court interpreted *Bifolck* as confirming that in a jury trial, "the question of the amount of punitive damages is for the jury, not the court." In fact, *Bifolck* holds that Section 52-240b "vests the court with exclusive authority to determine the amount of damages, whereas the trier of fact *traditionally* has determined the amount of common-law punitive damages." Bifolck v. Philip Morris, Inc., 324 Conn. 402, 450, 152 A.3d 1183 (2016) (Emphasis added).

> . . . (d) In any action brought by a person under this section, the court may award, to the *plaintiff*, in addition to the relief provided in this section, costs and reasonable attorneys' fees based on the work reasonably performed by an attorney and not on the amount of recovery.
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> . . . (g) In any action brought by a person under this section there shall be a right to a jury trial except with respect to the award of punitive damages under subsection (a) of this section or the award of costs, reasonable attorneys' fees and injunctive or other equitable relief under subsection (d) of this section.

(Emphasis added.)

The provision for a discretionary award of punitive damages in subsection (a) has remained unchanged since its enactment in 1973. The restriction of a discretionary award of attorneys' fees to a plaintiff in subsection (d) is the result of an amendment by Public Act No. 76-303, section 3(d) deleting "either party" and substituting in lieu thereof "the plaintiff." The legislative intent of this amendment was to encourage litigation in the public interest and "to create a climate in which private litigants help to enforce the ban on unfair and deceptive acts and practices."[196] Subsection (g), providing that any award of either punitive damages or attorneys' fees is not *required* to be determined by a jury, was added by Public Act No. 95-123, in reaction to the Supreme Court's decision in *Associated Investment Co. LP v. Williams Associates IV*,[197] which held:

> In view of the unique breadth and flexibility of the cause of action created by CUTPA, we conclude that it does not bear substantial similarity to a common law action triable to a jury prior to 1818. We are persuaded that CUTPA has its roots not

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[196] Stone v. East Coast Swappers, LLC, 337 Conn. 589, 604, 255 A.3d 851 (2020) ; Hinchliffe v. American Motors Corp., 184 Conn. 607, 617-18, 440 A.2d 810 (1981); Gebbie v. Cadle Co., 49 Conn. App. 265, 279-80, 714 A.2d 678 (1998). House Representative Alan Nevas (later, U.S. District Judge, 1985-2009) unsuccessfully urged rejection of the proposed amendment as a "bad bill" which created an "open season" and "fair game on the businessman." The vote in favor of the amendment was 87-46. Connecticut General Assembly House Proceedings, vol. 177, part 19 (4/20/76), pp. 2189, 2192.

[197] 230 Conn. 148, 159, 645 A.2d 505 (1994).

> in the common law, but rather in § 5(a)(1) of the FTCA, itself an expression of Congress' intent to identify and prevent a wide range of business conduct not actionable at common law.

Of all the Connecticut statutes providing for punitive damages or multiple damages, CUTPA is easily the most favored by the plaintiffs' bar. CUTPA has been cited in more than 10,000 court decisions, including more than 2,000 by federal courts, more than 300 by the Supreme Court and more than 600 by the Appellate Court. Among the reasons for this frequent use of CUTPA are the favorable measure of damages, which is not limited by attorneys' fees nor by monetary limits such as those imposed by CUTSA or the CPLA; the award of attorneys' fees available to plaintiffs but not defendants; and the specific provision that the attorneys' fees awarded not be based on the amount of recovery. In addition, substantively, CUTPA has been interpreted to provide unique breadth and flexibility existing independent of the common law. Lastly, the provisions of CUTPA are incorporated in 101 other statutes, identified in Appendix D hereto. Violations of these statutes have been interpreted as *per se* violations of CUTPA, thereby incorporating its powerful remedies.[198] The vast case law emanating from CUTPA is explained and analyzed in the excellent CUTPA TREATISE.[199] The discussion that follows is an attempt to update and summarize, at the risk of oversimplifying, the punitive damage and attorneys' fees provisions quoted above, which are more thoroughly explained in eighty-one pages of text and more than 400 footnotes.

The *standard* for a discretionary award of punitive damages under CUTPA is the same as the common law standard[200] described in part II, *supra*, i.e., reckless indifference

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[198] *See, for example*, Winakor v. Savalle, 343 Conn. 773, 780, 276 A.3d 407 (2022) (Based upon a violation of the Home Improvement Act, the trial court awarded compensatory damages in the amount of $100,173 plus $126,127 attorneys' fees. The Appellate Court held that the Home Improvement Act was inapplicable due to the new home exception and reversed the judgment on the CUTPA count (and with it the award of attorneys' fees), but left the breach of contract count standing. The Supreme Court affirmed the judgment of the Appellate Court.).

[199] CUTPA TREATISE §§ 6:10, 6:11.

[200] Gargano v. Heyman, 203 Conn. 616, 622, 525 A.2d 1343 (1987).

to the rights of others or intentional and wanton violation of those rights. In 2013, the Supreme Court rendered its decision in *Ulbrich v. Groth*,[201] clarifying that the *measure* of punitive damages under CUTPA is *not* limited to reasonable attorneys' fees and nontaxable costs awarded under the common law. Instead, trial judges may consider what have become known as the "*Baker* factors,"[202] i.e.,

- the degrees of relative blameworthiness;
- whether defendant's action was taken or omitted in order to augment profit;
- whether the wrongdoing was hard to detect;
- whether the injury and compensatory damages were small, providing a low incentive to bring the action; and
- whether the award will deter the defendant and others from similar conduct, without financially destroying the defendant.[203]

Trial judges may also consider a more concise version known as the three "*Campbell* factors," i.e.,

- the degree of reprehensibility of the defendant's misconduct;
- the disparity between the actual or potential harm suffered by the plaintiff and the punitive damages award; and
- the difference between the punitive damages awarded and the civil penalties authorized or im posed in comparable cases.[204]

In *Ulbrich*, the Court affirmed the trial court's award of punitive damages in the amount of $1,251,000, or three times the compensatory damages award of $417,000 (after

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[201] 310 Conn. 375, 449, 78 A. 3d 76 (2013).
[202] Exxon Shipping Co. v. Baker, 554 U.S. 471, 493, 128 S. Ct. 2605 (2008).
[203] *Ulbrich, supra* note 201, 310 Conn. at 454-55.
[204] State Farm Mutual Automobile Ins. Co. v. Campbell, 538 U.S. 408, 418, 123 S. Ct. 1513 (2003).

reductions following a jury verdict of $462,000), noting the admonition of the United States Supreme Court in *Campbell* that a punitive damages award of more than four times compensatory damages "might be close to the line of constitutional impropriety." In so holding, the Supreme Court explicitly rejected defendants' argument that the ratio of punitive damages to compensatory damages should be 1:1, as approved in *Baker*,[205] according deference to the trial court's factual determination and finding that it did not constitute a "manifest abuse in its discretion."[206]

Among the most thorough analyses of the *Baker* and *Campbell* factors are two trial court opinions, the first written by Judge Barry Stevens and the second by Judge Trial Referee Alfred Jennings. In *Bridgeport Harbour Place I, LLC v. Ganim*,[207] Judge Stevens bifurcated the trial, so that he determined issues of awards of punitive damages and attorneys' fees after a jury first determined all other issues. After a four-month trial, the jury had returned a verdict on the CUTPA count against two individuals, each in the amount of $10,000. Following a subsequent hearing, Judge Stevens awarded punitive damages in the amount of $60,000 against each of these two individuals. The Judge found that normally awards of punitive damages in CUTPA cases should be equal to or twice the amount of compensatory damages awarded, and that awards in excess of that range should be premised on "aggravating factors that are identifiable and articulable."[208] The most egregious aggravating factor considered was that CUTPA liability was based on intentional bribery of public officials, the first of both the *Baker* and *Campbell* factors. Also, it seems likely that greater punitive damages

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[205] *Baker* involved the infamous grounding of the supertanker *Exxon Valdez* on Bligh Reef off the coast of Alaska. The Court reduced the punitive damages award from $2.5 billion to equal the compensatory damages award of $507.5 million. The Ninth Circuit had already reduced the punitive damages award from $5 billion to $2.5 billion.

[206] *Ulbrich, supra* note 201, 310 Conn. at 455.

[207] Docket No. X06-CV04-0184523S, (October 31, 2008, Waterbury), 2008 Conn. Super. LEXIS 2723, *35-47, *aff'd*, 131 Conn. App. 99, 30 A.3d 703, *cert. granted on other gnds*, 303 Conn. 904 (2011).

[208] *Bridgeport Harbour, supra* note 207, 2008 Conn. Super. LEXIS 2723 at 40.

would have been awarded had it not been for the fact that the compensatory damages award of $10,000 against each of the CUTPA defendants was relatively modest in relation to the plaintiffs' claim for $2 million. The Appellate Court affirmed the trial court's award of punitive damages, holding that it is not improper to base them upon a multiple of compensatory, or actual, damages.[209] The Court declined to impose a "bright-line ratio which a punitive damages award cannot exceed," observing, however, that the United States Supreme Court has indicated that "few" awards significantly exceeding a single-digit ratio will satisfy due process.[210]

In *Artie's Auto Body v. Hartford Fire Ins. Co.*,[211] after seventeen days of trial, a jury returned a verdict in the amount of $14.8 million in favor of the plaintiff, a class of more than 1,000 Connecticut auto body shops that had performed work for compensation paid by the defendant. After a post-verdict hearing, Judge Jennings awarded punitive damages under CUTPA in the amount of $20 million, or 1.35 times the compensatory damages awarded by the jury,[212] adopting the "normative range" methodology of *Bridgeport Harbour* and after analysis of the *Baker* and *Campbell* factors, finding that mitigating factors outweighed aggravating factors.[213] Among the impressive aspects of the decisions of Judge Stevens and Judge Jennings is that they were both rendered prior to the decision of the Supreme Court in *Ulbrich v. Groth*, which clarified the law. The decisions which have followed have frequently adopted the "normative range," weighing aggravating and mitigating factors and ordinarily arriving at a ratio between 1:1 and 3:1, almost always a single-digit ratio.[214] While there has been considerable consistency with

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[209] *Bridgeport Harbour, supra* note 207, 131 Conn. App. at 148.

[210] *Id.*

[211] Docket No. X08-CV03-0196141S (June 5, 2013, Stamford), 2013 Conn. Super. LEXIS 1313, *15-34, *rev'd on other grounds*, 317 Conn. 602, 119 A.3d 1139 (2015) (finding no violation of CUTPA).

[212] *Id.,* 2013 Conn. Super. LEXIS 1313 at 33.

[213] *Id.*

[214] *See, for example,* Murillo v. A Better Way Wholesale Autos, Inc., D. Conn. Docket No. 3:17-cv-1883 (VLB) (July 15, 2019), 2019 U.S. Dist. LEXIS 117043, *23-29 (confirmation of arbitration award, ratio of 25:1, punitive vs. compensatory damages); Mystic Oil Co. v. A1 Petroleum, LLC, D. Conn. Docket No. 3:18-cv-1364

the 2:1 statutory limits imposed in CUTSA and the CPLA, there are two notable exceptions explained in well-reasoned trial court decisions.

