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Publishing a yearly review is like publishing a daily newspaper—you can’t say there was no news. It is true that the Supreme Court decided some interesting and significant cases in 2013, but it is also true that there were no major state or federal constitutional questions resolved, there were no major procedural decisions, such as State v. Kitchens\(^1\) in 2011, and there were no major pronouncements in the common law of torts or contracts or in how the courts construe statutes. In short, this is a good year to focus on things that tend to get lost when there are two or three cases that normally take center stage in this Review. One such thing is the petition for certification.

In our Review last year, we briefly commented on such petitions. We noted the increase in the grant rate of petitions from under fifteen percent to over twenty percent, but the decrease in the reversal rate on granted petitions from fifty percent to forty percent.\(^2\) This year we have decided to take a closer look at the grant and reversal rates.

First, we calculated the overall grant rate reported in calendar year 2013. With some minor adjustments (eliminating separate companion petitions but not separate petitions by opposing parties), we counted 359 petitions ruled on and seventy-four granted, for an undramatic grant rate of twenty-one percent.

With the assistance of our law clerk Ashley Noel, we then broke down the petitions by type of case and, given the large increase in pro se\(^3\) petitions in recent years, by whether a lawyer filed it. The result was dramatic. See the following chart.

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\(^*\) Of the Hartford Bar

\(^1\) 299 Conn. 447, 10 A.3d 942 (2011).


\(^3\) Mr. Horton dislikes the new phrase “self-represented party.” The Latin phrase, easily understood, has two syllables and five letters as opposed to seven syllables and twenty letters. We understand the courts no longer use “pro se” because it may have acquired a pejorative connotation, but if that is so “self-represented party” will also acquire such a connotation in time. A rose by any other name . . . .
## Supreme Court Petitions for Certification Decided in 2013

<table>
<thead>
<tr>
<th></th>
<th>Criminal</th>
<th>Habeas</th>
<th></th>
<th></th>
<th>Other</th>
<th>Total</th>
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<tbody>
<tr>
<td></td>
<td>By State</td>
<td>By Defendant</td>
<td>By State</td>
<td>By Petitioner</td>
<td>Termination of Parental Rights</td>
<td></td>
</tr>
<tr>
<td>By Lawyer: Certification Granted</td>
<td>6</td>
<td>21</td>
<td>2</td>
<td>3</td>
<td>2</td>
<td>40</td>
</tr>
<tr>
<td>By Lawyer: Certification Denied or Dismissed</td>
<td>0</td>
<td>77</td>
<td>0</td>
<td>71</td>
<td>9</td>
<td>71</td>
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<tr>
<td>By Pro Se: Certification Granted</td>
<td>_</td>
<td>0</td>
<td>_</td>
<td>0</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>By Pro Se: Certification Denied or Dismissed</td>
<td>_</td>
<td>7</td>
<td>_</td>
<td>3</td>
<td>3</td>
<td>44</td>
</tr>
<tr>
<td>Total</td>
<td>6</td>
<td>105</td>
<td>2</td>
<td>77</td>
<td>14</td>
<td>155</td>
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Now to explain the chart. As one can readily see, sixteen percent (57 out of 359) of the petitions were filed pro se, and not one of them was granted. So if the pro se petitions are backed out of the total petitions filed, the grant rate goes from twenty-one percent to twenty-five percent (74 out of 302).

That’s not all the drama. In habeas corpus cases based on criminal convictions, represented petitioners filed seventy-four petitions and the state filed two. Of the seventy-six petitions, five (both of the state’s plus three of the plaintiffs’ seventy-four) were granted. If these habeas petitions are also backed out, the grant rate goes from twenty-five percent to thirty-one percent (69 out of 226).

In criminal appeals, the state filed six petitions and represented defendants filed ninety-eight. Of these petitions twenty-seven were granted (all six of the state’s plus twenty-one of the defendants’). Note that in habeas and criminal petitions the state had a perfect grant score of eight for eight, and that represented criminal defendants, unlike represented habeas petitioners, did not do too badly, twenty-one percent versus four percent. But to return to our main theme, if we also back out criminal petitions the grant rate on the remainder goes to thirty-four percent (42 out of 122).

Finally, eleven represented parties filed petitions in termination of parental rights cases and two were granted. If these cases are now backed out of the total, we are left with a grant rate of thirty-six percent (40 out of 111).

This thirty-six percent grant rate in the “other” category is obviously of great significance for civil lawyers advising their clients on whether to spend the money on filing a petition. The grant rate is not fifteen to twenty percent as commonly supposed, but thirty-five to forty percent.

The other noteworthy statistic is the zero grant rate for pro ses. We wondered what the rate would have been if all fifty-seven pro se petitions were filed by lawyers.

Three hypotheses come to mind to explain the huge discrepancy in the grant rate between lawyers and pro ses: (1) pro ses do not understand the certification process and so file petitions in hopeless cases; (2) pro ses do not understand
the process and so do not know how to attract the Supreme Court’s attention in non-hopeless cases; and (3) pro sees start with two strikes against them because the Supreme Court does not want to decide an important issue in a case that is likely to be poorly briefed and argued by the pro se. It is important to know which of these hypotheses is the correct one because if it is either (2) or (3), the organized Bar should try to do something to assist pro sees on arguably meritorious petitions.

So we decided to test these hypotheses. This is not terribly difficult to do, because the primary evidence is the Appellate Court decision being attacked. We looked at the fifty-seven Appellate Court decisions attacked by a pro se. None had a dissent or a separate concurrence. Several were unreported orders or four-word decisions (“The judgment is affirmed” or “The appeal is dismissed”; see each volume of the Appellate Reports starting at page 900). While we cannot be sure, they most likely yielded hopeless petitions. But even for the many petitions that were attacking signed opinions, we could not find one Appellate Court decision of the fifty-seven deciding an issue that seemed likely to be vulnerable. So hypothesis (1) appears to be the correct one: the fifty-seven petitions filed by pro sees probably would have yielded a zero grant rate even if filed by lawyers.

So much for the certification grant rate. Granting certification accomplishes little for the appellant, except delay and attorneys’ fees unless there is a reversal. Last year we noted that the grant rates seemed to be inversely proportional to reversal rates, which makes sense if the Supreme Court is setting a lower bar on reviewing Appellate Court decisions. That means a higher grant rate is not necessarily something for the appellant to get excited about or for the appellee to get depressed about. The situation is to be distinguished from what happens in the United States Supreme Court. There, the grant rate is about one percent, but the appellant can break out the champagne if the petition is granted, because the reversal rate is around seventy percent.

4 Horton and Bartschi, supra, n.2.
So we looked closely at the reversal rate for 2013. We often had to use our own judgment in a partial reversal case. If it appeared to us that the appellant won on a significant part of the appeal, it counted as a reversal; otherwise it counted as an affirmance. Cross appeals were not considered because none of them significantly affected the result. Here is our tally:

**Supreme Court Cases Decided in 2013**

<table>
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<tr>
<th>Affirmed or Appeal Dismissed</th>
<th>On Petition for Certification</th>
<th>On Direct Appeal from Supreme Court</th>
<th>On Transfer from Appellate Court</th>
<th>Total</th>
</tr>
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<tr>
<td>Affirmed or Appeal Dismissed</td>
<td>46</td>
<td>6</td>
<td>18</td>
<td>70</td>
</tr>
<tr>
<td>Reversed</td>
<td>22</td>
<td>1</td>
<td>11</td>
<td>34</td>
</tr>
<tr>
<td>Total</td>
<td>68</td>
<td>7</td>
<td>29</td>
<td>106*</td>
</tr>
</tbody>
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Lo and behold, the reversal rate on cases certified from the Appellate Court after its decision has plunged, from almost fifty percent before 2012, to slightly under forty percent in 2012, and to thirty-two percent (22 out of 68) in 2013, thus validating our inverse proportion observation with a vengeance. This contrasts with the reversal rate on cases transferred from the Appellate Court before its decision, where the reversal rate in 2013 was thirty-eight percent (11 out of 29), consistent with the historical average (but lower than in 2012).

The much lower reversal rate on certified appeals leads us to wonder whether the Supreme Court is granting too many petitions. A few years ago, well over half the Supreme Court decisions came in transferred cases, but in 2013 only twenty-seven percent (29 of the 106) of the decisions came from them. We understand the (unpublished) review

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* Except in the cumulative total of 106 decided cases, the chart does not include two certified questions sent to the Connecticut Supreme Court from federal courts. The dismissal of the one writ of error is counted as an affirmance or dismissal of a direct appeal.
process for approving transfer is quite rigorous. Perhaps the Supreme Court should loosen up the transfer process and tighten up the certification process.

Let us know turn our focus to another group of issues that tend to get lost in years with major decisions, namely, appellate standards of reviewability for clear error, plain error, Golding review, and use of supervisory powers. First of all, make sure you choose the right phrase. “Clear error” is a factual error by the trial court so obvious that it will result in reversal of the judgment by an appellate court (assuming it is harmful).5 “Plain error” is a legal error by the trial court not properly preserved by the appellant in the trial court or on appeal but so obvious that it too will result in reversal as above.6 Do not use “plain” when you mean “clear” and do not use either word outside its standard of appellate review sense. (It is obvious, not clear or plain, that Connecticut is in New England.) Golding review is a four-part test for deciding unpreserved or improperly preserved constitutional questions.7 Supervisory powers are powers appellate courts use when they direct all lower courts to act in a certain way in the future independent of whether the issue was properly raised in the trial court or preserved on appeal.8 There has been considerable activity of late on the latter three topics; we include clear error for historical context.

Before 1979 neither clear error nor plain error existed as a specific legal doctrine in Connecticut. The antiquated finding system, which was abolished that year, blocked realistic appellate review on most factual questions. When the clear error doctrine replaced it that year, justices that were familiar with the old finding system gave the new system very little room to operate in. The first and leading case so holding is Pandolphe’s Auto Parts, Inc. v. Manchester.9 But

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5 Practice Book § 60-5, para. 1.
6 Practice Book § 60-5, para. 2.
the Supreme Court’s attitude has changed over the years. Today lawyers often raise such claims and there is nothing newsworthy when an appellate court in Connecticut finds clear error.\textsuperscript{10}

Unlike clear error, plain error as more than a remote possibility for reversal has never really caught on. There is some irony here because, also unlike clear error, there actually was a common law rule in Connecticut similar to plain error long before the plain error rule was adopted along with the clear error rule in 1979.\textsuperscript{11} The authors bemoaned the practical futility of raising plain error two years ago.\textsuperscript{12}

Since 2011 lawyers seem to be raising plain error more frequently. In 2013 the Supreme Court showed a modicum of interest in the doctrine. \textit{State v. Sanchez}\textsuperscript{13} has an extensive discussion of it. In that case it appears to have been plain (the opinion does not say so expressly) that the trial court failed to comply with a rule of criminal procedure. \textit{Sanchez} clarified some ambiguous language in prior cases and held that plain error is a two-part test: (1) an obvious mistake by the trial court plus (2) manifest injustice.\textsuperscript{14} \textit{Sanchez} discusses the second prong in detail and seems to have equated it with harmless error. In short the appellant must show an obvious and harmful error. \textit{Sanchez} explains in detail why the error, by being in effect harmless, did not create a manifest injustice. \textit{Sanchez} also overruled an aspect of a 1987 decision\textsuperscript{15} and held that Supreme Court review of an Appellate Court decision on plain error is plenary.\textsuperscript{16} So the Appellate Court is entitled to no deference if it finds or does not find plain error.

\textsuperscript{11} Practice Book (1963) § 652; Practice Book (1934) § 363.
\textsuperscript{12} Wesley W. Horton and Kenneth J. Bartschi, \textit{2011 Appellate Review}, 86 CONN. B.J. 1, 2-3 (March 2012).
\textsuperscript{13} 308 Conn. 64, 76-87, 60 A.3d 271 (2013).
\textsuperscript{14} \textit{Id. at 77-78 and n.7}.
\textsuperscript{16} \textit{Sanchez}, 308 Conn. at 78-80.
The appellants should have raised plain error but did not in *Ulbrich v. Groth*. The appellants put all their chips on the I-don’t-have-to-ask-the-trial-court-to-overrule-the-Supreme-Court square. The issue—a very important one—is whether the Supreme Court should continue to follow the federal cigarette rule in CUTPA cases even though the rule has not existed under federal law for decades. The trial court obviously had to follow the cigarette rule and the appellants, who (the 5-2 majority held) did not properly preserve the issue in the trial court, claimed it was reviewable on appeal because raising it to the trial court would have been futile.

The Supreme Court rejected the futility argument. The Court said it did not matter that it was futile to do so because raising it there served (1) to put the opponents on notice “and allow them to properly evaluate their position” and (2) to avoid “an ambush of the trial court.”

We agree, but only to a certain extent, with the first point; we do not agree with the second point. The first point has some merit if, knowing the issue will come up on appeal, the appellee could have put on evidence to show, for example, harmlessness. But if the issue is purely one of law and the harmfulness is obvious, as it surely would be if the cigarette rule was overturned, raising the issue in the trial court would not improve the record. In any event an appellee who thinks notice at trial would have made a difference can always state on appeal what it would have done. On the second point it is difficult to see how one can be accused of ambushing the trial court for failing to ask it to do what it cannot do. *Ulbrich* is harsh, especially when the issue is as important as is the validity of the cigarette rule.

Had the appellants raised plain error as a back-up to their futility argument, the Supreme Court would have had

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17 310 Conn. 375, 78 A.3d 76 (2013).
18 The cigarette rule in unfair trade practice cases permits a consumer remedy if the practice is “immoral, unethical, oppressive or unscrupulous.” *Id.* at 425 n. 43.
19 *Id.* at 429.
to decide whether the importance of the issue plays any role in its plain error jurisprudence. Adoption of the plain error doctrine in 1979 was envisioned, along with adoption of the clear error doctrine, as broadening appellate review.\footnote{Mr. Horton was a member of the predecessor of the Appellate Rules Advisory Committee in 1978. The committee was chaired by Superior Court Judge Jay Rubinow.} Ironically there were occasions before 1979 when the Supreme Court considered an unpreserved issue “not by reason of the appellant’s right to have it determined but because, in our opinion, in the interest of public welfare or of justice between the parties it ought to be done.”\footnote{Kavanewsky v. Zoning Board of Appeals, 160 Conn. 397, 401, 279 A.2d 567 (1971).} In Kavanewsky, the error did not appear to be plain, but the judgment was nevertheless reversed. In Ulbrich, there obviously would have been nothing plainly erroneous about the trial court following the cigarette rule. It will be a shame if the plain error rule blocks rather than facilitates review.

There is an intriguing concurring opinion by Chief Justice Chase Rogers stating that Golding review in the case at bar was barred by Kitchens,\footnote{Kitchens, 299 Conn. 447.} but whether plain error review was also barred is an open question not raised by the appellant.\footnote{State v. Webster, 308 Conn. 43, 63-64, 60 A.3d 259 (2013) (Rogers, C.J., concurring.)} That comment is a good segue to Golding review. That Golding, unlike plain error, has been a fruitful source for successful appellate review for many years is not in doubt. Indeed the Supreme Court found it too fruitful in Kitchens. In In re Azareon Y.\footnote{309 Conn. 626, 72 A.3d 1074 (2013).} the court clarified that the inadequacy of the factual record cannot be remedied by characterizing the issue as a pure question of law in which the appellee would, at a second trial, have the burden of supplying the missing evidence. The Court pointed out that burden of proof is irrelevant in determining the adequacy of the record.

The hot issue—and apparently the reviewability issue that is most controversial on the Court—is when to use the
supervisory powers doctrine.\textsuperscript{25} This doctrine allows the Supreme Court to order trial courts to adopt a rule of procedure that, while not constitutionally required, is necessary for the “perceived fairness of the judicial system as a whole.”\textsuperscript{26} In \textit{Medrano} the 4-3 majority ordered all trial courts in criminal cases not to instruct jurors to consider the interest of a testifying defendant in the outcome of the case. The dissent objected to “the majority’s rather summary use of the extraordinary remedy that is our supervisory power” and also objected on the merits.\textsuperscript{27}

The odd thing about \textit{Medrano}, as in many of the previous supervisory powers decisions, is that the portion of the opinion exercising that power is entirely dictum: the defendant had already lost the appeal before the Supreme Court reached the supervisory power issue. By unlinking the actual decision from the discussion of supervisory power, the Court gives the appellant little incentive to raise the issue or, if raised, to discuss it vigorously. In short, the Court’s exercise of its supervisory power tends to undermine the advantage of the adversary system. It also creates a shortcut to its normal rule-making power, where draft proposals, public hearings and advisory committee proceedings are the norm.

On the other hand, in the occasional case where use of supervisory power is linked to the actual decision in the case on appeal, it often seems somewhat superfluous to invoke that power. In \textit{Tanzman v. Meurer},\textsuperscript{28} the Supreme Court held unanimously in a family case that the trial court committed reversible error when it based its financial award on a party’s earning capacity without specifying what that earning capacity was. Having thus disposed of the case on that basis, the Court went on, in a 5-2 portion of the opinion, to invoke its supervisory powers to order trial courts to specify earning capacity in the future whenever it bases its

\textsuperscript{25} The authors completed this article in January 2014 before the Supreme Court’s excellent and exhaustive discussion of this doctrine in \textit{Blumberg Assocs. Worldwide, Inc. v. Brown & Brown of Connecticut, Inc.}, 311 Conn. 123, 84 A.3d 840 (2014). We will discuss \textit{Blumberg} next year.

\textsuperscript{26} \textit{Medrano}, 308 Conn. at 630.

\textsuperscript{27} \textit{Id.} at 632-33 (Norcott, J., dissenting).

\textsuperscript{28} 309 Conn. 105, 117, 70 A.3d 13 (2013).
financial award on earning capacity. But why the need to say that? The disposition of the case on that basis is perfectly obvious and binding as precedent on all lower courts.

Finally there is *State v. Polanco.* Polanco overruled *State v. Chicano,* which had held that, when a defendant is convicted of greater and lesser included offenses, the lesser is merged into the greater. The defendant in Polanco raised both a federal constitutional and a “jurisprudential” argument for vacating the lesser included conviction. (Once again, where is the state constitutional argument?) The Supreme Court held, in the exercise of its supervisory powers, that the lesser offense conviction had to be vacated. We do not understand why the Supreme Court felt it needed to use its supervisory powers to decide this issue. There is no indication in the opinion that the defendant failed to raise either of these issues in the trial court. Obviously the overruling of *Chicano* was going to be binding on the lower courts in any event. Why could the Supreme Court not say simply that it was adopting the vacatur rule as a matter of Connecticut common law?

While we said at the beginning of this article that the Supreme Court had no major constitutional or common law pronouncements in 2013, they did have pronouncements of some significance. In *A. Gallo & Co. v. Commissioner of Environmental Protection,* the Court held that beer and soft drink distributors did not have a vested property interest in unclaimed deposits for a certain period of time. The Court did not distinguish between state and federal constitutional law although the opinion mentions both the Fifth Amendment and Article First, Section 11. It is not clear whether the parties independently briefed Section 11. If they did, this would have been a good opportunity for the court either to make a distinction or to state explicitly that there is no difference in the meaning or treatment of vested rights.

