

08-2626-cv
Gross v. Rell

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

August Term, 2008

(Argued: May 20, 2009)

Question Certified: October 27, 2009)

Docket No. 08-2626-cv

DANIEL GROSS,
Plaintiff,

CAROLYN DEE KING,
Plaintiff-Appellant,

—v.—

M. JODI RELL, GOVERNOR, STATE OF CONNECTICUT, IN HER OFFICIAL CAPACITY; MAGGIE EWALD, FORMER ACTING LONG-TERM CARE OMBUDSMAN OF THE CONNECTICUT DEPARTMENT OF SOCIAL SERVICES, IN HER INDIVIDUAL CAPACITY; THOMAS P. BRUNNOCK, PROBATE JUDGE FOR THE DISTRICT OF WATERBURY, IN HIS INDIVIDUAL CAPACITY; KATHLEEN DONOVAN, IN HER INDIVIDUAL CAPACITY; JONATHAN NEWMAN, IN HIS INDIVIDUAL CAPACITY; GROVE MANOR NURSING HOME, INC., IN ITS INDIVIDUAL CAPACITY,*
Defendants-Appellees.

Before:

JACOBS, *Chief Judge*, STRAUB AND HALL, *Circuit Judges.*

* The Clerk of Court is directed to amend the official caption in this case to conform to the listing of the parties above. James J. Lawlor has been removed, as he was initially a defendant below but all claims against him were withdrawn at the District Court level. See J.A. 1 (revised complaint).

1 Appeal from dismissal of all claims as to all defendants in civil rights lawsuit arising out
2 of the alleged mistreatment of Plaintiff Daniel Gross. An involuntary conservatorship was
3 instituted as to Gross by the Waterbury, Connecticut Probate Court; the conservatorship was
4 ended when a Connecticut Superior Court judge granted Gross's petition for a writ of habeas
5 corpus, finding that the conservatorship should not have been imposed. Gross subsequently sued
6 the Probate Court judge, the conservator, the court-appointed attorney, the nursing home in
7 which he was placed, and various state officials. The U.S. District Court for the District of
8 Connecticut (Vanessa L. Bryant, *Judge*) dismissed the complaint, primarily on the basis of
9 judicial immunity (as to the judge) and quasi-judicial immunity (as to the conservator, attorney,
10 and nursing home). Claims against the state officials were dismissed for procedural reasons.

11 We affirm the dismissal of claims against the state officials, the tort claims against the
12 nursing home, and the finding of absolute judicial immunity as to the judge. However,
13 Connecticut law on quasi-judicial immunity, which applies to state-law claims, is unclear.
14 Therefore, we certify questions to the Connecticut Supreme Court regarding quasi-judicial
15 immunity.

16 As to the federal claims: our circuit is bound to apply the federal law of quasi-judicial
17 immunity. However, in this case and on these facts, the factors we must consider directly
18 implicate unsettled questions of state law. Therefore, we certify a question to the Connecticut
19 Supreme Court, asking for its guidance as to those factors. Upon receiving the Connecticut
20 Supreme Court's response, we will decide the federal question.

21 Affirmed in part, Certified to the Connecticut Supreme Court in part.

1 SALLY R. ZANGER, Connecticut Legal Rights Project, Inc., Middletown, CT, for *Plaintiff-*
2 *Appellant.*

3
4 GREGORY T. D'AURIA, Associate Attorney General for the State of Connecticut (Richard
5 Blumenthal, Attorney General, Jane R. Rosenberg, Assistant Attorney General, Clare
6 Kindall, Assistant Attorney General, *of counsel*), Hartford, CT, for *Defendants-Appellees*
7 *M. Jodi Rell, Maggie Ewald, and Thomas P. Brunnock.*

8
9 RICHARD A. ROBERTS (Nadine M. Pare, James R. Fiore, *of counsel*), Nuzzo & Roberts
10 L.L.C., Cheshire, CT, for *Defendant-Appellee Kathleen Donovan.*

11
12 LOUIS B. BLUMENFELD (Lorinda S. Coon, *of counsel*), Cooney, Scully and Dowling,
13 Hartford, CT, for *Defendant-Appellee Jonathan Newman.*

14
15 JEFFREY R. BABBIN, Wiggin and Dana, LLP, New Haven, CT, for *Defendant-Appellee*
16 *Grove Manor Nursing Home, Inc.*

17
18 _____
18 STRAUB, *Circuit Judge:*

19 For nearly a year beginning in 2005, Daniel Gross, an octogenarian, had a conservatorship
20 imposed for his estate and person against his will. He was kept in a nursing home for ten
21 months, until a Superior Court judge in Connecticut, citing “a terrible miscarriage of justice,”
22 granted his petition for a writ of habeas corpus and ordered him released. This lawsuit stems
23 from that unfortunate series of events.

24 It is alleged that a probate court judge signed a facially impossible order that did not
25 comply with the law; the court-appointed attorney disregarded Gross’s wishes to return to his
26 home in New York; the court-appointed conservator forcibly kept Gross in a nursing home,
27 against medical advice; and a nursing home housed Gross with a violent roommate who attacked
28 him. The complaint further alleges that defendant Maggie Ewald, Connecticut’s Long-Term
29 Care Ombudsman at the time, did not act on complaints about Gross’s treatment at the nursing
30 home because of concerns about adverse publicity.

1 These allegations, if true, might make out a case against the defendants. However, Judge
2 Thomas P. Brunnock, Conservator Kathleen Donovan, Attorney Jonathan Newman, and Grove
3 Manor Nursing Home, Inc. (“Grove Manor”) have asserted absolute immunity to suit: Brunnock
4 has asserted judicial immunity and the other three have asserted quasi-judicial immunity. The
5 District Court agreed and dismissed all claims against those defendants. (Claims against
6 Governor M. Jodi Rell and Ewald, as well as certain of Gross’s statutory and tort claims against
7 Grove Manor, were dismissed for various procedural reasons.)

8 The federal common law defense of quasi-judicial immunity applies to Gross’s federal
9 claims, and the similar but distinct *state* common law defense of quasi-judicial immunity applies
10 to Gross’s state law claims. Connecticut state law is unsettled as to quasi-judicial immunity.
11 Therefore, we certify questions to the Connecticut Supreme Court on the state law claims.

12 On the federal law claims, we apply the multi-factor test for quasi-judicial immunity set
13 forth by the Supreme Court. However, in this case, application of those factors involves
14 unsettled questions of Connecticut state statutory and common law. Therefore, we ask the
15 Connecticut Supreme Court for its guidance as to these factors. Upon receiving its response, we
16 will decide the federal claims.

17 Quasi-judicial immunity applies only to Donovan, Newman, and Grove Manor. We
18 affirm the grant of judicial immunity as to Brunnock and affirm the dismissal of the other claims.

19 **BACKGROUND**

20 In 2005, Daniel Gross, a life-long New York resident, was discharged from a hospital in

1 New York after treatment for a leg infection.¹ Shortly thereafter, he went to Waterbury,
2 Connecticut, where his daughter lived, to convalesce. On August 8, 2005, he was admitted to
3 Waterbury Hospital because of complications from his previous treatment. Nine days later, on
4 August 17, 2005, Barbara F. Limauro, a hospital employee, filed an application for appointment
5 of conservator in Waterbury Probate Court. The record does not indicate what prompted
6 Limauro to file this application.

7 The pertinent statute requires the probate court, as a threshold matter, to give the
8 respondent seven days' notice in any application for an involuntary conservatorship. CONN. GEN.
9 STAT. ANN. § 45a-649(a).² In addition, the notice must be served on the respondent or, if doing
10 so "would be detrimental to the health or welfare of the respondent," his attorney. *Id.* § 45a-

¹ As an appellate court, we do not engage in fact-finding. We take all facts and draw all inferences in the light most favorable to appellant, as we must do at the motion to dismiss stage, although we need not give credence to "pleadings that, because they are no more than conclusions, are not entitled to the assumption of truth." *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1950 (2009).

² Connecticut's statutory conservatorship scheme was amended in 2007, after the incidents in this case took place. Unless otherwise specified, this opinion cites to the version of the statute in place at the relevant time.

We are of the opinion that the 2007 revisions do not affect the underlying issues in this case regarding quasi-judicial immunity. *See, e.g.*, CONN. GEN. STAT. ANN. § 45a-648(a)-(d) (West 2008 pocket part) (outlining various provisions for an involuntary conservatorship as to one who is a non-resident or non-domiciliary); *id.* § 45a-649a (making various provisions for representation of a respondent in an involuntary conservatorship proceeding); *id.* § 45a-650(a) (specifying that probate court must "require clear and convincing evidence that the court has jurisdiction, that the respondent has been given notice . . . , and that the respondent has been advised of the right to retain an attorney"). These changes do not go to the underlying question here, namely, whether conservators, attorneys, and nursing homes may, as a matter of law, enjoy quasi-judicial immunity under federal and state common law. So far as we can ascertain, the questions we are certifying, regarding immunity generally, are unaffected by this revision. In any event, we have no reason to conclude that this amendment should apply retroactively, and the parties do not suggest otherwise.

1 649(a)(1)(A). The statute makes no provision for giving notice to the respondent other than by
2 personal service or service upon his attorney.

3 On August 25, 2005, Judge Thomas P. Brunnock issued an order of notice of a hearing to
4 be held on September 1, 2005, in connection with Limauro's application. On August 30, 2005,
5 the notice was served on Limauro. However, as the Connecticut Superior Court pointed out in
6 the subsequent habeas proceeding, there was no indication that Gross himself ever received
7 notice of the September 1 proceeding. The parties do not dispute that (1) Gross was entitled to
8 notice of the hearing, (2) he should have been given at least seven days' notice, pursuant to
9 Section 45a-649(a), and (3) the order dated August 25, 2005, specified that Gross should be
10 served by *August 24*.