In *Lafferty v. Jones*[215] relating to the false information disseminated by the defendant about the Sandy Hook Elementary School massacre, Judge Bellis awarded punitive damages under CUTPA, as well as punitive damages under the common law. As discussed in part II, *supra*, the total amount of common law punitive damages awarded to the fifteen plaintiffs was almost $322 million, one-third of the total amount of compensatory damages of $965 million. In addition to claiming common law punitive damages, the plaintiffs had urged that punitive damages be awarded under CUTPA, but without requesting a specific amount, stating: "CUTPA punitive damages are typically assessed as a multiple of compensatory damages, and that approach is surely appropriate here; it will be for the Court to determine the appropriate punitive and deterrent response to the defendants' wrongdoing." Having cited all of the leading cases on the subject discussed herinabove and specifically addressed the *Baker* and *Campbell* factors, the trial court awarded the sum of $10 million to each of the fifteen plaintiffs.[216] The Appellate Court reversed and vacated the award of punitive damages under CUTPA, not for any reason relating to the

(KAD) (April 12, 2019), 2019 U.S. Dist. LEXIS 245276, *10-11 (default judgment awarding ratio of less than 1:1 punitive vs. compensatory damages); Pointe Residential Builders BH, LLC v. TMP Constr. Grp., LLC, 213 Conn. App. 445, 460, 278 A.3d 505 (2022) (court judgment awarding ratio of 1:1, punitive vs. compensatory damages); A Better Way Wholesale Autos, Inc. v. Gause, 184 Conn. App. 643, 646, 195 A.3d 747 (*per curiam*), *cert. denied*, 330 Conn. 940 (2018) (confirmation of arbitration award, ratio of slightly less than 4:1, punitive vs. compensatory damages); Freeman v. A Better Way Wholesale Autos, Inc., 174 Conn. App. 649, 670, 166 A.3d 857, *cert. denied*, 327 Conn. 927 (2017) (court judgment awarding ratio of 3:1, punitive vs. compensatory damages); *Companions & Homemakers, Inc. v. A&B Homecare Sols, LLC*, Docket No. HHD-CV17-6075627S (April 13, 2021), 2021 Conn. Super. LEXIS 523, *16 (court judgment awarding ratio of 3:1, punitive vs. compensatory damages); Odell v. Wallingford Mun. Fed. Credit Union, Docket No. CV10-6012228S (August 8, 2013, New Haven), 2013 Conn. Super. LEXIS 1792, *130-31 (prescient court judgment rendered shortly prior to *Ulbrich* awarding ratio of 3:1, punitive vs. compensatory damages).

[215] Docket No. X06-UWY-CV18-6046436S (November 10, 2022), 2022 Conn. Super. LEXIS 2813.

[216] See Docket Entry #1010.00 (10/12/22), Plaintiffs' Memorandum of Fact and Law on CUTPA Punitive Damages #1018.00, p. 34.

damages, *per se*, but because it held that the complaint in the case did not state facts sufficient to satisfy the substantive requirement of a "trade or business" to support any liability under CUTPA.[217]

In *Konover Development Corp. v. Waterbury Omega, LLC*,[218] the plaintiff recovered a jury award of $437,671 compensatory damages on common law causes of action, as well as CUTPA. Although the jury answered interrogatories indicated that it had found that the defendant's conduct was willful, wanton, malicious or reckless, it declined to award any punitive damages on the common law causes of action. In post-verdict proceedings, the plaintiff sought awards of attorneys' fees and punitive damages under CUTPA. Judge Sicilian awarded attorneys' fees in the amount of $550,000 (*see*, note 126 *supra*) and punitive damages in the amount of $63,386. The reasons for the lesser award of punitive damages were the jury's declination of any punitive damages on all of the common law counts (notwithstanding its findings of defendant's culpability) and plaintiff's inability to "prevail" on all of its claims of damages.

There is a subset of CUTPA cases involving awards of modest, nominal or even no compensatory damages wherein nevertheless punitive damages have been awarded without regard to any normative range of ratios. These decisions, and appellate authority approving the awards, are collected in the CUTPA TREATISE.[219]

The *standard* for an award of attorneys' fees under subsection (d) of Section 42-110g is different from the standard for an award of punitive damages under subsection (a). Both awards are discretionary, but an award of attorneys' fees does not require proof of reckless indifference to the rights of

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[217] Lafferty v. Jones, 229 Conn. App. 487, 547, 327 A.3d 941 (2024), *cert. denied*, 351 Conn. 923 (2025)..

[218] Konover Development Corp. v. Waterbury Omega, LLC, Docket No. HHD-CV18-6093417S (December 19, 2023), 2023 WL 8889250.

[219] *See* CUTPA TREATISE, § 6:10, notes 6-13. *See also*, New Eng. Mercantile Grp., LLC v. Fishers Finery, LLC, Docket No. X03-HHD-CV14-6069683S (November 3, 2020) 2020 Conn. Super. LEXIS 1397, *7 (no compensatory damages; punitive damages awards against three defendants ranging from $12,701 to $311,185).

others or intentional and wanton violation of those rights. In *Stone v. East Coast Swappers, LLC*,[220] the Supreme Court reversed the judgment of a trial court which declined to award any punitive damages in addition to its award of $8,300 compensatory damages for a CUTPA violation based upon a dishonest estimate of car repairs. The trial court had found that the plaintiff failed to meet the common law standard required for punitive damages and for "similar reasons," declined to award attorneys' fees. The Supreme Court reversed and remanded the case, holding that there is no presumption in favor of an award of attorneys' fees under CUTPA, but a trial court "should be able to articulate appropriate reasons why it would not exercise its discretion to award attorneys' fees in furtherance of CUTPA's legislative objectives."[221] On remand, the trial court granted in full the plaintiff's application for attorneys' fees in the amount of $169,942, based upon time devoted to be matter by counsel, at rates varying between $90 and $350 per hour.[222]

VII. Substantive Ramifications

A. *Vicarious Liability*

Intentional, wilful or wanton tortious conduct of an agent is not sufficient, in and of itself, to impose vicarious liability for punitive damages against an agent's principal. In order for a principal to be liable for punitive damages, it is necessary to prove "some misconduct" of the principal beyond that which the law implies from the mere relationship of principal and agent. This has been the law of Connecticut and many other states for more than one hundred years. In the ancient case of *Maisenbacker v. Society Concordia of Danbury*,[223] the plaintiff was "rudely, insolently or angrily" ejected from the dance floor of a commercial ballroom by its floor manager, who placed his hand on the plaintiff's shoulder and informed

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[220] 337 Conn. 589, 255 A.3d 851 (2020).

[221] *Id*. at 609.

[222] Stone v. East Coast Swappers, LLC, Docket No. HHD-CV13-6046343S (March 9, 2021), 2021 Conn. Super. LEXIS 225, *4.

[223] 71 Conn. 369, 379, 42 A. 67 (1899).

her that she was not a "fit person" to be there. A jury awarded the plaintiff the princely sum of three hundred dollars,[224] from which the defendant, employer of the floor manager, appealed based upon the trial court's charge that an award of punitive damages was permissible. The Supreme Court reversed and remanded the case for a new trial, finding that the charge was improper in light of the absence of any evidence of "some misconduct" on the part of the employer.

For an explanation of the misconduct required to hold a principal liable for punitive damages, Connecticut has adapted the rule of Restatement (Second) Torts Section 909 (1979), summarized as follows:

> . . . "Punitive damages can be awarded against a master or other principal because of an act by an agent if, but only if, (a) the principal or a managerial agent authorized the doing and the manner of the act, or (b) the agent was unfit and the principal or a managerial agent was reckless in employing or retaining him, or (c) the agent was employed in a managerial capacity and was acting in the scope of employment, or (d) the principal or managerial agent of the principal ratified or approved the act."[225]

The Restatement requirements for establishing a principal's vicarious liability for punitive damages are unnecessary to establish a principal's vicarious liability for compensatory damages attributable to wilful acts of an agent. For the latter, all that is required is that the torts of the agent be committed within the scope of the agent's employment and in furtherance of the principal's business – even when those acts are directly in conflict with the principal's directions.[226]

Vicarious liability of principals arising out of reckless operation of motor vehicles raises a complicated issue of whether the common law summarized above has been partially abrogated. Prior to 2003, General Statutes Section 14-154a

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[224] Adjusted for inflation, the value of $300 in 1899 is $10,770 in 2023. www.in2013dollars.com/us/inflation.

[225] Stohlts v. Gilkinson, 87 Conn. App. 634, 867 A.2d 860, *cert. denied*, 273 Conn. 930 (2005); Gionfriddo v. Avis Rent A Car System, Inc., 192 Conn. 280, 299, 472 A.2d 306 (1984) (Shea, J., dissenting).

[226] Larsen Chelsey Realty Co. v. Larsen, 232 Conn. 480, 500, 656 A.2d 1009 (1995).

imposed liability upon owners of motor vehicles renting or leasing them to others "to the same extent as the operator would have been liable if he had also been the owner." This text had been construed as treating an owner-lessor as the alter ego of a rental car's operator,[227] as a consequence of which an owner-lessor was potentially liable for double or treble damages under General Statutes Section 14-295. In 2003, in *Matthiessen v. Vanech*,[228] the Supreme Court held that this abrogation of the common law did not extend General Statutes Section 52-183, which created a rebuttable presumption of agency between the owner and operator of a motor vehicle in negligence actions. Thus, as of 2003, the requirements of the Restatement for imposing vicarious liability on principals were abrogated with respect to owners-lessors of motor vehicles but otherwise applicable to protect principals against liability for punitive damages based upon the negligence of their agents, no matter how reckless it may have been. While *Matthiessen v. Vanech* was *sub judice*, the legislature passed Public Act No. 03-250, which amended both General Statutes Section 14-154a and 14-295. It amended Section 14-154a to provide that the statute is inapplicable to owners-lessors of private passenger vehicles if the total lease term is for one year or more and the vehicle is insured for bodily injury liability in amounts not less than $100,000 per person/$300,000 per occurrence. And it amended Section 14-295 to provide that owners-lessors are not responsible for double or treble damages unless such damages arose from their own operation of a motor vehicle.

Public Act No. 03-250 left several apparent gaps on the issue of vicarious liability of principals for common law punitive damages or for double or treble damages under Section 14-295. For example, as amended, Section 14-154a would appear to expressly abrogate the common law with respect to persons renting private passenger vehicles for *less than* one year, i.e., typical short-term car rentals. Further, the amend-

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[227] Gionfriddo v. Avis Rent A Car System, Inc., 192 Conn. 280, 285, 472 A.2d 306 (1984).

[228] 266 Conn. 822, 832, 836 A.2d 394 (2003).

ment to Section 14-295 may have, inadvertently or otherwise, created a basis for imposing liability for double/treble damages on owners who have owned but *not* rented or leased a motor vehicle recklessly operated by another person. There is no appellate authority and a split in trial court decisions on this specific issue, although in one of his vintage well-reasoned opinions, Judge Sheldon convincingly held that, as amended, Section 14-295 does not abrogate the common law rule protecting principals.[229] Although the law governing vicarious liability of a principal for punitive damages or double or treble damages based upon the misconduct of an agent may be unclear, the law governing insurance coverage for punitive damages has been clarified recently, as will now be explained.

B. *Insurance Coverage*

The issue of insurance coverage for punitive damages is probably at least as important as that of vicarious liability, because so many personal injury actions arise out of the operation of motor vehicles which are normally insured. Often, coverage is provided for operators who are neither owners of the motor vehicles involved nor authorized agents of the owners, but who had the owner's permission to use the motor vehicle, or a reasonable basis to believe that they had such permission. In its 2017 decision in *Nationwide Mutual Ins. Co. v. Pasiak*,[230] the Supreme Court found that the provisions of an insurance policy provided coverage for a claim of false imprisonment and held that there is no public policy that bars coverage for common law punitive damages arising therefrom, stating, in pertinent part:

> Notably, the plaintiffs do not contend that it would violate public policy to indemnify the defendant for compensatory damages awarded for the same intentional conduct. Common-law punitive damages under our law, which, unlike most jurisdictions, are limited to litigation costs, also help

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[229] Reis v. Hendel, Docket No. HHD-CV10-6016353S (September 7, 2011), 2011 Conn. Super. LEXIS 2279, *23.