29 Id.
32 309 Conn. 810, 73 A.3d 693 (2013).
The only other constitutional case of significance is *Gonzalez v. Commissioner of Correction*,\(^{33}\) holding, 4-2, that under the Sixth Amendment the arraignment of a defendant is a critical stage of a criminal proceeding and therefore the right to counsel attaches at that point. The state constitution was not discussed.

Two common law tort cases are significant. In *Doe v. St. Francis Hospital & Medical Center*,\(^{34}\) the Court, 5-1, applied Section 302B of the Restatement (Second) of Torts, which concerns the duty to protect another when one’s “own conduct creates or increases the foreseeable risk that such other person will be harmed by the conduct of a third party, including the foreseeable criminal conduct of that third party.”\(^{35}\) *Doe* concerns the criminal conduct of a medical doctor who was sexually abusing children in the guise of conducting a growth study under the auspices of the hospital, which was held liable for his conduct. The second significant case is *Simms v. Seaman*,\(^{36}\) holding that the litigation privilege shielding attorneys from liability from defamatory statements made during the course of judicial proceedings applies to claims of fraud stemming from their conduct during judicial proceedings.

The state continues to win absolute immunity claims, as it did in 2012 concerning the statute of limitations.\(^{37}\) In *Chief Information Officer v. Computers Plus Center, Inc.*,\(^{38}\) the Court held that a private party sued by the state in an action at law cannot counterclaim for damages without first presenting the counterclaim to the claims commissioner. A 105-year-old case tending to the contrary was held to apply only to equitable claims and related equitable counterclaims, although a footnote suggests a legal counterclaim for recoupment might have survived.\(^{39}\)

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33 308 Conn. 463, 68 A.3d 624 (2013).
34 309 Conn. 146, 72 A.3d 929 (2013). Mr. Horton represented the defendant’s insurance carrier in this case.
35 Id. at 175.
36 308 Conn. 523, 69 A.3d 880 (2013). Three members of the authors’ firm, Mr. Bartschi, Karen Dowd and Brendon Levesque, were parties to this case.
38 310 Conn. 60, 74 A.3d 1242 (2013).
39 Id. at 77-78, n.21.
The most significant family cases are *Tanzman*, discussed earlier; *Dowling v. Szymczak*, holding that in high income cases above the child support guidelines the trial court was not required to enter a child support order at a percentage of income lower than the percentage at the top income level in the guidelines; and *In re Elvin G.*, holding that the trial court cannot terminate parental rights on the basis of a failure of the parent to rehabilitate unless the parent has first received court-ordered specific steps to guide the parent to rehabilitation. While the father lost the appeal on the ground of harmless error, the ruling on the merits brought about a major policy change in the Department of Children and Families for future cases.

*Tuckman v. Tuckman* is significant primarily because of a footnote in which the Supreme Court expressly “overruled” an Appellate Court decision in *Bee v. Bee*. *Bee* had held that a party who failed to submit a child support guidelines worksheet cannot complain about a trial court’s failure to comply with it. *Tuckman* also established a test for determining how to treat pass-through income for Subchapter S Corporations.

The one significant arbitration decision is *State v. AFSCME, Council 4, Local 391*, holding, 6-1, that an arbitrator’s award reinstating a state employee who sexually harassed a fellow employee violated the state’s well-defined policy against workplace sexual harassment.

All the significant criminal cases, *Medrano*, *Sanchez*, *Polanco*, and *Gonzalez*, have been discussed earlier in this article. The one interesting administrative procedure case

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40 309 Conn. 390, 72 A.3d 1 (2013). The authors and Robert Shields of the authors’ firm represented the defendant.
41 310 Conn. 485, 78 A.3d 797 (2013). Mr. Bartschi, Dana Hrelic and Brendon Levesque of the authors’ firm represented the respondent father.
42 308 Conn. 194, 61 A.3d 449 (2013). The authors and Brendon Levesque of the authors’ firm represented the plaintiff.
43 Id. at 202, n.6.
45 Id. at 788.
46 *Tuchman*, 308 Conn. at 208-14.
is *Lopez v. Board of Education*,\(^\text{48}\) holding that a *quo warranto* proceeding in the Superior Court could not be used to challenge the qualifications of the Bridgeport school superintendent when there was an adequate administrative proceeding before the State Board of Education to challenge his qualifications, even if that administrative proceeding was not subject to a subsequent appeal to the Superior Court.\(^\text{49}\)

In past years we have not seen voting patterns in split decisions worthy of special note. But the 2013 voting patterns of Justices Peter Zarella and Dennis Eveleigh are of note. In most of the tort cases in which there was a split vote, Justice Zarella voted for the insurer or the tortfeasor and Justice Eveleigh voted for the insured or the victim.\(^\text{50}\)

Justice Andrew McDonald began sitting on the Supreme Court in February 2013 and Justice Carmen Espinosa in March. Because of the delay in their appointment after the retirement of Justice Ian McLachlan in October and Justice Lubbie Harper in November 2012, Senior Justice Christine Vertefeuille sat on a large number of appeals in the meantime. Justice McDonald established himself quickly as a strong voice on the Court.\(^\text{51}\) Justice Espinosa, whose back-

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\(^\text{48}\) 310 Conn. 576, 81 A.3d 184 (2013).

\(^\text{49}\) *Id.* at 601-02 n.23. But see a possible fraud exception, *Id.* at 600 n.22.

\(^\text{50}\) Misiti, LLC v. Travelers Property Casualty Co. of America, 308 Conn. 146, 61 A.3d 485 (2013) (construing “arising out of” language of insurance policy); Lexington Ins. Co. v. Lexington Healthcare Group, Inc., 309 Conn. 1, 68 A.3d 1121 (2013) (construing “aggregate limit” and “aggregate policy limit” language in insurance policy); Romprey v. Safeco Ins. Co. of America, 310 Conn. 304, 77 A.3d 726 (2013) (tolling provision in underinsured motorist case); *Doe*, 309 Conn. 146 (negligent supervision); *Cf. D’Ascanio v. Toyota Industries Corp.*, 309 Conn. 663, 72 A.3d 1019 (2013) (improper sanction of dismissal; Justice Zarella joined concurring opinion of Justice McDonald but disagreed with the basis of the majority opinion by Justice Eveleigh); *Simms*, 308 Conn. 523 (litigation privilege for attorneys; Justice Eveleigh wrote a solo concurring opinion but disagreed with the basis of the majority opinion by Justice Zarella).

\(^\text{51}\) See J.E. Robert Co. v. Signature Properties, LLC, 309 Conn. 307, 71 A.3d 492 (2013) (his first opinion, easing the standing requirement and overruling a 2006 case to the contrary); In re Azareon Y., *Id.* 626 (explanation of *Golding* requirement); Investment Associates v. Summit Associates, Inc., *Id.* 840, 74 A.3d 1192 (2013) (permitting retroactive revival of an unsatisfied judgment); See also Equity One, Inc. v. Shivers, 310 Conn. 119, 137, 74 A.3d 1225 (2013) (mortgage foreclosure) (McDonald, J., dissenting alone); *Romprey*, 310 Conn. 304 (tolling provision in insurance policy) (McDonald, J., dissenting with Justice Zarella); *D’Ascanio*, 309 Conn. 663 (sanctions issue) (McDonald, J., concurring with Justice Zarella).
ground has been in criminal law, wrote *H.P.T. v. Commissioner of Correction*,\(^5^2\) holding that if a habeas court finds inadequate assistance of counsel, whether at trial or in plea proceedings, the habeas court must not determine the remedy, but must remand the matter to the judge handling the criminal case to set the remedy.

Justice Flemming Norcott, who was on the Court since 1992, retired in October 2013. He was a strong voice for over two decades, especially for racial equality and against the death penalty. Appellate Court Judge Richard Robinson replaced him in early 2014.

Turning to the Appellate Court, the overall reversal rate for appeals decided in 2013 was just under eighteen percent.\(^5^3\) Only one of the forty cases submitted on briefs resulted in a reversal. Taking the cases submitted on briefs out of the equation yields a slightly higher reversal rate of nineteen percent. In other words, it was a statistically uneventful year for the Appellate Court.

We begin the discussion of cases with appellate procedure and the ever-vexing subject of finality. Although a judgment is normally final even if the court has not yet awarded statutory or contractual counsel fees,\(^5^4\) *Hylton v. Gunter*\(^5^5\) held that a judgment is not final where the court has yet to determine punitive damages in the form of counsel fees. On the other hand, the appointment of a receiver of rents pursuant to General Statutes Section 12-163a to collect back taxes was final in *Canton v. Cadle Properties of Connecticut, Inc.*,\(^5^6\) because the receivership proceeding was a separate and distinct proceeding and the rights of the parties had been concluded, thus satisfying both prongs of the *Curcio* test.\(^5^7\)

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\(^{52}\) 310 Conn. 606, 79 A.3d 54 (2013).

\(^{53}\) Given the sheer volume of cases in the Appellate Court (573 decisions published in 2013), the authors have not broken down the reversal rates by category as they have for the Supreme Court this year.


Another decision concerning appellate jurisdiction was *Newtown Pool Service, LLC v. Pond*, which applied a liberal construction to Practice Book Section 72-1 to hold that the court had jurisdiction to consider a writ of error from a small claims judgment despite the failure of the plaintiff to seek a transfer to the regular docket where the court awarded damages pursuant to a counterclaim in excess of the jurisdictional limits. The plaintiff had to seek transfer before answering the complaint (and therefore before becoming aware of the counterclaim) and could not seek transfer after becoming aware of the amount sought in the counterclaim.

A late appeal is vulnerable to a motion to dismiss but the lateness normally is waived in the absence of a motion to dismiss. This was the case in *Deshpande v. Deshpande*, but Judge Alvord dissented and would not have granted review despite the lack of a motion to dismiss as the appeal was a collateral attack on an earlier judgment. The authors agree with the majority’s decision to review the claim. Waiting until the appeal is briefed to raise timeliness amounts to an ambush of the appellant.

In reviewing a trial court’s ruling on a motion to dismiss, the normal standard of review requires viewing the facts favorably to the nonmovant. In *Sojitz America Capital Corp. v. Kaufman*, the court held as a matter of first impression that the decision to dismiss a shareholder derivative action presented a mixed question of law and fact subject to plenary review. The statute in question contains a heightened pleading standard and elements that the plaintiff must prove or disprove, which the court concluded justified a less deferential standard of review.

Appeal bonds are not normally required in Connecticut, but an exception exists for summary process appeals where General Statutes Section 47a-35a requires them, but does not provide the mechanism for setting them. In *Norwich v.*

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Shelby-Posello, the court examined the legislative history of Section 47a-35a and concluded that the appellant had the burden of filing a motion to set bond or to make use and occupancy payments during the appeal.

The rule regarding the necessity of a motion for articulation has been a thorn in the side of appellate practitioners for decades. Practice Book Section 61-10 was amended effective January 1, 2013, to provide that the court would not refuse review solely on the ground that the appellant failed to seek articulation. Without mentioning the amendment, the court in Szynkowicz v. Szynkowicz reviewed the appellant’s claims despite the failure of the appellant to file a motion for review of the denial of a motion for articulation. The defendant apparently complained in his brief about the denial, and in a footnote, the court indicated that the denial did not affect the court’s reasoning. The court also pointed out that the defendant should have filed a motion for review if he wanted more explicit findings. In Claude v. Claude, the court reversed where the trial court summarily denied a motion to open and did not comply with Practice Book Section 64-1, which requires a written decision or signed transcript of the decision. The Appellate Court lacked any basis to review the claim and, because the trial judge had retired and returned to private practice, any attempt at seeking an articulation would have been futile. While two cases do not a new paradigm make, they do reflect a change in attitude towards reviewing claims where the record is not crystal clear.

Two cases concerning civil procedure are noteworthy. The court held in Deutsche Bank National Trust Co. v. Bertrand that the time limitation set forth in Practice Book Section 17-32 for the clerk to enter a default for failure to plead upon a party’s motion does not apply to the court.

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63 Id. at 535, n.5.
Thus, the court had authority to grant the motion for
default prior to the expiration of the seven-day period set
out in the rule, and the court in *Bertrand* did not abuse its
discretion in granting the motion where the defendant had
engaged in a pattern of violating pleading deadlines in a
foreclosure action. In *General Electric Capital Corp. v. Metz
Family Enterprises, LLC*, the trial court improperly grant-
ed a prejudgment remedy where the underlying litigation
was in New York, because a PRJ depends on an action in
Connecticut courts.

In administrative law, the court held in *Commissioner of
Mental Health & Addiction Services v. Saeedi* that the
thirty-day period for filing claims under General Statutes
Section 4-61dd for retaliation against whistleblowers is not
jurisdictional. In *Evans v. Tiger Claw, Inc.*, the court con-
cluded that an investigator’s recommendation concerning
the alleged failure to pay wages is not a contested hearing
where the investigator may hold a hearing but one is not
required. Accordingly, such investigations do not have
preclusive effect on later litigation.

Arbitration awards are seldom vacated, but in three
cases, the court did just that. In *Stratford v. American
Federation of State, County & Municipal Employees, Council
15, Local 407*, an award reinstating a police officer who lied
about his health during an employment-related independent
medical examination violated the clear public policy against
dishonesty by police officers, as evinced in two Superior
Court decisions. An award ordering the reinstatement of a
nurse who failed timely to report suspected elder abuse also
violated public policy in *Burr Road Operating Co., II, LLC v.
New England Health Care Employees Union, District 1190.*

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68 141 Conn. App. 110, 61 A.3d 533, cert. denied, 310 Conn. 926, 78 A.3d 146
    (2013).
70 142 Conn. App. 213, 70 A.3d 42, cert. granted, 309 Conn. 909, 68 A.3d 662
    (2013). Judge Bear dissented and would have held that the arbitrator could rea-
sonably consider mitigating circumstances, namely that she was the only one of
several employees aware of the abuse to report it.
In *Dept. of Transportation v. White Oak Corp.*,\(^{71}\) the arbitration panel lacked subject matter jurisdiction to award liquidated damages after it concluded the DOT did not wrongfully terminate the contract at issue. There, the arbitration was restricted by General Statutes Section 4-61, which provides a limited exception to sovereign immunity, and because the submission was restricted, the court applied de novo review. On the other hand, the defendant in *Doctor’s Associates, Inc. v. Windham*\(^ {72}\) did not succeed in arguing that the award was obtained by undue means as opposing counsel’s failure to inform the panel of the defendant’s defenses when the defendant failed to appear at the hearing did not amount to misconduct.

Turning to substantive law and specifically torts, which got a workout in 2013, *Rickel v. Komaromi*\(^ {73}\) concerned the statute of limitations for a nuisance action caused by running bamboo that was invading the plaintiff’s property. Whether the invading bamboo was a continuing nuisance or trespass, in which case the statute had not run, or a permanent nuisance or trespass, in which case the statute had run, presented a factual question that should not have been decided on summary judgment.

A trio of premises liability cases is worth noting. The court held in *Konesky v. Post Road Entertainment*\(^ {74}\) that the mode of operation rule did not apply to serving beer from tubs of ice at a night club as that was not appreciably different from serving from behind a bar. The court sagely noted that night clubs could not operate if they could not serve cold beverages.

In *McDermott v. State*,\(^ {75}\) an arborist did not have a duty to remove a pedestrian who was killed by a ricocheting branch from a marked area during a tree-removal operation.

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\(^{72}\) 146 Conn. App. 768, 81 A.3d 230 (2013).

\(^{73}\) 144 Conn. App. 775, 73 A.3d 851 (2013).


because the pedestrian was more than two tree lengths away, a safe distance under industry standards. Judge Pellegrino dissented, concluding that the majority had elevated the industry standard to a conclusive standard rather than deferring to the fact finder.

Two cases concerned negligence claims against healthcare providers that did not sound in medical malpractice. In *Hellamns v. Yale-New Haven Hospital, Inc.*, the trial court improperly applied what amounted to a strict liability standard when it held that permitting a puddle of water to exist for any length of time in a hallway frequented by pregnant women was negligent. In *DiTeresi v. Stamford Health System, Inc.*, the hospital was held not liable for negligent or intentional infliction of emotional distress when it delayed for a few hours telling the plaintiff that her mother had been sexually assaulted at the hospital. The court noted among other things that imposing liability would create an incentive to over-report possible incidents of this nature.

Two cases involving medical malpractice concerned the much-litigated good-faith certificate and opinion letter. In *Nichols v. Milford Pediatric Group, P.C.*, a negligence action for injuries sustained in a fall while blood was being drawn sounded in medical malpractice and therefore required the good-faith certificate and opinion letter. In *Charlotte Hungerford Hospital v. Creed*, the hospital sued for vexatious litigation where the first suit was dismissed for lack of a good-faith certificate and the second suit brought under the accidental failure of suit statute was dismissed because the opinion letter was not by a similar provider, which the court deemed to be an egregious failure. While the lack of a certificate does not equal the lack of probable cause, i.e., no vexatious claim for the first suit, the finding of egregiousness in the second action supported the suit for vexatious litigation as to the second action.

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77 142 Conn. App. 72, 63 A.3d 1011 (2013).
79 144 Conn. App. 100, 72 A.3d 1175 (2013).
Two decisions delineated the limits of CUTPA. In *Stuart v. Freiberg*, the court properly granted summary judgment on a CUTPA claim for accounting malpractice where the allegations pertained to bad judgment rather than the entrepreneurial aspects of the defendant’s business. In *Western Dermatology Consultants, P.C. v. VitalWorks, Inc.*, the court held that a choice of law provision applying Connecticut law to interpretation of the contract and for resolution of disputes in a Connecticut forum did not mean that CUTPA applied to the plaintiff’s claims concerning problems with computer software installed in its New Mexico offices.

Two miscellaneous cases round out the discussion of torts. In *Sweeney v. Friends of Hammonasset*, the president of a volunteer organization that leads tours in a park enjoyed immunity under General Statutes Section 52-557m, which protects volunteers from claims of negligence in decision-making, where she trained volunteers, supervised them, and oversaw various activities. In *Cuozzo v. Orange*, the trial court improperly granted a motion to dismiss in a highway defect case for failing to give notice where a factual question existed, specifically whether a driveway to a shopping center the defendant owned was open to all travelers (making it a public highway) or merely licensees (making it a private road).

Turning next to workers’ compensation, *O’Connor v. Med-Center Home Health Care, Inc.* held that direct medical evidence is not required to prove total disability and that the plaintiff’s testimony concerning her limitations supported the commissioner’s finding of disability. Curiously, the court held that the commissioner’s finding that two physicians had opined that the plaintiff was total-
ly disabled was clearly erroneous, but rather than engage in a harmless error analysis or remand for a new hearing, the court simply disregarded the finding. As the finding could have provided the weight necessary for the commissioner to find the plaintiff was disabled, the authors do not understand why the court did not remand for a new hearing.

General Statutes Section 31-296 provides an informal procedure to terminate workers’ compensation benefits prior to an evidentiary hearing. In *Pagan v. Carey Wiping Materials Corp.*, the court held that this statute does not violate due process as it provides sufficient safeguards, including notice to the employee, the ability to request a hearing, access to the medical report that accompanies the form filed by the employer, and the opportunity for a formal hearing that would be subject to appellate review.

In 2008, the Supreme Court held in *Deschenes v. Transco, Inc.* that an employer may apportion partial disability benefits where an occupational injury and nonoccupational injury or disease concurrently affect the same part of the body. In *Sullins v. United Parcel Service, Inc.*, the majority held that because the plaintiff’s nonoccupational disease began five years prior to the occupational injury, apportionment was not appropriate. Judge Robinson dissented, arguing that the question is whether the injury and the disease are independent causes of the disability, not whether the disease process began at the same time as the injury.

