2016 APPELLATE REVIEW

BY: WESLEY W. HORTON AND KENNETH J. BARTSCHI*

I. SUPREME COURT

The most important Supreme Court event for 2016 is, sorry to report, the early retirement of Justice Peter Zarella on December 30, announced suddenly in early November.[1] We say "sorry to report" because Justice Zarella is only 67, so he had almost three more years before reaching the mandatory retirement age of 70. In discussing his intellectual leadership on the court this past year, we to a large extent review 2016's most important cases. But first, a little background.

In August 2015, the Supreme Court decided *State v. Santiago*,[2] in which, by a 4-3 majority, it declared the death penalty unconstitutional. The State thereafter filed a "Motion for Argument," essentially seeking reconsideration, which was denied (also by a 4-3 vote) on October 7, 2015.[3] At the time, another death penalty appeal, *State v. Peeler*,[4] was pending and ready for argument. In late October, the State filed a motion for a stay of execution of the judgment in *Santiago* to allow *Peeler* to be heard before *Santiago* became effective; the Supreme Court denied the motion by a 6-1 vote.[5] Two of the *Santiago* dissenters (Chief Justice Rogers[6] and Justice Zarella[7]) joined the majority in holding that the pendency of *Peeler* did not provide a proper basis to stay *Santiago*.[8]

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* Of the Hartford Bar.

1 We are pleased, however, to report that the state's first solicitor general, Gregory T. D'Auria, was appointed to fill the vacancy created by Justice Zarella's retirement.

2 318 Conn. 1, 122 A.3d 1 (2015). *Santiago* was discussed at length in Wesley W. Horton & Kenneth J. Bartschi, *2015 Connecticut Appellate Review*, 84 Conn. B.J. 172, 172-177 (2016).

3 319 Conn. 912, 124 A.3d 496 (2015).

4 321 Conn. 375, 140 A.3d 811 (2016).

5 319 Conn. 935, 935-36, 125 A.3d 520 (2015).

6 *See Santiago*, 318 Conn. at 137 (Rogers, C.J., dissenting).

7 *Id.* at 203 (Zarella, J., dissenting).

8 319 Conn. at 941-42 (Rogers, C.J., concurring).

The impetus behind all this fuss was that one of the four votes in the narrow *Santiago* majority belonged to Justice Flemming Norcott, who turned 70 soon after the oral argument in that case and was therefore ineligible to sit on any subsequent appeal seeking to revisit the death penalty, including *Peeler*. Justice Richard A. Robinson was appointed to the seat vacated by Justice Norcott, and his views on the death penalty were unknown.

The prosecutors were clearly infuriated by the *Santiago* decision, especially because they felt they had not been given a fair opportunity to address many of the points taken up by the majority (hence their oddly-titled "Motion for Argument," indicating they believed they would be addressing these points for the first time). They clearly intended to use the opportunity presented by *Peeler* to argue and reargue all issues decided or not decided in *Santiago*, and that is in fact what happened in January 2016 when *Peeler* went before the court with Justice Robinson now on the *en banc* panel. The stage was thus set for a showdown on the question of stare decisis.

It is here that we return to our appreciation of Justice Zarella's intellectual leadership on the court. Five of the seven *Peeler* justices joined in a short *per curiam* opinion which held that *Santiago* was binding on the court.[9] This was an easy decision for the three justices who had been in the *Santiago* majority (Palmer, McDonald, and Eveleigh, Js.) all of whom obviously agreed with *Santiago* on the merits and joined in a separate concurrence. Chief Justice Rogers, who had dissented in *Santiago*, and Justice Robinson, who had not sat on *Santiago*, filed separate concurring opinions stating that they thought it would be improper to overrule a recently decided case just because of a change in the membership of the court.[10] As Justice Robinson stated "[the decision] is not so clearly wrong that we should risk damaging this court's institutional stability by overruling it."[11]

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9 *Peeler*, 321 Conn. at 376-77.
10 *Id*. at 377-78, 413-16 (Rogers, C.J., concurring)(Robinson, J., concurring).
11 *Id*. at 416 (Robinson, J., concurring).

The remaining two justices dissented. Justice Zarella focused his sixty-nine-page dissent on a philosophical discussion of the general principles governing the doctrine of stare decisis.[12] He then reconsidered this doctrine and proposed his own test for the application of the doctrine in *all* cases, not just ones involving the death penalty.[13] This is the first time any justice in Connecticut has systematically analyzed the doctrine of stare decisis.

The most interesting part of the test proposed by Justice Zarella is that the justices would *first* decide whether a prior decision is correct.[14] This is clearly contrary to what they have done in the past. That is to say, unless a prior decision is clearly wrong, justices have applied stare decisis almost automatically.[15] But Justice Zarella would look first at whether he agreed with the prior decision as if it were being argued by the lawyers as a matter of first impression. Only if the answer is "no" would the justices then turn to the issue of stare decisis.

Justice Zarella's argument seems counter-intuitive, but his point forces us to think about first principles and shows why we said at the beginning that we are "sorry to report" that he has left the Supreme Court. His argument is that stare decisis will be more consistent if the discussion on the merits of the issue is separated from the discussion of deference. If a justice starts the analysis with the issue of deference, one's mind psychologically is likely to be pulled by one's opinion on the merits of the prior decision, which may be negative, either because the reasoning does not persuade or because times have changed. This psychology then improperly affects one's thinking about stare decisis by making the justice result oriented, i.e., wanting to overrule the prior decision. By putting the "I don't like the decision" thought out front at the beginning and then analyzing the

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12 *Id*. at 430-99 (Zarella, J., dissenting).

13 *Id*. at 443-48.

14 *Id*. at 448.

15 When the court has overruled precedent in the past, however, it has not always addressed stare decisis in any detail. *See, e.g.*, Campos v. Coleman, 319 Conn. 36, 57 n.16, 123 A.3d 854 (2015) (mentioning, but not analyzing, the doctrine in a footnote).

principles of stare decisis in the light of this thought explicitly, a justice can avoid result-oriented thinking by applying consistent, neutral principles.