[230] 327 Conn. 225, 259-61, 173 A.3d 888 (2017).

> to make the injured plaintiff whole. See *Bodner v. United Services Automobile Ass'n, supra*, 222 Conn. 492; see also *Bifolck v. Philip Morris, Inc.*, 324 Conn. 402, 455, 152 A.3d 1183 (2016) (our common-law measure of punitive damages is "indisputably one of the most conservative in the nation" [internal quotation marks omitted]). Accordingly, in the absence of a public policy reflected in our laws against providing such coverage, we conclude that, under the facts of the present case, the plaintiffs are bound to keep the bargain they struck, which includes coverage for common-law punitive damages for false imprisonment.[231]

This decision is consistent with *Avis Rent A Car System, Inc. v. Liberty Mutual Ins. Co.*[232] and takes another step away from *Tedesco v. Maryland Casualty Co.*[233] In *Avis Rent A Car*, the Court held that the defendant's insurance policy covered the award of treble damages under General Statutes Section 14-295 and that there was no public policy barring such coverage in light of the fact that the insured party was found derivatively liable under General Statutes Section 14-254a, and "not because of any actual wrongdoing on its part." *Tedesco* had held that the recovery of double or treble damages under a predecessor of Section 14-295was similar to a *qui tam* award intended "as punishment for a violation of the statute which has the aspects of a wrong to the public rather than to the individual."[234]

In sum, as clarified in *Nationwide Mutual Insurance* there is no public policy barring insurance coverage for common law punitive damages awarded against an insured party based on its vicarious liability for the wrongdoing of its agent or lessee. The decision ameliorates the effect of Public Act No. 03-250, because it provides for insurance coverage for awards of punitive damages against agents, eliminating or reducing any need to pursue recovery against their principals.

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[231] *Id.* The Court was unanimous on this point; Justices Eveleigh and Espinosa dissented on a different issue.

[232] 203 Conn. 667, 673, 526 A.2d 522 (1987).

[233] 127 Conn. 533, 18 A.2d 357 (1941).

[234] *Id.* The Court traced the origin of the statute to an act passed in 1797, around the time when a steam-powered vehicle was invented, or more than a century before the Ford Motor Company launched its new Model T in 1908. Standage, A Brief History of Motion (Bloomsbury Pub. Co. 2021), pp. 31-70.

C. *Common Law Rule Against Double Recoveries Reversed*

In a recent decision, the Connecticut Supreme Court in *White v. FCW Law Offices*[235] addressed whether a prevailing party may simultaneously recover treble damages under one statute and punitive damages under another statute for the same wrongful conduct.

In *White*, following a default judgment on liability, the trial court awarded $150,000 in compensatory damages pursuant to General Statutes § 52-571h for identity theft, trebled that award as required by the statute, and imposed an additional $300,000 in punitive damages under the Connecticut Unfair Trade Practices Act (CUTPA), General Statutes § 42-110a et seq. On appeal, the Appellate Court affirmed the trebling of damages under § 52-571h(b) but, *sua sponte*, vacated the CUTPA punitive damages award, reasoning that both forms of recovery constituted impermissible duplication.[236] In support of its conclusion, the Appellate Court relied on *AAA Advantage Carting & Demolition Service, LLC v. Capone*,[237] in which the court reduced statutory treble damages for theft under General Statutes § 52-564 by the amount of common-law punitive damages awarded for conversion.

The Supreme Court reversed. It held that treble damages under § 52-571h and punitive damages under CUTPA are not duplicative because they serve different legal purposes. Treble damages under § 52-571h(b) are compensatory in nature, ensuring full redress for identity theft by mandating an award that exceeds actual damages, whereas CUTPA punitive damages are discretionary, designed to punish misconduct and deter unfair trade practices. Accordingly, the Court concluded that the rule against double recovery does not bar recovery of both remedies.[238]

The decision in *White* thus confirms that Connecticut law permits recovery of both treble damages under § 52-571h

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[235] 352 Conn. 718, 338 A.3d 1128 (2025).
[236] *White v. FCW Law Offices*, 228 Conn. App. 1, 6–7, 10, 33 A.3d 406 (2024).
[237] 221 Conn. App. 256, 285, 301 A.3d 1111, *cert. denied*, 348 Conn. 924 (2023).
[238] *White v. FCW Law Offices*, 352 Conn. 718, 731-34, 338 A.3d 1128 (2025).

and punitive damages under CUTPA when the statutory elements are satisfied, reflecting the legislature's choice to impose layered consequences for conduct deemed especially egregious.

VIII. Procedural Aspects

A. *Procedure and Deadline for Seeking Award of Attorneys' Fees*

Until 1999, there was no rule of practice imposing a deadline for seeking an award of attorneys' fees, resulting in common law requiring that applications therefor be filed "within a reasonable time of the entering of the final judgment," the determination of which was within the discretion of the trial court.[239] In 1999, Practice Book Section 11-21 was adopted, which provides:

> Motions for attorney's fees *shall* be filed with the trial court within thirty days following the date on which the final judgment of the trial court was rendered. If appellate attorney's fees are sought, motions for such fees *shall* be filed with the trial court within thirty days following the date on which the Appellate Court or Supreme Court rendered its decision disposing of the underlying appeal. Nothing in this section shall be deemed to affect an award of attorney's fees assessed as a component of damages.

(Emphasis added.)

In spite of expressly requiring that such motions "shall" be filed within thirty days, in its 2018 decision in *Meadowbrook Center, Inc. v. Buchman*,[240] the Supreme Court unanimously held that this time limitation is directory, not mandatory. It then proceeded to hold that a failure to comply with the thirty-day deadline would be permitted only upon finding "excusable neglect," which requires the trial court's evaluation of four factors:

1. the danger of prejudice to the nonmovant;
2. the length of the delay and its potential impact on judicial proceedings;

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[239] Oakley v. Commission on Human Rights & Opportunities, 38 Conn. App. 506, 517, 662 A.2d 137 (1995), *aff'd*, 237 Conn. 28, 675 A.2d 851 (*per curiam*) (1996).

[240] 328 Conn. 586, 604, 181 A.3d 550 (2018).

3. the reason for the delay, including whether it was within the reasonable control of the movant; and
4. whether the movant acted in good faith.[241]

The *Meadowbrook Center* case had a protracted procedural history arising out of a collection action by the plaintiff, a skilled nursing facility, against the defendant, an alleged "responsible party" for the care of his mother who suffered from dementia. After a brief bench trial, the court entered judgment in favor of the plaintiff in the amount of $47,561 in 2011. This judgment was reversed by the Appellate Court in 2014 and remanded with direction to enter judgment in favor of the defendant.[242] On April 30, 2014, the trial court entered judgment for the defendant in accordance with the remand. On June 4, 2014, or thirty-five days thereafter, the defendant filed a motion for attorneys' fees pursuant to General Statutes Section 42-150bb, which was denied on the basis that the motion was untimely. The defendant again appealed and in 2016, the Appellate Court again reversed and remanded the case to the trial court in a holding[243] affirmed by the Supreme Court in 2018, as indicated hereinabove. The remand of the Supreme Court ordered that trial court to conduct a hearing to determine whether strict adherence to the thirty day deadline of Practice Book Section 11-21 would "work surprise or injustice." On remand, the trial court held an evidentiary hearing at which the defendant's counsel testified at length. Following post-hearing briefs, the trial found in September 2018, that the filing of the motion for attorneys' fees in June 2014 five days late was excusable.[244] After denial of plaintiff's motion for reargument,[245] the trial court conducted a second evidentiary at which the defendant's counsel again testified at length, together with his client,

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[241] *Id.* at 606.

[242] Meadowbrook Center, Inc. v. Buchanan, 149 Conn. App. 177, 212, 90 A.3d 219 (2014)

[243] Meadowbrook Center, Inc. v. Buchanan, 169 Conn. App. 527, 539-40, 151 A.3d 404 (2016).

[244] Meadowbrook Center, Inc. v. Buchanan, Docket No. HHD-CV10-6008121S (September 14, 2018), 2018 Conn. Super. LEXIS 2583.

[245] *Id.* (February 19, 1919), 2019 Conn. Super. LEXIS 377.

and introduced into evidence the retainer agreement, contemporaneous time records and itemized invoices. The trial court found the testimony of the defendant and his counsel credible and in a carefully written opinion filed on July 2019, awarded total attorneys' fees in the full amount requested of $177,109.[246] Shortly thereafter, the defendant obtained a prejudgment remedy to secure payment of the award. Thus, although the defendant ultimately prevailed, it required five years of appellate and trial litigation to excuse the five-day late filing of a motion for attorneys' fees under Practice Book Section 11-21. The moral of the story is to treat the deadline as mandatory, even though noncompliance may be excused.

The thirty-day deadline must be adhered to, even when an appeal is filed. The reference to "final judgment: in the first sentence of Section 11-21 should not be construed to permit a deferral of filing a motion for attorneys' fees until after resolution of an appeal. Separate motions or attorneys' fees should be filed within thirty days after any judgment of the trial court in favor of the movant and again within thirty days after any final decision of the Appellate Court or Supreme Court.[247] If a motion is filed within thirty days following an appellate decision but an earlier motion had not been filed within thirty days following the trial court judgment, then only fees relating to the appeal may be awarded.[248]

Practice Book Section 11-21 is not applicable to all claims for awards of attorneys' fees. By virtue of the fact that it is

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[246] *Id.* (July 9, 2010), 2019 Conn. Super. LEXIS 1906.

[247] Traystman, Coric & Keramidas, P.C. v. Daigle, 282 Conn. 418, 428, 922 A.2d 1056 (2007) (trial court judgment in favor of defendant affirmed by Appellate Court 9/7/04; defendant then filed amended bill of costs on 10/21/04 including trial and appellate attorneys' fees; held, trial court's allowance of fees reversed due to failure to file timely motion pursuant to Section 11-21); Nxegen, LLC v. Carbone, Docket No. CV12-6034499S (May 5, 2016, Hartford), 2016 Conn. Super. LEXIS 1001 (arbitration award confirmed by trial court 7/23/13, affirmed on appeal 3/25/15; held, motion for attorneys' fees filed 5/27/15, too late).

[248] *Cornelius v. Rosario*, 167 Conn. App. 120, 134, 143 A.3d 611 (2016) (summary judgment entered for defendant 2/1/11, affirmed on appeal 11/28/12, motion for attorneys' fees filed 12/18/12; held, only appellate fees awarded); *Hadelman v. Deluca*, Docket No. CV97-0060279S (April 13, 2006, Milford), 2006 Conn. Super. LEXIS 1145, *7 (trial court confirmed arbitration award 6/12/03, first motion for attorneys' fees filed 8/8/03, affirmed on appeal 7/12/05, another motion for attorneys' fees filed 8/10/06; held, only appellate fees awarded).

not incorporated in Practice Book Section 25-23, it seems clear that it is not applicable to family matters. And, by the express terms of its last sentence, the deadline is not applicable to claims for attorneys' fees that are a "component of damages." This sentence is ambiguous and should be clarified. According to its commentary, the rule's thirty-day time limitation "is aimed principally at statutory fees but, where appropriate, may be applied in situations where fees are founded upon an enforceable provision in a contract." In the most recent interpretation of the rule, in *Meadowbrook Center*, the Supreme Court expressly stated that the rule "applies to motions for attorney's fees that are authorized by contract as well as statute."[249] Prior decisions of trial courts have been inconsistent as to whether the rule is applicable to claims for attorneys' fees based on contractual provisions.[250] As a further complication, claims for statutory attorneys' fees that did not comply with the thirty-day deadline have been considered as a "component of damages," within the meaning of the last sentence of Section 11-21.[251] In light of the foregoing, obviously the safest course of action is to file a motion within the 30-day time limitation of the rule unless the judgment of the court has already awarded attorneys' fees.