An insurance case worth noting is *New London County Mutual Ins. Co. v. Zachem*. There, the court held that “vacant” for purposes of an exclusion for vandalism in a homeowners policy meant that no one was living in the house, not complete abandonment of the property. Daily visits to an unattached garage for property maintenance therefore did not defeat the conclusion that the house itself was vacant.

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85 144 Conn. App. 413, 73 A.3d 784, cert. denied, 310 Conn. 925, 77 A.3d 142 (2013).
On to contracts, and Gianetti v. Rutkin, which concerned balance billing, where health-care providers attempt to recover the difference between what they charge for a procedure and what the insurer pays under its contract with them.

General Statutes Section 20-7f prohibits the practice, but the court held in Gianetti that it does not apply where the provider does not have a contract with the insurer. A handful of property cases warrant some discussion. Deciding a question of first impression, the court in TD Bank, N.A. v. M.J. Holdings, LLC held that breach of a loan modification agreement was a cognizable special defense in a foreclosure action.

In DDS Wireless International, Inc. v. Nutmeg Leasing, Inc., a purchaser of goods could claim dissatisfaction constituted frustration of purpose excusing performance of the contract where the parties provided for early termination. In Kepple v. Dohrmann, the court held that a restrictive covenant restricting the height of vegetation was a view easement, not a private restriction that would have been time barred by General Statutes Section 52-575a. An option to purchase that lacked a date for exercising in a recorded deed expired eighteen months after conveyance pursuant to General Statutes Section 47-33a in Nash v. Stevens where the deed was unambiguous. Judge Lavery dissented in Nash, concluding that the question was not whether the deed was ambiguous but whether it completely captured the intent of the parties where extrinsic evidence indicated the option would not be exercised during the life of the grantors. Finally, the court held in Centrix Management Co., LLC v. Valencia that the reciprocal counsel fees statute in consumer contracts applies to leases.

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Two cases involved municipal authority as it relates to land. In *Canton v. Cadle Properties of Connecticut, Inc.*, the court held that while General Statutes Section 12-163a provides authority to appoint a receiver of rents to collect back taxes, the statute does not authorize the receiver to evict the tenant. In *Candlewood Hills Tax District v. Medina*, the trial court improperly invalidated the board’s reduction in the district boundaries where the board followed the statutory procedure and where the court did not find fraud, corruption, or misconduct. The board members did not owe a fiduciary duty and mere residency in the area to be excluded did not create a conflict of interest.

A probate case worth mentioning is *McGrath v. Gallant*. There, the court declined to adopt a rule limiting counsel fees to a percentage of an estate or requiring counsel to inform the court when counsel fees will consume most of the estate due to fighting amongst the heirs.

Family law usually provides a healthy number of cases for discussion, and 2013 was no different in this regard. Jurisdictional attacks on dissolution decrees are rare, but the defendant tried and failed in *Jumo v. Aomo*. There, the trial court properly rejected the defendant’s argument that a Kenyan divorce decree deprived the Connecticut court of jurisdiction where neither party established domicile in Kenya and where the plaintiff had not been served with process while visiting there.

In *Mensah v. Mensah*, the court reversed the financial orders because the trial court lacked sufficient financial information due to the parties’ failure to comply with discovery. It is not exactly clear what the trial court was supposed to do in those circumstances, but the plaintiff had appealed and much of the missing information related to the defendant.

Two family cases involved issues of statutory construction and resorted to legislative history to resolve them. General Statutes Sections 52-350a and 52-350f preclude property executions to enforce a family support judgment, but Section 46b-84 allows the use of postjudgment procedures to secure child support. The court in Kupersmith v. Kupersmith\textsuperscript{101} resolved the apparent conflict by looking to the legislative history, which revealed that Section 46b-84 had been amended in 2003 to allow attachments. The later, more specific statute prevailed over the earlier, more general statute. The court also resorted to legislative history in Eric S. v. Tiffany S.\textsuperscript{102} to determine that contempt for violating a protective order issued pursuant to General Statutes Section 46b-15 was civil, not criminal, and incarceration was not an option.

Custody modification cases where one parent seeks to relocate require a nearly impossible balancing of interests, although the legislature has attempted to delineate the various considerations in General Statutes Section 46b-56d. In Regan v. Regan,\textsuperscript{103} the court was not required to find it in the child’s best interest to permit relocation to Boston even though the relocation was reasonable in light of the purpose, which the court found to be legitimate. There, the plaintiff was a very involved father and the court found that the relationship with his son would suffer as a result of the move.

Alimony and support orders were the subject of four cases worth noting. In Malpeso v. Malpeso,\textsuperscript{104} a separation agreement providing for nonmodifiable alimony and support could be modified as to the child support component. Judge Alvord concurred, but noted that because the trial court will have to determine what portion constitutes child support, the decision will have tax ramifications as child support is not deductible to the payor or taxable to the recipient, unlike alimony. In Kavanah v. Kavanah,\textsuperscript{105} the trial court improperly deviated from the presumptive amount of sup-

\textsuperscript{101} 146 Conn. App. 79, 78 A.3d 860 (2013).
\textsuperscript{102} 143 Conn. App. 1, 68 A.3d 139 (2013).
\textsuperscript{103} 143 Conn. App. 113, 68 A.3d 172, cert. granted, 310 Conn. 923, 77 A.3d 140 (2013).
\textsuperscript{104} 140 Conn. App. 783, 60 A.3d 380 (2013).
\textsuperscript{105} 142 Conn. App. 775, 66 A.3d 922 (2013).
port under the child support guidelines to account for ordinary travel expenses to transport the child for visitation. In *Keller v. Keller*, the trial court improperly relied on gross income in fashioning pendente lite alimony and support where the court based its decision on gross earning capacity and made no effort to determine net income. And in *Nation-Bailey v. Bailey*, the trial court improperly modified rather than terminated alimony where the self-executing separation agreement provided for termination of alimony upon cohabitation and where the plaintiff lived with her fiancé for four months. Judge Borden dissented because in his view the reference to the cohabitation statute brought the full panoply of relief available under that statute.

The last family case concerns the automatic orders. The trial court in *Traystman v. Traystman* abused its discretion in finding that the defendant violated the automatic orders by drawing on a home equity line of credit to pay counsel fees and living expenses. The court had found that the counsel fees were reasonable and that the parties used the HELOC to pay household expenses. In the absence of a pendente lite alimony and the plaintiff’s limited income, it was not clear how she could pay her living expenses.

One child protection matter merits discussion. In *In re Elijah J.*, the court held that where a parent stands silent at a neglect proceeding and the custodial parent admits neglect or pleads nolo contendere, the effect of standing silent is to authorize the court to enter a judgment of neglect.

Criminal matters comprise a significant portion of the court’s docket, so it is not surprising that there are several criminal cases to discuss. Claims for prosecutorial improprieties are often raised but seldom succeed. Occasionally,

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108 Practice Book § 25-5.
111 Then-Judge McLachlan once noted that such claims have “become the criminal equivalent of the CUTPA claim, seemingly attached to all criminal appeals whether meritorious or not.” *State v. Jarrett*, 82 Conn. App. 489, 501, 845 A.2d 476, cert. denied, 269 Conn. 911, 852 A.2d 741 (2004).
however, the court will be pushed over the edge as two cases last year demonstrate. In *State v. Santiago*,\(^{112}\) the court exercised its supervisory powers to reverse a murder conviction for prosecutorial improprieties where the same prosecutor had been repeatedly criticized for similar conduct in other cases. In *State v. Felix R.*,\(^{113}\) the prosecutor’s improprieties resulted in a due process violation, and the court noted other cases involving the same prosecutor, although the court declined to exercise its supervisory power there.

Three other cases involving due process claims warrant attention. In *State v. Banks*,\(^{114}\) the court held that the statutory requirement that felons submit DNA applied to all felons by virtue of a 2003 amendment. Because the statute was regulatory like Megan’s Law, and not criminal, it was not an ex post facto law. The court further held that the state could use reasonable force to extract the DNA from an uncooperative defendant.

In *State v. Riley*,\(^{115}\) the majority concluded that an effective sentence of 100 years for murder and attempted murder for a 17-year-old defendant did not violate the Eighth Amendment even though *Miller v. Alabama*\(^{116}\) prohibits mandatory life sentences for juveniles because the sentence was discretionary and the court considered the defendant’s age in fixing the sentence. Judge Borden dissented, concluding that the majority read Miller too narrowly, especially in light of the science concerning juvenile brains.

In *State v. Santos*,\(^{117}\) limiting disclosure of a witness’s mental health records and not permitting defense counsel to consult an expert to interpret them violated the defendant’s right to confront adverse witnesses. The majority concluded

\(^{112}\) 143 Conn. App. 26, 66 A.3d 520 (2013).
\(^{114}\) 143 Conn. App. 48, 71 A.3d 582, cert. granted, 310 Conn. 951, 71 A.3d 582 (2013).
\(^{115}\) 140 Conn. App. 1, 58 A.3d 304, cert. granted, 308 Conn. 910, 61 A.3d 531 (2013).
that the error was harmless where multiple witnesses testified that the defendant stabbed the victim at a crack house. Judge Borden again dissented, noting that the trial court had released only four of seventy-eight pages of records that included information on the witness’s ability to perceive and remember and that the medications he was on caused hallucinations. The error was not harmless in his view because the other witnesses were high on crack and the victim was heavily medicated when he gave his statement to police.

Another case involving sentencing, but not a due process claim, was *State v. Apt.*\(^{118}\) There, the court held that that a sentencing enhancement for committing a crime while released on bond had to be reversed because the defendant had completed accelerated rehabilitation and the charges nolled, both of which required erasure of the records pursuant to General Statutes Section 54-142a prior to sentencing.

In *State v. Menditto*,\(^{119}\) the defendant sought to take advantage of General Statutes Section 54-142d, which provides for erasure of prior convictions when the crime has been discriminalized, after the legislature decriminalized possession of marijuana from an offense to a violation. The court imported the definition of “offense” from General Statutes Section 53a-24, which defines the term to include violations, so the defendant was not entitled to erasure.

Three cases challenging evidentiary rulings are worth noting. In *State v. Martinez*,\(^{120}\) a narcotics field test should have been subject to a Porter hearing, but the error was harmless. In *State v. Anwar S.*,\(^{121}\) lab reports concerning the presence of chlamydia in a child sexual abuse victim were not reasonably testimonial such that the defendant had a right to cross examine the technicians who did the tests. The tests were requested by a doctor to whom the child had been referred by a social worker, so the technicians would

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not have known that the tests were for a prosecutorial purpose. And in *State v. Jones*,122 the court properly submitted the DVD of a cruiser’s dashboard camera pursuant to Practice Book Section 42-23 by playing it back in the court room rather than the jury room where the latter lacked the proper equipment.

In a rare successful habeas matter, the court held in *Michael T. v. Commissioner of Correction*123 that failure to call an expert witness where the four-year-old victim had been repeatedly interviewed was ineffective assistance of counsel. Accordingly, the trial court properly granted the petition.

The substantive discussion concludes with a trio of cases concerning attorneys. In *Carrillo v. Goldberg*,124 the trial court abused its discretion in reducing counsel fees for a CUTPA claim by ninety-five percent where the defendant failed to prove the fees were unreasonable. In *Olszewski v. Jordan*,125 the majority held that a common-law charging lien against marital assets did not violate Rule 1.5 of the Rules of Professional Conduct. Then-Judge Espinosa dissented on the ground that the public policy against contingency fees in dissolution actions precluded charging liens. Lastly, *In re Nyasia H.*126 held that a former child-protection advocate was not disqualified under Rule 1.11 from representing DCF in a child protection matter where in her former role she was involved in securing counsel for the respondent as the child advocate played an administrative role with no substantive involvement in the matter.

The Appellate Court continues to remain current on its docket, thanks to the fourteen or so supposedly retired Supreme Court justices and Appellate Court judges that sit as judge trial referees. Judges Bishop, Borden, Pellegrino,
Schaller, Peters, Harper, and Flynn were the most active in 2013. Many of these judges also conduct pre-argument conferences. As for the regular judges on the court, Judge Robinson was nominated late in 2013 to take Justice Norcott’s place on the Supreme Court. Judge Eliot D. Prescott replaced him on the Appellate Court.
BUSINESS LITIGATION: 2013 IN REVIEW

BY WILLIAM J. O’SULLIVAN*

In 2013, Connecticut’s appellate courts often focused on the interpretation of contracts, including provisions, such as disclaimers of warranties and various boilerplate, that typically command little attention during the drafting process. These decisions provide a pointed reminder that business cases are sometimes decided not only by contract terms that are actively negotiated, but by “fine print” that is often taken for granted. This article will discuss those cases, as well as other decisions of interest to business litigators.

I. CONTRACT CASES

A. Disclaimers of Warranties

In Ulbrich v. Groth, the Supreme Court found that standard “disclaimer of warranty” language was insufficient to shield a foreclosing bank from liability when it “sold” items of personal property that it never owned. The defendant TD BankNorth, N.A. (bank) foreclosed a mortgage on the real estate and a security interest in the personal property associated with a special events facility in Wallingford. At the foreclosure auction, the auctioneer provided prospective bidders with a brochure that listed the types of personal property to be sold, which included office furniture, pool equipment, sporting goods, kitchen equipment and fixtures, maintenance equipment, tents, chairs, tables and vehicles. The brochure contained a disclaimer reciting that no warranties were being made as to the quality, quantity or usefulness of items sold; that all items were being sold “as is, where is”; and that items “may have been removed or added since the preparation of this list.”

Before the auction, the bank learned that many items of personal property used to operate the facility had been

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1 310 Conn. 375, 78 A.3d 76 (2013).
2 Id. at 383-84 & n. 6.
leased, not purchased, by the debtors, and therefore may not be subject to the bank’s security interest. However, this was not disclosed to prospective bidders.  

The high bidder, who tendered a bid in the amount of $1.65 million, received two bills of sale for the personal property, each of which recited that the bank was conveying to him “all of the [bank’s] right, title and interest, as such [bank] has or may have in and to the personal property described on [e]xhibit ‘A’ attached hereto…” The bills of sale also recited that “secured party makes no warranties or representations of any kind whatsoever, express or implied, with respect to the collateral. The assets are sold ‘as is’ and ‘where is’ and the secured party specifically disclaims any warranties of merchantability or fitness for any purpose whatsoever.”

The high bidder subsequently learned that numerous items on the site had not been included in the sale, because the debtors had not owned them. He and his assignee brought suit under a number of theories, including breach of the warranty of title. In its defense, the bank cited the disclaimer language in the bills of sale.

As for the first disclaimer, which recited that the bank was conveying only whatever “right, title and interest as such [bank] has or may have” in the items, the court agreed with various out-of-state authorities that, under Section 2-312 of the Uniform Commercial Code, “disclaimer language must be specific, and quitclaim type language stating that the seller is selling only what interest the seller has in the property is not sufficient.” Applying this standard, the court concluded that the first disclaimer was not sufficiently specific.

As for the second disclaimer, that the bank “makes no warranties or representations of any kind whatsoever, express or implied” with respect to the personal property, the court similarly agreed with “a number of courts [that] have held that a general statement that property is being sold as is and that

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3 Id. at 384-85.
4 Id. at 386.
5 Id. at 386-87.
6 Id. at 418-19. The court cited, among other authorities, Jones v. Linebaugh, 34 Mich. App. 305, 309, 191 N.W.2d 142 (1971), for the proposition that
the seller is making no warranties of any kind is insufficient to disclaim an implied warranty of title."7 Accordingly, the court found that the second disclaimer was inadequate.8

The decision in Ulbrich suggests that in cases involving the sale of goods, disclaimers of the warranty of title require much more specificity than disclaimers of other types of warranty, such as quality and merchantability. “Quitclaim” type language does not suffice.

Another business case involving the effect of warranty language— but in this instance, finding the contract language dispositive—was the Appellate Court’s decision in Western Dermatology Consultants, P.C. v. VitalWorks, Inc.9 The case involved the sale of medical-practice software, associated hardware, training and related services from the defendant VitalWorks, Inc. (VitalWorks) to the plaintiff. Claiming that the software did not function as promised, the plaintiff brought suit.

The contract between the parties disclaimed all warranties, with a limited exception.10 The trial court concluded that VitalWorks made additional express warranties, through various pre-contract representations, demonstrations and correspondence, and breached those warranties.11 But the Appellate Court disagreed. Noting that the contract contained a merger clause, the court found that through application of Article 2’s version of the parol evidence rule, General Statutes Section 42a-2-202, all prior warranties had merged into the one articulated in the contract.12

The Appellate Court went on to address an issue of first impression in Connecticut: whether the merger clause also

“very precise and unambiguous language must be used to exclude a warranty so basic to the sale of goods as is title.” Id. at 419.

7 Id. (citing cases).
8 Id. at 420.
10 The agreement contained an express warranty that for 90 days after installation, the software would “substantially conform to the [d]ocumentation when used by the [c]ustomer in a manner that is consistent with the [d]ocumentation,” and specifically disclaimed all other warranties. Id. at 184.
11 Id. at 185-86.
12 Id. at 190-91 (citing General Statutes § 42a-2-202).
barred the plaintiff’s claim for negligent misrepresentation, which had been based on various oral statements and promises that preceded execution of the contract. The court found that those representations “were explicitly superseded by the merger clause,” making it clear that VitalWorks “did not intend to be bound by any representation made prior to the contract being signed, and, therefore, reliance by the plaintiff on any such representation would not have been reasonable.” The Appellate Court reversed the judgment below, and entered judgment for the defendant.

B. Course of Dealing

In RBC Nice Bearings, Inc. v. SKF USA, Inc., the Appellate Court addressed whether a contract can be modified through “course of dealing” notwithstanding a contract term that requires all modifications to be put into writing. The defendant, a manufacturer of ball bearings, sold its product line and associated assets to the plaintiffs. As part of the transaction, the parties entered into a contract by which the defendant would serve as the plaintiffs’ exclusive distributor for certain products. Under that contract as amended, the defendant agreed to purchase prescribed minimum quantities of product, subject to certain adjustments, each contract year over a eight-year term. The contract also provided, “No provision of this [agreement] may be waived or amended other than by a written instrument signed by the party against whom enforcement of such amendment or waiver is sought.”

In years two and three of the contract, the parties negotiated downward adjustments of the defendant’s purchase requirements. In year four, the defendant fell short by approximately $1.8 million, but the plaintiffs did not formally accept the reduced amount nor did they take immediate action to enforce the contract. The defendant’s purchas-

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13 Id. at 194.
14 Id. at 197.
16 Id. at 291-92. This contract provision will be referred to as the “modification clause.”
es again fell short in years five and six, after which the plaintiffs terminated the contract and sued for breach of contract, among other claims.17  

Following a courtside trial, the trial court found that the parties “through their course of performance clearly modified the original terms of their agreement,” allowing the defendant to make purchases in accordance with its reasonably foreseeable business needs rather than in the quantities prescribed in the contract.18 The court therefore entered judgment for the defendant.