11 Also on August 25, 2005, Brunnock appointed Jonathan Newman to represent Gross in
12 the involuntary conservatorship action. Newman interviewed Gross, who told Newman that he
13 opposed the conservatorship. Newman described Gross as alert and intelligent and stated in a
14 report that Gross wanted to live at home and manage his own affairs. Nevertheless, Newman
15 concluded that he could not "find any legal basis in which to object to the appointment of a
16 conservator of Daniel Gross' person and estate." Newman also signed the form "attorney for
17 ward." The relevant statute defines a "ward" as "a person "for whom involuntary representation
18 *is granted*" pursuant to statute. CONN. GEN. STAT. ANN. § 45a-644(h) (emphasis added). At the
19 time Newman signed the form, no such representation had been granted; Gross was not a "ward"
20 but rather a "respondent." *Id.* § 45a-644(f).

21 A Superior Court judge would later say that Newman's conclusion that there was no legal
22 basis for objecting to the involuntary conservatorship "completely blows my mind," that there

1 was “[n]o support for it,” and that “it just defies imagination. . . . This was counsel for Mr. Gross
2 and it is obvious to me that he grossly under and misrepresented Mr. Gross at the time.” J.A.
3 115.

4 The respondent also has a right to attend any hearing on the application. CONN. GEN.
5 STAT. ANN. § 45a-649(b)(2). If he wishes to attend “but is unable to do so because of physical
6 incapacity, the court *shall* schedule the hearing . . . at a place which would facilitate attendance . .
7 . but if not practical, then *the judge shall visit the respondent*” before the hearing, if he is in the
8 state. *Id.* (emphasis added). The next section reiterates that a judge could “hold the hearing on
9 the application at a place within the state other than its usual courtroom if it would facilitate
10 attendance by the respondent.” *Id.* § 45a-650(c). The parties do not dispute that (1) Judge
11 Brunnock never visited Gross, (2) the hearing was not held at a location that would facilitate
12 Gross’s attendance, and (3) Gross was not personally present at the hearing.

13 Furthermore, Connecticut law at the time only permitted a conservatorship for those who
14 were residing or domiciled in Connecticut, *id.* § 45a-648(a); Gross was neither a resident nor a
15 domiciliary. It is undisputed that Newman failed to bring this jurisdictional defect to the court’s
16 attention. (As will be explained *infra*, it was on the basis of this defect that the Connecticut
17 Superior Court eventually granted Gross’s petition for a writ of habeas corpus and held the
18 conservatorship void *ab initio*.)

19 On September 1, 2005, Brunnock appointed Kathleen Donovan as conservator to manage
20 Gross’s person and estate. Connecticut state law provides that the probate court must require a
21 probate bond and, “if it deems it necessary for the protection of the respondent, [it may] require a
22 bond of any conservator” as well. CONN. GEN. STAT. ANN. § 45a-650(g). Donovan never posted

1 a bond.

2 A week or two later, Donovan placed Gross in the “locked ward” of Grove Manor
3 Nursing Home. Gross alleges in his complaint that his roommate was a confessed robber who
4 threatened and assaulted him. Gross also claims that Grove Manor, with the knowledge and
5 consent of Donovan, kept him in a room with the violent roommate after it learned of the assault,
6 which was not reported to the police.

7 In April of 2006, Gross was on an authorized day visit to Long Island. While there, he
8 experienced chest pains and was admitted to a hospital. According to the complaint, Donovan
9 came to Long Island with an ambulance and insisted that Gross be returned to Connecticut.
10 When the doctor indicated that this was medically unwise, Donovan nonetheless removed Gross
11 from the hospital against his wishes and returned him to the locked ward at Grove Manor.

12 Gross alleges in his complaint that there was no reason to put him in the locked ward. He
13 further alleges that Ewald, the state ombudsman, and Donovan, the conservator, were aware of
14 these problems but failed to take steps to alleviate them. The parties do not dispute that Donovan
15 obtained from Brunnock *ex parte* orders limiting Gross’s contact with family and with counsel;
16 Gross claims that there was no evidence suggesting that such contact was harmful to him. We
17 are very troubled by one such order in particular. According to Gross’s complaint, this order
18 restricted Gross’s daughter’s ability to visit him: the visits were required to be on-premises, only
19 once per day, for no longer than one hour. Strangely, it also prohibits her from bringing “any
20 recording devices (visual and/or audio) into Grove Manor Nursing Home.” The restrictive nature
21 of the order, and the prohibition on the use of recording devices, gives credence to Gross’s
22 allegation that there was a conspiracy to deprive him of his rights — and potentially, to prevent

1 the exposure of such injustices.

2 On June 9, 2006, Gross filed a petition for a writ of habeas corpus in Connecticut
3 Superior Court. A hearing was held on July 12. Brunnock moved to dismiss, making the (rather
4 remarkable) argument that habeas relief was unnecessary because, if the Probate Court acted
5 without jurisdiction, the conservatorship was void *ab initio* and Gross could leave Grove Manor
6 at any time. The Superior Court granted the writ:

7 [O]ut of an absolute caution that somebody else may come in and
8 file [an] appearance in this case, I'm going to grant the writ of
9 habeas corpus[;] I'm going to find in accordance with the statute
10 that he has – is and has been, since September 1, been deprived of
11 his liberty. And at the time of his – of his appointment of the
12 conservator of both his person and his estate, Probate Court lacked
13 the jurisdiction on the basis that he was not a domiciliary and/or a
14 resident of the [S]tate of Connecticut. The conservatorship is
15 terminated as a result of the decision on the habeas corpus and Mr.
16 Gross is free to leave here today.

17
18 The court also halted all pending transactions involving Gross's property, saying "that nothing [is
19 to] be done with the sale of [Gross's] house in New York," and that "any previous orders of the
20 Probate Court with reference to that real property in New York are also terminated, so there is
21 nothing in New York." The Superior Court said there had been "a terrible miscarriage of
22 justice."

23 Upon returning to New York, Gross found that his house had been, in his words,
24 "ransacked." The complaint alleges that a chandelier and some furniture were missing. Gross
25 lived independently in his home from the time of his release at least until the time of the
26 complaint, and apparently until the time of his death in 2007.

27 In 2007, plaintiff brought the complaint and the District Court dismissed it as to all

1 defendants. The District Court found that Brunnock was entitled to judicial immunity. The court
2 went on to reason that the conservator, attorney, and nursing home were entitled to immunity
3 because they were serving the judicial process. However, the District Court reasoned that the
4 nursing home was *not* entitled to derivative, quasi-judicial immunity for discretionary acts that
5 were not performed specifically for the purpose of complying with a Probate Court order. Thus,
6 the nursing home's decision to leave Gross in a room with his roommate for several days, after
7 his roommate attacked him, was held to be discretionary and not protected by quasi-judicial
8 immunity. This left statutory³ and tort claims against the nursing home. The District Court
9 dismissed the statutory claims on the basis of waiver, leaving only the tort claims, which
10 consisted of claims for intentional and negligent infliction of emotional distress.

11 The District Court also dismissed all claims against the governor and most claims against
12 the ombudsman, essentially on failure to prosecute or waiver grounds. However, it initially let
13 stand the claims against the ombudsman for failure to investigate complaints about Gross's
14 detention in the nursing home. Thus, there were two sets of claims remaining: intentional and
15 negligent infliction of emotional distress against the nursing home regarding the violent
16 roommate and intentional infliction of emotional distress against the ombudsman for failure to
17 investigate.⁴

18 Then, at the end of a telephone conference about discovery and the course of the lawsuit,

³ The statutory claims against the nursing home alleged violations of the Omnibus Budget Reconciliation Act of 1989, 42 U.S.C. § 1396r, and the Patients' Bill of Rights, CONN. GEN. STAT. ANN. § 19a-550.

⁴ The negligent infliction of emotional distress claim against the ombudsman was dismissed because Connecticut state officials have immunity for negligent acts. CONN. GEN. STAT. ANN. § 4-165.

1 the District Court announced that it did not think those remaining claims would exceed \$75,000
2 and said it would dismiss the case. Counsel did not object to this dismissal, and those claims
3 were dismissed without prejudice. Once these were dismissed, there were no remaining claims.
4 Gross's timely appeal followed.

5 DISCUSSION

6 The main issue in this case pertains to judicial and quasi-judicial immunity. For the
7 reasons described below, Brunnock is entitled to judicial immunity. However, we certify to the
8 Connecticut Supreme Court certain questions relating to quasi-judicial immunity as to the
9 conservator, the attorney, and the nursing home. We affirm the District Court's dismissal of all
10 other claims as to Rell and Ewald and the statutory claims against the nursing home.⁵ We note at
11 the outset that, although we affirm the District Court's dismissal of many claims, we do not
12 condone the actions of the defendants.

13 I. An Overview of Judicial and Quasi-Judicial Immunity

14 A. In General

15 In this case, there are several intersecting issues. The first question is whether defendants
16 Brunnock, Donovan, Newman, and Grove Manor may assert judicial or quasi-judicial immunity
17 as a defense. The second question, assuming immunity applies, pertains to the *scope* of that

⁵ We note that the intentional infliction of emotional distress claim against Ewald and the nursing home, and the negligent infliction of emotional distress claim against the nursing home, were dismissed without prejudice for want of jurisdictional minimum. These claims may be reasserted if quasi-judicial immunity does not apply and the claims as to Donovan, Newman, and Grove Manor are reinstated. They may also be reasserted in a separate action in any event.