B. *Hearings on Attorneys' Fees*

The determination of the amount of an appropriate award of attorneys' fees "should not result in a second major litigation . . .. [T]rial courts need not, and indeed should not, become green-eyeshade accountants. The essential goal in

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[249] Meadowbrook Center, Inc., *supra* note 236, 328 Conn. 586, 603, n. 8.

[250] *Nxegen, LLC, supra* note 243 (contract-based claim for fees denied as untimely under rule); *Little Mts. Enters. v. Groom*, Docket No. FST-CV07-5004977S (January 31, 2014, Stamford), 2014 Conn. Super. LEXIS 258, *31-34 (rule applies to statutory claims for attorneys' fees but not contractual rights); *Just Breakfast & Things III, LLC v. Vidiaki*, Docket No. KNL-CV10-5014092S (August 7, 2013, New London), 2013 Conn. Super. LEXIS 2389, *27-30 (rule inapplicable to actions on contract for recovery of fees).

[251] *Torrence Family L.P. v. Laser Contr.*, LLC, 94 Conn. App. 526, 535-38, 893 A.2d 460 (2006) (claim based on CONN. GEN. STAT. § 49-51, filed more than four months postjudgment, remanded for consideration on merits); *TDS Painting Restoration v. Copper Beech Farm*, 73 Conn. App. 492, 577, n. 18, 808 2d 726 (2002) (untimely claim based on CONN. GEN. STAT. § 52-249a within last sentence of rule). For an excellent critique of this footnote see *Little Mts. Enters., supra* note 246, n. 12.

shifting fees (to either party) is to do rough justice; not to achieve auditing perfection."[252] In its 2004 decision in *Smith v. Snyder*, the Supreme Court attempted to clarify existing confusion in prior case law by stating the following rule:

> [W]hen a court is presented with a claim for attorney's fees, the proponent must present to the court at the time of trial, or in the case of a default judgment, at the hearing in damages, a statement of the fees requested and a description of the services rendered. Such a rule leaves no doubt about the burden on the party claiming attorney's fees and affords the opposing party an opportunity to challenge the amount requested at the appropriate time.[253]

In rendering this decision, the Court cited with approval its decision two years earlier in which a lawyer recovered legal fees based on *quantum meruit*, after being discharged by his client in a real property tax appeal in which the fee agreement provided for a $5,000 retainer to be applied as a credit against a contingent fee. At trial the plaintiff estimated that he had devoted one hundred hours to the case, but did not provide time records, nor did he provide any evidence as to his usual hourly rate. Nevertheless, the Court upheld an award which applied a rate of $275/hour based upon the attorney trial referee's presumed "general knowledge of the reasonable value of legal services that have been fairly described."[254] Undoubtedly, the more prudent course of action for the proponent seeking an award of attorneys' fees is to file an affidavit which describes the background of the attorneys, their usual and customary hourly rates and specifically itemizes time charges on a daily basis in increments of one-tenth of an hour, together with supporting contemporaneous billing records. It is not necessary, however, to offer expert testimony to establish the reasonableness of the fees requested.[255]

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[252] Information Servs. Group v. BDCM Real Estate Holdings, Docket No. NWH-CV20-6005987S (October 4, 2022), 2022 Conn. Super. LEXIS 2086, *3 (lockout of commercial tenant, $600K damages sought; $10K compensatory plus $60K CUTPA punitive damages awarded, $700+K attorneys' fees requested, $275K awarded).

[253] Smith v. Snyder, 267 Conn. 456, 479, 839 A.2d 589 (2004) (footnote omitted).

[254] Shapero v. Mercede, 262 Conn. 1, 3, 10, 808 A.2d 666 (2002).

[255] Miller v. Kirshner, 225 Conn. 185, 201, 621 A.2d 1326 (1993); Appliances, Inc. v. Yost, 186 Conn. 673, 680-81, 443 A.2d 486 (1982).

If a party intends to challenge a request for an award of attorneys' fees, it is necessary to state that challenge to the court, indicating whether it is to the rate charged, the time claimed or both. In the absence of a challenge, the court is not required to conduct an evidentiary hearing but may, instead, exercise its discretion based upon affidavit and supporting documentary evidence.[256] If a challenge to an award is asserted, then the court must conduct an evidentiary hearing to resolve the dispute and permit the opposing party to question under oath a billing attorney who has submitted an affidavit in support of the requested fees.[257] Proponents of requests for attorneys' fees have been permitted to compel production of opposing counsel's invoices and supporting documentation when the dispute focuses on time charges, but not when it focuses on rate charges.[258] Except in matrimonial cases, where *pendente lite* awards for anticipated attorneys' fees are not unusual, the Supreme Court has not yet decided whether it is appropriate to award anticipated future attorneys' fees on prejudgment remedy applications, even when probable cause is demonstrated.[259]

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[256] Whelan v. Brestelli, 230 Conn. 683, 710, 331 A.3d 1220 (2025); Taylor v. Pollner, 210 Conn. App. 340, 345-47, 270 A.3d 213 (2022); Borg v. Cloutier, 200 Conn. App. 82, 119-20, 239 A.3d 1249 (2020); William Raveis Real Estate, Inc. v. Zajaczkowski, 172 Conn. App. 405, 426, 160 A.3d 363, *cert. denied*., 326 Conn. 906 (2017). For an example of a careful review of well-done affidavits and documentary evidence, *see*, Bongiorno v. Capone, Docket No. FST-CV12-6015733S (November 24, 2017), 2017 Conn. Super. LEXIS 4968, *12-18, *rev'd in part on other gnds*, 185 Conn. App. 176, 196 A.3d 1212, *cert denied*, 330 Conn. 943 (2018).

[257] Commission on Human Rights & Opportunities v. Sullivan, 285 Conn. 208, 239, 939 A.2d 544 (2008); Barco Auto Leasing Corpo. v. House, 202 Conn. 106, 121, 520 A.2d 162 (1987).

[258] Judge Arterton wrote two well-analyzed decisions on this issue: Serricchio v. Wackovia Sec., LLC, 258 F.R.D. 43 (D. Conn. 2009) (plaintiff allowed discovery of defendant's billing records of legal fees in light of defendant's claim that plaintiff's attorneys' time was excessive); Romag Fasteners, Inc. v. Fossil, Inc., Docket No. 3:10cv1827 (JBA) (December 10, 2014), 2014 U.S. Dist. LEXIS 171256 (plaintiff not permitted discovery when defendant's claims focused on hourly rate and block billing). *See also*, Doe v. East Lyme Bd. Of Educ., Docket No. 3:11cv291 (JBA) (March 27, 2019 U.S. Dist. LEXIS 53148) (decision carefully considering and adjusting various components of fees claimed).

[259] TES Franchising, LLC v. Feldman, 286 Conn. 132, 149 n. 18, 943 A.2d 406 (2008).

C. *Finality of Trial Court Judgment Determining All Issues Other than Amount of Attorneys' Fees or Common Law Punitive Damages to be Awarded*

By statute[260] and rule of practice,[261] generally an appeal may only be taken from a "final" judgment. A tricky question arises when a trial court enters judgment for a plaintiff awarding compensatory damages and finds liability for attorneys' fees or common law punitive damages, but defers decision on the *amount of* attorneys' fees or common law punitive damages to be awarded. Is that a "final" judgment? Answering this question correctly is important because if an appeal is taken too soon, it is vulnerable to mandatory dismissal for want of subject matter jurisdiction of the Appellate Court. And if an appeal is taken too late, it is vulnerable to discretionary dismissal for failure to comply with appellate rules. In four opinions rendered over thirty years, between 1988 and 2018, the Supreme Court admirably attempted to simplify the issue, adopting and then ratifying a "bright line" approach under which judgments of trial courts are deemed "final" when all issues are resolved other than the *amount* of attorneys' fees or common law punitive damages.[262] To state the corollary, appeals must be taken from judgments of trial courts notwithstanding any deferral of setting the *amount* of attorneys' fees or common law punitive damages to be awarded.

The rule was first applied to a judgment finding liability under CUTPA but not determining the amount of attorneys' fees award until twenty-two days thereafter. An appeal taken eight days after the award but thirty days after the underlying judgment was dismissed as untimely. The Supreme Court affirmed the dismissal of appeal from the underlying judgment, but reversed the dismissal of the appeal determining the amount of the attorneys' fees.[263] This holding was then

[260] Conn. Gen. Stat. § 52-263.

[261] Practice Book § 61-1.

[262] Paranteau v. DeVita, 208 Conn. 515, 522, 544 A.2d 634 (1988); Benvenuto v. Mahajan, 245 Conn. 495, 501, 715 A.2d 743 (1998); Hylton v. Gunter, 313 Conn. 472, 480, 97 A.3d 970 (4-2 decision) (2014); Town of Ledyard v. WMS Gaming, Inc., 330 Conn. 75, 85, 191 A.3d 983 (2018).

[263] *Paranteau, supra* note at 523. The opinion does not indicate whether the defendant-appellant moved the Appellate Court to excuse the short untimeliness of the appeal.

applied to an appeal in a strict foreclosure action in which the plaintiff's attorneys' fees were not yet determined at the time of the judgment. Although the Court recognized that a determination of the amount of attorneys' fees was necessary in order for parties to determine the amount needed for redemption, it nevertheless maintained the "bright line" approach and permitted an appeal taken within twenty days of the underlying judgment of strict foreclosure and prior to any award of attorneys' fees.[264] This holding was then extended in a 4-2 opinion to apply to common law punitive damages. The trial court had entered judgment for compensatory damages in the amount of $342,648, together with a finding that the plaintiff was entitled to "punitive damages in the form of attorney's fees" on counts alleging fraud, civil theft, breach of fiduciary duty and breach of the implied duty of good faith and fair dealing and instructing counsel to file an affidavit setting forth the amount of attorneys' fees claimed. The defendant filed an appeal eighteen days thereafter.[265] Subsequently, shortly after the appeal was filed, the trial court awarded punitive damages in the amount of $23,400, representing the amount claimed in attorneys' fees. The majority opinion of the Supreme Court reversed the Appellate Court's *per curiam* order that had granted the defendant's motion to dismiss based on the ground that, because the appeal was filed too soon, a final judgment had not yet entered, as a consequence of which the Appellate Court lacked subject matter jurisdiction.[266] In its fourth opinion on the issue, the Supreme Court again confirmed the "bright line" approach allowing an appeal before the amount of legal fees had been determined, applying it to a case in which summary judgment had entered as to liability only, scheduling a subsequent hearing to determine the amount of attorneys' fees to be awarded to the

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[264] *Benvenuto, supra* note 264.