The Appellate Court reversed, holding that the parties’ agreement limited their ability to make a modification without a signed writing.19 The court noted that the Uniform Commercial Code (UCC) provides, at General Statutes Section 42a-1-303(f), that the parties’ course of performance “is relevant to show a waiver or modification of any term inconsistent with the course of performance.”20 But the same statute further states that this principle is subject to General Statutes Section 42a-2-209, which requires enforcement of a contractual modification clause.21 Because the subject contract contained clear and unambiguous language to this effect, the Appellate Court found that the trial court erred in holding that the contract had been modified through the parties’ course of dealing.22

Another “course of dealing” case, but with a very different outcome, was the Appellate Court’s decision in Alarmax Distributors, Inc. v. New Canaan Alarm Company.23 The plaintiff, a wholesale distributor of fire and home security equipment, and the defendant, an installer and servicer of security and fire alarm systems, entered into a credit agreement in 1999. Under their agreement, the plaintiff agreed

17 Id. at 293, 296-98.
18 Id. at 299.
19 Id. at 304 (citing General Statutes § 42a-2-209, which provides in relevant part that “[a] signed agreement which excludes modification or rescission except by a signed writing cannot otherwise be modified or rescinded”)
20 Id. at 300 (citing General Statutes § 42a-1-303(f)).
21 Id. at 299-300.
22 Id. at 299-301.
to ship product on credit, and the defendant agreed to pay its account in full within thirty days of shipment.\textsuperscript{24}

In practice, though, the parties ignored the thirty-day provision; the plaintiff routinely allowed late payments while continuing to ship product upon the defendant’s request, and the defendant periodically rendered lump-sum payments, always in round numbers. This pattern persisted for a period of years.\textsuperscript{25}

In 2005, the defendant found itself in financial crisis due to an embezzling bookkeeper. The defendant made a final purchase from the plaintiff in May 2005, received a demand letter from the plaintiff that November for an account balance of $112,309.90, and rendered partial payments of $2,500 in December 2005 and $1,500 in February 2006. The defendant made no further payments, and in September 2009, the plaintiff sued. The defendant asserted that its last payment had been due in June 2005 (thirty days after the final shipment), more than four years before the commencement of suit, and sought refuge in the four-year statute of limitations prescribed by General Statutes Section 42a-2-725, which applies to actions for the sale of goods.\textsuperscript{26}

The trial court found that, through the parties’ course of dealing, they had modified their agreement from an “invoice by invoice” system to an open account arrangement. The court further found that the defendant’s partial payment in February 2006 constituted an acknowledgement of the debt—the entire running debt, since the parties were now on an “open account” system—thus tolling the statute of limitations, and rendered judgment for the entire principal balance claimed by the plaintiff, in the amount of $109,984.55. Rather incongruously, given the finding that the parties’ original written agreement had been extinguished by their course of dealing, the trial court also awarded the plaintiff finance charges, in the amount of 1.5% percent per month, as provided in the parties’ credit agreement.\textsuperscript{27}

\textsuperscript{24} Id. at 321-22.
\textsuperscript{25} Id. at 324.
\textsuperscript{26} Id. at 322-24.
\textsuperscript{27} Id. at 324-25. The finance charges were almost equal to the amount of the underlying debt, with a total of $105,546.88 in accrued finance charges. Id. at 325.
The Appellate Court agreed with the trial court’s conclusion that the parties had modified their agreement to the point that the original agreement was extinguished and a new contract had been formed through course of dealing, and affirmed that part of the judgment. However, the court reversed the award of finance charges, agreeing with the defendant that the plaintiff “cannot rely on the original agreement as a basis to support the imposition of the finance charges while simultaneously relying on the existence of a new contract to reset the tolling of the statute of limitations.”

A comparison of the outcomes in *RBC Nice Bearings* and *Alarmax Distributors* is telling. In both instances, the plaintiff persuaded the trial court that the parties’ contractual relationship had been fundamentally changed by their course of dealing. The key distinguishing feature, resulting in opposite outcomes following appeal, was that one contract included a “no amendments without a writing” clause, and the other apparently did not.

C. Other Contract Cases

In *National Groups, LLC v. Nardi,* the Appellate Court rejected the argument that, as a matter of law, a false representation in a written contract may support a claim for negligent misrepresentation even if the party bringing the claim was unaware of the term. The plaintiff wished to move its business into the defendant’s building, and entered into a lease and purchase-option contract to that effect. The contract contained boilerplate language reciting that there was no pending litigation with respect to the property (no-litigation clause). In point of fact, there was a pending action between the defendant and the ground lessor of the property, pertaining to the number of available parking spaces at the site. The no-litigation clause slipped through the drafting process even though the attorneys for both sides knew about the pending action.

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28 Id. at 334.
29 Id. at 336.
31 Id. at 191-92.
When the pending action was concluded, the defendant was left with access to only forty-eight of the eighty-eight parking spaces at the site, which was inadequate for the plaintiff’s needs. The plaintiff sued, claiming, among other theories, negligent misrepresentation based on the no-litigation clause. The trial court entered judgment for the defendant. The court found that the plaintiff, through its attorney, had actual knowledge of the pending action. The plaintiff’s principal testified that she personally did not have such knowledge, and the trial court found that testimony credible. However, the court rejected her further testimony that she had relied on the no-litigation clause, noting that the “rather generic clause” was buried in the midst of a seventy-five page document.

On appeal, the plaintiff argued that because knowledge of all terms of a contract are imputed to contracting parties, it should follow as a matter of law that the parties are deemed to rely on those terms. The Appellate Court rejected this argument, noting that “the principles of contract law are not dispositive in a claim of negligent misrepresentation, which sounds in tort.... Imputed knowledge of the contract terms may justify enforcing the contract, but in tort a party’s knowledge does not automatically result in reasonable reliance. Reasonable reliance is distinct from mere knowledge.”

In *Keeper’s, Inc. v. ATGCKG Realestate, LLC*, the Appellate Court refused to enforce a tenant’s right of first refusal against a landlord that had received an unsolicited purchase offer at a time when the landlord had no interest in selling the property. The plaintiff tenant and defendant landlord were parties to a lease that provided in relevant part: “If, during the term of the lease, or any renewal or extension thereof, landlord receives a written, bona fide offer to purchase the premises, landlord shall provide ten-
ant with a copy thereof. Tenant shall have ten (10) days after receipt thereof to notify landlord that it elects to purchase the premises under the same terms and conditions as set forth in said offer ...”36

The landlord received an unsolicited written purchase offer from an unrelated party. The landlord had never offered to sell the property, and had no desire to do so. Within ten days, the tenant, which discovered the offer under circumstances unclear from the record, gave the landlord a written notice of its intent to exercise the right of first refusal. When the landlord refused to sell, the tenant sued for specific performance.37

The trial court granted the defendant landlord’s motion for summary judgment. The Appellate Court affirmed, citing numerous authorities in support of the proposition that as a matter of law, a right of first refusal becomes operative only if the property owner decides to sell. A right of first refusal is thus distinguishable from an option, which may be effective regardless of the owner’s wishes.38

The Appellate Court’s decision in Salce v. Wolczek39 addressed a real estate purchaser’s contractual obligation to share his profit with the seller, if the purchaser subsequently transferred “any ownership interest in the Premises” to a third party. The plaintiff and defendant each owned a half-interest in a limited liability company (LLC), which owned a property in Trumbull, Connecticut (premises). In April of 2007, they entered into an agreement (buyout agreement) by which the defendant would buy out the plaintiff’s interest for $1.75 million. The buyout agreement provided “If within one year of the closing hereunder any ownership interest in the Premises is transferred [to a person unaffiliated with the defendant’s family] based on a whole property value of more than $3,500,000, Buyer

36 Id. at 792.
37 Id. at 792-93.
38 Id. at 796-97.
[defendant] shall pay to Seller [plaintiff] an additional purchase price equal to one-half the excess at the same time as the transfer” (disgorgement clause).40

The parties closed on May 31, 2007 (parties’ closing date), and the LLC promptly conveyed the premises to an entity (family LLC) owned by the defendant’s family, which the parties agreed did not trigger the disgorgement clause. However, on March 19, 2007, within one year of the parties’ closing date, the family LLC entered into a real property purchase agreement with one Brian Vaughn (Vaughn purchase agreement) to sell the premises for $5.5 million. The latter closing transpired on July 1, 2008, more than a year after the parties’ closing date. The plaintiff sued, claiming that the Vaughn purchase agreement, which was executed within one year of the parties’ closing date, triggered the disgorgement clause. The trial court agreed, and granted his motion for summary judgment in the amount of $1 million.41

A divided panel of the Appellate Court affirmed.42 The majority noted that, under the doctrine of equitable conversion, the Vaughn purchase agreement had the effect of immediately transferring an equitable interest in the premises, even though the transfer of physical title would not occur until later. The disgorgement clause broadly applied to the transfer of “any ownership interest,” not more narrowly to, say, the “transfer of title at closing.”43

II. Remedies

In 2013, Connecticut’s appellate courts also issued a number of decisions about remedies available to plaintiffs in business cases.

40 Id. at 530-31.
41 Id. at 530-32.
42 Judge Borden dissented, opining that the disgorgement clause was ambiguous, making the case unsuitable for disposition by summary judgment. He noted that the clause provides for disgorgement of half the profit “at the same time as the transfer” to the third party. This suggests that the parties may have intended the disgorgement clause to apply only if the “actual transfer of legal title”—the event that typically generates funds—transpired within the one-year window.
43 Id. at 534-35.
A. The Economic Loss Doctrine

The Supreme Court’s decision in the foreclosure-auction case *Ulbrich v. Groth*,\(^44\) was notable also for its discussion of the economic loss doctrine (doctrine). Under that doctrine, as first articulated by the Connecticut Supreme Court in 1998, in *Flagg Energy Development Corp. v. General Motors Corp.*, “commercial losses arising out of the defective performance of contracts for the sale of goods cannot be combined with negligent misrepresentation.”\(^45\) The defendants in *Ulbrich* argued that under this principle, the plaintiffs’ claims for negligence and negligent misrepresentation should be barred.\(^46\)

The doctrine is rooted in General Statutes Section 42a-2-721, which provides in relevant part, “Neither rescission or a claim for rescission of the contract for sale nor rejection or return of the goods shall bar or be deemed inconsistent with a claim for damages or other remedy.”\(^47\) According to the court in *Flagg Energy Development Corp.*, the implication of the statute “is to make actions for fraud or misrepresentation presumptively inconsistent with postacceptance claims for breach of warranty.”\(^48\) Putting it another way, as the court did in *Ulbrich*, a burned buyer in a purchase-of-goods case can “choose between (1) pursuing a breach of warranty claim under the contract and (2) rescinding the contract and pursuing a tort claim” – not both.\(^49\)

\(^{44}\) 310 Conn. 375, 78 A.3d 76 (2013). For a discussion of other aspects of this case, see supra at note 1 and surrounding text.
\(^{45}\) 244 Conn. 126, 153, 709 A.2d 1075 (1998).
\(^{46}\) *Ulbrich*, 310 Conn. at 399.
\(^{47}\) The Supreme Court found, contrary to the trial court, that while the doctrine has its roots in Article 2 of the UCC, it may be applied in the Article 9 setting. *Id.* at 402.
\(^{48}\) *Id.* at 401.
\(^{49}\) *Id.* at 407, n. 29. The court acknowledged that in *Williams Ford, Inc. v. Hartford Courant Co.*, 232 Conn. 559, 579 (1995), it had stated broadly that “a remedy on the contract is independent of a remedy for negligent misrepresentation,” but clarified that the court intended to say in that case “a remedy on the contract and a remedy for negligent misrepresentation may be independent remedies.” *Ulbrich*, 310 Conn. at 405-06 (emphasis in original). Cases that implicate the economic loss doctrine are among those in which the two categories of remedies may not be pursued concurrently.
Because the contract in *Ulbrich* “involves a sale of goods covered by the UCC, the exclusive remedy for [a negligent misrepresentation] claim would be to reject the goods and to rescind the contract, a remedy that the plaintiffs in the present case do not seek.” Rather, they sought damages, a remedy not permitted under the economic loss rule. Accordingly, the Supreme Court reversed the judgment for the plaintiffs on their negligence and negligent misrepresentation claims.

The court next turned to the issue of whether or not the economic loss rule similarly barred the plaintiffs’ claims under CUTPA, as the Supreme Court had ruled in the *Flagg Energy Development Corp.* case. Overruling that aspect of the *Flagg* decision, the court declared that “the economic loss doctrine does not bar claims arising from a breach of contract, including a breach of contract for the sale of goods covered by the UCC, when the plaintiff has alleged that the breach was accompanied by intentional, reckless, unethical or unscrupulous conduct.” Because “aggravated” contract breaches of this type may support a CUTPA claim, and because the plaintiffs had pled and proved such conduct, judgment in their favor on the CUTPA count was proper.

B. Attorneys’ Fees, Costs, Punitive Damages and Interest

In *Total Recycling Services of Connecticut, Inc. v. Connecticut Oil Recycling Services, LLC*, the Connecticut Supreme Court weighed in, for the first time, on the issue of awarding legal fees to a successful litigant when some but not all of the claims provide for such an award. The plaintiff sued the defendant for the breach of three contracts in connection with the defendant’s purchase of the plaintiff’s business. Of the three contracts—one for the sale of equipment (equipment contract), one for the sale of goodwill

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50 *Id.* at 406.
51 *Id.* at 407-08.
52 *Id.* at 409.
53 *Id.* at 412.
54 *Id.* at 410.
55 *Id.* at 413.
56 308 Conn. 312, 63 A.3d 896 (2013).
(goodwill contract) and a covenant not to compete (noncompete contract)—all but the equipment contract contained a provision entitling the defendant to attorneys’ fees in the event of a breach by the plaintiff.  

The defendant counterclaimed for breaches by the plaintiff of all three contracts. Following trial, a jury rejected the plaintiff’s contract claims; found for the plaintiff on a claim of unjust enrichment; and found for the defendant on its counterclaim. The jury awarded the defendant damages only for breach of the equipment contract, the only contract lacking an attorneys’ fees provision.

The trial court initially denied the defendant’s motion for attorney’s fees, and the Appellate Court reversed. On remand, at a hearing on the defendant’s ensuing motion for attorneys’ fees, the defendant argued that apportionment of legal fees among the claims and counterclaims under the various contracts was not possible, and introduced expert testimony that “apportionment in a case such as the present one was neither practicable nor consistent with general legal billing practices.” The trial court again denied the motion for attorney’s fees, noting that the defendant did not “identify which reasonable attorney’s fees were incurred in prosecuting its breach of contract counterclaims with regard to the contracts that specifically provide for attorney’s fees.” A divided panel of the Appellate Court affirmed.

The Supreme Court reversed. Drawing in large part on federal caselaw, as well as several Connecticut Appellate Court cases addressing fee awards under CUTPA, the court ruled that “when certain claims provide for a party’s recovery of contractual attorney’s fees but others do not, a party is nevertheless entitled to a full recovery of reasonable fees.

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57 Id. at 315.
58 Id. at 316.
59 Id. (citing Total Recycling Servs. of Connecticut, Inc. v. Connecticut Oil Recycling Servs., LLC, 114 Conn. App. 671, 680-81, 970 A.2d 807 (2009)).
60 Id. at 318.
61 Id. at 319.
63 Id. at 328-33.
attorney’s fees if an apportionment is impracticable because the claims arise from a common factual nucleus and are intertwined.”64 The court remanded the case for further proceedings.65

In Aaron Manor, Inc. v. Irving,66 the Connecticut Supreme Court gave an expansive reading to General Statutes Section 42-150bb (statute),67 which allows a consumer who successfully defends or prosecutes a claim arising under a commercial contract to be awarded an attorneys’ fee, if the contract contains an attorneys’ fee clause for the benefit of the commercial party.

The plaintiff, a skilled nursing care facility, brought suit against the defendant, who had signed a “Patient/Resident Admissions Agreement” (admission agreement) in connection with her father’s admission into the plaintiff’s facility. Under the admission agreement, the defendant signed as a “responsible party” who agreed that, to the extent she had control over or access to her father’s assets, she would use those funds for her father’s welfare, including paying the plaintiff for services rendered to him. However, the defendant never had her father’s power of attorney, nor was ever appointed conservatrix over his person or estate while he was alive, nor executrix or conservatrix of his estate after he

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64 Id. at 333.
65 Id. at 337-38.
67 The statute provides: “Whenever any contract or lease entered into on or after October 1, 1979, to which a consumer is a party, provides for the attorney's fee of the commercial party to be paid by the consumer, an attorney's fee shall be awarded as a matter of law to the consumer who successfully prosecutes or defends an action or a counterclaim based upon the contract or lease. Except as hereinafter provided, the size of the attorney's fee awarded to the consumer shall be based as far as practicable upon the terms governing the size of the fee for the commercial party. No attorney's fee shall be awarded to a commercial party who is represented by its salaried employee. In any action in which the consumer is entitled to an attorney's fee under this section and in which the commercial party is represented by its salaried employee, the attorney's fee awarded to the consumer shall be in a reasonable amount regardless of the size of the fee provided in the contract or lease for either party. For the purposes of this section, 'commercial party' means the seller, creditor, lessor or assignee of any of them, and 'consumer' means the buyer, debtor, lessee or personal representative of any of them. The provisions of this section shall apply only to contracts or leases in which the money, property or service which is the subject of the transaction is primarily for personal, family or household purposes.”
died. Her brother held her father’s power of attorney, and handled his financial affairs.\textsuperscript{68}

Following the death of the defendant’s father, the plaintiff sued her for unpaid services, claiming breach of contract and fraud. The admission agreement contained an attorneys’ fees provision. The defendant prevailed at trial, and subsequently moved for an award of attorneys’ fees pursuant to the statute.\textsuperscript{69}

The court noted that the statute provides protection to a “consumer,” defined as “the buyer, debtor, lessee or personal representative of any of them.”\textsuperscript{70} Reversing a divided panel of the Appellate Court,\textsuperscript{71} the Supreme Court held that the defendant was her father’s “personal representative” for purposes of the statute, even though she did not hold an “official” position such as conservatrix or attorney-in-fact.\textsuperscript{72}

In \textit{Clem Martone Construction, LLC v. DePino},\textsuperscript{73} the Appellate Court ruled that, in establishing recoverable attorneys’ fees for a foreclosing mechanic’s lienor, the trial court erred in excluding fees associated with defending against the homeowner’s counterclaim for poor workmanship. The court noted that “in order to succeed on the foreclosure claim, the plaintiff’s counsel necessarily had to defend against the defendant’s counterclaim ... that the plaintiff had failed to render substantial performance under the contract.”\textsuperscript{74}

On a cross-appeal in \textit{Ulbrich v. Groth},\textsuperscript{75} the plaintiff challenged the trial court’s denial of his request for an award of “nontaxable” costs, for such items as trial equipment, transcripts, third party copying, Westlaw research,

\textsuperscript{68} 307 Conn. at 611-12.
\textsuperscript{69} \textit{Id.} at 613, 617.
\textsuperscript{70} \textit{Id.} at 616 (emphasis in original).
\textsuperscript{71} The Appellate Court decision is reported at 126 Conn. App. 646, 12 A.3d 584 (2011).
\textsuperscript{72} 307 Conn. at 617.
\textsuperscript{74} \textit{Id.} at 331.
\textsuperscript{75} \textit{Ulbrich}, 310 Conn. 375. For a discussion of other aspects of this case, see \textit{supra} at note 1 and surrounding text and note 44 and surrounding text.
delivery costs, marshal fees, the jury fee and court fees. Ulbrich had made this request pursuant to General Statutes Section 42-110g(d), a section of CUTPA that allows award for “costs and reasonable attorneys’ fees.” The trial court denied the request, based on a decision of the Appellate Court, Miller v. Guimaraes, holding that awards for “costs” pursuant to General Statutes Section 42-110g(d) are limited to those specifically taxable by statute.