Justice Zarella then discusses these principles in detail, focusing first on the benefits and second on the costs of stare decisis.[16] It is a fascinating and thought-provoking discussion, regardless of whether one has this discussion before or after deciding whether one likes the prior decision. To return to the issue of result-oriented decisions, Justice Zarella may very well be correct about psychology,[17] but we believe the cost of putting the correctness of the prior decision first and consideration of stare decisis second outweighs the benefit. The cost is that, in every appeal where there is a prior decision on point, the justices will first be forced to decide whether they agree with it as if it were a matter of first impression. That is quite a burden to impose. Perhaps the Justice Zarellas of the world have the motivation and energy to do so, but we doubt whether most other mortals would. We would stick with the traditional test applied by Justice Robinson in *Peeler*: if it isn't clearly wrong, stare decisis applies, and that is the end of the discussion.[18] But we never would have had this discussion at all had it not been for Justice Zarella, and for that he is to be applauded.

Now on to other important 2016 decisions. *State v. Kono*,[19] authored by Justice Palmer, considered an important search and seizure case solely under the state constitution.[20] The majority held that a warrantless dog sniff of the contents of a condominium from the common area just outside the condominium itself violates Article First Section 7.[21] It is a scholarly discussion of state search and seizure law and follows our recommendation[22] that, where coordinate state and federal constitutional issues are both open issues and

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16 *Id.* at 470-84.

17 Although that point cuts both ways; express disagreement with a decision may affect the justice's view on the amount of deference it deserves.

18 *Id.* at 418-19, 423-24 (Robinson, J., concurring).

19 324 Conn. 80, 152 A.3d 1 (2016).

20 *Id.* at 82 n.3.

21 *Id.* at 89.

22 *See* Wesley W. Horton, THE CONNECTICUT STATE CONSTITUTION at 36 (2nd Ed. 2012). Mr. Bartschi concurs.

are separately and properly briefed by the lawyers, the state issue should be decided first.

The majority's best rationale, with which we agree, for relying solely on the Connecticut Constitution is that the court should try to decide a case on a ground on which it is the ultimate authority so that it can develop a robust body of important state constitutional law and decide the case with finality.[23] We are pleased to see this position finally and emphatically espoused by the majority. The majority's second rationale is that it could not say with a high degree of confidence that the U.S. Supreme Court would reach the same conclusion under the federal Constitution.[24]

Justice Zarella filed a concurring opinion, first noting that there is no precedent for the majority's second rationale.[25] Next he points out that the court has in the past been inconsistent in the order in which it decides coordinate state and federal issues.[26] He then launches into an argument about why it makes more jurisprudential sense to consider the coordinate federal issue first.

His argument for discussing federal law first is that, since the 1960s, federal law is what lawyers and judges have focused on (the lawyers in fact did so in the *Kono* trial),[27] so federal constitutional law is far better developed.[28] Much better, he says, to focus first on well-developed law and then treat state law interstitially, to be looked at only when federal law provides no remedy.[29] He says this is consistent with one of the prongs of analyzing state constitutional claims: federal law.[30] If that prong favors the criminal defendant, what is the purpose of going further? Justice Zarella mentions a number of other reasons, such as

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[23] *Kono*, 324 Conn. at 123-24.

[24] *Id*. at 129.

[25] *Id*. at 130-33 (Zarella, J., concurring) ("The ability to continually forecast how the United States Supreme Court might decide a question has not, in prior decisions, been treated as a prerequisite to beginning with a federal constitutional analysis.").

[26] *Id*. at 135-37.

[27] *Id*. at 134.

[28] *Id*. at 143-45.

[29] *Id*. at 145-47.

[30] *Id*. at 148.

importance of uniformity in state and federal law to avoid forum shopping (e.g., state prosecutors, in possession of evidence inadmissible under the state constitution, giving it to federal prosecutors for their use).[31]

We do not need to extend the list of Justice Zarella's reasons or to expatiate on our disagreement with them; any reader interested is encouraged to peruse Mr. Horton's book cited herein and in both the majority opinion and Justice Zarella's dissent. The point we want to make now is that it is about time that the court gave this important subject the time and analysis it deserves. *Kono* is the first time it has been done extensively, and Justice Zarella was assuredly the catalyst.

A third major case in 2016 is *Cefaratti v. Aranow*.[32] The majority, in a 4-3 opinion authored by Chief Justice Rogers, held that the doctrine of apparent agency applies in tort actions.[33] The majority relied on a 1941 case because, incredibly, that was the most recent Connecticut case on this important point.[34]

Justice Zarella dissented. He and the majority sparred over whether the 1941 case actually decided the issue,[35] but there is no question that the 1941 case did not discuss the public policy involved. That opened the door for Justice Zarella's discussion of the roles of courts and the legislature in the development of the law. He discusses the historical role of the courts in developing private law as opposed to the legislature in developing public law, and then turns to the increasing role of the legislature in developing private law as well.[36] He concludes that, unless the common law is unclear and the issue concerns the expansion of liability with potentially far-ranging societal consequences, it is often better for the legislature to consider the issue first.[37]

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31 *Id*. at 149-50.
32 321 Conn. 593, 141 A.3d 752 (2016).
33 *Id*. at 596-97.
34 *Id*. at 601-06 (citing *Fireman's Fund Indem. Co. v. Longshore Beach and Country Club, Inc*., 127 Conn. 493, 18 A.2d 347 (1941)).
35 *Id*. at 629 (Zarella, J., dissenting).
36 *Id*. at 632-36.
37 *Id*. at 632.

We are not primarily interested in whether he is right, or even whether the result in *Cefaratti* is right; we are primarily interested in the fact that Justice Zarella's thinking about first principles encourages us as practicing lawyers to think about them more than we are wont to do when we are preparing our briefs and our oral arguments.