[265] *Hylton, supra* note 264, 313 Conn. at 480. Both the Supreme Court opinion and the Appellate Court opinion state that the appeal was taken on April 6, 2011, which would have been several days late from entry of the underlying judgment. However, the Appellate Court Case Detail reflects that the appeal was timely filed on April 1, 2011 (AC 33316).

[266] Hylton v. Gunter, 142 Conn. App. 548, 66 A.3d 517 (*per curiam*) (2013), *rev'd, Hylton, supra* note 258.

defendant for its successful defense of a federal court action challenging the plaintiff's right to impose personal property taxes on slot machines.[267]

Though the consistency of the "bright line" opinions is helpful, at least two hypothetical situations have uncertain outcomes: (a) a trial court judgment awarding compensatory damages but reserving decision *whether* to award common law punitive damages or statutory attorneys' fees and, if so, the amount thereof; and (b) a trial court judgment awarding compensatory damages but reserving decision *whether* to award statutory punitive damages or multiple damages and, if so, the amount thereof. The uncertainty of outcome for the first hypothetical arises from the Supreme Court holding that a trial court judgment is final even though the "*recoverability or amount*" of attorneys' fees remains to be determined.[268] The uncertainty of outcome for the second hypothetical arises from footnotes 13 and 15 of the *Hylton* majority opinion, as well as the dissenting opinion of Justices McDonald and Zarella. In these footnotes, the majority expressly emphasizes that their conclusion is limited to common law punitive damages and that statutory punitive damages "present unique final judgment considerations not present in this case."[269] Adding to the uncertainty of outcome of this hypothetical is the existing case law dealing with finality of trial court judgments which do not determine whether to award interest – prejudgment or postjudgment – or, if so, the rate thereof. In *Balf Co. v. Spera Constr. Co.*,[270] the Supreme Court dismissed an appeal from a trial court judgment which had entered summary judgment against a surety for the principal amount due on a construction performance bond but denied summary judgment as to the plaintiff's claim for prejudgment interest thereon, effectively finding that the appeal was filed too *soon*.

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[267] *Town of Ledyard, supra* note 264, 330 Conn. at 85.

[268] *Id.* at 85; *Paranteau, supra* note 258, 208 Conn. at 523; This confusing holding is referred to in *Spinnato v. Boyd*, 231 Conn. App. 460, 483 n.12, ___ A.3d ___ (2025) when a trial court ordered additional hearings on detailed invoices and affidavits of counsel.

[269] *Hylton, supra* note 264, 313 Conn. at 486-87, nn 13-15.

[270] 222 Conn. 211, 608 A.2d 682 (*per curiam*) (1992).

In *Georges v. Ob-Gyn Servs., P.C.*,[271] the Supreme Court affirmed the Appellate Court's dismissal of an appeal from a trial court judgment accepting a $4.2 million jury verdict in favor of the plaintiffs in a medical malpractice action, effectively finding that the appeal was filed too *late*. At the time of the judgment, the trial court had not yet determined offer of compromise interest under General Statutes Section 52-192a, nor had it determined a rate of postjudgment interest to be awarded under General Statutes Section 37-3b. The chronological sequence was as follows:

10/28/16	$4.2m Verdict & Judgment thereon
12/12/16	Trial Court Order awarding $1.6m O.C. interest and postjudgment interest at rate of 10%.
12/16/16	Defendants' appeal
12/22/16	Plaintiffs' Motion to Dismiss untimely appeal
12/30/16	Defendants' Motion to File Late Appeal[272]
2/8/17	Appellate Court Order granting Motion to Dismiss as to underlying Judgment, denying as to 12/12/16 interest awards and denying Motion to File Late Appeal
5/29/18	Appellate Court *per curiam* Order affirming 12/12/16 interest awards[273]
10/23/19	Supreme Court oral argument
6/3/20	Supreme Court opinion

The Court unanimously affirmed dismissal of the appeal from the underlying judgment, finding that the trial court was required to award interest under both Section 52-192a and Section 37-3b and had no discretion to deny such in-

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[271] 335 Conn. 669, 240 A.3d 249 (2020).

[272] Case Detail, Georges v. Ob-Gyn Servs., P.C., AC 39909.

[273] Georges v. Ob-Gyn Servs., P.C., 182 Conn. App. 901, 184 A.3d 840 (*per curiam*) (2018), *aff'd*, 335 Conn. 669, 240 A.3d 249 (2020).

terest.[274] In a split 4-2 decision, with Justices D'Auria and Palmer dissenting, the Court affirmed denial of the Motion to File Late Appeal.[275]

A subsequent trial court decision correctly observes that an award of postjudgment interest under General Statutes Section 37-3a is "quite different" from an award under Section 37-3b because the former is discretionary while the latter is mandatory.[276] In sum, it seems that, generally, trial court judgments that defer determining the amount of offer of compromise interest or the rate of postjudgment interest under Section 37-3b are final judgments from which appeals can be taken but trial court judgments that defer whether to award prejudgment interest, postjudgment interest under Section 37-3a or, if so, the rate thereof, are not final judgments from which appeals can be taken.

In spite of the adoption of a "bright line" standard, the issue of finality of judgments, as affected by awards of attorneys' fees or interest, remains a "confusing area of the law," as aptly characterized by Justices D'Auria and Palmer.[277] The risk of catastrophic consequences resulting from being slightly early or late[278] in filing a simple set of appellate forms might be mitigated by appealing from the judgment of the trial court soonest to occur and then amending an appeal thereafter upon each order subsequent thereto pursuant to Practice Book Section 61-9, adopted in 2010[279] and amended thereafter, most recently in 2023.

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[274] 335 Conn. at 680, 685.

[275] *Id*. at 697.

[276] Digital 60 & 80 Merritt, LLC v. Bd. of Assessment Appeals, Docket No. HHB-CV14-6025041S (August 3, 2021), 2021 Conn. Super. LEXIS 1246, *4. *See also*, Fogarty, *Postjudgment Interest in Civil Actions in Connecticut*, Conn. Bar J. 299, 303, 315 (2020).

[277] *See Georges v. Ob-Gyn Servs., PC, supra* note 275, 335 Conn. at 697 (D'Auria and Palmer, JJ. dissenting).

[278] Slightly, in relation to the usual time required for disposition of an appeal.

[279] Broadnax v. City of New Haven, 294 Conn. 280, 298, n. 33, 984 A.2d 658 (2009).

D. *Attorneys' Fees Incurred in Successful Defense of Appeal from Award*

There is a sharp distinction drawn in our case law between attorneys' fees incurred in defending an award of a trial court based upon a contract or a statute providing for attorneys' fees versus attorneys' fees incurred in defending an award of a trial court of common law punitive damages based on attorneys' fees (nontaxable costs). Appellate attorneys' fees based on contracts or statutes are recoverable.[280] Appellate attorneys' fees based on an award of common law punitive damages are not recoverable.[281] The opinion of the Supreme Court rejecting appellate legal fees incurred in the defense of an award of common law punitive damages is devoid of any meaningful reason why there should be such a distinction, holding simply, "there is no statutory authority to award attorney's fees incurred in defending a subsequent appeal in a fraud action."[282] The subsequent cases on this issue only accept the precedent of the Supreme Court, as required. The common law provides that the measure of punitive damages is attorneys' fees (plus nontaxable costs). There is no case law stating that means only *some* attorneys' fees. Since the purpose of an award of punitive damages in Connecticut is to compensate a successful plaintiff, it seems illogical to stop the attorney's meter from running when defending an appeal from award of common law punitive damages, while allowing it to continue running when defending an award of fees based upon a contract or statute. It also seems inconsistent with the "bright line" standard adhered to for determining finality of judgments, as explained in part VII *supra*.

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[280] Total Recycling Servs. of Conn., Inc. v. Conn. Oil Recycling Servs., LLC, 308 Conn. 312, 335, 63 A.3d 896 (2013); Watson Real Estate, LLC v. Woodland Ridge, LLC, 208 Conn. App. 115, 128, 264 A.3d 96, *cert. denied*, 340 Conn. 911 (2021); Gagne v. Vaccaro, 118 Conn. App. 367, 370, 984 A.2d 1084 (2009).

[281] O'Leary v. Industrial Park Corp., 211 Conn. 648, 651, 560 A.2d 968 (1989); SBD Kitchens, LLC v. Jefferson, 157 Conn. App. 731, 752, 118 A.3d 550, *cert. denied*, 319 Conn. 903 (2015); Stone Key Grp., LLC v. Taradash, Docket No. FST-CV16-6029872S (December 8, 2021), 2021 Conn. Super. LEXIS 2055, *7.

[282] *Id*. at 652.

IX. Conclusion

In my previous three Bar Journal articles,[283] I attempted to address financial aspects of civil litigation statutes in Connecticut which I believed were outdated, unfair or unwise and that had troubled me at various times over the fifty-five years of my otherwise satisfying practice of law, sometimes representing plaintiffs, other times representing defendants. This article was a little different, as I had no objective other than to more fully learn the subject at hand and then to share that learning with my colleagues at the bar. I had been generally aware of the adoption of more rules and the enactment of more statutes providing greater opportunities for an award of attorneys' fees or enhanced damages, but became curious to learn the full extent of this evolution. My research confirmed what I had long suspected – there are definitely more than a "few exceptions" to the American rule in Connecticut. A sea change occurred in July 1973 when CUTPA was enacted, dramatically broadening both the bases for imposing civil liability in commercial transactions as well as increasing the amounts of potential damages which might be recovered by authorizing awards of punitive damages in addition to attorneys' fees and, by a subsequent statutory amendment, restricting those awards to plaintiffs only. Aside from common law exceptions to the American rule and awards of punitive damages under the common law, there are now fifteen Practice Book rules and 337 state statutes providing for awards of attorneys' fees. Included in these statutes are fifty-four that also provide for awards of multiple damages (i.e., typically, double or treble) and 123 statutes, including 101 incorporating CUTPA, that also provide for awards of punitive damages. With the hope that it might be helpful to identify, summarize and sometimes compare these rules and statutes in a single usable source, I have once again imposed upon the good offices of the venerable Bar Journal.

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[283] Fogarty, *Witness Fees and Taxation of Costs in Civil Actions in Connecticut*, 92 Conn. Bar J. 53 (2019); Fogarty, *Postjudgment Interest in Civil Actions in Connecticut*, 92 Conn. Bar J. 299 (2020); and Fogarty, *Offers of Compromise in Civil Actions in Connecticut: Excessively Punitive and Disparate Sanctions*, 94 Conn. Bar J. 169 (2022).

Having begun with a suspicion that our common law limitation on awards of punitive damages had become archaic and too limiting, I now believe, through my work on this article, that as it has evolved and developed, Connecticut law strikes a reasonable balance between allowing recoveries in civil actions that are too small and those that are too great. Enactment of statutes providing for awards of punitive damages in addition to attorneys' fees was, I believe, necessary to provide for civil *punishment* of outrageous conduct in addition to the additional *compensation* already provided by awards of common law punitive damages. I further believe that the common law limitations imposed upon these awards of statutory punitive damages, generally within a "normative range" of two times compensatory damages, are generally adequate to provide that appropriate level of civil punishment. Inspired by Justice Ecker's recent thought-provoking concurring opinion (part 3) in *Seramonte Associates, LLC v. Town of Hamden*,[284] I shall presume respectfully to have been granted leave to kibitz in the suggested dialogue between the Legislative Branch and the Judicial Branch for the purpose of offering a few concluding observations and suggestions.