The Supreme Court reversed this aspect of the trial court’s decision. The court noted “it is well established that nontaxable costs may be awarded as punitive damages under the common law.” Given that CUTPA separately provides for awards of punitive damages pursuant to General Statutes Section 42-110g(a), and in light of the remedial purpose of CUTPA as a whole, the Supreme Court held that nontaxable costs may be recoverable as an element of punitive damages under the latter statute.

The Ulbrich decision is noteworthy also for a detailed analysis, under the factors articulated by the United States Supreme Court in Exxon Shipping Co. v. Baker, of whether or not the trial court’s separate award of punitive damages under CUTPA passed constitutional muster. Those factors include “whether the defendant’s conduct was reckless, intentional or malicious; whether the 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.... Of these factors, the reprehensibility of the defendant’s conduct is the most important.” The court found that the trial court’s award of treble damages was justified under the Exxon analysis.

76 Id. at 461.
77 Id.
79 Ulbrich, 310 Conn. at 462.
80 Id.
81 Id. at 462-63.
83 Ulbrich, 310 Conn. at 454-55 (citations and internal punctuation omitted).
Sikorsky Financial Credit Union, Inc. v. Butts\textsuperscript{84} presented the question of whether a contract term that governed the “postmaturity” interest rate, but did not explicitly apply “postjudgment,” should control the court’s award of postjudgment interest. The contract at issue, an installment sale contract for the purchase of a motor vehicle, imposed interest at the rate of 9.14% per annum, both before and after maturity. Upon the borrower’s default, the plaintiff repossessed and sold the vehicle, sued for a deficiency, and obtained a judgment. The trial court applied the contract interest rate up to the date of judgment, but awarded discretionary postjudgment interest at two percent per annum, pursuant to General Statutes Section 37-3a.\textsuperscript{85}

On appeal, the plaintiff argued that the contractual interest rate should have applied to both pre- and postjudgment interest. Noting that the contract did not expressly address postjudgment interest, the Appellate Court disagreed, and affirmed the judgment below.\textsuperscript{86}

C. Other Remedies Cases

In Nation Electrical Contracting, LLC v. St. Dimitrie Romanian Orthodox Church,\textsuperscript{87} the Appellate Court found a property owner liable in unjust enrichment to a subcontractor that had performed work on its property, even though the owner had fully paid its obligation to the general contractor on the project. The defendant contracted with Primrose Construction Company, Inc. (Primrose) to construct a church on its property. Primrose in turn hired the plaintiff to perform electrical work. In January of 2008, the plaintiff submitted an invoice to Primrose in the amount of $40,000 for services rendered. The following month, Primrose ceased work on the project, and submitted a final progress bill to the defendant, which refused to pay. That bill included the work performed by the plaintiff, which had

\textsuperscript{85} \textit{Id.} at 756-58.
\textsuperscript{86} \textit{Id.} at 758-60.
\textsuperscript{87} 144 Conn. App. 808, 74 A.3d 474 (2013).
fully performed its obligations under its subcontract, and in a workmanlike manner.88

Primrose recorded a mechanic’s lien against the defendant’s property. In a subsequent proceeding to discharge the lien, the court found that Primrose’s work overall had been unworkmanlike, that the defendant had reasonably expended funds in excess of the contract price to have the project completed by another contractor, that the defendant owed nothing further to Primrose, and that there was no lienable fund to which Primrose’s mechanic’s lien could attach. The court granted the defendant’s application to discharge Primrose’s lien.89

In a separate action, the plaintiff sued the defendant for its unpaid work, claiming, among other theories, unjust enrichment. The defendant argued that such a claim should be barred, in light of the ruling in the earlier case that it owed nothing further to Primrose, the general contractor. The trial court disagreed with the defendant, finding that the earlier ruling in the Primrose litigation had no such preclusive effect. Given that the defendant had received the benefit of the plaintiff’s work, and that the defendant had paid neither the plaintiff nor Primrose for that particular work, the plaintiff’s claim was subject to a straightforward analysis under the principles of unjust enrichment, which supported a judgment for the plaintiff. The trial court also awarded the plaintiff statutory prejudgment interest, pursuant to General Statutes Section 37-3a.90

The Appellate Court affirmed. The court agreed that the ruling in the first case discharging Primrose’s mechanic’s lien did not create an obstacle to the plaintiff’s subsequent claim for unjust enrichment. The court further found, in an apparent matter of appellate first impression, that statutory prejudgment interest for the wrongful detention of money may be awarded in actions for unjust enrichment.91

88 Id. at 810-11.
89 Id. at 811-12.
90 Id. at 813-14, 819.
91 Id. at 818-21.
In *DDS Wireless International, Inc. v. Nutmeg Leasing, Inc.*, the Appellate Court ruled that the common-law contract defense known as frustration of purpose cannot trump remedies spelled out in the parties’ contract. The defendant, an operator of a fleet of taxi cabs, had purchased a mobile dispatch system, with an associated service contract, from the plaintiff. The service contract allowed either party to cancel the agreement following default by the other party and expiration of a thirty-day notice-and-cure period.

When Nutmeg sent DDS Wireless a termination notice that did not comply with the notice provision in the agreement, DDS Wireless sued for nonpayment under the service contract. At trial, a principal of Nutmeg testified that the dispatch system was unreliable. Crediting that testimony, the trial court entered judgment for the defendant, finding that the purpose of the service agreement had been frustrated.

The Appellate Court reversed. Tracing the doctrine of frustration of purpose back to an English case from 1903, the court noted that the doctrine has been adopted in Connecticut and “acts to provide an excuse for nonperformance by a party whose purposes were thwarted by events the parties did not contemplate and could not foresee.” The Appellate Court ruled that the doctrine did not apply in the case before it, given that the parties had indeed contemplated the very circumstance at hand—dissatisfaction on the part of the customer with the performance of the system—and had prescribed a legal avenue to end the contractual relationship. Accordingly, and given that the defendant had not properly invoked the mechanism permitted

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93 *Id.* at 522.
94 *Id.* at 522-23.
95 The court referred to *Krell v. Henry*, 2 K.B. 740 (C.A. 1903), in which a would-be spectator of the coronation of King Edward VII contracted to rent an apartment overlooking the procession route. When the coronation was postponed and the procession cancelled, the spectator refused to pay for the rental. Following suit by the apartment owner, the court excused the breach, on the grounds that “the object of the contract was frustrated by the non-happening of the coronation and its procession on the days proclaimed.” *Id.* at 525-26.
96 *Id.* at 526.
under the contract, the court found that the trial court had erred in applying the frustration doctrine, and reversed the judgment below.\textsuperscript{97}

The promissory note at issue in \textit{General Electric Capital Corporation v. Metz Family Enterprises, LLC}\textsuperscript{98} contained a forum selection clause requiring any dispute to be litigated on the merits in New York, but allowing a party to elect any other jurisdiction “for equitable relief … including, but not limited to orders of attachment or injunction necessary to maintain the status quo pending litigation or to enforce judgments …”\textsuperscript{99} The plaintiff obtained a prejudgment remedy in the Connecticut Superior Court, from which the defendants appealed, claiming that through operation of the forum selection clause, the court lacked personal jurisdiction over them. The Appellate Court agreed with the defendants, and reversed the judgment below.\textsuperscript{100}

The court noted that under Connecticut practice, “a plaintiff’s application for a prejudgment remedy is not a stand-alone pleading,” but rather “is entirely dependent upon … an action … upon which a Connecticut court will render judgment.”\textsuperscript{101} The action brought by the plaintiff sought “legal relief in the form of money damages . . . [and not] any form of equitable relief.”\textsuperscript{102} That is, although the plaintiff sought equitable relief by way of its PJR application, the complaint itself “did not seek equitable relief and, instead, proceeded on a general breach of contract theory for which it sought legal relief.”\textsuperscript{103} Thus the plaintiff’s action “did not fall under the limited exception of the forum selection clause.”\textsuperscript{104}

The court’s reasoning is puzzling, given that the forum selection clause is not limited to “bringing an action for

\begin{itemize}
  \item \textsuperscript{97} \textit{Id.} at 527.
  \item \textsuperscript{98} 141 Conn. App. 412, 61 A.3d 1154 (2013).
  \item \textsuperscript{99} \textit{Id.} at 417, n. 2.
  \item \textsuperscript{100} \textit{Id.} at 422-23.
  \item \textsuperscript{101} \textit{Id.} at 424 (quoting Cahaly v. Benistar Property Exchange Trust Co., 268 Conn. 264, 273-74, 842 A.2d 1113 (2004)).
  \item \textsuperscript{102} \textit{Id.} at 425.
  \item \textsuperscript{103} \textit{Id.} at 427.
  \item \textsuperscript{104} \textit{Id.}
\end{itemize}
equitable relief”; rather, it broadly allows a party to “apply” for equitable relief in a forum of its choosing, which appears to be just what the plaintiff did in the case.

In Chief Information Officer v. Computers Plus Center, Inc.,\(^ {105}\) the Supreme Court held that when the state files a lawsuit against a private party, it may still assert sovereign immunity against a counterclaim for damages. The court rejected the defendant’s contention that in filing suit, the state had implicitly waived immunity to counterclaims. A defendant sued by the state must obtain the permission of the Claims Commissioner before counterclaiming for damages.\(^ {106}\)

The decision applies only to counterclaims at law; consistent with ancient caselaw, sovereign immunity does not bar equitable counterclaims to suits in equity.\(^ {107}\) In dictum, the court strongly intimated that sovereign immunity similarly would not bar counterclaims in recoupment—limited to reducing or defeating the state’s claim, but not seeking affirmative recovery.\(^ {108}\)

In Citibank N.A. v. Lindland,\(^ {109}\) the Supreme Court ruled that the successful bidder at a foreclosure auction could properly intervene in a foreclosure action, and move to open and modify the court’s supplemental judgment, even after title to the property had passed to him. The plaintiff sued to foreclose a second-position mortgage on property in Cromwell. The trial court, not realizing that the mortgage at issue was a second mortgage and that the property lacked equity, ordered a judgment of foreclosure by sale. The committee for sale was unaware of the first mortgage, and therefore did not disclose it to prospective bidders. Robert Olsen tendered the high bid in the amount of $216,000, and consummated the purchase on January 21, 2009, similarly unaware that the property was subject to a first mortgage—and indeed that that first mortgage had recently been foreclosed, in a separate action.\(^ {110}\)

\(^ {105}\) 310 Conn. 60, 74 A.3d 1242 (2013).
\(^ {106}\) Id. at 79, 91.
\(^ {107}\) Id. at 83.
\(^ {108}\) Id. at 77, n. 21.
\(^ {109}\) 310 Conn. 147, 75 A.3d 651 (2013).
\(^ {110}\) Id. at 151-54.
On February 26, 2009, the trial court entered a supplemental judgment disbursing $91,854.27 to the plaintiff in satisfaction of its mortgage debt.\textsuperscript{111} The court then entered a further supplemental judgment authorizing disbursement to the property owner, but execution of that order was stayed, and the court retained custody of the balance of the sale proceeds.\textsuperscript{112}

In April of 2009, Olsen learned the true state of affairs, successfully moved to intervene in the case, and moved to open and vacate the judgments of foreclosure by sale and the supplemental judgments. The trial court granted the motion to open.\textsuperscript{113}

The plaintiff appealed from that order, and the Appellate Court reversed, holding that Olsen lacked standing to pursue his claims against the plaintiff, and that the court lacked authority to open the foreclosure judgments after title to the property passed to him.\textsuperscript{114} The Supreme Court granted certification to appeal, and reversed.\textsuperscript{115} The court concluded that, given that Olsen had expended funds for the purchase of the property, and that the supplemental judgments addressed the distribution of those funds, Olsen met the test of classical aggrievement and thus had standing to pursue his claims.\textsuperscript{116} As for the court’s authority to grant him relief after title had passed, the Supreme Court noted that Olsen “does not seek any remedy relating to the property itself; it is the proceeds from the sale and the restitution thereof that is at issue.”\textsuperscript{117} Because the trial court’s authority over the property was immaterial, and its authority over the sale proceeds was clear, the court had authority to open the supplemental judgments.\textsuperscript{118}

\textsuperscript{111} \textit{Id.} at 154.
\textsuperscript{112} \textit{Id.}
\textsuperscript{113} \textit{Id.} at 154-56.
\textsuperscript{115} 310 Conn. at 175.
\textsuperscript{116} \textit{Id.} at 164-65.
\textsuperscript{117} \textit{Id.} at 168.
\textsuperscript{118} \textit{Id.}
III. BUSINESS TORTS

2013 featured several appellate cases about the reach of liability for tortious interference and unfair trade practice.

Landmark Investment Group, LLC v. Calco Construction and Development Company, 119 the Appellate Court drew a distinction between “aggressive business practices” 120 and tortious interference—agreeing with the trial court that the defendants had committed the former but not the latter. The plaintiff was a party to a purchase and sale agreement with Chung Family Realty Partnership, LLC (Chung, LLC) pertaining to a parcel of land in New Britain. Those parties had a falling out, and the plaintiff sued Chung, LLC seeking to enforce the agreement (Chung litigation). Meanwhile, the defendant John Senese, through his company Calco Construction and Development Company (Calco), entered into a backup agreement with Chung, LLC for the purchase of the property, which was contingent upon Chung, LLC prevailing in the Chung litigation. Senese played additional angles as well, purchasing the existing mortgages on the parcel, and funding Chung, LLC’s legal fees in connection with the Chung litigation.121

The plaintiff prevailed in the Chung litigation, obtaining an order, affirmed by the Appellate Court, of specific performance directing Chung, LLC to convey the property to the plaintiff.122 But the plaintiff was unable to capitalize on its victory, as the town had meanwhile commenced foreclosure of tax liens on the property, which eventually went to auction. The high bidder was a company formed by Senese.123

The plaintiff sued Senese and Calco, asserting claims of tortious interference, unfair trade practice, and civil conspiracy. The plaintiff sought a prejudgment remedy, but following a three-day hearing, the trial court denied the plain-

120 Id. at 47 (this is the trial court’s characterization of the behavior of the defendants that gave rise to the suit).
121 Id. at 41-46.
122 Id. at 46 (citing Landmark Inv. Grp., LLC v. Chung Family Realty P’ship, LLC, 125 Conn. App. 678, 10 A.3d 61 (2010), cert. denied, 300 Conn. 914, 13 A.3d 1100 (2011)).
123 Id.
tiff’s application, finding “no evidence that Senese enticed or manipulated Chung, LLC, into terminating its agreement with the plaintiff” or that “Senese and/or Calco made any misrepresentations or committed any other tort in the course of conduct which ultimately injured [the plaintiff].”124 The plaintiff appealed, but the Appellate Court, deferring to the trial court’s findings of credibility and weighing of the evidenced, affirmed the judgment below.125

In Marinos v. Poirot,126 the Supreme Court revisited the requirement that a plaintiff filing suit under CUTPA must allege and prove he or she has suffered an “ascertainable loss of money or property.”127 The plaintiff, executrix of the estate of a deceased attorney, brought suit against two attorneys, including a former employee, alleging that they had stolen clients, files, supplies and staff time from the decedent’s law office. Among the plaintiff’s various causes of action was a claim under CUTPA.128

In response to the defendants’ discovery request seeking a calculation of the alleged loss, plaintiff replied that an accounting “is ongoing, therefore no itemization can be listed herein. As soon as the cumulative value has been assessed we will forward a copy of the same.”129 However, the plaintiff never followed through with the promised information, and the trial court granted the defendants’ motion for summary judgment, observing that the plaintiff’s objection included no proof of loss beyond “conclusory statements and a list of office supplies allegedly taken . . . .”130

The Supreme Court affirmed. The court observed that, for purposes of CUTPA, “ascertainable loss” need only be “capable of being discovered, observed or established,” and not necessarily measured in a precise amount.131 But here, in the face of a summary judgment motion, the plaintiff

124 Id. at 47-48.
125 Id. at 52-55.
127 Id. at 708 (citing CONN. GEN. STAT. § 42-110g(a)).
128 Id. at 709-11.
129 Id. at 711.
130 Id.
131 Id. at 714.
“fail[ed] to offer any proof of any loss allegedly suffered.”132 The court brushed aside the plaintiff’s list of allegedly purloined office supplies, such as copy paper, paper clips, and note pads, observing that the act “is not designed to afford a remedy for trifles.”133

In *Reyes v. Chetta*,134 a business owner sold his business, used self-help to take the business back when his buyer defaulted—and found himself liable to the third party who in turn had bought the business from his buyer.

In 2007, Michael Amoruso entered into an agreement to sell his landscaping and snow removal business (business), consisting of customer accounts and equipment, to Nicholas Chetta, for the sum of $85,000. The debt was evidenced by a promissory note, which provided for acceleration of the debt upon default, but did not provide that Amoruso would thereupon have the right to take back his customers.135

Within a few months, in January of 2008, Chetta sold the business to the plaintiff, for a cash price of $50,000. That spring, Chetta stopped making payments on his note to Amoruso, and Amoruso learned that Chetta had sold the business to the plaintiff. Amoruso responded by contacting his former customers, telling them he was back in business, and encouraging them to cancel their business relationship with the plaintiff and return to him. He succeeded in recapturing approximately seventy percent of his former customers.136

Upon trial of the plaintiff’s ensuing lawsuit against both Amoruso and Chetta, the court found Amoruso liable for tortious interference with business relations and violations of CUTPA. The court entered judgment for the plaintiff for the entire $50,000 purchase price he had paid to Chetta, together with an award of prejudgment interest.137

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132 *Id.* at 716 (emphasis in original).
133 *Id.* at 715, n. 5 (citing Hinchcliffe v. Am. Motors Corp., 184 Conn. 607, 614, 440 A.2d 810 (1981)).
135 *Id.* at 760-61.
136 *Id.* at 761.
137 *Id.* at 762-63.
The Appellate Court agreed with the trial court’s findings as to liability, attaching particular significance to the fact that the loan agreement between the plaintiff and Amoruso did not provide Amoruso with the remedy of taking his customers back upon default. The court also noted that the purchase agreement provided that its terms would inure to each party’s successors and assigns, evidencing that the parties contemplated that Chetta might sell the business to a third party.

In State v. Acordia, Inc., the state sued the defendant, an independent insurance broker, alleging violations of the Connecticut Unfair Insurance Practices Act (CUIPA) and CUTPA. The defendant had entered into a program with five insurance carriers, under which the defendant would give them preferential consideration in placing insurance, and the carriers in turn would rebate one percent of the total premiums written through the defendant. The defendant did not disclose the existence of this program to its customers.

At trial, four of the defendant’s customers testified that they relied on the defendant to provide unbiased and independent advice regarding the purchase of insurance coverage, but that they had never been made aware of the program. The trial court found that the defendant had breached its fiduciary duty to its customers, and that this in turn gave rise to violations of CUIPA and CUTPA.