A fourth major case of the year is *State v. Dickson*.[38] The chief justice, for a 4-member majority, wrote that an in-court identification not preceded by a non-suggestive out-of-court identification violates the federal constitution.[39] Having done so but also having affirmed the conviction because the error was harmless beyond a reasonable doubt, the majority went on to craft a prophylactic constitutional rule requiring prescreening before a first time in-court identification.[40]

Justice Zarella concurred in affirming the conviction but otherwise disagreed with the majority. He spars with the majority over whether a prophylactic rule construing the federal constitution is permissible, but his interesting discussion is on whether the suggestiveness of such an identification makes it unconstitutional. He concedes that in-court identifications are suggestive,[41] which for most lawyers would be the end of the discussion but which for him is only the beginning.

Justice Zarella points out that, unlike other suggestive procedures, an in-court identification occurs in the presence of the judge, the jury, and the defendant's lawyer.[42] Thus, everyone knows the exact factual context, which can then generate fully informed cross examination and comment from the judge; juries can use their common sense about what they have seen with their own eyes. There is more in his dissent, but our point once again is not whether Justice Zarella is right; our point is that he stretches our minds by

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[38] 322 Conn. 410, 141 A.3d 810, *petition for cert. docketed, sub. nom.*, Connecticut v. Dickson (16-866) (2016).

[39] *Id*. at 415-16.

[40] *Id*. at 445-47.

[41] *Id*. at 483 (Zarella, J., concurring).

[42] *Id*. at 487.

focusing attention on the broader picture.

A pair of important cases were decided that involve tobacco and the Restatement of Torts: *Izzarelli v. R.J. Reynolds Tobacco Company*,[43] and *Bifolck v. Philip Morris, Inc.*[44] Justice McDonald wrote the scholarly majority opinions, while Justice Zarella wrote the scholarly concurrences.

In *Izzarelli*, the majority held that the ordinary consumer expectation test under Section 402A of the Restatement (Second) of Torts did not apply to a cigarette that the plaintiff claimed had addictive properties higher than those of normal cigarettes because of the way the Defendant designed and manufactured them.[45] The court held that the complexity of the design and manufacture meant that a *modified* consumer expectation should be applied, one that made expert testimony essential and made the consumer's expectation only one factor in determining whether the product was unreasonably dangerous under Section 402A.[46] The ordinary consumer expectation test was relegated to the unusual situation when the defect is so obvious that no expert testimony is needed to prove it.[47]

Justice Zarella, joined by Justice Espinosa, concurred that the ordinary consumer expectation test should not apply but would have adopted instead the recent Restatement (Third) pure risk-utility standard based on proof of a reasonable alternative design.[48]

The majority did not reach this issue because of the way the case was briefed and certified from the Second Circuit. However, they did reach the issue a few months later in *Bifolck*, certified from the District Court. While the Restatement (Third) issue was not certified, the Supreme Court reached it on its own.[49] The majority then decided to make modest refinements to Section 402A in pleading and terminology (such as calling the "modified consumer expec-

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43 321 Conn. 172, 136 A.3d 1232 (2016).
44 324 Conn. 402, 152 A.3d 1183 (2016).
45 *Izzarelli,* 321 Conn. at 194.
46 *Id.* at 202-03.
47 *Id.* at 202.
48 *Id.* at 213 (Zarella, J., concurring).
49 *Bifolck,* 324 Conn. at 407.

tation" test the "risk-utility" test) rather than to abandon it.[50] Once again, Justice Zarella concurred, again joined by Justice Espinosa, but would have adopted the Restatement (Third) rule.[51] *Bifolck* also held that the consumer's expectation is not part of the test for a product liability claim premised on negligence.[52] *Bifolck* further held that statutory punitive damages under General Statutes Section 52-240b are not limited to common law punitive damages.[53]

Doe v. Boy Scouts of America[54] yielded an important statute of limitations decision. While reversing an 8-figure judgment for the plaintiff and ordering a new trial in a sexual abuse case because of an error in the charge,[55] a 4-3 majority opinion by Chief Justice Rogers rejected the defendant's claim that the sexual abuse statute of limitations, General Statutes Section 52-577d, applies only to the perpetrator.[56] That claim had been made unsuccessfully to a couple dozen state and federal trial judges over the past 25 years, but surprisingly had never been litigated on appeal. The plaintiffs' bar survived a close call. Once again, Justice Zarella dissented.[57]

If you are reading this review, you are probably a practicing lawyer, and if you are, you should read *Harrington v. Freedom of Information Commission*.[58] It may not look as though it has anything to do with lawyers in general, but in fact it is an excellent treatise by Justice McDonald for a unanimous court on the bounds of the attorney-client privilege. Briefly, if the primary purpose of the communication is legal, then the whole communication is privileged.[59] So think about the primary purpose before communicating. If the primary purpose is non-legal, the incidental legal part still may be privileged if it can be separated out.[60] One

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50 *Id*. at 433-36.
51 *Id*. at 456-58 (Zarella, J., concurring).
52 *Id*. at 444.
53 *Id*. at 453.
54 323 Conn. 303, 147 A.3d 104 (2016). The authors represented the defendant.
55 *Id*. at 315-16.
56 *Id*. at 340.
57 *Id*. at 343 (Zarella, J., concurring in part and dissenting in part).
58 323 Conn. 1, 144 A.3d 405 (2016).
59 *Id*. at 19-21, 144 A.3d at 416-18.
60 *Id*. at 18.

wants to structure such a communication in a way that the legal and non-legal aspects are not commingled.

Standard Oil of Connecticut, Inc. v. Administrator, Unemployment Compensation Act,[61] explores the boundary line between an employee and an independent contractor. While the law was clear, the justices split 4-3, with Justice Zarella writing the majority opinion and Chief Justice Rogers writing the dissent. The interesting point is not the facts themselves but Justice Zarella's thoughts about statutes that are remedial. In the majority's view, the remedial canon of statutory construction should not apply to all portions of a remedial statute when to do so would undermine a legislative compromise concerning various portions of the statute.[62]

Lewis v. Clarke,[63] holding that tribal sovereign immunity applies to a limousine driver employed by the Mohegan Sun when he was driving guests home off the reservation,[64] has the distinction of being the first Connecticut Supreme Court case to draw the attention of the United States Supreme Court since *Kelo v. New London*.[65] Unlike *Kelo*, however, the Connecticut Supreme Court was reversed in *Lewis*.[66]

MERSCORP Holdings, Inc. v. Malloy[67] rejected due process, equal protection, and dormant commerce clause claims concerning a national electronic registration database company that was required to pay land record recording fees about three times what other mortgagees pay. The discussion involves highly technical facts. We are disappointed that the state equal protection clause was not separately briefed.[68] The court decided the case solely under federal law.