Additionally, as noted earlier, James J. Lawlor (Connecticut's Probate Court Administrator) is listed in the caption; however, the revised complaint asserts no claims against him.

1 immunity. Finally, as to each of the defendants and claims pled in this case, there is the question
2 of whether federal or state law on immunity governs. The defendants' briefs — and, to be sure,
3 some of the cases in this area — either blur, or do not recognize, these distinctions.

4 Gross is asserting federal and state law claims against state officials. The doctrine of
5 judicial and quasi-judicial immunity is, in the main, a creation of the U.S. Supreme Court with
6 regard to federal claims and thus a federal law doctrine. The cases support employing the federal
7 defense of quasi-judicial immunity as against federal claims. However, Gross had also pled state
8 law claims against state defendants. Connecticut has adopted tests for judicial and quasi-judicial
9 immunity that are nearly identical to the federal law tests. However, the state law doctrine is
10 conceptually distinct from the federal law doctrine.

11 With regard to the state law claims, we recognize the uncertainty regarding the state law
12 doctrine of quasi-judicial immunity and certify questions to the Connecticut Supreme Court as to
13 the availability of immunity. Normally, we would apply federal law to the federal claims and
14 simply decide them. However, in this case, the federal test involves applying the so-called
15 *Cleavinger* factors. *See Cleavinger v. Saxner*, 474 U.S. 193 (1985). These factors — which
16 inquire into the nature of the actor in the judicial system, the existence of safeguards, the role of
17 precedent, and so on — implicate unsettled questions of state law. Therefore, we ask the
18 Connecticut Supreme Court for its guidance as to those factors. After the court responds, we will
19 make the ultimate determination, as a matter of federal law, of whether immunity applies.

20 **B. Applicable Legal Standards**

21 Defendant Brunnock asserts the defense of judicial immunity, while defendants Donovan,
22 Newman, and Grove Manor assert the defense of quasi-judicial immunity. The first, threshold

1 question is whether these defendants may assert these defenses at all. The cases indicate that the
2 *federal* common law on judicial immunities applies even to *state* officials when they are sued in
3 federal court on federal claims. *See Pierson v. Ray*, 386 U.S. 547 (1967) (§ 1983 action against
4 local police officers and judges); *Tucker v. Outwater*, 118 F.3d 930 (2d Cir), *cert. denied*, 522
5 U.S. 997 (1997) (§ 1983 action against New York town justice). We apply this federal test even
6 when the substantive inquiry involves state law. *See Tucker*, 118 F.3d at 932 (noting that
7 whether the judge “acted in the clear absence of all jurisdiction” turned on New York law
8 regarding the scope of the judge’s jurisdiction); *Huminski v. Corsones*, 396 F.3d 53, 76 (2d Cir.
9 2005) (noting, in a § 1983 action against state judges, that courts “look to state law to determine
10 whether [the judges] acted within their jurisdiction and . . . as to whether they acted . . . in their
11 judicial capacities,” and then applying the federal law test for judicial immunity). As we describe
12 below, we may apply settled federal law to dispose of the question of judicial immunity as to
13 Brunnock with regard to federal claims.

14 In this case, federal jurisdiction over the state-law claims against Brunnock were based on
15 diversity jurisdiction. Diversity of citizenship cases, though brought pursuant to federal subject
16 matter jurisdiction, are decided on the basis of *state* substantive law. *Krauss v. Manhattan Life*
17 *Ins. Co. of N.Y.*, 643 F.2d 98, 100 (2d Cir. 1981). Therefore, as to those claims, we look to
18 Connecticut law to determine if judges enjoy immunity and, if so, under what circumstances.
19 Connecticut has a doctrine of judicial immunity, which is, in all respects relevant here, identical
20 to the federal test. *See Shay v. Rossi*, 253 Conn. 134, 170 (2000) (citing *Stump v. Sparkman*, 435
21 U.S. 349, 364 (1978)), *overruled on other grounds*, *Miller v. Egan*, 265 Conn. 301 (2003);

1 *Leseberg v. O’Grady*, 115 Conn. App. 18, 22 (2009) (citing *Mireles v. Waco*, 502 U.S. 9, 11-12
2 (1991)). Therefore, because Connecticut law is clear as to judicial immunity, we may decide that
3 question as well.

4 As to the remaining defendants, the issue is closer. Donovan, Newman, and Grove
5 Manor are asserting not judicial immunity, but *quasi-judicial* immunity. In this context, the U.S.
6 Supreme Court has set forth a “functional” test that is binding on this court on matters of federal
7 law. *See Cleavinger*, 474 U.S. at 201-02 (explaining that quasi-judicial immunity is determined
8 by a functional approach, in light of several enumerated factors); *see also Butz v. Economou*, 438
9 U.S. 478, 511-12 (1978) (describing the functional approach). We clarify now that the federal
10 law on quasi-judicial immunity applies to state officials sued in federal court on federal claims.
11 Courts have so held in the context of judicial immunity. *Cf. Pierson*, 386 U.S. 547; *Tucker*, 118
12 F.3d 930. Judicial and quasi-judicial immunity are both absolute immunities. *See Mitchell v.*
13 *Forsyth*, 472 U.S. 511, 521 (1985) (noting that both are absolute immunities); *but see Kalina v.*
14 *Fletcher*, 522 U.S. 118, 132 (1997) (Scalia, J., concurring) (noting that, historically, quasi-
15 judicial immunity “was more akin to what we now call ‘qualified,’ rather than absolute,
16 immunity”). We discern no reason to treat them differently with regard to choice of law
17 questions. Thus, federal law on quasi-judicial immunity, and specifically, the functional
18 approach specified in *Cleavinger*, applies to Gross’s federal claims against Donovan, Newman,
19 and Grove Manor.

20 However, again because our jurisdiction over state claims is grounded in diversity of
21 citizenship, state substantive law applies to Gross’s state-law claims against Donovan and

1 Newman.⁶ *See, e.g., Bonime v. Avaya, Inc.*, 547 F.3d 497, 501 n.4 (2d Cir. 2008). Once again,
2 we look to Connecticut law to determine if conservators and court-appointed attorneys for
3 conservatees are entitled to absolute quasi-judicial immunity, and, if so, under what
4 circumstances. Connecticut law, like federal law, employs a “functional” approach to quasi-
5 judicial immunity. *See Carrubba v. Moskowitz*, 274 Conn. 533, 542-43 (2005) (employing a test
6 derived from *Butz*, 438 U.S. at 513-17). *Carrubba* involved state claims (emotional distress and
7 malpractice) against a court-appointed counsel for a minor child. *Id.* at 536. The Connecticut
8 Supreme Court noted that *Butz* involved claims brought under federal law pursuant to § 1983.
9 *See id.* at 542. However, the *Carrubba* court did not suggest that the test should be any different
10 when state law claims were at issue, as they were in that case. *See id.* (stating that it was
11 adopting the Supreme Court’s test for quasi-judicial immunity to determine whether attorneys
12 appointed as counsel for minor children “should be accorded absolute immunity under
13 [Connecticut] state common law”).

14 Thus, in the normal course, to determine whether quasi-judicial immunity extends to
15 Donovan and Newman, we would simply apply *Cleavinger* to test the validity of the quasi-
16 judicial immunity defense to the federal law claims and the similar *Carrubba* functional analysis
17 in connection with the state law claims. However, in this particular case and on these facts, both
18 analyses intersect unsettled questions of state law. First, as to the quasi-judicial immunity

⁶ As we explain *infra*, all state law claims against the nursing home have been dismissed. Therefore, there is no need to decide whether a nursing home may raise the defense of quasi-judicial immunity under state law. We will, of course, have to decide the question as a matter of federal law with respect to the federal claims.

1 defense regarding state law claims: no Connecticut case squarely addresses whether conservators
2 and court-appointed attorneys for conservatees may enjoy quasi-judicial immunity. The most
3 analogous case pertains only to attorneys appointed as counsel for minor children, *see Carrubba*,
4 274 Conn. 533, and it is not sufficiently similar to this case for us to determine with confidence
5 what state law on this point is. Therefore, we certify questions to the Connecticut Supreme Court
6 so that it may decide whether conservators and court-appointed attorneys for conservatees may
7 assert quasi-judicial immunity *as to state claims*, and the scope of any such immunity, as a matter
8 of state law. The state court's pronouncement as to those questions will be final.

9 As to the quasi-judicial immunity defense to the federal law claims, *Cleavinger* instructs
10 courts to analyze various factors, described *infra*, in determining whether quasi-judicial
11 immunity applies. *Cleavinger*, 474 U.S. at 201-02. In this case, these factors intersect with the
12 nature and function of the Connecticut probate court system. Although we *could* analyze those
13 factors and simply decide the immunity question as a matter of federal law, we deem it the more
14 prudent course to allow the Connecticut Supreme Court to speak to the issue first.

15 In deciding the federal immunity question, we would apply the *Cleavinger* factors, which
16 we detail *infra*. We respectfully request that the Connecticut Supreme Court discuss these
17 factors in light of the role played by conservators, attorneys, and nursing homes. We will decide,
18 after receiving the Connecticut Supreme Court's guidance, the federal law immunity questions.