On appeal, the defendant argued that, as a matter of law, alleged violations of the common law, such as breach of fiduciary duty, cannot provide the predicate for violations of CUIPA. The Supreme Court agreed. CUIPA defines prohibited conduct as either those acts defined in General Statutes Section 38a-816, which has 22 subsections describing a broad array of practices, or those found to be unfair

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138 Id. at 766.
139 Id. at 766, n. 7.
140 310 Conn. 1, 73 A.3d 711 (2013).
141 Id. at 4 (specifically alleging violations of General Statutes §§ 42-110m and 38a-816).
142 Id. at 12.
143 Id. at 12-14.
practices after a hearing before the insurance commissioner, pursuant to General Statutes Sections 38a-817 and 818. The Supreme Court found that these are the only avenues for establishing a violation of CUIPA. The court further found that, absent a violation of CUIPA, the plaintiff’s claim under CUTPA could not stand.

IV. EXTENSIONS OF LIABILITY

In several cases, the appellate courts rewarded creative plaintiffs who sought to extend liability beyond the parties with whom they had contracted.

In *Brett Stone Painting and Maintenance, LLC v. New England Bank*, a bank implicitly assumed its borrower’s obligations under a home construction contract, and became liable for the entire cost of completing the house. The defendant bank (bank) agreed to lend up to $374,810 to Frederick Villar for the construction of a house. As part of the security for the loan, Villar granted the bank a conditional assignment of his construction contract with the plaintiff builder.

Following default of Villar’s obligations under the loan agreement, an officer of the bank urged the plaintiff to continue working on the house, knowing that the cost to complete would exceed the balance of funds available under the loan agreement. The plaintiff did so, and the bank rendered three partial payments but refused to pay the plaintiff in full for the work it had performed.

The trial court found that through its conduct, the bank had implicitly exercised its rights as assignee of the construction contract, thereby stepping into the shoes of the borrower and assuming the duty to pay. The court entered judgment for the plaintiff in the amount of $61,852.14, plus an award for attorneys’ fees pursuant to the contract.

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144 *Id.* at 20-27.
145 *Id.* at 37-38.
147 *Id.* at 674-75.
148 *Id.* at 678. The loan agreement required the improvements to be completed by February 28, 2008, which was not accomplished. *Id.* at 676.
149 *Id.* at 677, 686.
150 *Id.* at 678.
The Appellate Court found that the trial court’s factual finding as to assumption of the contract was not clearly erroneous, and affirmed the judgment below.151

In *Coppola Construction Company v. Hoffman Enterprises Ltd. Partnership*,152 the Supreme Court examined another angle of a many-faceted issue: when does the corporate form protect a company’s principal from personal liability in tort?

The plaintiff brought suit against both the first-named defendant (Hoffman Enterprises) and its principal, Jeffrey S. Hoffman (Hoffman). The action arose from certain site work that the plaintiff, a construction contractor, had performed on property owned by Hoffman Enterprises. In connection with that work, the plaintiff had dealt with Hoffman Enterprises’ putative construction manager and agent, Signature Construction Services, LLC (Signature). Signature purported to authorize the plaintiff to perform extra work, for which the plaintiff was never paid.153

In the single count of its complaint directed against the individual Hoffman, the plaintiff alleged that after the plaintiff performed its work, Hoffman repudiated his earlier representations that Signature was the agent for Hoffman Enterprises. The plaintiff therefore pursued Hoffman personally on a claim of negligent misrepresentation.154

In a motion to strike, Hoffman countered that the plaintiff’s claim against him was legally insufficient. Hoffman argued that even assuming Signature had lacked actual authority to act as Hoffman Enterprises’ agent, if he on behalf of Hoffman Enterprises had assured the plaintiff to the contrary (as alleged), that would have the effect of conferring apparent authority upon Signature to bind Hoffman Enterprises. In other words, if the plaintiff indeed had reasonably relied upon Hoffman’s representations that Signature was the agent of Hoffman Enterprises, that would give the plaintiff a contract remedy against Hoffman Enterprises, meaning there had been no “detrimental”

151 Id. at 686.
153 Id. at 344-46.
154 Id. at 346.
reliance as required for a viable claim of negligent misrep-
resentation. The trial court agreed with Hoffman, and
granted his motion to strike.\textsuperscript{155}

The Appellate Court reversed, noting that the plaintiff had
the “right to plead alternative causes of action based on the
same facts” and that “tort remedies may be different from
contract remedies, and damages may be sought from different
parties.”\textsuperscript{156} Following a grant of certification the Supreme
Court agreed and affirmed the judgment of the Appellate
Court. The Supreme Court noted the “black letter law that
an officer of a corporation who commits a tort is personally
liable to the victim regardless of whether the corporation
itself is liable.”\textsuperscript{157} The court also noted that, while the precise
issue at hand appeared to be one of national first impression,
courts in other jurisdictions had found “viable claims of neg-
ligent misrepresentation brought against corporate officers,
despite the existence of contractual remedies against the cor-
porate entity arising from the same conduct.”\textsuperscript{158}

In \textit{Joseph General Contracting, Inc. v. Couto},\textsuperscript{159} the
Appellate Court imposed personal contract liability upon
the owner of a business that was a party to a contract, find-
ing that in his conduct of post-contract modifications and
dealings, he had left it unclear if he was acting personally or
as an agent of the company.

The plaintiff, Joseph General Contracting, Inc. (compa-
ny), entered into a written contract with the defendants,
John Couto and Jane Couto, for the construction of a house
and carriage house. The owner and president of the compa-
ny was Anthony J. Silvestri.\textsuperscript{160} As the project bogged down,
Silvestri did a number of things that, in the eyes of the
court, “muddied the waters so that, over the course of per-

\begin{itemize}
\item\textsuperscript{155} \textit{Id.} at 346-47.
\item\textsuperscript{156} \textit{Id.} at 348 (citing Coppola Constr. Co. v. Hoffman Enters. Ltd. P’ship, 134
Conn.App. 203, 210, n. 4, 38 A.3d 215 (2012)).
\item\textsuperscript{157} \textit{Id.} at 354 (quoting Kilduff v. Adams, Inc., 219 Conn. 314, 331, 332, 593
A.2d 478 (1991)).
\item\textsuperscript{158} \textit{Id.} at 354-55.
\item\textsuperscript{159} 144 Conn. App. 241, 72 A.3d 413, \textit{cert. granted}, 310 Conn. 924, 77 A.3d 139
(2013).
\item\textsuperscript{160} \textit{Id.} at 244-45.
\end{itemize}
formance, it became unclear to [the Coutos] with whom they were transacting business.”161 Silvestri “pressured the Coutos to change the nature of the contract by paying for the development up front.”162 When the company was unable to obtain sufficient financing, he struck an agreement with the Coutos that they would be reimbursed for interest they paid on a construction loan that they procured. He also “individually” signed an escrow agreement with the Coutos in connection with estate paving, and obtained a permit for a dock associated with the project.163

The trial court found that on such facts, the Coutos “reasonably were entitled to infer from Silvestri’s conduct that he personally had become a party to the [construction] contract.”164 On the Coutos’ counterclaim, the court found Silvestri jointly and severally liable with the company for breach of that contract, as well as breach of implied warranty, trespass, and violations of CUTPA.165

The Appellate Court affirmed, finding it “reasonable for the [trial] court to find that . . . [Silvestri] did not clearly inform the Coutos that he continued, at all times, to be acting in a representative rather than in an individual capacity” and was therefore “a party to the modified contract and hence personally liable for breach of contract.”166

V. MISCELLANEOUS BUSINESS LAW CASES

In J.E. Robert Company v. Signature Properties, LLC,167 the Supreme Court found that a mortgage loan servicer, which was neither the owner nor the holder of the loan in question, had standing to pursue foreclosure in its own name. The court noted that under relevant provisions of the Uniform Commercial Code, persons entitled to enforce a negotiable instrument are not limited to owners and

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161 Id. at 252.
162 Id.
163 Id.
164 Id. at 252-53.
165 Id. at 245.
166 Id. at 253-54.
holders. Rather, an instrument may be enforced by a transferee, provided that “the transferor must intend to vest in the transferee the right to enforce the instrument [and] the transferor must deliver the instrument to the transferee so that the transferee has either actual or constructive possession.”

The court added as a cautionary note that under these circumstances, the foreclosing plaintiff has an additional evidentiary burden. “A nonholder in possession ... cannot rely on possession of the instrument alone as a basis to enforce it. ... [I]n cases in which a nonholder transferee seeks to enforce a note in foreclosure proceedings, if the defendants dispute the plaintiff’s right to enforce the note, the plaintiff must prove that right.” Here, the plaintiff met that burden by placing into evidence the agreement that designated the plaintiff as the servicer of the mortgage in question. That document specifically addressed the plaintiff’s right to enforce the mortgage by foreclosure.

The Appellate Court’s decision in Sojitz America Capital Corporation v. Kaufman contains the Connecticut judiciary’s first appellate-level examination of General Statutes Section 33-724 (statute), which governs the dismissal of shareholder derivative actions upon motion of the corporation. The plaintiff, a shareholder of nominal defendant Keystone Equipment Finance Corporation (Keystone), brought suit on behalf of Keystone against Todd Kaufman, a director and employee of Keystone. The plaintiff alleged

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168 Id. at 319-20 (citing General Statutes § 42a-3-301, which provides in relevant part: “A person may be a person entitled to enforce the instrument even though the person is not the owner of the instrument.” The official comment adds that “a person entitled to enforce an instrument ... is not limited to holders.”

169 Id. at 320 (citing General Statutes § 42a-3-203(a)).

170 Id. at 325-26, n. 18 (citations omitted).

171 Id. at 329.


173 General Statutes § 33-724 reads in relevant part as follows:

“(a) A derivative proceeding shall be dismissed by the court on motion by the corporation if one of the groups specified in subsection (b) or (e) of this section has determined in good faith, after conducting a reasonable inquiry upon which its conclusions are based, that the maintenance of the derivative proceeding is not in the best interests of the corporation. ... (1) A majority vote of qualified directors present at a meeting of the board of directors...."
that Kaufman had falsely attested to Keystone’s lenders that Keystone’s board had formally and properly authorized Keystone to enter into lending relationships with them. The plaintiff claimed that in so doing, Kaufman had exposed Keystone to potential liability to the banks and rescission of existing credit lines, in breach of Kaufman’s fiduciary duty to Keystone.174

The plaintiff sent a demand letter to Keystone’s board of directors, demanding that it remove Kaufman as a director, terminate his employment, and bring suit against him. The plaintiff further demanded that the board appoint an independent committee to investigate its allegations. The board replied with a letter rejecting the plaintiff’s demands.175

The defendants moved to dismiss the lawsuit, asserting that a qualified majority of Keystone’s directors, following a thorough inquiry, had determined in good faith that maintenance of the suit was not in the company’s best interests. The statute provides that when this is so, a derivative proceeding “shall be dismissed by the court on motion by the corporation.”176 The trial court granted the motion and entered judgment for the defendants, from which the plaintiff appealed.177

Applying plenary review to the judgment below,178 the Appellate Court first considered the threshold issue of whether the plaintiff’s complaint sufficiently “allege[d] with particularity,” as required by the statute,179 that a majority of the board did not consist of “qualified directors”180 at the

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174 Id. at 488-89.
175 Id. at 489.
176 CONN. GEN. STAT. § 33-724(a).
177 Sojitz, 141 Conn. App. at 490.
178 Id. at 495. The Appellate Court concluded that a dismissal pursuant to General Statutes § 33-724 should be reviewed as a mixed question of fact and law, making plenary review appropriate.
179 The heightened pleading requirement is prescribed by General Statutes § 33-724(c).
180 Id. at 496-98. General Statutes § 33-605(a)(1) provides that, for purposes of General Statutes § 33-724, a “qualified director” is one who does not have “(A) a material interest in the outcome of the proceeding, or (B) a material relationship with a person who has such an interest. . . .” Section 33-605(b)(2) further provides that “Material interest” means an “actual or potential benefit or detriment, other than one which would devolve on the corporation or the shareholders generally,
time the board decided to terminate the litigation.\textsuperscript{181} The plaintiff had alleged that two of Keystone's four directors “had full knowledge, or acted in reckless disregard of the actions taken by [Kaufman] addressed in this Complaint, and are not in a position to dispassionately determine whether the instant litigation is in the best interests of Keystone.”\textsuperscript{182} The Appellate Court agreed with the trial court that these allegations were insufficient to meet the statute’s heightened pleading requirement, and that for present purposes, the directors were “qualified” for purposes of the statute.\textsuperscript{183}

The court then turned to the issue of whether or not the plaintiff had established, as required by the statute, that the board did not reach its decision “in good faith after conducting a reasonable inquiry upon which its conclusions were based.”\textsuperscript{184} The court reviewed the affidavits and exhibits filed in connection with the motion to dismiss, including a board report describing the board’s inquiry and conclusions.

The report indicated that the board had reviewed, inter alia, the plaintiff’s writ and complaint; minutes from relevant shareholder and board meetings; relevant certifications delivered to Keystone’s lenders; and correspondence from the plaintiff’s counsel.\textsuperscript{185} It further indicated that the board had concluded that maintenance of the derivative action was not in the company’s best interests, for a variety of reasons: small likelihood of success, given the lack of provable damages; legal expense; disruption to the company’s operations if Kaufman’s employment were terminated; and negative impact on Keystone’s lending relationships.\textsuperscript{186}

\begin{itemize}
  \item \textsuperscript{181} 141 Conn. App. at 496-98.
  \item \textsuperscript{182} Id. at 500.
  \item \textsuperscript{183} Id. at 501.
  \item \textsuperscript{184} Id. at 502.
  \item \textsuperscript{185} Id. at 502, n. 17.
  \item \textsuperscript{186} Id. at 503.
\end{itemize}
The Appellate Court determined that its review of the board’s decision-making was limited by operation of the business judgment rule. Under this deferential standard, the court concluded that “the plaintiff has not met its burden of proving that the board’s inquiry was unreasonable.”\(^{187}\) The court added that it “may conduct a limited review into the board’s conclusions to determine that they follow logically from the inquiry, but may not scrutinize the reasonableness of its determination.”\(^{188}\) The court affirmed the judgment below.\(^{189}\)

The Appellate Court’s decision in *Fradianni v. Protective Life Insurance Company*\(^{190}\) contains a useful discussion about the “continuing course of conduct” tolling doctrine for purposes of statutes of limitation. The plaintiff, the owner of a universal life insurance contract written in 1992 with a predecessor of the defendant, alleged that he had been overcharged at the inception of the contract and annually thereafter, upon the payment of each premium. The defendant asserted that the claim was time-barred by the applicable statute of limitations, General Statutes Section 52-576, which imposes a six-year limitations period upon contract claims. The plaintiff responded that the limitation period had been tolled, under the continuing course of conduct doctrine.\(^{191}\)

The Appellate Court disagreed. The court ruled that the continuing course of conduct doctrine applies in “cases where it is the cumulative effect of the defendant’s behavior that gives rise to the injury.”\(^{192}\) The case at hand, by contrast, involved “a series of repeated breaches over a period of years,” each of which caused damages that “were readily calculable and actionable at the time of the breach.”\(^{193}\) The doctrine therefore did not apply. However, the court further found that the separate and discrete breaches that occurred within the limitation period were actionable.\(^{194}\)

\(^{187}\) *Id.* at 508.

\(^{188}\) *Id.* at 509.

\(^{189}\) *Id.* at 510.


\(^{191}\) *Id.* at 92-97.

\(^{192}\) *Id.* at 100.

\(^{193}\) *Id.*

\(^{194}\) *Id.* at 103.
For the fourth time in four years, the limited liability company known as 418 Meadow Street Associates, LLC, has generated appellate caselaw on the issue of when, in the face of dissension among the members, an LLC has authority to file suit. In 418 Meadow Street Associates, LLC v. One Solution Services, LLC, two members of the plaintiff landlord, who collectively owned a fifty percent interest in the company, brought suit against a tenant without the consent of the plaintiff’s third member, Barbara Levine, who owned the remaining fifty percent. The defendant claimed that the plaintiff had brought suit without proper authority, and therefore lacked standing to do so.

The LLC’s operating agreement and the relevant provision of the Limited Liability Companies Act (act) required the suit to be approved by a majority of the plaintiff’s membership. The act further provides that in determining the necessary vote, “the vote of any member ... who has an interest in the outcome of the suit that is adverse to that of the limited liability company shall be excluded.”

The trial court found that Ms. Levine had “an adverse interest in the outcome of [the] suit,” as a result of which her vote was properly excluded, allowing the suit to continue. The court made this finding based in large part on the history of contentious relations between Ms. Levine and the other members.

The Appellate Court disagreed. The court held that the trial court erred when it “focused on the animosity between Barbara Levine and the other members of 418 Meadow Street, rather than on whether Barbara Levine’s interest was adverse to the interest of 418 Meadow Street.”

proper inquiry is an adverse interest in the outcome of the litigation, not general contentiousness among the members. The Appellate Court remanded the case to the trial court to make a finding on the issue of “adverseness” under the proper standard.\textsuperscript{203}

In \textit{Little Mountains Enterprises, Inc. v. Groom},\textsuperscript{204} the Appellate Court considered the measure of damages that applies when a piece of real estate proves to have less value than promised. The defendants sold the plaintiff a parcel of land in Weston for the sum of $1.25 million. In the contract, the defendants “represent[ed] and warrant[ed] that the premises consists of two building lots each approved for a five bedroom single family dwelling.”\textsuperscript{205}

Five months after closing, the town’s zoning enforcement officer notified the plaintiff that in point of fact, the property did not have subdivision approval. The plaintiff did not notify the defendants about the issue, but instead proceeded to incur considerable expenses obtaining the necessary approval. The plaintiff then filed suit, claiming breach of contract and misrepresentation. Following a courtside trial, the trial court rendered judgment for the plaintiff in the amount of $77,741.60, including compensation for the plaintiff’s surveying fees, engineering fees, real estate taxes, and interest paid on bank loans.\textsuperscript{206}

The Appellate Court reversed the damage award. The court noted the rule that “limit[s] the damages award to the diminished value of the building whenever the cost of repairs is dramatically larger than the difference in value.”\textsuperscript{207} Here, the trial court noted that the plaintiff “did not provide the defendants with an opportunity to cure the defect in a ‘cost effective manner,’ that the plaintiff ‘underwent costly measures’ to obtain subdivision approval and that it had accrued ‘large amounts of damages’ to remedy the breach.”\textsuperscript{208} Such language seemingly hints at the possi-

\textsuperscript{203} Id. at 386.
\textsuperscript{204} 141 Conn. App. 804, 64 A.3d 781 (2013).
\textsuperscript{205} Id. at 806.
\textsuperscript{206} Id. at 806-08.
\textsuperscript{207} Id. at 811 (citing Levesque v. D & M Builders, Inc., 170 Conn. 177, 365 A.2d 1216 (1976), and Johnson v. Healy, 176 Conn. 97, 105, 405 A.2d 54 (1978)).
\textsuperscript{208} Id.
bility that the plaintiff’s measures had been economically wasteful, and perhaps disproportionate to diminution in value. But the plaintiff presented “no evidence as to the difference in the values of the premises as warranted and as sold,” meaning the trial court had lacked the necessary information to compare “diminished value” with “cost of repairs.” The Appellate Court remanded the case for further proceedings as to the measure of damages only.