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61 320 Conn. 611, 134 A.3d 581 (2016).
62 *Id*. at 658.
63 320 Conn. 706, 135 A.3d 677, *rev'd*, 137 S. Ct. 1285 (2017). The authors' firm filed an amicus brief supporting the plaintiff in the U.S. Supreme Court on behalf of the Connecticut Trial Lawyers Association.
64 *Id*. at 707.
65 545 U.S. 469 (2005).
66 *Lewis*, 137 S. Ct. 1285.
67 320 Conn. 448, 451, 131 A.3d 220, *cert. denied*, 137 S.Ct. 372 (2016).
68 *Id*. at 460-61 n.7.

LaFrance v. Lodmell[69] decided an important issue in family law concerning an agreement to arbitrate contained in a prenuptial agreement. The Court held that General Statutes Section 46b-66(c), which addresses the use of arbitration in family matters, applies to all agreements to arbitrate marital controversies, regardless of whether they were entered into before or during the marriage.[70]

One criticism we are silent on this year is the court's delays in issuing its opinions. Because of Justice Zarella's retirement, the Court issued most of its opinions it had heard before November 2016, when Justice Zarella stopped sitting, by the end of December. This meant that a large number of decisions were handed down in the last few days of December, including the 4-3 decision in *Skakel v. Commissioner of Correction*,[71] issued in the afternoon of December 30th, Justice Zarella's last day.

We end our Supreme Court discussion with one of the more amusing claims in an obscure area of the law, the marital privilege. In *State v. Davalloo*,[72] Chief Justice Rogers held for a unanimous court that statements by an adulterous spouse who was trying to kill her husband did not qualify for the privilege. The *Davalloo* Court weighed her claim and sagely noted that she probably wasn't trying to preserve the marriage.

II. Appellate Court

Turning now to the workhorse of the appellate system, the Appellate Court published 458 decisions in 2016,[73] reversing in about 20% of them, a bit higher rate than in recent years. It is always interesting to see what the rever-

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[69] 322 Conn. 828, 144 A.3d 373 (2016). The authors' firm represented the defendant.

[70] *Id*. at 837.

[71] 325 Conn. 426, __ A.3d ___ (2016). Justice Zarella wrote the majority opinion and Justice Palmer wrote the dissent. The opinion yields much grist for the press but nothing in the way of noteworthy legal issues. The petitioner filed a motion for reconsideration in early January 2017, which remained pending at press time in June 2017.

[72] 320 Conn. 123, 142-44, 128 A.3d 492 (2016).

[73] This includes 56 memorandum decisions that appear at the back of Connecticut Appellate Reports.

sal rate is for cases submitted on briefs, as it seems a bad idea to waive oral argument. In 2016, the reversal rate for cases submitted on briefs was around 12%, which, while substantially better than in most years, still is lower than the overall reversal rate.

Constitutional challenges usually bypass the Appellate Court, but in *Hope v. State*[74] the court rejected a Second Amendment challenge by a self-represented plaintiff to General Statutes Section 29-38c, which allows the seizure of firearms when a person poses an imminent risk of injuring someone. The court concluded that the statute falls within the "presumptively lawful regulatory measures" set forth in *District of Columbia v. Heller*.[75]

Appellate procedure, on the other hand, usually generates some noteworthy cases, and 2016 was no different. The perpetually vexing question of finality arose in *Doyle Group v. Alaskans for Cuddy*.[76] Extending the logic of *Hylton v. Gunter*,[77] which concerned the award of common-law punitive damages, the *Doyle Group* court held that the failure of the trial court to award contractual prejudgment interest did not deprive it of jurisdiction for lack of a final judgment because the plaintiff's entitlement to interest was not discretionary, and the contract set out a specific calculation formula.[78]

Rulings on the applicability of the automatic stay set forth in Practice Book Section 61-11 are decided on motions that almost never see the light of day. In *Citigroup Global Markets Realty Corp. v. Christiansen*,[79] however, the court published its decision dismissing the appeal on mootness grounds where the defendant in a foreclosure action had filed three successive motions to open because no automatic stay arises after a third such motion pursuant to subsections 61-11(g) and (h). Consequently, the law days had run

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74 163 Conn. App. 36, 133 A.3d 519 (2016).
75 *Id*. at 43 (citing District of Columbia v. Heller, 554 U.S. 570 (2008)).
76 164 Conn. App. 209, 137 A.3d 809, *cert. denied*, 321 Conn. 924, 138 A.3d 284 (2016).
77 313 Conn. 472, 97 A.3d 970 (2014).
78 *Doyle Group*, 164 Conn. App. at 221-22.
79 163 Conn. App. 635, 137 A.3d 76 (2016).

and title had vested in the plaintiff.[80] The authors applaud the court for issuing a full decision and hope it will continue to do so in future situations where a motion raises issues not yet well developed in our case law.

Preservation of claims often trips up appellants. An exception in the past was a claim of judicial bias, which the court would often review because of the serious nature of the allegation. The court has shifted its view, it seems, for in *Zilkha v. Zilkha*[81] the court refused to review a claim of judicial bias where the appellant failed to move to disqualify the trial judge in the trial court. In *Ferraro v. Ferraro*,[82] the court created a new preservation issue when it refused to review a claim that an articulation improperly altered the judgment where the defendant did not amend the appeal or file a motion for review. *Ferraro* does not cite *In re: Christian P.*,[83] which disregarded an improper articulation in the absence of an amended appeal or motion for review.