19 In so doing, we do not intend to suggest that judicial immunity always turns on state law.
20 Indeed, the common law doctrine predates even our government. *See Floyd v. Barker*, 77 Eng.
21 Rep. 1305 (Star Chamber 1607). The U.S. Supreme Court has recognized judicial immunity for

1 over one hundred years, *see Bradley v. Fisher*, 80 U.S. (13 Wall.) 335 (1871), as have federal
2 courts around the country, *see, e.g., Cok v. Consentino*, 876 F.2d 1 (1st Cir. 1989), including our
3 own, *see Tucker*, 118 F.3d 930, when addressing federal civil rights claims. Nevertheless,
4 application of *Cleavinger* in this case directly implicates the role and function of conservators,
5 attorneys, and nursing homes in the Connecticut probate court system and Connecticut public
6 policy, matters that the Connecticut Supreme Court is better equipped to speak to.

7 If, based on the Connecticut Supreme Court’s guidance as to the *Cleavinger* factors, we
8 conclude that the quasi-judicial immunity defense is not available to Donovan, Newman, or
9 Grove Manor, as a matter of federal law, then we need not decide the precise outer bounds of
10 immunity. However, if we ultimately conclude that the immunity defense *is* available to any of
11 the defendants under federal law, we will have to determine the circumstances under which
12 immunity is defeated. Even judicial immunity, which provides judges with very broad
13 protection, may be overcome if the judge acts in the clear absence of all jurisdiction or if he is not
14 acting in his judicial capacity. *See, e.g., Tucker*, 118 F.3d at 933 (citing cases). It may be the
15 case that *quasi-judicial* immunity may similarly be overcome: for example, if the plaintiff alleges
16 that the actions a defendant took were discretionary (as opposed to in strict compliance with
17 court orders), undertaken in bad faith, intentional torts, etc. No case in our Circuit spells out the
18 circumstances under which quasi-judicial immunity may be surmounted. If such immunity exists
19 in this case, we will undertake to decide this second-order question. If it does not, then Gross’s
20 lawsuit may proceed in the normal course.

21 The nature of this “second step” can be illustrated with an example from Donovan’s brief.

1 Donovan argues that the actions she took — selling Gross’s property, maintaining a bank account
2 with him, changing the locks on his house, etc. — were proper and within the scope of the duties
3 that a conservator typically carries out. However, these arguments do not go to whether a
4 conservator has immunity (step one). They go to whether Gross’s complaint, *assuming there is*
5 *immunity*, alleges sufficient facts to overcome it. It may, or it may not (we do not decide that
6 question now), but it is a distinct question from whether quasi-judicial immunity even extends to
7 these kinds of defendants.

8 Of course, it should go without saying that Donovan (or any defendant) cannot, at this
9 stage, argue that certain actions (such as placing Gross in the locked ward of the nursing home,
10 restricting his access to his children, and forcibly returning him to Grove Manor from a New
11 York hospital) were for his own protection. At this stage, we must construe all facts in the light
12 most favorable to Gross. A defendant may not bootstrap an argument that she should not be
13 liable *on the merits* into an argument that she is protected by absolute immunity. We cannot
14 resolve factual disputes in the *defendants’* favor at this stage to conclude that they are absolutely
15 immune from suit.⁷

16 With this background in mind, we analyze the judicial and quasi-judicial immunity

⁷ Indeed, at least at one juncture — with regard to Gross’s forcible return to Grove Manor from New York — Donovan concedes that the probate court did *not* have actual knowledge of what was happening, suggesting only that “it can reasonably be *inferred* that returning Gross to Grove Manor was done under the supervision, knowledge, and implied consent of the Court.” Brief for Defendant-Appellee Donovan at 22 (emphasis added). Because we must draw all inferences in the light most favorable to the plaintiff, we must decline Donovan’s invitation to reasonably infer that she forcibly returned Gross to Grove Manor from New York “under the supervision, knowledge, and implied consent of the Court.”

1 questions as to Brunnock, Donovan, Newman, and Grove Manor.

2 **II. Judicial Immunity: Judge Thomas P. Brunnock**

3 Plaintiff makes several claims against Brunnock, including violation of the Americans
4 with Disabilities Act, conspiracy (per 42 U.S.C. § 1985), violation of due process rights, abuse of
5 process, and negligent and intentional infliction of emotional distress. It is unnecessary to parse
6 the specifics of each claim because the only issue on appeal is immunity. We affirm the grant of
7 judicial immunity as to the judge.

8 The problems in this case began when Brunnock signed an order on August 25, 2005
9 indicating that a hearing would occur on September 1 — and that Gross was to be notified of the
10 hearing by *August 24*. Moreover, there is no indication that Gross even learned of the hearing
11 until August 30, just two days prior. Additional diligence on Brunnock’s part could have
12 uncovered the fact that Gross was neither a resident nor a domiciliary of Connecticut; as Judge
13 Gormley of the Superior Court noted at the hearing on the habeas petition, there was not “a
14 scintilla of evidence that [Gross was] a resident or domiciliary of the state of Connecticut.”
15 Obviously, Brunnock to some extent had to rely on the representations of Gross’s appointed
16 counsel, but — in particular, knowing that Gross was not served with notice of the hearing until
17 past the statutory deadline, and obviously aware of the fact that Gross was not at the hearing
18 itself — it would have been advisable to inquire further into the facts. Indeed, as Judge Gormley
19 noted, “Mr. Gross doesn’t get to go to the hearing, or get notice of the hearing, and has no ability
20 to say to anybody[, ‘I don’t live here.’] . . . [T]his case has disturbed me from day one. I kept
21 looking for some evidence that would support what has taken place in this case but I find none . .

1 . . .”

2 Nevertheless, Brunnock’s mishandling of the case is insufficient to defeat judicial
3 immunity. “A judge will not be deprived of immunity because the action he took was in error,
4 was done maliciously, or was in excess of his authority; rather, he will be subject to liability *only*
5 *when he has acted in the clear absence of all jurisdiction.*” *Stump v. Sparkman*, 435 U.S. 349,
6 356-57 (1978) (internal quotation marks omitted and emphasis added). The critical question is
7 whether he had jurisdiction. *Id.* at 356. However, there is a difference between *exceeding*
8 jurisdiction and acting in the *absence* of jurisdiction:

9 if a probate judge, with jurisdiction over only wills and estates,
10 should try a criminal case, he would be acting in the clear absence
11 of jurisdiction and would not be immune from liability for his
12 action; on the other hand, if a judge of a criminal court should
13 convict a defendant of a nonexistent crime, he would merely be
14 acting in excess of his jurisdiction and would be immune.

15
16 *Id.* at 357 n.7. Judicial immunity is not defeated “even when the judge is accused of acting
17 maliciously and corruptly.” *Pierson v. Ray*, 386 U.S. 547, 554 (1967).

18 Gross suggests that it should be easier to defeat judicial immunity when the judge in
19 question is sitting on a court of limited jurisdiction. However, this is not the law. Admittedly,
20 some discussion in *Stump* suggests that the judge was immune because he sat on a court of
21 general jurisdiction. *See Stump*, 435 U.S. at 357 (noting that the judge had “original exclusive
22 jurisdiction in all cases at law and in equity whatsoever”) (internal quotation marks omitted).
23 The point is not that a judge on a court of general jurisdiction enjoys “more” immunity than one
24 on a court of limited jurisdiction. Rather, the point is that a judge on a court of general

1 jurisdiction is less likely to have acted in the clear absence of all jurisdiction.

2 More to the point, the discussion in these cases — and in the parties’ briefs in this case —
3 involve an “elastic,” and therefore imprecise, “concept of jurisdiction.” *United States v. Cotton*,
4 535 U.S. 625, 630 (2002). In this context, a court acts in the absence of all jurisdiction when it
5 does not have any “statutory or constitutional *power* to adjudicate the case.” *Id.* (internal
6 quotation marks omitted). Here, it is undisputed that Brunnock had the power to adjudicate
7 conservatorship applications. The defect arose out of the erroneous conclusion that Gross was a
8 resident of Connecticut. This erroneous legal conclusion is insufficient to strip the judge of
9 immunity.

10 In *Maestri v. Jutkofsky*, 860 F.2d 50 (2d Cir. 1988), we addressed judicial immunity in
11 the context of a lawsuit against a town justice. In that case, the plaintiffs were arrested, based on
12 an arrest warrant issued by the defendant, in the town of Germantown. However, the defendant
13 was a town justice in Taghkanic, which is not adjacent to Germantown. By statute, town justices
14 have jurisdiction “only in the town in which the offense was committed [or, in certain
15 circumstances,] any adjoining town within the same county.” *Id.* at 52. We explained in *Maestri*
16 that “a judge will be denied immunity only where it appears, first, that the judge acted in the clear
17 absence of jurisdiction, and second, that the judge *must have known* that he or she was acting in
18 the clear absence of jurisdiction.” *Id.* at 53 (emphasis added). In that case, we held that
19 immunity did not apply, because the offense in question occurred in a non-adjoining town, and
20 “[n]o reasonable town judge would have thought himself to have had jurisdiction over a non-
21 adjoining town.” *Id.*

1 Gross seizes on that language here, arguing that no reasonable Connecticut Probate Court
2 judge would have thought he had jurisdiction over a New York resident. This misses the crucial
3 distinction between *Maestri* and this case, *viz.*, that it was undisputed that the judge in *Maestri*
4 knew the plaintiffs were from a town over which he had no jurisdiction. *See id.* at 51-52. Here,
5 Brunnock had subject matter jurisdiction over cases like Gross's, and though it was ultimately
6 held that he did not have personal jurisdiction over Gross, Brunnock did not know it at the time.
7 Immunity therefore applies.