The Appellate Court’s decision in *Moran v. Morneau* illustrates the principle that if a complaint is not well pleaded, a plaintiff is not entitled to judgment even against a defaulted defendant. In July of 2003, the plaintiff recorded a land records notice against the defendant’s property, claiming an interest in the property under the doctrine of constructive trust. In 2004, she obtained a prejudgment remedy of attachment against the property, and sued the defendant. In the meantime, in August 2003, the defendant had mortgaged the property, which mortgage was ultimately owned by Chase Home Finance, LLC (Chase).

The plaintiff obtained judgment against the defendant, recorded a judgment lien against his property, and sued to foreclose the judgment lien. Claiming that both her attachment and judgment lien related back to her constructive trust notice, the plaintiff named Chase as a defendant and obtained a default against Chase for failure to appear. Following the entry of a foreclosure judgment, Chase moved to set aside the default judgment and sought a judicial determination of the respective lien priorities. The plaintiff claimed that, because she had alleged the superiority of her lien in her complaint, and because Chase had been defaulted, the lien priority issue had been conclusively established as to Chase, barring judicial review of the issue.

The Appellate Court disagreed. Drawing on earlier precedent, the court observed that a default does not auto-

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209 *Id.*
210 *Id.* at 813.
211 140 Conn. App. 219, 57 A.3d 872 (2013).
212 *Id.* at 222-23.
213 *Id.* at 223-35.
matically trigger judgment, or entitle the plaintiff to the relief requested. Rather, default leads to judgment “only when the allegations in the well pleaded filing are sufficient on their face to make out a claim for judgment or relief.”\textsuperscript{214} Exercising plenary review over the legal sufficiency of the complaint, the court found an absence of legal authority for the proposition that the plaintiff’s attachment or judgment lien could relate back to her constructive trust notice.\textsuperscript{215} The default against Chase “did not obligate the court to accept this incorrect legal position in determining the priority order of the parties’ lien interests.”\textsuperscript{216}

VI. Conclusion

Connecticut’s 2013 appellate caselaw provides many cautionary tales about the importance of care in contract drafting and review. Many outcomes were influenced or dictated by standard contract language regarding warranties, merger, forms of notice, amendment, and the like. Whether drafting an agreement or mapping out a litigation strategy, counsel are reminded that language in the “miscellaneous” section of a contract may prove to be the most important language of all.

\textsuperscript{214} Id. at 225-26 (quoting Commissioner of Social Services v. Smith, 265 Conn. 723, 736-737, 830 A.2d 228 (2003)).
\textsuperscript{215} Id. at 226-27.
\textsuperscript{216} Id. at 229.
This article traces the development of the child protection function of the Connecticut Superior Court, juvenile division. While the delinquency court originated in 1903 as a major reform to separate juvenile offenders from the adult penal system,\(^1\) the care of neglected and dependent children had been a concern of Connecticut state and local government for centuries. Yet it was only in 1921 that the protection of these children became linked to the evolving juvenile court for delinquents. While the police initiated contact between the offending juvenile and the delinquency court, the non-delinquent child was brought to court through an executive child protection agency. This article outlines the evolution of Connecticut’s child protection system and its administrative arm, now known as the Connecticut Department of Children and Families. Paralleling this development, the child protection function of the juvenile court, as opposed to its delinquency function, became increasingly affected by laws passed by the United States Congress. The article concludes with a review of the federal mandates applicable to child protection.

I. Child Protection Before 1873

Before 1873 Connecticut towns shouldered the task of protecting neglected children by means of both public and private measures. The police made arrests in cases of child murder, rape, or gross abuse. In addition according to Zephaniah Swift, writing in 1795, “if there be any children who live idly, and are exposed to want, having none to take care of them,” then the selectmen were to take them into their care and find suitable arrangements.\(^2\) When children

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had no living parent, the town court of probate was to appoint a guardian.\textsuperscript{3} Swift’s description of the public role in juvenile care held true for the greater part of the 19th century as well.\textsuperscript{4}

Further, church groups came to the aid of neglected children. For example, in 1809, Protestant women formed the Hartford Female Beneficent Society for orphaned girls; in 1832, an asylum for indigent boys was opened in Hartford.\textsuperscript{5} Private placement was utilized as well. Five or six boys “were collected from the abodes of poverty, and placed under the care of a respectable family . . . .”\textsuperscript{6} Protestant women also opened a boys and girls orphan asylum in New Haven in 1833. These facilities allowed the residents to thrive, such as some former residents who served in the Civil War and were recognized as patriots for their efforts to preserve the Union.\textsuperscript{7}

Of course, the greater number of neglected children were, according to a document summarizing the situation, left to “almshouses, indenture, [and] apprenticing” as depicted in Dickens’ \textit{Oliver Twist}.\textsuperscript{8} Almshouses were established throughout Connecticut towns where destitute families were placed.\textsuperscript{9} In Wethersfield a “Bye Law” of the almhouse monitored behavior of children and provided for their “instruction and schooling.”\textsuperscript{10}

\textsuperscript{3} \textit{Id.} at 213.
\textsuperscript{4} \textit{See} ZEPHANIAH SWIFT, DIGEST \textsc{OF THE LAWS \textsc{OF THE STATE OF CONNECTICUT}}, Vol. I 48-49, 61 (1822). \textit{See also} Massachusetts Statutes (1866); \textsc{JOSEPH STORY, COMMENTARIES ON EQUITY JURISPRUDENCE ADMINISTERED IN ENGLAND AND AMERICA} 1341 (1888).
\textsuperscript{5} Editorial, \textit{The Orphan Asylum}, HARTFORD DAILY COURANT, March 29, 1853.
\textsuperscript{6} HARTFORD COURANT, December 4, 1832, at 3.
\textsuperscript{7} Hartford Orphan Asylum, HARTFORD COURANT, October 14, 1861.
\textsuperscript{8} \textit{See} Marjorie Siskey, Outline, \textit{History of Neglected and Uncared-for Children}, Connecticut State Library Archives, RG 019, Series 5 (1954). Ms.Siskey retired in 1971 after many years as a supervisor of the State Welfare Department’s Bureau of Child Welfare. She was first appointed in 1945, a graduate of Wellesley College and New York School of Social Work.
\textsuperscript{9} An almshouse was a residence for the town paupers during the 18th and 19th centuries. It was also known as a poor house or a poor farm. Children would be placed by the town selectmen with their parents in the almshouse, or alone if their parents were deceased, and there was no other guardian available. \textit{See} http://www.poorhousestory.com/poorhousesinconnecticut.html.
II. THE RISE OF GOVERNMENTAL CHILD PROTECTION AGENCIES –1873 TO 1921

A. The ASPCA Steps Up to Protect Children

After the Civil War, Connecticut faced the real—or sometimes perceived—problems of increased immigration, family dissolution, and lack of “temperance.” Child neglect became an increasingly pressing concern.

Mark Twain’s *Adventures of Huckleberry Finn*, written in the mid-1870's, was a call for reform of the laws protecting the neglected child. One commentator stated:

So much attention is paid to *Huckleberry Finn’s* treatment of subjects such as slavery and race relations that its theme of child abuse is generally overlooked. It is a surprising oversight, in view of the fact that the novel’s central character is a young boy running away from an alcoholic father’s physical abuse.\(^{11}\)

Twain accurately relates a scene in probate court (in Missouri, but exactly like Connecticut where Twain lived at the time) as Judge Thatcher and the widow ask the court to “let one of them be [Huck’s] guardian.” The probate judge, however, “was a new judge that had just come, and he didn’t know the old man [Pap]; so he said courts mustn’t interfere and separate families if they could help it; said he’d druther not take a child away from his father. So Judge Thatcher and the widow had to quit the business.”\(^{12}\)

In this passage, Twain characterized the status of Connecticut law in the early 1870's, demonstrating the reliance on the probate court and on the common presumption in favor of natural parents.\(^{13}\) Twain also shows that the probate system did not guarantee that Huck, like many of the children of his day, would be protected from parental bru-

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12 MARK TWAIN, HUCKLEBERRY FINN, 26 (University of California Press) (1985)
tality. But there were changes on the way. In New York in 1874, an event occurred that facilitated the next step in child protection. As Professor John E.B. Myers stated: “Organized child protection emerged from the rescue in 1874 of nine-year-old Mary Ellen Wilson, who lived with her guardians in one of New York City’s worst tenements, Hell’s Kitchen.”

A missionary, Etta Wheeler, learned from neighbors of the child’s being beaten and abused. Wheeler told the police of the neighbors’ reports of Mary Ellen Wilson’s crying, but the police refused to act on hearsay evidence. Children’s charity organizations welcomed the possibility of taking Wilson into their care, but informed Wheeler that they could not legally enter her home to remove her. Wheeler then turned to Henry Bergh, founder of the American Society for the Prevention of Cruelty to Animals (“ASPCA”). “Why not go to Mr. Bergh,” urged Wheeler’s niece, “for she is a little animal, surely.”

The ASPCA succeeded in obtaining a court order removing the child from her home. A correlation thereby was established between cruelty to animals and cruelty to children. Just a few years later, in 1880, the Connecticut Humane Society (“CHS”) was formed. The society maintained the link between animals and humans seen in the Wilson case from New York. The secretary of the CHS told a Hartford Courant reporter: “[CHS] is against cruelty in general. It does not count the number of feet: it reckons the capacity of suffering. If one tortures his horse, [the society] is for the horse; if his wife or child, it is for them.”

An editorial in the Courant also shows the animal-child link, in discussing “some recent cases attended to” by the CHS. In one case, children were living in a hovel while the

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18 Id.
father and mother drank into oblivion. In another, a nine-year-old cared for younger siblings while the father and mother were in and out of jail. In a third case, the mother was institutionalized, the father was working part-time and the children were deathly ill with fever. The editorial concluded with the CHS’s efforts to remedy the abuse of several horses and cows and to issue a stop order to a farmer who was selling diseased beef.19

B. Child Protection Under the Board of Charities

With the economic downturn of 1873, the state created an institution to aid those living in poverty: the Board of Charities (“Board”). By legislation passed in the session of 1873,20 the Board was established with three men and two women, each appointed by the governor.

The legislation provided that the Board was to “inspect all incorporated hospitals, and institutions in which persons are detained by compulsion, to ascertain whether their inmates are properly placed, or improperly held.” The Board was permitted to examine witnesses and remedy any abuses found. The institutions were given the right to respond to accusations and to appeal to the governor over orders of the Board. A Board visitation schedule was established; during visits the Board was to ask residents if they wished to talk in private.

The Board maintained contact with similar boards created about the same time in other states. On May 20, 1874, four of the boards (Massachusetts, Connecticut, New York and Wisconsin) held a national conference in New York City, seen today as a milestone in the development of state welfare organizations.21

19 The Humane Society: Some Recent Cases Attended To, Hartford Courant, November 22, 1888.
The original legislation limited Board inspections to hospitals and prisons, including facilities for juvenile offenders. The Board was given no duties regarding neglected children, but it soon recognized that numerous children languished in almshouses. It determined that the placement of children in almshouses was to end.\textsuperscript{22}

A study commission established by the legislature in 1882\textsuperscript{23} consisting of four members of the Board recommended the creation of temporary county homes for placement of children, in lieu of their placement in almshouses. Under legislation subsequently passed on this recommendation in 1883-1885,\textsuperscript{24} the temporary county home system was created, supervised by a board of management. Children from two to sixteen years of age were eligible for placement in the county homes, while the town selectmen continued to be responsible for children under four as well. Placement in the county homes was designed to be temporary until foster homes were found for the children.\textsuperscript{25}

The board of management of each county home had the power to place children in foster homes; once the child was committed to the county home, the natural parent was without legal authority to intervene with this placement. The Connecticut Supreme Court upheld this principle in \textit{Whalen v. Olmstead}.\textsuperscript{26}

The Board initially had representation on the county homes’ board of management. Agents of the state Board visited the homes, but had no power to petition for commitment to the homes. Reading the 1883 legislation creating


\textsuperscript{23} Special laws, 1882, no. 209.

\textsuperscript{24} 1883 session, ch. 126, 1885 Session, ch. 116.

\textsuperscript{25} Siskey, \textit{supra} note 8, notes that: “[F]requently, however, children were not placed until they were old enough to be of value from the point of view of doing chores.” This meant that the child would live many years what was intended as a temporary home, but effectively became permanent. The child was thus denied one of the purposes of the county home: to arrange as soon as possible for placement in a foster or adoptive home.

\textsuperscript{26} 61 Conn. 263, 23 A. 964 (1891). The Supreme Court continued to follow \textit{Whalen} as long as the county homes remained in existence. \textit{See} Goshkarian’s Appeal from Probate, 110 Conn. 463, 148 A. 379 (1930).
the county homes,\textsuperscript{27} it is clear that the General Assembly intended to end the practice of placing children in almshouses. Section 1 states that the county temporary homes were established “for the better protection of children below the ages of two and sixteen . . . waifs, strays, children who are or may hereafter be committed to hospitals, almshouses, or workhouses, and all children within said ages.” In Section 3, the overseers of the poor were prohibited from placing or retaining children in almshouses. By Section 4 of the 1883 act, a probate court, justice of the peace or the Connecticut Humane Society could move to commit a child to a county temporary home.\textsuperscript{28} Despite the need for the board to obtain the right to commit a child, the Board faced opposition in the legislature to its request for a $3000 budget to pay the salary of Henry E. Burton, its secretary. The opponents charged that Burton was given a patronage post as he previously served as executive secretary to Governor Jewell.\textsuperscript{29} The opposition did not convince the legislature and the Board was included in the commitment process.

In 1888, the Board exercised its newly-obtained powers. A three-year-old child, Lilly Rhodes, was residing in the Hartford poorhouse, and under the 1883 legislation, the Hartford selectmen should have sent Lilly to the county temporary home in East Hartford. The Board petitioned the Hartford probate court to have this placement occur. The first selectman, George Fowler, resisted the Board’s petition. He told the probate judge that the child was paralyzed as a result of scarlet fever. The selectmen claimed to be “properly helping” Lilly.

The probate judge disagreed with Selectman Fowler and placed the child in the East Hartford home. Fowler later charged that the only reason that the Board sought the East Hartford placement was to increase the temporary home’s income flow.\textsuperscript{30} The Board and the temporary home replied that the law was being violated by Fowler and his fellow

\textsuperscript{27} 1883 session, ch. 126.
\textsuperscript{28} 1888 statutes §3658.
\textsuperscript{29} NEW YORK TIMES, February 20, 1885.
\textsuperscript{30} Children in Almshouses, HARTFORD COURANT, March 12, 1888.
The only goal of the temporary home was to attend to Lilly’s medical issues and find a foster home for the child so that she would not remain in Hartford’s almshouse.\textsuperscript{31} She was subsequently placed in a foster home. By 1890, the Board had assisted in committing over 1,500 children with only a staff of three.\textsuperscript{32}

The Board continued its original function of inspecting the temporary homes and exposing areas needing remediation. In one inspection of the Hartford County home at Warehouse, Miss Mary Hall reported that “Mrs. Pitkin” was absent and had left her mother in charge. The bathrooms were not clean, the outside grounds were in a disorderly state and the children looked neglected.\textsuperscript{33}

The Connecticut Humane Society’s statewide role in child care also continued under the 1883 legislation creating temporary homes.\textsuperscript{34} The CHS’s annual report for 1886 stated that its agents had placed 83 children in temporary homes. The CHS’s efforts for children as well as animals continued into the 20th century. At one point, the \textit{Courant} praised the Society as a “practical and beautiful charity.”\textsuperscript{35}

As the 20th century began, the first indication of different approaches to child protection surfaced: Was it better to have temporary county homes or should the state take over the care of neglected children? The board of management of the temporary homes strongly objected to “the boarding of county home children in private asylums at state expense.”\textsuperscript{36} A \textit{Courant} editorial blasted a legislative proposal to allow private orphanages supported by the state to be on the same footing as the county homes, arguing that the county homes could take care of all dependent children. The proposed legislation, which ultimately failed to pass, was “mischievous” and would encourage parents to “throw their children upon the public for support.”\textsuperscript{37}

\textsuperscript{31} \textit{The Lilly Rhodes Case}, \textit{HARTFORD COURANT}, March 21, 1888.
\textsuperscript{32} See Siskey, supra note 8.
\textsuperscript{33} \textit{Dirt and Disorder}, \textit{HARTFORD COURANT}, September 5, 1894.
\textsuperscript{34} \textit{The Connecticut Humane Society Annual Meeting – A Good Year’s Work}, \textit{HARTFORD COURANT}, January 2, 1887.
\textsuperscript{35} \textit{A Practical and Beautiful Charity}, \textit{HARTFORD COURANT}, October 15, 1910.
\textsuperscript{36} \textit{Board of Charities: Annual Report}, \textit{HARTFORD COURANT} December 24, 1902.
\textsuperscript{37} \textit{A Mischievous Bill}, \textit{HARTFORD COURANT}, June 10, 1901.
The Board had a variety of responsibilities regarding state institutions including hospitals and prisons—both adult and juvenile—in addition to its duties in regard to neglected children. The child care function took up an increasing amount of time and in 1917, the Board created a Department of Child Welfare.\(^{38}\) In addition, the Board urged in a report to Governor Marcus Holcomb that a study committee be formed to look into the care of children placed in the county homes as well as private facilities.\(^{39}\)

**III. The Juvenile Court and the Welfare Department**

The study committee, sanctioned by the legislature and appointed by Governor Holcomb, began its work in 1919 as the Commission on Child Welfare ("Commission"), with fifteen members, a budget of $22,000 and an executive secretary, Professor H.P. Fairchild of New Haven.\(^{40}\) In 1921, the Commission produced its report.\(^{41}\) After declaring that the 20th century was the "century of the child," the Commission made two recommendations.

The first was based on the Commission's conclusion that "[t]here is no state-wide agency which makes a specialty" of child care.\(^{42}\) In addition there was an inadequate system in place for removal of children from the county-temporary homes to foster care. Nor could a court place a child directly in a private institution instead of a county home.\(^{43}\) The Board, according to the Commission, was unable, due to staff and budget limitations, to remedy these deficiencies. The Board had not made visits to certain institutions in two years. Its record-keeping was abysmal.\(^{44}\)

The Commission therefore recommended that the Board be dissolved and a public welfare department be created. The Department of Child Welfare, then-currently in the

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\(^{38}\) Dana, *supra* note 22, at 31.


\(^{40}\) REPORT OF THE CT COMMISSION ON CHILD WELFARE TO THE GOVERNOR, VOL. ONE (1921).

\(^{41}\) *Id.*, at vi.

\(^{42}\) *Id.* at 7.

\(^{43}\) *Id.* at 7-10.

\(^{44}\) *Id.* at 14-16.
Board, should be placed as a division in the newly-created state welfare department as the Bureau of Child Welfare. The new bureau should have a minimum field staff of ten and was charged with initiating improvements, licensing institutions, reporting on child care institutions, supporting local authorities’ placements and taking its own actions to find foster care for committed children.\(^{45}\)

The second fundamental recommendation of the 1921 Commission relied upon a development that had initially occurred in Connecticut in 1903: the creation of a juvenile court. The progressive philosophy of the age had already resulted in the establishment of a juvenile court for delinquents.\(^{46}\) Now the Commission recommended that the care of neglected children also become part of the juvenile court.\(^{47}\) The Commission made use of the prevailing philosophy that the juvenile court functioned as a “clinic” and the judge as a “physician.”