A bevy of cases involving civil procedure warrants attention. Several exemplified the preference for giving litigants their day in court. In *Harnage v. Lightner*,[84] the court put an interpretive gloss on General Statutes Sections 52-185 and 52-186 to allow the trial court discretion to waive or lower the recognizance bond for indigent inmates as a means of avoiding constitutional infirmity. In *Housing Authority v. Weitz*,[85] the court held that the trial court abused its discretion in defaulting the defendant, who failed to appear due to illness, where her counsel did appear and offered to make her come to court or proceed without her. The trial court in *Kearse v. Taylor*[86] improperly denied a motion to open a default judgment where the defendants claimed lack of notice. Their lawyer had been placed on inactive status and the trustee did not have an appearance

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80 *Id*. at 636-37, 640.
81 167 Conn. App. 480, 486-87,144 A.3d 447, (2016).
82 168 Conn. App. 723, 727 n.3, 147 A.3d 188 (2016).
83 98 Conn. App. 264, 907 A.2d 1261 (2006).
84 163 Conn. App. 337, 358-62, 137 A.3d 10 (2016), *cert. granted*, 323 Conn. 902, 150 A.3d 683 (2016).
85 163 Conn. App. 778, 782-83, 134 A.3d 749 (2016).
86 165 Conn. App. 780, 781-82, 140 A.3d 389 (2016).

in the file.[87]

Nonsuiting a party because of counsel's failure to pay a $500 fine on time was a disproportionate sanction in *Herrick v. Monkey Farm Café, LLC*.[88] The majority thought the court could have increased the fine for the lawyer and made the lawyer's continued practice of law contingent on the payment.[89] Judge Alvord concurred, but thought that holding the lawyer's law license hostage was too harsh.[90] And in *Ridgaway v. Mount Vernon Fire Ins.*,[91] a nonsuit for failure to file certain documents with the court was a disproportionate sanction where the court found that the noncompliance was solely attributable to the lawyer and not the party. Finally, in *Capasso v. Christmann*,[92] the trial court improperly granted summary judgment on the grounds of inadequate briefing on the plaintiff's part without first determining whether the defendant had established that no genuine issue of material fact existed.

In other cases raising procedural issues, *Barton v. Norwalk*[93] held that an offer of compromise in an inverse condemnation case was not for a sum certain (and therefore invalid) where the demand included appraisal fees and costs subject to a cap, as well as the necessary land use permits for the property. In *Matos v. Ortiz*,[94] the court applied plain error review and invoked its supervisory powers to hold that the trial court could not summarily enforce a release and separation agreement reached in an employment matter before litigation was commenced.

While General Statutes Section 52-80 provides broad authority to plaintiffs to withdraw an action prior to the commencement of a hearing, that right does not extend to the sort of "procedural chicanery" that took place in

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87 *Id*.
88 163 Conn. App. 45, 52-53, 134 A.3d 643 (2016).
89 *Id*. at 53 n.4.
90 *Id*. at 55 (Alvord, J., concurring).
91 165 Conn. App. 737, 761, 140 A.3d 321 (2016), *cert. granted*, 322 Conn. 908, 140 A.3d 978 (2016). The authors represent the plaintiffs.
92 163 Conn. App. 248, 260-61, 135 A.3d 733 (2016).
93 163 Conn. App. 190, 213-17, 135 A.3d 711 (2016), *cert. granted*, 321 Conn. 901, 136 A.3d 1272 (2016).
94 166 Conn. App. 775, 805-08, 144 A.3d 425 (2016).

Palumbo v. Barbadimos.[95] There, the plaintiff failed to claim her case to jury in time and, to avoid a bench trial, she withdrew her action and filed a new, identical action.[96] Stating that "[a] plaintiff should never be permitted to abuse its right to voluntarily withdraw an action," the court held that the right to withdraw an action does not automatically provide a right to bring a new, identical action if doing so prejudices another party, such as the defendant here who wanted a bench trial.[97] Accordingly, the trial court abused its discretion in denying the defendant's motion to restore the original case to the docket.[98]

Finally, in *Meadowbrook Center, Inc. v. Buchman*,[99] the court held that the thirty-day period to file a motion for counsel fees pursuant to Practice Book Section 11-21 was directory, not mandatory. Accordingly, the trial court erroneously failed to exercise its discretion to consider a motion for counsel fees filed five days late where the claim was based on a mandatory counsel fee award pursuant to a consumer protection statute.[100]

A noteworthy administrative appeal in 2016 was *Do v. Commissioner of Motor Vehicles*.[101] Although a police report for DUI cases is normally admissible in license suspension hearings if reliable, the form in this case had numerous discrepancies, such as listing two different cars (one licensed in Massachusetts, the other in Connecticut), showing different dates, and including handwritten alterations by an unknown party that rendered the report unreliable.[102] Judge Bear dissented, arguing that these were errors of form and that the plaintiff bore the burden of showing that the document was unreliable.[103]

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95 163 Conn. App. 100, 134 A.3d 696 (2016).
96 *Id*. at 102.
97 *Id*. at 115.
98 *Id*. at 103-04.
99 169 Conn. App. 527, 537-38, 151 A.3d 404 (2016), *cert. granted*, 324 Conn. 918, 154 A.3d 1007 (2017).
100 *Id*. at 540.
101 164 Conn. App. 616, 138 A.3d 359 (2016), *cert. granted*, 320 Conn. 934, 138 A.3d 931 (2016).
102 *Id*. at 662.
103 *Id*. at 637 (Bear, J., dissenting).

In another example of the court's fondness for arbitration, *Ippolito v. Olympic Construction, LLC*[104] held that imperfect compliance with the cancellation provision of a contract governed by the Home Improvement Act did not violate public policy.