8 Plaintiff also argues that Brunnock knew or should have known that he did not have
9 jurisdiction as of the September 1, 2005, hearing, because (1) the notice that Brunnock signed on
10 August 25 was facially defective, as it did not allow for the statutorily-mandated seven days'
11 notice, *see* CONN. GEN. STAT. ANN. § 45a-649(a); (2) the return of service indicated that
12 Limauro, and not Gross himself (or his attorney), was the person served; and (3) Newman's
13 report to the court indicated that Gross lived in New York, so that a reasonable judge would
14 have, at a minimum, engaged in further fact-finding to determine if jurisdiction were proper.
15 These claims find some support in the statute, which provides that the respondent must be given
16 seven days' notice of a hearing and that he himself must be served. Moreover, if the respondent
17 wishes to attend the hearing, the judge *must* either hold the hearing in a convenient location or
18 visit the respondent. *Id.* § 45a-649(a)-(b).

19 But as the Supreme Court has instructed, "judges should be at liberty to exercise their
20 functions with independence and without fear of consequences." *Pierson*, 386 U.S. at 554.
21 Moreover, "the scope of the judge's jurisdiction must be construed broadly where the issue is the

1 immunity of the judge.” *Stump*, 435 U.S. at 356. Brunnock clearly had jurisdiction over cases
2 like *Gross*’s. The judge simply did not have jurisdiction over *Gross*’s case itself. Indeed, as a
3 recent Connecticut Appellate Court case explains, “[a] judge does not act in the complete
4 absence of authority, even if she acts erroneously, unless the judicial conduct is so far outside the
5 normal scope of judicial functions that the judge was in effect not acting as a judge.” *Leseberg v.*
6 *O’Grady*, 115 Conn. App. 18, 23 (2009) (internal quotation marks omitted). That test is not met
7 here; ruling on conservatorship applications and related matters are judicial functions within the
8 realm of a probate judge. *See id.* at 24. A judge’s “fail[ure] to comply fully with statutory
9 procedures,” as was the case here, is insufficient to strip the judge of immunity. *Id.* at 23.

10 The foregoing analysis applies to state as well as federal claims. As explained above,
11 Connecticut’s common law of judicial immunity is, so far as relevant here, the same as the
12 federal test. *See Shay v. Rossi*, 253 Conn. 134, 170 (2000) (citing *Stump v. Sparkman*, 435 U.S.
13 349, 364 (1978)), *overruled on other grounds*, *Miller v. Egan*, 265 Conn. 301 (2003); *Leseberg*
14 *v. O’Grady*, 115 Conn. App. 18, 22 (2009) (citing *Mireles v. Waco*, 502 U.S. 9, 11-12 (1991)).
15 For the reasons discussed above, we hold that Brunnock is entitled to judicial immunity on state
16 law claims.

17 Thus, Brunnock did not act in the clear absence of subject matter jurisdiction, and he was
18 not aware of the defects in personal jurisdiction, making judicial immunity appropriate. We
19 therefore affirm the District Court’s grant of judicial immunity to Brunnock and its dismissal of

1 all claims against him.⁸

2 **III. Quasi-Judicial Immunity**

3 **A. Federal vs. State Law**

4 As discussed above, there are two distinct but related questions in this case: first, whether
5 Donovan, Newman, and Grove Manor are entitled to the defense of absolute quasi-judicial
6 immunity as to federal claims (a question of federal law), and second, whether Donovan and
7 Newman are entitled to such immunity as to state law claims (a question of state law). We are
8 certifying questions as to both of these issues. We are certifying questions regarding the state
9 law issue because the Connecticut Supreme Court has not definitively spoken on the subject of
10 quasi-judicial immunity for conservators and court-appointed attorneys for conservatees.

11 We are also certifying a question that relates to the federal law question. We do so
12 because application of the factors the Supreme Court has outlined intersects unsettled questions
13 of Connecticut state law and policy. Therefore, we ask the Connecticut Supreme Court to give
14 us guidance as to the role of conservators, attorneys, and nursing homes within the Connecticut
15 probate court system. Upon receiving this guidance, we will decide the federal claims at issue
16 here.

⁸ *Case v. Bush*, 93 Conn. 550 (1919), does not change the analysis. According to a treatise, *Case* stands for the proposition that a judge who acts without subject matter jurisdiction could be subject to civil liability. See RALPH H. FOLSON & GAYLE B. WILHELM, PROBATE JURISDICTION & PROCEDURE IN CONN. § 2:5, at 2-19 (2d ed. 2008). However, *Case* significantly predates the U.S. and Connecticut Supreme Courts' authorities on the question and, most important, does not distinguish between a judge *exceeding* his jurisdiction and acting in the clear *absence* of jurisdiction, which is the relevant legal test.

1 We note that, in practice, the division between the federal and state law issues may
2 vanish. As we explain *infra*, the Connecticut Supreme Court, in its most recent case on quasi-
3 judicial immunity, explained that it was adopting U.S. Supreme Court case law on the subject. It
4 does not appear to us that the federal and Connecticut tests diverge much, if at all. However, we
5 do not presume to decide the contours of Connecticut law.⁹ After all, the Connecticut Supreme
6 Court may expand, restrict, abandon, or otherwise modify its current state common law doctrine
7 on this point. Even if that is the case, we would nonetheless find helpful a discussion of the role

⁹ A recent case from the D.C. Circuit illustrates the potential for difference. In *Atherton v. District of Columbia*, 567 F.3d 672 (D.C. Cir. 2009), the court had to address the question of whether a juror officer and an Assistant United States Attorney were entitled to quasi-judicial immunity for dismissing a juror, allegedly on account of his ethnicity. The D.C. Circuit employed a three-part functional analysis based on *Butz* to determine the question of quasi-judicial immunity, *see id.* at 683, just as the Connecticut Supreme Court did, *see Carrubba*, 274 Conn. at 542-43.

However, Connecticut seems to extend immunity to those who are “performing a function that was integral to the judicial process.” *Id.* at 542. The D.C. Circuit, on the other hand — relying on the same Supreme Court case as Connecticut — seems to extend immunity only to those who are exercising a judicial function or acting in a way integrally related to *adjudication*. *See Atherton*, 567 F.3d at 683. For example, in *Atherton*, the D.C. Circuit explained that the juror officer “was not involved in the resolution of any factual or legal issue; and her responsibilities did not involve handling any pleadings, disputes, or controversies of law.” *Id.* at 683-84. Thus, even officials who are important in providing the necessary conditions for the operation of the judicial system are not protected by immunity unless they are performing adjudicative functions. *See id.* at 684. The D.C. Circuit, relying at least in part on the same cases as the Connecticut Supreme Court, appears to have developed a test for quasi-judicial immunity that is narrower than that in Connecticut.

We note this difference, not to suggest that the Connecticut test is “incorrect,” but only to point out how a federal court and a state court, employing the same legal framework, may come to different conclusions when one is applying federal law and the other is applying state law. Such an outcome may or may not arise in this case, but such a possibility is what requires us to certify two sets of questions.

1 of the various actors in the Connecticut probate system in light of the federal law factors as
2 enunciated in *Cleavinger*.

3 Of course, if Connecticut's *state law* analysis of quasi-judicial immunity relies on the
4 same factors as the federal law test, then the Connecticut Supreme Court will so advise us.

5 In either event, we will ultimately apply and elaborate on the *federal law* test for quasi-
6 judicial immunity. First, in light of the guidance received by the Connecticut Supreme Court, we
7 will decide whether the defense of quasi-judicial immunity is available to these defendants at all.
8 Then, we may also need to decide related questions, such as whether the defense should be raised
9 at a motion to dismiss, or at a later stage. If we conclude that quasi-judicial immunity applies to
10 any of the federal claims against the defendants, we may also need to answer the second-order
11 question of precise scope and contours of that immunity. These determinations would be made
12 as a matter of federal law.

13 Therefore, although state and federal law questions are posed with regard to each
14 defendant, we do not bifurcate our analysis below.

15 **B. Conservator Kathleen Donovan**

16 Gross pleads several federal and state law claims against the former conservator,
17 Kathleen Donovan: conspiracy pursuant to § 1985, violation of his right to due process, negligent
18 and intentional infliction of emotional distress, breach of fiduciary duty, false arrest and tortious
19 assault, and false imprisonment. The District Court dismissed all of these claims, concluding
20 that Donovan, as a court-appointed conservator acting pursuant to the Probate Court's order, was
21 entitled to quasi-judicial immunity. The District Court wrote,

1 Donovan’s argument to extend Judge Brunnock’s judicial
2 immunity to her actions is a simple one as the law is clear and well
3 established. Donovan was acting as an agent of the Probate Court,
4 at the direction and under the supervision of Judge Brunnock. If
5 Judge Brunnock is immune from suit, than [*sic*] Donovan as
6 conservator acting as his agent or at his direction must be immune.
7

8 However, we are not of the view that “the law is clear and well-established.” To the
9 contrary, as we read them, the statutes and case law in Connecticut do not sufficiently enable us
10 to analyze the factors set forth by the Supreme Court in deciding when an individual is entitled to
11 quasi-judicial immunity.

12 At the outset, we note that Donovan is correct: courts are willing to extend absolute
13 judicial immunity to those who “perform functions closely associated with the judicial process.”
14 *Cleavinger v. Saxner*, 474 U.S. 193, 200 (1985). Those who seek this absolute immunity bear
15 the burden of demonstrating that public policy requires such a broad exemption from suit. *See*
16 *id.* at 201. The Supreme Court has set forth a “functional” approach to determine whether a
17 particular individual is entitled to quasi-judicial immunity. The factors include

18 (a) the need to assure that the individual can perform his functions
19 without harassment or intimidation; (b) the presence of safeguards
20 that reduce the need for private damages actions as a means of
21 controlling unconstitutional conduct; (c) insulation from political
22 influence; (d) the importance of precedent; (e) the adversary nature
23 of the process; and (f) the correctability of error on appeal.
24

25 *Id.* at 202; *see also Butz v. Economou*, 438 U.S. 478, 511-12 (1978) (describing the factors in
26 greater detail).