At the time of the Commission’s Report the juvenile court did not exist as a separate entity. For budgetary reasons, juvenile court for delinquents was composed of the town, city and borough courts, and in some towns, the offices of the justice of the peace. The Commission sought to include non-delinquent, neglected children in this system, such as it was. “There is no ground for making a sharp differentiation between a delinquent child and an uncared-for child or neglected child as far as the agency of treatment is concerned.”\(^{48}\) The agents of the new Bureau of Child Welfare were to have a direct relationship with all juvenile courts. The Bureau’s chief juvenile probation officer was to supervise both delinquency and neglect at the juvenile court.\(^{49}\)

Wilbur F. Gordy, a Commission member and president of the Hartford Board of Education, praised the Commission proposals as “humanistic.”\(^{50}\) The suggested legislation was

\(^{45}\) Id. at 23.
\(^{46}\) The progressives favored a separate juvenile court over the probate court. Hart, supra note 13, at 67.
\(^{47}\) Report, supra note 40, at 25.
\(^{48}\) Id. at 31.
\(^{49}\) Id. at 23.
\(^{50}\) Gordy Likes Child Welfare Program, HARTFORD COURANT, February 25, 1921.
also good economics, reducing “crime, vice, poverty, and kin-
dred evils.” On March 6, 1921, welfare groups “stormed
the capitol” to support the proposals as they were taken up
by a legislative committee.

But opposition groups soon surfaced. Two incidents high-
light the opposition that surfaced to the proposed legisla-
tion. At a legislative hearing held on February 23, 1921, an
auxiliary bishop named Murray opposed merging the func-
tion of protecting neglected children into the delinquency
court. It would be “fundamentally vicious” to associate neg-
lected children with those classed as delinquent.

The second incident highlighted why the Board of
Charities’ Child Welfare Bureau could not be left in place,
and therefore, not replaced by the new Welfare Department
bureau. A debate over the new bureau arose at the appropri-
ations committee meeting of April 27, 1921. Chairman Eaton
asked why giving $75,000 to the Board of Charities would not
be preferable to creating a new agency and bureau, thereby
increasing the number of state agencies. The executive sec-
retary of the Commission that issued its report in 1921,
Fairchild, replied that “no competent person familiar with
child welfare work” would undertake the task in Connecticut
“for anything near $75,000 . . . .” He pointed out that children
are embarrassed by their assignment to a Board of Charities,
inasmuch as they were not “objects of charity.”

A Mrs. George Tompkins of Westport made a bitter
attack on the county home in Norwalk. An attendee of the
hearing warned of the dire consequences to the Republican
Party if the General Assembly failed to adopt the welfare
bill with its child care provisions. His comment was called
frivolous by an appropriations committee member.

Relying on the Commission Report of 1921 and the
debates in the legislative committees, the General Assembly

51 Id.
52 Hartford Courant, March 7, 1921.
53 Child Welfare Bill is Fundamentally Vicious, Declares Bishop Murray,
Hartford Courant, February 24, 1921.
54 State Charities Board Given Prior Claim on Child Welfare by Hall,
Hartford Courant, April 28, 1921.
55 Id.
passed “An Act concerning Juvenile Courts” as well as another creating the welfare department and a child bureau.\textsuperscript{56} The juvenile court definition included neglected and uncared-for children. The juvenile court consisted in actuality of the justice, town or police court in each town in separate session from its adult session. The Welfare Department was to conduct foster care home placement in cooperation with the county homes. It would also license and inspect all child institutions. As initially instituted, the towns still retained jurisdiction over neglected children to age four.\textsuperscript{57}

As the state Welfare Department, Bureau of Child Welfare was emerging, the Connecticut Humane Society continued its statewide office for children as well. The CHS recognized that the Bureau of Child Welfare was the lead agency.\textsuperscript{58} It opened a new headquarters at 300 Washington Street in Hartford where the town delinquency court and detention home were located.\textsuperscript{59}

IV. Newly-Combined Juvenile Courts—1921 To 1940

The Bureau of Child Welfare immediately exercised its new authority, making twelve foster placements, 133 professional calls on institutions, four investigations prior to commitments and granting two licenses for boarding houses for children.\textsuperscript{60} Governor Everett Lake called the new child welfare legislation “one of the most important steps ever taken by any Connecticut legislature.”\textsuperscript{61}

\textsuperscript{56} P.A. 1921, ch. 307 (creating Welfare Department, § 2 creating Bureau of Child Welfare), ch. 336 (juvenile court), ch. 381 (county homes).
\textsuperscript{57} Siskey, \textit{supra} note 8.
\textsuperscript{58} More Funds Needed By Humane society for New Branches, \textit{Hartford Courant}, February 1, 1923.
\textsuperscript{59} Humane Society Quarters Viewed, \textit{Hartford Courant}, January 26, 1922.
\textsuperscript{60} Twelve Children Are Given Homes, \textit{Hartford Courant}, November 3, 1921.
By December 1922, Welfare Commissioner Charles Dow reported that state involvement had reduced the number of children sent to county homes by fifty percent. In addition, the Bureau of Child Welfare was having success in placing children with relatives, something the county homes had not sufficiently accomplished. Nevertheless, progress was made through the 20's and 30's but “placement did not keep pace with commitment. In 1932, County children [totaled] 2,303, [with] 1,398 (60%) in County homes or private institutions.”

During this period, the attorney general began to take a role in representing the Welfare Department. There is no indication that assistant attorneys general appeared in the juvenile court (which was essentially a separate police court or justice of the peace of each town). Occasionally assistant attorneys general appeared as amici in the Superior Court. But the attorney general did issue opinions regarding child protection and the Welfare Department.

In one opinion of June 13, 1933, Attorney General Warren B. Burrows and Assistant Attorney General H. Roger Jones ruled that children presently residing in community or county homes were not “neglected” to the extent that the Bureau of Child Welfare was required to take jurisdiction. The opinion also stated that state jurisdiction ended when the child turned fourteen. However, the fourteen-year-old cut off was generally ignored and the state continued its guardianship role until the child was twenty-one. Another Attorney General opinion of April 4, 1936, traced the role of the juvenile court in committing children to the care of state-supervised institutions. The attorney general’s role and the juvenile court were later to evolve.

One of the issues of child care arising after 1921 was the decision of the legislature to establish a “juvenile court” con-

62 State Makes 50 p.c. Cut in Number of Children Sent to County Homes, HARTFORD COURANT, December 7, 1922.
63 Siskey, supra note 8, at 2.
65 REPORT OF THE ATTORNEY GENERAL; CARE OF NEGLECTED AND UNCARED FOR CHILDREN, PUBLIC DOC'T #40, 18TH BIENNIAL REPORT OF THE ATTORNEY GENERAL 160 (1933).
66 Siskey, supra note 8, at 2.
sisting of separate courts in each town, as discussed previously. The Commission on Child Welfare of 1921 had approved of this structure for the juvenile court, but reformers came to doubt the wisdom of this diffusion in the 1930’s. Welfare groups began a campaign to establish a statewide juvenile court. The first effort was taken in 1935 with the establishment of two experimental juvenile courts in two counties, Fairfield and Windham.68

Then in 1939, the legislature almost passed a juvenile court statute, but the bill failed on the final day of the session.69 The opponents were willing to accept the changes to the delinquency statutes so that there would be an actual juvenile court, but there was a fear that if the juvenile court extended to neglected children, the cost would be too high for the state to bear.70

Another issue taken up in the 1930’s was the fact that three separate jurisdictions had interests in child care: the municipality through the selectmen, the county with its board of management, and the state and its Welfare Department. A commission established in 1931 recommended that the selectmen of each town no longer have jurisdiction over children under four.71 In response, in 1935, the legislature revised the jurisdiction over neglected children so that the state had rights to age six and the local governments had jurisdiction thereafter.72

The 1931 commission endorsed for the first time the concept that the state would entirely control child protection.73 It proposed that all county home properties pass to state control with the state taking jurisdiction of all county duties, and relieving the counties from any responsibility for reimbursing the towns for any extra expenses.

Two commissioners dissented: one complained that the proposed state take-over was “a far more radical departure

69 Cohn and Bates, supra note 1, at 307.
70 Id. at 70.
71 Siskey, supra note 8.
72 P.A. Ch. 126; Siskey, supra note 8.
73 REPORT OF THE CONNECTICUT COMMISSION ON CHILD WELFARE, JANUARY SESSION 46 (1933).
from the present system,” and was unnecessary.\textsuperscript{74} It was a function that the state Bureau of Child Welfare was unprepared to “properly exercise.” The majority’s recommendation for total state control was not accepted by the legislature until more than twenty years later.

V. \textbf{The Current System Emerges, 1941-1955}

The reformers were successful in establishing a juvenile court in 1941 with three court districts, Fairfield, New Haven and Hartford.\textsuperscript{75} The definitional section did not change the definition of the “delinquent child,” “the dependent child,” “uncared-for child” or “the neglected child” from the previous 1930 revision.

The 1949 statutes newly provided that the juvenile court had “exclusive original jurisdiction over all proceedings concerning uncared-for, neglected, dependent and delinquent children within the state.” The only exclusion was for matters of “guardianship and adoption and all other matters affecting property rights of any child over which the probate court has jurisdiction.”\textsuperscript{76}

The 1941 legislation, codified in the 1949 revision of the statutes, left in place the county homes for neglected and uncared-for children as set forth in the 1930 revision. The juvenile court was authorized to commit such children to the county home until a permanent placement was found.\textsuperscript{77} The bifurcated system whereby the county homes provided for care of children between the ages of six and eighteen, and the Welfare Department provided housing for children under six was not changed.

As he had with delinquent children,\textsuperscript{78} Chief Justice Maltbie significantly influenced child protection law in two rulings involving a mother named Mary E. Dattilo.\textsuperscript{79} In the first case,

\textsuperscript{74} \textit{Id.} at 44.

\textsuperscript{75} Cohn and Bates, \textit{supra} note 1, at 308-09. The 1941 legislation was codified in General Statutes §2802 \textit{et seq.} (1949).

\textsuperscript{76} \textit{CONN. GEN. STAT.} § 2805.

\textsuperscript{77} \textit{CONN. GEN. STAT.} § 2826.

\textsuperscript{78} \textit{See} Cohn and Bates, \textit{supra} note 1, at 318-20.

\textsuperscript{79} A third ruling by Maltbie held that appeals from the Juvenile Court to the Superior Court required payment of the filing fees of the Superior Court. Appeal of Dattilo, 135 Conn. 411, 66 A.2d 596 (1949).
In re Appeal of Dattilo,\textsuperscript{80} two of Mary’s children had been committed to the county home in New Haven and one to the Welfare Department for placement. Mary moved in Juvenile Court to have the commitments revoked. Her motion was denied and she appealed to the Superior Court which affirmed. She then appealed to the state Supreme Court.

Assistant Attorney General Frank W. Flood, appearing in the Supreme Court as an amicus, moved to erase the appeal “on the ground that the decision of the Superior Court was not such a judgment as could be made the basis of an appeal.”\textsuperscript{81} Attorney Flood’s main argument was that the 1949 statutes only provided for an appeal from the Juvenile Court to the Superior Court and was silent on a further appeal to the Supreme Court.\textsuperscript{82} He further raised the fact that the Juvenile Court proceedings were confidential. In addition, the trial judge might have a conversation or personal contact with the juvenile and this would restrict review by the Supreme Court.\textsuperscript{83}

Chief Justice Maltbie rejected Attorney Flood’s arguments, treating the motion as one addressed to the inherent exercise of jurisdiction by the Court. He reasoned that the Supreme Court had reviewed zoning cases under its general authority, even though the zoning statutes did not mention an appeal from the Superior Court to the Supreme Court.\textsuperscript{84} To deal with the issue of confidentiality, evidence in the Juvenile Court would be placed under seal. The fact that the trial judge had contact with the child was found to be no different from cases where children brought habeas corpus actions to the Superior Court and then to the Supreme Court. “To deny [an appeal] might well prevent a determination by this court of questions of law vital to the interests of the parties.”\textsuperscript{85}

The second appeal reached the merits. In In re Appeal of Dattilo,\textsuperscript{86} (“Dattilo II”), Chief Justice Maltbie ruled, in one of

\begin{itemize}
\item 80 135 Conn. 512, 66 A.2d 596 (1949).
\item 81 Id. at 513.
\item 82 Id. at 514.
\item 83 Id. at 516.
\item 84 Id. at 515.
\item 85 Id. at 517.
\item 86 136 Conn. 488, 72 A.2d 50 (1950).
\end{itemize}
his last cases in his twenty-year career as the state’s highest jurist, that the lower courts correctly denied Mary’s motion to revoke commitment.\textsuperscript{87} He first rejected a claim by Mary’s attorney that questioned the trial court’s acceptance of investigative reports on the status of the children.\textsuperscript{88} These reports were authorized by Superior Court rules and were in any case within that court’s inherent right to review. The court could reject the reports as inadequate and they were also subject to cross-examination.\textsuperscript{89}

Secondly, Mary had not proved a ground for revocation. The children were doing well in placement and Mary and her second husband did not appear “qualified to supervise adolescent children, and the husband would not be a good influence on growing boys.”\textsuperscript{90} Under the standard of review requiring the court to act in the best interest of the child, continued commitment was appropriate.

From January 1942, when the three districts of the Juvenile Court commenced operation, until 1955, commitments were shared between the counties and the state Welfare Department.\textsuperscript{91} In 1953, the General Assembly created a committee to investigate the relationship between the state and its subdivisions. As part of the ensuing report, a research memorandum was included in September 1954 entitled: “State-County Care of Committed Children—Administration and Cost” (Research Memorandum”).\textsuperscript{92}

The Research Memorandum made the following conclusions: commitment to the counties as opposed to the state led to higher than necessary costs, and a lack of needed uniformity in the commitment process. The better approach would be to make the Welfare Department the exclusive custodian “of all children committed by the juvenile court as neglected

\textsuperscript{87} Id. at 496.
\textsuperscript{88} Id. at 490.
\textsuperscript{89} Id.
\textsuperscript{90} Id. at 495.
\textsuperscript{91} See Thomas D. Gill, The Connecticut State Juvenile Court, 18 CONN. B. J. 209 (1944). The article was based on an address by Chief Juvenile Court Judge Gill to the Practice and Procedure section of the Connecticut bar on October 17, 1944.
\textsuperscript{92} MAURICE C. WINTRODE AND F. GENTILE, STAFF MEMBERS, CONNECTICUT PUBLIC EXPENDITURE COUNCIL (September 1954).
or uncared-for and should be given financial and administrative responsibility for their care.” The commissioner of the department would also have the duty to initiate such commitments or other placement where appropriate.93

The legislature agreed with the recommendations in the Research Memorandum94 and passed Public Act 55-366—“An Act Concerning Transferring the Duties of the County Commissioners as to Neglected and Uncared-for Children to the Welfare Commissioner.” The Act, codified as Sec. 1125c, took effect on July 1, 1955. The first section of the Public Act provided that “[t]he welfare commissioner shall have general supervision over the welfare of children who require the care and protection of the state.”

The Courant gave its complete endorsement to the new legislation. In a June 3, 1955 editorial, it declared that the General Assembly just concluded would “go down in the books as one that put child care on a new and better basis in this state. . . . [I]n a few days the ancient tradition of county care for these children will be ended.” The joint system in which children below the age of six were placed with the state and those above six with the county was disruptive to family unity. The Welfare Department should now seek to place all eligible children in foster homes. “No orphanage is good for a child, and the sooner the children are removed from them the better it will be.”

On June 15, 1955, the Courant quoted an employee of the Welfare Department stating that the Department was in the process of phasing out the county homes. Only the Hartford County home at Warehouse Point would, under the legislation, remain for any period of time. Some of the county homes would remain on a small scale as temporary shelters.95

With the Welfare Department’s Bureau of Child Welfare Services now the state’s representative in Juvenile Court,

93 Id. at 88.
94 Democratic and Republican leaders ironed out their differences on a measure transferring care of neglected children from the counties to the state, HARTFORD COURANT, May 24, 1955.
95 Three County Homes To Close This Month, HARTFORD COURANT, June 15, 1955.
the Attorney General took on full legal representation. The assistant attorneys general no longer appeared in Superior Court as amici, but as representatives of the department.\footnote{See, e.g., Suprenaut v. Commissioner of Welfare, 21 Conn. Sup. 154, 148 A.2d 669 (1958) (holding that juvenile court erred in awarding custody to the commissioner). The Commissioner was represented by Assistant Attorney General Ernest H. Halstedt and special assistant Richard E. Rapuano.}

VI. CONCLUSION—AND A LOOK BEYOND 1955.

By 1955 the groundwork for the present child care system had been established in Connecticut. There was a juvenile court with the power to commit children to state care. Both initiation and placement was administered by the State Welfare Department. The Department was represented in the courts by the Attorney General and his assistants.

Briefly there were two further developments. First, in 1969, pursuant to legislation, the Welfare Department transferred its responsibilities for delinquent institutions, Connecticut School for Boys and Long Lane School for Girls, to a new agency, the Department of Children and Youth Services (DCYS).\footnote{P.A. 69-664.} In 1975, again pursuant to legislation, the Welfare Department transferred its Children’s Bureau to DCYS.\footnote{See S.A. 74-52, setting up a study commission. The Courant reported on March 17, 1974, that “The Connecticut Child Welfare Association is backing a plan [of Governor Meskill] to shift children’s services out of the state Welfare Department.” This was accomplished in P.A. 75-524.} In 1993, DCYS was re-named the Department of Children and Families (DCF).\footnote{P.A. 93-90.}

The second major development was the increased involvement of the federal government in child protection. In February 1909, President Theodore Roosevelt had called for the establishment of a Children’s Bureau and his recommendation was adopted in 1912. But maltreatment of children became a subject of specific federal interest only after the 1960’s.\footnote{Myers, supra note 11, at 454-60.}

The federal legislation included the Child Abuse Prevention and Treatment Act (CAPTA) of 1974,\footnote{P.L. 93-247.} and the Adoption Assistance and Child Welfare Act (AACWA) of
Family preservation was the key component of AACWA. Another act that established strict guidelines for returning children to parents or the placing of children for adoption was passed in 1997—the Adoption and Safe Families Act (ASFA). Connecticut was also affected in 1989, when the state was placed by a consent agreement in a receivership under the supervision of the Connecticut Federal District Court. *Juan F. v. O’Neill*, CV No. 89-859 (CFD). A monitor continues to perform oversight of the state DCF and recent reports have been positive.

Even with these developments, little has changed regarding the issues facing those administering the law in 1955, when the system came together. As Marjorie Siskey said to a Courant reporter on her 1971 retirement from the Welfare Department about the foundation period:

> I don’t know if it’s radio, TV, the news media or the war that produce violence among children. But the whole cultural pattern is changing. We’re breaking away from the larger family constellation. Grandpa used to watch over the kids, or an aunt or uncle would. Now kids are sophisticated at a younger age and are much smarter. It’s all to the good. There’s much more tolerance and acceptance of differences. There is still so much innate goodness in people in spite of what we hear about crime, so much of people caring for people. You get a lot of emotional satisfaction out of seeing what people are willing to do for other people. . . . I think you have to have a feeling of dedication . . . . It isn’t just a job. You have to have conviction about people’s ability to change, otherwise you’re working in a vacuum.

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102 P.L. 96-272. The states receiving federal financial assistance must use reasonable efforts to prevent removal of children from their homes.

103 P.L. 105-89.

104 Id. The states must make decisions regarding removal from home within 12 months and must start termination proceedings, if warranted, within 15 months.
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