To the Legislative Branch, I suggest that, perhaps through the Office of Legislative Research, it proactively establish its own set of criteria for application of statutes incorporating CUTPA or creating an independent basis for awarding both attorneys' fees and punitive damages to specific circumstances. Not every collection case deserves the potential for an award of punitive damages as well as attorneys' fees. The subject is too important to be left to *ad hoc* consideration of legislative bills promoted by lobbyists for special interest groups. The sea change that began in 1973 could have ended badly but for the fact that the Judicial Branch controlled it by resolving the ambiguity of providing for awards of "punitive" damages in addition to attorneys' fees, first, by establishing factors to be considered in determining the measure of those damages and, then, by setting a flexible "normative"

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[284] 345 Conn. 76, 112, 282 A.3d 1253 (2022).

limit to avoid unconstitutional awards. A statutory award of punitive damages in additional to attorneys' fees is a most valuable tool in the toolbox of the state's administrators of justice. Double damages or treble damages are also valuable tools, but they are effective only when the underlying awards of compensatory damages are significant. As my father taught me, double nothing is still nothing. But statutory punitive damages may serve to provide punishment where most appropriate, even when significant compensatory damages cannot be proven.

To the Judicial Branch, I suggest that our unique, conservative measure of punitive damages has worked out well, providing a just and reasonable complement to awards of additional damages provided by statutes in certain situations and found appropriate in the exercise of discretion of trial judges. Likewise, when all of the elements of causes of action are satisfied pursuant to statutes that provide for enhanced damages, then awards under one or more of those statutes should be available for use in the discretion of the trial court. Except in a situation in which the elements of one cause of action are identical to, or included within, the elements of another cause of action, I suggest that awards for different statutory offenses are not "double recoveries," but recoveries for different offenses deemed by the legislature to warrant special enhanced punishment. Similar to sentencing for the commission of multiple crimes, the elements of which are not identical or lesser included offenses, trial judges should be able to award multiple damage awards.

Further, I suggest that attorneys' fees agreed upon and/or paid by clients be presumed to be fair and reasonable and awarded to their full extent when so authorized by contract, rule or statute. An award of attorneys' fees should be full, not partial, from beginning to end, until the entry of final judgment. It has been my experience that trial judges, more so state court than federal court, seem to have a natural reluctance to award all of the attorneys' fees actually incurred in civil litigation. Post-trial evidentiary hearings to review fee applications have too often resulted in additional fees offset-

ting, or even exceeding, any reductions ordered by the court. And occasionally, they have disrupted an attorney-client relationship by indicating that a client has agreed to and/or paid fees in an amount in excess of what a court found to have been fair and reasonable. Having labored in the vineyards of civil litigation in Connecticut too long to continue to reap the benefits or suffer the consequences of more than a "few exceptions" to the American rule created during my career, I have no cause to complain. Having been blessed throughout my career with wonderful law partners and normally satisfying trials and appeals, I am confident that the next generation of the bench and bar will continue, and improve upon, the work of the last generation.

APPENDIX A

189 Connecticut Statutes Providing for Awards of Attorneys' Fees But Not Multiple Damages or Punitive Damages

Explanation: The column marked "M" indicates statutes purporting to provide for a mandatory award of reasonable attorneys' fees. The column marked "D" indicates statutes providing for a discretionary award. The column marked "π" indicates those statutes providing for awards in favor of the party that succeeded in recovering damages. The column marked "Δ" indicates those statutes providing for awards in favor of the party that succeeded in defending a claim for damages. When both the "π" and "Δ" columns are checked, it indicates that the statute provides either for an award in favor of the prevailing party or for an award to plaintiff or defendant, depending upon different stated conditions. As explained in the text, there is ambiguity in some statutes (indicated by question mark) and others have been interpreted so that "shall" means "may." Hence, the statements of subjects below are intended to serve as descriptive identifications of sources and are not substantive summaries of the statutes.

Gen Stat §	Subject	M	D	π	Δ
1-82(c)	Alleged violations of Code of Ethics by state employees found lacking in		x		x
	probable cause				
1-206(d)	Frivolous or dilatory appeals from FOIC (limited to $1,000)	x		x	x
1-206(e)	Successful appeal from FOIC against DEEP re hazardous waste		x		x
1-241	Appeals from FOIC contrary to injunction	?			x
1-350s(c)	Liability for refusal to accept acknowledged POA		x	x	x
1-365(c)	Liability for refusal to accept substitute decision-making document	?		x	
2-3a(b)	Employer discrimination against member of General Assembly		x	x	x
3-62d	State action for escheat	?		x	

Gen Stat §	Subject	M	D	π	Δ
4-28j(b)	State action against tobacco company re escrow fund	x		x	
4-28q(a)	State action to recover enforcement cost against tobacco company	x		x	
4-61dd(e),(k)	Retaliation of State or large contractor against whistle-blower		x	x	
4-184a(b)	Successful UAPA appeals in which agency acted without substantial justification (limited up to $7,500)		x	x	x
4-197	Action against state agency for disclosure of personal data	x		x	
4-278(e),(f)	Qui Tam recovery, health or human services	x		x	
4-279(b)	Qui Tam recovery, health or human services	x		x	
4-279(c)	Frivolous qui tam claim		x		x
4-284(b)	Liability of employers for discrimination based on employee's acts re false claims	?		x	
5-202(m)	Unsuccessful defense of appeal from Employees' Review Board by OPM	x		x	
7-121a(c)	Liability of nonpublic schools to repay loan of municipality	x		x	
7-147h(b)	Enforcement action by historic district commission		x	x	
7-239(i),(j)	Private collection of municipal water charges		x	x	
7-254(f),(i)	Private collection of municipal sewer charges		x	x	
7-258(e),(h)	Private collection of municipal sewer assessments	x		x	
7-263a(c)	Liability of water pollution control authority to repay loan of municipality	x		x	
7-322c(c)	Discrimination of employers against volunteer firefighters and EMTs		x	x	x
7-606(a)	Reimbursement of municipality for services of receiver of deteriorated properties in revitalization zone	x		x	
8-12	Municipal action for wilful violations of zoning regulations		x	x	
8-270a	Municipal action for reimbursement of displaced tenants	?		x	
9-7b(a)(2)	Collection of unpaid fine of State Elections Enforcement Commission		x	x	
10-153f(c)(8)	Successful defense of applications to modify or vacate certain arbitration awards re State Bd of Ed		x	x	x
10-153m	Successful defense of applications to modify or vacate certain arbitration awards re Bd of Ed		x	x	x
12-140	Costs of municipality incurred in tax sales	x		x	
12-161a	Collection of personal property taxes	x		x	

Gen Stat §	Subject	M	D	π	Δ
12-163a(a)	Reimbursement of municipality for services of receiver of properties	x		x	
	in arrears of property taxes				
12-166	Property tax collection includes attorneys' fees	x		x	
12-192	Sharing of fees in tax collection by two or more municipalities	x		x	
12-193	Real property tax foreclosure	x		x	
12-285c	State action to recover fines for transporting cigarettes illegally	x		x	
12-326h(f)	State action for illegal transportation of cigarettes	x		x	
14-145c	Liability of for improper towing/locking car	x		x	
16-8a(d)	Protection of public service company whistle blower for retaliation		x	x	
16-50p(j)	Liability for misrepresentation or omission of material fact re application	?		x	
	for certificate of environmental compatibility				
16-262e(g)	Liability of owner, lessor or manager of renovated building to provide	x		x	
	access to utility meter				
16-262f(a)(4)	Action for receivership for utility company	x		x	
16-262t(a)(5)	Action for receivership for water company	x		x	
16-266	Eminent domain award in excess of amount paid to property owner	x		x	
17a-510(a)	Applications of indigents for release from psychiatric hospital	x		x	
17a-685(n)	Applications of indigents re treatment of alcohol/drug dependency	x		x	
17b-197	Appeal from denial of certain social security benefits	x		x	
17b-261q(d)	Nursing home collection action against transferors of assets		x	x	
17b-261q(d)	Successful defense of action above	x			x
17b-261r(e)	Actions by nursing homes to recover applied income		x	x	
17b-261r(e)	Successful defense of action above	x			x
17b-529(a)	Liability for misrepresentations & omissions of material	x		x	
	fact re continuing care facility				
17b-745(a)(8)	Liability to pay support of persons supported by State		x	x	
20-329y	Liability under Real Property Securities Dealer Act	x		x	
21-82(h)	Liability of landlord of residential building for repeated demands for access		x	x	
	having effect of unreasonable harassment				
21-86	Liability for violations of statutes governing new mobile, modular or	x		x	
	prefab homes				
21a-422r(a)	Liability of employer for violation of drug testing statutes		x	x	

Gen Stat §	Subject	M	D	π	Δ
22-364b	Liability of owner or keeper for dog attacking and injuring guide dog	x		x	
22a-18(e)	Liability under EPA action brought by private person		x	x	
22a-44(b)	Action for violation of Inland Wetlands Act		x	x	
22a-354s(b)	Action for violation of aquifer protection		x	x	
22a-449f(g)	DEEP action for damage caused by release of petroleum products	x		x	
22a-471(b)(4)	State action for reimbursement of remediation for	?		x	
	pollution to groundwater				
22a-506(b)	Collection of assessment of benefits from wastewater system	?		x	
31-40i	Action against employers requiring sterilization as	x		x	x
	condition of employment				
31-40x(f)	Complaint against employer heard by Labor Commissioner	x		x	
	for requesting/requiring info re personal online account				
31-50b(c)	Actions against associated broadcast entities for requiring employment	?		x	
	agreements with certain prohibited provisions				
31-51m(c)	Liability of employers for discipline/discharge of whistle blowers		x	x	x
31-51q(b)	Liability of employers for discipline or discharge of employee exercising		x	x	
	certain constitutional rights				
31-51q(b)	Employer's successful defense of action brought without substantial		x		x
	justification				
31-51z	Liability of employers for violation of statutes re drug testing	x		x	
31-51ss(h)	Liability of employers for discharge or coercion of	x		x	
	employee taking leave as victim of family violence				
31-52(d)	Liability for violation of preference of State citizens in employment	?		x	
	of construction trades for work on public buildings				
31-53(g)	Contractors' right to reimbursement for payments made on	?		x	
	behalf of subcontractors on public works projects				
31-57g(c)(3)	Liability for displacement or termination of employees	x		x	
	at Bradley International Airport in violation of statutes				
31-69b(b)	Liability of employers for discipline or discharge of	x		x	
	employee based on employee's filing or initiating claim				
31-76o(c)	Individual liability of employers for failure to make required	x		x	
	payment to employee welfare fund				
31-226a(b)	Liability of employers for discipline or discharge based on employee	x		x	
	filing claim under State contracts statutes				