Turning to torts, as the trademark used to say, "Petco. Where the pets go.®" Sometimes they go on the floor and leave a puddle, which caused a slip and fall in *Porto v. Petco Animal Supplies Stores, Inc.*[105] The plaintiff tried unsuccessfully to extend the mode of operation rule set forth in *Kelly v. Stop & Shop, Inc.*,[106] but unlike salad bar detritus, canine incontinence is not confined to one particular part of the store.[107]

Plaintiffs are always trying (but seldom with success) to evade governmental immunity. The plaintiff in *Brooks v. Powers*[108] did succeed, at least in the Appellate Court, in overturning summary judgment. The majority concluded a genuine issue of material fact existed as to whether the plaintiff's decedent came within the identifiable person/imminent harm exception to discretionary act immunity where constables were told of a woman in need of medical help standing out in a field during a storm who later drowned in Long Island Sound.[109] According to the majority, the harm must be general (i.e., injuries the storm caused) not specific (i.e., drowning), and must be more likely than not to occur on the day in question.[110] Judge Mullins dissented, arguing that the nexus between standing outside during a storm and subsequently drowning was too attenuated for purposes of the exception.[111] The Supreme Court granted certification.[112]

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[104] 163 Conn. App. 440, 453, 136 A.3d 653 (2016), *cert. denied*, 320 Conn. 934, 134 A.3d 623 (2016).
[105] 167 Conn. App. 573, 575, 145 A.3d 283 (2016).
[106] 281 Conn. 768, 918 A.2d 249 (2007).
[107] *Porto*, 167 Conn. App. at 579-85.
[108] 165 Conn. App. 44, 138 A.3d 1012 (2016), *cert. granted*, 322 Conn. 907, 143 A.3d 603 (2016).
[109] *Id.* at 46-48.
[110] *Id.* at 55.
[111] *Id.* at 90 (Mullins, J., dissenting).
[112] *See supra* note 105.

Another way around governmental immunity is to bring a nuisance claim. However, in *DiMiceli v. Cheshire*,[113] an untimely nuisance count against a town for injuries sustained on a playground did not relate back to negligence claims against the town because nuisance requires a positive act by the town and the negligence allegations asserted only omissions.

Other attempted tort claims also failed. In *Marsala v. Yale-New Haven Hospital, Inc.*,[114] the hospital removed the plaintiffs' decedent from a respirator against their wishes. The trial court properly struck the claim for negligent infliction of emotional distress and rendered summary judgment on the claim for intentional infliction of emotional distress because the hospital's duty was to the patient. The plaintiffs also failed to state a claim for bystander emotional distress where they did not allege that they witnessed the removal of the respirator or experienced severe emotional distress.[115]

Finally, the trial court in *Tyler v. Tatoian*[116] properly dismissed fraud and CUTPA claims based on statements made by a party during litigation pursuant to the litigation privilege doctrine.

Turning to workers' compensation and employment, in *Staurovsky v. Milford Police Dept.*,[117] the court declined to overrule its own thirty-year-old precedent, and held that a police officer who suffered a heart attack after retiring did not qualify for workers' compensation benefits because, even though he had heart disease while employed, the disabling experience did not occur until after retirement. The Supreme Court may do the job for the Appellate Court, as it has granted certification.

In the category "no good deed goes unpunished," the plaintiff in *Morrissey-Manter v. Saint Francis Hospital &*

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[113] 162 Conn. App. 216, 232-35, 131 A.3d 771 (2016).
[114] 166 Conn. App. 432, 438-40, 142 A.3d 316 (2016).
[115] *Id.* at 441-42.
[116] 164 Conn. App. 82, 93-94, 137 A.3d 801 (2016), *cert. denied*, 321 Conn. 908, 135 A.3d 710 (2016).
[117] 164 Conn. App. 184, 200-03, 207-208, 134 A.3d 1263 (2016), *appeal dismissed*, 324 Conn. 693, 154 A.3d 525 (2017).

Medical Center[118] saved a patient's life by altering a pacer wire of a cardiac patient who arrived from another hospital with a temporary pacer and no adapter plug. The plaintiff was effectively fired for violating hospital policy because she "tampered with" the connection.[119] In affirming summary judgment for the defendants, the majority rejected her claim that the hospital wrongfully discharged her in violation of a public policy of saving lives because she had not briefed the issue.[120] Judge Alvord thought the issue was adequately briefed, noted that review was discretionary in any event, and would have recognized the prima facie validity of the plaintiff's public policy argument of saving lives.[121]

Property law generated several interesting decisions in 2016. In a case of first impression, the court in *Francini v. Goodspeed Airport, LLC*[122] concluded that an easement by necessity can include a utility easement. In *Village Apartments, LLC v. Ward*,[123] the court concluded that mere stones and fences are not "other physical facility" for purposes of proving a right-of-way under General Statutes Section 47-33h, which includes a "pipe, valve, road, wire cable, conduit, duct, sewer, track, hole, tower or other physical facility." In *Barton v. Norwalk*, the plaintiff succeeded in establishing inverse condemnation where the taking of a parking lot destroyed 90% of the value of the commercial building.[124] The Supreme Court has granted review.

The court in *136 Field Point Circle Holding Co., LLC v. Razinski*[125] concluded that where the defendants in a summary process action had filed an answer prior to failing to make use and occupancy payments, General Statutes Section 47a-26b required a hearing on the merits of judg-

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[118] 166 Conn. App. 510, 513-15, 142 A.3d 363 (2016), *cert. denied*, 323 Conn. 924, 149 A.3d 982 (2016).

[119] *Id.* at 514-15.

[120] *Id.* at 526-27.

[121] *Id.* at 548 (Alvord, J., concurring and dissenting).

[122] 164 Conn. App. 279, 280-81 (2016), *cert. granted*, 321 Conn. 919, 137 A.3d 764 (2016).

[123] 169 Conn. App. 653, 665-68, 152 A.3d 76 (2016), *cert. denied*, 324 Conn. 918, 154 A.3d 1008 (2017).

[124] 163 Conn. App. 190, 207, 135 A.3d 711 (2016), *cert. granted*, 321 Conn. 901, 136 A.3d 1272 (2016).

[125] 162 Conn. App. 333, 343-44, 131 A.3d 1213 (2016).

ment of possession. In another case of first impression, the court held in *Astoria Federal Mortgage Corp. v. Genesis Ltd. Partnership*[126] that an assignee of a mechanics lien who fails to record the assignment does not lose standing to foreclose on the lien. The court in *TD Bank, N.A. v. Doran*[127] held that a laches defense is irrelevant to a deficiency judgment in an action for strict foreclosure because the purpose of the hearing is to determine the difference between the debt and the value of the property.