27 In this case, the application of these factors directly intersects the nature and function of
28 the Connecticut probate court system and considerations of Connecticut public policy. For

1 example, although all individuals connected to the judicial process in some way would surely
2 like to “perform [their] functions without harassment or intimidation,” *Cleavinger*, 474 U.S. at
3 202, certain of those individuals enjoy absolute immunity, *see, e.g., Imbler v. Pachtman*, 424
4 U.S. 409 (1976) (prosecutors entitled to absolute immunity) , while others do not, *see, e.g.,*
5 *Antoine v. Byers & Anderson, Inc.*, 508 U.S. 429 (1993) (court reporters not entitled to absolute
6 immunity). Which side of the line a court-appointed conservator falls on necessarily involves
7 questions regarding the role of a conservator in Connecticut and the way that position is
8 envisioned in Connecticut’s statutory and common law scheme.

9 Connecticut case law is not sufficiently on point to provide a rule of decision here. In
10 *Carrubba v. Moskowitz*, 274 Conn. 533 (2005), the Connecticut Supreme Court held that court-
11 appointed counsel for minor children were entitled to quasi-judicial immunity. The court began
12 the analysis by noting that the “extension [of judicial immunity to others] generally has been very
13 limited.” *Id.* at 540. Moreover,

14 not every category of persons protected by immunity are entitled to
15 *absolute* immunity. In fact, just the opposite presumption prevails
16 — categories of persons protected by immunity are entitled only to
17 the scope of immunity that is necessary to protect those persons in
18 the performance of their duties. The presumption is that qualified
19 rather than absolute immunity is sufficient to protect government
20 officials in the exercise of their duties.

21
22 *Id.* at 541 (internal quotation marks and alteration omitted). These comments might lead one to
23 conclude that courts should be very reluctant to expand the reach of quasi-judicial immunity.

24 However, after adopting the U.S. Supreme Court’s functional approach, the court
25 determined that court-appointed counsel for minor children *were* entitled to absolute immunity.

1 The court reasoned that court-appointed counsel for minor children were “subject to the court’s
2 discretion,” could “be removed by the court at any time,” and were, “just as any other attorney, . .
3 . subject to discipline for violations of the Code of Professional Conduct.” *Id.* at 543. The court
4 emphasized that court-appointed counsel for minor children served a dual function; in addition to
5 being attorneys advocating their clients’ (i.e., the child’s) wishes, they must “promot[e] the best
6 interests of the child,” *id.* at 544, which involves “be[ing] more objective than a privately
7 retained attorney,” *id.* at 545. The court acknowledged that the “dual obligations imposed on the
8 attorney for a minor child . . . are not easily disentangled.” *Id.* However, the role as advocate
9 “must always be subordinated to the attorney’s duty to serve the best interests of the child.” *Id.*
10 at 546. The court also distinguished the case of representing a child — which “imposes a higher
11 degree of objectivity on [an] attorney” — from that of representing an adult. *Id.* at 545 (internal
12 quotation marks omitted).

13 Thus, after explaining that the attorney had an objective role (i.e., not purely as an
14 advocate) that made her integral to the judicial process, and that the complaint made no
15 allegation that the attorney “acted outside the usual role of an attorney for the minor children,”
16 the court concluded that the attorney was entitled to absolute quasi-judicial immunity. *Id.* at 549.

17 Relying primarily on *Carrubba*, Donovan argues that she should be immune from suit.
18 *Carrubba*, however, is not sufficiently instructive. The application of the factors set forth in
19 *Cleavinger* to the circumstances of this case (a federal question) depends on the nature of the role
20 a conservator serves under Connecticut law, a topic that *Carrubba* does not discuss. Therefore,
21 we think it most prudent to seek the assistance of the Connecticut Supreme Court with respect to

1 the *Cleavinger* factors.

2 Indeed, Connecticut law seems to recognize that, in certain circumstances, conservators
3 *can* be liable for their official actions. First, a probate court is required by statute to require the
4 posting of a probate bond if it appoints a conservator for the estate of a respondent. *See* CONN.
5 GEN. STAT. ANN. § 45a-650(g). The court also has the ability, in its discretion, if it appoints a
6 conservator of the person, to require the conservator to post a bond “for the protection of the
7 respondent.” *Id.* The court did not require such a bond in this case, which Gross claims was part
8 of the conspiracy against him. Regardless, the fact that the law requires a probate bond, and
9 permits a bond for the protection of the conserved person, suggests that the legislature was aware
10 of the possibility of conservators’ liability.

11 The Connecticut Supreme Court’s decision in *Jewish Home for the Elderly of Fairfield*
12 *County, Inc. v. Cantore*, 257 Conn. 531 (2001), is instructive. The home at which the decedent
13 stayed sued the conservator when the conservator did not pay it for its services. It alleged “an
14 action on the probate bond to recover for the loss it suffered as a result of [the conservator’s]
15 failure to ensure timely payment for [the conservatee Kosminer’s] care.” *Id.* at 539. The
16 Connecticut Supreme Court determined that the complaint had stated a claim against Cantore and
17 that the home had standing to bring its claim. *Id.* at 543. It held that Cantore had a duty, among
18 other things, to use Kosminer’s estate to support her and pay her debts. *Id.* at 540. Thus, the
19 Connecticut Supreme Court’s holding in the *Cantore* litigation seems to recognize that a
20 conservator can be sued in an action on the probate bond when he fails to perform his duty.

21 Moreover, a conservator is defined as a fiduciary, *see* CONN. GEN. STAT. ANN. § 45a-

1 199, and fiduciaries “who[,] in good faith[,] make[] payments . . . pursuant to the order of the
2 court of probate having jurisdiction before an appeal has been taken from such order, shall not be
3 liable for the money so paid . . . even if the order under which such payment . . . has been made is
4 later reversed, vacated, or set aside,” *id.* § 45a-202(a). It could be, however, that a fiduciary *may*
5 be liable (1) if he did not act in good faith, (2) if the probate court lacked jurisdiction, or (3) if he
6 acted *after* an appeal was taken and the underlying order is reversed.

7 Thus, Connecticut law seems to imply that (at least certain types of) conservators may be
8 liable in certain circumstances. This suggests that conservators do not have absolute immunity
9 from suit (the first-order question) but that they may raise certain affirmative defenses to liability.
10 In such a context, it appears inappropriate for us to hold that conservators are absolutely immune
11 from suit.

12 It would be particularly inappropriate for us to so hold because, in other contexts,
13 Connecticut law explicitly recognizes certain conservators’ immunity. By law, “[a]ll receivers or
14 conservators *of trust banks or uninsured banks* . . . shall be immune from suit and liability, both
15 personally and in their official capacities . . .” CONN. GEN. STAT. ANN. § 36a-237h(a)-(b) (West
16 2008 pocket part) (emphasis added). Moreover, immunity under this section *does not* extend to
17 attorneys retained by the conservator, *id.* § 36a-237h(a), or to “intentional or wilful and wanton
18 misconduct of the receiver or conservator,” *id.* § 36a-237h(b). Other types of conservators are
19 similarly immune, *see, e.g., id.* §§ 45a-683 (guardians of people with mental retardation). These
20 provisions do not apply to the kind of conservator at issue in this case. The fact that the
21 legislature specifically made several types of guardians and conservators immune but not others

1 lends support for the proposition that conservators like Donovan are *not* immune or that, if such
2 immunity exists, it is not absolute. *Inclusio unius est exclusio alterius*.

3 To be sure, the Connecticut Supreme Court may disagree and conclude that it is more
4 consistent with the overall statutory scheme to hold that conservators like Donovan *are* immune
5 despite the fact that no statute explicitly confers immunity. For example, the court may reason
6 that if other conservators are immune, Donovan should be as well. This underscores the
7 rationale for certification; the state court is in a better position to speak to that question of state
8 policy. *Cf. See Sealed v. Sealed*, 332 F.3d 51, 59 (2d Cir. 2003) (“Where a question of statutory
9 interpretation implicates the weighing of policy concerns, principles of comity and federalism
10 strongly support certification.”) (citation omitted).

11 Admittedly, other federal cases have held that a conservator *is* entitled to quasi-judicial
12 immunity. *See, e.g., Cok v. Cosentino*, 876 F.2d 1 (1st Cir. 1989) (per curiam); *Collins v. West*
13 *Hartford Police Department*, 380 F. Supp. 2d 83 (D. Conn. 2005); *Rzayeva v. United States*, 492
14 F. Supp. 2d 60 (D. Conn. 2007); *Sasscer v. Barrios-Paoli*, No. 05-cv-2196, 2008 WL 5215466,
15 at *5 n.5 (S.D.N.Y. Dec. 8, 2008).¹⁰

16 Donovan suggests that conservators are simply an arm of the probate court. But this is
17 not the end of the inquiry. Although “it is clear that the conservator acts under the supervision
18 and control of the Probate Court,” they do so “*in the care and management of the ward’s estate*”
19 or person. *Probate of Marcus*, 199 Conn. 524, 529 (1986) (emphasis added). Indeed, *Marcus*,

¹⁰ *Collins* is currently on appeal before our court. However, to the extent that *Collins* overlaps, our panel has precedence, because *Collins* has not yet been heard.

1 which Donovan cites, held that it was impermissible for a conservator to make a gift to herself
2 from the ward's estate. (The conservatrices sought to make such a gift, the probate court denied
3 them permission, and they appealed.) *Id.* It seems at first cut illogical to hold that, if the
4 conservatrices in that case made such an *ultra vires* distribution, they would be absolutely
5 immune from suit by the ward, even though the actions they took were clearly impermissible.