Gen Stat §	Subject	M	D	π	Δ
31-296(b)	Liability of employers for breach of voluntary workers' compensation agreement	x		x	
31-300	Liability of employers for failure to comply with workers' compensation award or for having unreasonably contested liability	x	x	x	
31-379(c)	Liability of employers for discrimination, discharge or discipline based on employee having filed complaint with OSHA	x		x	
31-425(c)	Liability of employers for failure to enroll covered employee in retirement plan	x		x	
33-1238(c)	Court-ordered inspection of records of nonstock corporation	x		x	
33-1239(c)	Inspection of records of nonstock corporation by director		x	x	
34-34d	Derivative actions on behalf of limited partnership entities in which plaintiff receives anything, by settlement or judgment		x	x	
34-271e(b)	Derivative actions on behalf of partnership entities where substantial benefit obtained; sanctions		x	x	x
34-362(i)	Action by dissociated partner of limited partnership entities for buyout of interest against party found to have acted improperly		x	x	x
34-522(d)	Derivative actions on behalf of statutory trust in which plaintiff receives anything, by settlement or judgment		x	x	
35-34	Injunctions issued in antitrust actions	x		x	
35-54	Claim of misappropriation of trade secret made in bad faith or injunction request made or resisted in bad faith		x	x	x
36a-56a(c)	Successful action by bank or credit union for unlawful use of its name or trademark	x		x	
36a-648(a)	Successful action against creditor using abusive, harassing, fraudulent, deceptive or misleading practice to collect debt		x	x	
36a-717	Successful action of mortgagor to enforce obligations of mortgage servicer to pay real property taxes and insurance premiums	x		x	
36a-740	Finding of violation by financial institution of Home Mortgage Disclosure Act		x	x	
36a-760i(a)	Violation of nonprime home loan statutes	?		x	
36b-29(a)	Liability under Uniform Securities Act	x		x	
36b-74(b)	Liability under Business Opportunity Act	?		x	
38a-9(b)(2)	Successful application to "improve" arbitration award re automobile insurance property damage		x	x	x

Gen Stat §	Subject	M	D	π	Δ
38a-274	Liability of unauthorized insurer for vexatious failure to make payment per		x	x	
	contract without cause				
38a-479ff	Liability of health insurer or health care center for retaliatory action	?		x	
	against enrollee, provider or employer for filing complaint				
38a-995(c)	Liability of insurance institution for disclosure of personal information		x	x	x
42-100c(b)	Liability of creditor for failure to correct error under retail account	x		x	
42-110m(a)	Action on behalf of State for CUTPA violation		x	x	
42-115e(b)	Exceptional cases in which injunctive relief is sought for deceptive		x	x	x
	trade practices				
42-125i(d)	Injunctive relief granted for deceptive trade practices for foreign		x	x	
	discriminatory boycott				
42-133g(a)	Successful action by franchisee for violation of statutes	x		x	
42-133n(a)	Successful action by franchisee for unlawful termination or	x		x	
	prohibition against assignment				
42-133ee	Action by consumer or party to contract injured by violation of	?		x	
	statutes governing new motor vehicle franchise				
42-149(b)	Wilful violations of statutes prohibiting contingent transaction constituting		x	x	
	deceptive trade practices				
42-150bb	Actions on consumer contracts or leases successfully prosecuted or	x		x	x
	defended by consumer				
42-158r	Violation of statutes relating to retainage and arbitration in certain		x	x	x
	construction contracts				
42-158s(c)	Offers of compromise in construction contract arbitration	x		x	x
42-180	Prevailing party in action for breach of warranty of sale or lease of		x	x	x
	motor vehicle				
42-181(e)	Automobile manufacturer found to have "appealed" from arbitration		x	x	
	award without good cause				
42-251	Landlords' liability under rent-to-own agreements		x	x	
42-335	Violation of statutes relating to assistive living devices		x	x	
42-354	Successful actions by suppliers or dealers of farm, forestry, light	x		x	
	industrial or commercial or garden equipment				
42-399(d)	Actions in which court finds that consumer lease is unconscionable	x		x	
42-410(d)	Action on consumer lease with provision for lessor's attorneys' fees	x			x
	when defended successfully				
42-413(a)	Violation of statutes relating to residual value of open-end	x			x
	consumer leases				

Gen Stat §	Subject	M	D	π	Δ
42-424(e)	Successful actions by lessees on consumer leases	x		x	
42a-2A-107(d)	Actions in which court finds that consumer lease is unconscionable	x		x	
42a-4A-305(e)	Actions for violation of UCC governing funds transfers	x		x	
42a-5-111(e)	Prevailing party in actions for violations of UCC governing letters of credit		x	x	x
42a-7-601	Protection of bailee when document of title missing or stolen		x	x	x
45a-294(b)	Executor defending admission of Will to probate	x		x	x
45a-489a(e)	Actions by protector of trust for care of an animal to enforce trust		x	x	
45a-649a(d)	Representation of respondent or conserved person subject to involuntary petition		x	x	x
46a-82e(d)(4)	Petition to CHRO to render decision (limited to $500)		x	x	
46a-86(b)	CHRO determination of discriminatory employment practice		x	x	
46a-95(d)	Actions to enforce CHRO order of presiding officer	x		x	
46b-62(a)	Actions for dissolution of marriage, separation, annulment or support		x	x	x
46b-87	Contempt orders granted or denied in matrimonial actions		x	x	x
46b-115r(c)	Prevailing party in action relating to custody in which court declined jurisdiction based upon conduct of party	x		x	
46b-115ee	Prevailing party in action under Uniform Child Custody Jurisdiction & Enforcement Act	x		x	x
46b-171(a)	Paternity actions in which support of child is ordered	x		x	
46b-215(a)(8)	Persons found in contempt for failure to pay support order		x	x	
46b-331(b)	Enforcement of support order under Uniform Interstate Order		x	x	x
46b-339(b)	Enforcement of support order under Uniform Interstate Order		x	x	x
46b-466	Orders for genetic testing to determine parentage		x	x	
47-33j	Actions for slander of title		x	x	
47-75(a)	Successful action to enforce compliance with Condominium Act of 1976, condominium instruments, rules or regulations		x	x	
47-77(a)	Actions to foreclose lien for common charges imposed under Condominium Act of 1976	x		x	
47-88g(b)	Actions of tenants aggrieved by conversion into condominium		x	x	
47-90a(b)	Actions of purchasers from declarant for misrepresentation or omission of material fact in public offering statement		x	x	

Gen Stat §	Subject	M	D	π	Δ
47-253(d)	Liability of declarant to association under Unit Ownership Act	x		x	
47-258(a)(b)(g)	Liability of unit owner on statutory lien for assessments and common	x		x	x
	charges imposed under Unit Ownership Act				
47-278(a)	Actions to enforce obligations under Unit Ownership Act, declaration		x	x	
	or bylaws				
47-292	Actions of tenants aggrieved by conversion into Common Interest		x	x	
	Community				
47a-7a(d)	Liability of landlord to tenant for bed bug infestation in leased	x		x	
	residential property				
47a-13(b)	Liability of landlord due to failure to provide essential services as		x	x	
	required in statute				
47a-18	Liability of tenant for refusal to allow landlord entry as provided		x	x	
	in statutes				
47a-18a	Liability of landlord of residential property for unlawful entry or		x	x	
	harassment				
49-8(c)	Liability for failure to deliver release of mortgage or discharge of	x		x	
	ineffective lien as required by statute				
49-42(a)(2)	Actions on payment bonds in lieu of mechanic's lien in which claim or		x	x	x
	defense is without substantial basis in law or fact				
49-51(a)	Actions to discharge mechanic's liens found to have been filed without		x	x	
	just cause				
51-247a(d)	Liability of employers for discharge of employee due to employee's	x		x	
	jury service				
52-99	Allegation or denial in pleading untrue & without cause	x		x	x
	(limited to $500 per offense)				
52-190a(a)	Liability of attorney or client for filing in medical malpractice action a		x		x
	certificate of negligence found not made in good faith				
52-192a	Offer of compromise not accepted by defendant (limited to $350)		x	x	
52-195	Offer of compromise not accepted by plaintiff (limited to $350)		x		x
52-196a(f)	Granting or denying special motions to dismiss actions based on	x		x	x
	defendant's exercise of certain constitutional rights				
52-240a	Frivolous claim or defense in product liability action		x	x	x
52-245	Affidavit or statement of defense made without cause or for delay		x	x	
52-249(a)	Judgments of foreclosure of mortgages or mechanic's lien as	x		x	
	allowance of costs				

Gen Stat §	Subject	M	D	π	Δ
52-249a	Successful plaintiff in action for bond substituted in lieu of	x		x	
	mechanic's lien				
52-251	Actions for construction of Will brought by fiduciary	x		x	x
52-251a	Actions in which plaintiff prevails in small claims matter transferred to		x	x	
	regular docket on motion of defendant				
52-251b	Prevailing party in actions for personal injury/property damage arising		x	x	x
	out of violations of civil rights				
52-251d(a)	State action to establish parentage or to establish, modify or enforce		x	x	x
	child support orders				
52-256b	Person found in contempt of court order		x	x	x
52-400c	Prevailing party in postjudgment enforcement or discovery proceeding		x	x	x
52-407nn(e)	Dismissal of action or subpoena against arbitrator or arbitration	x			x
	association on ground of immunity				
52-484	Interpleader actions		x	x	x
52-570c(d)	Actions for transmission of unsolicited advertising material		x	x	
52-570d(c)	Actions for illegal recording of private telephonic communication	?		x	
52-570f	Actions by aggrieved persons for theft of gas, water,		x	x	
	telecommunications, wireless radio or community antenna TV service				
52-571d(g)	Actions by aggrieved persons for discrimination by golf country club		x	x	
52-571i	Actions by aggrieved persons for sexual trafficking	?		x	
52-571k	Deliberate, wilful or reckless denial of equal protection rights by police		x	x	
	officer				
52-571l(a)	Liability for disclosure of personally identifiable information for no	?		x	
	legitimate purpose with intent to harass, terrorize or alarm				
52-572j(b)	Derivative actions against corporations or unincorporated associations		x	x	
52-631(c)	Owner's liability to receiver for knowingly failing to perform statutory		x	x	x
	duties				
52-632(f)	Knowingly violating injunction issued by receiver		x	x	
52-639	Responsibility of person for appointment of receiver		x	x	
53-443	Actions by aggrieved insurers for violations of health insurance fraud act	x		x	
53-452(b),(c)	Actions for violation of computer crimes		x	x	
54-85b(c)	Liability of employers for discharging, penalizing employee for	x		x	
	attending court proceeding for crime or assisting investigation				

Gen Stat §	Subject	M	D	π	Δ
54-206	Payment for personal injury or death by Office of Victims Services		x	x	
	for commission of felony (limited to 15% of award)				
P.A. 23-204	John R. Lewis Act re: electors' rights		x	x	x
Sec. 418					

APPENDIX B

54 Connecticut Statutes Providing for Awards of Multiple Damages, of Which 29 Also Provide for Attorneys' Fees

Explanation: The column entitled, "Multiple" indicates whether damages doubled (2), trebled (3) or otherwise increased. The column entitled. "Mandatory" states whether the multiplication is mandatory (yes), discretionary (no), or ambiguous (ambig). The column entitled "Atty Fees" indicates whether the statute also provides for an award of attorneys' fees and, if so, whether the award is mandatory (mand) or discretionary (discret). Five of these statutes are discussed in the foregoing text, as identified in the columns entitled, "Subject" (see text supra*).*

Gen Statute §	Subject	Multiple	Mandatory	Atty Fees
1-82(c)	Alleged violations of Code of Ethics by state employees	2	No	Discret
	found to have been made without foundation in fact			
1-89(c)	State action for violation of Code of Ethics	2	No	No
1-93(c)	Alleged violations of Code of Ethics by lobbyists			
	found to have been made without foundation in fact	2	No	Discret
4-275(b)	State action for false claims under state-administered	3	Yes	Mand
	health or human services programs			
4-284(b)	Discrimination in employment	2	Yes	Mand
6-32(a)	Failure of state marshal to execute and return	2	Yes	No
	process or making false or illegal return			
10-9a(d)	State action for misuse of Department of Education	3	No	No
	funds or resources			
12-68	Purchaser of real estate failing to record Deed resulting	2	Ambig	No
	in taxation of property to seller			
13b-324(a)	RR Co failing to comply with safety rules of Dept of	2	Yes	No
	Transportation			
14-106b(d)	Tampering with/selling inaccurate odometer;	3	Yes	Mand
	CUTPA (punitive) damages			
14-295	Certain violations of statutes re operation of	2 or 3	No	No
	motor vehicle; see text *supra*			