Finally, two cases demonstrate the strong public policy in favor of affordable housing. In *Brenmor Properties, LLC v. Planning & Zoning Commission*,[128] the record did not contain evidence of the specific harm engendered by noncompliance with standards for road widths that would justify denial of an affordable housing development. And in *JAG Capital Drive, LLC v. East Lyme Zoning Commission*,[129] the trial court properly reversed the zoning commission, which had claimed that the exception for industrial zones set forth in General Statutes Section 8-30g(g)(2)(A) applied where the zone in question permitted convalescent homes.

A significant portion of the court's docket consisted of family cases. These cases often fleshed out some of the subtleties of family law, and sometimes sowed confusion. For example, in *Dumbauld v Dumbauld*,[130] the majority held that the trial court could not order pendente lite alimony to be paid out of assets. Judge Beach would have reversed on other grounds but observed that while *Simms v. Simms*[131] would not authorize the court to order a party to pay pendente lite alimony out of assets, the trial court could still consider the party's assets in fashioning the order.[132]

In *Fazio v. Fazio*,[133] a separation agreement requiring

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126 167 Conn. App. 183, 193-95, 143 A.3d 1121 (2016).
127 162 Conn. App. 460, 468-69, 131 A.3d 288 (2016).
128 162 Conn. App. 678, 703-07, 136 A.3d 24, *cert. granted*, 320 Conn. 928, 133 A.3d 460 (2016).
129 168 Conn. App. 655, 666, 674, 147 A.3d 177 (2016).
130 163 Conn. App. 517, 523, 136 A.3d 669 (2016).
131 283 Conn. 494, 927 A.2d 894 (2007).
132 *Dumbauld*, 163 Conn. App. at 534-36.
133 162 Conn. App. 236, 237-39, 131 A.3d 1162 (2016), *cert. denied*, 320 Conn. 922, 132 A.3d 1095 (2016).

the defendant to pay unallocated alimony and support "until the death of either party, the remarriage or cohabitation of the [plaintiff] pursuant to [General Statutes] § 46b-86(b)" was ambiguous as to whether alimony terminated automatically upon cohabitation or was merely subject to modification. In *Nuzzi v Nuzzi*,[134] the trial court improperly denied a motion to modify on staleness grounds where the separation agreement provided a right to petition for a *de novo* review of the unallocated alimony and support order after a one-year grace period.

In *Farmassony v. Farmassony*,[135] child care costs were held to be part of child support orders and therefore cannot be retroactively modified prior to the date of service of a motion to modify. The court held in *Malpeso v. Malpeso*[136] that when unbundling a child support order from an unallocated award of alimony and support, the court must use the child support guidelines in effect at the time of the original order.

In *Antonucci v. Antonucci*,[137] the trial court improperly treated as a post-nuptial agreement an agreement by the plaintiff's mother to quitclaim a house to the plaintiff with a life estate in exchange for the defendant waiving any claim to the house. As a matter of contract law, the agreement was not between the parties to the dissolution but between the defendant and his future ex-mother-in-law, with the plaintiff as a third-party beneficiary.[138] The court remanded the case to determine whether the agreement violated public policy by encouraging divorce.

While the civil rules of practice apply in significant part to family cases, there are also specific rules for family matters. In *Morera v. Thurber*,[139] the court held that the court must hold a probable cause hearing when the opposing party objects to a motion for leave to file a motion to modify

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[134] 164 Conn. App. 751, 765-66, 138 A.3d 979 (2016), *cert. granted*, 323 Conn. 902, 138 A.3d 979 (2016).
[135] 164 Conn. App. 665, 672-73, 138 A.3d 417 (2016).
[136] 165 Conn. App. 151, 165-66, 138 A.3d 1069 (2016).
[137] 164 Conn. App. 95, 110-13, 138 A.3d 297 (2016).
[138] *Id.* at 114-15.
[139] 162 Conn. App. 261, 264, 131 A.3d 1155 (2016).

custody. No hearing is required if the opposing party does not object.[140] In *Ill v. Manzo-Ill*,[141] the court concluded that Practice Book Section 25-34, which provides that (absent good cause shown) motions may not be reclaimed after three months, authorizes the dismissal of a motion to modify alimony that was not diligently prosecuted.

Although, under the mosaic doctrine, an error in the financial orders incident to a dissolution of marriage usually requires a new hearing on all orders, the court in *Britto v. Britto*[142] severed an erroneous order pertaining to real estate where the trial court improperly disregarded the parties' stipulation as to the value. The court concluded there was no evidence that the stipulation was interdependent with the other financial orders.[143] A better reason, however, was that the plaintiff, whose interest would be diminished by adopting the parties' values, did not want reconsideration of the other orders.[144]

Finally, an order to pay a promissory note as part of financial orders incident to the dissolution of the parties' marriage in *Profetto v. Lombardi*[145] was a money judgment, not a family support judgment and therefore could be enforced through the foreclosure of a judgment lien pursuant to General Statutes Sections 52-350f and 52-380a.

Turning to juvenile law, the Appellate Court had several cases dealing with the fallout from *In re Yasiel R.*,[146] which requires a pre-trial canvass of parents in cases terminating parental rights. In *In re Daniel N.*,[147] the court grudgingly applied *Yasiel* retroactively to require a new hearing where no canvass had occurred. The Appellate Court practically begged the Supreme Court to grant certification and reverse, which it did.[148]

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[140] *Id.*
[141] 166 Conn. App. 809, 819-20, 142 A.3d 1176 (2016).
[142] 166 Conn. App. 240, 248, 141 A.3d 907 (2016).
[143] *Id.* at 251.
[144] *Id.*
[145] 164 Conn. App. 658, 663-64, 137 A.3d 922 (2016).
[146] 317 Conn. 773, 794, 120 A.3d 1188 (2015).
[147] 163 Conn. App. 322, 333, 135 A.3d 1260 (2016), *rev'd*, 323 Conn. 640, 150 A.3d 657 (2016).
[148] *Id.*

Meanwhile, the Appellate Court found various ways around *Yasiel*. In *In re Leilah W.*,[149] the trial court conducted the canvass after trial but before a decision. The court held that violating a mandatory supervisory mandate was not reversible error in the absence of harm.[150] The court reached the same conclusion in *In re Elijah G.-R.*[151] The respondent in *In re Raymond B.*[152] failed to preserve the *Yasiel* claim at trial and could not succeed under *Golding* review because the right to a canvass was not of constitutional magnitude.