6 In sum, our conclusion as to quasi-judicial immunity as to federal claims against
7 Donovan is governed by the *Cleavinger* factors. The analysis of those factors implicates
8 questions of Connecticut state law that, as described above, are not entirely clear. For example,
9 there is obviously a need to assure that conservators can operate without the threat of harassing
10 litigation, but Connecticut courts, familiar with the role of the conservator within that state's
11 system, may believe that this factor deserves less weight than we might otherwise give it.
12 Similarly, the Connecticut Supreme Court might inform us that there are strong procedural
13 safeguards in place (the second factor), but that these are undercut by the fact that probate judges
14 in Connecticut are elected (the third factor). The Connecticut court can also assist us in
15 determining, for example, the chances of errors being corrected on appeal or the role of precedent
16 in the Connecticut probate system.¹¹

17 Therefore, as to Gross's federal claims against Donovan, we certify a question to the
18 Connecticut Supreme Court. We ask the court to explain the role and function of a court-

¹¹ Defendants have argued that plaintiff implicitly recognized that the judge's orders were proper because there was no appeal. This ignores the obvious fact that if one is held to be incompetent, possibly without notice, it is difficult if not impossible to file an appeal.

1 appointed conservator, in the context of Connecticut’s probate court system, in light of the
2 factors set forth by *Cleavinger v. Saxner*, 474 U.S. 193, 202 (1985). Upon receiving the
3 Connecticut Supreme Court’s response, we will decide whether quasi-judicial immunity extends
4 to conservators as a matter of federal law, and if so, the second-order question of what the precise
5 scope of that immunity is.

6 As to the state claims against Donovan, we simply certify the question of whether
7 conservators are entitled to quasi-judicial immunity. Regarding the state law claims, the
8 Connecticut Supreme Court’s determination will be final.

9 **C. Attorney Jonathan Newman**

10 Gross makes several federal and state claims against Newman: conspiracy (by way of
11 § 1985), violation of his right to due process, intentional and negligent infliction of emotional
12 distress, and malpractice. Although Donovan and Newman are both attorneys, there is a
13 significant caveat: Newman, as Gross’s attorney, was an advocate, while Donovan, as the
14 conservator, was not. The parties seem to dispute whether Newman’s role was *solely* that of an
15 advocate (Gross’s position) or whether he was to advocate Gross’s views tempered by his own
16 judgment (Newman’s position). However, it is clear that, at least to some extent, Newman was
17 supposed to act as an advocate. Therefore, his role was to some degree less as an “arm of the
18 court,” and he has a correspondingly weaker claim to quasi-judicial immunity.

19 The *Cleavinger* factors are relevant here, as they were for Donovan:

- 20 (a) the need to assure that the individual can perform his functions without
21 harassment or intimidation; (b) the presence of safeguards that reduce the need for
22 private damages actions as a means of controlling unconstitutional conduct; (c)

1 insulation from political influence; (d) the importance of precedent; (e) the
2 adversary nature of the process; and (f) the correctability of error on appeal.

3
4 474 U.S. at 202.

5 Newman argues that he is entitled to quasi-judicial immunity because he was acting as an
6 arm of the court, noting that he was “appointed by the [probate] court to represent the interests of
7 a person being considered for a conservatorship.” Brief of Defendant-Appellant Newman at 6.
8 However, this statement misleadingly evokes the “best interests” standard that applies to court-
9 appointed counsel for minor children. *See Carrubba*, 274 Conn. at 544-45 (holding that counsel
10 for a minor child has a “duty to secure the best interests of the child”). By contrast, the statute on
11 conservatorships indicates that the court may appoint an attorney to “represent the respondent,”
12 CONN. GEN. STAT. ANN. § 45a-649(b)(2), with no mention of “best interests.” In light of this
13 statute, Newman’s argument that “[a] physician *has already determined* that the person is”
14 incompetent and therefore “the attorney could not simply parrot the client’s wishes, but was
15 obligated to assist the court in serving the client’s best interest,” is particularly weak. It also
16 appears to misconstrue the nature of the proceedings. The court must find by clear and
17 convincing evidence *that* the respondent is incompetent. *Id.* § 45a-650(d). Until that time, the
18 respondent is like any other competent client. Moreover, *after* the conservator is appointed, *she*
19 is the one who manages the ward’s affairs and his person. *Id.* Thus, if anyone, it is the
20 conservator who exercises independent judgment as against the ward’s wishes, not the attorney.
21 Indeed, one can imagine that the system works best when the conservator reports to the court an
22 independent judgment about what the ward’s “best interests” would be, and the attorney

1 advocates for his client’s wishes, with the probate court ultimately responsible for the ward’s
2 protection. Of course, whether such a system “works best” is a matter of Connecticut policy.¹²

3 Newman also points to various facts that he says support his claim that he acted properly:
4 Gross could not attend the hearing because he was in the hospital (though alternative
5 arrangements could have, and by statute must have, been made); signing papers as “attorney for
6 ward” when Gross had not yet been adjudged incompetent was merely a technical error; the lack
7 of notice was curable; and so on. However, just as with Donovan, Newman may not bootstrap
8 his arguments on the *merits* into an argument for *immunity*. At this stage, we must take all facts
9 in the light most favorable to Gross. The only issue on appeal is that of quasi-judicial immunity.
10 Whether Newman was or was not negligent is not before us.

11 Instead, our analysis is governed by the *Cleavinger* factors, and as with Donovan, that
12 analysis implicates questions of state probate law. For example, though attorneys typically
13 should operate without the threat of harassing litigation, Connecticut policy may favor giving
14 relatively less protection for attorneys appointed for conservatees than for those for minor
15 children. *Cf. Carrubba*, 274 Conn. at 541-42 (noting that prosecutors in Connecticut are entitled
16 to absolute immunity but public defenders are entitled to only qualified immunity). As with
17 Donovan, the Connecticut Supreme Court might inform us that there are strong procedural
18 safeguards in place (the second factor), but that these are undercut by the fact that probate judges
19 in Connecticut are elected (the third factor). The *Cleavinger* analysis is also affected by the fact

¹² We note that Newman’s citation to *Lesnewski v. Redvers*, 276 Conn. 526 (2005) appears entirely inapposite.

1 that Newman has *some* role as an advocate, making him commensurately *less* of an “arm of the
2 court.”

3 Therefore, as to Gross’s federal claims against Newman, we certify a question to the
4 Connecticut Supreme Court. We ask the court to explain the role and function of a court-
5 appointed attorney for a conservatee, in the context of Connecticut’s probate court system, in
6 light of the factors set forth by *Cleavinger v. Saxner*, 474 U.S. 193, 202 (1985). Upon receiving
7 the Connecticut Supreme Court’s response, we will decide whether quasi-judicial immunity
8 extends to court-appointed attorneys for conservatees as a matter of federal law, and if so, the
9 second-order question of what the precise scope of that immunity is.

10 As to the state claims against Newman, we simply certify the question of whether court-
11 appointed attorneys for conservatees are entitled to quasi-judicial immunity. As to the state law
12 claims, the Connecticut Supreme Court’s determination will be final.

13 **D. Grove Manor Nursing Home**

14 Gross pled six claims against Grove Manor: two civil rights conspiracy claims pursuant
15 to § 1985, two statutory violations (concerning the Omnibus Budget Reconciliation Act of 1989
16 and the Patients’ Bill of Rights), and emotional distress (intentional and negligent). Of these, the
17 civil rights claims are preserved on appeal and the remainder are waived. However, as to the
18 emotional distress claims, dismissal was without prejudice and these claims may be reasserted in
19 the future.

20 **1. Civil Rights Claims**

21 The civil rights claims against Grove Manor rise and fall with the determination of quasi-

1 judicial immunity. If the conservator and attorney have quasi-judicial immunity, then the nursing
2 home may as well, at least to the extent that it was merely carrying out their orders. If they do
3 not, then the nursing home likely does not. For the reasons discussed above in connection with
4 Donovan and Newman, we certify questions regarding the nursing home's immunity as well.
5 However, we note that the case for derivative immunity is weakest with regard to the nursing
6 home. Grove Manor was furthest removed from the judicial process. Moreover, no court case
7 that we have found extends judicial immunity to an *institution* (as opposed to an individual).

8 Once again, our analysis is governed by the *Cleavinger* factors. We will not rehash them
9 here, but we note that, as with Donovan and Newman, the application of those factors to Grove
10 Manor implicates Connecticut probate law. Because Grove Manor is more removed from the
11 judicial process than Donovan or Newman, it may have a weaker case for immunity. However,
12 despite this fact, the policy considerations may exist that militate toward finding Grove Manor
13 immune, particularly if Donovan and Newman are immune. The Connecticut Supreme Court is
14 in the best position to address these questions in the first instance. Therefore, as to Gross's
15 federal claims against Grove Manor, we certify a question to the Connecticut Supreme Court.
16 We ask the court to explain the role and function of a nursing home in the context of
17 Connecticut's probate court system, in light of the factors set forth by *Cleavinger v. Saxner*, 474
18 U.S. 193, 202 (1985). Upon receiving the Connecticut Supreme Court's response, we will
19 decide whether quasi-judicial immunity extends to nursing homes as a matter of federal law, and
20 if so, the second-order question of what the precise scope of that immunity is.

21 **2. Statutory and Tort Claims**

1 The District Court declined to grant Grove Manor quasi-judicial immunity as to the
2 statutory claims and the tort claims. The District Court reasoned that these causes of action went
3 to Grove Manor's decision to assign Gross to a particular room, to assign him a particular
4 roommate, and to keep him in the room with the roommate after the roommate attacked him.
5 The District Court concluded that these decisions were discretionary and not specifically called
6 for by court order; thus, even if immunity applied to Grove Manor, it would not apply to these
7 discretionary acts.