Gen Statute §	Subject	Multiple	Mandatory	Atty Fees
16-15	Public service company or electric supplier failing to comply with DPUC order	2	Yes	No
16-278	Utility corporation failing to comply with DPUC order	2	Yes	No
16a-20(d)	Liability to DEEP for illegal creation of fuel shortage	3	No	No
19a-336	Obstruction of watercourse or damage to dam	2	Yes	No
19a-337	Deposition of material in watercourse where it will naturally be carried to land of another	2	Yes	No
19a-532	Nursing/residential care home discrimination/retaliation based on complaint against home	3	Yes	No
19a-552(b)	Nursing/residential care home mismanaging funds of residents	3	Yes	No
20-417e	Failure of new home construction contractor to refund deposit, as provided in §20-417d(d)(7)	3	Yes	No
21a-222	Health club material violation of statutory duties; CUTPA (punitive) damages in addition to treble damages and atty fees	3	Ambig	Discret
23-65(b)	Restoration of tree removed or damaged on public property	5	No	Mand
31-68(a)	Employer's failure to pay minimum fair wages or overtime wages	2	Yes	Discret
31-72	Employer's failure to pay wages; see text *supra*	2	Yes	Discret
31-289a(a)	State action to recover fine imposed by Workers' Compensation Commission	2	No	Discret
31-290c(a)	State action for misrepresentation or nondisclosure re workers' compensation benefits	3	Yes	No
31-355(c)	State action to recover from employer payments made by Second Injury Fund	2	No	Discret
35-11i(b)	Illegal use of trademark	3	No	Discret
35-18h(b)	Illegal use of trademark	3	No	Discret
35-35	Violation of State antitrust statutes	3	Yes	Mand
36a-683(e)(3)	Violation of Truth-in-Lending Act	2	No	Discret
36a-855(a),(b)	Violation of State student loan statutes; punitive damages in addition to treble damages and atty fees	3	No	Discret
38a-465k(e)	State action for wilful violation of life settlement statutes	3	No	No

Gen Statute §	Subject	Multiple	Mandatory	Atty Fees
38a-988a(b)	Liability for sale of individually identifiable medical information	2	Yes	Mand
42-234a(b),(c)	State action for wilful violation of State statutes re energy prices; punitive damages in addition to double damages and atty fees	2	No	Discret
42-480(e)	Actions against facilitators of income tax refund anticipation loans	3	Yes	Mand
42-482(d)	Prevailing party in actions between principals & sales representatives when principal wilfully, wantonly, recklessly fails to pay	2	Yes	Mand
47a-13(a),(b)	Landlord's wilful failure to provide essential services to dwelling unit	2	Ambig	Discret
47a-21(d)(2)	Landlord's failure to return security deposit within 30 days of termination of lease of dwelling unit; see text *supra*	2	Yes	No
47a-46	Unlawful entry and detainer	2	No	No
51-247a(e)	Employer's wilful failure to compensate employee for jury duty according to State statutes	3	No	Discret
52-560	Cutting or destruction of trees or shrubs	3-5	Yes	No
52-560a(c),(d)	Damage for encroachment on open-space land	5	No	Discret
52-564	Stealing property of owner; see text *supra*	3	Yes	No
52-565	Forgery or alteration of document	2	Yes	No
52-566	Wilful removal or destruction of bridge or part	3	Yes	No
52-567	Destruction or damage to highway milestone, guidepost or railing	3	Yes	No
52-568	Vexatious suit with malice	3 or	Yes	No
	Vexatious suit without probable cause; see text *supra*	2	Yes	No
52-568a	Vexatious suit against "pick or cut your own agricultural operation"	2-3	Yes	Discret
52-569	Wilful destruction or opening of gate or fence	2	Yes	No
52-570b(c),(e)	Wilful and malicious violation of State computer crime statute (53a-251)	3	Yes	Mand
52-571c(b)	Violation of State criminal statutes (53a-181j *et seq*) prohibiting discrimination/intimidation based on bigotry or bias	3	Yes	Discret
52-571e	Damages resulting from action of agent on surety bond in criminal proceeding	3	No	Discret

Gen Statute §	Subject	Multiple	Mandatory	Atty Fees
52-571h(b)	Violation of State criminal statutes (53a-129a) prohibiting	3	Yes	Mand
	identity theft			
52-571aa	Discrimination on account of membership in armed forces	3	Yes	Mand

APPENDIX C

22 Connecticut Statutes Providing for Awards of Punitive Damages, of Which 18 Also Provide for Attorneys' Fees

Explanation: The two columns entitled "Punitive" indicate whether an award of punitive damages is mandatory (mand) or discretionary (discret). The two columns entitled "Atty Fees" indicate whether an award of attorneys' fees is mandatory (mand), discretionary (discret), or not provided for (No) in the statute. Three of these statutes which have been held to provide an enhanced measure of punitive damages are discussed in the foregoing text, as identified in the columns entitled, "Subject" (see text supra*).*

		Punitive		Atty Fee	
Gen Stat §	Subject	Mand	Discret	Mand	Discret
4d-39(c)	Illegal disclosure of public records by		x		x
	contractor or agent				
16-8d(b)	Retaliatory actions against public service company		x	x	
	whistle blowers				
17b-462(a)	Abuse, neglect, exploitation or abandonment of		x		x
	elderly persons				
19a-550(e)	Wilful or reckless disregard of patients' bill of rights by		x	No	No
	nursing home facility				
22-351a(c)	Intentional killing or injury of a "companion animal;"		x		x
	punitive damage limit of $5K				
22a-157a	State action against person causing or responsible for		x	x	
	radioactive exposure hazard				
31-40z(d)	Employers' liability for penalizing employees for		x		x
	discussing amount of wages				
31-40aa(j)	Employers' reckless or malicious violation of statutes		x	x	
	re rehiring post COVID19				
31-76(b)	Employers' intentional or reckless discrimination in		x		x
	payment of compensation on basis of sex				

Gen Stat §	Subject	Punitive		Atty Fee	
		Mand	Discret	Mand	Discret
31-290a(b)	Employers' illegal discharge, discipline or discrimination		x	x	
	against employee for claiming workers compensation or				
	COVID19 benefits				
31-901a(b)	Liability to employee for violation of Connecticut		x	x	
	Premium Pay statutes				
35-53	Wilful and malicious misappropriation of trade secrets;		x		x
	punitive damage limit 2X compensatory; see text *supra*				
36a-428n	State action re wilful violation of State order re		x	x	
(k)(5)	dissolution of foreign bank				
36a-618	Violation by a "loan broker" of statutes relating to		x	x	
	unsecured loans				
42-110g*	CUTPA violation; see text *supra*		x		x
(a)(d)					
42-900(e)	Liability of third-party delivery service for illegal use of		x	No	No
	likeness of merchant				
46a-89(b)	CHRO action for discriminatory employment practices;		x	No	No
	punitive damage limit of $50K				
46a-98	Liability of creditor for discriminatory credit practices;		x	No	No
(c),(d)	punitive damage limit of $1K for individual or				
	lesser of 1% net worth or $5K for class				
46a-104	Liability for discriminatory practices		x		x
52-240b	Product sellers' reckless disregard for safety of product		x		x
	users; punitive damage limit of 2X compensatory				
	damages; atty fee to prevailing party when frivolous				
	claim or defense per §52-240a; see text *supra*				
52-564a	Liability for shoplifting; stealing agricultural produce;	x		x	
(b),(c)	punitive damage limit of $300. Reciprocal discretionary				
	if plaintiff does not prevail.				
54-41r	Liability for illegal interception, disclosure or use of	x		x	
	wire communication				

*101 statutes expressly incorporate CUTPA by reference, as identified on Appendix D

Appendix D

101 Connecticut Statutes That Expressly Incorporate CUTPA by Reference Providing for Awards of Both Attorneys' Fees and Punitive Damages

4-28m(d)	Tobacco Products
12-326b(c)	Sale of cigarettes
12-572b(b)(2)	Off-track betting
14-15b(e)	Motor Vehicle Rental Contracts
14-16c(g)	Sale of Totalled & Salvaged Motor Vehicles
14-106b(d)	Odometer Tampering
14-106d(d)	Fake Air Bags For Motor Vehicles
14-332a(c)(3)	Gasoline Surcharges
16-245o(j)	Restrictions on Use of Customer Information by Electric Companies for Marketing Purposes
16-245s(c)	Switching Electric Suppliers
16-247s(h)	Cellular Mobile Telephone Directories and Customer Inquiries and Complaints Regarding Regarding Cellular Mobile Telephone Service Confidentiality of Telephone Records
16-256i(d)(2)	Unauthorized Switching of Telecom munications Carriers

16a-15(h)	Posting of Gas Prices
16a-21(k)	Heating Fuel
16a-22k(d)	Heating Fuel
16a-23(c)	Distribution of Gasoline by Refiners
16a-23a	Sale of Anthracite
16a-23r	Heating Fuel
17a-716(c)	Sober Living Homes
19a-508c(k) (4) & (1)	Hospital and Health System Facility Fees
19a-639f(i)	Cost and Market Reviews of Hospital Transfers
19a-904d(c) & (e)	Health Information Blocking and Electronic Health
19a-907b(b)	Conversion Therapy
20-7f(b) and (c)	Health Care Provider Unfair Billing Practices
20-124a	Dental Referral Services
20-150(e)	Sale of Cosmetic Contact Lenses
20-341(d)	Enforcement of Certain Professional and Occupational Licensing and Registration Laws
20-341y(b)	Mechanical Contractors
20-417g	New Home Construction Contractors

20-427(c)	Home Improvement Contractors
20-457(b)	Community Association Managers
20-633a(d)	Protected Health Information
20-691(k)	Registration of Locksmiths
21-35h(b)	Closing-Out Sales
21-83e(b)	Mobile Manufactured Homes and Home Parks
21a-222(b)	Health Club Act
21a-343(c)	Failure to Permit Entry to Permit Entry or Inspection by State Under State Child Protection Act
21a-404	Home Food Service Plan Sales Act
22-61m(s)	Advertising of hemp
21a-421bb(f)	Advertisement of Cannabis Products
22-244	Sale of Milk
22-247	Sale of Milk
30-64b	Sale of Alcoholic Liquor
33-1335	White Collar Crime Enforcement and Corporate Fraud Accountability
35-1(a) and (b)	Fictitious Trade Names
36a-267(c)	Reverse Mortgages
36a-498(g)(2)	Mortgage Trigger Leads

36a-498h(b)	Lead Generators of Residential Mortgage Loans
36a-589	Check Cashing Services
36a-700(f)	Credit Clinics
36a-701b(j)	Requiring Consumer Credit Bureaus to Offer Security Freezes
38a-193(c)(3)	Health Care Centers and Insolvency Protection
38a-355(b)	Notice Concerning Used Auto Parts
38a-398(d)(2)	Travel Insurance
38a-477cc(c)	Pharmacy Contracts
38a-815	Insurance Business
38a-852	Insurance Business
38a-871(e)	Unpaid Assessments
42-103k	Apartment Listing Services
42-103tt(a)	Time Shares
42-103ww(d)	Time Shares
42-110q(b)	Service Contract Agreements
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