In other juvenile matters, the court in *In re David B.*[153] held that the trial court had the authority to substitute a successor legal guardian for a minor child where the original petitioner died while the probate appeal of the termination of parental rights was pending. Finally in *In re Jacklyn H.*,[154] an evaluation report contained privileged mental health information pertaining to children in a neglect proceeding obtained through a waiver limited to the proceeding. When the trial court learned that the report had been disclosed to a juvenile probation officer, it should have held a hearing to determine whether the information in the report was covered by the waiver.[155]

Turning to criminal cases, the court held on a petition for review in *State v. Abushaqra*[156] that the trial court had inherent authority to seal an NCIC report and FBI rap sheet and require the petitioner to lodge all copies with the court.

In *State v. Williams-Bey*,[157] the court held that a 35-year sentence for a juvenile who pleaded guilty to accessory to murder did not violate the federal or state constitutions. A parole hearing was an adequate remedy for purposes of

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[149] 166 Conn. App. 48, 53-56, 141 A.3d 1000 (2016).
[150] *Id.* at 63.
[151] 167 Conn. App. 1, 6-7, 142 A.3d 482 (2016).
[152] 166 Conn. App. 856, 863, 142 A.3d 475 (2016).
[153] 167 Conn. App. 428, 429-30, 142 A.3d 1277 (2016).
[154] 162 Conn. App. 811, 813-14, 131 A.3d 784 (2016).
[155] *Id.* at 834.
[156] 164 Conn. App. 256, 258, 137 A.3d 861 (2016).
[157] 167 Conn. App. 744, 144 A.3d 467 (2016), *after remand*, 173 Conn. App. 64, __ A.3d ___ (2017).

Miller v. Alabama[158] in light of *Montgomery v. Louisiana*[159] and P.A. 15-84, which provides that juveniles who are sentenced to more than ten years may be eligible for parole after 60% of their sentence has been served.[160]

Two criminal cases included interesting evidentiary rulings. In *State v. Leniart*,[161] the majority held that the *corpus delicti* rule, which requires independent, corroborating evidence of death when a confession is offered, is an evidentiary rule that is waivable in the absence of an objection. Judge Flynn concurred and dissented, arguing that the rule is substantive and required independent evidence, which was the case there.[162] In *State v. Gilligan*,[163] a toxicology report that was not mailed to the defendant within 24 hours should have been excluded from evidence where no second test was performed as General Statutes Section 14-227a requires. Further, a report indicating the ratio of cocaine to its metabolite did not indicate the "amount" of cocaine present in the defendant's blood. Both errors were harmless, however.[164]

Two habeas petitioners succeeded in proving to the Appellate Court the ineffective assistance of their trial counsel. In *Eubanks v. Commissioner of Correction*,[165] the petitioner's trial counsel failed to object on hearsay grounds to double hearsay that provided the main support for his conviction. In *Helmedach v. Commissioner of Correction*,[166] defense counsel improperly delayed conveying a favorable plea deal to the petitioner because she was going to testify and did not want to upset her. The court found the lawyer's actions to be paternalistic as the petitioner had the right to assess the offer and decide whether to testify.[167]

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158 567 U.S. 460, 132 S. Ct. 2455 (2012).
159 136 S. Ct. 718 (2016).
160 *Williams-Bey*, 167 Conn. App. at 765.
161 166 Conn. App. 142, 158-59, 140 A.3d 1026, *cert. granted*, 323 Conn. 918, 149 A.3d 499 (2016).
162 *Id*. at 229-31 (Flynn, J., concurring and dissenting).
163 164 Conn. App. 406, 414-15, 138 A.3d 328 (2016).
164 *Id*. at 415-16.
165 166 Conn. App. 1, 11-12, 140 A.3d 402 (2016), *cert. granted*, 323 Conn. 918, 149 A.3d 980 (2016).
166 168 Conn. App. 439, 440-41, 148 A.3d 1105 (2016), *cert. granted*, 323 Conn. 941, 151 A.3d 845 (2016).
167 *Id*. at 455.

The last case in this review concerns lawyers getting paid, or not, as was the case in *Parnoff v. Yuille*.[168] There, the court held that an attorney may not recover his fee in *quantum meruit* where the fee agreement violates the statutory caps set out in General Statutes Section 52-251c.[169]

As for personnel, Judge Herbert Gruendel turned 70 in March 2016 and Judge Robert Beach has taken senior status. Both have joined the dozen or so referees who sit on the court. The most active referees in 2016 in hearing cases were Judges Bear, Bishop, Flynn, Gruendel, Harper, Pellegrino, and West. In May 2017, Judges Nina Elgo and Maria Araujo Kahn were elevated to fill the vacancies created by Judges Gruendel and Beach. For the first time in its history, women comprise the majority of Appellate Court judges.

On a sad note, 2016 saw the passing of Justice David Borden. He served as a justice on the Supreme Court from 1990 to 2007, when he reached the mandatory retirement age of 70. His idea of retirement was to serve as a referee on the Appellate Court until near the end of his life. His scholarly approach to opinion writing, especially in statutory construction, helped elevate the caliber of both the Supreme Court and Appellate Court. He was also famous for posing complicated hypotheticals during oral argument that challenged the best advocates. He is, and will be, sorely missed.

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[168] 163 Conn. App. 273, 136 A.3d 48 (2016), *cert. denied*, 321 Conn. 902, 138 A.3d 280 (2016).

[169] *Id.* at 275.