8 The District Court went on to dismiss plaintiff's statutory claims because he did not
9 discuss them in his opposition to Grove Manor's motion to dismiss. We affirm the dismissal of
10 these claims because they were waived below and are not discussed in the plaintiff's opening
11 brief on appeal (other than in connection with whether Grove Manor has quasi-judicial
12 immunity).

13 This leaves the intentional and negligent infliction of emotional distress claims against
14 the nursing home. As noted above, these claims survived the District Court's quasi-judicial
15 immunity analysis. Roughly three weeks later, the District Court held a telephone conference to
16 get further background on the case and determine issues for discovery and the subsequent course
17 of litigation. Then, at the very end of that conversation, the following transpired:

18 [THE COURT:] So with respect to the ombudsman the period of
19 non-economic damages would not exceed two months[, the time
20 from Ewald receiving the complaint and Gross being released].
21 And with respect to the nursing home the period of non-economic
22 damages would not exceed four days[, the time after Gross getting
23 attacked and the nursing home reassigning him to a different
24 room]. Is that inaccurate?

1 MR. PETERS[, counsel for Gross]: With the facts before me I
2 can't say that it is, your Honor.

3
4 THE COURT: All right. Given that, of course you understand that
5 in order to sustain an action in district court there has to be a
6 showing by you, the plaintiff, that your damages are \$75,000 or
7 greater. And to be honest with you, I'm at a loss to see how that
8 could possibly be the case on these facts. I don't believe I have
9 [subject-matter] jurisdiction.

10
11 That's not to say that if I dismiss this case you would not be able to
12 file it in superior court. But I don't believe you have Federal Court
13 jurisdiction any longer given the remaining claims and the extent
14 of the damages associated with those remaining claims.

15
16 MR. PETERS: We all – we would like to – I mean, we would not
17 oppose that analysis which would call for you dismissing the case
18 because then we could appeal.

19
20 THE COURT: That you could. All right.

21
22 Do you want to withdraw the case?

23
24 MR. PETERS: No.

25
26 THE COURT: Do you object to the dismissal of the case?

27
28 MR. PETERS: No, I do not.

29
30 THE COURT: All righty, I'll enter the order.

31
32 Gross does not address this issue in his principal brief. This constitutes waiver. *See, e.g.,*
33 *Zhang v. Gonzalez*, 426 F.3d 540, 541 n.1 (2d Cir. 2005). Gross refers to the emotional distress
34 claims in his reply brief and points out that his arguments about them were raised at the District
35 Court. However, this is also insufficient to properly present an issue on appeal. *See McCarthy v.*
36 *S.E.C.*, 406 F.3d 179, 186 (2d Cir. 2005) (“[A]rguments not raised in an appellant’s opening

1 brief, but only in his reply brief, are not properly before an appellate court *even when the same*
2 *arguments were raised in the trial court.*”) (emphasis added). Merely mentioning the relevant
3 issue in an opening brief is not enough; “[i]ssues not sufficiently argued are in general deemed
4 waived and will not be considered on appeal.” *Frank v. United States*, 78 F.3d 815, 833 (2d Cir.
5 1996), *vacated on other grounds*, 521 U.S. 1114 (1997). “[S]imply stating an issue does not
6 constitute compliance with [Federal Rule of Appellate Procedure] 28(a): an appellant or cross-
7 appellant must state the issue *and* advance an argument.” *Id.* Because Gross did not advance
8 any argument until the reply brief, the issue is waived.

9 Accordingly, we affirm the dismissal of the statutory and tort claims against Grove
10 Manor. The tort claims may be reasserted in the future as they were dismissed without
11 prejudice.¹³

12 **E. Sanctions Other Than Civil Liability**

13 In *Carrubba*, the Connecticut Supreme Court recognized that, even though a court-
14 appointed attorney for a minor child might be absolutely immune from suit, he or she, “just as
15 any other attorney, is subject to discipline for violations of the Code of Professional Conduct.”
16 *See* 274 Conn. at 543. Similarly, even if Brunnock, Donovan, Newman, and Grove Manor were
17 immune from suit, they may be subject to discipline for violations of their respective professional

¹³ Unlike Donovan and Newman, no state-law claims remain as to Grove Manor. Therefore, we need not certify a separate question as to whether, as a matter of state law, nursing homes may enjoy quasi-judicial immunity. However, because dismissal was without prejudice, there is a possibility of that question arising in the future. We note this only to point out that this posture may affect the Connecticut Supreme Court’s handling of the certified question.

1 ethics rules and/or licensing requirements. The question of whether defendants violated such
2 obligations is not before us. However, we note this fact because the possibility of such discipline
3 may affect the Connecticut Supreme Court’s analysis. Moreover, referral to disciplinary
4 authorities, if any, would be a matter of state, not federal, law.

5 **IV. Governor M. Jodi Rell and Ombudsman Maggie Ewald**

6 Gross alleged that Rell violated the Americans With Disabilities Act, 42 U.S.C. § 12101
7 *et seq.*, and negligently inflicted emotional distress. He alleges that Ewald violated Section 504
8 of the Rehabilitation Act of 1973, 29 U.S.C. § 794, and the First Amendment, and that she
9 intentionally and negligently inflicted emotional distress.

10 Gross does not discuss these claims in his opening brief. (The ADA, First Amendment,
11 and Rehabilitation Act claims are not mentioned at all and the emotional distress claims are only
12 mentioned in connection with Donovan and Newman.) Rell and Ewald argue that these claims
13 should be deemed waived. Gross has now explicitly abandoned all claims against Rell and the
14 Rehabilitation Act claim against Ewald, and does not discuss the First Amendment claim in
15 either his opening or reply brief. However, he argues in his reply brief that the dismissal of the
16 intentional infliction of emotional distress claim against Ewald in her individual capacity should
17 be vacated.¹⁴

18 However, we will not consider this argument because it is waived for the reasons

¹⁴ Gross pled both intentional and negligent infliction of emotional distress against Ewald, but she enjoys immunity for negligent (but not intentional) torts under state law, CONN. GEN. STAT. ANN. § 4-165. We affirm the District Court’s dismissal of that claim.

1 discussed above with regard to Grove Manor. Therefore, we affirm the District Court's dismissal
2 of the negligent infliction of emotional distress claim against Ewald. Again, we note that this
3 claim was dismissed without prejudice for failing to exceed the jurisdictional minimum. If the
4 Connecticut Supreme Court concludes that quasi-judicial immunity does not apply to Donovan,
5 Newman, and/or Grove Manor, the claim against Ewald may be reasserted. Moreover, the claim
6 may be reasserted in a separate action in any event.

7 **CONCLUSION**

8 For the reasons discussed above, the District Court's decision is AFFIRMED in part and
9 CERTIFIED in part to the Connecticut Supreme Court. We affirm the grant of judicial immunity
10 as to Brunnock and the dismissal of the claims against Rell and Ewald. We also affirm the
11 dismissal of the emotional distress claims against Grove Manor.

12 However, because there is no controlling appellate decision, constitutional provision, or
13 statute in Connecticut that explains whether conservators and court-appointed attorneys for
14 conservatees enjoy quasi-judicial immunity, we certify the following questions to the
15 Connecticut Supreme Court:

- 16 1. Under Connecticut law, does absolute quasi-judicial immunity extend to
17 conservators appointed by the Connecticut Probate Courts?
18
- 19 2. Under Connecticut law, does absolute quasi-judicial immunity extend to attorneys
20 appointed to represent respondents in conservatorship proceedings or to attorneys
21 appointed to represent Conservatees?
22

23 In answering these two questions, the Connecticut Supreme Court may, if necessary, also
24 define the scope and contours of any such immunity. The Connecticut Supreme Court's

1 pronouncement as to these state law questions will be final.

2 Gross has also pled federal law claims against Donovan, Newman, and Grove Manor.

3 With regard to these claims, we must decide if the *federal* defense of quasi-judicial immunity
4 applies to a conservator, court-appointed attorney for a conservatee, or nursing home. However,
5 our determination of this question implicates questions of Connecticut law and policy.

6 Therefore, we certify an additional question to the Connecticut Supreme Court, asking for its
7 guidance in connection with the *Cleavinger* factors:

8 What is the role of conservators, court-appointed attorneys for conservatees, and
9 nursing homes in the Connecticut probate court system, in light of the six factors
10 for determining quasi-judicial immunity outlined in *Cleavinger v. Saxner*, 474
11 U.S. 193, 201-02 (1985)?
12

13 The certified questions may be deemed modified to cover any further pertinent questions
14 of Connecticut law involved in this appeal that the Connecticut Supreme Court chooses to
15 answer. This panel retains jurisdiction and will decide the federal quasi-judicial immunity
16 question as well as any issues that may remain on appeal once the Connecticut Supreme Court
17 has either provided us with its guidance or declined certification.

18 It is therefore ordered that the Clerk of this Court transmit to the Clerk of the Connecticut
19 Supreme Court a Certificate, as set forth below, together with a complete set of the briefs,
20 appendices, and record filed in this Court by the parties.

21 The parties shall bear equally any costs or fees imposed by the Connecticut Supreme
22 Court.

CERTIFICATE

1

2

The foregoing is hereby certified to the Connecticut Supreme Court, pursuant to CONN.

3

GEN. STAT. ANN. § 51-199b and 2d Cir. R. 0.27, as ordered by the United States Court of

4

Appeals for the Second Circuit.